# AN UNACCEPTABLY HIGH COST

## An Inside Look at Colorado's Sex Offender Law and Treatment Program

FOURTH EDITION

## 2010 - 2011

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## "Colorado Sex Offender Lifetime Supervision Act of 1998"

C.R.S. §18-1.3-1001. Legislative declaration.

The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision. The general assembly also finds that keeping all sex offenders in lifetime incarceration imposes **an unacceptably high cost** in both state dollars and loss of human potential. The general assembly further finds that some sex offenders respond well to treatment and can function as safe, responsible, and contributing members of society, so long as they receive treatment and supervision. The general assembly therefore declares that a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health, and welfare of the state.

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## INTRODUCTION

It is an interesting and difficult time to be writing the Fourth Annual edition of this report. A great many important things happened during this past year, but some of the most important remain unresolved. Moreover, a great many important things are getting ready to happen during the coming year, but have not yet really begun. So we find ourselves standing, as it were, at a crossroads. Much is in limbo. Yet there is increasing reason for hope, and we are convinced that now, more than ever, is the time to press forward resolutely if we are to see significant and lasting change.

Before we proceed further we should mention that Jeremy Loyd, the coauthor of the First and Second Annual editions of this report, remains incarcerated without treatment at this writing. He has been refused admission to the "modified" Sex Offender Treatment and Monitoring Program (SOTMP) at Fremont Correctional Facility. Although he is supposedly on the "waitlist" for Arrowhead Correctional Center, everyone completing Phase I treatment for the first time is placed ahead of him on the list, so in reality he is coming no closer to getting into treatment. As long as Mr. Loyd remains without treatment, he will continue to be denied parole. He is now serving the eighth year of his "2 years to Life" sentence under Colorado's Lifetime Supervision Act.

Overall, the story of this year has been one of hope emerging from disappointment and seeming disaster. There is no better illustration of this than the story of the emergence of Advocates for Change (AFC), a new advocacy group which is fighting for just and humane treatment of those convicted or accused of sex offenses, and their families. This year's report will consider how Colorado CURE's Sex Offender Issues Group (SOIG) unexpectedly became AFC, and review the work this new group has done so far.

As usual, this report will include a sort of "year in review" section, looking at important events related to sex offense issues in the Colorado Legislature, state and federal courts, the Colorado Department of Corrections (DOC), and select items from local and national news reports over the past year. Much of this material will, of course, be things that we personally find interesting. However, we are aware that for many reading this report, the detailed discussion of court rulings may not be nearly as interesting as it is to us! So we will try not to make this section of the report unnecessarily tedious.

Much as in last year's report, we have tried to select some main topics which are not only highly significant, but have also not been covered in depth by previous editions. We admit that we struggled quite a bit while trying to choose these subjects. This report itself also seems to be at a crossroads. Many of the issues we feel to be most important have already been discussed in depth in previous editions. Strategically, the time is not yet right to raise others. Nevertheless, thousands, like ourselves, who have been convicted of sex offenses continue to endure myriad abuses, injustices, and unfounded prejudices. There is therefore no shortage of issues which need to be brought to the attention of policymakers and the general public.

This year's special topics will be: (1) the Sex Offender Management Board (SOMB) Sunset Review bill, its journey through the legislature and where it wound up, and (2) the practice of

federal civil commitment of sex offenders and its constitutionality as evaluated by the U.S. Supreme Court in *U.S. v. Comstock*. These issues, while not as intimately interconnected as the three chosen for last year's report, are nevertheless extremely important and merit attention.

Finally, it has been our custom to offer recommendations at the close of previous reports. This year our recommendations will be replaced with a section discussing what the next steps are that need to be taken toward establishing a functional, humane, and just system of sex offense law and treatment in Colorado. These suggestions are based on our firsthand experience with sex offender law and the treatment system.

## ADVOCATES FOR CHANGE: THE EMERGENCE OF TRUE ADVOCACY

### The Strange Birth of AFC *(And What the Author Accidentally Had to Do With It)*[1]

The past year witnessed a great shift in the center of activity and influence among community groups advocating reform around sex offense issues. For many years Colorado CURE's SOIG was the primary (if not the sole) group directly concerned with issues related to those who have been charged and/or convicted of sex offenses. However, in late November 2009 a number of factors combined to bring a sad and sudden end to the SOIG.

One of the unexpected precipitating factors was apparently a paper entitled "No Known Cure: The Danger and Destructiveness of the Language of Disease." A member of the SOIG contacted the author of this report in September 2009 and asked if he could do some research and writing about the "no known cure" policy, since a review of the policy had been recommended in the Sunset Review of the SOMB produced by the Department of Regulatory Agencies (DORA) last year.[2] So the author drafted the paper and submitted it to the SOIG. The group approved, and began distributing the paper with the subtitle, "A Position Paper of the Sex Offender Issues Group – Colorado-CURE."

This drew a significant negative reaction from certain individuals within the leadership of CURE, for a variety of political and personal reasons which we will not detail here. As a result of the controversy generated by the No Known Cure paper, in conjunction with a number of other significant factors, the Colorado CURE Board voted to disband the SOIG on Sunday, November 22, 2009. Annie Wallen, the Chair of the SOIG, ensured that the group's meeting place would continue to be available, and the group, with virtually all of its original members still intact, was able to smoothly transition into its new existence as an independent group separate from CURE. Several men at Fremont Correctional Facility, including Annie's husband Rick, suggested calling the new group Advocates For Change, and AFC was born.[3]

[1] I am grateful to the leadership of AFC, particularly Annie Wallen, for helping to write this section of the paper.
[2] Department of Regulatory Agencies: Office of Policy, Research and Regulatory Reform, "2009 Sunset Review: Sex Offender Management Board" (October 15, 2009), at 31-35.
[3] AFC subsequently re-released a revised version of the No Known Cure paper with the subtitle, "A Position Paper of Advocates for Change." A copy of this version is included herein as APPENDIX A. CURE, inexplicably, actually produced a position paper in *support* of the no-cure philosophy, although the paper was somewhat equivocal.

AFC has accomplished a great deal during the first year of its existence. The group established a board of directors, which is as follows: Annie Wallen, Chair; Carolyn Turner, Vice Chair; Susan Walker and G.L. Rosencrans Secretaries; Jan Hunsaker, Treasurer; and board members B.J. Russell, Diane McDaniel, Steve S., Yvonne Parietti, Mitch Sherman, Kelly Killion, and the author, Mark Walker.[4] The membership of AFC is largely made up of people who have been charged with and/or convicted of sex offenses, and their family members and loved ones. This composition makes for a very powerful, dedicated, and passionate group.

In June, 2010 the group finalized its vision and mission statements:

> Inherent in AFC's mission is the belief that each person, whether one who has committed an offense or is a victim of an offense, is not solely defined by the label "offender" or "victim" and, as such, is worthy of just and humane treatment.
>
> The mission of Advocates For Change is to support those with a sex offense and their families by:
>
> - Advocating for change in sex offense laws and policies and for the adherence to constitutional rights;
> - Educating the public, lawmakers, and the judiciary; and
> - Promoting the reintegration of those with an offense into the community.

Not only has AFC committed itself to this mission, but its members are already hard at work trying to turn the vision into a reality.

## The Work So Far

At a foundational level, the structure of the new group is now largely in place. Committees have been formed to address issues surrounding membership, research, mission statement development, and fundraising. In March AFC began putting out a monthly newsletter, *The Advocate*, to keep members and their families up to date on the group's activities. A website is also being developed at www.advocates4change.org, and an assortment of other administrative construction is in the works.

More importantly, group members correspond regularly with prison inmates and provide a support system and resources for them and their family members. AFC is accumulating a library of research studies, media reports, and other materials concerning sexual offending, recidivism, laws and court opinions. The group is therefore quickly becoming a repository for a great deal of information, which we can make available to anyone who may need it. Moreover, in appropriate circumstances, AFC is able to refer individuals to sources of legal counsel and representation, and to support and assist individuals desiring to file complaints with the SOMB regarding unethical behavior by treatment providers.

[4] I was, very much to my surprise, voted an honorary board member by the board in late March or early April, 2010. It is a privilege to be a part of AFC. Amazingly, treatment and parole have approved a safety plan for me to attend the board meetings, although scheduling conflicts have thus far prevented me from doing so.

AFC holds monthly meetings on the 3rd Tuesday of each month at St. Paul's Lutheran Church in Denver, and these meetings have drawn such speakers as Paul Prendergast of the SOMB, attorney John Pineau who is spearheading the Department of Corrections Class Action (DOCCA) lawsuit; attorney Maureen Cain, Policy Director of the Colorado Criminal Defense Bar (CCDB); representatives of parole and probation departments; and officials from some of the more sensible treatment providers.

AFC has also been a key player in two major projects during its brief existence. The first, which consumed virtually the entire focus of the group from January to May of 2010, was supporting House Bill 10-1364, the SOMB Sunset Bill. Many members of the group testified before the judiciary committees in both the House and Senate. At least two AFC representatives were at the capitol building daily meeting with legislators, lobbying, distributing fliers and research papers produced by AFC, and presenting other information. During this time many letters, emails, and phone calls from AFC members were directed to legislators and, eventually, the governor's office. Although the bill, which was overwhelmingly passed by the legislature, was ultimately vetoed by Governor Ritter, the group achieved numerous undeniable successes. Members have been hard at work on the legislation again during the 2011 legislative session. AFC's past and future work on this bill will be discussed in more detail below.

The second major project was AFC's engagement in fundraising efforts for the DOCCA lawsuit. The attorneys heading up the project indicated that at least $40,000 would be required to even begin work on the suit, because of the massive complexity of preparing for and litigating the issues involved. AFC took up the challenge and put out a plea for contributions. Thanks to generous donations from group members, families, and even some prisoners and parolees, $22,000 had been raised by September. Then the group was contacted by an anonymous donor who promised that, if AFC could raise half of the remaining $18,000 by October 15th, the donor would contribute the last $9,000. The group raised the money by October 11th, the anonymous donor came through, and the DOCCA suit is now fully funded. It is high time for the courts to shine a serious spotlight on the egregious abuses taking place within DOC "treatment" system.[5]

In spite of everything already accomplished, the group is really just getting warmed up, and is committed to taking full advantage of every opportunity to pursue the mission of effective and passionate advocacy. For anyone reading this who has been charged with, or convicted of, a sex offense, and for your families and loved ones, our desire is that the people of AFC would be an ongoing source for you, not only of advocacy, but also of comfort, support, encouragement, and above all, hope.

## SEX OFFENSE ISSUES UPDATE

### Sex Offense Issues in the Colorado Legislature

There were several bills which came through the Colorado Legislature during the past year that are of interest. The changes made by these bills have a variety of implications. Some of them

[5] For further analysis of this ongoing issue see: Jeremy J. Loyd, et al., "An Unacceptably High Cost: An Inside Look at Colorado's Sex Offender Law and Treatment Program," (February 2007), at 4-5 [hereinafter "Unacceptably High Cost"].

bear on sex offense issues directly, and some only indirectly. The most significant of these bills, the SOMB Sunset Review, will be discussed in much more detail later in this report. But it will be worthwhile here to briefly consider the relevant changes made by some of the other new legislation.

***House Bill 10-1374: Concerning Parole***

This bill passed the House and Senate unanimously, and went into effect on May 25, 2010. The primary change made by this bill for our purposes was that it significantly revised the statutory parole guidelines, and now requires the parole board to use structured decision-making in release and revocation hearings.[6]

The bill requires the Division of Criminal Justice, Department of Public Safety, to develop an "Administrative Release Guideline Instrument" and a "Colorado Risk Assessment Scale," which are to be used by the parole board when evaluating applications for parole.[7] The legislature intended this aspect of the bill to prevent individual parole board members from behaving arbitrarily in granting or denying parole, and to give them a standard set of guidelines from which to work. The legislation states, "…using structured decision-making unites the parole board members with a common philosophy and set of goals and purposes while retaining the authority of individual parole board members to make decisions that are appropriate for particular situations."[8] It goes on to observe, "Structured decision-making by the state board of parole provides for greater accountability, standards for evaluating outcomes, and transparency of decision-making…"[9] Finally, with respect to the risk assessment scale, "[a]n offender's likelihood of success may be increased by aligning the intensity and type of parole supervision, conditions of release, and services with assessed risk and need level."[10] When the required instruments have been developed, the parole board will use them to assess very specific criteria, which are set out in the statute, to make parole decisions.[11]

This legislation also requires DOC to develop "administrative revocation guidelines" which the parole board must use when evaluating parole revocation complaints.[12] Here, too, the bill provides specific criteria to be considered when making revocation decisions.[13]

Most interesting for our purposes, however, is that the bill requires the SOMB to develop a "Specific Sex Offender Release Guideline Instrument" to provide guidance to the parole board when deciding whether to release individuals convicted of sex offenses.[14] This instrument,

[6] Colorado Criminal Defense Bar, "2010 Legislative Summary," (June 19, 2010), p. 3 [hereinafter "Legislative Summary"].
[7] §17-22.5-107(1) C.R.S.
[8] § 17-22.5-404(1)(c) C.R.S.
[9] § 17-22.5-404(1)(d) C.R.S.
[10] § 17-22.5-404(1)(e) C.R.S.
[11] § 17-22.5-404(4)(a) C.R.S.
[12] § 17-22.5-107(2) C.R.S.
[13] § 17-22.5-404(5)(a) C.R.S.
[14] § 16-11.7-103(4)(l) C.R.S.

however, is only to be used for offenders with determinate sentences, since release guidelines for those with indeterminate sentences are already set out in the Lifetime Supervision Act.[15]

Last, but certainly not least, the bill requires the parole board to work with the Division of Criminal Justice, Department of Public Safety to "develop and implement a process to collect and analyze data related to the basis for and the outcomes of the board's parole decisions. The process shall collect data related to the board's rationale for granting, revoking, or denying parole."[16] This data will then be analyzed by the Division of Criminal Justice.[17]

This new law makes a number of obvious positive changes. It should move the parole board toward evidence-based decision-making and away from decisions based on arbitrary, personal opinions of board members. It also provides standards for parole decisions which can be used to assess the board's performance. The requirement that the board collect data on reasons for its decisions should also offer greater transparency of the process itself, and discourage the sort of seemingly baseless and capricious decisions which have been all too common in the past.

It is unfortunate that the legislature elected not to address the board's apparent unwillingness to parole those with indeterminate sentences in any significant number. That said, the provision of a guiding instrument to enable the board to make objective decisions, rather than subjective knee-jerk reactions, regarding parole for those with sex offenses who have determinate sentences is an important step in the right direction. There are several other aspects of the bill which have not been discussed here, including a section which affects earned time. For a complete understanding of the legislation the reader is encouraged to obtain a copy of the bill or examine the various statutes which it has amended.[18]

***House Bill 10-1334: Concerning Changes to Indecency Crimes***

This bill changed the statutes defining the offenses of Public Indecency[19] and Indecent Exposure,[20] with mixed results. The bill enjoyed support from both district attorneys and the CCDB, and a careful analysis of the bill's changes to the law reveals why.

The first behavior affected by this bill was previously defined as "an act of masturbation in a public place or where the conduct may reasonably be expected to be viewed by members of the public." This was located under the Public Indecency statute, which was a Class 1 Petty Offense, did not require registration as a sex offender, and did not require an offense-specific evaluation. The bill moved this offense to the Indecent Exposure statute. The behavior is now defined as "knowingly perform[ing] an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to any person."[21] This is now a Class 1 Misdemeanor, requires registration for five years for a first

[15] § 17-22.5-404(4)(c) C.R.S.
[16] § 17-22.5-404(6)(a) C.R.S.
[17] § 17-22.5-404(6)(c) C.R.S.
[18] Statutes substantively amended by H.B. 10-1374 include: § 16-11.7-103 C.R.S.; § 17-2-207 C.R.S.; § 17-22.5-107 C.R.S.; § 17-22.5-404 C.R.S.; § 17-22.5-405 C.R.S.; and § 22-33-107.5 C.R.S.
[19] § 18-7-301 C.R.S.
[20] § 18-7-302 C.R.S.
[21] § 18-7-302(1)(b) C.R.S.

offense,[22] and lifetime registration plus internet posting for a second offense,[23] along with requiring an offense-specific evaluation.[24] Essentially, for the act masturbation, the bill made it a crime even if the act does not occur in a public place, as long as someone sees it under circumstances in which it is likely to cause them "affront or alarm." In addition to significantly broadening the sorts of behaviors which are criminalized, the bill also increased the penalties and added registration and evaluation requirements.

The second behavior affected by the bill was previously defined as "a lewd exposure of the body in a public place or where the conduct may reasonably be expected to be viewed by members of the public with the intent to arouse or to satisfy the sexual desire of any person." This was also located under the Public Indecency statute, which made it a Class 1 Petty Offense which did not require registration or offense-specific evaluation. The bill changed the definition of the prohibited behavior to read, "knowingly expos[ing the] genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person."[25] The behavior is now under the Indecent Exposure statute, which makes it a Class 1 Misdemeanor requiring registration for five years for a first offense,[26] lifetime registration plus internet posting for a second offense,[27] and an offense-specific evaluation.[28] Like the masturbation offense, the act no longer has to take place in public to be a crime.

The final behavior covered by the bill was previously defined as "knowingly expos[ing the] genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person." This was covered under Indecent Exposure, and is similar to the new crime created by the bill described above, without the intent to arouse or satisfy sexual desire. It was therefore a Class 1 Misdemeanor, and required registration for five years for a first offense, lifetime registration plus internet posting for a second offense, and an offense-specific evaluation. The bill moved this crime to the Public Indecency statute, and retained virtually the identical language, but added the requirement that the behavior be performed "in a public place or where the conduct may reasonably be expected to be viewed by members of the public."[29] This behavior is now a Class 1 Petty Offense, with no registration or offense-specific evaluation required, but **only for the first offense**. Second or subsequent offenses remain Class 1 Misdemeanors.[30] The registration requirements are rather complicated in this new statutory scheme. No registration is required for a first offense. If a second offense is committed within five years of the first, registration will be required; if it is longer than five years, no registration is required; for a third or subsequent offense, registration will be required.[31] The first offense

[22] § 16-22-102(9)(m) C.R.S.; § 16-22-103(2) C.R.S.; § 16-22-113(1)(c) C.R.S.
[23] § 16-22-113(3)(c) C.R.S.; § 16-22-112(2)(b)(II)(E) C.R.S.
[24] § 16-11-102(1)(b) C.R.S.; § 16-11.7-102(2) & (3)(m) C.R.S.
[25] § 18-7-302(1)(a) C.R.S.
[26] § 16-22-102(9)(m) C.R.S.; § 16-22-103(2) C.R.S.; § 16-22-113(1)(c) C.R.S.
[27] § 16-22-113(3)(c) C.R.S.; § 16-22-112(2)(b)(II)(E) C.R.S.
[28] § 16-11-102(1)(b) C.R.S.; § 16-11.7-102(2) & (3)(m) C.R.S.
[29] § 18-7-301(1)(e) C.R.S.
[30] § 18-7-301(2)(b) C.R.S.
[31] § 16-22-102(9)(z) C.R.S.; § 16-22-103(2) C.R.S.

requiring registration will mandate five years on the registry;[32] the second lifetime registration with internet posting.[33]

The third section of the bill discussed above represents something of a positive step, and will hopefully reduce the number of individuals (particularly the homeless) who are forever saddled with sex offense convictions because someone saw them urinating in public. Of course, it only helps if it is someone's first offense. Overall, however, this bill criminalizes a wider variety of behaviors than the previous laws, and creates more severe penalties and stricter registration requirements for those behaviors.

