the Legal Pad

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"It is difficult to get a man to understand anything if his paycheck depends on him not understanding it." – Albert Einstein

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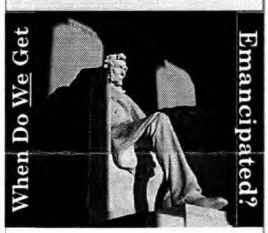

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Feedback? News? Write!

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Quotes & Notes from April 2023 Oral Argument

The 3rd & Likely Final Appeal in the *Karsjens* Case is Heard. Next Stop: Decision.

Summary of Key Argument Points -- Appellant's Argument (by Attorney Dan Gustafson, Gustafson Gluek PLLC):

In the second appeal in the *Karsjens* case, Court of Appeals said that Counts 5-7 were not covered by the "shocks the conscience" standard. Hence by way of remand, it ordered the District Court to address conditions of confinement by applying the *Bell* and *Youngberg* holdings using a "totality of the circumstances" analysis, even if those circumstances would not have been actionable individually, as long as, in combination, the conditions of confinement constituted punishment.

The District Court did not follow this mandate. It split out Count 6 (addressing least restrictive alternatives), claiming it was already decided. Separately, the District Court also cited *Beaulieu* as holding (as did *Bell* itself) that we are not entitled to the least restrictive alternative. Nonetheless, we argue that there is an entitlement to a "less" restrictive alternative if it satisfies the *Bell* and *Youngberg* tests. In addition to the combination test, a key consideration is the duration one is subjected to bad conditions (citing *Villanueva* case [6th Cir., 1981]), where 1 month was too long to tolerate.

Also on remand, the District Court misdirected its inquiry, focusing on institution security. Actually, the purpose of this statute is treatment so that confinees can be released, which the District Court totally ignored. [At this point, Judge Jane Kelly interrupts, asking if the District Court examination of the BER issue (i.e., that compliance with facility rules is helpful toward progression in treatment and hence toward eventual release) didn't suffice to make the connection to treatment and release as a goal?] Gustafson answered that the District Court only "tangentially" connected this to treatment, but mostly was addressing only the need for institutional "order" in regard to rules and compliance with them, including the BER system of misbehavior punishment. [Judge Kelly then asked for another example of some place in the District Court's opinion where it should have considered treatment considerations, but did not. Gustafson pointed to double-bunking as adversely impactful on treatment progress and noted that MSOP's use of double-bunking is unlike the typical prison scenario where double-bunking is resorted to only as a stopgap measure to handle overcrowding. Instead, he notes, double-bunking has been part of the original MSOP design and no measures were ever undertaken to alleviate it. This, he says, is parallel to the lack of administrative consideration of ways to let more confinees out or to foster the ability of confinees to gain release. All of these bad conditions have gone on for 20-30 years, impacting many inmates for much of that period – in a maximum-security facility. Gustafson noted that the State's response (that a confinee can petition for reduction of custody), while true, lacks meaningfulness, since that petition process takes years to complete just once. Such delay for years would not have been tolerated by this Court of Appeals in *Villanueva*, and neither should it be here.

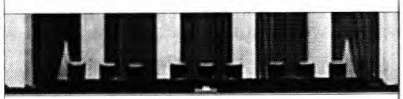
[At this point, Gustafson ceded some of his time to the DOJ attorney to make further points of argument of hers.- 9:00 min. mark]

Amicus Curiae's Argument (by DOJ Attorney Lamb):

The federal Department of Justice's interest is in ensuring that the standard of *Youngberg v. Romeo* is honored in cases of conditions of confinement in mental health confinement facilities. The District Court failed to apply the rational connection test of *Bell* to civil commitment context and failed to grapple with *Youngberg*'s acknowledgement of the "unique" "liberty interest" of mental health confinees, as opposed to penal prisoners. In the mental health context, considerations must not be just about "safety" of confinees, but also about "care and treatment" of confinees with an eye to the goal of release. So (in answer to a question by Judge Kelly), even simply under *Bell*, it is the extent of the government's interest that must be considered, given such mental health needs and goals.

Youngberg spells that out for mental health facilities, and also tells courts to look to "professional judgment" to determine whether this has been done. However, the appellate judges pressed as to how far a facility must go to comport with professional judgment standard. Attorney Lamb answers that the Dept. of Justice [DOJ] acknowledges that application of that standard can be "deferential" to state's needs, but says that the question of whether the state went "far enough" to satisfy professional judgment in this case must consider the very extensive, detailed findings made by the District Court as to the matter [before the first appeal], and also whether the treatment program was achieving its claimed aims with regard to completion of treatment and reintegration of confinees [implying that it was not doing so]. Lamb contends that findings about that were not incorporated in District Court's consideration on remand after second appeal.

Judge Shepard says that the professional judgment piece was never advocated by the appellants in *Karsjens* case; prior argument by counsel was strictly based on *Bell*. Lamb rejoins that, regardless, the Court of Appeals in the second appeal pointed to *Youngberg*. That judge says that reference in that opinion to Youngberg was simply to emphasize the continuing applicability of *Bell* to civil commitment cases, as well as prison cases. But Lamb points out that closing portion of the appellate court's opinion in that second appeal mentioned the need to apply consideration of both *Bell* and *Youngberg*.



Will There Be Another Stop Later?

However, Judge Shepard pointed to the panel of four experts appointed by the District Court and to his reading of *Youngberg*. He thinks the opinions of those experts would have been "irrelevant" if *Youngberg* required the state to show that it had exercised proper "professional judgment," because it would have been required to present its own experts to show that it had. [This is screwy reasoning. While the burden was upon plaintiffs to show a lack of, or bad professional judgment, the testimony by the court-appointed experts effectively fulfilled that burden, such that the burden of proof did shift to the defendants at that point, and they did not bring testimony adequate to show fulfillment of that professional judgment standard.] Attorney Lamb answered that the authorities cited by the appellate court in the second appeal all incorporated the *Youngberg* standard, and hence the *Youngberg* standard is at issue.

Judge Lokken says he thinks had the *Youngberg* "professional judgment" standard been intended to be invoked by the Court of Appeals on remand from the second appeal, the proofs put in by the state on that remand would have been different. [With that, *Lamb* ends argument, leaving Gustafson a minute for rebuttal argument in the end.

MN Asst A.G. Winter for appellees:

Even if *Youngberg* applied, it is extraordinarily deferential to state, and would uphold MSOP. Count 2 of *Karsjens* was dismissed in the first appeal. Also, in *Van Orden v. Stringer*, this Court of Appeals also applied the shocks the conscience standard; this means there is no right to less restrictive alternative or to Youngberg's professional judgment standard. Count 6 is just the same claim. [But *Van Orden* was decided after and in reliance on the ruling in the first appeal in *Karsjens* itself, so *Van Orden* adds nothing to support for returning to the rationale employed in *Karsjens #1* after the remand in *Karsjens #2* effectively departed from the shocks the conscience standard as to Counts 5-7, at issue in *Karsjens* appeal # 3.] Appointed expert testimony was relevant, but supports MSOP practices.

Addressing the *Bell* issues (at request by

(Continued on page 2)

Judge Shepard), interests of state in public safety and institutional security supports rational basis for MSOP. Female judge asks about the importance of duration. Winter says duration was not raised before the Court of Appeals earlier.

Appellant's Rebuttal Argument (by Dan Gustafson):

Youngberg was raised by Appellants in App. #2 & on later remand, so it has not been waived.

Appellees actually raised *Youngberg* arguing to its standard.

The medical professionals say that plaintiffs could be treated at a less-restrictive placement, but they were not. The planned move to Cambridge was interfered with by Gov. Dayton. Experts who testified at trial (not the 706 experts) all said that treatment could be done at a less-restrictive alternative.

Editor's Comments:

Now that the oral argument has been held, it only remains in this appeal for the panel of three appellate judges to decide the issues they deem controlling and to write the majority opinion and any dissenting opinions in the case. Recall that the decision can be unanimous or by a majority vote of two out of the three.

This is very likely the last appeal of the *Karsjens* case. It is also likely that wrangling over law applicable to the case will end with this appeal, leaving, at most, only some factual loose ends for resolution on remand to the District Court. Therefore, the fate of the *Karsjens* challenge to MSOP conditions of confinement and most notably to MSOP's handling of treatment advancement and passage of MSOP confinees to "less restrictive alternatives." including the claimed release-preparation sub-program known as "CPS" (Community Preparation Services) and "Provisional Discharge," will effectively be resolved by the forthcoming decision in this appeal.

The waiting time for the anticipated decision can vary widely, from as short as one-to-two months on the short end to as long as six months or more in the long end. From lore based on past cases involving challenges to sex-offender civil commitment programs or their procedures and also considering the decisions in the preceding two appeals in *Karsjens* itself, it is reasonable to believe that a decision reached at the fast end of this range of possible wait-times is likely to be adverse to the plaintiff-appellants. On the other hand, a decision that takes considerably longer than that to announce is more likely to either be fully in their favor or to at least give them significant concessions compared to the situation before this third appeal.

As before, whichever litigant is disappointed by the awaited outcome can opt to petition the United States Supreme Court (SCOTUS) to accept review of the appellate result. However, in doing so, the case would then join about 20,000 other cases sent to SCOTUS annually with such a request for review ("certiorari"). Of all such annual petitions, only about 100 are accepted for SCOTUS review. Further, prior requests for review of the first two appellate outcomes in *Karsjens* were rejected. Common legal wisdom suggests that, other things being equal ("ceteribus paribus"), SCOTUS would disfavor such a repetitive petition. In sum, such unlikelihood of SCOTUS review contributes to the impression that, win or lose, the *Karsens* case is now reaching the end of its long road since its filing in 2011.

The waiting in MSOP for a decision is not yet breeding any tension, but if the months slowly go by during the wait, this is likely to gradually change. If the decision is adverse, disappointment among MSOP confinees will be strong.

It currently remains a given in the collective opinion among confinees (at least in the MSOP-Moose Lake facility) that, without any complete change in the personnel and philosophy of personnel in MSOP administration and in clinical administration and supervision, (including in both treatment and assessment divisions), any large-scale increase in the number of confinees released per year is very unlikely to occur.

Past administration claims of such increases in the then-near future fizzled (at least as to the size of increase of releases being less than dramatic), leaving the credibility and perhaps even the *bona fides* of further claims of that kind in stronger doubt now, lacking any immediate and large-scale results.

