AN UNACCEPTABLY HIGH COST

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

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This report is intended to raise your awareness of the various problems surrounding the Lifetime Supervision Act of 1998, the DOC's implementation of that Act, and the frivolous spending and other abuses of public funds in combination with a blatant disregard for a truly beneficial and therapeutic approach to sex offender treatment in the Department of Corrections.

As inmates at the Arrowhead Correctional Center in Canon City, Colorado, and participants in the Phase II Sex Offender Treatment and Monitoring Program (SOTMP), we would like to present what we have observed of the abuses and failures of this treatment program and, in some cases, our experiences with sentences under the Lifetime Supervision Act. We contend that our views and experiences are a fair representation of the majority of those similarly situated.

THE 1998 LIFETIME SUPERVISION ACT

Many of us are serving sentences under the Colorado Sex Offender Lifetime Supervision Act, which governs the sentencing procedures applicable to most felony sex offenses committed on or after November 1st, 1998 [§§ 18-1.3-1001 to -1012 C.R.S.]. While the Act is in principle a praiseworthy attempt to emphasize treatment and rehabilitation for offenders over simple incarceration while maintaining a strong focus on community safety, in actual practice it has become glaringly apparent that it falls unacceptably short in a number of vital areas.

First, the Act short circuits constitutional due process protections which are required to impose an indeterminate sentence. An accused individual has a number of procedural due process rights which must be observed in determining the duration of his sentence. He must be given an opportunity to be heard on the facts justifying a sentence of up to his natural life, such as the likelihood of his recidivism, and an adequate continuing opportunity to be heard after the indeterminate sentence is imposed. The accused also has the right to proof beyond a reasonable doubt and a jury verdict on every fact which increases his maximum potential sentence. The Act denies these rights by attaching a presumption of dangerousness and likelihood of recidivism to all sex offender convictions, thereby removing all process, and making the indeterminate life sentence automatic in all such cases. There is no burden of proof on the State to demonstrate that our offenses merit a life sentence. The assumption is built in.

And the defendant is denied any opportunity to prove otherwise.

Second, the Act violates the constitutional right to equal protection. Equal protection is violated when the State punishes a lesser crime more severely than a greater crime. The Lifetime Supervision Act violates equal protection because it punishes all sex offenders, regardless of the conduct underlying the offense of conviction and even if they are a non-violent, first-time offender, more severely than someone who commits second degree murder or first degree assault. Although we are technically eligible for parole after the completion of our minimum sentence, the criteria for release are stringent, and we are in fact rarely granted parole. The Sex Offender Management Board (SOMB) in their annual report published November 1st, 2006, indicates that of roughly 1000 people sentenced under the Act thus far, only 3 have been granted parole. Even if we are paroled, we are still subject to intensive lifetime supervision, with a return to custody for life authorized for even a minor violation. Indeed, many of us are this very moment serving indeterminate prison sentences for just such "technical violations" of probation, which we will detail further. Although our offenses entailed less grave consequences than, for example, second degree murder, the Act inflicts a more severe penalty.

Third, the Lifetime Supervision Act violates the constitutional provisions against cruel and unusual punishment, because the life sentence imposed in most cases will be disproportionate to the crime. In comparison, the only other crimes for which an individual may be incarcerated for life are class one felonies; i.e., first degree murder and kidnapping involving bodily injury. These offenses are qualitatively different and more serious than the sex offenses which subject persons to lifetime incarceration under the Act.

Fourth, the Act violates the separation of powers doctrine, which views independence between the legislative, executive, and judicial branches of government as a requirement for the resistance of tyranny. No branch is constitutionally permitted to exercise any power properly belonging to the others. The Lifetime Supervision Act violates this doctrine because criminal sentencing is a matter for the legislative and judicial branches, but the Act vests undue power in an executive body regarding the actual length of an offender's incarceration. The parole board, an arm of the executive branch, makes this determination under the Act. If I, for example, have a sentence of 4 years to Life under the Act, the parole board determines whether I am actually incarcerated for 4 years, 10 years, or 80 years. The hands of the judiciary, which should make this decision, are bound by the Act.

Finally, the Lifetime Supervision Act violates the privilege against self-incrimination. The Act requires that offenders demonstrate therapeutic progress before being considered for release to parole. Essential to such therapeutic progress is the completion of a sexual history detailing unprosecuted crimes,

the full disclosure of which is verified by use of the polygraph, which we will discuss in more detail shortly. Because a sentence under the Act explicitly mandates participation in treatment as a part of that sentence, and because a refusal to disclose potentially incriminating information is considered to be lack of satisfactory progress in treatment which results in termination from treatment and ineligibility for parole, the Act effectively compels us to disclose potentially self-incriminating information in violation of our constitutional rights. In effect we must choose between self-incrimination or life in prison without the possibility of parole. The fact that the SOTMP treatment contract requires that we waive confidentiality of this information because State law mandates that therapists report such information to the proper authorities [19-3-304 C.R.S.] only serves to exacerbate the violation.

IMPLEMENTATION OF THE ACT BY THE COLORADO DEPARTMENT OF CORRECTIONS

For all its inherent shortcomings, the legislative intent behind the Lifetime Supervision Act was by and large praiseworthy. In their legislative declaration the Colorado General Assembly remarked:

> 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.

Clearly the intent behind the Act was never to incarcerate all sex offenders for life, an approach the assembly explicitly rejected. Rather, because ensuring that sex offenders received treatment before release appeared to greatly enhance community safety, the general assembly sought a method by which to ensure that only individuals who chose to participate in treatment and were making progress would be released from prison into the community. This would protect public safety while avoiding the "unacceptably high cost" of keeping such individuals in prison for life.

However, nearly 10 years after its enactment we must ask why the Lifetime Supervision Act has been such an abysmal failure that only a miniscule portion, less than 1%, of all those sentenced under the Act to date have been successfully released into the community, while the vast majority, despite many of us successfully progressing in treatment and being well past our minimum sentences, remain incarcerated at tremendous cost to the taxpayer. As of the end of Fiscal Year 2004-2005, the estimated annual cost of incarcerating all offenders sentenced under this Act was $19.7 million, with projected annual increases of $3.7 million (see

Report to the Colorado General Assembly at www.lifetimeactreport.org p.28). All this while these compliant offenders could be under parole supervision and receiving treatment in the community at a fraction of the cost. So much for avoiding this "unacceptably high cost in both state dollars and loss of human potential".

