The Legal Pad | Volume 1, Issue 6 | May 8, 2017
"I'm no longer accepting the things I cannot change.... I'm changing the things I cannot accept." - Angela Davis

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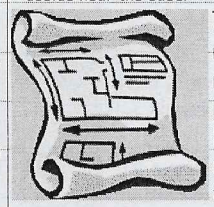
Karsjens: What to Expect in the 'SCOTUS Phase' on/after May 23, 2017

by Kenneth Daywitt and Cyrus Gladden

On or before May 23, 2017, our attorneys (the Gustafson Gluek firm) will file their argument in the Supreme Court of the United States (informally nicknamed "SCOTUS") asking its justices to review the decision by the Eighth Circuit's 3-judge panel reversing Judge Frank's ruling in the *Karsjens* case. In the Latin used by that highest court, this request is a "petition for writ of certiorari" (pronounced as if two words followed by a name: "sir" "shore" "Ari", informally, a "cert. petition"). This petition gives SCOTUS the option to hear and decide hear the case.



Typically, SCOTUS considers approximately 7-8,000 such petitions per year. SCOTUS accepts only about 80 of these. In this case-selection process, SCOTUS judges ("justices") look for controversies about the meaning and application of the U.S. Constitution and other matters of national importance. An initial screening eliminates most petitions. This means that a rapid response from SCOTUS usually means a rejection of the case.

The justices then meet on Wednesdays and Fridays in a secure conference room to consider which of the remaining petitions to grant. Before each conference, the justices study the petitions to be considered then. In each conference, cases are discussed in turn. As to each, the Chief Justice briefly summarizes the case. Then each justice, in order of seniority on the court, is given the opportunity to comment on it, stating why he thinks the case should or should not be "granted cert."

After the comments, the justices vote on which cases to accept. Of the nine justices in SCOTUS, four votes are needed to grant cert to any given case. If *Karsjens* does not achieve cert, the ruling by the Eighth Circuit will stand.

If *Karsjens* is granted cert, it will surely not be heard this year when the Court's term begins on the "First Monday" in October. If accepted by SCOTUS, *Karsjens* will most likely not be heard by SCOTUS until October 2018.

In that event, before that oral argument, our lawyers and lawyers for the opposition, together with each entity granted amicus curiae ("friend of the court") status in the case will file briefs stating how they think the issues presented by the case should be decided – and why. From these detailed briefs, the justices will study the case closely with substantial assistance from their staffs of law clerks.

On the designated hearing date, the lawyers will present oral arguments to the justices. The justices often interrupt these presentations to ask lawyers difficult and pointed questions. These questions may explore the merits of an issue honestly and neutrally. Alternatively, a justice may ask questions in the hope of building support from the other justices for a favored consensus. In such instances, a question may be aimed at reinforcing a favored position by either litigant, or at tearing down a disfavored position. However, the most common concern reflected by such questions is the impact that the precedent which may be set in the case at hand could have on future cases and the overall impact such decisional trends would have on constitutional law in the long run. The responsibility for carefully and wisely governing this should cause SCOTUS justices to transcend current political considerations and personal preferences. This is our greatest hope in this effort to capture the attention of SCOTUS.

After oral arguments have been completed, another private conference takes place, at which the justices discuss the case and vote on how they believe the case should be decided. Sometimes a case will be effectively decided right in that conference. In other cases, uncertainties or disagreements among justices continue afterward for some time. In such cases, justices may write and circulate draft opinions to the others, in an effort to build consensus among the justices. This is an earnest attempt within SCOTUS to find points that at least most justices can agree on. On a controversial point, these private discussions/debates can continue. Thus, draft opinions are changed (perhaps more than once), and justices may change their positions in a search for the soundest basis for decision in the case.

Once a case reaches the point where a majority, or at least a plurality, in favor of a decision has 'gelled,' the process of writing the final opinion(s) begins. If the chief justice sides with the majority, he assigns writing the majority opinion either to himself or to one of the other justices in the majority. When the chief justice is not with the majority, the senior justice in the majority assigns writing of that majority opinion.

One or more justices may file either a "concurring" or "dissenting" opinion. A justice may concur to state a reservation about a majority decision with which he or she otherwise agrees, a limitation he/she would like to see applied to it, or simply a different path of logic taken to arrive at the same result in the case.

Alternatively, a justice filing a dissent thereby states that he or she would decide the case contrary to the majority, giving his/her rationale. While dissents do not alter the outcome of a case, they can serve as a basis in later cases for SCOTUS to reconsider an issue in light of developments that may vindicate a dissenting opinion's concerns.

Cases decided on a five-to-four vote basis generally reflect controversy within SCOTUS about a given issue. Nonetheless, a decision by a five-justice majority still controls the outcome of the case as definitively as a unanimous decision.

However, a special "split decision" situation is presented when the opinion by a plurality does not have the five votes needed for an actual majority of justices. In such cases, concurring opinions needed to achieve the required five votes functionally govern the case's result. The justice writing the concurring opinion thus becomes the controlling "swing vote" in that case. This happened, for instance in *Kansas v. Hendricks*, in which Justice Kennedy became that swing vote through his concurrence. Hence, the actual holding in that case was limited by the terms of his concurring opinion.

Hopefully, this will help you to gain an accurate idea of what may transpire in SCOTUS over the upcoming period as *Karsjens v. Piper* is presented to that highest Court in the country.