***House Bill 10-1089: Concerning Placement After a Parole Revocation of a Parolee Who Is a Sexually Violent Predator***

Under prior law, any parolee who was under sentence for a conviction of a nonviolent Class 5 or 6 felony, and who was revoked from parole for a technical violation, was required to be placed in a community return to custody facility (CRCF), which is made up of DOC contract beds in community corrections facilities.[34] The bill introduces a new provision permitting the parole board to send an otherwise eligible parole violator to prison instead of CRCF if the individual has been designated a sexually violent predator (SVP).[35] The mere fact that this statute acknowledges the possibility that someone could be convicted of a Class 5 or 6 *nonviolent* felony and still be designated a "*violent* predator" is, of course, highly suspect.

***Other Bills of Interest***

There are a couple of other bills which passed the legislature that, although they do not bear directly on sex offenses, do have implications. House Bill 10-1360 reduced the maximum period of re-incarceration and changed the other conditions which may be imposed on a parolee due to a technical parole violation.[36] Finally, House Bill 10-1413 made it more difficult for district attorneys to "direct file" adult charges against a juvenile in district court, and increased the minimum age of the juvenile against whom this can be done.[37] The reason this is interesting is that the bill included exceptions which allow the district attorney to continue to direct file as before, without the additional requirements created by the bill, if the juvenile is charged with one of three types of offenses: First Degree Murder, Second Degree Murder, or a sex offense. So this bill demonstrates once again the category sex offenses are placed in by criminal justice professionals, effectively equating them with murder in terms of severity.

[32] § 16-22-102(9)(z) C.R.S.; § 16-22-103(2) C.R.S.; § 16-22-113(1)(c) C.R.S.
[33] § 16-22-113(3)(c) C.R.S.; § 16-22-112(2)(b)(II)(E) C.R.S.; § 16-11-102(1)(b) C.R.S.; § 16-11.7-102(2) & (3)(m) C.R.S.
[34] "Lesgislative Summary," supra note 6, at 7; cf. § 17-2-103(11)(b) C.R.S.
[35] § 17-2-103(11)(b)(VI) C.R.S.
[36] *See* § 17-2-103 C.R.S.
[37] *See* § 19-2-517 C.R.S.

## Sex Offense Issues in the State and Federal Courts

As always, there have been a number of significant court rulings affecting sex offense issues during the past year. Indeed, it often seems as though the percentage of all published court opinions in Colorado which somehow involve sex offenses or related issues is disproportionately high. The following is an overview of the most significant state and federal cases decided since the last report. The U.S. Supreme Court opinion in *United States v. Comstock* is omitted because it will be dealt with at greater length later in this report.[38] We include this information because, in addition to the fact that it is an area of particular interest to the author personally, we also hope that it may be useful to individuals who are seeking to challenge their sex offense convictions or sentences in the courts. If this section strikes the reader as tedious, we encourage him or her to skip ahead to something more interesting.

*People v. Loveall*[39]

This case was decided by the Colorado Supreme Court. Although the case deals with a number of legal issues, one is of particular interest. While Loveall was on probation for 10-Life under the Lifetime Supervision Act pursuant to convictions arising from an internet sting, his probation officer filed a revocation complaint alleging that he had violated his probation by (1) having contact with his newborn child at the hospital, (2) being terminated from his treatment program as a result of the contact with his child, and (3) failing to find employment.[40] At the revocation hearing, Loveall's probation officer testified that an unnamed probation officer, who was not present at the hearing, had observed Loveall having contact with his child at the hospital.[41] She also testified that a third probation officer had received letters and a phone call from nurses at the hospital confirming the contact, but again none of these individuals were present at the hearing.[42] Loveall's attorney argued that, because the prosecution did not give him copies of the letters or provide the nurses names until just before the hearing, Loveall was denied a reasonable opportunity to confront and cross-examine the witnesses against him.[43]

The Colorado Supreme Court held that "the People's use of hearsay evidence, undertaken by the People without timely providing Loveall with the names of the declarants, constitutes a denial of his constitutional right to due process."[44] Moreover, because it was unclear whether the trial court would have revoked Loveall's probation without considering the factors introduced by the improper hearsay evidence, the Court upheld the Court of Appeals' reversal of the probation revocation, and remanded the case to the trial court for a new hearing.[45]

This opinion and the Court of Appeals opinion below are significant for their analysis of the propriety of the use of hearsay evidence in probation revocation hearings.[46] This is particularly

[38] See below, pp. 30-33.
[39] *People v. Loveall*, No. 08SC451, slip op. (Colo. May 17, 2010).
[40] *Id*. at 4-8.
[41] *Id*. at 5.
[42] *Id*. at 5-6.
[43] *Id*. at 7.
[44] *Id*. at 13-14.
[45] *Id*. at 19-23.
[46] The Court of Appeals opinion is *People v. Loveall*, 203 P.3d 540 (Colo.App. 2008).

important for sex offense cases due to the past tendency of probation officers to rely heavily on hearsay from treatment providers when pursuing revocation. A thorough reading of both opinions will provide much insight into Colorado courts' current position on this issue.

*United States v. Metzener*[47]

This case was decided by the United States Court of Appeals for the 10th Circuit, on appeal from the United States District Court for the District of Colorado. Metzener was on supervised release following a federal prison sentence for receiving child pornography.[48] "As a condition of his supervision, the court required him to 'participate in an approved program of sex offender evaluation and treatment, which may include polygraph and plethysmograph examinations, as directed by the probation officer.'"[49] Although Metzener complied with all these conditions for the majority of his supervised release, just four days before it was set to expire he failed a polygraph and "admitted to engaging in several activities that were not permitted by his sex offender treatment provider."[50]

Metzener's probation officer obtained an arrest warrant for him, claiming that he had failed to "participate in an approved program of sex offender evaluation and treatment."[51] The district court agreed that he had violated the terms of his supervised release by failing to "participate" in the treatment program because he did not "complete" it, and sentenced him to another 12 months of supervised release and treatment.[52] Metzener appealed, arguing that he did "participate" in treatment, but the 10th Circuit found no abuse of discretion in the way the district court interpreted the term.[53] The most interesting part of the Court's opinion, however, is the following editorial at the end:

> While we hold that it was not an abuse of discretion for the district court to interpret the word "participate" in the manner that it did, we hasten to add that this entire appeal would likely have been unnecessary if the court had more precisely written the term of supervised release at issue. […] Despite the use of the word "participate" in the Sentencing Guidelines, we believe that defendants would have better notice of what is required of them, and justice would be better served, if district courts more clearly stated the requirements of participation. For instance, courts have crafted terms of supervised release that require the defendant to "participate in and successfully complete" a treatment program, or to "participate in a mental health program specializing in sexual offender treatment approved by the probation officer, and abide by the rules, requirements and conditions of the treatment program." We therefore strongly encourage district courts to be more specific as to the amount of participation they require when imposing a term of

[47] *U.S. v. Metzener*, 584 F.3d 928 (10th Cir. 2009).
[48] *Id*. at 929.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 929, 931.
[53] *Id*. at 935.

> supervised release, and whether they are in fact requiring successful completion of such a program.[54]

Although this opinion is binding only at the federal level, it provides persuasive authority for state courts, and may signal the willingness of the 10th Circuit to entertain vagueness challenges to poorly worded conditions of "participation" in treatment, or other similar conditions, imposed at the state level.[55]

*State of Idaho v. Cobler*[56]

This case from the Idaho Court of Appeals addresses a significant issue that has yet to be decided in Colorado: the effect on parental rights of no contact orders ("NCOs") prohibiting parents convicted of sex offenses which do not involve their own children from having any contact with children, including their own.[57] In *Cobler*, the defendant was charged with sexual battery of a minor child, and at arraignment the district court entered an NCO prohibiting him from having contact with "any minor child."[58] After pleading guilty to one count, Cobler filed a motion to modify the NCO to allow him to have contact with his own children, which the court denied without explanation.[59]

Cobler appealed, arguing "that the prohibition against his having contact with all minors interfere[d] with his fundamental right to parent his children."[60] The appellate court, taking guidance from the infamous case of Mary Kay Letourneau in Washington,[61] agreed:

> We consider the standard adopted in Washington persuasive in determining the proper course to follow in Idaho when reviewing the terms of an NCO. Thus, a term in an NCO limiting a fundamental right must be reasonably necessary to accomplish the essential needs of the state. It is without a doubt an essential need of the state to prevent sexual abuse of minor children, whether at the hands of the children's parents or by strangers. However, forbidding all contact with Cobler's children is not reasonably necessary to prevent sexual harm to them in this instance, nor is it reasonably related to rehabilitation. Cobler's psychosexual evaluation indicated that he had a moderate probability to reoffend and that his risk is localized to individuals similar to J.M., older adolescents who are vulnerable to exploitation due to troubled lives. Cobler is described as an

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[54] *Id*.
[55] See *Id*. at 932. ("Mr. Metzener does not argue that this term of supervised release is unconstitutionally vague, and we do not address that question.") When a court brings up an argument that an appellant has not made, for the sole purpose of observing that the argument was not made, it may be a signal that the court would be willing to favorably entertain such an argument were it to be made in the future. *Cf*. *Id*. at 935, n.3 (observing that Metzener abandoned on appeal his previous argument "that the district court's reliance on the [program's] treatment contract was an improper delegation of judicial authority," another interesting argument which might be made in the future.)
[56] *State v. Cobler*, No. 34308, slip op. (Idaho Ct.App. February 4, 2009), *aff'd on other grounds*, *State v. Cobler*, 229 P.3d 374 (Idaho 2010).
[57] For the U.S. Supreme Court's take on the issue of parental rights see *Troxel v. Granville*, 530 U.S. 57 (2000).
[58] *Cobler*, No. 34308, slip op. at 2.
[59] *Id*.
[60] *Id*. at 3.
[61] *State v. Letourneau*, 997 P.2d 436 (Wash.Ct.App. 2000).

> opportunist with a disturbing pattern of involvement with older teenage girls. There is nothing in the record describing Cobler as a pedophile.
>
> Two of Cobler's children, one boy and one girl, were under the age of six at the time of his arrest. Cobler has another daughter who was fifteen at the time of his arrest, who lives with her mother in Missouri. There was no indication in the psychosexual evaluation that Cobler would prey upon any of his children, nor that communication with their father would be harmful to them. Without such a determination, denying Cobler all parental rights oversteps the authority of the state. On the information in the record before us, the all-encompassing prohibition against Cobler having contact with any minors has not been shown to be sufficiently related to his crime, nor reasonably necessary to prevent future criminality or to rehabilitate him. Therefore the district court abused its discretion by denying Cobler's motion to modify the NCO to allow some form of contact with his children.[62]

Again, while this case is not binding in Colorado, it does represent persuasive authority, and Colorado courts can certainly take guidance from it, as the Idaho court did from the Washington courts. As we have argued in previous reports, the blanket prohibition against parents convicted of sex offenses having any contact with their own children, particularly when those children are not victims, is counterproductive to rehabilitation and reintegration efforts, and damaging to families and children.[63] *Cobler* presents a reasonable argument which may be used to good effect in Colorado in the future.[64] Because the case addresses an issue which has such devastating consequences for so many under Colorado's current legislative, administrative, and treatment schemes surrounding sex offenses, it merits careful consideration.

*People v. Day*[65]

This Colorado Supreme Court case addresses the requirements for applying the pattern of abuse sentence enhancement provision of §18-3-405(2)(d) C.R.S. A jury acquitted Day of sexual assault on a child and sexual assault on a child by one in a position of trust, convicting him instead of an attempt on each count; nevertheless, the jury also convicted him of the pattern of abuse sentence enhancer.[66] The Colorado Supreme Court vacated the enhanced sentence, observing that "the prosecution […] must allege and prove that the defendant committed at least

[62] *Cobler*, No. 34308, slip op. at 6.
[63] Mark T. Walker, et al., "An Unacceptably High Cost: An Inside Look at Colorado's Sex Offender Law and Treatment Program – 3rd Annual Report" (November 2009), pp. 20-22 [hereinafter "Unacceptably High Cost – 3rd Annual"].
[64] Unfortunately, when the Idaho Supreme Court considered this case, it found that the district court had abused its discretion in the manner in which it denied Cobler's motion to modify the NCO, and declined to reach his argument that the order impermissibly violated his right to parent his children. The appellate opinion therefore, while not overturned, was also not explicitly upheld on this point by the Idaho Supreme Court, which neatly sidestepped deciding the issue. See *State v. Cobler*, 229 P.3d 374 (Idaho 2010).
[65] *People v. Day*, 230 P.3d 1194 (Colo. 2010).
[66] *Id*. at 1195.

two **completed incidents** of sexual contact on the same child victim for the pattern of sexual abuse sentence enhancer to apply as part of the trial court's judgment of conviction."[67]

In Day's case, he was convicted only of attempted, not completed, sexual assaults, and the Court determined this to be insufficient to support a pattern of abuse sentence enhancement as a matter of law:[68]

> The jury convicted Day of an attempted, not completed, sexual assault on a child for [one] incident and an attempted, not completed, sexual assault on a child by one in a position of trust for the [other] incident. The trial court should not have entered a judgment of conviction for sexual assault on a child as a part of a pattern of sexual abuse, because that sentence enhancement statutory provision requires completion of two or more incidents of sexual contact on the child victim and here the jury made findings of attempt only on counts one and two, the allegations of sexual assault on which the prosecution in this case elected to proceed. The jury acquitted Day of the two completed sexual assault charges, as specified by the prosecution in counts one and two, and the prosecution did not prove any other incidents of sexual contact that would support the pattern of sexual abuse judgment of conviction.
>
> […] Consequently, we direct the trial court, on remand, to resentence Day for his attempt convictions, without application of the pattern of sexual abuse sentence enhancement statutory provision.[69]

Needless to say, this case arose from a very specific set of facts due to the apparent confusion of Day's jury, among other things. However, the case may still have implications for some who are sentenced under the pattern of abuse sentence enhancement provisions of Colorado law.

*Sex Offense Cases Involving Deferred Judgments*

During the past year Colorado courts decided two significant sex offense cases involving deferred judgment and sentence agreements. In the first, *People v. Perry*,[70] the Colorado Court of Appeals reviewed the trial court's denial of Perry's petition to be removed from the sex offender registry. After pleading guilty to Sexual Assault on a Child, Perry successfully completed his deferred judgment and sentence.[71] Nevertheless, the trial court found that he was statutorily ineligible to petition for removal from the registry because Colorado law designates anyone "convicted" of sexual assault on a child as ineligible for removal.[72] The appellate court reversed, finding that because Perry completed his deferred judgment he was no longer presently

[67] *Id*. at 1197. (Emphasis added.)
[68] *Cf. Id*. at 1199 ("Pursuant to the plain language of the pattern of sexual abuse sentence enhancement statutory provision, § 18-3-405(2)(d), attempts do not support a pattern of sexual abuse conviction.")
[69] *Id*. at 1196.
[70] *People v. Perry*, No. 08CA2201, slip op. (Colo.App. August 5, 2010).
[71] *Id*. at 1.
[72] *Id*.; *see* §16-22-113(3)(b)(II) C.R.S.

"convicted" of sexual assault on a child, and he was therefore eligible to petition for removal from the registry.[73]

The second case did not have such a positive outcome. In *M.T. v. People*,[74] the defendant pled guilty as a juvenile to Attempted Sexual Assault on a Child and received a deferred judgment and sentence, which was successfully completed. Because completion of the deferred judgment resulted in dismissal of the original charges, M.T. filed a civil action seeking to seal the criminal records pursuant to Colorado statutes, and the trial court ordered them sealed.[75] The Court of Appeals reversed, ruling that in spite of the successful completion of deferred judgment, the records of M.T.'s case still contained "records pertaining to a [sex offense] conviction," and therefore the file could not be sealed under Colorado law.[76] It should be noted that Judge Webb filed a persuasive dissenting opinion in this case, arguing that the records should have been sealed.[77]

These two cases appear contradictory on the surface. However, the appellate court made a subtle distinction. Colorado's registration laws only prohibit removal from the registry when someone **presently** has a conviction for one of a number of specific sexual offenses. However, successful completion of a deferred judgment results in withdrawal of the guilty plea and dismissal of the charges, and once this happens the person is no longer convicted of the offense. Therefore a person who has completed a deferred judgment and sentence can petition for removal from the registry. On the other hand, the laws governing sealing prohibit the sealing of cases containing records **pertaining to** a sex offense conviction. Because a person who completes a deferred judgment and sentence was nevertheless convicted of the charge during the period of deferred judgment, even after it is completed the records still pertain to the **previous** conviction. Therefore the person cannot seal the records under Colorado law.

The Court's ruling in *M.T.* is particularly disturbing, because it removes a significant motivation for a defendant (particularly a juvenile) to accept a plea offer involving a deferred judgment and sentence. This decision may result in many cases going to trial which otherwise would have reached disposition. We do, however, observe hopefully that the Colorado Supreme Court granted certiorari in this case on February 14, 2011.

*Sexually Violent Predator Cases*

There were also several interesting Colorado cases interpreting the Sexually Violent Predator ("SVP") statutes during the past year. In *People v. Hunter*,[78] the Colorado Court of Appeals reversed Hunter's SVP designation. Although Hunter was the victims' neighbor and well known to both of them, the trial court ruled that he met the SVP criterion of being a "stranger" to the

[73] *Id*. at 12.
[74] *M.T. v. People*, No. 09CA0710, slip op. (Colo.App. February 4, 2010).
[75] *Id*. at 1 (*see* §24-72-308(1)(a)(I) C.R.S., allowing individuals whose cases have been dismissed to petition for sealing of the records).
[76] *Id*. at 2 (*see* §24-72-308(3)(c) C.R.S., prohibiting the sealing of "records pertaining to a conviction of an offense for which the factual basis involved unlawful sexual behavior").
[77] *Id*. at 11-14.
[78] *People v. Hunter*, No. 08CA0316, slip op. (Colo.App. December 24, 2009) (Judge Casebolt filed a dissenting opinion based on his differing interpretation of the SVP statute).

victims because he was wearing a sock over his face during the assaults and the victims did not recognize him.[79] The appellate court disagreed, commenting:

> [N]othing in the [SVP] statute indicates that the criterion is met when the victim knows the offender, but is unable to identify him, as was the case here. The statute defines an SVP based on the relationship between the offender and the victim, not the manner in which the offense is committed. Under these circumstances […] we must conclude that defendant does not meet the statutory definition of an SVP.[80]

*People v. Buerge*[81] dealt with a very significant issue given the increasing number of convictions in Colorado for Internet luring and similar offenses. Buerge was caught in an Internet sting operation when he arranged to meet an undercover police officer posing as a fourteen year old girl, and he subsequently pleaded guilty to attempted sexual assault on a child – victim less than fifteen.[82] After the trial court found him to be an SVP, Buerge argued on appeal that the SVP statute required the existence of an actual victim.[83] The Court of Appeals disagreed, stating:

> [I]f a defendant intended, with the requisite culpability, to sexually assault a person, it does not matter that the intended victim was fictional or did not actually exist.
>
> Here, defendant pleaded guilty to attempted sexual assault on a child under the age of fifteen, and it is undisputed that he had an intended victim, that is, a fourteen-year-old girl. It is also undisputed that the intended victim would have been a stranger. Accordingly, the circumstances meet the requirement in the SVP statute that there be an intended victim who was a stranger. It does not matter that there was no actual person victimized in this attempt crime, nor does it matter that the intended victim of the attempt was fictional.
>
> […] Just as a defendant can be convicted of attempted sexual assault even when there is no actual victim, because the offense could have been committed had the attendant circumstances been as the defendant believed them to be, so, too, a defendant can be determined to be a sexually violent predator because there would have been a victim (an intended victim) had the attendant circumstances been as the defendant believed them to be.[84]

With all due respect to the Court of Appeals, this sort of surreal reasoning was once reserved for tales of science fiction horror. It appears, however, that we no longer need fear the future emergence of the "thought police" of Orwell's *1984*, or the "pre-crime" unit of *Minority Report*. If this unnerving court opinion is any indication, such creatures are already upon us.