So why is the Lifetime Supervision Act not working as intended? Though part of the fault clearly lies in flaws within the Act itself, another major contributing factor is the faulty implementation of the Act by the Colorado Department of Corrections.

The first failure is the manner in which the DOC has chosen to interpret and enforce the indeterminate sentencing provisions of the Act. Anyone receiving an indeterminate sentence is labeled a "Lifer" by the DOC. For example, one of us is serving a 2 to Life sentence for Unlawful Sexual Contact. This man's lawyer had explained the lifetime supervision sentence to him by saying that he would do 2 years in DOC, and would then be on parole for a period of 10 years to Life. Imagine his shock when he received his parole paperwork after his first parole hearing to find the word LIFER written above his sentencing type! Another individual, currently serving a 4 to Life sentence under the Act, was alarmed to find that DOC had listed a Mandatory Release Date on his paperwork in the year 2901! Clearly DOC did not view his sentence as a 4 year prison term with subsequent lifetime supervision on parole, but rather as a life sentence like any other. 900 years for a class 4 felony. When we reach our minimum sentences we are technically eligible for parole, but since virtually no one sentenced under the Act is actually being paroled, DOC's literal life sentence approach has become a reality for most of us.

The second major issue is the DOC's failure to provide adequate access to treatment for those sentenced under the Lifetime Supervision Act. Since the Act mandates treatment, and in fact conditions release on an offender's success in treatment, it would seem something should be done to ensure that those willing to participate in treatment are provided with access to that treatment, and in a timely enough fashion to enable them to progress sufficiently in treatment to meet the necessary criteria to be eligible for parole once their minimum sentence has been completed. DOC, however, regularly obstructs the availability of treatment by sending offenders who are just entering the prison system with lifetime supervision sentences to private facilities such as the Huerfano County Correctional Center, or other locations which do not offer any type of sex offense specific treatment program. The paperwork and process necessary to be transfered to one of the few DOC facilities that do offer such treatment can take anywhere from several months to years. Once an individual makes it to the right facility, the extremely limited resources of the SOTMP and their ability to treat a very limited number of offenders at any one time, guarantees a period of at least 6 more months on a waiting list to enter Phase I SOTMP treatment. A minimum of an additional 6 months is required to wait for one of the 96 available spots in Phase

II. By this time many of us are at or past our minimum sentences, but because we have been unable to make sufficient progress in treatment we are refused a recommendation for parole by the SOTMP, and so cannot be paroled. This unavailability of treatment extends the actual length of our incarceration, and increases the number of lifetime supervision offenders waiting for the treatment space we continue to occupy. In spite of a recent Federal Court ruling establishing that the language of the Lifetime Supervision Act gives those sentenced under its provisions a constitutional liberty interest in being in treatment, the DOC appears to be doing nothing to increase the capacity of available treatment programs or otherwise ensure timely access to treatment for those sentenced under the Act. This problem can only get worse, at great expense to the Colorado taxpayers. (For an excellent illustration of this, see the discussion of Jeremy Loyd's case on p.17)

As an additional observation, we must note that the DOC labels everyone sentenced for a sex offense as a violent offender, regardless of the nature or circumstances of the offense. Since all sex offenses are assumed to be violent by definition, there is no burden of proof on the State to demonstrate that the crimes were violent, no necessity to present evidence in support of such a finding, and no opportunity to present a defense. This blanket categorization by DOC affects our access to parole, community corrections, and community reintegration programs aimed exclusively at non-violent offenders. It also affects our DOC custody classification. Ultimately, it results in all sex offenders, regardless of highly significant differences in our actual offending behavior, being lumped together in a single category.

Although not officially an arm of the DOC, the parole board makes a significant contribution to the failure of the Department to properly implement the Lifetime Supervision Act. SOMB standards provide that once an offender has met a series of specific criteria in treatment he is then eligible for parole, and will be given a recommendation from SOTMP for parole and/or community corrections. The vast majority of those who do receive this recommendation are nevertheless denied parole by the parole board. Although the Act provides that the board may only grant parole if it determines that "there is a strong and reasonable probability that the person will not thereafter violate the law" and that "the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if released under appropriate treatment and monitoring requirements" [18-1.3-1006(1)(a)C.R.S.], it would seem that the SOTMP is in a much better position to make such determinations than is the parole board. The recommendation for parole indicates that the treatment professionals, based on established criteria and extended clinical experience with the individual, believe him to be ready for parole. The parole board, however, consistently rejects their assesment and denies parole. In light of the fact that the individual members of the parole board are appointed by, and subject to termination by, the governor, and are thus

uniquely subject to political pressures, it seems reasonable to wonder what factors other than the law and the facts at hand are weighed in these decisions. Moreover, two of us, both sentenced under the Act, are in court with the parole board at this time over various abuses. One was illegally labeled a Sexually Violent Predator by the parole board, although he did not meet the statutory criteria [18-3-414.5 (1) (a) C.R.S.]. The board was doing this to us regularly until very recently. Another man was given an illegally long parole deferment, 5 years rather than the 3 year maximum permitted by statute [18-1.3-1006 (1) (c) C.R.S.]. Both these cases are currently pending in Colorado courts, along with numerous others, many concerning the Sexually Violent Predator (SVP) label. Meanwhile, these abuses of authority and jurisdiction by the parole board are resulting in longer periods of actual incarceration. After all, the SVP label automatically makes one a "public risk", which in itself is sufficient justification to deny parole.

While it is technically possible for those of us sentenced under the Lifetime Supervision Act to progress to community corrections given a recommendation from the SOTMP, DOC provides a miniscule number of beds for sex offenders in community corrections facilities. The majority of facilities will not accept us at all. Of those that will, the SOTMP only works with two: Independence House in Denver, and COMCOR in Colorado Springs. Even in these two facilities, only a fraction of the available bedspace is allocated for use by those emerging from the prison SOTMP. Based on these factors we conclude that progressing out of treatment via community corrections is virtually a non-option.