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Gladden and the Wage Case: Is No News Good News?

Everyone knows that the *Gladden* case remains on hold, pending the outcome in the *Karsjens* case in the U.S. Supreme Court. I have talked about this relationship between the two cases in past issues, so I won't repeat that discussion now.

The current focus of the *Gladden* case is on getting and reviewing the recordings from 1994 legislative committee and Task Force hearings about the then-pending bill that ultimately became the SPP/SDP commitment law. Getting those CDs and getting them uploaded into my legal network folder is provng to be a longer process than expected.

These CDs are in two large installments. The first of these was last known to be in the hands of the Gustafson Gluek firm ("GG"). If it has not already done so, however, GG is about to send that batch to MSOP's IT staff for that uploading.

The second batch is either on its way from the MN Historical Society Library to my friend for

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decompression and sound quality enhancement, or they are about to mail that batch. As on the first batch, once that digital work is done by specialists on the audio, those CDs will likewise head off to GG, and ultimately on to IT and hence to my legal space on the network.

Do not expect fast work on these recordings on my part, however. This is just the beginning.

You already know that we are searching for evidence that, in passing the "MCCTA of 1994" (the SPP/SDP law), the legislature intended to set up a system of post-sentence lifetime preventive detention of sex offenders whose criminal records were deemed "the worst" — with no realistic possibility of release.

Such a legislative intent for permanent detention irrespective of true mental illness or disorder and without evidence of "volitional impairment" is sufficient to cause a court to strike down the law embodying that aim.

Psychiatrists define "volitional impairment" as a state of being so subject to sexual impulses that one acts reflexively or without any decisional process, immediately committing a sex crime. Under *Kansas v. Crane*, a mere tendency to decide to commit a sex crime as a means to gratify a deviant sexual orientation is not constitutionally sufficient to support commitment.

We all know that among our number, almost none of us have that lack of ability to control our actions in the moment. Therefore, almost no one here qualifies for the constitutional minimum required to be committed.

I am convinced that statements were made in the course of those 1994 legislative hearings that will prove beyond doubt that the intent of legislators was to keep us all confined for the rest of our lives simply as a politically reassuring 'look good' measure, all the while aware that none of us would satisfy that definition of "volitional impairment."

They acted in willful disregard of psychological science that already then showed: (1) that sex offenders have a low recidivism rate; and (2) that there is no scientifically valid, reliable way of predicting whether some sex-crime ex-convict will recidivate in the future.

In sharp contrast, these hearings were veritable 'hate-fests,' a parade of screeds against sex offenders as the most vile of people and sex crimes as inflicting such emotional harms on victims as to be 'fates worse than death.' Much of this was nothing more than a march of persons with the view that sex itself is a dangerous or repulsive thing, and with projections that anyone with sexually 'libertine' attitudes and proclivities must be restrained, as a projection of feelings that those individuals themselves have experienced within themselves but sought to repress.

In seeking to salve such concerns in those hearings, legislators themselves echoed such sentiments, and did so even more emphatically. This will emerge from these audio recordings.

However, in all, about 65 hours of such hearings are said to be included in these recordings. Each recording must be listened to closely, with frequent repetition of certain passages, and then subsequent listenings to ensure that the significant passages have been excerpted correctly.

Based on my experience with the recordings of the full Senate and House sessions when passing the MCCTA on Aug. 31, 1994, it will probably take an equivalent of three full playings of each recording to ensure this completeness and correctness of all excerpts. Therefore, this will total nearly 200 hours of listening.

Unfortunately, this can only be done at one location with extremely limited hours of access. Hence, it is clear that this process of listening and excerpting will take a number of months to complete. From time to time during this process, I will do my best to keep you abreast of my progress and of particularly impactful findings of the inflammatory statements I find in those recordings.

That's it for now on the *Gladden* case. Now let's talk for just a minute about the '50% wage recoupment case,' which we can call the '*Gamble* case' in honor of its first-listed plaintiff. (In all there are five of us).

You'll recall from my last issue that the State Attorney General, acting for the defendants, moved for dismissal of each claim in this case, for alleged reasons applying to one or more of those claims. I wrote and submitted a lengthy brief opposing dismissal.

Of particular note, the defendants argued that the *Martin v. Benson* case of 2011 decided adversely against James Martin by Magistrate Judge Keyes bars the claim in *Gamble* that the federal FLSA (including the federal minimum wage requirement) requires that we be paid that minimum wage.

However, James Martin proceeded *pro se*, and it is clear that he did not know that patients in mental facilities who are given work that otherwise would be done by workers from outside the facility are covered by the FLSA. In turn, because he did not address that point in his argument to the Court, Judge Keyes apparently proceeded without that critical information. (There is no mention of it in his opinion.)

In the lack of awareness of that critical piece of law, Judge Keyes proceeded down a mistaken logical path involving consideration of whether or not we "need" minimum wage, as a matter of consideration of legislative intent.

However, it is axiomatic that when the terms of a statute are clear, or can be (and have been) derived in judicial opinions, based on those clear terms of the statute itself, no resort to examination of statements of legislative intent is permissible.

Had Judge Keyes only known of the inclusion of "patient workers" within the FLSA, he never would have proceeded down that erroneous path of 'need,' and instead would have ruled for Martin on the face of the FLSA and its plain construing judicial opinions to date on this very point.