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[79] *Id*. at 1-2; see the SVP statute at §18-3-414.5 C.R.S.
[80] *Id*. at 8.
[81] *People v. Buerge*, No. 07CA2393, slip op. (Colo.App. November 12, 2009).
[82] *Id*. at 1-2.
[83] *Id*. at 2.
[84] *Id*. at 9-10.

The Court of Appeals decision in *People v. Gallegos*,[85] fortunately, strikes a less sinister note. Gallegos pleaded guilty to attempted sexual assault on a child based on an incident while he was bathing his live-in girlfriend's daughter, and the trial court subsequently found him to be an SVP on the basis that he had established a relationship with the victim primarily for the purposes of sexual victimization.[86] The appellate court disagreed and ordered the trial court to remove Gallegos' SVP designation, observing that "Gallegos lived in the same household with the victim […] for approximately two and a half to three years; [ ] the living arrangements indicate that Gallegos and the victim had a relationship akin to a stepparent-stepchild; and […] he believed that the victim looked to him as a father figure."[87] Based on these facts, the Court concluded:

> [O]nly if an offender creates or starts a relationship primarily for the purpose of sexual victimization can he or she meet the statutory criterion of "establishing a relationship" for that purpose. In other words, "established a relationship" applies when an offender, from the outset, seeks out a victim from individuals with whom he or she has no definable relationship, and sexual victimization is the primary purpose of the relationship. Accordingly, it follows that where an offender already has a relationship with the victim independent of the sexual victimization, the offender cannot be considered to have established the relationship for that purpose.[88]

*Justice Stevens' Gift: The Promise of Padilla v. Kentucky*[89]

In this U.S. Supreme Court opinion, authored by Justice John Paul Stevens just months before his retirement in June 2010, the Court held that Padilla's counsel was constitutionally deficient because he failed to inform his client of the risk that he would be deported after pleading guilty to drug distribution charges.[90] While this case does not appear at first glance to have any relationship to sex offense issues, legal experts believe that the case will have a huge impact beyond deportation issues because it addresses the constitutional implications involved in informing defendants about the collateral (or indirect) consequences of their guilty pleas.

> The 7-2 ruling obliges criminal defense lawyers to advise their noncitizen clients about the possible deportation consequences of accepting a plea agreement. But […] the decision is already providing fodder for defendants who were caught unaware about collateral consequences beyond the immigration context – such as housing implications of pleading guilty to a sex offense […]
>
> […] Margaret Love, a D.C. solo practitioner who specializes in clemency, restoration of rights and collateral consequences of pleas […] believes the decision may also create obligations for judges and prosecutors to give defendants information about the consequences of pleas. "It resets the balance in the plea

[85] *People v. Gallegos*, No. 07CA2373, slip op. (Colo.App. September 17, 2009).
[86] *Id*. at 1; see the SVP statute at §18-3-414.5 C.R.S.
[87] *Id*. at 6.
[88] *Id*. at 5-6.
[89] *Padilla v. Kentucky*, ____ U.S. ____, 130 S.Ct. 1473, No. 08-651, slip op. (U.S. March 31, 2010).
[90] *Id*., slip op. at 1.

> context," said Love, also noting that "this is the first time the Supreme Court has regulated plea bargains."[91]

Observers are already seeing *Padilla* being used in a variety of new cases:

> The *Padilla* case […] is being cited in much broader contexts than the case itself. The obligation of lawyers to advise clients about collateral consequences of plea bargains well beyond immigration issues – from pension benefits to housing – is being tested in the aftermath of *Padilla*. Judges have already issued conflicting rulings on the retroactive effect of the decision.
>
> "The Court left open what the rule would be for other consequences, like parole and sex-offender status, so a lot of cases are being filed," said Stephen Kinnaird, a partner in Paul, Hastings, Janofsky & Walker's Washington office who argued and won the *Padilla* case.
>
> "This may be the most important 'right to counsel' case since Gideon v. Wainwright," said Washington solo practitioner Margaret Love, who has written extensively about collateral consequences. "It's a case where you pull a little string and things begin to unravel. It's a gift from Justice Stevens that will keep on giving."[92]

In light of the large assortment of extremely serious collateral consequences of sex offense convictions (particularly costly long-term compulsory treatment programs, mandatory registration often for life, no-contact provisions which destroy families, and residency restrictions which essentially amount to exile – a term the Supreme Court used in *Padilla* to describe deportation), this case may have huge implications for advisements, plea bargains, and effective assistance of counsel in sex offense cases. All those intimately concerned with sex offense issues should be watching the developments resulting from *Padilla* with great interest.

## Sex Offense Issues in the Colorado Department of Corrections

The treatment of those convicted of sex offenses who are incarcerated in the Colorado Department of Corrections ("DOC") remains one of the major and central problems in any discussion of sex offense issues in Colorado. Although much of the information regarding current trends within DOC now of necessity comes to the author at second or third hand, it is nevertheless vital to address several of these trends in this year's report.[93]

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[91] Tony Mauro, "The Growing Impact of Supreme Court's Padilla Case," *The BLT: The Blog of Legal Times*, August 19, 2010. Web. August 20, 2010. http://legaltimes.typepad.com/blt/2010/08/the-growing-impact-of-supreme-courts-padilla-case.html

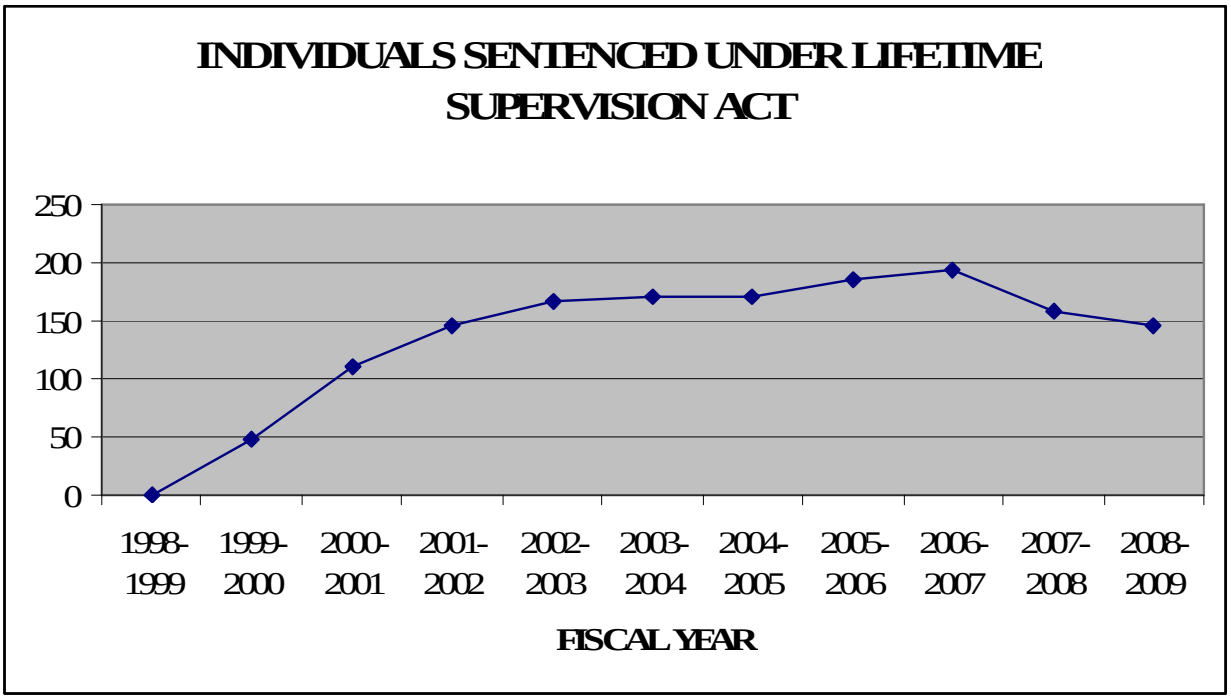
[92] Tony Mauro, "Recent High Court Cases Already Having Major Impact," Law.com, August 9, 2010. Web. August 20, 2010. http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202464165246

[93] Readers of this report who are in DOC are encouraged to send letters to Advocates for Change to keep us informed of those things going on inside which affect and concern you. Letters with content which is of general interest and can be used to give legislators, members of the press, and others who receive copies of these reports, an "inside look" at the abuses occurring in the system may be included in future editions (space permitting) with permission of the letter's author. All letters will be printed anonymously to maintain confidentiality.

*Lifetime Supervision Annual Report – 2009* [94]

The DOC's "Lifetime Supervision of Sex Offenders – Annual Report," while invariably discouraging, is also typically interesting. We have used it in previous reports to demonstrate the destructive trends which continue to evolve under the Lifetime Supervision Act. This year we would simply like to highlight several interesting aspects of the Report. DOC tends to embed the data (which the Report is statutorily required to contain) into blocks of text. This makes it extremely difficult to interpret the data, and we hope the following analysis will help to clarify it.

Discussing the impact of the Lifetime Supervision Act on Colorado's prison population, the Report states that "[t]hrough fiscal year (FY) 2008-2009, a total of 1,496 offenders have been sentenced to prison under the Lifetime Supervision provisions for sex offenses."[95] The report's breakdown of the number of offenders sentenced under those provisions each year is suggestive.

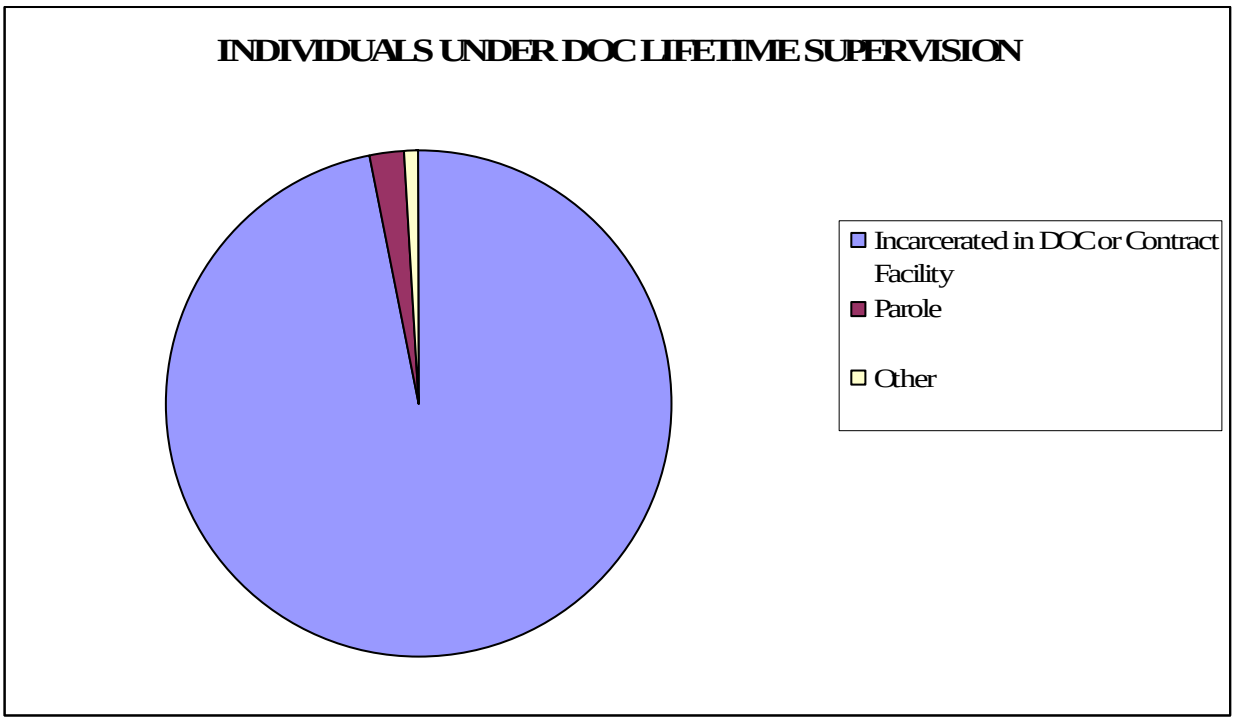



The most interesting trend in this data is the decrease in the number of individuals sentenced under the Lifetime Supervision provisions, from the steady yearly increase to the high in 2006-2007, back down to a level not seen since 2001-2002. It is far too early to speculate on reasons for this change or on whether or not it will continue. But this author has encountered a good deal of anecdotal evidence indicating that some courts began to refuse to sentence individuals under the Lifetime Supervision Act once it became apparent that it was not functioning as the legislature intended. The decrease in numbers therefore may represent a move on the part of judges (and perhaps even some district attorneys) toward greater attempts to fashion sentences

[94] Colorado Department of Corrections, Colorado Department of Public Safety & State Judicial Department, "Lifetime Supervision of Sex Offenders: Annual Report" (November 1, 2009).
[95] *Id*. at 3; the following graph was taken from the same.

and plea agreements for those accused of sex offenses which circumvent the Lifetime sentencing provisions. It will be increasingly interesting if this trend continues.

Later in the same section of the Report, the DOC provided additional astonishing statistics. Noting that "[a]s of June 30, 2009, 1,400 offenders were under DOC supervision for one or more sexual offense convictions sentenced under the Lifetime supervision provisions," the Report gives a breakdown of the current status of each of these individuals.[96]

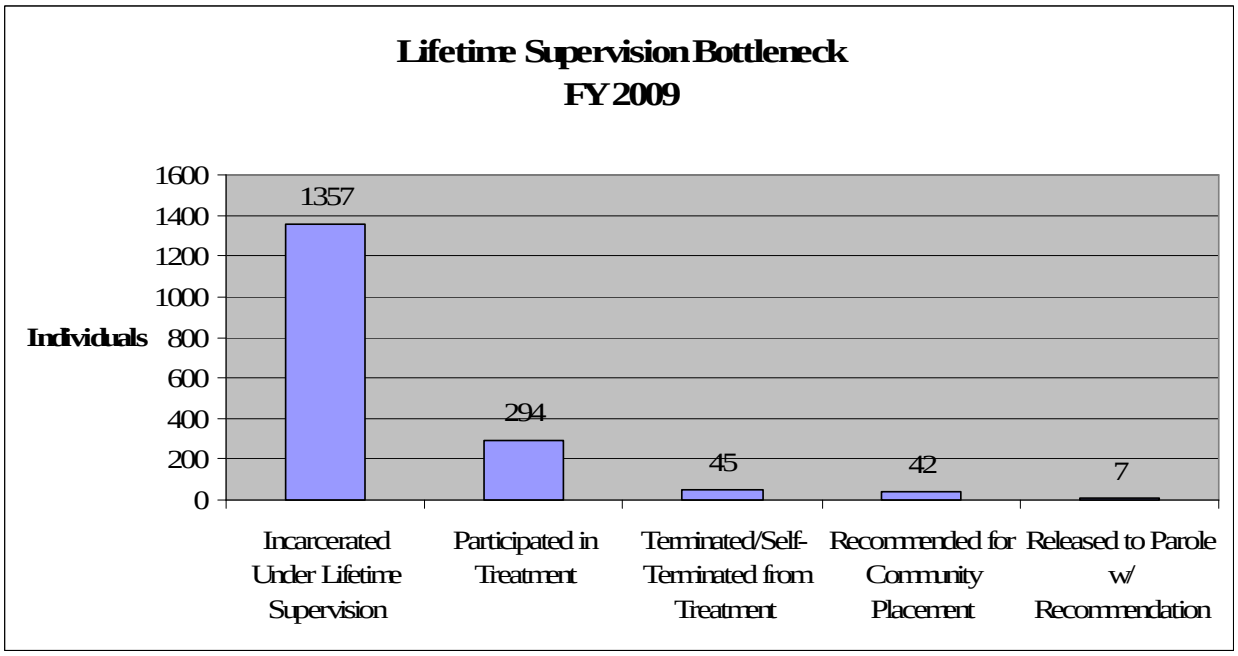



If you have to squint at the above graph to see the sections representing those who are not incarcerated, you are not alone. DOC reports, "A total of 34 offenders under lifetime supervision have released to parole, with 26 of these releases [over 75%] occurring in FY 2009."[97] Yet despite this recent laudable increase in efforts by the Colorado Parole Board and community corrections systems to progress more Lifetime Supervision inmates into the community, the overwhelming majority of those sentenced under the Lifetime provisions remain incarcerated. The DOC Report also states, "The Parole Board held release hearings for 483 lifetime supervision sex offenders during FY 2009 […] of these, 31 were granted parole during the fiscal year."[98] This represents a miniscule 6% parole rate. Even more concerning is the fact that, of the

[96] *Id*. at 4; the following graph was taken from the same. "Other" includes individuals not yet received by DOC, on interstate compact, in Youthful Offender Services, in Community Corrections, or in the Intensive Supervision Inmate Program. Note that the total number of offenders under DOC supervision is lower that the total number sentenced under the Lifetime Supervision provisions, because 94 individuals "discharged" their sentences through death or court action. *See Id*.
[97] *Id*. at 5.
[98] *Id*.