Overall, the apparent philosophy of MSOP top administrators, judging from their action/recommendation on releases, appears to be consistent with the "containment" approach to past sexual recidivists. That approach has been repeatedly determined by researchers to be contrary to facts now known and hence as being a view "stuck in the past" and based only on lingering fear-based mythology of sexual offending still incorrectly popular among the public.

It is the notion that sex offenders have a high and steady likelihood of future recidivism not reducible to zero likelihood or even any figure deemed acceptably close to zero. That belief is contrary even to the very notion of treatment and is even more inevitably in conflict with the universally-confirmed reality that even just increasing age alone of any former sex offender drastically reduces and eventually completely extinguishes any likelihood of later recidivism.

Yet that notion has guided MSOP practice since its founding and clearly, it still does stymie and obstruct treatment progression and release. At bedrock, it is the ultimate reason why MSOP confinees are sent through MSOP's unique treatment program requiring many years at least to complete and so demanding of perfection and unswerving in professed and demonstrated allegiance by a treatment participant to the minutiae of each point of its many-pointed "Matrix" as often to result in demotion from or retention in a given step of treatment for a number of additional years.

This is in diametric opposition to the treatment program in the Minnesota Dept. of Corrections, which manages to graduate nearly all of its participants and to do so within three years with no complex Matrix program, all currently with less than a 2% later recidivism rate.

No peer-reviewed research has ever confirmed any claim that those under sex -offender commitment – whether or not they receive treatment -- are at all significantly more likely to commit a later sex offense if released than former sex-crime prisoners who were never committed. Hence, the 'containment' approach as to committing sex offenders effectively for natural life has no scientifically supportable basis at all. It is just an excuse for inflicting additional incarceration upon past sex offenders as further punishment for what they were either convicted of or were merely suspected of doing in the past, not truly for what they might do in the future.

No one can know what any individual will do in the future. Such claims based on so-called "clinical judgment" have been proven to be wrong nine times out of ten. Even so-called "actuarial risk assessment," being based on groups of past sex offenders who happened to share only one attribute with each other, cannot make any individual prediction of future sex offending by any specific individual. Scientific examination of this process has determined that it invariably hovers around the same accuracy as simply flipping a coin. That is not precognition or logically compelled prediction of any certain future event; it is pure-chance guessing. No one should ever be deprived of freedom on that basis.

If *Karsjens* fails to gain any traction toward converting MSOP from the ill-concealed "shadow prison" it now is to a working treatment program capable of releasing with confidence a regular rumba line of treatment participants in the same successful time frame as the Minnesota DOC, then decisions have to be quickly made as to how to compel such change or, if not doable, how to shutter MSOP permanently and release all of its confinee-victims. As Frederick Douglass once said, "The struggle may be a moral one, or it may be a physical one, But it must be a struggle. Power concedes nothing without a demand; it never has and it never will." This may be effected through different litigation theories and strategies, legislative lobbying, public contact and persuasion, including via media, and/or actions or inactions of resistance and/or protest that by definition garner media and public attention. Nothing is certain when it comes to the future, but one thing is certain: If we do nothing, nothing will change in the course we are on, and that course has unmarked mass graves for our ashes after MSOP has disposed of our corpses. I am sure no one here wishes that personal fate.

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Shaming the Constitution, Part 8 – Ch. 5 Excerpts

Michael L. Perlin & Heather Ellis Cucolo, Shaming the Constitution: The Detrimental Results of Sexual Violent Predator Legislation (Philadelphia: Temple Univ. Press, 2017), Chapter 5: "At Trial"

Editor's Note: This is the eighth in a series of excerpts from *Shaming the Constitution*, a watershed book dispelling the fraud of sex offender civil commitment (SOCC) and calling for its immediate repeal everywhere. In this chapter, topics discussed include ineffectiveness of appointed counsel, lack of an independent expert, risk assessment evidence and its admissibility and (in) competence of the testifying expert on the tests used, and invasion of patient—therapist confidentiality.

Text excerpts:

p. 91: **Access to Counsel**

"...Although securing a constitutional right to counsel in civil commitment is an initial step, it is crucial that we not merely consider the right to counsel but discuss that right in combination with the quality of counsel and counsel's resources and knowledge in this area of the law. Effective counsel in SVPA proceedings must be able to combat unique and complex challenges for a number of reasons:

SVPA proceedings normally turn on the interpretation of several controversial psychometric tests, and counsel must demonstrate a familiarity with the psychometric tests regularly employed at such hearings and with relevant expert witnesses who could assist in the representation of the client.[21]

Although the Supreme Court has held in *Ake v. Oklahoma*[22] that a defendant has a right to an independent expert in a felony trial, there is scant analogous case or statutory law with regard to SVPA matters. This makes it very difficult for counsel to be able to launch a defense in such cases.

The fact that the population in question is the most despised group of individuals in the nation may have a chilling effect on the vigorousness of representation in this area.[23]

pp. 91-2: *Reassessing Ineffectiveness*

(Continued on page 3)

of Counsel

For the past thirty years, the U.S. Supreme Court's standard of *Strickland v. Washington*[24] has governed the question of adequacy of counsel in criminal trials. There, in a Sixth Amendment analysis, the Supreme Court acknowledged that simply having a lawyer assigned to a defendant was not constitutionally adequate but that that lawyer must provide 'effective assistance of counsel, effectiveness being defined as requiring simply that counsel's efforts be 'reasonable' under the circumstances.[25] The benchmark for judging an ineffectiveness claim is simply 'whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.'[26]

Although he Court has subsequently extended the *Strickland* standard in cases involving plea bargaining,[27] bail hearings,[28] the sentencing[29] and appellate stages[30] (as well as to the mitigation stage of death penalty cases)[31] over the years, this standard has proven to fall far short of ensuring that counsel is truly adequate[32]: that he or she investigates the case, provides the defendant with all the information necessary for the defendant to make informed choices, and mounts a vigorous defense at trial.[33] 'Little evidence disputes the failure of *Strickland*" to ensure that capital defendants truly receive adequate assistance of counsel.[34]

p. 92: Examples of cases in which counsel fell clearly short of the mark – yet were affirmed on appeal, the *Strickland* arguments being rejected – are, in some cases, jaw dropping. In one case, counsel was found to be effective even though he had failed to introduce ballistics evidence showing that the gun taken from the defendant was not the murder weapon.[35] In another case, an attorney was found constitutionally adequate to provide representation to a death-eligible defendant notwithstanding the fact that he had been admitted to the bar for only six months and had never tried a jury case.[36] Another lawyer was found constitutionally adequate even where during the middle of the trial he appeared in court intoxicated and spent a night in jail.[37]

...[T]here was no hint at all in *Strickland* as to what its impact might be on other cases that were not criminal prosecutions but that potentially involved lengthy periods of institutionalization.

Individuals labeled sexually violent predators can face indefinite civil commitment under a state statutory sexual predator commitment scheme; in a significant percentage of these cases, such commitments are, basically life sentences.[40] Such cases are, following the Supreme Court's decision in *Kansas v. Hendricks*,[41] classified as 'civil' rather than 'criminal' because they involve 'involuntary civil confinement of a limited subclass of dangerous persons.'[42]

p.93: Lack of Specialized Knowledge

...At least one specific case has articulated a powerful statement as to how civil commitment proceedings could be 'unpacked' in the course of an opinion articulating why a *more* rigorous standard was required in such cases. Fifteen years ago, in *In re Mental Health of K.G.F.* [29 P.3d 485 (Mont. 2001)],[48] the Montana Supreme Court acknowledged that the *Strickland* standard might not be a sufficient test of adequacy in cases involving involuntary civil commitment, relying on state statutory and constitutional sources to find that 'the right to counsel ...provides an individual subject to an involuntary commitment proceeding the right to effective assistance of counsel. In turn, this right affords the individual with the right to raise the allegation of ineffective assistance of counsel in challenging a commitment order.'[49] In assessing what constitutes 'effectiveness,' the court – startlingly, to our minds – eschewed the *Strickland* standard as insufficiently protective of the 'liberty interests of individuals such as K.G.F., who may or may not have broken any law, but who, upon the expiration of a ninety-day commitment, must indefinitely bear the badge of inferiority of a once 'involuntarily committed' person with a proven mental disorder.'[50]

Shaming, ala Philip Glass, Waiting for the Barbarians

Importantly, one of the key reasons why *Strickland* was seen as lacking was the court's conclusion that 'reasonable professional assistance (the linchpin of the *Strickland* decision) 'cannot be presumed in a proceeding that routinely accepts – and even requires – an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation.'[51]

While no other jurisdiction has yet followed the lead of the *K.G.F.* case,[52] in our opinion it is 'without doubt the most comprehensive decision on the scope and meaning of the right to counsel in this context from any jurisdiction in the world.'[53] [citing *Michael L. Perlin*, "'I Might Need a Good Lawyer, Could Be Your Funeral, My Trial': A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education," 28 *Wash. U. J.L. & Pol'y* 241, 245 (2008)]. And this was largely because of its willingness to 'get' the fact that the *Strickland* standard might not be sufficient in all cases involving subsequent institutionalization.

pp. 93-4: Lack of an Independent Expert

How important is it to retain an independent expert in an SVPA proceeding? In order to be an effective advocate at an SVPA hearing, counsel must exceed the minimal bounds of *Strickland*. Counsel must demonstrate a familiarity with the psychometric tests that are regularly employed at such hearings[54] and collaborate with relevant expert witnesses who could assist in the representation of the client, experts who would be appointed by the court at no cost to the person facing sexual offender adjudication in the same manner envisioned by the Supreme Court's *Ake v. Oklahoma* decision in insanity cases.[55]

The complexities involved in an SVPA trial – mental health determinations, scientific underpinnings, actuarial tests, and other scoring tools used by psychologists – all have an impact on whether the quality of representation afforded to individuals facing sexual offender civil commitment is sufficient to protect their liberty interests.[56] These cases are truly like no other in the justice system and require a heightened standard of representation. In order to meet this heightened standard, counsel must use every resource and tool at his or her disposal in order to be effective and offer ethical and rigorous representation. Counsel must seek out and have access to expert instruction and opinion on the psychiatric, social, and political elements of each case – skills that are most likely beyond most attorneys' schooling and legal education. Without such access, counsel has little hope of understanding the opinions and expertise that he or she will confront throughout the development of the case and will likely provide inadequate representation.

p. 97: **Understanding Evidence**

Risk Assessment

In greatly simplified terms, there are two broad approaches to conducting risk assessments in order to predict future dangerous sexual behavior: clinical judgment and actuarial assessment.[99] The clinical approach requires evaluators to consider a wide range of risk factors and then form an overall opinion concerning future dangerousness. The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense, which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.[100]

The difficulty of calculating actual risk using actuarial instruments is compounded by a host of factors: underreported offenses,[101] amount of time the offenders studied have resided in the community,[102] and the vast differences in types/attractions/specifics of offending characteristics.[103] Additionally, using a tool that was normed on a group of offenders to assess an individual offender has been criticized as insufficiently valid due to significant differences between the individual and the population on which the test was normed.[104]

p. 98: As a Florida appellate court has explained:

'For many purposes, an error rate of 30% or more is quite acceptable. Life insurance companies, for example, usually charge higher premiums or refuse to insure the pool of obese, cigarette smokers because the probability of a premature death is higher among the members of this pool, even though many members of the pool live to an average age. It is one thing to price insurance based on actuarial evidence with an error rate of 20% or higher; it is quite another to deprive citizens of their constitutional liberty based on actuarial devices with such high error rates.'[107]

A false positive occurs when a scientist errs by incorrectly placing a person into a group or category based on a scientific test. The introduction of actuarial tools in the risk assessment of sexual offenders ...has pitted experts against one another in a battle to determine which method of prediction is superior.[108]

Questions about the ethical usage and accuracy of these instruments remain unanswered.[109]....