In the *Gamble* case, the magistrate judge, who appears to be careful and thoughtful, has thus far taken over a month and a half deliberating on the dismissal issues, including this critical point itself. This period of deliberation telegraphs that she is taking our argument on this point earnestly, not simply brushing it aside.

While this is no guarantee of success, it is good news that we are being taken seriously, both on this specific point and on our other claims in the case.

So, in sum, the current status of the *Gladden* and *Gamble* cases, for separate reasons, is one of quiet proceedings that offer reason to be upbeat about both cases. Thus, no news is, in this instance, good news.

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A Useful Thought as Preface:

[From Cory Doctorow, "Gimme Shelter: Disasters Don't Have to End in Dystopias," Wired, 25:04 (April 2017, pp. 15-16, at 16:]

"Here's how you make a dystopia: ...The belief in the barely restrained predatory nature of the people around you is the cause of dystopia, the belief that turns mere crises into catastrophes. ...Whether ...disasters are dystopias? That's for us to decide, and the deciding factor might just be the stories we tell ourselves."

The same reasoning can be applied to "sex offenders." Our society fearfully conjures up monstrous mental images of inhuman crimes inflicted by monsters, and gives those believed capable of such acts that label.

Believing in a fictional notion of the ever-present proliferation of such crimes and such monsters in their neighborhoods (based on nothing more than a handful of rare instances branded into the public consciousness by never-ending media coverage), some members of the public appoint themselves as "activists" and demand legislative action to keep "sex offenders" away from them, and even to continue to confine them cumulatively to their ended sentences, on nothing more than that fear of future crimes that probably would never occur, based on known statistics.

In this ceaseless fantasizing of windmills and boogeymen to tilt at, society makes itself the victim of its own state of panic, looking for 'signs' of such monsters around very corner and under every rock.

Society needs to stop telling itself stories involving acceptance of belief in a supposedly barely restrained predatory nature of some mythical class of non-humans called "sex offenders," if it hopes to avoid the dystopia it has been on the road to creating unwittingly for the last 40 years.

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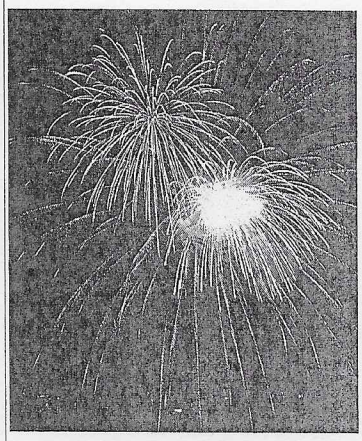

The True Nature of Sex Offender Commitment

The first thing you need to understand is that sex offender commitments have nothing in common with civil commitment of anyone else.

Traditional civil commitment was aimed at those who suffered episodic loss of contact with reality – delusions so engrossing that their ability to function was totally disrupted, including matters like the ability to safely cross a street, or who suffered from pathological urges to violent actions against themselves or other people.

Granted, this could include irresistible impulses to commit a sex crime. However, the focus in traditional commitments was not on the particular type of feared action, but rather, on the certain imminence of the delusional or irresistible act. Only those indisputably under such delusions or irresistible impulses were subjected to commitment.

In contrast, in the 21 sex offender commitment laws now on the books in the U.S., where words like "impulse" and "urge" are

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used, they mean any motivation, no matter how abstract, attenuated, and strictly confined to fantasy a sexual thought or desire might be. There is no limitation to imminent sex crimes and no requirement of true irresistibility of any momentary sexual impulse. Indeed, so-called "expert" forensic psychological testimony at sex-offender commitment trials will often include an assertion (stated with a perfectly straight face) that the individual in question has some level of likelihood (as low as 1%-5%) of committing a sex crime at some unknown, speculated time in the remainder of that person's lifespan.

In another contrast, traditional commitments not only require a finding of a specific mental illness, but also focus on its causation of the "dangerous to others" status (where it exists). But in sex offender commitments, no mental illness is required. In fact, to facilitate such commitments, psychiatrists have invented definitions of mental states called "disorders." Some disorders merely restate the fact of a sex offender's particular past crime(s), while others lapse into boundless vagueness (such as, "antisocial personality disorder" – often panned as being nothing more than 'jerk syndrome.').

In truth, all of this is simply excuse-making for refusing to release sex offenders when their prison sentences end. This is done, not out of any reasonable fear that any of them will commit another sex offense immediately following prison release, but instead out of a junk-science assertion that, eventually – perhaps many years or even decades later, they might do so.

Contrary to cultural myth propagated by those with something to gain by spreading fear and hatred, as a class, sex offenders have the very lowest rate of committing new sex crimes after release from prison, compared to recidivism rates of prison releases who committed other types of crimes for a later crime of the same type as their conviction. Therefore, in order to justify commitment of a given sex offender, forensic 'expert' witnesses must come up with all manner of hair-splitting distinctions and exceptions in an attempt to cast the targeted sex offender as 'highly likely' to reoffend, with a 'serious difficulty' in resisting something incorrectly called an "impulse" to do so. That such distinctions and exceptions simply have no basis in science at all doesn't bother these hired character assassins or the judges who accept their every word as if stone tablets delivered by the Hand of God.