1400 individuals under Lifetime Supervision in DOC, 540 (nearly 40%) were "past their parole eligibility date (PED) as of June 30, 2009."[99]

Further review of the DOC's data makes it easy to understand why so many individuals who are past their PED are still incarcerated. The graph below shows the bottleneck effect resulting from the current dysfunctional system within DOC.[100]



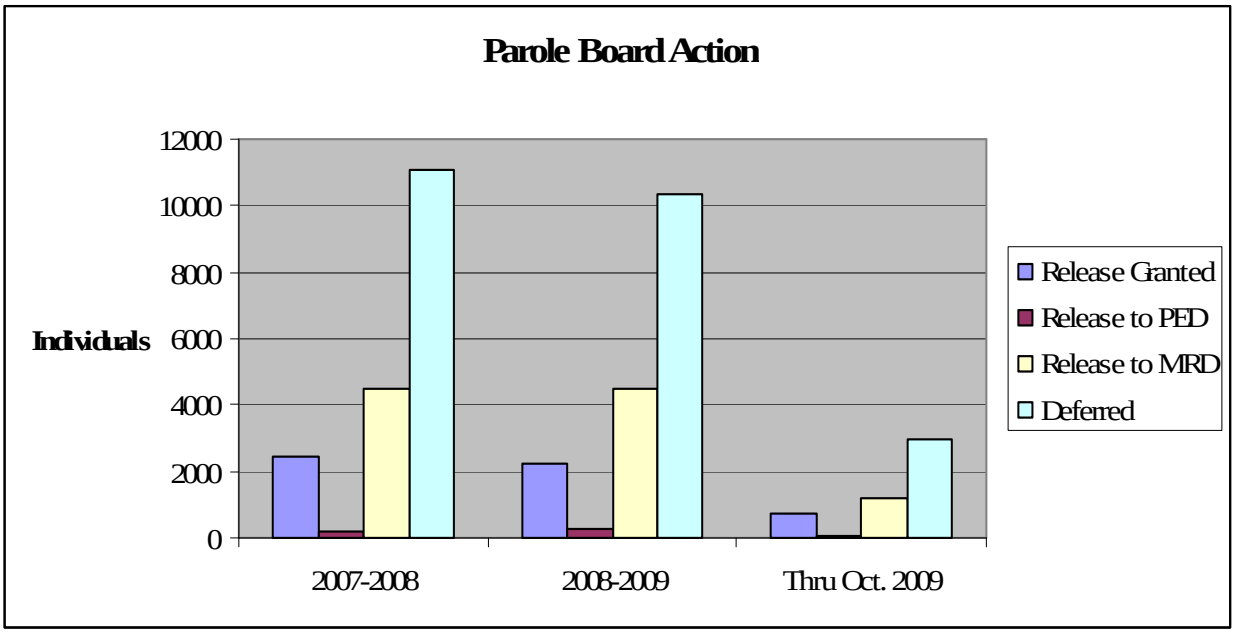

The ultimate consequence of this bottleneck is the steadily increasing population of individuals incarcerated in DOC under Lifetime Supervision. Although the parole board doubtless bears some responsibility for this situation, the failure of DOC to provide adequate treatment appears to be the most serious aspect of the problem. Given the systemic dysfunction (as detailed in our previous reports) which plagues the DOC's attempts to implement the provisions of the Lifetime Supervision Act, the situation is not likely to change without significant intervention from the legislature, the courts, or both. In light of the statement of legislative intent appended to the beginning of this report, one might expect to find the legislature dissatisfied with the current state of affairs.

*Parole Board Status Report – 2009*[101]

Pursuant to §17-22.5-404(6) C.R.S., the Colorado Parole Board issued a report containing data on all parole decisions from 2007-2009. The data in the report is broken down by board member, and although this is interesting we have not included the breakdown in the graph below because

[99] *Id*. at 4.
[100] The following graph was taken from *Id*. at 4, 12, 14. Note that no one was released to community corrections with a recommendation. All numbers are for FY'09.
[101] Kevin L. Ford, Ph.D., "Information Collection and Analysis of Parole Board Decisions: Status Report," Office of Research and Statistics, Division of Criminal Justice, Department of Public Safety (November 1, 2009).

it is not directly applicable to the present issue. This data is included here for the primary purpose of demonstrating the role the parole board plays in the Lifetime Supervision bottleneck described above, and to give the larger context of the board's overall performance.[102]




Clearly, the consistent practice of the board is to defer (refuse to release) the vast majority of the individuals who come before it. Note that a "release to MRD" is not really a grant of parole, because the individuals would have been released at their Mandatory Release Date (MRD) regardless of the parole board's action. Combining the number of individuals deferred with those paroled to their MRD's, and comparing that total to the number of individuals granted release immediately or at their Parole Eligibility Date (PED), yields an overall average parole rate of 17%. Although this rate is alarmingly low, it is significantly higher than the 6% rate for those serving Lifetime Supervision sentences.

We believe the above data speak for themselves. The sex offense treatment system in DOC is broken. For those fortunate few who somehow manage to navigate their way through the system far enough to receive a recommendation for community placement, the parole board stands as a virtual bar to any hope of further progress. It is painfully obvious that something must be done to effect major changes in both of these areas if the Lifetime Supervision Act is to function as anything other than a simple life sentence to prison – the very thing the legislature declared it was attempting to avoid by passing the Act itself.

*Emerging Issue at Fremont*

During 2009 AFC began receiving reports from individuals at Fremont Correctional Facility ("FCF") that the facility had created a restricted privileges unit for those who are "non-compliant" with treatment recommendations. AFC Chair Annie Wallen contacted Warden

[102] The following graph was taken from *Id*. at 6-8.

Timme at FCF, and was informed that this was in fact correct, and that effective June 1, 2010 FCF had "become compliant" with administrative regulations and state law providing for restriction of offenders' privileges for those who do not participate in recommended treatment or job assignments.[103] In response, AFC sent a letter to the Warden in mid-October, with copies to Ari Zavaras and Peggy Heil, detailing multiple objections to this practice, and in particular arguing that it constituted cruel and unusual punishment. To her credit, the Warden responded promptly in little more than a week. However, she essentially dismissed the concerns raised in AFC's letter, stating that the facility's current practice conforms to regulations and state statutes.[104]

Naturally, AFC found this response unsatisfactory, and has sent out a request in the Advocate newsletter for stories and information from individuals who have been placed on restricted privileges under this regulation. We fully intend to continue to pursue the issue.

*"An Inside Look" From an Anonymous Source in DOC*

Since the author is no longer incarcerated in DOC, it has often been difficult to obtain accurate and direct information about new issues arising on the inside. All the letters sent to AFC by individuals sharing their stories have been incredibly valuable in this regard. Below we have reproduced a series of bullet points sent us by one such individual, containing a mixture of various snapshots of the systemic problems in DOC's sex offense treatment system.[105]

- On 12/10/10 an FCF inmate in cellhouse 6 was found by another inmate, just before he successfully hung himself. The inmate that purportedly nearly killed himself had also purportedly been "ridden hard" by his therapist and treatment group for the last week or so. He supposedly has an indeterminate sentence (no surprise). The [correctional officers] are only saying "he was found unconscious," and it's unlikely mental health will say much about it either if they don't have to.
- One inmate was told by the polygrapher here (only Amich & Jenks allowed here) that he passed his sex history polygraph, only to be mysteriously told later by his therapists that he had failed his polygraph.[106]
- One inmate was given approval for his sex history polygraph addendum[107] by his therapists, only to be intimidated by the polygrapher saying that he hadn't

[103] DOC A.R.s 600-05 & 600-005, and §17-20-1145 C.R.S.
[104] See APPENDIX B for a copy of AFC's letter to Warden Timme, and the Warden's response.
[105] We of course cannot vouch for the accuracy of all the contents of this letter, but we also have no reason to doubt its accuracy. We have reproduced the letter verbatim.
[106] This is unfortunately not uncommon, and verifies much of what we have previously said about the nature of the polygraph. See Jeremy J. Loyd & Mark T. Walker, et al., "An Unacceptably High Cost: An Inside Look At Colorado's Sex Offender Law and Treatment Program – Second Annual Report", (September 2008), at 32-34 [hereinafter "Unacceptably High Cost – 2nd Annual"]. Regardless of the outcome of the "test" itself, the result must be approved by the entire "treatment team" in a final "staffing" before it becomes official. The test result has been known to change during these staffings, leading us to conclude that therapists are capable of overturning non-deceptive results based on their personal, unsubstantiated opinions that an individual may be withholding information. Our objections to the exclusive use of Amich & Jenks to conduct polygraphs in DOC are detailed in *Id.* at 34-36.
[107] An addendum is a document which an individual may use to disclose additional information and add it to their previous sexual history documentation.

disclosed any new victims since his previous polygraph. He, not surprisingly, didn't pass – despite having no reaction [to the test questions] – [there is] no accountability for these polygraphers or their "results."

- One inmate, having passed both sex history polygraphs here recently, [ ] was told [shortly thereafter] by his therapists that he hadn't disclosed everything from his file, and soon after[wards he was] terminated from treatment. Even they don't really believe the polygraphs are accurate!
- An inmate verified he'd received a letter from his Phase I group [a] few months ago, indicating there would be no new groups indefinitely. He claims [that] to his knowledge, even now in December [2010] no new Phase I groups have started.[108] A therapist here, upon being asked about the "no new groups" rumor, very angrily replied, "If I find out who started that rumor I will have that person sent out of the facility!"
- An inmate who went to mental health, perhaps a year ago or more now, and told them he was suicidal was then punished for [it] by being told he'd now need to wait an additional year for his psych rating to go back down before he could go to Arrowhead (a lower-rated psych facility), which he needs to do in order to [get into treatment and] to be eligible for parole on his indeterminate sentence.[109]
- An inmate who had been assertively trying to get into treatment [ ] at FCF by sending kites[110] to a therapist was later punished by this same therapist. [She told him] he was too aggressive and she didn't want to deal with him [at FCF, so he] would now need to go to Arrowhead [for treatment] (a longer road on his 2-Life sentence). Most 2-Lifes do treatment at FCF.
- An inmate, having received notice and gone to court (for a possible favorable outcome) during his Phase I group, was mysteriously the only one in his group (despite doing very well in group) not to pass his subjectively rated oral exit interview.[111]
- Passed polygraphs (with the one noted exception above) continue to be the only real criteria for [individuals] to be given recommendations for treatment completion. This despite a lot of evidence they are not reliable.[112]
- Inmates with really good out-of-state parole opportunities [and] support seem to be [encountering] more resistance (even [having] support people denied at the last

[108] Here we find another major cause (almost certainly the primary cause) of the Lifetime Supervision Bottleneck described above: the failure of DOC to make treatment legitimately available to those who are eligible for it.

[109] The individual described here had his psych classification increased as a result of his discussion with mental health. Because Arrowhead as a facility is rated to accept only individuals with lower psych classifications, he is not eligible to go there until a certain amount of time passes and his psych classification automatically goes back down. Not only does this prevent individuals with mental health issues from receiving treatment, which seems to us contradictory, but it also creates a disincentive for those who need to get into SOTMP for parole eligibility to contact mental health if they are struggling. This procedure could easily result in suicides that could otherwise have been prevented, and demonstrates again (as if another demonstration were required) that DOC values the lives of those entrusted to its charge far less than its own bureaucratic, procedural inanity.

[110] A "kite" is a small form which individuals can use to communicate with staff in the various departments of the prison where they are incarcerated.

[111] Incidents of retaliation from the treatment program against those individuals who exercise their right of access to the courts, while depressingly common, are also virtually impossible to prove.

[112] Lack of a treatment recommendation essentially precludes parole, and if such recommendations are being withheld on the sole basis of polygraph results, there are major legal and constitutional implications.

> minute). Case managers [are] not supportive of many out-of-state prison transfers and/or parole transfers for SOs – particularly indeterminates.

The above represents only a brief description of a handful of issues in a single DOC facility offering SOTMP treatment. Even so, the sheer scope of the dysfunction is readily apparent. While many have despaired of ever seeing any sort of positive change in the system, we struggle to remain hopeful that policymakers will awake to the problem and recognize the need for sweeping reform. It is clearly well past time for a fresh, restorative approach to criminal justice in the arena of sex offense issues.

## Sex Offense Issues in the News

There is never any shortage of sex offense-related stories in the news media, and over-dramatization and fear-mongering are usually the order of the day. However, from time to time there are some stories of a different sort, and the main positive effect of such stories is to offer a glimpse behind the façade of myth and disinformation which has grown up around sex offenses. We offer an overview of several such stories here, in the hope that they will challenge some stereotypes and encourage those who find themselves enmeshed in Colorado's system.

*Ten Years Too Late - Justice for Timothy Masters*

At AFC we have regular opportunity to interact with people who are encountering the criminal justice system in Colorado for the first time, either as a criminal defendant or a close family member. The author has been struck by the frequency with which such individuals make comments along the following lines: "I can't believe it actually works like this. I thought that the police and courts were there to find the truth. I thought only the guilty would be convicted, and the innocent would be vindicated. I thought they would care about what really happened, and that the punishment would fit the crime. But now I'm finding out I was completely wrong." "Disillusioned" is a word I have heard used more than once by such people to describe their experience with the system. Surely, no one could have more cause to be disillusioned than Tim Masters. But mercifully, for once, justice has (eventually) actually been done.

Virtually everyone who takes any interest in sex offense issues will be aware that Masters, after spending ten years of his life in prison for murdering and sexually mutilating Peggy Hettrick in 1987, was exonerated by DNA evidence and released when his conviction was reversed in 2008. Over the last couple of years, however, the significant (and admittedly somewhat satisfying) fallout from Masters' case has continued.

In 2008, Masters filed a federal lawsuit in the U.S. District Court for the District of Colorado, naming multiple defendants (most in the District Attorney's Office and Fort Collins Police Department) and asserting a variety of claims.[113] The most significant defendants were Terrence A. Gilmore and Jolene C. Blair, the Deputy District Attorneys who had prosecuted Masters (and who had both subsequently been appointed as Judges in the Eighth Judicial District), along with

[113] The following information about Masters' lawsuit is taken from the Court's opinion in *Masters v. Gilmore, et al.*, No. 08-cv-02278-LTB-KLM (D.Colo. October 5, 2009).

James Broderick, the Fort Collins Police Department Lieutenant who headed up the police investigation into the murder, applied for the warrant to arrest Masters, and testified at the trial.

The allegations in Masters' lawsuit read like a script for a movie about police corruption: ignoring, concealing, fabricating, and destroying evidence; ignoring alternative suspects; manipulating expert witnesses' conclusions by concealing information from them; providing false statements and omitting information in the arrest warrant affidavit; and lying about the whole thing to the District Attorney's Office investigators after Masters' conviction was overturned.

Naturally, almost all the defendants filed motions to dismiss on various grounds (such as prosecutorial immunity – the prosecutor's license to do pretty much whatever they want). U.S. District Court Judge Lewis T. Babcock, however, denied the motions to dismiss in part and permitted some (although not all) of Masters' claims to proceed. Unsurprisingly, around four months after the court's ruling on these motions, Larimer County's Board of Commissioners voted to pay Masters $4.1 million to settle the suit. The City of Fort Collins also elected to settle, and Masters ultimately received a total of $10 million. Although this hardly seems enough to make up for the nightmare that Masters was put through, David Wymore, one of Masters' attorneys, clearly got the real point when he said, "The settlement allows Tim to re-establish himself as a human being […] He wants to be a normal guy."[114] That is what the system really tried to steal from Tim Masters – his humanity. Happily, this time it failed. Masters has been vindicated, and has his life back (at least, whatever is left of it).

The saga wasn't over after the suit settled – indeed, it just kept getting better and better. On June 30, 2010 a grand jury in Larimer County returned an indictment against James Broderick, the investigating police Lieutenant, for eight counts of felony perjury for his role in Masters' conviction. The indictment alleged that Broderick had made multiple false statements in the arrest warrant affidavit, and lied repeatedly on the stand during Masters' preliminary hearing and trial.[115] As of this writing the author is unaware of any further developments in Broderick's case.

The final vindication came from Colorado voters. On November 2, 2010 Judge Terrence Gilmore and Judge Jolene Blair, the two prosecutors who railroaded Masters in 1999, were thrown off the bench during judicial retention elections. One news story reported, "Masters has said all along that he simply wanted an apology from Gilmore and Blair, and from the lead police investigator in the case, Fort Collins police Lt. Jim Broderick […but] Blair and Gilmore have refused to acknowledge [their mistake]. 'They didn't apologize […] They showed no remorse.'"[116]

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[114] Ed Andrieski, "County Pays $4.1 Million for Wrongful Imprisonment," *Associated Press* (February 17, 2010). (Accessed through AOL News at http://www.aolnews.com/nation).

[115] For a news article on Broderick with a link to the indictment itself, see Monte Whaley, "Cop in Tim Masters Case Indicted on Perjury Charges," *The Denver Post* (June 30, 2010). (Accessed through denverpost.com at http://www.denverpost.com/news/ci_15410724).

[116] Trevor Hughes, "Judges Gilmore, Blair Ousted," *Coloradoan.com* (November 3, 2010). (Accessed through colorodoan.com at http://www.colorodoan.com/article/20101103/NEWS03/11030364/Judges-Gilmore-Blair-ousted).

But after all, why should they? They were just doing their jobs, right? They are crusaders for Justice, defenders of the American Way, protecting society from the packs of marauding Criminals who would otherwise prey on the innocent. And if some guy gets thrown in prison for a decade for a crime he didn't commit, what of it? He is just collateral damage in the war on crime, the price of safety for the people…

Of course, it never seems to occur to individuals like Blair and Gilmore that Tim Masters *is* "the people" who they claim to represent and protect; he *is* the "society" they claim to be trying to defend. They victimized him, stole a huge part of his life from him, in cold blood and without remorse. Perhaps, if Coloradoans will take a long hard look at this situation, we will begin to see through the old "us vs. them" lie, the idea that there is some group of defective individuals out there called "criminals" that are fundamentally different from "normal people." Perhaps we can begin to realize that every one of us, whether convicted of crime or prosecuting crime, is simply a human being. We are all capable of horrendously destructive choices that do irreparable damage to others' lives. Are Blair and Gilmore "criminals"? Did their actions cause any less damage to their victim than those of most of the men and women currently populating Colorado's prisons? But they will almost surely never face incarceration, simply because they are a part of the system, and the system doesn't crush its own.

So in the end it's not really about "criminals", not about justice, not about punishment, not about guilt or innocence. It's simply about power. If you're on the side with the power, you can destroy people's lives with impunity and tell yourself you're one of the good guys. And if you're on the other side…well, just ask Tim Masters.

*An Inmate and a Guard at Sterling Correctional Facility*

The end of 2010 was a sad and interesting time at Sterling Correctional Facility ("SCF"). In November a 51 year old inmate named Michael Carey was found dead in his cell after a Denver detective filed an arrest warrant against him for alleged involvement in two sexual assaults in 1997-98.[117] Carey's death came after the allegations were reported by both the Denver Post and 9News, placing him in considerable danger from other prisoners.[118] The Logan County Coroner, however, ruled the death a suicide, claiming that he found no evidence of foul play.[119] Carey's family told the media that they didn't believe the new allegations.[120] But, of course, we'll never know the truth because Carey won't get his day in court; he already had his trial in the press – and was condemned.[121]

Interestingly, only a month later the Denver Post reported that 59-year-old Arthur Stafford, who worked as a Correctional Officer at SCF, had been arrested by Jefferson County and was being held for investigation of attempted sexual assault on a child, enticement of a child, and Internet

[117] Kirk Mitchell, "Sterling Prison Inmate Found Dead After Arrest in Sex Assaults," *The Denver Post* (November 11, 2010) (Accessed through Denverpost.com at http://www.denverpost.com/fdcp?1290184219843).
[118] *Id.*
[119] Jace Larson, "Coroner Says Prisoner Hanged Himself in Cell After New Sexual Assault Allegations Surfaced," 9News.com (November 6, 2010) (Accessed through 9News.com at http://www.9news.com/news/article.aspx?storyid=161878&provider=top).
[120] *Id.*
[121] For an insightful letter to AFC from an anonymous prisoner commenting on this event see APPENDIX C.

luring of a child.[122] Apparently, Stafford was caught in an Internet sting operation by the notorious Jefferson County District Attorney Investigator Mike Harris, "who was posing online as an underage teenage female."[123] After several alleged online communications about meeting the non-existent "victim" for sex, investigators claim Stafford finally arranged the meeting and when he arrived he was (naturally) arrested. [124] Beyond the rather obvious (and undeniably magnificent) irony inherent in this story, the vital observation seems to be that here we have another blurring of the supposed line between the "good guys" and the "bad guys", between the "criminal justice system" and the "criminals" from whom it claims to be protecting society. Could it be that there is no such line, and that we're all just people after all? As the DOC's own SOTMP sex offense treatment curriculum proclaims, "everyone is a fallible human being" – except when it comes to committing sex offenses, of course. Everyone knows that only THEY are capable of that! WE are normal people, and we just don't have it in us. Right, Officer Stafford?