As noted in a thorough opinion by a Florida appellate judge, the relevant scientific community that must generally accept these tests and the interpretation of their results should include a broader group of clinical and experimental psychologists and psychiatrists, and not merely the group of licensed professionals who regularly testify, urging jurors and fact-finding judges to rely upon these tests.[111] A defense expert in a New Jersey case cautioned about this reliance on actuarial tools:

'I think it's a real concern here that these instruments promise something they don't deliver. And they have an incredible aura of scientific certainty and preciseness that's just not there if you peel away the second layer of the onion. Therefore, I think psychologists do a disservice to the profession and psychiatrists, too, for that matter, when they use them and act as if there's this precision and with a scientific basis that's not really there.'[112]

p.99: Actuarial approaches use statistical analysis to identify a number of risk factors that assist in the prediction of future dangerousness. Because actuarial models are based on statistical analysis of small sample sizes, they have a variety of potential predictive shortcomings.[113] However, despite the statistical limitations of actuarial models, some experts have called for the complete rejection of clinical assessment in favor of pure actuarial assessment.[114]

The use of actuarial tools raise multiple issues. In a thorough and probing analy-

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sis of these tests, Professor Eric Janus and Dr. Robert Prentky have concluded that ' to a greater or lesser extent, all ARA (actuarial risk assessment] instruments have shortcomings, and these shortcomings detract from the reliability of the instruments.'[115] Janus and Prentky note that there are three potential sources of prejudice from ARA testimony : (1) concern that the scientific and statistical nature of actuarial assessment will unduly influence the fact finder into giving it more weight and credibility than it deserves and that the principle of 'actuarial superiority' will exacerbate this tendency, (2) concern that juries will ignore the lack of 'fit' between the actuarially derived risk and the legally relevant risk , thus giving ARA too much weight, and (3) the reality that the 'incriminating significance' of statistical probabilities is 'obscure.'[116]

Four of the most common issues that have been debated regarding the usage of actuarial instruments are: (1) admissibility under the evidentiary review standards, (2) lawyers' and judges' familiarity with these tests, (3) concern over confusion and misinterpretation of the results by juries, and (4) the expert's lack of training to administer these tests.[117]

Admissibility under Evidentiary Review Standards

Generally, the standard of review for admitting evidence must satisfy the tests articulated in either *Frye v. United States*[118] or *Daubert v. Dow Merrill.*[119] In short, *Daubert* places the reliability assessment on trial judges while *Frye* delegates to the scientific community the duty to determine whether the evidence in question has gained general acceptance. *Daubert* has been considered by some as potentially more generous than the *Frye* standard, thus substantively minimizing the role of the general acceptability standard in federal court.[120]

p. 100: In *State ex rel. Romley v. Fields*,[130] ...the court found that unlike DNA and other types of 'scientific' evidence, these risk assessment tools do not have an 'aura of scientific infallibility' but are subject to interpretation and their predictive value is far less than 100 percent.[132]

p. 110: These complex issues and circumstances must be considered in the evaluation of the quality of representation afforded to individuals in sexual predator commitment n cases. These cases are truly like no other in the justice system and require a heightened standard of representation. In order to meet this heightened standard, counsel must use every resource and tool at his or her disposal in order to be effective and offer ethical and rigorous representation. Counsel must seek out and have access to expert instruction and opinion on the psychiatric, social, and political elements of each case – skills that are most likely beyond most attorneys' schooling and legal education. Without such access, counsel has little hope of understanding the opinions and expertise that he or she will confront throughout the development of the case and will likely provide inadequate representation. Only through stricter standards of representation will we have the ability, in the words of a Florida appellate court, to still be able to 'honor and trust the heritage of freedom and liberty that has made this country strong.'[220]

There is no doubt in our minds that SVPA trials are heavily weighted against the defendant. The loosely defined statutory language that requires a qualifying conviction to subject a defendant to sexual offender civil commitment for what may not even be a sexual crime[221] and the open-ended pool of diagnoses that could satisfy the term 'mental abnormality'[222] make a defense attorney's job of representation incredibly challenging. The threshold issue of 'mental illness' has historically proven to be an elusive one.[223] Litigators in this area must be especially wary of circular, over-inclusive, under-inclusive, and self-contradictory definitions.[224]

Earlier in this chapter, we stated:

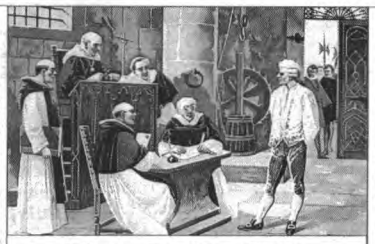
> [T]he judiciary has failed to ask the necessary questions or demand the necessary answers from the clinical community that would justify civil commitment and the grave deprivation of freedom and liberty based on future risk predictions.[225]

This failure on the part of the judiciary -- a failure to even perfunctorily investigate the validity and reliability of psychometric tests the use of which leads, inevitably, to the long-term (often lifetime) incarceration of this population without even the slightest patina of scientific respectability -- shames the Constitution and the entire legal system. And it continues to do this in spite of a steady stream of articles and research findings that reject, *in toto*, the bases for the use of these tests,[226] tools that remain premised on questionable and unconfirmed scientific methods.[227]

pp. 110-11: Moreover, the public's panic from the fear of recidivism if adjudicated sexual offenders are ever to be released to the community has not subsided, despite the growing amount of information and statistically reliable data signifying a generally low risk of re-offense.[228] But again, the vividness heuristic and false OCS have created a toxic environment in which these mostly groundless fears dominate the media, legislative chambers, and the judicial decision-making process. The fallout from these fears makes it all the more difficult to reverse the policies that we discuss here.[229]

pp. 112-13: **Patient-Therapist Confidentiality**

...Clinicians working in the institutions are 'required to resolve ethical dilemmas, which invariably arise ...by breaching



Following a Time-Honored Tradition

traditional mental health ethical principles such as maintaining confidentiality and promoting patient autonomy.'[253] The American Academy of Psychiatry and Law has voiced its concerns about court-ordered evaluations: 'Respect for the individual's right of privacy and the maintenance of confidentiality are major concerns. ...The psychiatrist maintains to the extent possible given the legal context.'[254] Regardless, courts have found that information elicited during treatment could be used in involuntary civil commitment proceedings and that information garnered during treatment while in prison was admissible in initial hearings to determine SVP status.

This lack of patient-therapist privilege has been argued by invoking the Fifth Amendment right to remain silent based on statements an offender might make during treatment.[255] For treatment purposes, committees are encouraged to discuss all offenses, charged and uncharged, and the privilege against self-incrimination has been applied to uncharged crimes that could potentially result in further criminal sanctions.[256] Professor Christopher Slobogin argues that 'the strongest case for [applying the Fifth Amendment] can be made in the context of 'special track' sentencing when the state attempts to use an offender's statements to enhance her penalty beyond that normally prescribed for individuals convicted of the same offense.'[257] Since such a statute allows for 'what is in effect a second penalty,' he maintains that 'the accusatorial model should apply.'[258]

The 1996 U.S. Supreme Court decision in *Jaffee v. Redmond*[259] recognized the importance of protecting confidential communications between a psychotherapist and patient from involuntary disclosure. The decision reaffirmed the position that a privilege between a therapist and patient would serve important private interests. The Supreme Court not only recognized the need for a federal privilege to protect confidential communications between a psychotherapist and the patient but also extended that privilege to include confidential communications made to licensed social workers in the course of psychotherapy.[260] Although guaranteed protections were allotted for the confidentiality of highly personal or embarrassing conditions in order to encourage treatment, those protections did not apply to SVP civil commitment because the person subject to SVP commitment has not sought out treatment, but rather an evaluation is imposed.[261] The Court further noted, 'The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.'[262]

p. 115: **The Right to Remain Silent**

...Procedural protections under SVPA proceedings, such as the right to remain silent, have been considered in light of the protections that are offered during a post-conviction proceeding in a criminal case. In the Supreme Court case of *Minnesota v. Murphy*,[287] the Court ruled that the right to remain silent in the post-conviction stage is not self-executing and the defendant must invoke it.