The legislative intent behind the Lifetime Supervision Act was to create a system whereby sex offenders could progress out of prison and back into the community, but only after participating and progressing in treatment while in prison. Thus they sought both to preserve community safety by ensuring that offenders were not released untreated, and to avoid the "unacceptably high cost" resulting from keeping compliant offenders incarcerated indefinitely. The multiple and glaring failures of the DOC to properly implement this intent, however, have made it impossible for the sentencing scheme to function as designed. While those sentenced under the Act continue to pour into the prisons, progress through the system to successful release has ground to a virtual halt. The SOTMP therefore, in a desperate attempt at self-preservation, has devised other, less ethical methods of creating turnover in the treatment program, giving the illusion that the system is working, and ensuring that their program continues to be funded by the State of Colorado.

THE SOTMP TREATMENT PROGRAM

All of this might be repaired, and the problem solved, were there an effective, successful treatment program in place to provide those sentenced under the Lifetime Supervision Act with the treatment that the legislature incorporated as such a vital part of the sentencing design. Sadly, the treatment system

currently in place has also been a disastrous failure. As a result, those of us sentenced under the Act most often find ourselves in prison, receiving inadequate, unethical, and often unconstitutional therapeutic treatment, and having no hope of progressing back into the community.

<u>The Treatment System In The Community</u>

Questionable and flatly unethical behavior abounds within the pre-prison treatment system. When an individual is convicted of a sexual offense, he is required to undergo a Sex Offense Specific Evaluation as part of his presentence investigation. The probation department orders him to report to a specific treatment center in the community for this evaluation, and that center then submits a report and recommendations to the court. Suppose, then, that the court sentences him to probation; one of the conditions of probation is, of course, sex offender treatment. So he goes to his probation officer, who orders him to attend treatment at the same facility that performed his original evaluation! So now he is court ordered to pay this treatment program for a treatment which they recommended he take, and prison is the consequence if he refuses or is unable to pay. How is it possible for him to believe that his original evaluation and recommendations for treatment were unbiased? Moreover, this treatment facilitiy orders him to take polygraphs with a very short and specific list of polygraphers, and he is unable to choose from the large number of approved polygraphers in the State. So both the treatment programs and the polygraphers have essentially a captive clientelle: unable to choose between services, forced to pay for both treatment ($300+/mo in many cases) and polygraphs ($200+/ea), and subject to prison for failure to do so. What is the likelihood of such individuals being allowed to progress out of treatment on the recommendation of the very program that sees them as a guaranteed paycheck? What is the likelihood of his passing polygraphs, when a failed test can be used as a justification to keep him in treatment, order him to take additional groups (at $50+/ea), and keep him a captive client of both the treatment program and the polygrapher? Thus a pseudo-mental health industry is born, and conflicts of interest are the rule of the day. Surely some fundamental notions of due process are violated when the same evaluators who recommend that an offender participate in specialized sex offender treatment are the same individuals who are retained, on a contract basis by the State, to administer these treatment programs.

Those of us sentenced under the Lifetime Supervision Act are particularly susceptible to the whim and caprice of these community treatment providers, since termination from the treatment program for any reason will almost certainly result in an indeterminate prison term. Some of the stories of the men who started out in the community and are now serving lifetime sentences in prison are shocking. From being unable to afford treatment fees, to getting married without permission, to failing to demonstrate enough "victim empathy", to returning home 27 minutes late on

an ankle monitor after agreeing to do one more job for the boss at the end of the day: the stories of men having their probation revoked and being sent to prison on lifetime sentences for absurd and "technical" rule violations abound. Based on our own experiences (see Jeremy Loyd's story p.17), we have little doubt that such accounts accurately reflect the sorts of things that are taking place.

The system in the community sets us up for failure. We are often forced to move out of our homes and away from our families due to a strict, no-exceptions policy forbidding any contact with anyone under 18, including one's own children, regardless of the nature of the individual offense. Our families and support systems are destroyed or put under extreme strain. It is then extremely difficult to find a new place to live, as few are willing to rent to sex offenders, and the rules governing how close we can live to schools, parks, etc. are prohibitive. If we do not find an address at which to register, however, we face prison time. The situation with employment is very similar: employers are unwilling to hire us, and we are frequently forced to quit a job once we have found one due to some concern cited by a probation officer. However, if we are unable to pay the hundreds of dollars a month required in restitution, treatment fees, polygraphs, and additional expenses such as antabuse and urinalysis, we again face prison. The treatment providers, who have a great deal of discretion to terminate individuals (resulting in virtually automatic probation revocation) have very little burden of proof or accountability to establish that such terminations are justified. There is no due process offered to those facing termination, in spite of the fact that it will deprive them of their liberty. Any criteria which may exist for termination are often vague and subjective, and so impossible to enforce.

The SOMB reports that during Fiscal Year 2004-2005, of the 64 lifetime supervision offenders whose sentencing status changed, the vast majority, 38, had their probation revoked and were sentenced to DOC. They do not report what percentage of those had actually committed new crimes, let alone sex offenses. But based on our own research and experience, we are convinced that it is a minute portion. Overall, lifetime supervision offenders are regressed to prison primarily for "technical" probation violations, and not for new crimes.

This propensity of the probation departments and community treatment facilities to regress lifetime supervision offenders to DOC takes the financial burden for treatment and supervision off of the offender, and lays an even larger burden on the taxpayer. If the system in the community were focused on trying to see sex offenders through to successful completion of treatment and probation, it might prove successful for those sentenced under the Act. As it is, the combination of extensive conflicts of interest, lack of oversight or accountability, and an unjustifiable overemphasis on "community safety" bordering on paranoia, makes it an inexorable one-way trip to prison for

many lifetime supervision offenders.

DOC's Sex Offender Treatment and Monitoring Program (SOTMP)

Upon reaching DOC the situation becomes even worse. We are now compelled to pursue treatment in the SOTMP or face a certain life sentence. So, clinging to hope that there may still be a way to regain our lives and freedom, we sign up for the Phase I treatment program and spend 6 months or more on a waiting list. Before beginning Phase I we are required to sign a "treatment contract". This seems absurd on its face, as prisoners are not permitted to enter into contracts at all. Besides, surely it is signed under duress, since our options are to sign or spend life in prison with no possibility of parole!