*Prosecuting the Prosecutors*

Further blurring the lines of the "us vs. them" mentality is the recent alleged involvement of district attorneys with sex-related crimes. On September 30, 2010 the Greeley Tribune reported that "Myrl Serra, the top prosecutor in the 7th Judicial District based in Montrose, was arrested […] and later released on $5,000 bond" for suspicion of unlawful sexual contact and indecent exposure.[125] The Attorney General's office was expected to appoint a special prosecutor to handle the case.[126]

Around the same time, on September 27, 2010, the Associated Press reported that Ken Kratz, the District Attorney for Calumet County in Wisconsin, would resign amid "accusations that he abused his position in seeking relationships with vulnerable women."[127] Kratz allegedly "sent 30 text messages to a domestic abuse victim trying to strike up an affair while he prosecuted her ex-boyfriend on a strangulation charge."[128] After the woman complained and the texts became public, several other women surfaced, leveling similar accusations of inappropriate behavior against Kratz.[129] As an added twist, "Kratz was also the longtime chairman of the Wisconsin Crime Victims' Rights Board, which investigates and sanctions public officials who violate

[122] Howard Pankratz, "Prison Guard Arrested for Internet Luring of a Child," *The Denver Post* (December 6, 2010) (Accessed through Denverpost.com at http://www.denverpost.com/fdcp?1291738580984).
[123] *Id*.
[124] *Id*.
[125] Associated Press, "Colorado Prosecutor Accused of Unlawful Sexual Contact," *The Greeley Tribune* (September 30, 2010)(Accessed through GreeleyTribune.com at http://www.greeleytribune.com/apps/pbcs.dll/article?AID=/20100930/NEWS/100939991&Show=0&SAXOEdAjax=1&AjaxRequestUniqueId=1285871746348111&template=printart).
[126] *Id*.
[127] Carrie Antlfinger, "Attorney Says 'Sexting' Wisconsin DA Will Resign," *Associated Press* (September 27, 2010) (Accessed through AOLNews.com at http://www.aolnews.com/2010/09/27/attorney-says-sexting-wis-da-will-resign/).
[128] *Id*.
[129] *Id*.

crime victims' rights. He stepped down from that post in December under pressure from state officials."[130]

What are we to make of these news stories? One lesson comes through loud and clear – the good guys vs. bad guys, white knights vs. criminals mentality is terribly askew. We are all human beings, and as human beings we all have the capacity to make terrible, destructive choices and to commit crimes. Perhaps our "criminal justice" system should start treating everyone subject to it, including those accused or convicted of sexual offenses, like human beings instead of ("predators") dangerous animals with defective wiring.

## NO KNOWN CURE: THE SURPRISING HEART OF THE SOMB SUNSET REVIEW DEBATE

Last year's report focused heavily on the then upcoming SOMB Sunset Review.[131] The Department of Regulatory Agencies (DORA) conducted an investigation and issued a report to the legislature with a number of recommendations, all of which we supported.[132] However, with all the excellent ideas contained in the DORA report, one in particular became central to the debate over the bill to reauthorize the existence of the SOMB.

### The Issues

To our minds, a major key to making significant changes through the SOMB bill last year was one particular recommendation made by DORA: ***The Board should study and determine whether and to what extent the treatment of sex offenders and other Board policies, including the no-cure policy, work, and present the report to the General Assembly no later than December 1, 2011.***[133]. AFC took up this issue right away, arguing that the "no cure" policy and containment model[134] should be reconsidered in light of scientific research and best practices. The "no cure" policy quickly became the central issue in the debate, as AFC used the DORA recommendation as an open door to attempt to have the language removed from the SOMB statute.

Another issue being discussed privately among AFC members, and other organizations on our side of the debate, was the possibility of changing the law to permit individuals sentenced to treatment in the community to have a choice of treatment providers. The idea was discussed very briefly with Senator Joyce Foster during conversations about the SOMB bill, but members of AFC were not planning to attempt to address this issue during the last legislative session. Then,

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[130] *Id*. An amusing note: earlier in 2010 the district attorney in another Wisconsin county threatened to arrest teachers in the local school districts for following a new state law regarding sex-education, saying that the law promoted sexual assault of children and that teachers could be charged with felony contributing to the delinquency of a minor and face up to six years in prison. AOLNews, "Wis. DA Threatens Arrest for Local Sex-Ed Teachers," AOLNews (April 7, 2010)(Accessed through AOLNews.com at http://www.aolnews.com/2010/04/07/wis-da-threatens-arrest-for-local-sex-ed-teachers/).

[131] "Unacceptably High Cost – 3rd Annual," supra note 63, at 2-7.

[132] *Id*. at 39.

[133] "Sunset Review," supra note 2, at 31-35.

[134] For an extensive discussion of the containment model see "Unacceptably High Cost – 2nd Annual," supra note 106, at 5-21.

just under a week prior to the end of the session, Senator Foster told AFC members that she had a surprise for them, but didn't say what it was. On the floor of the Senate she introduced a change to the SOMB bill that would permit an individual in community-based treatment to choose from a list of three treatment providers selected by the individual's parole or probation officer. This amendment was then reviewed by the judiciary committee, a conference committee, was adjusted slightly, and was incorporated into the final version of bill.

## The Advocates

AFC was just one piece of a larger coalition, and everyone was thinking along basically the same lines about what we wanted to accomplish. Numerous members of AFC, criminal defense attorneys, retired Colorado appellate court Judge Frank Dubofsky, and sex offense expert Dr. Michael Miner all appeared to testify before the house judiciary committee. AFC had representatives at the capitol three to five days per week, who would arrive early in the morning and start setting up numerous appointments to meet with legislators.

AFC members and individuals from other organizations testified in committees, did a great deal of work on the phones, and prepared and distributed flyers and other literature to the entire legislature. A number of papers were written to refute the arguments being made in favor of the "no known cure" policy, and these were also widely disseminated among the legislators. Special meetings were held to address specific topics, and one member of the AFC board even went on a local radio program to debate a victim's advocate and a representative of the district attorney's office.

## The Adversaries

Naturally, each day AFC was at work at the capitol there were opposing forces present, visiting the legislators' offices at same time as AFC members. AFC tried to measure the opposition's activity and respond to them as quickly as possible, either through written materials or by addressing their arguments in meetings with the legislators. The opposition group consisted of a particular segment of the sex offense treatment community, along with victims' representatives/advocates, and had a table set up in the capitol building to distribute information and advance their position.

It appeared that members of this party were primarily opposed to any change in the statutory "no cure" language, and this was their primary focus during meetings with legislators and testimony before the judiciary committees. Representatives of the District Attorneys Council also testified in opposition to AFC in both the judiciary and conference committees.

## The Outcome

In the final version of the 2010 SOMB bill, the "no cure" language was completely removed, and the majority of the DORA recommendations were incorporated. The bill passed both houses of the legislature, nearly unanimously, but was subsequently vetoed by Governor Ritter. Ostensibly the veto was due to the late amendment added to the bill by Senator Foster, which would have created a system for those convicted of sex offenses to choose their own treatment provider from

a list of approved SOMB providers, while giving parole/probation the ability to overrule the offender if they felt it was important to do so. Opposition forces, particularly those treatment providers who saw their exclusive referrals from parole slipping away and knew that giving offenders a choice would mean death for their programs, mounted a media campaign to smear Senator Foster. Unfortunately, they largely succeeded. Despite numerous phone calls and letters from AFC members and other supporters of the bill, as well as some favorable opinion pieces in the Denver press, Governor Ritter apparently caved in to pressure from the media and (as a former district attorney) from the District Attorneys Council, and refused to sign the bill into law.

As a result of this outcome, the bill was reintroduced during the 2011 legislative session. The SOMB indicated that they would push for their own bill, which would not include the DORA recommendations or any other changes. Based on the letter issued by the Governor when he vetoed the previous bill, the SOMB asked a victims advocate group to spearhead the writing of the new bill. AFC reviewed the proposed language of the original bill prepared by this group, and was not at all satisfied with it. It therefore became necessary for AFC to seek members of the legislature who were willing to introduce amendments to the bill.

AFC met with legislators, with a particular emphasis on newly elected individuals. The "no cure" language remained a point of contention, although AFC continued to focus on and argue for the inclusion of all the DORA recommendations. Of particular concern was the provision instituting new research and reporting requirements for treatment programs. AFC was fully in favor of this, but because it carried a fiscal note it was an unusually difficult issue in the current economic climate.

The primary roadblock to achieving these goals was the fact that the victims' advocacy group drafting the bill selected sponsors in the legislature who agree with their positions. The transfer of power in the House to a Republican majority likewise posed additional challenges. However, it appears that the progress made during the previous session provided AFC with a strong foundation for ongoing success in the legislature. In spite of some unexpected twists, the new bill was eventually passed.[135]

The bill accomplished several important things. The old language required the SOMB to recommend "treatment based upon the knowledge that sex offenders are extremely habituated and that there is no known cure for the propensity to commit sex abuse."[136] The same section now requires a treatment recommendation "based upon existing research demonstrating that sexually offending behavior is often repetitive, and that there is currently no way to ensure that adult sex offenders with the propensity to commit sexual offenses will not reoffend."[137] While this language remains less than ideal, it does three important things: first, it removes the highly objectionable disease concept communicated by the term "cure;" second, it focuses on the nature of the behavior rather than of the person; and third, it implicitly acknowledges that not all adults convicted of sex offenses have a so-called "propensity" to offend.

[135] H.B. 11-1138 was signed by the Governor on May 27, 2011.
[136] Our objections to this language have been well documented. See, i.e., APPENDIX A.
[137] §16-11.7-103(4)(a) C.R.S.

The other significant aspects of the bill were: (1) requiring the SOMB to develop a procedure to identify low risk offenders; (2) requiring the SOMB to collect data from treatment providers to evaluate the effectiveness of treatment; and (3) requiring the SOMB to refer complaints against treatment providers to DORA for investigation, rather than reviewing the complaints themselves. We may revisit these issues in greater detail in the 2011 report.

## U.S. v. COMSTOCK: FEDERAL CIVIL COMMITMENT AND THE U.S. CONSTITUTION

Many readers of this report may recall the mention in last year's edition of a United States Court of Appeals case, *United States v. Comstock*,[138] which was decided by the Fourth Circuit, finding the civil commitment provisions of the Adam Walsh Child Protection and Safety Act (AWA) unconstitutional.[139] At the time we observed that the U.S. Supreme Court had granted certiorari to review the case, but expressed hope that the AWA provision would finally be struck down as an unconstitutional overreaching of the federal government's power.[140] Sadly, despite valiant efforts on the part of the Respondents, and sympathizers who filed an *amicus curiae* brief, the U.S. Supreme Court elected to overrule the Fourth Circuit and declared that the federal government has the power under the U.S. Constitution to indefinitely civilly commit individuals who have been deemed "sexually dangerous."

### Making the Case

The U.S. government, the Petitioner in the case, filed its Opening Brief in August of 2009. Counsel of record for the government was, of course, the Attorney General at the time, Elena Kagan, who was subsequently appointed by President Obama to the Supreme Court. The question presented to the Court for consideration read as follows:

> Whether Congress had the power under Article I of the Constitution to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.[141]

The government's argument was, in essence, that the federal government indisputably has the authority under the Constitution to enact criminal laws which are necessary and proper for carrying out its enumerated powers. As a part of that authority, the government may also create a federal penal system for the purpose of enforcing its laws and punishing those who violate them. The government therefore contended that the ability to civilly commit individuals who are in the custody of that federal penal system is a "necessary and proper" appendage to the power of Congress to enact criminal laws and punish offenders. Moreover, the government argued that

[138] 551 F.3d 274 (4th Cir. 2009).
[139] "Unacceptably High Cost – 3rd Annual," supra note 63, at 15-16.
[140] *Id*. at 16.
[141] *United States v. Comstock*, No. 08-1224, Brief for the United States, p. (I).

because the federal prison system had custody of these individuals a "special relationship" was created between the government and the individual, such that the government therefore had a "special responsibility" to protect the public by not releasing dangerous individuals into society.[142]

Counsel for Respondents, including attorneys from Covington & Burling LLP and the Office of the Federal Public Defender, filed a Response Brief in October, 2009. Respondents argued, again in essence, that civil commitment is not in itself necessary and proper to the exercise of any power enumerated in the Constitution. Rather, the government was attempting to chain together powers, so to speak, by making civil commitment necessary and proper to the power to enact criminal laws and punish offenders, which power is itself only conferred on Congress by virtue of its being necessary and proper to the exercise of enumerated powers. The Necessary and Proper Clause, Respondents argued, does not authorize the federal government to do something because it is necessary and proper to something else, which is necessary and proper to something else, etc. until one finally reaches back to an enumerated power. Otherwise, the clause could conceivably enable Congress to chain virtually any exercise of power back to an enumerated power and claim it is constitutional – a frightening thought indeed. Respondents also argued that the civil commitment provision permitted the federal government to intrude on the police powers reserved to the States under the Constitution.[143]

*Amicus curiae* briefs were also filed in the case, one in support of each side. In support of the United States, a coalition of Attorneys General from 29 different states filed an *amicus* brief in September 2009.[144] In addition to the arguments made by the United States in its briefs, the Attorneys General argued that the federal government had the authority to enact the civil commitment portions of the AWA under the Commerce Clause of the U.S. Constitution.[145] The one thing that becomes clear reading this brief is that the primary concern of the states involved is simply that they want the federal government to be able to civilly commit persons deemed "sexually dangerous" so the states do not have to deal with such people themselves.[146]

On the other side of the issue, an *amicus curiae* brief was filed in November 2009 in support of the Respondents by representatives of the Cato Institute and Prof. Randy E. Barnett, professor of legal theory at the Georgetown University Law Center.[147] This brief made essentially the same arguments as those made by Respondents, and also argued that the Commerce Clause does not give Congress the authority to enact the provisions in question.[148]

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[142] *Id.* at 16-21; *cf. United States v. Comstock*, No. 08-1224, Reply Brief for the United States, filed November 2009.
[143] *United States v. Comstock*, No. 08-1224, Brief for Respondents, pp. 7-13.
[144] *United States v. Comstock*, No. 08-1224, Brief for the States of Kansas, *et al.*, as *Amici Curiae* in Support of Petitioner. Interestingly, Colorado's Attorney General did not join this brief. The states involved in the brief were: Alabama, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Washington, and Wisconsin.
[145] *Id.* at 4-6.
[146] *Id.* at 3 ("Although federal law expressly permits – even encourages – the transfer of federal inmates to state custody for sex offender treatment if the States are willing to accept such persons, the States generally could not and would not want to absorb federal offenders into the existing state programs for a variety of reasons.")
[147] *United States v. Comstock*, No. 08-1224, Consolidated Brief of the Cato Institute and Prof. Randy E. Barnett as *Amici Curiae* in Support of Respondents.
[148] *Id.* at 2-6.

## The Supreme Court's Opinion

The U.S. Supreme Court issued its opinion on May 17, 2010, and disappointingly held that the federal government does have the authority under the Constitution to civilly commit people under the AWA.[149] The Court provided the following summary of its opinion, which some readers of this report may find useful:

> We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.[150]

At the same time, the Court explicitly noted that it was not deciding whether or not the statute violated such Constitutional provisions as equal protection, procedural or substantive due process, or other rights; the opinion therefore left the door open for a challenge to the statute on other grounds.[151]

Interestingly, Jusitces Thomas and Scalia filed a dissenting opinion, arguing that the civil commitment portion of the AWA exceeded Congress' authority, and that the majority's interpretation of the Necessary and Proper clause comes perilously close to granting the federal government a general police power which is forbidden to it under the Constitution.

## Implications

Why did we elect to include such a detailed discussion of the *Comstock* case in this report? There are two reasons: first, having mentioned the case last year we thought it proper to follow up with a brief explanation of the outcome; second, we have heard a great deal of concern and speculation about the implications of this case, and wanted to weigh in on the conversation.

The most important thing for readers of this report to understand about *Comstock* is that the decision **does not directly affect anyone in state custody who was convicted of a sexual offense under state law.** It only applies to individuals in federal custody pursuant to federal sex offense convictions. States have always been free to enact civil commitment laws if they so

[149] *United States v. Comstock et al.*, 560 U.S. ____ (2010).
[150] *Id.*, slip op. at 22.
[151] *Id.* Note that the Fourth Circuit subsequently rejected a due process challenge to the statute. *U.S. v. Comstock*, 627 F.3d 513 (4th Cir. 2010). The Supreme Court's opinion contains detailed and complex constitutional arguments. Readers who are interested in such details are encouraged to review the opinion in its entirety.

desire, and many have done so. A different outcome in *Comstock* would have had no effect on such state laws. Other states have no civil commitment laws, and *Comstock* does not mean that states will now be able to civilly commit state prisoners where they couldn't before. The state and federal governments are in many respects completely separate, and it is important not to confuse the two. What affects one will often not affect the other, and that is the case here.

On the other hand, the case has some negative implications for everyone convicted of a sex offense which, while more remote, are nevertheless real. First, the Court's opinion seems to take for granted that it is possible for the government to prove by clear and convincing evidence that someone is "sexually dangerous to others." It is not at all evident that such a thing can legitimately be proven. Second, despite the protests of the majority, the opinion appears to expand the federal government's police powers for the convenience of the states, which is always a disturbing prospect. Ultimately, the opinion simply winds up reinforcing in the public mind the unwarranted stereotype of individuals convicted of sex offenses as subhuman psychopaths and sociopaths with defective wiring who should just be put in cages and left there. We can only hope that some future challenge to the civil commitment portion of the AWA on other constitutional grounds may prove successful.

## AN INSIDE LOOK

There are a number of individuals and organizations out there writing critically of the current state of sex offense law around the country. "An Unacceptably High Cost" is unique due only to the fact that it is written primarily by an individual convicted of a sex offense, and seeks to provide the firsthand experiences and perspectives of those convicted of such offenses. The idea is to give policy makers and others, who generally view the sex offense management system only from the outside, a sense of what it looks and feels like to be on the inside.

To that end, we provide a number of firsthand accounts below. First, the author has included a brief update on his life since the last report, which is intended primarily as an apology for the late appearance of this Fourth Annual edition. Following this we have reproduced a number of anonymous letters from individuals who remain incarcerated under Colorado's sex offense laws.

### Author's Update

Followers of "An Unacceptably High Cost" will be keenly aware that this edition appeared around six months later than it should have. Those readers who know me personally will know that I feel a great responsibility to continue to provide an avenue for the voices of those convicted of sex offenses to be heard, and I therefore am very sorry for the late completion of this edition. I feel I owe you an explanation of what happened and how I plan to avoid this problem in the future. Here is my effort.