In dictum in *Murphy*, the Court stated:

> There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.[288]

pp. 115-16: **Sixth Amendment Right to a Jury Trial**

...Most litigation seeking a right to a jury trial, when it is an unavailable option under the state's SVP statute, has been unsuccessful.294 Courts have rejected constitutional arguments under the premise that SVPA proceedings are distinguishable from criminal matters and that civil commitment proceedings hold no constitutional right to a jury trial. Courts and legislators have long maintained that the rules of civil procedure apply to SVPA proceedings.[295] Ongoing scholarly debates have ensued about whether the right to a jury trial should be granted as well as about the benefits and drawbacks of both options in the emotionally charged area of sexual violent offending.[296] On the one hand, bench trials may not hold the strict standards of evidence that would be maintained in front of a jury.[297] A belief that the judge is impartial and able to objectively consider all evidence might allow for otherwise prejudicial information to be admitted into evidence.[298] Issues that arise from sexual offender civil commitment jury trials have focused on, variously, what instructions must be provided to the jury and whether the absence of certain instructions is prejudicial to the defendant,[299] the prejudicial value of testimony surrounding prior crimes and whether testimony was irrelevant and unfairly prejudicial,[300] a jury's competency to appropriately weigh complicated testimony and unique statutory language that ius necessary to make a determination of commitment,[301] and a jury's difficulty with detaching from the highly charged emo-

(Continued on page 5)

tions that accompany these types of crimes.[302] We cannot lose sight of the fact that the public views sex offenders as 'those who are perceived as in the grip of evil or monstrous desires[303] and as the most 'despised' group in society.[304]

p. 116: **The Right to Testify at Trial**

The Fifth Amendment fundamental right to testify in one's own behalf has been inconsistently applied in sexual offender state proceedings. A California court has said that, although it was improper to preclude the defendant from his right to testify over counsel's objection,[305] in a recommitment proceeding this error was harmless because no reasonable juror would have believed the defendant's proffered testimony that his rape victims and the female hospital staffers he stalked invited his attentions.[306]

Notes:

21 Future risk assessment includes the use of actuarial instruments.

22 470 U.S. 68 (1985)

23 *Heather Ellis Cucolo & Michael L. Perlin*, "Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration," 22 *Temp. Pol. & Civ. Rts. L. Rev.* 1, 2 (2012).

24 466 U.S. 668, 668 (1984).

25 *Id.* at 669.

26 *Id.* at 686.

27 *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

28 *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Frye, supra.* O)n why these cases augur a 'seismic shift' in Strickland jurisprudence, see *Justin F. Marceau*, "Embracing a New Era of Ineffective Assistance of Counsel," 14 *U. Pa. J. Const. L.* 1161, 1163 (2012).

29 *Glover v. United States*, 531 U.S. 198 (2001).

30 *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)

31 *Wiggins v. Smith*, 539 U.S. 510 (2003).

32 *Carissa Byrne Hessick*, "Ineffective Assistance at Sentencing," 50 *B.C. L. Rev.*1069 (2009). For a novel analysis, arguing that indigent reform would best be served by an equal protection analysis rather than a Sixth Amendment analysis, see *Lauren Sudeal Lucas*, "Reclaiming Equality to Reframe Indigent Defense Reform," 97 *Minn. L. Rev.*1197 (2013).

33 On the question of whether *Strickland* is the appropriate standard in cases involving a defendant's right to testify, see *Donald Capra & Joseph Tartakovsky*, "Why Strickland Is the Wrong Test for Violations of the Right to Testify," 70 *Wash. & Lee L. Rev.* 95 (2013).

34 *Michael L. Perlin*, The Executioner's Face Is Always Well-Hidden: The Role of Counsel and the Courts in Determining Who Dies," 41 *N.Y. L. Sch. L. Rev.* 201, 205-06 (1996).

35 *Graham v. Collins*, 829 F. Supp. 204, 209 (S.D.Tex. 1993).

36 *Paradis v. Arave*, 954 F.2d 1483, 1490-92 (9th Cir. 1992).

37 *Haney v. State*, 603 So.2d 368, 377-78 (Ala. Crim. App. 1991).

40 *Jenny Roberts*, "The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators'," 93 *Minn. L. Rev.* 670, at 707 (2008).

41 521 U.S. 346 (1997).

42 *Id.* at 356.

48 29 P.3d 485 (Mont. 2001).

49 *Id.* at 491.

50 Id.

51 Id. at 492, quoting *Michael L. Perlin*, "Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases," 16 *Law & Hum. Behav.* 39, 53-54 (1992) ("identifying the Strickland standard as 'sterile and perfunctory' where 'reasonably effective assistance' is objectively measured by the 'prevailing professional norms.'").

52 *Perlin & Cucolo*, Mental Disability Law: Civil and Criminal, § 6-3.3.4.

53 *Michael L. Perlin*, "'I Might Need a Good Lawyer, Could Be Your Funeral, My Trial': A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education," 28 *Wash. U. J.L. & Pol'y* 241, 245 (2008).

54 See *infra* "Understanding Evidence" (psychometric tests).

55 470 U.S. 68 (1985) (indigent criminal defendant who makes a threshold showing that insanity is likely to be a significant factor at trial is constitutionally entitled to a psychiatrist's assistance).

56 *K.G.F.*, 29 P.3d at 491.

99 *Dennis Doren*, "Using Risk Assessment Instrumentation," in Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 103 (2002).

100 *Id.*

101 *Karen J. Terry*, Sexual Offenses and Offenders: Theory, Practice and Policy 92 (2006)

102 *Lucy Berliner*, "Sex Offenders: Policy and Practice," 92 *Nw. U. L. Rev.* 1203, 1209 (19987).

103 *Id.*

104 *Robert Prentky & Ann Burgess*, Forensic Management of Sexual Offenders, 237 (2000).

107 *Burton*, 884 So.2d at 1119-20 (when these tests are utilized in sexual offender civil commitment, the result of a false positive is indefinite confinement in a facility that looks very similar to a prison).

108 In his analysis of these actuarial instruments, characterizing them as "deficient," Prof. Frederick Vars has concluded that given our over-reliance on these tools, "the goals and methods of sex offender civil commitment need to be reevaluated. *Frederick E, Vars*, "Rethinking the Indefinite Detention of Sex Offenders," 44 *Conn. L. Rev.* 161, 193 (2011).

109 *In re Civil Commitment of Burton*, 884 So.2d 1112, 1120 (Fla. App. 2004) ("I, for one, do not yet have faith that it is wise for the judiciary or for society as a whole to rush down this new path before we are confident that both the science of jurisprudence and the science of psychology and psychiatry are up to this awesome task.").

111 *Burton*, 884 So.2d at 1116 (psychologists and psychiatrists must decide whether the members of their profession have a professional capacity to perform this function, and the legal community must decide whether ordinary citizens serving as jurors have this capacity); *In the Matter of the Commitment of R.S.*, 801 A.2d 219, 220 (N.J. 2002) (many of the same people who created the assessment tools did the reliability and validation studies, but only because most of the instruments have not been in use long enough for peer review or replication studies).

112 *In the Matter of the Commitment of R.S*, 773 A.2d 72, 82 (N.J. App. Div. 2001).

113 *Harry M. Hoberman*, "Dangerousness and Sex Offenders – Assessing Risk for Future Sex Offenses," in 2 The Sexual Predator 45 (Anita Schlank ed. 2001).

114 *Vernon L. Quinsey et al.*, "Fifteen Arguments Against Actuarial Risk Appraisal," in Violent Offenders: Appraising and Managing Risk 171 (1998).

115 *Eric Janus and Robert Prentky*, "Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability," 40 *Am. Crim. L. Rev.* 1443, 1472 (2004). See also *Anthony D. Perillo, et al.* "Examining the Scope of Questionable Diagnostic Reliability in Sexually Violent Predators (SVP) Evaluations," 37 *Int'l J. L. & Psychiatry* 190 (2014) (study of 375 New Jersey cases revealed "questionable agreement across paraphilic and non-paraphilic diagnoses").

116 *Id.* at 1487.

117 *Melissa Hamilton*, "Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws," 83 *Temp. L. Rev.* 697, 731 (2011) ("There are no criteria, however, for the scope, time, or regimen for training or otherwise certifying potential assessors on the actuarial instruments.").

118 *Frye v. United States*, 293 F. 1013, 1014 (D.SC. Cir. 1923); see also *Kenneth R. Foster & Peter W. Huber*, Judging Science: Scientific Knowledge and the Federal Courts 225 (1999) ("The 'Frye rule' was applied by federal courts for more than 50 years and is still enforced by many state courts.").

119 *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

120 *James Aaron George*, Note: "Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?", 61 *Vand. L. Rev.* 221, 223-35 (2008) (discussing how *Daubert* is broader than *Frye* but that courts have applied it strictly).

130 State ex rel. Romley v. Fields, 35 P. 3d 82 (Ariz. App. 2001).

132 *State ex rel. Romley v. Fields*, 35 P. 3d at 89.

220 *In re Commitment of Burton*, 884 So.2d 1112, 1121 (Fla. App. 2004)

221 See Ch. 3, at "Residency Restrictions."

222 The wide latitude given to prosecutors and clinicians under these statutes exists most readily in the definition of "mental abnormality" and/or personality disorder. See *Allen Frances & Shoba Sreenivasan*, Commentary, "Sexually Violent Predator Statutes, The Clinical/Legal Interface," 25 *Psychiatric Times* 49 (2008).

223 *Stephen Rachlin*, "Retention and Treatment Issues on the Psychiatric Inpatient Unit," in Psychiatric-Legal Decision Making by the Mental Health Practitioner 77. 80 (Harvey Bluestone et al. eds, 1994).

224 *Kevin M. Carlsmith, John Monahan & Alison Evans*, "The Function of Punishment in the 'Civil' Commitment of Sexually Violent Predators," 25 *Behav. Sci. & L.* 437, 447 (2007) ("Ordinary people support these [SVP] laws for unconstitutional reasons.").

225 *Supra* after note 179.

226 *Stephen D. Hart, Christine Michie & David J. Cooke*, "Precision of Actuarial Risk Assessment Instruments: Evaluating the 'Margin of Error' of Group v. Individual Predictions of Violence," 190 *British J. Psychol.* 60, 60 (2007).

227 *Cailey S. Miller et al.*, "Reliability of Risk Assessment Measures Used in Sexually Violent Predator Proceedings, 24 *Psychol. Assessment* 944 (2012).

228 *R. Karl Hanson et al.*, "High Risk Sex Offenders May Not Be High Risk Forever," 29 *J. Interpers. Violence* 15 (2014)

229 *Infra*, Ch. 8, discussing how a turn to therapeutic jurisprudence may serve to remediate these issues.

253 *Bill Glaser*, Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs, 4 *W. Crim. Rev.* 143 (2003).

254 *American Academy of Psychiatry and Law*, Ethical Guidelines for the Practice of Forensic Psychiatry § II Confidentiality (rev. ed. 2005).