The contract imposes a number of significant conditions, not the least of which is no contact with children, including our own. This is a blanket condition, regardless of the individual offense, and has the effect of breaking families and taking fathers from children who need them. The contention of the SOTMP that "this policy is designed to protect children" is absurd in cases where the crime did not involve children at all, much less the offender's own. Unless they are victims, how does forbidding one of their parents to speak to them, or even about them, "protect children"? The SOTMP purports to offer a "Parental Risk Assesment" by which an offender may be approved by the treatment program for contact with his children. Unfortunately, our experience indicates that this procedure is completely dysfunctional. We know of only one individual who has ever been approved for contact through this system, and it took him until Phase II, after nearly 5 years in treatment, to accomplish it. Years of lost relationship with his children, and to what real purpose? The rest of us often despair of ever again seeing or speaking with our children, neices, nephews, or grandchildren.

Moreover, the contract requires that we waive confidentiality with respect to all disclosures of prior crimes, and that we take full responsibility for the crime for which we were convicted. Failure to do the latter is termed "denial" and is punishable by termination from the treatment program, and thus a life sentence with no parole eligibility. However, at the time Phase I begins it is more than a remote possibility that an individual may still be appealing his conviction in the courts, having pleaded not guilty and never having admitted to committing the alleged offense. Surely to compel such an individual to admit guilt or face life in prison is a clear violation of his 5th Amendment rights against self-incrimination.

In addition, while the duration of Phase I SOTMP (in addition to at least 6 months on a waiting list to get in) is between 6 months and a year, it is not possible to obtain a recommendation for parole or community while in this level of treatment. It is not considered to be "sufficient progress", so those who become eligible for parole during this phase of treatment are unable to actually be paroled, and must remain incarcerated at least until they reach Phase II.

Once Phase I is complete, we are required to sign another contract for the next level of treatment, then endure another 6 month minimum wait for bed space at the Arrowhead Correctional Center's "Therapeutic Community" program, also known as SOTMP Phase II. This is currently the only facility which offers Phase II treatment, and the total available space for the program is 96 beds. The only way someone on the waiting list is able to get into the program is if someone who is already there leaves the community. This is possible in only four ways: release, progression to community corrections, parole, or termination from treatment.

If what we have described thus far is true, however, community corrections and parole have not proven to be viable options for lifetime supervision offenders. And, of course, apart from these there is no release possible for such individuals. One would expect, then, that the population of the therapeutic community program would remain largely static. In fact, this is far from the case. The SOTMP has employed two distinct but complimentary methods to ensure a significant turnover rate and to give the impression that the program is progressing individuals successfully into the community.

The first method involves the manipulation of the population of the Phase II program. Upon surveying the members of the Therapeutic Community (TC) in 2006, we discovered that the population is divided almost exactly 50/50 between lifetime supervision offenders and those with determinate sentences. This means that of the 96 available beds, approximately 48 are allotted to those sentenced under the Lifetime Supervision Act. The remaining 48 are given to other offenders, and of these individuals we have observed that a significant number have a year or less remaining until their mandatory release date at the time they are admitted into the program. In fact, one individual currently in the program had already been paroled when he started Phase II. This guarantees that a minimum number of individuals will go to the community from the Phase II program each year, and though they would have been released even if they had never participated in treatment, the Phase II program is able to claim that they have "successfully completed" treatment and progressed to the community. This method accomplishes a twofold purpose: it provides "success" statistics that give the appearence that the program is working and moving offenders out of prison into the community; and because these individuals leave the TC quickly the program is able to bring in more short term participants, thus raising the total number of individuals treated by the program in a given year, and thereby enabling the program to obtain more funds based on these numbers. And all the while large numbers of men sentenced under the Lifetime Supervision Act, and therefore required by law to be in treatment and unable to get out of prison unless they are, have been denied access to the Phase II program and attendant parole eligibility because half of the beds are occupied by individuals with determinate sentences, many with mere months left until release. In this way the Phase II program pads its "success" statistics and ensures the continuance of its current level

of funding.

The second method is much more damaging to those of us sentenced under the Act, and appears to us to be substantially more sinister. This is the frequent decision by the therapists to terminate individuals from the treatment program. The SOTMP probation and termination guidelines describe termination from treatment as a "powerful treatment tool", when in fact it is probably the most destructive procedure employed by the program, especially for lifetime supervision offenders.

The TC contract lists several reasons an individual may be terminated from the treatment program. These include: failure to attend all assigned program groups, sessions, and activities; violation of cardinal rules, basic rules, or the TC contract; receiving a COPD conviction; and as a catchall, the deliberately vague provision that an individual "can be...terminated from the Treatment Community based upon the consensus of treatment staff that [he has] failed to make sufficient and sustained progress towards meeting [his] treatment goals." Thus, the contract provides for termination based on "lack of progress", which is established by the opinion of the therapists.

When an individual is terminated from the SOTMP, he is ineligible to return to the program for at least 6 months. Of course, once he is eligible he must get back on the waiting list to return, which takes a minimum of another 6 months. Thus the termination results in around a year of incarceration while the individual is unable to make progress in treatment or become eligible for parole. This extends his overall time spent in prison, at a cost of around $25,000 per year to the taxpayers (see Report to the Colorado General Assembly at www.lifetimeactreport.org p. 9).

The benefits of terminations, which have historically been frequent and commonplace in Phase II, are similar to those achieved by ensuring that 50% of the TC population are not lifetime supervision offenders. Since virtually no one sentenced under the Act progresses out of prison from Phase II, the program uses the "treatment tool" of termination to cycle such people out of the program and make room for those on the waiting list. This gives the impression that those with indeterminate sentences are being afforded access to treatment in Phase II as they are allowed to enter the program, taking the space of someone terminated perhaps earlier that day. And once again the "# of offenders treated/year" statistic increases, supporting a higher level of funding for the program. Several individuals currently in the TC have been terminated and returned more than once.