Judges and other participants in this judicial system of sex offender commitments know full well that these prognostications by such 'experts' are merely prostitution of the psychiatry and psychology profession, and that such testimony is merely the plausible rationalization for predetermined judicial will: preventive detention probably for the rest of a sex offender's life. Politics and fanaticism and the bureaucracy they drive ensure that administration of sex offender commitment really means permanent detention, not treatment and release.

Meanwhile, other sex offenders, with records of such crimes just as extensive, are regularly released onto closely watched parole, which they complete without incident or, at worst, are re-imprisoned for a "technical violation" of the elaborately restrictive terms of their paroles. In short, the correctional system handles released sex offenders quite adequately, proving the lack of necessity for their commitment.

No system is perfect, of course. We must simply accept the fact that total perfection is unattainable by any kind of system. Nonetheless, the correctional system is so efficient that, out of approximately 100,000 sex offenders released from prison every year, those who then perpetrate either serial or violent sex crimes upon defenseless strangers are so few that they make national headlines in each of those rare instances.

Thus, sex offender commitment is an unjust, immoral, and wasteful boondoggle. But it also quietly opens the trapdoor to a steep and very slippery downward slope into a dark abyss of totalitarianism where, as in Minority Report, individuals of any class singled out can be detained forever, not for any crime, but just for 'dangerous' thoughts or emotions. In fact, this creeping spread is already beginning. All misuse of commitment to confine those feared to be dangerous – including sex offenders -- must be stopped, or freedom will exist for none.

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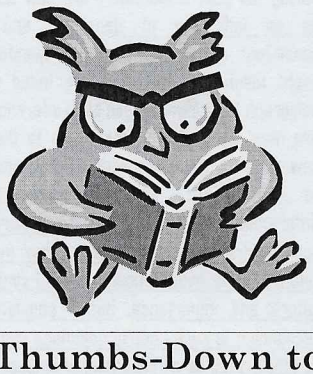


Thumbs-Down to Polygraph Testing of Sex Offenders

Editor's Note: The following article excerpt confirms and expands on items in previous issues concerning the unscientific nature of polygraphy in the context of testing of sex offenders after their convictions, including as part of sex-offender treatment.

Gershon Ben-Shakhar, "The Case Against the Use of Polygraph Examinations to Monitor Post-Conviction Sex Offenders," 13 *Legal and Criminological Psychology* 191-207 (2008)

Abstract excerpt (p. 191):

"...[T]he prevalent method of polygraph testing, the CQT, suffers from several major flaws and has no scientific basis. These flaws, which characterize all usages of the CQT, including its use with sex offenders, create a considerable risk of false positive as well as false-negative errors. Second, no methodologically sound research examining the validity of the CQT, neither in its forensic application, nor in its use with sex offenders has been conducted. Finally, ...the use of CQT polygraphy with sex offenders is even more problematic than its common use as an aid in criminal investigations. Clearly, rehabilitation programs of convicted sex offenders are highly important, but the use of polygraph testing in this context is misguided and instead of reducing recidivism in sex offenders is likely to achieve just the opposite."

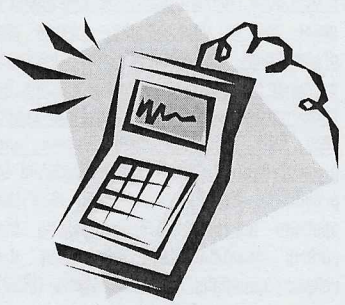
Text:

(p. 192): "...[T]he physiological measures monitored by the polygraph are peripheral measures governed by the autonomic nervous system (ANS), such as changes in skin conductance, heart-rate, and blood pressure. These, as well as other autonomic measures, are by no means measures of deception. Rather, they measure autonomic arousal and they may be triggered by a host of factors, such as surprise, cognitive load, loud noise, as well as fear of being classified as 'deceptive' by a polygraph examiner."

(p. 193): "...[A]ll the physiological measures monitored by the polygraph display very large individual differences. ... Typically, responses to relevant questions pertaining, directly or indirectly, to the issue under investigation are compared with responses to some form of control or comparison questions. The choice of these control questions and the inferences made on the basis of the comparison between responses to the two types of questions are the crucial factors determining the validity of polygraph tests.

"The CQT relies on relevant questions that are directly related to the event under investigation ('did you do it?' type of questions) and uses control questions similarly formulated, but related to non-specific issues from the examinee's past history."

(p. 194): "The questions are of three general types: (a) Relevant questions – directly crime-related questions of the 'Did you do it?' type (e.g., 'Did you break into Mr. Jones' apartment last Friday night?'). (b) Control questions – focusing on general, non-specific misconducts, of a nature as similar as possible to the issue under investigation (e.g. 'Have you ever taken something that did not belong to you?'). (c) (Irrelevant questions – focusing on completely neutral issues (e.g. are you sitting on a chair?'). These are intended to absorb the initial OR evoked by any opening question, and to enable rest periods between the more loaded questions. Typically, the whole question series is repeated three or four times. An additional important component of the CQT is an attempt to convince the examinee that the [polygraph is highly accurate. For this purpose, a **rigged** card test is usually administered either before conducting the CQT, or during an intermission between CQT sessions...."



(p. 196): "...[F]ear of being falsely classified as deceptive and bearing the consequences of such an error is one salient factor that may cause strong reactions to the relevant, crime-related questions among innocent suspects, even if they believe in the veracity of their answers to the relevant questions.