255 *In re Commitment of Lombard*, 2003 WL 21756111 (Wis. Ct. App. 2003) (using defendants statements regarding past sexual offenses made to state's psychologist during an evaluation at his trial did not violate Fifth Amendment). *In re Commitment of J.M.B.*, 964 A.2d 752 (N.J. 2009) (court could use

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offender's statements as properly admitted statements of a party); *Com. v. Knoble*, 42 A.3d 976 (Pa. 2012) (defendant's Fifth Amendment rights not violated by sexual history therapeutic polygraph examination); *In re A.C.*, 991 A.2d 884 (Pa. Super. Ct.2010) (juvenile's Fifth Amendment right not violated by the admission of treatment records that contain his fantasies discussed during treatment). See also *Merrill A Maiano*, "Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventive Measures in the Face of Required Treatment Programs," 10 *Lewis & Clark L. Rev.* 989 (2006) (considering application of Fifth Amendment to castration cases).

256 *Jessica Wilen Berg*, "Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs," 79 *Cornell L. Rev.* 700, 702 (1994); *Mary A. Shein*, "The Privilege Against Self-Incrimination Under Siege: Asherman v. Meachum," 59 *Brook. L. Rev.* 503, 408 (1993); see generally *David B. Wexler*, "Therapeutic Jurisprudence and the Criminal Courts," 35 *Wm. & Mary L. Rev.* 279, 285 (1993).

257 *Christopher Slobogin*, "Dangerousness and Expertise," 133 *U. Pa. L. Rev.* 97, 168-69 (1984).

258 *Id.* at 169.

259 *Jaffee v. Redmond*, 518 U.S. 1 (1996) (confidentiality serves both private and public interest).

260 *Id.* at 13.

261 Some courts hold that, while the privilege attaches, testimony of sexual offenders' therapists falls within the exception for communications relevant to proceedings to compel hospitalization for mental illness; see, e.g., *Troville v. State*, 953 So.2d 637 (Fla. Dist. Ct. App. 2007); *People v. Dist. Ct,. County of Adam*, 797 P.2d 1259 (Colo. 1990).

262 *Jaffee v. Redmond*, 518 U.S. 1 (1996).

287 *Minnesota v. Murphy*, 465 U.S. 420 (1984).

288 *Id.* at 434 (quoting *Lefkowitzv. Cunningham*, 431 U.S. 801. (1977)).

295 *In re Detention of Williams*, 22 P.3d 283 (Wash. Ct. App. 2001) (discovery that is permitted under civil rules of procedure and evidence in ordinary involuntary civil commitment cases applicable in SVP case); *Commitment of Malone*, 336 S.W. 3d 860 (Tex. App. 2011).

296 Legal and psychological scholars have questioned the ethics, validity and bias of jury decisions in this area. See *Stephen D. Hart*, "Actuarial Risk Assessment: Commentary on *Berlin et al.*," 15 *Sexual Abuse: J. Res & Treatment* 338-41 (2003); *Laura S. Edens & John F. Guy*, "Juror Decision-Making in a Mock Sexually Violent Predator Trial: Gender Differences in the Impact of Divergent Types of Expert Testimony," 21 *Behav. Sci. & L.* 215-37 (2003); *John Q. LaFond*, Preventing Sexual Violence: How Society Should Cope with Sex Offenders (2005).

297 *State v. Charada T.*, 991 N.Y.S.2d 9, 10 (2014) (although Supreme Court "erred by permitting an expert witness to introduce hearsay testimony about a crime the respondent was never charged with committing," error was harmless under the circumstances); *State v. Mark S.*, 924 N.Y.S.2d 881, 666 (A.D. 2011) (court in non-jury trial "presumed to be able to distinguish between admissible evidence and inadmissible evidence [and to abide by the limited purpose of hearsay evidence when admitted] and to render a determination based on the former").

298 *People v. McKee*, 73 Cal. Rptr 3d 661, 668 n. 23, 689 (Ct. App. 2008) (court relied on expert's belief that defendant would reoffend even though it concluded that the defendant had not been diagnosed properly); *Robert Prentky et al.*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychol., Pub. Pol'y & L.* 357, 361 (2006) (the misuse of science in the SVP courtroom is a variation of pretextuality).

299 *State v. Adrien S.*, 980 N.Y.S.2d 558 (A.D. 2014). Jury instructions were considered proper in *In re Wyatt*, 701 N.E.2d 337 (Mass. 1998) (an instruction that asked the jury to consider whether a prisoner "is" sexually dangerous, rather than whether he or she "remains" sexually dangerous, appropriately instructed the jury). For cases finding jury instructions on lack of control inadequate, see *Love v. State*, 90 S.W.3d 236 (Mo. App. 2002); *Thomas v. State*, 74 S.W.3d 789 (Mo. App. 2002) (jury instruction inadequate because it did not require a showing of serious difficulty in controlling behavior).

300 *In re Young*, 857 P.2d 989, 1014 (Wash. 1993).

301 See *supra*, "Understanding Evidence".

302 *Joel D. Lieberman et al.*, "Determining Dangerousness in Sexually Violent Predator Evaluations: Cognitive-Experimental Self-Theory and Juror Judgment of Expert Testimony," 25 *Behav. Sci. & L.* 507-26 (2007).

303 *Jonathan Simon*, "Sanctioning Government: Explaining America's Severity Revolution," 56 *U. Miami L. Rev.* 217, 229 (2001).

304 *Bruce Winick*, "Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 *Psychol. Pub. Pol'y & L.* 505 (1998).

305 *People v. Allen*, 809 Cal. Rptr.3d 183 (2008).

306 *Id.* at 210.

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Retired Rep. Sandell Tells MN House: Reform MSOP Mess Now.

Text:

"To: Members, House ways and Means Committee

Re: Minnesota Sex Offender Program

Thanks very much for taking time to read this note and consider its appeal. I've written to some of you during the session and testified at both the House and Senate Human Services Committees regarding the Minnesota Sex Offender Program, a complex, ineffective, and deeply flawed project administered by DHS.

MSOP has been the subject of repeated critical reviews in professional, media, and legislative studies during the last 35 years. Its costs have risen in every biennium – now at $210 million dollars. There is no regular independent assessment of the program. Legislative discussion has been avoided due to the nature of its subject. Minnesota's program is the largest and most expensive in the country. The number of individuals incarcerated (now at 750) continues to rise. The average length of stay is the longest in the country. Yet it has no statistical effect on reducing sexual aggression and assault in Minnesota.

Few legislators are familiar with MSOP, yet should the Omnibus bill pass out of your committee as is, your DFL members will vote to endorse the program and spend another $210 million dollars for this grab-bag of ineffective policy and practice.

It is just irresponsible to continue spending more taxpayers' money every year just because legislators find the subject politically threatening. You can change that!

Before passing the Health and Human Services Finance Bill out of your committee, strip the bill of its MSOP appropriation, suspend its allotment until the 2024 session, and require the Human Services Committee members to attend a series of discussions based on a contemporary assessment of MSOP during the interim.

Let's pay attention to preventing sexual aggression, supporting victims and their families, paying attention to issues of mental health leading to assault, search for the most effective treatment and therapy for offenders, and re-evaluate the process of commitment and rehabilitation.

With sincerity and respect,

Steve Sandell

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MSOP-ML Staff Assaulted; MSOP Administration Responds

by Cyrus Gladden

The Minnesota Sex Offender Program ("MSOP") is a sex offender commitment system created by this state. It operates two high-security confinement facilities in St. Peter and Moose Lake, Minnesota, together holding 750 of those committed to it, exclusive of the 98 additional confinees who have already died, and a few score who have been granted "provisional" or "final" discharge. These facilities are surrounded by double-fencing, with copious razor wire on top of each of those inner and outer fences, and with even more razor wire between them. In every way, the interior architecture of each of these facilities and the way that each is operated are identical to a high-security prison. For this reason and the fact that its confinees are not present due to a criminal sentence, but instead are relegated to this system only after expiration of any prison or jail term they have already served, the many critics of this kind of confinement system call it a "shadow prison" or simply, "America's gulag."

I know these facts with certainty because I am one of those confined in the shadow prison known as MSOP-Moose Lake. Almost all of us are calm and well-behaved – far more so than most inmates in high security prisons. Similarly, almost none of us wish to commit any further sex crimes at this point of our respective lives, especially not those of us who already are age 60 and above (disclosure: I'm 72). In this age range, virtually no former sex offender ever commits another sex crime if released into the general populace. This makes it pointless and frankly simply spiteful to retain those of us in this senior-citizen category, who have long-since completed our lengthy prison sentences. But then, our current confinement is tacitly understood by all as an end-run in avoidance of the prohibition on double-jeopardy.

In the last week of April, I learned of formation of a secret association of some MSOP employees who despise MSOP confinees categorically and who wish the confinees could be confined overtly rather than covertly for the rest of their lives. Because of their hatred of any effort to free confinees and/or bring an end to MSOP, and in particular the entity known as "OCEAN" which advocates that end, they named their entity and its website "LAND." Unlike the open website for OCEAN, most of the LAND website can only be accessed by its mem-

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bers using a password.

Among other things, members of this LAND organization urge their members to harass confinees and to thwart efforts by confinees to gain their rights under law by any means available to members.

This last fact bothered me especially, since within the three preceding weeks I had learned from a judge in the Minnesota Dept. of Human Services' Appeals Division that a series of 14 mailings I had sent to that judge for filing in the administrative appeal I was (and still am) conducting as to General Assistance benefits had not reached that judge. In the same hearing, the attorney representing my opponent, the county agency administrating those benefits also revealed that that office had not received the 12 mailings I had sent to it in connection with that same administrative appeal.

I believe that the most likely reason for this non-delivery of these various mailings was that none of them were ever actually deposited in the USPS mail, despite the fact that I was charged for mailing of each envelope. In the same time period that these mailings were being deposited by me, an attorney employed by MSOP (not a party to that appeal) contacted that administrative judge to discourage her from granting my motion for a videoconference hearing, as opposed to a merely telephonic hearing. Despite the fact that MSOP conducts such videoconferences in other cases constantly, this MSOP attorney told the judge that to arrange for such a videoconference hearing in my appeal would be "inconvenient" for MSOP.

This contact was an unauthorized attempt by a non-party to influence the outcome of a case by making my ability to present my case in hearing much more difficult, and as to presentation of documentary evidence needed to prevail impossible by effectively 'blinding' me to the proceedings in that hearing.

But for an inadvertent admission of that contact by a different MSOP employee, I would never have known of that verboten conversation. Having found out about it, I moved to recuse that judge, and that judge granted that motion. I also petitioned for imposition of Bar discipline against that attorney, given the fundamental impropriety of such secret contacts by a nonparty. I believe that all of the foregoing misconduct was the doing of LAND members in an effort to block my administrative appeal and to make it impossible for me to prevail in that appeal.