One of the more immediately disturbing results of termination results from the fact that those being terminated are typically sent by DOC to a medium security private facility such as Crowley or Bent County. The problem lies in the fact that sex offenders are hated and despised by the rest of the prison population. Physical violence and extortion against us are commonplace,

and our primary method of survival is concealing the nature of our crimes from others. However, when participating in the Phase II treatment program all sex offenders are housed in a single building which is exclusively TC participants. Thus all other offenders at Arrowhead are able to observe where we live and the nature of our offenses becomes common knowledge. This information has a way of following a terminated individual to his new facility. Now add in the fact that medium security facilities routinely have a much higer level of violence than minimum restricted facilities such as Arrowhead, and that DOC often sends particularly unpleasant offenders who have been dubbed "management problems" to private facilities, creating an even more hostile environment, and we are likely to be facing serious danger. The DOC and treatment program take no steps to protect such individuals from attack by other inmates, and terminated men are frequently assaulted at such facilities. Just within this past month we received word of a young man who had been terminated from the program and sent to a private facility. He was attacked and beaten nearly to death with combination locks because he was a sex offender. Last we heard he was in critical condition. Surely our 8th Amendment right to be free from cruel and unusual punishment is implicated by this termination procedure! The treatment staff, however, despite being aware of this problem, have not been deterred in the least from wielding the "treatment tool" of termination liberally and frequently.

Another highly questionable practice is the SOTMP's use of the polygraph to justify termination from treatment. The polygraph itself is well known to be an instrument of dubious usefulness and accuracy. The American Psychiatric Association has proclaimed that the polygraph has "no medical or psychiatric applications as defined by the American Psychiatric Association's own ethical standards". Courts have determined that it is inadmissible as evidence due to its unreliability. It has been extensively debunked in the media, and ex-polygraphers have written books exposing the so-called "lie detector" as a fraud. Nevertheless, the SOTMP continues to use the device extensively as a justification to terminate individuals from treatment. In the case of lifetime supervision offenders, such a termination effectively condemns us to a life sentence in prison. This based on a device which is inadmissible as evidence to support a sentence to prison in the first place.

The SOTMP, aware of the highly questionable ethics, legality, and constitutionality of this practice, have attempted to veil it in semantics. The TC contract requires that participants take polygraph exams, but does not explicitly state that we are required to pass them. However, a predetermined number of "deceptive" polygraph results automatically constitutes "lack of progress", which is grounds for termination. Thus, when an individual is terminated his paperwork may list the grounds for termination as "lack of progress", while in reality the true and sole grounds are "deceptive" polygraph results. And termination for the preset number of failed polygraphs is automatic, exceptions being extremely rare.

One of the most frightening aspects of this is that termination from treatment due to failed polygraphs is equivalent to a life sentence in prison without possibility of parole, since no one who has been terminated on this basis has ever been able to return to the treatment program, as far as we have been able to determine. Supposedly all one need do in order to be eligible to return in such a situation is to pass a polygraph. Sounds easy enough! But as we observed before, terminated individuals are typically sent to private facilities, which offer them no access to polygraphs. Furthermore, there is no functional system in place for them to request a transfer to a facility where the polygraph would be available. Thus they are unable to take a new polygraph, and so unable to pass it and become eligible to return to Phase II. They are trapped in a life sentence limbo with no way back to treatment and parole eligibility. The SOTMP appears indifferent to this situation, and has taken no steps to rectify it. We know of individuals terminated for polygraphs, who have written to the therapists repeatedly over the course of months (in some cases years) virtually begging to be readmitted to treatment. They inform us their letters are ignored.

To compound the problem even further, if such is possible, the SOTMP contracts with a single polygrapher to provide all polygraphs for the participants in the treatment program. This particular provider, Amich & Jenks, also works heavily with community treatment programs. There are numerous issues created by having only a single polygrapher for the SOTMP, not the least of which involves a financial conflict of interest. For example, an individual in treatment may be permitted 4 attempts at a polygraph before being terminated. Regardless of the result of the first test, it is in Amich & Jenks' best interest to fail that person, knowing that he will be required to retake the polygraph, and they will be able to charge for a second test (or third, or fourth). The bill for this, of course, is footed by the taxpayers. During Fiscal Year 2005-2006, the DOC budget for SOTMP included $95,696 for polygraph testing, every cent of it going to Amich & Jenks. How much this provider takes in overall as a result of contracts with sex offender treatment programs can be discovered by requesting a copy of Amich & Jenks financial report from their website, we are told.

The second major issue created by this single provider polygraph system is the lack of oversight or professional review to create accountability for Amich & Jenks. We are utterly unable to appeal the results of our polygraphs, to challenge them, or to request a review of the test by a neutral polygrapher. Even our requests to be given a copy of the actual test results are refused as a matter of policy. So Amich & Jenks can fail individuals with impunity, and possibly questionable motives, and the end result is increased revenue for them at taxpayer expense. And for lifetime supervision offenders? Life in prison.

All this becomes almost exquisitely ludicrous when we consider what the taxpayers are actually paying for. In Fiscal Year 2005-2006 the DOC budget included over $2 million for sex offender

treatment and related services. Much of this amount is used to fund SOTMP treatment for individuals who are admitted to the program. However, over $95,000 of it is used to pay for polygraphs, which are used to terminate people from the program. So taxpayers are paying to kick people out of the very treatment that they just paid for those same people to receive! Absurd? We certainly think so. To say the system is inefficient would be far too generous. It is a farce and a travesty. But not for the SOTMP, which continues to receive its funding. And not for Amich & Jenks with their lucrative contract. The losers are the taxpayers who unwittingly foot the bill for this nonsense. And, of course, those of us sentenced under the Lifetime Supervision Act. For us, the cost may very well be the rest of our natural lives.

The type of polygraph most frequently used to justify termination from treatment is known as a "sexual history" polygraph. As part of Phase II we are required to complete a detailed history of all sexual activity we have ever engaged in, including possible criminal behavior. We have already detailed our constitutional objection to this (pp. 2-3). The completeness and accuracy of the sexual history are supposedly ensured by the use of the polygraph. Completion of the sexual history, and a "non-deceptive" result on the corresponding polygraphs, are a prerequisite for a recommendation for parole per the SOMB standards and the TC contract. Refusal to complete the sexual history results in termination. Likewise, failure of 4 consecutive history polygraphs is interpreted (in spite of the test's notorious inaccuracy) as a refusal to disclose everything and also results in termination. Thus the polygraph, though unable to determine truthfulness with any reliability, is used as a threat to compel self-incrimination: tell everything, or fail the polygraphs, be terminated, and spend life in prison.