"...[A] dishonest examinee that frequently steals, or injures his fellow men, will show stronger responses to a control question regarding the aforementioned activities than a virtuous person. Therefore, paradoxically, the chance that a CQT will incriminate the honest examinee (who does not tend to react to the control questions) is greater than the chance that a dishonest examinee will be incriminated. Indeed the very logic of the CQT points out the danger that the honest man's version will be judged untrue.

(pp. 196-97)" "... A basic requirement for any test is standardization (e.g., *Anastasi & Urbina*, 1997). This requirement is essential to guarantee that all examinees undergo the same experience. Only when it is fulfilled do the resulting scores (or evaluations) have a uniform meaning, allowing comparisons between different people who took the test. In the case of the CQT, this requirement is not met. The pre-test interview, which is completely subjective, is an essential part of every CQT. The control questions, which

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later form the basis of the polygraphist's inferences, are determined during the pre-test interview and their selection and formulation depend solely on the interrogator's intuition, and the relationship he or she forms with the examinee.

"In addition, the testing conditions may also be a function of the examiner-examinee relationship. For example, an examiner may present the questions in a different manner when he believes that the examinee is deceptive than when he believes he is testing a truthful suspect. This feature of the CQT has been acknowledged by several supporters of this technique. For example, *Honts & Perry* (1992, p. 372) wrote that 'an examiner who was motivated to produce a deceptive result might ask over-general or provocative relevant questions, and spend a great deal of time on their review and presentation. Subsequently, this unethical examiner could ask very narrow, specific, or inappropriate control questions and spend very little time on their review and presentation. An examiner predisposed to produce a truthful result could take the opposite approach, overemphasizing the control questions and minimizing the relevant questions.' *Honts & Perry* (1992) raised this possibility in relation to an unethical and dishonest examiner, but decades of research in social psychology teaches us that honest persons can be unintentionally affected by their prior beliefs (e.g. *Chapman & Chapman*, 1982; *Klayman & Ha*, 1987; *Snyder & Swann*, 1978a, 1978b). More recently, *Abrams* (1999, p. 224) made a similar comment and wrote that '...there is a delicate balance that exists between the comparison and relevant questions and many variables can tip this balance in either of those two directions. Too much discussion of one or the other during the pre-test, a difference in inflection or loudness when the questions are being asked, any discussion between charts that stresses either the relevant or comparison questions, or any mental activity on one question versus another can weigh the balance in the direction of that particular emphasis.' These citations clarify the implications of the unstandardized nature of the CQT. It is therefore clear that, by and large, polygraph examinations conducted by different interrogators (even for a given case and suspect) are liable to be quite different from each other."

(p. 197): "Lack of standardization characterizes not only the choice and presentation of the CQT questions, but also the measurement and quantification of the physiological responses. This is rather surprising because the type of physiological responses monitored during a typical CQT *can be easily measured in an objective* manner, using computerized procedures. In fact, such an objective quantification is a routine procedure in psychophysiological experiments, and computer algorithms have been developed for measuring the responses in the CQT (e.g. *Kircher & Raskin*, 1988). However, objective, quantified measurement procedures are rare in CQT practice.

"Some polygraph agencies rely on an overall evaluation of the polygraph charts. This approach is clearly impressionistic and subjective, and as such, vulnerable to various biases...."

(p. 198): "In the CQT practice, it is considered vital that the same interrogator constructs the questions and conducts the questioning. Often this interrogator also tallies up the results of the examination. This approach introduces contamination into the investigative process because judgments made on the basis of the CQT are based on more information than is contained in the physiological measures alone (e.g. the examinee's criminal records and the information contained therein; the behavior of the examinee during the pre-test interview and the test). ... Contamination may introduce a bias (labeled 'confirmation bias', e.g. *Ben-Shakhar*, 1991; *Elaad et al.*, 1994) into the polygraph examiner's final judgment, because the knowledge gathered prior to the polygraph investigation may induce certain expectations in the examiner and the entire polygraph investigation and chart interpretation may be biased in favour of these prior expectations.

"An interesting and impressive demonstration of the contamination effect and the type of bias to which it could lead, was presented in the '60 minutes' television program, produced by CBS in 1986, as an informal experiment conducted by its producers. As part of the experiment, they independently approached three polygraphists, with a request to conduct an investigation for a firm from which some photographic equipment had allegedly been stolen. The polygraphists were told that only four employees had access to the equipment, and therefore only one of them could have stolen the equipment. They were also told which employees was suspected of being the thief, but that there was no evidence to support this suspicion. In truth, no equipment had been stolen, but each polygraph interrogator was given a different name as the name of the suspected thief (unbeknownst to the employees themselves). Each of the polygraph interrogators examined the four employees using the CQT and each of the three investigators reached the confident conclusion that the employee that had been named to him lied during the polygraph investigation, while the three other employees had spoken the truth. This *demonstration gives a very vivid illustration* of the confirmation bias that may result from contaminated CQT examinations."

(p. 199): "...[P]rior expectations of polygraph examiners affected the way they interpreted CQT polygraph charts, when in reality these charts were inconclusive.

"This contamination problem is especially acute when results obtained from CQT tests are presented as objective and scientific, when in fact the CQT is just a tool aiding the investigator in collecting impressions."