First, I have been blessed with a full time job. While I love the work and it gives me an opportunity to help people, at the same time it is extremely demanding. I spend eight hours or more per day reading, researching and writing, and it is surprisingly exhausting. In addition, I have gone back to school in an attempt to (finally) finish my undergraduate degree, and I have been taking rather heavy courseloads. This semester I took 12 credit hours. So when I get home

from work, and on the weekends, I spend another four to five hours reading, researching and writing. There have also been times when I have been called upon to research and write something quickly in support of AFC's efforts in the legislature, which I have been more than happy to do.

Then, of course, there is treatment. Since switching treatment programs[152] I have been progressing successfully, and aside from some problems on a couple of polygraphs (which I have since cleared up) I have had no significant difficulties. I attend group once a week, and one individual session per month. While this does not require a great deal of time each week, there is sometimes homework involved (more writing). I have actually been told that I will be able to reduce my group meetings to every other week when I finish updating my relapse prevention plan, but I simply haven't had time to do it!

Finally, I now have permission to spend time with all my family members, and I have made this a priority because I have lost a lot of time with them over the last 10 years. When I put all this together with my efforts to get some exercise and all the usual chores and errands of everyday life on the streets, I end up having to get by on five to six hours of sleep per night. The result, sadly, was that when I actually had some time to work on "An Unacceptably High Cost," writing was about the last thing I wanted to do, and I was often able to generate very little motivation.

Looking back on the experience of writing this edition of the report, I realize a couple of things. First, sitting down and researching and writing a 30 or 40 page report was a lot easier when I was in prison. I had a lot more free time to work with! The first two editions of this report were completed in a couple of months. It is clear to me that this is no longer a feasible timeline for preparing the report, and I have therefore elected to begin issuing the report every other year, rather than annually. This will also ensure that I have a greater amount of new and interesting content for each edition of the report, since each edition will cover two years worth of information.

Secondly, I realize that I need more help if I am to continue producing "An Unacceptably High Cost." While the members of AFC have been invaluable, they are extremely busy helping offenders and their families and working with the legislature, in addition to their own jobs and responsibilities, and I do not want to call them away from such important work. This report is "an inside look," which means that it should be written primarily by us as offenders (although our family members certainly have valuable perspectives to contribute). I am therefore asking anyone who has been accused or convicted of a sex offense and wants to share their experience with the system to send stories, articles, topic ideas, etc. for future reports to AFC. If they are marked "Unacceptably High Cost" or sent to the attention of the author, I will get them. Some of you have already shared your thoughts and stories with AFC, and I have included them in the next section. I thank you all for your patience and continued support of these reports. We are

[152] Readers of the 3rd Annual edition of this report will recall that I was attempting to obtain a copy of my discharge summary from my previous treatment program, T.H.E. I had been stonewalled by both the treatment program and the parole department. I eventually sent parole an official request for a copy of the document under the Colorado Open Records Act (CORA), and they finally provided me with a copy. I have attached my CORA request as APPENDIX D, for anyone who may find it useful.

making a difference, and working together, with everyone's contributions included, we can do even more.

## Stories From the Inside

Part of the unique perspective provided by this report is the ability to share personal stories of individuals who are subject to the sex offense treatment and management systems, and it is for this purpose that the following stories are presented. They are set down here just as they were written, as first-person narratives. Most will be anonymous in order to protect the individuals involved from the hostile reactions and damaging reprisals so often suffered by those with the audacity to speak out against the current abuses.[153] The first, however, will be a familiar name to those who have read the first three editions of this report.

*Jeremy Loyd*

I am in DOC under an indeterminate sentence. As I look out the cell house window I see the colors of autumn. Normally, this would be a happy time for any other inmate, as it would signify another year down on their sentence. However, for me it is a very sad time, as it is an indicator of another year I sit in prison, waiting for some treatment program I am not being offered. I am waiting endlessly for treatment because there is no end to the treatment program, and therefore there is no bed space for me and the vast majority of others like me with an indeterminate sentence.

Although I have seen the parole board nine times[154] on a Two Years to Life sentence, when I see them I am still told that I have to stay in prison another year because I need treatment that I cannot get. In addition to this, I cannot go to a minimum security facility because I have an indeterminate sentence. I have 2 points,[155] which should qualify me for minimum security custody level. But I am singled out because of my sentence.

Although I have not had any write-ups or trouble since 2004, I really do not get to enjoy good time, or earned time, because for my Class 4 felony I have a M.R.D. of 2899 A.D.[156] So I say, "Good time towards what?" Also, in spite of the fact that I can't actually get paroled because I'm not in treatment, I cannot even get a doctor's appointment for a severe health issue, because technically I am "parole eligible." So I can forget about seeing a doctor for a major procedure. I have to fight to even see the dentist just to get a common filling. I am not eligible for a lot of jobs

[153] "Unacceptably High Cost – 3rd Annual," supra note 63, at 29-38.
[154] Mr. Loyd was sentenced to DOC in May, 2003.
[155] DOC classifies inmates for security purposes based on a point system. The more points an individual has, the higher security level facility in which they are housed.
[156] "Good time" and "earned time" are methods of sentence calculation which reduce an inmate's sentence based on length of time already served and good behavior. "M.R.D." stands for "mandatory release date," the date on which DOC must release an inmate. In a normal sentence, the M.R.D. would continually be moving toward an earlier date on the calendar as a result of accumulated good/earned time. In Mr. Loyd's situation, however, it is impossible to earn enough good/earned time to move his M.R.D. sufficiently for him to get out of prison during his lifetime. So for him, the good/earned time is utterly meaningless.

at my facility because I am waiting for some treatment that I cannot get. And when I do get treatment my fate is determined by a polygraph.[157]

Will someone please do something for all of us in here? When I signed a plea agreement for probation I did not know I was signing a plea for a life sentence in prison. This madness has to stop. It is unethical. A Class 4 felony is my crime. And while I'm sitting here waiting for some kind of relief, I will watch every type of violent criminal, including murderers, walk out of the gate. This is a true travesty. I am but one of many who share the same curse imposed by Colorado courts, at the mercy of a horribly inadequate system.

*Letter - 3/31/09*

I am writing in regards to the SOTMP program. I came to [---------] Correctional Facility over 2 ½ years ago, after being accepted into the program from a different facility. I was told I was in denial from a previous charge [which] I have already done the time for. I was still accepted and put on the wait list. I am supposed to receive ten days earned time each month. But I am only receiving four. I am being punished for no reason. [With the full ten days per month] I would be 120 days closer to being on parole. I cannot be considered for parole until Phase I of the program is complete, which is supposed to be complete by my parole eligibility date. That went by almost a year ago. I will be seeing the [parole] board again in July, [and] I will be denied again because it takes 6 months to complete the program. If it is true that the program gets money for me being on the wait list then 2 ½ years of tax payers' money has been wasted.[158] I also am required to do the program again when I get out. I want to do the classes, but I do not trust or have confidence in the people who run the program.

*Letter – 4/1/09*

I am writing in regards to the DOC SOTM[P] Phase I and Phase II programs. I am serving a 14 year sentence and took and completed Phase I in 2002. I then was sent to Arrowhead and successfully completed, meeting all the criteria [for the] program after 2 ½ years.

I was then paroled to community where I lived in a halfway house and went to treatment at THE for 10 months, at which time I accepted a ride with a peer from a coworker, who had her daughter in the van, to the store. I failed to report this and was sent back to prison on a technical violation [for] breaking a rule, and it was decided I should go back to Arrowhead Phase II. I was sent back to Fremont and was given the run around by Phase I and II therapists for 2 years, being told I could not take Phase I over, and not being accepted back to Phase II [I was waitlisted].

I have never been in denial to my crime and behaviors. Yet I am punished by the SOTM[P] by having 4 days a month being taken of my good time [for] denial of treatment. I have been told I will not start getting my 4 days good time back until I'm 30 days back into [the treatment] program that I have already satisfactorily completed once.

[157] For a detailed discussion of the polygraph see "Unacceptably High Cost – 2nd Annual," supra note 106, at 26-41.
[158] For the record, we do not know whether the SOTMP receives funding for individuals who are on the waiting list to get into the program. Frankly, however, nothing would surprise us.

I have 0 points, which [would normally result in my being placed in a] minimum [security] facility. Yet I am held in a medium closed facility for programs that I have already completed.

I am a first time offender and have not had a single write up in the 9 years I have been incarcerated. I have been a model inmate, yet here I have sat for the last 3 years in limbo, losing valuable good time and being told I need to complete programs [I have already taken]. I feel the SOTM[P] abuses its power and the real meaning of a treatment program, and lumps all of its clients together and cycles them around and around for the purpose of [obtaining] funds [for the program], with no real intent of helping the offender to enter the community and to reintegrate with their family. I believe that this is a failing program here in the DOC and that the SOTM[P] fund[ing] and the success of the program should be scrutinized and rethought.[159]

*Undated Letter*

Before I was sentenced I had two evaluations by two separate therapists. They both stated that I could be treated safely in the community and was a minimum risk to reoffend. The judge ignored the experts' advice and sentenced me to 8 years to indeterminate.

My lawyer told me I would do 66% of my time, then be paroled at [that] time. He lied to say the least. I was suckered into taking that deal to plead guilty.[160]

I have done all my eight years shy 3 months. And I have had less than 2 years of treatment. Upon arriving to DOC in 2001 it was nine months later I entered into [the] Phase I program. That lasted for about 8 months, then I was terminated due to "lack of progress." I was being forced, I felt, to admit to things I didn't do.[161]

Another 10 or 12 months go by, and I get back in the Phase I program, [which] took about 9 months. Still the same issue came up. I felt I was being forced to admit to something I didn't do.

[159] This man's story is not at all an uncommon one. My experience with THE persuades me that the program takes delight in returning individuals to prison for the slightest technical infraction, and will not hesitate to do so given any excuse. Once back in prison, an individual is then back in the grip of the vicious cycle of the SOTMP, which refuses to let people in and then punishes them with loss of earned time, among other things, for not being in. One final observation on this letter: although it is not really possible to actually "complete" Phase II treatment in DOC (because it is open-ended), it is possible to complete all the treatment courses offered and to meet all the requirements of the program. This is the logical equivalent of completion, and there is no purpose in requiring a man like this to go back to the program. But DOC does require it, and he is willing to go, but they won't put him in. Then they take his earned time, which for someone with a determinate sentence has the effect of actually extending the period of time the individual spends incarcerated.

[160] Again, in my experience this is not unusual. In the past judges, prosecutors, and even some defense attorneys have been woefully ignorant of the true nature of a sentence under the Lifetime Supervision Act of 1998. This has resulted in inaccurate advisement to many people about the penalties they are actually facing as a result of their criminal charges. I personally know someone whose indeterminate sentence was overturned by the court when he demonstrated that his written plea agreement actually stated that he would spend no more than 8 years in prison for a crime that required an indeterminate sentence. Fortunately, the grasp of the Lifetime Supervision Act by courts and attorneys appears to be improving, but too late to help those who have been falsely induced into pleading guilty and now find themselves with a life prison sentence.

[161] This is a distinct possibility, and would not be much of a surprise. "Unacceptably High Cost – 2nd Annual," supra note 106, at 33-34.

Nonetheless, I was progressed to the Phase II program at Arrowhead. I arrived there [in] June of 2005. I was making progress. You get a monthly evaluation. I progressed a little each month. The last month I was there I received 2 tokens for doing well and progressing.[162] A week later I was terminated for lack of progress. I failed 1 polygraph. And 1 was all I was ever given or have ever taken in my life.[163] The polygrapher hassled me. But they supposedly reviewed the tape and said he didn't. I went to court to get all my records, [and] "magically" that audio and video [from my polygraph] disappeared.[164] Now I have no proof, just my word.

I was terminated and continue to wait to be in court-ordered treatment – treatment I could pay for [in the community]. I've also been up for parole 2 times, [with] 1 more coming up in July. But of course [I am] turned down due to lack of treatment. I can't get into treatment, and would like to be so I could be paroled. All termination does is to keep me from dealing with my issues […] I don't feel we are getting the treatment that was intended. We are simply being warehoused and kept from progressing.

## CONCLUSION

2010 was an eventful year in Colorado for those of us concerned with sex offense issues. An old advocacy group vanished, and a new – and hopefully more effective – one was born. The Colorado legislature and the state and federal courts created new law around sex offenses, some positive and some discouraging.

More importantly, AFC made some great friends and allies in the legislature, and effectively spread the message that it is imperative that we move toward a more reasonable, humane, and evidence-based approach to sex offense issues in Colorado. In spite of the fact that the 2010 bill was vetoed by the Governor, a strong foundation of understanding and respect was built by AFC in the legislature, and it served us well as the SOMB reauthorization bill was reconsidered in 2011.

The DOC has, as always, been problematic. It seems clear that individuals sentenced under the Lifetime Supervision Act are still not being provided with access to the statutorily mandated treatment required for parole eligibility. Moreover, even with a treatment recommendation, the parole board continues to refuse to grant parole to those with indeterminate sentences. These ongoing problems create a Lifetime Supervision bottleneck, and unless they are corrected the Act cannot possibly function as the legislature intended.

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[162] This refers to a practice of the SOTMP Phase II program, which doles out tokens each month to those who do well on their monthly treatment progress evaluations. A token is a small metal coin which can also be obtained from DOC canteen, and is used to purchase soft drinks from vending machines inside the prison. To receive 2 tokens indicates that your evaluation shows you to be progressing in treatment.

[163] The significance of this is that the SOTMP typically provides 4 attempts to pass the first polygraph (referred to as a "sexual history" polygraph) prior to terminating someone. For our objection to the use of the polygraph in general, and as the basis of termination from treatment in particular, see "Unacceptably High Cost," supra note 5, at 12-15; "Unacceptably High Cost – 2nd Annual," supra note 106, at 26-41.

[164] We have heard of this happening numerous times. See "Unacceptably High Cost – 2nd Annual," surpa note 106, at 35.

One of the most striking features of the past year was the number and nature of news stories in Colorado involving sex offense issues. From the vindication of the innocent Tim Masters to the discovery of sex offending behavior among prison guards and district attorneys, the truth about the distorted "us good guys versus those monsters" nonsense, which has been fed for so long to the general public, is beginning to come to light.

We are at a crossroads in Colorado concerning sex offense issues. We have the opportunity to make a major turn onto a new path where our approach to these issues will be characterized by truth instead of disinformation, hope instead of fear, restoration instead of retribution, empowerment and enablement instead of control and manipulation, evidence instead of stereotypes, and humane treatment instead of objectifying labels. Indeed, this change may already be beginning. Now is the time for all who desire to see such lasting change to act together and let our voices be heard. This battle has often been discouraging, and we have had our hopes dashed many times before, but we cannot stop working for change now, when we are just beginning to make a real difference. "Let us not become weary in doing good, for at the proper time we will reap a harvest if we do not give up."[165]

## NEXT STEPS

In past reports we have included extensive recommendations for changes which we believe are necessary for Colorado's sex offender law and treatment program to function in the just, humane manner which the legislature originally intended. In this edition we take a different approach, and instead of suggesting specific solutions we identify problem areas that we believe should be addressed in the immediate future. We recognize that there are numerous other issues which we could include here, but since we are aware that we cannot address everything at once, we believe the following four issues are the most pressing and should be priorities at this time. We will be most effective if we focus our attention and resources where they can do the most good. This year our recommended "next steps" are as follows:

1. Address the sex offense treatment system in DOC. Individuals sentenced to prison under the Lifetime Supervision Act are not being provided with access to the treatment which is required under the statute and necessary for parole eligibility. The most effective approach to this problem will likely be through the DOCCA lawsuit which, while it has taken longer than anticipated to prepare, should be going forward sometime during 2011. The legislature must be made aware that DOC is unable or unwilling to provide the treatment required for the Lifetime Supervision Act to function properly, and specific solutions for this problem must be proposed.

2. Address the Lifetime Supervision bottleneck being created by the parole board. Having individuals with treatment recommendations for parole sitting in prison year after year because the parole board refuses to grant them parole is unacceptable. The legislature must be approached with this issue, and made aware that the current practice of the parole board is contributing significantly to defeating the intent of the Lifetime Supervision Act. Specific solutions for this problem must be proposed, including the possible addition of language to the statute removing the parole board's discretion and mandating a grant of parole for all those with treatment recommendations.

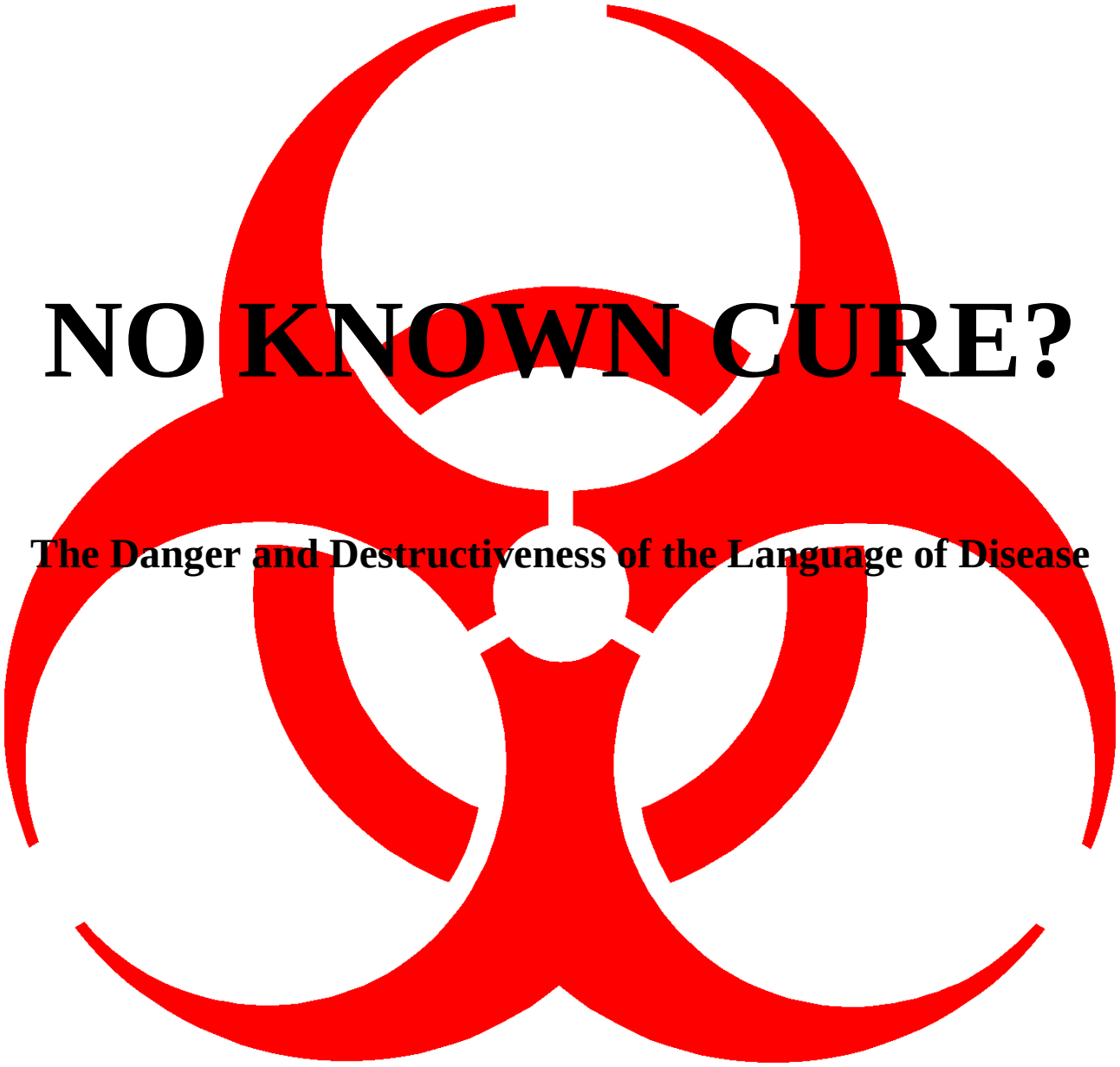
[165] Galatians 6:9 (NIV)

3. Address the use of polygraphs in sex offense treatment. Given the fact that polygraphs are not used by many successful sex offense treatment programs around the world, that the Colorado courts have uniformly rejected them (and any testimony related to them) as having no evidentiary value, and that the results of these tests have enormous destructive potential and minimal benefit as they are currently employed, it seems this is a vital issue and must be taken up. The best avenue to approach this issue will be difficult to determine, and must be evaluated carefully.