Before reaching the full number of failed polygraphs which result in termination, the treatment program begins using the results to justify restricting or suspending the privileges of program participants. For example, a second "deceptive" history polygraph will result in an individual being required to sign a "probation" contract. For the third failed test it is a "notice" contract. In addition to various assignments, these contracts impose a loss of certain privileges for a specified period of time: usually 90 days, or until a "non-deceptive" polygraph result is achieved. The notice contract, for example, provides that the individual will be unable to use any of his electric appliances (TV, coffee maker, radio, etc.) while under the contract. The DOC imposes similar consequences for COPD convictions. These are known as "Loss of Privileges" (LOP) or "Restricted Privileges" (RP) status. Although restrictions on LOP or RP are slightly more extensive than a notice contract, the DOC is required to provide a due process hearing before depriving inmates of these privileges. The SOTMP provides no such process. Fail the polygraph, we must sign the contract relinquishing our privileges. If we refuse to sign the contract, we are terminated. If we violate the contract conditions, we are terminated.

Clearly the polygraph plays a decisive role in the SOTMP treatment program. The question, given that the test has been pronounced worthless from virtually every quarter, is should it have the power to condemn someone to life in prison? And further, should the taxpayers be paying for it?

Recently a man who had been terminated from Phase I treatment challenged the termination in Federal court, claiming his constitutional rights had been violated. In its ruling in the case (Beebe v. Stommel) the Court agreed, saying that the SOTMP's termination procedures displayed a deliberate indifference to individuals' rights that was "so egregious, so outrageous that it may be fairly said to shock the contemporary conscience" (quoting County of Sacramento v. Lewis). The Court therefore ordered the SOTMP to put procedures in place to provide us with due process before terminating us from treatment. Although one of the requirements of minimal due process is a hearing by a "neutral and detached" hearing body, the procedure put in place by the DOC and SOTMP in response to the ruling fails to provide any such thing. Rather, their new system establishes a "Termination Review Panel" consisting of 3 SOTMP therapists appointed by the SOTMP manager, to hear a presentation of the case for termination made by yet another SOTMP therapist. Far from being "neutral and detached", this panel will not provide the minimal due-process protection required by the Court. Instead the SOTMP is making a mockery of the Court's ruling in their desperation to retain complete control over termination from treatment. When questioned, one therapist insisted that termination would remain "a clinical decision, not a legal decision". The Court, apparently, does not agree. This is simply a further demonstration of the importance of termination to the SOTMP's method of manipulating the system for its own benefit in total disregard for individuals' rights.

Not only does the SOTMP apparently ignore Federal court rulings, they also ignore their own standards and guidelines. The SOMB established the official criteria that those of us sentenced under the Lifetime Supervision Act must meet in order to be eligible for a recommendation for parole. These criteria are arranged in 3 formats: the "Standard" format applies to those with 6 years or more minimum sentence; the "Modified" format to those with 2 to 6 years minimum sentence; and the "Foundation" format to those with less than 2 years minimum. As the minimum sentence decreases, the criteria that must be met for a parole recommendation become less complex. This enables those who will become eligible for parole more quickly to meet their criteria more quickly, so that by the time they reach their parole eligibility they will be able to receive a recommendation from the treatment program. Unfortunately, the SOTMP does not recognize either the "Foundation" or "Modified" format, and to our knowledge they have never done so. Instead, the treatment contract lists only the "Standard" format as the criteria we must meet for a parole recommendation, and forces everyone to meet those more stringent criteria regardless of minimum sentence. The effect of this is to make it impossible for those with shorter minimum

sentences to meet the criteria before becoming parole eligible, thus ensuring a longer period of incarceration for such individuals. As of September 2005, the DOC had 115 offenders sentenced under the Act requiring the Foundation format, 138 requiring the Modified format, and 418 requiring the Standard format. The SOTMP, at that time, was forcing 253 individuals to meet criteria not required by the SOMB in order to receive a recommendation. We have no doubt the number has grown since then.

The final aspect of the SOTMP we must address is its duration. For purposes of comparison, the Arrowhead Correctional Center also houses a drug and alcohol TC program. Individuals participating in that program are able to complete all the requirements in approximately 9 months, graduate, and receive a certificate of completion. In contrast, it is not possible to graduate from the SOTMP, because it never ends! We cannot complete this treatment program; it is perpetual. There is one individual here in Phase II, for example, who has been here for nearly 14 years with no end in sight. For those of us under lifetime supervision this fact has a devastating effect on our motivation to continue in treatment. What are we working toward? There is no light visible at the end of the lifetime supervision tunnel. This fact, combined with everything else, has caused many of us to despair. This is why retired Colorado Appellate Court judge Frank N. Dubofsky characterized the Lifetime Supervision Act as "a black hole of a lifetime sentence with no way out" (see Report to the Colorado General Assembly at www.lifetimeactreport.org, Foreword, p. i).

Guiding Principles of the SOMB

It certainly appears that the SOTMP is working at cross-purposes to the legislative intent of the Lifetime Supervision Act. However, this is hardly surprising when the foundational principles of the treatment program are understood. The SOMB, in its standards and guidelines, has laid down a number of "guiding principles" for the treatment and supervision of sex offenders. The first three of these principles, which appear to govern all the others, are instructive, and read as follows:

1. Sexual offending is a behavioral disorder which cannot be "cured".
2. Sex offenders are dangerous.
3. Community safety is paramount.

From these premises only one conclusion can be reached. We have a "behavioral disorder" which makes us dangerous to the community. Since we cannot be "cured" we will always be dangerous to the community. The #1 goal of the SOMB and SOTMP is to protect the safety of the community. Therefore, the only reasonable course of action is to keep us out of the community for as long as possible. No wonder that lifetime supervision has become life in prison! And no wonder that men like Greig Veeder, erstwhile head of the THE treatment program in Denver, have proposed the the creation of sex offender "colonies" where sex offenders

can be kept seperate from the community for their entire lives. Given the SOMB's faulty premise that we have some sort of incurable disease, it is difficult to prevent the phrase "leper colony" from springing to mind. As long as such "guiding principles" as these are adhered to by those responsible for providing the treatment required by the Lifetime Supervision Act, the intent of the legislature that we should not be imprisoned for life will never be realized.