(pp. 201-02): "...[S]ince the use of polygraph with sex offenders falls under the category of screening tests, rather than specific-incident tests (see *Grubin*, 2008) it is likely to be even less valid than the forensic use of polygraphy (see *NRC*, 2003). Specifically, the CQT is used with convicted sex offenders to verify whether they complied with their parole conditions (e.g. whether or not they engaged in various sex-related misbehaviours). Thus, unlike the typical criminal investigation, sex offenders are not examined about a specific crime or a specific known event, but rather on a set of hypothetical misbehaviours that might or might not have occurred. This application of the CQT falls in the category of 'event-free' usages, which [poses] an additional host of concerns. *Ben-Shakhar* (1989) argued that all the problematic features of the CQT become even more severe under the event-free application, because this method cannot be used in a straightforward manner. Recall that the relevant questions used in the CQT pertain to a specific event (crime). In order to use it for detecting hypothetical (or future) crimes, control questions (which relate to general misdeeds) must play the role of the relevant questions. In other words, enhanced physiological reactions to the typical control question (e.g. 'Have you engaged in masturbation to deviant fantasies during the past 6 months?') are now taken as an indication of deception and a consistent responding to those questions might mean that the examinee failed the polygraph test. But to make such inferences, one must compare the responses to those new relevant questions with the responses to equivalent control questions. Unfortunately, it is impossible to construct such control questions, because they must relate to other hypothetical crimes of similar nature and importance, but a consistent responding to such control questions cannot be interpreted as an indication of innocence. In other words, in the event-free application of the CQT, the comparison questions become too similar to the relevant ones and interpretation of differences in the responses in these two types of questions becomes very ambiguous."

(p. 203): "It should come as no surprise that the results of these studies revealed much larger rates of false-positive outcomes (e.g. 19 and 21% in *Kokish et al.*, 2005, and in *Grubin & Madsen*, 2006, respectively) than the rates of false-negative outcomes (6 and 5% in these two studies, respectively)."

(p. 204): "Summary and conclusions

"...The use of the CQT with sex offenders is particularly problematic because of the event-free context of sex offenders' periodical examinations. In addition, no methodologically sound studies have been conducted to test the validity of the CQT, neither in its forensic application, nor in the sex-offenders context.

"...Once the true nature of the CQT is revealed to potential offenders, its deterrent value will be lost. Learning about the CQT may affect the outcomes of this test in several ways. First, potential examinees will understand that the CQT is not a valid test of deception. Second, they will learn that what they are told by polygraph examiners in pre-test interviews is untrue. Whereas polygraph examiners tell their examinees that responding to the control questions may incriminate them, in reality the exact opposite is true."

Editor's Closing Note: To conserve space, the author's citations to references mentioned is omitted here. Should you need those references (as, for litigation purposes), contact the editor.

This article by Prof. Ben-Shakhar, one of the leading researchers into polygraphy use and misuse, strongly supports the conclusions in articles appearing in previous editions of The Legal Pad. Because this issue remains of strong ongoing concern to all treatment participants in MSOP, additional articles on this topic may be excerpted in future editions. Stay tuned.

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The Lessons from Thomas Duvall's Ordeal

Thomas Duvall just completed a four-day trial before the Supreme Court Appellate Panel ("SCAP"). It remains to be seen as this goes to press whether Duvall will gain approval for release (presumably to "provisional discharge" status).

However, "ordeal" is the right word. Duvall was vilified in every conceivable way by attorneys representing the State in opposing his release. Over his years in MSOP, Duvall unwittingly provided MSOP (and thereby those opponents) plenty of ammunition to use against him in this release proceeding, all without doing anything wrong, in fact, following the

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direction and encouragement given to him by MSOP clinical staff themselves.

IF Duvall is released as the outcome of this court proceeding, it will be despite, rather than because he followed those directions and suggestions by MSOP staff. From this, it is possible to derive at least a few lessons from Duvall's ordeal:

1. In your commitment case and in MSOP, never admit or discuss unconvicted allegations of any sex crimes. This applies to allegations which resulted in charges as well as ones that never resulted in charges. The standard for admissibility and consideration of unconvicted accusations under MN law is whether "clear and convincing evidence" leads the judge to believe such unconvicted accusations actually took place.

MSOP clinicians will repeatedly attempt to convince you that 'coming clean' to all sex crimes you ever did, and even to false accusations that they repeatedly press you to 'admit,' will do you internal good and will advance the cause of your release.

However, as Duvall's case shows, the real use of such unconvicted accusations, once you admit them, is to draw a much more ominous picture of your claimed probability of committing further sex crimes if released, according to the argument you will surely encounter from attorneys for the State.

2. Never write any "journals" of your current sexual thoughts and/or fantasies or even merely verbally discuss them with or in the presence of staff. Limit your discussions of these topics to only your most trusted associates, if even them.

Duvall was duped by clinicians' encouragements into maintaining journals of his inner thoughts. He made the mistake of describing deviant thoughts of rape and sex with minors and other fantasies. In his release proceeding, attorneys for the State argued from those journal entries that Duvall was a current threat to the public because he still entertained such fantasies of illegal sexual behaviors.

Scientifically, the truth is that such fantasies do not portend future misconduct; many men entertain such deviant fantasies and yet never sexually offend at all. Nonetheless, judges act from biases about sex offenders, one of which is the myth that once one has engaged in one or more 'hands -on' sex crimes, deviant fantasies suddenly change to a harbinger of recidivism.

The State's attorneys in Duvall's release proceeding are playing hard to that baseless bias and are even pleading their case in the press and media, in a crass effort to intimidate the SCAP judges – most of whom face re-election – out of releasing SCAP applicants.