4. Support the reform efforts currently being undertaken by the Colorado Commission on Criminal and Juvenile Justice. The committee formed to address sex offense issues is working on a number of positive reforms on matters such as registration and revising the Lifetime Supervision Act. We must continue to monitor and contribute to this important work.

# APPENDIX A

**NO KNOWN CURE:**
**THE DANGER AND DESTRUCTIVENESS**
**OF THE LANGUAGE OF DISEASE**



# NO KNOWN CURE?

## The Danger and Destructiveness of the Language of Disease

A Position Paper of
Advocates for Change

November 2009

**Revised Edition**

## I. THE PRINCIPLE

The first of the "Guiding Principles" set forth in the Standards and Guidelines for the Colorado Sex Offender Management Board (SOMB) reads, in pertinent part, as follows:

> 1. Sexual offending is a behavioral disorder which cannot be "cured."
>
> […]
>
> Many offenders can learn through treatment to manage their sexual offending behaviors and decrease their risk of re-offense. Such behavioral management should not, however, be considered a "cure," and successful treatment cannot permanently eliminate the risk that sex offenders may repeat their offenses.[166]

This principle is also encoded in Colorado statutes, which require the SOMB to conduct its duties "based upon the knowledge that sex offenders are extremely habituated and that there is no known cure for the propensity to commit sex abuse. The board shall develop and implement measures of success based upon a no-cure policy for intervention."[167]

Clearly this "no-cure policy" forms the foundation for the SOMB's approach to all of its statutory duties. The question addressed herein is whether this language has any place in Colorado's sex offender laws or the guiding principles of the regulatory agency tasked with managing sex offenders and their treatment programs. It is not simply a question of whether this terminology is appropriate or helpful, but of whether it is not in fact counterproductive and ultimately damaging to the effectiveness of the SOMB in performing its legislative mandate.

The article of the Colorado statutes which created the SOMB contains a legislative declaration, which indicates that the SOMB and the systems it administers were intended by the general assembly to "work toward the elimination of recidivism by [sex] offenders."[168] While the legislature clearly recognized that "**some** sex offenders cannot or will not respond to treatment,"[169] we must consider whether the SOMB's blanket application of the "no cure" philosophy to all sex offenders is compatible with the general assembly's stated purposes.

## II. THE TERM

Webster's dictionary contains a number of different definitions of the term "cure", both as a verb and a noun. Several of these are relevant in the context of the "no cure" philosophy, and illustrate the fallacies that this terminology embodies and communicates about sex offenders.

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[166] Colorado Sex Offender Management Board, "Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitoring of Adult Sex Offenders", (March 2008), p. 5.
[167] §16-11.7-103(4)(a) C.R.S.
[168] §16-11.7-101 C.R.S.
[169] *Id.*

**Cure (n) – 2 a: recovery or relief from a disease; b: something (as a drug or treatment) that cures a disease.**

**Cure (v) – 1 a: to restore to health, soundness, or normality.** [170]

The primary message that the "no cure" language communicates is that sex offenders have a disease. The concept of an incurable disease implies a physiological condition which cannot be corrected, such as Lou Gehrig's Disease[171]. We are not aware of any widely accepted scientific research (and certainly the SOMB does not rely on such research) connecting sex offending behavior with a physiological condition of any kind. Indeed, the SOMB guiding principles refer to sex offending as a behavioral, not a physiological, disorder. The use of the term "cure", the language of disease, distorts the nature of sex offending behavior by equating it with conditions like Lou Gehrig's Disease, which, although they can be managed to some degree, will in time inevitably run their course and can only have one ultimate outcome.

Sex offending is not a disease, it is a behavior. The terminology of the cure, in its most essential form, cannot reasonably be applied to a behavior – it simply makes no sense to speak of there being, or not being, a cure for a behavior. The word implies something much deeper, something fundamentally and physiologically wrong with individuals who commit sex offenses. Regardless of whether or not there is any support for such a view (we argue there is not), the distorting effect of this language on the public perception of sex offenders is profound. To conceive of sex offending as a disease enables an absolutist "us versus them" mentality among treatment providers and the general public. If there is something fundamentally wrong with sex offenders that is not wrong with me, then I am not like them and cannot relate to them. Suddenly it becomes very easy to advocate any sort of inhumane treatment of sex offenders which may be proposed, because after all, it is not as if they were normal people. Suddenly it becomes very easy to hate.

We contend that it is this fundamental distortion which leads inexorably to the extremist, "leper colony" style quarantine approach to sex offenders advocated by some containment proponents. Moreover, we have encountered public sentiment in the media and on the blogs in passionate and seemingly genuine support of such practices as locking up all sex offenders for life, shooting them immediately upon conviction, or the Czech practice of surgically removing their testicles. It is no coincidence that in a large percentage of cases the individuals justify their endorsement of such barbarism with the biting assertion, "There is no cure for these people!" What they obviously think this means is that all sex offenders are certain to offend again, since they have a disease that cannot be cured and which therefore can have only one ultimate outcome – offending.

**Cure (n) – 3: something that corrects, heals, or permanently alleviates a harmful or troublesome situation.**

[170] Webster's New Collegiate Dictionary 276 (1979).
[171] We elect to use Lou Gehrig's Disease as an illustration here because it is a condition which genuinely has no cure, and is inevitably fatal.

**Cure (v) – 1 b: to bring about recovery from; 2 a: to deal with in a way that eliminates or rectifies; b: to free from something objectionable or harmful.**[172]

If we must apply the term "cure" to sex offending behavior, it can only reasonably be based on the definitions above. Presumably, then, the assertion that sex offenders cannot be cured actually means that their offending behavior cannot be rectified, eliminated, corrected, or permanently alleviated. They cannot recover from, or be freed from, such behavior. Is this assertion accurate?

Current research demonstrates that it is not. Below is a table summarizing the results of recent studies on sex offender recidivism rates. We believe the numbers speak for themselves.

| STUDY | SEXUAL RECIDIVISM RATE | FOLLOW-UP PERIOD | DEFINITION OF RECIDIVISM | SAMPLE SIZE |
|---|---|---|---|---|
| Hanson & Bussierre (1998)[173] | 13.4% | 4-5 years | Various | 23,393 |
| Ohio Department of Rehabilitation & Correction (2001)[174] | 11% | 10 years | Re-incarceration | 14,261 |
| Bureau of Justice Statistics (2003)[175] | 5.3% | 3 years | Re-arrest | 9,691 |
| Harris & Hanson (2004)[176] | 14% | 5 years | Charges or Convictions | 4,724 |
| | 20% | 10 years | | |
| | 24% | 15 years | | |
| Hanson & Morton-Bourgon (2004)[177] | 13.7% | 5 years on average | Various | 31,216 |
| Hanson & Morton-Bourgon (2005)[178] | 14.3% | 5-6 years | Charges or Convictions | 19,267 |

In fact, the research indicates that 76% – 94.7% of convicted sex offenders do not recidivate. This is virtually the opposite of what the public has been led to believe, and drives researchers to the conclusion that "most sexual offenders do not re-offend sexually over time."[179] It is this

[172] Webster's New Collegiate Dictionary 276 (1979).
[173] R. Karl Hanson & Monique T. Bussière, "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies", *Journal of Consulting and Clinical Psychology*, Vol. 66, No. 2 (1998), pp. 348-362.
[174] State of Ohio Department of Rehabilitation and Correction, "Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases", (April 2001).
[175] U.S. Department of Justice, Bureau of Justice Statistics, "Recidivism of Sex Offenders Released From Prison In 1994", NCJ 198281 (November 2003).
[176] Andrew J.R. Harris & R. Karl Hanson, "Sex Offender Recidivism: A Simple Question", Public Safety and Emergency Preparedness Canada (2004).
[177] R. Karl Hanson & Kelly Morton-Bourgon, "Predictors of Sexual Recidivism: An Updated Meta-Analysis", Public Safety and Emergency Preparedness Canada (2004).
[178] R. Karl Hanson & Kelly Morton-Bourgon, "The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies", *Journal of Consulting and Clinical Psychology*, Vol. 73, No. 6 (2005), pp. 1154-1163.
[179] Timothy Fortney, Jill Levenson, Yolanda Brannon, & Juanita N. Baker, "Myths and Facts About Sexual Offenders: Implications for Treatment and Public Policy", *Sexual Offender Treatment*, Vol. 2, No. 1 (2007).

conclusion that has led the Center for Sex Offender Management[180], and even some members of Colorado's SOMB[181], to label the idea that all sex offenders re-offend as a "myth". So, if the great majority of convicted sex offenders do not recidivate, can it not be reasonably said that their offending behavior has been rectified, eliminated, corrected, or permanently alleviated? Have they not recovered from, or been freed from, the behavior?

We are aware of the objection that studies such as those cited above measure only re-arrest or re-conviction rates, and because many sex offenses go unreported actual recidivism is significantly higher. In response to this we observe that, while it is true that many offenses go unreported, it is likely that a large majority of unreported offenses are committed by individuals who have never been convicted of a sex offense. Convicted offenders are typically under such stringent supervision that those who do re-offend are very likely to be discovered.[182] So the findings of the studies cited are probably closer to the true numbers than some opponents have asserted.

What are we to make of the 76% – 94.7% who do not recidivate? If sex offending is a behavioral disorder, and a majority of offenders do not repeat the behavior, are they not "cured" by the definition given above? If not, why not? We suppose it will be argued that it is not in fact the behavior, but rather the "propensity to commit sex abuse"[183] which cannot be cured. The idea of a "propensity" indicates that there is some sort of inclination or tendency to commit sex abuse which is innate; that is, which is possessed from birth as an essential, inherent characteristic of particular individuals. Once more, we ask that any who take this view put forth scientific evidence in support of the existence of such a "propensity." This idea simply returns us to the language of disease.

**Cure (n) – 2 c: a course or period of treatment.**[184]

The SOMB has taken an approach to sex offender treatment which relies on cognitive-behavioral treatment models. In support of such models research is typically cited showing a cognitive-behavioral approach to be marginally more effective than other types of treatment in reducing sex offender recidivism. This type of treatment, however, is implicitly grounded in an understanding of sex offending primarily as a behavior resulting from distorted thinking patterns, and attempts to correct faulty thinking and consequently eliminate undesirable behavior.

When this treatment approach encounters the "no cure" philosophy of sex offending, only two conclusions are possible. If cognitive-behavioral therapy is indeed the best approach to treating sex offenders, then the problem is ultimately behavioral and the language of disease is misapplied to it. If, however, some sort of physiological problem is indeed at the root of the matter, we are on the wrong track with cognitive-behavioral therapy and should be seeking an

[180] Center for Sex Offender Management, "Myths and Facts About Sex Offenders" (August 2000), at http://www.csom.org/pubs/mythsfacts.html (accessed 9/4/2009).
[181] Chris Lobanov-Rostovsky, "The Current State of Public Policy Towards Sexual Abusers: Myths, Facts, and Controversies", Presentation to the 23rd Annual International Conference on Child and Family Maltreatment, San Diego, CA (January 27, 2009).
[182] Franklin E. Zimring & Chrysanthi S. Leon, "A Cite-Checker's Guide to Sexual Dangerousness," *Berkeley Journal of Criminal Law*, Vol. 13, No. 1 (Spring 2008), pp. 68-69.
[183] §16-11.7-103(4)(a) C.R.S.
[184] Webster's New Collegiate Dictionary 276 (1979).

exclusively medical solution. We believe the latter conclusion to be dangerously mistaken, and therefore assert the former.

## III. THE INCONSISTENCY

A significant inconsistency in the application of the "no cure" philosophy also merits attention. We observe that this language is deliberately eliminated from the portions of Colorado statutes which deal with juvenile sex offenders.[185] Members of the sex offender treatment community consistently indicate that the "no cure" concept is not meant to be applied to juveniles[186]. We must ask: why not? Two observations militate against this division between juvenile and adult sex offenders.

First, if there truly exists a propensity – an innate, inborn inclination – to sexual offending, which cannot be cured, then there is no reason to suppose that adult sex offenders are any different from juvenile offenders. In this case the language of disease should be applied to all indiscriminately. Surely a 14 year old with Lou Gehrig's Disease is no more curable than a 44 year old. We unequivocally deny that there is any such propensity, and therefore contend that this language should not be used in reference to either juvenile or adult offenders.

Second, if sex offending is actually a behavioral disorder, then research demonstrates that this behavior is only marginally more "curable" in juveniles than adults. The following studies examined the sexual recidivism rates for juvenile sex offenders.

| STUDY | SEXUAL RECIDIVISM RATE | FOLLOW-UP PERIOD | SAMPLE SIZE |
|---|---|---|---|
| Alexander (1999)[187] | 7.1% | 3-5 years | 1000+ |
| Reitzel & Carbonell (2006)[188] | 12.53% | 59 months on average | 2986 |
| Caldwell (2007)[189] | 6.8% | 5 years | 249 |

According to research, 87.47% – 93.2% of juvenile sex offenders do not recidivate, compared to 76% – 94.7% of adult offenders. If juveniles stop recidivating with sexual offending behavior at only a slightly higher average rate than adults, why is it that adults cannot be "cured" but juveniles can? Should we not rather say that there is an average successful "cure" rate of 85% - 90% for both adult and juvenile offenders? Viewed in this light, the application of the "no cure" policy to either group appears ludicrous.[190] This is simply another example of the internal

[185] See §16-11.7-103(4)(f) C.R.S.

[186] See, for example, Colorado Sex Offender Management Board, "White Paper on the Adam Walsh Child Protection and Safety Act of 2006", Colorado Department of Public Safety, Division of Criminal Justice (September 2008), p. 4 ("'no cure' philosophy for juveniles has no basis of evidence.")

[187] Margaret A. Alexander, "Sexual Offender Treatment Efficacy Revisited", *Sexual Abuse: A Journal of Research and Treatment*, Vol. 11 (1999), pp. 101-116.

[188] Lorraine R. Reitzel & Joyce L. Carbonell, "The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta- Analysis", *Sexual Abuse: A Journal of Research and Treatment*, Vol. 18, No. 4 (October 2006), pp. 401-421.

[189] Michael F. Caldwell, "Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders", *Sexual Abuse: A Journal of Research and Treatment*, Vol. 19, No. 2 (2007), pp. 107-113.

[190] Astute observers have noted that, in the original version of this paper, our argument in this section could potentially be interpreted as advocating more severe criminalization and punishment for juvenile sex offenders on

inconsistencies inherent in the "no cure" philosophy. If this language makes no sense and is misleading, destructive, and counter-productive to the goals of the general assembly in creating the SOMB, why should it be retained?

## IV. THE OBJECTIONS

Finally, we must address two more common objections to the abandonment of the "no known cure" terminology. First, it is often asserted that the majority of sex offender treatment programs around the country accept the "no cure" philosophy. We have seen no specific data on this point, and so we invite those who make such assertions to produce it. We can state with certainty, however, that not all treatment programs are based on the "no cure" concept. It is interesting, for example, to consider Minnesota's sex offender management program. In setting forth their "guiding principles for sex offender supervision", the "Adult Work Group Principles" include statements which echo the SOMB's guiding principles, such as "public safety is paramount" and "sexual offending is a behavior disorder." Conspicuously absent, however, is any language suggesting that sex offending cannot be "cured."[191] We are aware that this is only one example, but we have no doubt there are others. In any case, as any good attorney will tell you, "The mere number of witnesses appearing for or against a certain proposition does not in and of itself prove or disprove said proposition."[192]

Second, we occasionally hear it said that if one should ask a sex offender he would himself say that he cannot be cured. We answer that this is because such sex offenders have been indoctrinated into treatment programs which have **told** them they cannot be cured. The power of treatment programs to reshape the way individuals view themselves, highly beneficial if properly directed, can do untold damage when misguided by irrational concepts such as the "no known cure" philosophy. How does convincing an individual that he has an incurable disease, which will inevitably manifest itself as sex offending behavior, reduce recidivism? Will it not rather reduce such an individual to a state of hopeless resignation, his only recourse being to stop working toward change and simply accept himself for what he is? And then what will he do? Should we not instead be offering hope?

## V. THE CONCLUSION

The concept that sex offending has "no known cure" has been encoded into Colorado statutes and incorporated into the guiding principles of the SOMB. The language, however, is confusing, contradictory, and misleading, and has numerous destructive consequences. It does not reflect current research on sex offender recidivism, nor does it contribute to the ability of the SOMB to fulfill its legislative duties. The "no cure" philosophy is internally inconsistent, undermines the efficacy of treatment programs, damages the motivation of offenders to become healthy,

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the basis that they are as "uncurable" as adult offenders. While this interpretation would have run counter to the tenor of the paper as a whole, we recognize that it was possible, and therefore offer several clarifying comments in this revised version. Moreover, we view this potential conclusion as fundamentally absurd and would hope that no rational individual would arrive at it. However, the application of the "no cure" philosophy to juvenile offenders by the federal government in the Adam Walsh Act cautions us that, when it comes to current sex offender law and policy, irrationality and absurdity appear to rule the day. This critical observation is therefore well taken.

[191] Minnesota Sex Offender Management, "Final Report" (February 15, 2007), p. 22.

[192] Colorado Jury Instructions – Criminal, § 3:05.

productive members of society, and encourages the general public to despise all sex offenders as defective human beings.

This terminology does not effectively or accurately communicate anything truthful about sex offenders or offending behavior. If the intent of the language is to convey the idea that there is no 100% effective treatment for sex offenders which can infallibly ensure that they will not re-offend in the future, we naturally agree. There is no 100% effective method to ensure that **anyone** will not sexually offend, short of execution. But we suggest that there are much better ways to say this than with the language of disease. The "no cure" terminology found in Colorado statutes and the SOMB's guiding principles is dangerous and counter-productive, and should therefore not be retained for any purpose, but must rather be eliminated.