Also within the last ten days of April, MSOP introduced a program of urging all confinees to inform on other confinees for every violation of MSOP "policies." This is a body of approximately 900 unpromulgated 'pseudo-rules' imposed on an ad hoc basis by either MSOP or its immediate administrative superior body ("Direct Care and Treatment"/"DCT") upon MSOP confinees, for which violations confinees are punished, often without any right to a hearing to contest the violation.

The pitch for confinees to engage in this 'snitching' activity was supposedly that total suppression of such minor rule breaking is necessary for the integrity of a "therapeutic community" and that anyone unwilling to engage in such snitching was, in effect, as guilty of a rule violation as someone who had actively abetted the rule violation.

MSOP has long insisted, without any peer reviewed scientific research to support it, that violation of even minor institutional rules by a former sex offender under confinement will inevitably lead to sex offending if released. The innuendo appears to be that, if one is caught breaking such minor rules, MSOP will have valid grounds to oppose that individual's release. The introduction of this 'snitching program' appears to imply that failure to 'snitch' will also be taken as valid ground to deny release to the one refusing to snitch.

This was an unprecedented and unjustified attempt to foist such a duty to become an informant to MSOP upon every confinee. Furthermore, to force snitching is inherently to expose the one forced to snitch to danger of bodily harm. And not to be ignored is the trivial nature of most MSOP "policies. For instance, it violates a given policy if one who has been given food on his tray in the dining hall chooses to take that food to his cell hall, rather than to eat it in the dining hall. Many if not most MSOP confinees have violated this and other rules of similar triviality, and yet only a couple out of the 100 or so released thus far to provisional discharge have committed any crime, sexual or otherwise, during the ensuing years of provisional discharge. Had they been chronic violators of MSOP policies, they would not likely have been released. Therefore, it would appear that the two who committed a crime after being released were not such chronic rule violators. Therefore, if anything, those crimes actually disprove the claim that rule violations foreshadow crime commission of any kind after release, much less that, more specifically, they predict sexual recidivism after release. Simply put: they do not.

As comparison to the various minutiae that MSOP policies forbid, a large study reported in *Wollert, Richard & Skelton, Alexander*, "Egregious Flaws Discredit the Butner Redux Study: Effective Policies for Sentencing Federal Child Pornography Offenders Require Findings Based on Valid Research Principles," in: L.A. Dubin & E. Horowitz (Eds.), *Caught in the Web of the Criminal Justice System* (pp. 185-214), London, UK: Kingsley" (2017), proved that even possession of illegal child pornography does not make later commission of 'hands-on' child sexual abuse any more likely. Hence by comparison, the notion that trivial facility-rules violations can cause later sexual recidivism is beyond poppycock.

As a result of common knowledge of the outlandishness of this MSOP claim of importance of stamping out all such trivial rule violations, verbal opposition to this program was voiced widely throughout the program, in both weekly "community meetings" in each cell hall, and in treatment group sessions. In light of this widespread vocal opposition, that program was quietly shelved, at least for the time being. Most believe that this attempted action by MSOP administration was an effort to deprive individuals of release, and at the same time to 'divide and conquer' MSOP confinees by setting policy violators and snitches against each other. This creation of pervasive distrust obviously would make it harder to establish a sense of solidarity in the cause of opposition to MSOP policies and actions that effectively prevent release, such as its adherence to a needlessly interminably long treatment program of pointlessly vast complexity not in use anywhere except in MSOP, in which it was concocted. In sum, the sense of 'us versus them' has never been stronger in MSOP than now. Resentment has greatly risen over such moves, which included the brute banning of any criticism of MSOP's treatment program or any of its practices as "protest" subject to severe punishment.

Almost all MSOP confinees are reasonably well composed. However, a few experience strong anger and a desire to physically lash out at someone who arouses that anger, through taunting or other forms of provocation. Sometimes one in this small unrepresentative sliver of MSOP population will be in a position where he believes that he literally has nothing left to lose if he lets the dogs of his inner rage off their chains. One of these was Nicolas L. "Nikko" Aron-Jones ("Jones" herein). Jones had engaged in a serious fight with another MSOP confinee, in which he caused substantial bodily harm to his opponent. For this, on April 30th, Jones was waiting in the segregation unit known as "Omega 2" to be returned to prison to serve a further term of incarceration, after which he would be returned to MSOP.

On that day, a search of Jones and his room resulted in discovery of a homemade knife (a "shank" in prison parlance). Security officers involved in the search confiscated this shank. However, in view of their expectation that Jones would be taken to prison soon regardless, they did not write up the mandatory reports about that discovery.

Further, since Jones was already in MSOP's segregation unit, they also did not place Jones on security-based restrictions in Omega 2 (including locking him within his cell there), or transfer him to a different, even higher-security location within the facility known as the High Security Area ("HSA"),where constant confinement to one's assigned cell is a matter of course, or even merely pay particular attention to the emotional significance that had caused Jones to create or obtain a shank, as a basis to reasonably suspect that other efforts by Jones to achieve an assault on security staff would likely be imminent. However, such emotional meaning did exist; in fact, Jones was a man on fire inside at that time. Sometime after that search, Jones dismantled a large desk fan and placed its motor into an otherwise empty pillow case – a replacement weapon of a surprise nature.

The next day, an MSOP security officer performing a security round to determine all inmates in that segregation unit were where they were supposed to be, passed by Jones, who then was in the dayspace of the unit. Significantly, at that moment, the door to his cell was open. The security officer, aware that Jones' shank had been confiscated and hence feeling confident in his bodily safety, verbally taunted Jones by sarcastically wishing him a good time in prison, implying by his turn of phrase that Jones would probably be victimized while there. As the security officer began to walk away, Jones quickly and quietly retrieved his weaponized pillowcase and then stealthily crept up behind the officer as he prepared to strike him.

At about 1:30 on Monday afternoon, May 1st, I overheard two "Incident Command System" ("ICS") announcements over the staff radio system here in MSOP-Moose Lake (MSOP-ML) in fairly quick succession. For those never present here, think of these "ICS" radio announcements as trouble alarms. They serve as radio summons for response by specially trained security squad members. However, most often these calls are made merely for a confinee in this facility who refuses to do as he is told or who speaks disrespectfully or hostilely to the staff person generating that announcement. Less frequently, this ICS-call system is also invoked when two confinees are in a toe-to-toe confrontation or high-volume or threatening argument, or (even less frequently) are already exchanging punches with each other. The ICS system would also apply if a confinee used something as an improvised weapon as a threatening device or in an actual assault. However, these last incidents are rare here (thank goodness).

Yet, the fact that these two ICS calls came within a half-hour of each other made me wonder if a multiple-confinee incident was involved. Still, being busy, I continued with tasks I was engaged in at the moment. However, within the next two minutes after the first of these

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alarms, I witnessed multiple squad members running at top speed to respond to the first of these ICS calls, and not long afterward, also to the second one. This seemed to telegraph that something unusually serious was going on.

At this moment, I was returning from a weekly linen exchange to my unit. I noticed that only one of three large electrically-operated doors to" the Complex" (which in this facility holds five cell hall units containing all but about 60 or so of the 440 confinees in this facility) was open – an exceptional state of things suggesting some current security-implicating event somewhere in the facility. I progressed into my own unit and put my new linens where they belonged. I then went to the kitchenette at the rear of my cell hall to heat a cup of instant coffee.

There I encountered one of the confinee-workers in the Property Department's distribution warehouse who had handed me my fresh linen package not more than ten minutes earlier. I glanced at my watch, realizing that he was back from work about one-and-a-quarter hours early. Based on past practice, this implied to me that linen distribution had been suspended only a couple of minutes after I left that area. Although I was curious, I knew that it was unlikely that he would have known anything more than anyone else about the cause for that suspension decision, so I simply went on wordlessly with my coffee-heating errand.

Within minutes, however, rumors began to circulate that a confinee had assaulted a staff member. This, I later learned, was the assault perpetrated by Jones as mentioned above. I was directed to look out the kitchenette window facing toward the front of the facility, giving some view of the vehicle area outside of the confinee-transport garage. Two squad cars were parked there with overhead light bars lit – something that would only occur in a serious incident involving a major crime. It was being suggested then that at least one of these narratives of assault had included serious injury to the staff member. More specifically, this rumor asserted that the staff member had been stabbed (a claim later debunked). Notwithstanding this error, this account included the claim that the staff member had already been transported to a hospital for emergency care.

Until that transport left the facility, all cell halls were confined to their respective day spaces. Most intriguingly, the details offered up in the accounts of this event started diverging so greatly from one account to the next that it seemed that there might have actually been two such assaults. In fact, this turned out to be the case. A different confinee assaulted a different staff member. However, at this point, no details were being asserted at all about this second assault, except that it had happened between 1:00 and 2:00 p.m.

At about 2:15, movement was reopened. Linen exchange was resumed. However, at about 2:40, that exchange was prematurely ended and everyone was summarily sent back to their respective living units. At that point, the same unit lockdown for all units was reinstated.

This was starting to look ominously large – a double assault on staff persons even in the same month, let alone within the same hour of each other, being unheard of to the best of my knowledge, despite having been an involuntary guest here for the last nine years.

Staff persons at the security desk in my cell hall were wearing downright stony facial expressions, something typically reserved for adverse events deemed very serious. They seemed to be involved in tense monitoring of confinees in the day space, as if seeking to determine our respective moods. This alone confirmed behaviorally that something as serious as an assault upon staff had occurred – whatever the details.

We all, on the other hand, were mostly uninformed and certainly not complicit in whatever had just happened. Most of us were occasionally reciprocally scanning the faces of those staff members in an unsuccessful effort to gain any clues about what was going on. The few who simply advanced to the desk and asked outright for an explanation were simply told that nothing could be said then.

Per my schedule, I went to work in the kitchen at this point (4:15 p.m.). We were admitted and fed before the general population as usual, but we were told that something very serious was underway, and that no guarantees could be made about what we would be doing (as opposed to our usual duties) and how long we might be able to stay at work that evening. Six confinees from our work crew volunteered to leave work and return to their cell halls. That offer was accepted, and they left right away. The rest of us stayed and prepared for work, but were given duties that differed from our usual positions, since it became clear that supper would be delivered to the various cell halls and would be consumed there, rather than in the communal dining hall.