AN AUTOBIOGRAPHICAL CASE STUDY: JEREMY J. LOYD

My name is Jeremy J. Loyd, inmate registration number 117779, case number 02CR40, Fremont County, Colorado. Here is my story in brief. I am in no way trying to justify, or minimize, what I have done. I am merely trying to show how the punishment does not fit the crime, and you will see in my case, as with many others in this State, that this is true. This is all fact and truth, so help me God.

In 2001 I chose to have inappropriate sexual contact with a 14 year old female. There was no force or violence involved. The State calls this charge Sexual Assault On A Child. In January 2002 I was arrested, and taken to jail. At the advice of a public defender I pleaded guilty to this crime, even though the case against me was weak and lacking evidence. I wanted to be honest, and this was my first and only felony in my entire life. I did over 7 months in the county jail on a sentence of 90 days in jail and 10 years to life on probation.

Prior to my release a probation officer came to the jail, and said, "I will be on vacation, so you will be on your own for almost a week, no supervision. Come see me on this day." I agreed. I got out and got another apartment and job, and the whole "shopping list" of things the probation officer wanted me to do. I was placed on an ankle monitor and was allowed to go to work, the store, etc. I called in, and made all of my appointments and obligations.

One day I was in the work van with my boss, and we were on our way back into town after a long day of work when we got dispatched to one more air conditioning call. I called the probation office and asked for one more hour out to do the last job of the day. My probation officer was not there, but the secretary said, "How long?" I said, "One hour." She agreed, so I stayed and worked. It took us about half an hour to do the call. I got in my door approximately 27 minutes after my regular curfew, well within the extra hour I was given. I also had other side jobs going, and was regularly permitted to work these too, often as late as 11:00pm. So I was doing well for only being out of jail for less than three weeks.

I was arrested two days later for working late on that last call. The probation officer said <u>she</u> had to give me permission, not her secretary. In short, I was sent to prison for 2 years to life for a technical violation. Their justification was that

they did not know where I was for that short amount of time. Recall that upon my release from county jail I was on my own for 6 days so my probation officer could go on vacation!

Now I was in prison at Sterling Correctional Facility, and I tried to do the SOTMP program, but was kept out of it in spite of the parole board denying me parole because I was not in the program. I tried repeatedly to get the therapists to put me in treatment so I could meet the requirements for parole. Finally, after many grievances and threats of lawsuits, they put me in. Their attitude was, "we have got you for the rest of your life and we can put you in 10 years from now". This even goes against DOC's Administrative Regulation 700-19, p.4, Sec.G.

I completed Phase I of the program, and I waited for many months to get into Phase II. I literally had to file more grievances and threaten more lawsuits just to get into the program here at Arrowhead. Now I'm here, and they're telling my family and me it could be years before I get paroled. All for a class 4 felony, which in any other case carries a 2-6 year cap on the sentence. But I'm going on past that time, with no light at the end of the tunnel.

I see the parole board in April of '07 for the fourth time. I am a low risk on every assessment they have, yet I am being treated like a lifer. My Mandatory Release Date on my reclassification paperwork says "2899". I got 899 years or so for a class 4 felony. Even my parole denial papers say "LIFER" on Mandatory Release Date. I truly am a "lifer".

There was no force or violence in my crime. Yes, I should not have done it. But a life sentence for this? Please look at these sentencing guidelines, because the indeterminate Act of 1998 is not working, and I'm living proof. I've lost everything, and I deserve to be punished, but this is ridiculous. The sentence does not fit the crime. This is fact, and there are many with stories like mine in prison. I will make my police reports and transcripts available; I have nothing to hide. I did wrong, and I deserve to be punished, but this is way overboard and draconian. In a lot of other cases a technical violation of probation or parole carries no more than 180 days incarceration. I'm doing life. Please help me. Thank you.

SUMMARY

Sex offenses are crimes which are little understood, and can in some cases be particularly disturbing to the general public. The media has taken advantage of this fact by sensationalizing sex offenses and demonizing sex offenders based on rare and extremely gruesome cases. This has produced a level of public hysteria over sex offenders, and an outcry that something be done to protect them from these monsters. In response, lawmakers prudently sought advice from "experts" on sex offenders as to what should be done. These "experts" based their approach on flawed principles, such as the idea that sex offending is an

incurable disease. Then, seeing a way to take advantage of the situation, they deliberately distorted or concealed the true recidivism statistics for sex offenders. A recent Utah study followed 400 felony sex offenders from treatment in the prison system through 26 years after release. The study found that 83% had no new criminal convictions during that time. The executive director of the Utah Department of Corrections said the study debunks a common myth that sex offenders are "lying in wait for your children and stalking them...what this information shows is the vast majority of sex offenders do not recommit crimes of general nature and sex offenses in particular". But the "experts" consulted by the Colorado legislature likely bandied about recidivism figures for sex offenders in excess of 80%; indeed, we have heard figures in the 90% range quoted in the popular media. Based on these false statistics, the "experts" recommended a system of lifetime treatment, and the Lifetime Supervision Act of 1998 was born. Not surprisingly, these same experts were contracted by the State to provide the very lifetime treatment they had recommended, ensuring their job security and a nice income provided by the taxpayers. Because continued public support for the system depends on continued public hysteria over sex offenders, the SOMB and SOTMP deliberately feed into, or at least refuse to contradict, the false information about sex offenders being propagated by their willing accomplices in the media. In fact, on one occasion when the media wanted to come in and interview Phase II participants one of us suggested that, as a prerequisite for any interview, the SOTMP should require them to agree to include as part of their article or story accurate citations of the studies which have been conducted showing low rates of sex offender recidivism. The therapists refused to consider the idea. So what is the final outcome? The legislature does something decisive about sex offenders. The public feels safer. The therapists and polygraphers are set for life. And we spend the rest of our lives in prison, but what of that? It's no worse than monsters such as we deserve.

The only problem is that it's a lie. We're not monsters, we're men who've committed crimes. We're human beings with rights in spite of what we've done. The treatment we are subject to is unjustifiable when compared to the nature of the vast majority of our crimes. But because we're sex offenders and widely despised by the public no one is willing to stand for our rights. No one wants to be seen as an advocate of "sexual predators"! So we are abused with impunity, and hardly a voice is raised in protest. Should it be so?