3. Never take a polygraph exam in MSOP. Duvall did, with the result that the examiner claimed that he showed a deceptive response in denying that he had recently masturbated to violent or deviant sexual thoughts.

There are three possibilities here:

(a) The examiner may have lied about the outcome;

(b) Duvall may have actually lied about this; or

(c) This emotionally charged question may have caused an emotional reaction that appeared the same as a deceptive response, even though Duvall answered truthfully.

As you have already read in an earlier edition of this newsletter, and as is strongly confirmed by the shocking revelations in the article excerpts in this issue, polygraph exam results are notoriously inaccurate, especially when an emotionally charged question/topic is involved – an inaccuracy compounded when multiple "relevant" questions are asked (as they almost always are in MSOP polygraph exams). Thus, the probability of such 'honest inaccuracy' is nearly as great as an accurate result in such exams.

Further, consider for a moment who is paying the polygrapher. Any MSOP-employed/contracted polygrapher who does not produce a high percentage of deceptive outcomes will not remain on the payroll for long. This creates a powerful temptation for the polygrapher to falsify results in order to keep MSOP administrators satisfied. Anyone who would take a polygraph administered by anyone with such a conflicted motivation is asking to be victimized by scientific fraud.

4. It is claimed that an MSOP treatment participant cannot progress through treatment and thus be eligible for release without the candor and "transparency" reflected by the journals that Duvall is now victimized by.

However, Duvall's case teaches that every instance of candor about one's sex offending or concerning one's past or present sexual attractions, orientation(s), desires, fantasies, or just the existence of any libido whatsoever, regardless whether such statements are made in one's "core group" or elsewhere, or whether in writing or purely verbally, will be compiled into one big dossier and stored up for use against one at any point at which one seeks release.

The moral of this story is undeniably clear: Never be candid or make any admission/concession as to oneself in MSOP. If the cost of such candor is one's permanent retention in confinement, and treatment requires such statements, then ask yourself what is the point in such futile, self-defeating 'treatment.'

Despite several approvals by SCAP over recent years of MSOP detainees for provisional discharge, almost no one to date has actually been successfully placed on that status. So the incentive 'carrot' is illusory in any event. Distinctly, provisional discharge is so onerous that one of the few to ever actually get to that status sought and was granted re-institutionalization back into MSOP lockup. That speaks volumes about the unlivability of provisional discharge.

Duvall's crimes all date back to the 1970s and '80s. Thus, they have almost no relevance to whatever Duvall's current motivation may be to commit sex crimes now, some 30 to 45 years later. This is accentuated by the fact that Duvall is now 61 years ago. Effectively, those crimes were a lifetime ago.

And most profound of all, the statistics are unanimous that those at and beyond age 60 almost never commit another sex crime (perhaps 0.5%, say the stats). Because this is closely tied to the natural diminution of sex hormones and sex drive in such senior citizen-status, it is basically inexorable and hence the most reliable indicator of sex-crimes desistance that exists.

Thus, for the State to argue that the aging Mr. Duvall remains the risk he was as a man in his 20s would be hilarious, were it offered as a joke. All of the fanatical and political posturing advanced by State officials cannot add any earnest gravitas to that preposterous proposition.

Old men frequently hang cheesecake calendars on their walls, but they do not assault young women who might bear passing resemblance to those images. Duvall's fantasies are merely the mental equivalent of such images. The fact that some are objectively repulsive does not add a single percentage point to any predicted likelihood of sexual re-offense by him.

Fantasies do not serve as accurate predictors of sex crimes regardless of their content. This has been proved time and again by studies conducted as to those convicted of collecting child pornography. Regardless of masturbation to and fantasizing from those pictures and videos, those individuals did not commit sex crimes against minors at any rate greater than that of others not collecting child pornography.

The conclusion that sexual "deviance" does not predict recidivism at all has been confirmed by all modern sex offender recidivism statistics that find no difference in recidivism rates between rapists and pedosexuals.

In any event, Duvall denies that he engaged in any deviant sexual fantasies. The state's case opposing his release is only based on polygraph exam results suggesting that Duvall lied in those denials. However, lie detector test outcomes are inadmissible in courts across the board – and for very good reason, as the article in this issue and articles in past issues on polygraphy applied to sex offenders show beyond question.

It is a blatant travesty of justice that judges appointed by the highest court in Minnesota would stoop to base a decision denying release from confinement to one when the evidence claimed to support such continued lockup is purely such deeply dubious testing of known great inaccuracy and whose results are subject to highly subjective interpretation by the test's examiner.

The only sane moment in Duvall's current case seeking release came when one of the SCAP judges questioned whether it was "a realistic goal" for sex offenders to "not think about sex," while asking how a treatment regime could address a person's thoughts in any event.

The answer is obvious: everyone thinks about sex – not constantly, but fairly often, to be sure. The young may anticipate some hoped-for future sexual exploit – while the old, like Duvall, merely remember sexual actions in the distant past.

Doubtless there are some on staff in MSOP who will think Duvall to be dangerous even after he is so old and mentally feeble that he can no longer recall how to spell sex.

But beyond that being ludicrous, it only serves as a cover for the relentless punitive intent that is the real, but hidden true motivation for the very existence for MSOP: lifetime detention as extra punishment and as deterrence by object lesson.