Over the course of the evening, many details unfolded. There had indeed been two assaults on different staff members, perpetrated by different confinees. Both had occurred in the segregation area (known as "Omega"). Everything else about these respective assaults differed, however. The first was perpetrated by a confinee known to be very angry about his commitment and virtually everything about this facility. Furthermore, went the story, he had been repeatedly harassed by the staff person he then assaulted. In the moment, something in the interaction between the two apparently struck this confinee as more deliberate harassment and he just snapped.

Like many assaults in confined environments, it was a surprise assault from behind the victim. In this case, the assailant wielded something heavy and solid, smashing the back of the victim's head, immediately rendering him unconscious. A later news report asserted that the object used as this improvised weapon was a fan motor stuffed within an otherwise empty pillowcase, allowing it to be swung with control. According to reports, he then continued to smash the back of the victim's skull with that heavy object -- possibly also kicking his head as well -- as he lay unconscious on the floor. Ultimately, we also learned that as soon as security squad members arrived and were able to subdue and restrain the assailant and remove him from the scene, they began work to do what could be done to stabilize the victim and to arrange for transport to a regional trauma-class hospital for physician triage.

That being done, due to the severity of the cranial injury, a decision was immediately made by physicians at the regional hospital to transfer the victim-patient to the Mayo hospital in Rochester, MN, about 200 miles to the south. Helicopter transport was carried out as soon as available. As of this writing (about 48 hours later), the victim's current condition is not known to MSOP-ML confinees.

The alleged assailant was arrested by city police or county deputy sheriffs for this assault and was immediately transported to either the Moose Lake police station or the county detention center pending filing of formal criminal charges. The next day, Jones was charged with attempted murder.

By contrast, the second assaultive incident was minor. The current narrative, which may or may not be accurate, is that this other confinee, feeling pestered by a different MSOP staff member, simply pushed that staffer back away from the confinee. As defined by the disciplinary rule on assault, this qualifies as an assault, but it shrinks to nearly harmless from a physical harm perspective in comparison to the other assault described above.

Those who know this confinee widely agree that he shoulders symptoms of major mental illness involving flashes of uncontrolled temper. Most believe he should have been committed, not as 'sexually dangerous,' but instead as someone mentally ill and dangerous. This would have allowed him to receive true psychiatric treatment that could have helped him with his problem, making incidents such as his assault on May 1st far less likely. Committing him as sexually dangerous (under disputed criminal circumstances) deprived him of that needed significant treatment and forced him instead to languish in a facility with very little in the way of actual psychiatric treatment. Clearly, this confinee was also tense and frustrated on the day of his assault, just as the other confinee was.

Now recall that, especially because both of these assailants were in the segregation unit, no MSOP confinees knew anything about Jones possessing the fan motor in a pillow case. Further, there was no weapon involved in the other assault and no statements by that other assailant about any intent to push any MSOP staff person. Therefore, no one knew anything to snitch about as to either of them. Hence, snitching could not have provided any avenue toward psychiatric intervention or any process of dialog with either of them by MSOP staff that would have laid bare their state of tension and rage that ultimately provoked their respective assaults.

Certainly, MSOP was obligated to recognize the symptoms of mental illness and inability to handle confrontation by staff. Yet apparently, MSOP at least condoned, and may have egged on such confrontation of both of these emotionally challenged confinees. Certainly, the failure to restrict Jones to his cell by the officers who discovered the shank was directly to blame for the assault by Jones. After that assault, four security officers were placed on suspension for their respective failures that led to that assault. To the extent that anyone could have detected any mood change in the other assailant that would have suggested that violence by that assailant was a likely possibility, because that assailant was segregated, only staff could have come to that suspicion. Hence, MSOP personnel, not some failure by confinees to snitch, is responsible for prompting both of these assaults.

MSOP has been ignoring the mental health of its confinees, allowing the mental maladies suffered by some of them to simply fester unattended and to get worse. Instead, it has been pursuing a course aimed at providing claimed excuses not to ever release its confinees while it goads the fragile ones to completely avoidable acts of violence.

When consulted by a TV reporter about these assaults, MSOP Executive Director Nancy Johnson claimed that these two events made for a total of 42 assaults by MSOP confinees (presumably over the 28 years of MSOP's existence). Unless most assaults on staff by confinees have been kept secret, this claimed number is very dubious. Compounding that doubt is the fact that only a few such assaults have ever resulted in criminal charges. Yet Johnston pressed her claim, adding that such assaults supposedly show the grave danger posed by those committed to MSOP.

No, Nancy, they simply illustrate the well-known fact that any chronically mistreated dog can become a dangerous dog.

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Anyone running a claimed treatment program for committed sex offenders involving confrontation and harassment of its confinees and operating a deliberately endless treatment program which no one can ever satisfy should find another line of work.

In contrast, the treatment program operated by the Minnesota Corrections Department in its Lino Lakes prison has graduated countless thousands of sex offenders over the last three decades with criminal records typically just as extensive as that of those committed to MSOP over the nearly same number of years of its existence. Yet the current recidivism rate for those treatment graduates from the Lino Lakes prison program no longer than three years each has reduced over those same years to a rate less than 3% currently.

This shows that Ms. Johnston's program does not fail because of any 'monsters' committed to MSOP. Instead, its failure is due entirely to its cockamamie, insanely demanding treatment design having nothing to do with sexual offending, unlike any other sex offender programs. Lest you doubt this, ponder closely the fact that when MSOP releases anyone to provisional discharge, it immediately requires each releasee to enroll in a different treatment program in the free world, from start to finish – as if he had never undergone any MSOP treatment at all.

Despite the facts that these assaults could not be attributed to any MSOP confinees other than the two assailants themselves, and that no such other confinees could have known of these assaults when they were imminent, the MSOP-Moose Lake Facility Director and its Clinical Director placed the facility on unit restriction of all confinees.

The memo announcing this unit-restriction facility lockdown cited "Personal Accountability" and "Community Responsibility" the two key buzz-phrases cited as reasons why all confinees should snitch against all others violating or thought to be violating any of MSOP's myriad policies. This was echoed by the follow-up memo of May 2, 2023, which ended with the exhortation to all "to focus on our core values of Personal Accountability, Respect for Others and Community Responsibility..." and to "use this [lock-in] time for self-reflection of your personal choices that contributes to a safe and therapeutic environment."

This was simply a veiled way of implying that this lockdown, not necessitated by any security threat existing in the wake of these two assaults, was just retaliation for the staff-perceived failure by all confinees to aggressively snitch out every rule violation in the facility, regardless how minor, how unconnected to any act of violence, and unlikely to be known by any confinees other than the violators themselves and their confederates in such violations (if any).

Finally, the later memo of May 5, 2023 makes the connection between raising snitching to a nearly universal occurrence and a return to some semblance of ordinary programing as before this lockdown categorically clear and demanding, thus:

"...[There has been an increase in clients challenging facility rules and blatant refusal to follow them. As part of Community Responsibility, clients and staff alike have been tasked with confronting rule breaking behavior to help support the therapeutic environment. ...When seemingly insignificant rules are ignored, safety becomes a concern. ...Because of this, we have restricted movement this last week and had asked each community to focus on our core values of Personal Accountability, Respect for Others, and Community Responsibility at their Therapeutic Community meetings. Moving forward as an attempt to help stabilize our community we will be moving to a managed movement schedule. We will resume open movement when the state of our communities allows. While this is meant to be a temporary measure, it will remain in effect until there is a demonstrated improvement in cooperation with facility rules."

As explained by the facts narrated above, nothing about snitching or about rule compliance by the vast mass of MSOP confinees had anything to with or could have averted the assaults on staff members that supposedly precipitated this lockdown. These were purely actions of two individuals whose propensity for violence was already known (and in fact, was responsible for their placement in segregation, where these assaults took place). As shown clearly from the above account, at least the first, and most severe of these assaults was directly caused by staff negligence and failure to follow critically important security rules.

Contrary to that last memo, this was no "seemingly insignificant rule." Had those security personnel locked Jones into his segregation cell, as they obviously should have after the discovery of his shank, that following assault could never have occurred. This is staff's fault, pure and simple, and is not any possible reflection upon the confinee population of MSOP-Moose Lake.

But there is nothing "seeming" about the insignificance of rules of MSOP. Many things that are regarded as rule violations here do not exist in open society. The example of banning taking food that is given to us in the dining room back to our living units to eat there, and potentially in combination of other food items for a more pleasing dining experience has no rationale beyond the trivial as rules go. For this reason, it is an obvious alternative impression that this rule exists only to prevent us from such better dining experiences, especially in the existing circumstance of dining room meals that, as provided, are far from pleasing.

The converse rule that bars bringing condiments and seasonings to the dining room for use to improve the flavor of foods eaten there would seem to have no rationale at all, save this same aim to decrease our ability to enjoy our food beyond the mere salt and pepper provided there. To suggest that institution safety turns upon not just obedience to such spiteful trivialities, but further depends on whether others inform staff of such behaviors lapses beyond the ridiculous into the unintelligibly irrational.

Frankly, in recent years, there already has been, and still is, quite a bit of surreptitious snitching going on in this facility in any event – so much so that most confinees believe that there is already at least one snitch informing staff for every rule-breaking event that happens here. Almost all of this is motivated by the snitch's belief that by doing so, he may accelerate his advancement through treatment and grant of his petition for CPS or provisional discharge.

However, with so many snitching, often on the same rule infraction, staff does not need all of those duplicative tips. Therefore, the fact that there isn't really any connection between snitching and gaining release remains obvious from the small number or releases per year, despite the fact that so many are already snitching.

The clear reality is that staff could not actually write disciplinary citations for, and engage in administrative prosecutions of every such snitched-out act of rule infraction; staff already aptly choose not to tie up their valuable time pursuing such trivialities. Hence, the whole purpose of such snitching is not to decrease rule violations in the absence of actual consequences for them; instead, it is purely to create records of long lists of such violations that can be used against any given petitioner to the SRB and CAP court for promotion to CPS status or provisional discharge. It is an attempt to block everyone's release by trivialities, in the absence of any serious reason to do so.

The act of admission of such rule violations in the absence of any administrative prosecution with an official finding of guilt is what will legally allow such use of trivialities against one in such subsequent tries to gain release or less-restrictive setting (CPS). Yet such petty violators are falsely persuaded by MSOP therapists that such admission is an important part of their treatment process. Indeed it is – if the intended aim of the treatment process is to find every claimed infinitesimal reason for non-release.