SUGGESTED SOLUTIONS

Since we have raised numerous problems with the Lifetime Supervision Act and its implementation in this report, we would now like to propose a brief list of solutions to some of them. This list is certainly not exhaustive, but rather representative of the types of solutions we believe will be necessary and effective.

1. Review and amend the language of the Lifetime Supervision

Act to correct the constitutional problems enumerated herein.

2. Give individuals sentenced to prison under the Act a Mandatory Release Date at the expiration of their minimum sentence, and require the SOTMP to demonstrate that such individuals have, through their own fault, failed to meet the applicable criteria before they can be kept incarcerated past the minimum sentence. Such a ruling should be made by the sentencing court.

3. Enforce the language of the Act mandating that those senenced under its provisions "shall" participate in sex offender treatment. If DOC fails to provide access to such treatment they should be held in contempt of court. Compare the recent action of Denver District Judge Martin Egelhoff, who threatened to hold state officials in contempt for failing to provide inmates with mental health treatment he had ordered.

4. Apply the indeterminate sentence only to repeat sex offenders, not first time offenders.

5. Require a finding of a crime of violence by the court, with the opportunity to have the facts pertinent to such a finding heard by a jury, before any sex offender can be labelled "violent".

6. Require that the parole board "shall" parole a sex offender who is eligible for parole, "unless" there is clear and convincing evidence that the offender has, through his own fault, failed to meet the applicable criteria or is otherwise an unacceptably high risk to reoffend. This must be demonstrated on a case-by-case basis, and not assumed due to the nature of the original offense.

7. Provide more space in community corrections for sex offenders.

8. Provide that sex offenders in treatment in the community can select their own treatment provider and polygrapher from the list of SOMB approved providers.

9. Provide true due process for those facing termination from treatment in the community, since the result will be the deprivation of their liberty and a prison sentence.

10. Provide that, unlike new crimes, a technical violation of probation or parole will be punishable by no more than 180 days in county jail or DOC.

11. Enforce the Federal court's ruling that the SOTMP must provide due process hearings before a "neutral and detached" hearing body in order to terminate anyone from treatment. Given the massive implications of termination for those sentenced under the Act, the burden of proof on the SOTMP in such cases should be stringent. The argument could be made that the language of the Act does not permit termination under any circumstances.

12. Forbid DOC to transfer those terminated from treatment to

high risk facilities where their lives are likely to be endangered.

13. Insist that the SOTMP contract with multiple polygraphers, and allow for appeal and review of polygraph results. No longer permit the use of the polygraph to justify termination from treatment. Ideally, forbid the use of the polygraph entirely in the SOTMP and community treatment programs.

14. Do not permit the SOTMP to require a self-incriminating sexual history disclosure as a condition of treatment. The crime for which an individual is incarcerated should be the focus of treatment.

15. Insist that the SOTMP abide by the criteria for parole recommendations set forth by the SOMB. Alternately, encode such criteria in the statute itself. The SOTMP has a tendency to ignore standards and guidelines, but would likely not ignore the law, and their adherence could be more easily enforced and monitored.

16. Require that the SOTMP, like the drug and alcohol TC program, have a specific and limited duration. Once specified classes are completed and criteria met, participants should graduate from the treatment program and receive a certificate of completion. Once finished, they should be paroled.

17. Restructure the SOMB and SOTMP so that they are based on principles which accurately reflect current scientific data regarding sex offending behavior and recidivism.

18. Simply dissolve the entire system and start over.

TABLE OF SOURCES

Administrative Regulations

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DOC A.R. 700-19. 15,16,18

DOC A.R. 700-32. 15

SOTMP Documents

Phase I Treatment Contract. 2,3,9

Phase II TC Contract. 2,3,10,11,14,15,16

SOMB Documents

Colorado Sex Offender Management Board:
Standards & Guidelines for the Assessment,
Evaluation, Treatment and Behavioral
Monitoring of Adult Sex Offenders. 3,9,14,16,17

Colorado Sex Offender Management Board:
Lifetime Supervision Criteria. 15,16

Other Government Documents

Colorado Department of Corrections/
Colorado Department of Public Safety/
State Judicial Department: Lifetime
Supervision of Sex Offenders: Annual
Report - November 1, 2005. 8,13,14,16

Additional Documents

A Report to the Colorado General
Assembly on the Failure of the
Colorado Department of Corrections
to Give Effect to the Legislative
Intent of the Colorado Sex Offender
Lifetime Supervision Act of 1998 -
First Annual Report Fiscal Year
2005-2006 (www.lifetimeactreport.org). 3,4,11,13,14,16

Caselaw

Beebe v. Stommel 333 F.Supp.2nd 1011 (D.Colo.2006). .5,15

County of Sacramento v. Lewis 523 U.S. 833 (1998). . 15

Morrissey v. Brewer 408 U.S. 471 (1972). 15

Assorted Related Caselaw

United States v. Salerno 481 U.S. 739 (1987). 1,2

Page #

Reno v. Flores 507 U.S. 292 (1993). 1,2

Mathews v. Elderidge 424 U.S. 319 (1976). 1,2

Apprendi v. New Jersey 530 U.S. 466 (2000). 1,2

Specht v. Patterson 386 U.S. 605 (1967). 1,2

People v. White 656 P.2d 690 (Colo.1983). 1,2

People v. Young 859 P.2d 814 (Colo.1993). 2

People v. Nguyen 900 P.2d 37 (Colo.1995). 2

People v. Owens 670 P.2d 1233 (Colo.1983). 2

Solem v. Helm 463 U.S. 277 (1983). 2

People v. Gaskins 825 P.2d 30 (Colo.1992). 2

Bowsher v. Synar 478 U.S. 714 (1968). 2

Meyers v. United States 272 U.S. 52 (1926). 2

People v. Wiedemer 852 P.2d 424 (Colo.1993). 2

Smith v. Miller 384 P.2d 738 (Colo.1963). 2

United States v. Smith 686 F.Supp. 847 (D.Colo.1983). 2

McKune v. Lile 536 U.S. 24 (2002). 2,3