# APPENDIX B

**LETTER FROM AFC TO FCF WARDEN TIMME
REGARDING CREATION OF RESTRICTED PRIVILEGES UNIT,
AND WARDEN TIMME'S RESPONSE**

**ADVOCATES FOR CHANGE**
**P.O. Box 441656**
**Aurora, CO 80044**

October 14, 2010

Warden Timme
Fremont Correctional Facility
PO Box 999
Canon City, CO 80215

RE: Fremont Unit 4

Dear Warden Timme:

As you may be aware, Advocates For Change (AFC) is very concerned about the recent decision to implement AR 0600-05 at Fremont Correctional Facility (FCF).

While we understand the need for this AR, as shown by its use at other CDOC facilities, we have two complaints about its use at FCF, given its large population of those convicted of a sex offense, many of whom have indeterminate sentences.

The two complaints are 1) the conflict between FCF modification of AR 0600-05 and SOTMP's AR 700-19 regarding termination of offenders from treatment and 2) non-contact visits and no phone calls for those on Restricted Privileges. We maintain that the implementation of AR 0600-05 and the FCF modification (AR 0600-005) constitutes cruel and unusual punishment for those inmates who have been terminated from treatment provided by SOTMP and are placed on Restricted Privileges.

This argument is based on the following:

1. AR 0600-05 Restriction of Privileges and its FCF modification AR 0600-005 are directly in **conflict** with SOTMP's policies regarding the termination of offenders from treatment.

   AR 0600-05 states in section IV. Procedures: (D) To be removed from restricted privilege's status, an offender must be unassigned for 60 days (no work or treatment) **and participate in an assigned program equivalent to the program causing placement on RP status, at a satisfactory level, for a period of 30 days and continue satisfactory participation.** (e.g., an offender terminated from treatment must be reinstated to treatment for thirty days in order to be removed from RP)
   **BUT**
   **FCF Modification 0600-005** states in section IV Procedures that **C (3)…**Offenders that are placed on RP due to program noncompliance/termination **will maintain their current work assignment**. (e.g., an offender terminated from treatment will keep work assignment but will remain in RP until reassigned to treatment). Does placement on the wait list constitute participation in/readmission to treatment?

**AND**
**C (4)**Compliance reviews…shall be completed by the **case manager** after the first 60 days and then every 30 days thereafter….When offenders are in compliance with the conditions of RP , they will be recommended for removal.
**HOWEVER**
**SOTMPS's AR 700-19 IV Procedures** states that Offenders that have not had an opportunity to participate in treatment will have priority over an offender that has had an opportunity and did not take advantage of that opportunity. **"These offenders may not be placed back upon a waiting list until a prescribed amount of time has passed"**. The period of time prescribed is **undefined** and **subjective**, based upon the SOTMP's evaluation of the specific individual. Those offenders with indeterminate sentences who get terminated from treatment will always be at the bottom of the wait list and if not put on the wait list be doomed to RP for life. For offenders with indeterminate sentences, treatment is the only possible exit from CDOC.

**Conclusion: AR 0600-05 and FCF Modification 0600-005's failure to provide a fair and objective method for removal from RP status for offenders terminated from treatment constitutes cruel and unusual punishment as it is at the whim of the case managers within the Department of Corrections and potentially dooms the offender to RP status or the bottom of the wait list for life, violating the Lifetime Supervision Act's mandate that all offenders receive treatment.**

**2.** The restrictions of visits and phone calls for inmates on RP status as listed in FCF Modification 0600-005, Procedures IV, E. 8 and 11 constitute cruel and unusual punishment, disproportionate to the infraction-a termination from treatment.

FCF Modification 0600-005, Procedures IV. E. 8. states that during restricted privilege status…"offenders will not be allowed to visit for the first 30 days of Restricted Privileges status. Offenders must complete a request for non-contact visits if they want to visit while on Restricted Privileges status. The visiting sergeant will schedule visits as space and time permits not to exceed two hours, one (1) time per week."
**AND**
Procedures IV. E. 11. states that "Offenders will not be allowed telephone privileges with the exception of CIP legal calls. Offenders on RP status will notify cell house staff of the need to access the dayroom to place an attorney phone call."

**ARGUMENT:** The fact that **offenders terminated from treatment may not be readmitted to treatment for an undetermined length of time,** (see #1) having no phone calls to family and friends is detrimental to an offender's well being and is excessively punitive. Non-contact visiting for 2 hours at a time has been for used for Ad Seg and the most serious of offenders. Such limited non-contact places those offenders whose family/friends are out of state at a disadvantage or for those whose medical disabilities prevent them from visiting. For them, frequent phone calls are their lifeline to their loved one. There is an abundance of research that stresses the importance of an outside support system as instrumental in the successful rehabilitation of an offender.

**CONCLUSION: The non-contact visits and no phone calls other than legal are restrictions that are disproportionate to the infraction – termination from treatment and as such constitute cruel and unusual punishment. Depending on if or when the offender is placed back on the wait list for treatment, (see #1), these excessively punitive restrictions could last a lifetime for those with an indeterminate sentence.**

**RESOLUTION:**
We ask that you review the complaints above, take steps to correct the contradiction between the Administrative Regulations, provide a reasonable timeline for offenders who have been terminated from treatment to get back into treatment, allow phone contact by the offender to family and friends, and allow physical contact during visits for those offenders on Restricted Privileges.

We also would like to know how many of the inmates in Unit 4 are being assigned to staff CSP 2?

Thank you for your attention to these matters.

Sincerely,

Annie Wallen, Chair
Advocates for Change
P.O. Box 441656
Aurora, Colorado 80044

cc: Ari Zavaras, Executive Director, Colorado Department of Corrections
Peggy Heil, Director, Sex Offender Treatment and Monitoring Program

STATE OF COLORADO

COLORADO DEPARTMENT OF CORRECTIONS

FREMONT CORRECTIONAL FACILITY
P. O. Box 999
Cañon City, Colorado 81215--0999
Phone (719) 269-5002

FAX (719) 269-5020

Bill Ritter, Jr.
Governor

Aristedes W. Zavaras
Executive Director

October 19, 2010

Annie Wallen, Chair
Advocates for Change
PO Box 441656
Aurora, CO 80044

Dear Ms. Wallen,

Thank you for taking time to express your concerns pertaining to the implementation of CDOC Administrative Regulation 600-5, *Restriction of Offenders' Privileges in Correctional Facilities* at Fremont Correctional Facility. Your specific concerns regard your perception of a conflict between the FCF Implementation Adjustment for this policy and Administrative Regulation 700-19 *Sex Offender Treatment and Monitoring Program* and the restriction of privileges and contact visits for offenders who have been placed on Restricted Privileges status due to their non-compliance in the SOTMP program. I have reviewed the issues that you have raised as follows:

- *Concern that FCF Implementation Adjustment to 600-05 fails to provide a fair and objective method of removal from RP status for offenders terminated from treatment and is at the whim of case managers, possibly dooming offenders to RP status for life.* This is hardly the case, as any offender previously coded non-compliant with SOTMP recommendations may submit a kite at ANY time to be re-screened for placement on the waitlist. If the offender's sex offender code is positively changed within the 90 day time frame and for a minimum of 30 days, then he is reviewed for placement back in general population. In other words, if he requests re-screening and his sex offender code is modified positively, and he remains compliant for a minimum of 30 days, he is automatically reviewed for removal from Restricted Privileges. The facility policy does not allow for offenders that become non-compliant with programs and subsequently placed on Restricted Privileges status, to lose their work assignments as we feel that would be a form of double jeopardy against the offender. The intent of the statute and the policy is to encourage offenders to be pro-active in obtaining the job skills and treatment beneficial to their successful reintegration into society.
- *Concern that non-contact visits and no phone calls other than legal are restrictions that are disproportionate to the infraction.* CDOC Administrative Regulation 600-05 specifically states, "The purpose of this AR is to **establish procedures for withholding privileges, such as those defined in CRS 17-20-114.5, from offenders who refuse to participate in required labor, educational, or work programs, or who refuse to undergo available counseling or combination of the foregoing,** and to allow for the documentation and review of such offenders for return of privileges upon their participation in such programs or counseling." Per CRS 17-20-114.5, "Any person

convicted of a crime and confined in any state correctional facility listed in section 17-1-104.3 is not entitled to any privileges that may be made available by the department. If any such person is required by the department to perform any available labor, participate in any available educational program or work program, undergo any available counseling, or any one or a combination of the foregoing and such person does not perform the labor participate in the program, undergo the counseling, or do any one or a combination of the foregoing as required by the department, the department shall deny specified privileges to such persons." **Visits and the use of phones for non-legal matters are considered privileges** as outlined in the Colorado Revised Statutes listed above. Again, the intent of the statute as well as the policy is to encourage offenders to be pro-active in obtaining the job skills and treatment beneficial to their overall progress and eventual successful community reintegration.

Thank you again for expressing your concerns. In closing, I would like to emphasize the point that the implementation of FCF IA 600-5 brings us into compliance with state statute as well as CDOC policy.

Please let me now if you have any further questions or concerns.

Sincerely,

Rae Timme

Rae Timme, Warden
Fremont Correctional Facility
RT/dsb

Cc: Aristedes Zavaras, Executive Director
Lou Archuleta, Deputy Director of Prisons
Peggy Heil, Director SOTMP
Katherine Sanguinetti, CDOC Public Information Officer

# APPENDIX C

**ANONYMOUS PRISONER LETTER**
**RE: SUICIDE AT STERLING CORRECTIONAL FACILITY**

November 09, 2010

Dear AFC:

Regarding the death of an inmate with a sex offense at Sterling Correctional Facility:

From what I gathered in the cursory scanning of Saturday's paper (11-6-10), this inmate was already incarcerated for a previous sex offense when, through DNA matching, he was connected to one, perhaps two, other unsolved sex offenses. These connections were made public through either the newspapers, local TV news, or both. Allow me to digress for a moment and invite a game of multiple choice:

These connections were made public because:

1) DNA testing and database archiving for criminal case matching is a brand new technology worthy of the news

2) Being currently incarcerated, this inmate was an enormous danger to society and the media was doing their job alerting the public

3) Newspapers are obligated by a vested interest of rating and circulation increases through unnecessary fearmongering. Thus, it would be unprofessional to pass an opportunity to mention sex offenses and/or use the term "sex offender"

Obviously, I'm being dardonic. But sadly, the man ended up dead in his prison cell by, as of yet, an apparent suicide. Think what you may of his offenses, the circumstances surrounding his mental health, the ages of the victims and the trauma they endured at his hands, but a few things the CDOC spokesperson (Sanguinetti) was quoted as saying struck me very odd. She claimed that the inmate was offered administrative segregation (Ad Seg) after DOC staff discovered these new allegations were made public, and that the inmate refused. Perhaps I've read way too much Edgar Allan Poe in my time, or maybe I've been down too long to accept the DOC's inherent obnoxious duplicitous nature as being limited to isolated incidents - but I couldn't help but wonder why, if this was an apparent suicide, Ms. Sanguinetti was so adamant to tell the press CDOC offered this person Ad Seg for his protection, and that he declined. Either things aren't as apparent as they seem, or CDOC has changed its policies dramatically. Because the last I checked, Colorado's Department of Corrections does not offere protective custody, and Ad Seg without committing a Code of Penal Discipline vilation (CPOD) would constitute as such.

This lack of preventative protective measures leaves many inmates with sex offenses open targets for predatory violence - violence which is subtly condoned by many CDOC staff. I know, I know, there's never been a case where a CDOC staffmember looked up an inmate's file on computer and handed that information over to someone with a whole lot of time to do and in desperate need of an excuse to vent some sociopathic anger. Either way, I'm confident that if a poll were conducted asking inmates with sex offenses as to whether or not,

given similar circumstances where they felt predatory violence was imminent, they were offered Ad Seg, the results would yield a staggering 0%.

Does anyone not recall that just this past summer an inmate made the papers when he expressed his concerns about being in a predominately large population of inamtes with sex offenses at Fremont Correctional Facility? He claimed his fears stemmed from being sexually assaulted by another inmate at, of all places, a facility where there was a relatively minimal population of sex offenses. He was also described by CDOC staff in that very article as being a "problem child" who burned a lot of bridges to the point where there were very few facilities left where he might get along well. Nonetheless, he was beaten by inmates right under the very noses of CDOC staff while standing in Med Line. I doubt he was offered Ad Seg when his buisness hit the papers. And I'm sure not a single staffmember secretly smiled or thought such street justice was appropriate for the allegations he had made against inmate and staff alike.

As for the inamte at Sterling, I'm sure the circumstances of this man's death will come to light. I'm sure the CDOC will conduct a thoroughly exhaustive investigation and produce objective quality evidence of this Ad Seg offer and its subsequent refusal (i.e. a signed piece of paper). I'm sure no one in the public or political arean is thinking he got what he deserved, and even if they are, I'm sure it will have no bearing on the weight this case is given in terms of priority or prevention. I'm sure not a single negative opinion is derived from the realistically-based TV show Law & Order: SVU. I'm also sure that people incarcerated for sex offenses are at the highest level of risk for repeated predatory violence as well as prejudice and hate by CDOC staff and non-SO inmates alike. No one except people directly affected by sex offense legislation, which includes CDOC regulations and operating procedures, will really be concerned if it is discovered this inmate was a victim of a hate crime. And I'm sure CDOC does not, nor ever has, offered Ad Seg to inmates.

Typically, if you feel such hate-related predatory violence is imminent and you bring it to the attention of CDOC staff, you have to provide the names of the inmates you feel are threatening you. Essentially, you have to snitch or rat, whatever you want to call it - and that can get you killed just as fast if not faster. If you do not provide such information, you're told, "Tough luck," "Too bad. Don't come to prison," or "You shouldn't have been touching them kids" (because all sex offenses are those sex offenses, right? By the way - the grammar is not for effect in that last example). And even if you do comply and give them what they want, after they cart off the guilty parties it becomes obvious to everyone around you that you said something. And I know you're going to find this hard to believe, but there are a gang or two in at least one out of five prisons. So the choice that CDOC arrogantly expects is no choice at all, because anyone can see it's a choice of wanting to die because you have a sex offense or because you snitched.

The other real choices the inamte with a sex offense can opt for is:

1) fight, get killed or seriously injured. Oh, and add a facility violence

rap on their record, throw some points on their classification sheet (the higher the points, the "harder" the facility you might end up in), and include a Class I (the most severe) CPOD violation, all of which the parole board loves.

2) Purposely violate a lesser CPOD offense to get into Ad Seg (which includes the points, the record, and a loss of earned time, privilages, etc.) only to be released about 20 days later typically right back into the same environment with the same violence thirsty predators. This is called "Checking in" and in order for it to provide an inmate with long term protection, it would have to be done several times over.

So, with the ever helpful staff, the highly understanding and effective policy of the CDOC, the parole acceptable behavior of non-SO inmates, the highly responsible media, the incredibly accurate depictions of people with sex offenses in every entertainment venue available, and the unrelenting Christian ethic of the public, it's almost ludicrous to believe an inmate might choose option 3) Suicide.

For all those interested in sex offense legislation and the safety and well being of loved ones in CDOC facilities, it might do a bit of good to pay very close attention to how this case is handled and hang on every word CDOC personnel say. Because how this is handled, and what is said now will reveal alot when compared to what is said and how things are handled in the future. It will also reflect why - in or out of prison - most people with sex offenses are concerned, terrified, suspiscious, and despairing of the environement in which we live.

# APPENDIX D

**AUTHOR'S REQUEST FOR HIS T.H.E. DISCHARGE SUMMARY UNDER THE "COLORADO OPEN RECORDS ACT"**

May 24, 2010

Sex Offender Intensive Supervision Parole
Attn: Program Director
745 Sherman St. Suite 100
Denver, CO 80203

To Whom It May Concern:

This is an official written request by Mark Timothy Walker, person in interest, to inspect and copy criminal justice records under the Colorado Open Records Act (CORA), §24-72-301 C.R.S., *et seq*. Specifically, the criminal justice record I am requesting is the treatment discharge summary (otherwise known as a termination report) issued to parole for Mark Timothy Walker by Teaching Humane Existence Treatment Program in April, 2009. In support of this request I state as follows:

1. The requested discharge summary is a criminal justice record. Pursuant to §24-72-302(4) C.R.S., criminal justice records include "all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule."

2. Upon information and belief, the discharge summary is kept by the Colorado Department of Corrections, Division of Adult Parole, Sex Offender Intensive Supervision Parole unit. This agency is a criminal justice agency pursuant to CORA. §24-72-302(3) C.R.S. provides that a criminal justice agency "means any […] agency of the state […] that performs any activity directly relating to the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders."

3. The discharge summary is kept for use in the exercise of functions required or authorized by §§18-1.3-1005 – 1006 C.R.S., and by the administrative rules promulgated by the Sex Offender Management Board, Division of Criminal Justice, Department of Public Safety pursuant to §16-11.7-103(4)(a) – (e) C.R.S.

4. Upon information and belief, the Director of the Sex Offender Intensive Supervision Parole unit is currently the official custodian of the discharge summary. Pursuant to §24-72-302(8) C.R.S., the official custodian is "any officer or employee of the state or any agency, institution, or political subdivision thereof who is responsible for the maintenance, care, and keeping of criminal justice records, regardless of whether such records are in his actual personal custody and control."

5. Under §24-72-305(1) C.R.S., there are only two applicable grounds for denying access to this criminal justice record (other provisions of this section do not apply to the record requested):

> The custodian of criminal justice records may allow any person to inspect such records or any portion thereof except on the basis of any one of the following grounds or as provided in subsection (5) of this section:
>
> (a) Such inspection would be contrary to any state statute;
>
> (b) Such inspection is prohibited by rules promulgated by the supreme court or by the order of any court.

6. If I am not permitted access to the discharge summary, I request that a written statement of the grounds for the denial be provided to me within seventy-two hours pursuant to §24-72-305(6) C.R.S.:

> If the custodian denies access to any criminal justice record, the applicant may request a written statement of the grounds for the denial, which statement shall be provided to the applicant within seventy-two hours, shall cite the law or regulation under which access is denied or the general nature of the public interest to be protected by the denial, and shall be furnished forthwith to the applicant.

7. If the requested records are not in the custody and control of the Director of the Sex Offender Intensive Supervision Parole unit, I request to be notified forthwith of this fact in writing as provided by §24-72-304(2) – (3) C.R.S.:

> (2) If the requested criminal justice records are not in the custody or control of the person to whom application is made, such person shall forthwith notify the applicant of this fact in writing, if requested by the applicant. In such notification, he shall state, in detail to the best of his knowledge and belief, the reason for the absence of the records from his custody or control, their location, and what person then has custody or control of the records.
>
> (3) If the requested records are not in the custody and control of the criminal justice agency to which the request is directed but are in the custody and control of a central repository for criminal justice records pursuant to law, the criminal justice agency to which the request is directed shall forward the request to the

> central repository. If such a request is to be forwarded to the central repository, the criminal justice agency receiving the request shall do so forthwith and shall so advise the applicant forthwith. The central repository shall forthwith reply directly to the applicant.

8. I further request that I be provided with a copy of the requested record, or permitted to copy the record, in accordance with §24-72-306 C.R.S. I agree to pay any reasonable fees for such copy properly assessed under this section.

9. I hereby expressly reserve the right to seek judicial review of any denial of access to the discharge summary pursuant to §24-72-305(7) C.R.S.

Sincerely,

Mark Timothy Walker