Instead, the real motive of MSOP administration in trying to pressure all inmates into snitching is to impress every confinee that MSOP power over him is absolute, and can force him to do even things that he otherwise would never do. This is 'breaking' the will of a confinee and turning him into a subservient automaton who will follow every order by his MSOP masters. It is part of brainwashing. It is not treatment, it is deliberate instillation of pure fear and desperation of having no means of exit except by following such dictatorial edicts that are contrary to one's physical safety and that may be contrary to one's personal ethics.

The end result is that such slaves become more fawning to their MSOP masters with each successive month. They eventually adopt a false belief that by following MSOP orders, they will be released in due time and they will not mind anymore that 'due time' will take decades. In fact, each of these brainwash victims will rationalize this by adopting the further belief that such massively delayed release is actually his own fault for being deviant and hence, supposedly nearly impossible to treat. In the shame induced by adoption of these beliefs, he will even question whether he should ever be released, believing the assertion constantly repeated to him that he represents a danger to public safety.

Rather than strengthening the judgment, resolve, and self-control of such a victim of mental manipulation, this process reduces him to a trembling mass of protoplasm convinced that he has no such power and that, if released, he will act in accord with his basest momentary impulses. By depriving its victims of their own decisional processes, this mistreatment only produces the very monstrosities it claims to wish to reform.

Instead of attempting to establish a 'snitch culture,' MSOP should focus on changing its treatment modality and its methods of operation in ways that provide a genuinely humane and kind way of interacting with all of its confinees. This is needed in order to provide efficient treatment and timely release for every confinee who at any time within such confinement no longer presents either: (1) a sexual disorder recognized as such within the current edition of the Diagnostic and Statistical Manual of the American Psychiatric Association; (2) a probability of sexual offending within five years of projected release to a level more likely than not (in excess of 50% probability); or (3) experiencing of absolutely irresistible impulse to immediately commit a sex crime upon a person.

As to any person committed to MSOP who meets any of these three alternative criteria, MSOP should immediately petition the Special Review Board (SRB) and, if needed, appeal or defend against opposing appeal to the Commitment Appeal Panel (CAP) for final discharge of any such person.

This inherently includes any person

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under commitment to MSOP either (a) whose last sexual offense occurred while they were still juveniles; (b) whose last sexual offense occurred more than ten years before the current date; (c) whose commitment as either a sexually psychopathic personality or as a sexually dangerous person was based in part on expert testimony derived from clinical risk assessment methods; (d) who currently are seriously, chronically physically disabled or suffer from a seriously debilitating illness; or (e) who have attained at least the age of 60 years.

Additionally, MSOP must refrain from any assessment methods or treatment considerations based on any "dynamic risk factors" assessment techniques: (1) that are not based on academically accepted actuarial statistics establishing a substantial difference for each included dynamic risk factor in terms of observed recidivism rates in the comparative sample of offenders; (2) that include "acute" factors subject to rapid change; (3) that are vague or otherwise capable of being subjectively judged to be present as to the test subject; or (4) which techniques fail to account for "protective dynamic factors" applicable to the assessed person, including all consideration used in evaluating whether one is succeeding at desistance from sexual offending.

MSOP must also discontinue considering as part of anyone's "sexual history" any assertions of crime that were neither subject of any conviction nor have been admitted by the perpetrator of said crime. Nor should MSOP either compel participation in any polygraph, "Eye Detect," or any other form of claimed "lie detection." Nor should MSOP rely in any manner or to any extent upon, or submit same as evidence of any purported sexual crimes beyond such convictions because it is forced self-incrimination and, distinctly, by all current technical means is atrociously inaccurate.

Nor may MSOP rely upon any "actuarial" risk assessment instrument that includes any factors of: (1) whether prior sexual crimes involved male, rather than female victims; or (2) whether one was married or was in a cohabitational relationship with any adult partner in intimacy for any length of time.

Nor may MSOP rely upon any version of the Minnesota Sex Offender Screening Tool or any other actuarial screening tool based at least in part on factors not involving actions of sexual misconduct or any actuarial risk assessment tool which does not fully account for the diminishing effect of increasing age of the subject on probability of sex-crime recidivism or which permits scoring points or partial points for attitudes, beliefs, or opinions on the part of, or statements by the subject as to any matter, including sexual topics.

MSOP must refrain from use of: (1) any polygraph examination; or (2) a penile plethysmograph ("PPG") test, Abel/ABID assessment or any other form of test of sexual response, attraction or interest.

The Department Of Human Services and MSOP must provide each person, when released from MSOP detention, whether unconditionally or provisionally, remedial life-skills, vocational training, and education to the fullest level of such person's individual ability, each to the extent such services are accepted by the person. Additionally, the DHS must find us adequate housing, jobs suitable to our education and training, and provide all necessary means of support, including cash stipends, until we can support ourselves through such employment or stable independent-contractor work or stable small-business.

MSOP must cease using Cognitive-Behavioral Treatment (CBT) and all experimentation and use only treatment programming as to which there is a scientific consensus or clear evidence based on randomized controlled trials (RCTs) that such treatment programming has a significant impact on sex-crime recidivism. As to any person committed to MSOP for whom there is no treatment programming that has a significant impact on sex-crime recidivism, MSOP must petition the SRB and CAP process or any other forum of competent jurisdiction to terminate that commitment and to finally discharge that person.

MSOP must also cease each of the following practices:

- deliberately sluggish treatment;
- 'patient' hold-backs and demotions;
- frequent treatment regimen replacements, requiring patient 'start-overs';
- all attempts at the inherent impossibility of extinguishing deviant attractions;
- ill-conceived, failed attempts at 'brainwashing';
- refusal to acknowledge any "meaningful change" despite successful treatment completion;
- lack of releases through treatment;
- duration of confinement through old-age to death; and
- insistence on an unattainable 'zero-percent recidivism risk' "public safety guarantee" before granting release

MSOP must cease employing undefined, unspecific "Matrix" standards to justify overly conservative, subjective evaluation by clinicians that deliberately thwarts treatment advancement and prevents release. MSOP must also cease using "Need Areas" rhetoric as excuse-making to keep its committed persons detained.

There are many other flaws and shortcomings in its approach to sex offender treatment. Moreover, so many problems exist in how MSOP approaches conditions of confinement issues that it is simply not possible to address that distinct topic at all within the confines of this article.

In sum, MSOP should invest its energy in fixing the vast array of serious flaws and problems in how it approaches treatment and release of its confinees, rather than waste efforts and attention focusing on disregard by confinees of its myriad trivial policies. There is an old adage that before criticizing another for the mote of dust in the other's eye, one should see to removing the beam of lumber from his own eye.

Bluntly, MSOP's problems are many, serious, and largely self-inflicted through bad management and unrealistic and even flatly incorrect obsessions. Because of this, MSOP has attracted deserved harsh scrutiny from legislators. It should not seek to blame its confinees for those problems – especially not problems as to which confinees had no contact with.

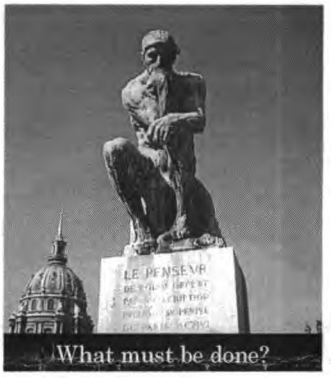
And, worse than scapegoating, it should not seek to force confinees to engage in practices, such as snitching, that centuries of prison experience teach are pointless and dangerous. In the 2011 Legislative Auditor's report on MSOP, it was noted that, in MSOP-Moose Lake, a facility of about 430 confinees, there were then (and still are) about 400 security personnel. The same near-parity of numbers also applies in the St. Peter MSOP facility. Surely with that number at its disposal, MSOP can do its own investigation of confinee misbehavior. Leave us out of it, please.

Epilogue Mon., May 8, 2023: On Sunday evening, a multi-person fight among confinees took place in residential unit 1-E in MSOP-ML. When security squad members arrived and broke it up, they placed one of the participants in handcuffs. That individual was a person previously involved with the protest movement in this facility. The squad members then stood aside while the other fight participants, not yet cuffed, punched the cuffed one a few final times.

On Monday, another assault on staff members occurred in unit 1-E at about 12:35 p.m. Current information about that event indicates that this different confinee assailant essentially went berserk from rage. Within a very short time, he smashed a chair into one female staff member's face, nearly bit all the way through another female staff member's finger, and earnestly tried to gouge out the eye of the Unit Director with a finger. Previously, those who knew the assailant, including this writer, have thought of him as mild-mannered and calm. Because Unit 1-E was thereupon put under immediate lockdown, it has not been possible to interview any eyewitnesses to either the fight the preceding night (with different participants) or to the staff assault this afternoon. Consequently, further information about these events may be slow in emerging.

It has been learned that there was significant dismay that the security squad members cuffed the one participant in the Sunday evening fight and appeared to deliberately allow his opponents to take a final series of 'free shots' at him in that defenseless situation. It is not known, however, whether this had anything to do with the assailant's motivation for his assaults on staff members today.

It is clear, however, that dissatisfaction and emotional disquiet appear to currently prevail among many confinees in MSOP-ML.



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Coalinga Shakes Off Latest COVID-19 Variant.

by Cyrus Gladden

This follows up after my article on an outbreak of COVID-19 in the Coalinga SOCC facility in *tLP* # 7:5 (p. 1). That outbreak was amazingly virulent, sickening about three-quarters of the 950 committed sex offenders in that facility. One nearly died. Many others were sickened so seriously that they had to be briefly hospitalized. However, the regimen of treatment with an antiviral drug Paxlovid seems to have worked wonders. At this writing the outbreak has passed its peak. New cases have almost completely been eliminated, and those who were infected are now either fully recovered or have firmly entered a recovery period. In fact, a health official has told Gary Gillespie, one of the committed in Coalinga, that standard programming will be fully resumed before you read this, barring any unexpected turn in the outbreak. By that time, it is expected that no active COVID-19 cases will remain in the facility.

Still, sadness lingers over the fact that, overall since COVID-19 first began ravaging this country, more deaths from that virus occurred at the Coalinga facility per capita than at any other state hospital or prison in California. It also signifies that staff efforts at sanitation and sterilization in the facility lagged far behind parallel efforts elsewhere. This points up the need for absolute insistence that modern standards of health care be in effect in every commitment facility for sex offenders anywhere in the country.

Nonetheless, congratulations guys!

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