If you want to learn something, learn that.

* * * * * *

Internet Provided to Prisoners in Europe – Without First Amendment Rights.

Derek Gilna, in an article titled "'Prison Cloud' Provides Limited Internet Access to Belgian Prisoners," published in the April 2017 edition of *Prison Legal News* (p. 28), reports that Belgian prison authorities have instituted at least limited access to the Internet for prisoners in that country, direct from their cells.

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Access is intermediated by a service called "Prison Cloud," which controls access to online services (presumably through the use of filtering software). Prison Cloud also directly provides information about jobs currently available on the outside, and can display books and legal research materials that prisoners select.

Prisoners can also opt to pay for Internet -based phone calls and secure email, both of which can be made at any time from their cells. Each prisoner can also access records and other documents from their own case without having to request them from staff.

Movies, including ones of an 'adult' nature, are available as well through Prison Cloud at a per-showing fee (about $4-8 US equivalent). A free meditation website is also provided. Each prisoner receives a monitor, keyboard, mouse, headset, USB drive with user name and password and equipment needed to connect to a server.

Gilna reports that prison officials conceded that Internet access was compelled to keep up with the times, but that they also believe the Internet access system will reduce prisoner conflicts and will provide services without the previous need for staff assistance.

Gilna adds that a number of prisons within the U.S. already provide secure email and that some (including jails) supply tablet computers for prisoner use.

We live in the most technologically advanced country on the planet, with the greatest array of personal rights guaranteed by its Constitution, specifically including the First Amendment rights to communicate and to receive media and information, all without restraint. In this context, one is forced to wonder what motivation, other than wretched spite and an urge to pile on extra punishment, would cause officials to bar such means of communication so indispensable to modern life. Someone, it would seem, is intent on keeping us all in a dark cave, held effectively incommunicado. What is fair, ethical, or legal about that?

* * * * *

Do Committed Sex Offenders Have a First Amendment Right of Access to the Internet?

Editor's Note: Once again in this issue, it seems best to present an excerpt from an academic article about a subject of interest to us. However, in doing so, its endnotes must be omitted to fit within the space available. Should you need the text of any endnote for litigation or other compelling reason, contact the Editor to request same.

Excerpts from: *Tanya Kessler*, "'Purgatory Cannot Be Worse Than Hell': The First Amendment Rights of Civilly Committed Sex Offenders," 12 *N.Y. City L. Rev.* 283 (Summer 2009):

pp. 294-95: "[Justice Breyer's dissent in *Kansas v. Hendricks*] ...further noted that incapacitation is a punitive goal.[71] Incapacitation appeared to be the primary purpose of the statute as treatment was delayed until after the prison sentence was completed, and there was no provision for considering less restrictive alternatives (unlike in the civil commitment of persons with mental illness).[72]...

"*Hendricks* has been criticized on a number of grounds, for 'straining the distinction between criminal punishment and civil commitment';[75] creating criteria based on erroneous understandings of sex offender behavior;[76] relying on an 'unacceptably fuzzy' mental abnormality standard;[77] ignoring the clear legislative purpose of the statute;[78] and, more fundamentally, authorizing 'the use of extensive preventive detention, dressed up in mental health language.'[79] Scholars also note that predicting dangerousness on the basis of past crimes 'would be "impermissible character evidence" for other felony defendants.[80] The core constitutional problems of *Hendricks* are only amplified by the application of the prison standard to the constitutional claims of individuals with civil status."

p. 295: "Starting in the late 1960s, federal courts extended constitutional protections to many aspects of incarceration, including First Amendment rights and living conditions.[83] During this more protective period, under *Procunier v. Martinez*, the standard for First Amendment violations of prisoner rights was akin to strict scrutiny: the regulation had to further 'an important or substantial governmental interest unrelated to the suppression of expression' and the limitation could be 'no greater than necessary' to the interest involved.[84]"

pp. 296-97: [To distinguish *Turner v. Saffley*, author notes that the challenged mail regulation there barred inmate-to-inmate mail at different institutions,[91] and that the rule was content neutral.[100]]

pp. 320-21

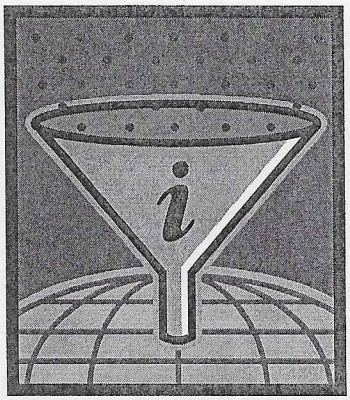
Alternatives to the Prison Standard

"Given the United States Supreme Court's holding in *Hendricks* that civil commitment is not imprisonment, the prison standard is not appropriate for civilly committed sex offenders' First Amendment claims. It is worth asking what the appropriate standard would be, but before doing so, some fundamental issues require attention.

"A core problem with civil commitment is the underlying constitutional infirmity of civilly committing sex offenders when treatment – the characteristic that allegedly distinguished civil commitment from imprisonment – has not been proven to reduce recidivism and is often a legislative justification rather than a genuine goal. Even beyond the question of the efficacy of treatment, much of the science underlying civil commitment is suspect. Michael Perlin has argued that the Hendricks decision, like much mental disability jurisprudence, is characterized by what he terms 'pretextuality': courts accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest decisionmaking.[256] Other scholars have noted that the use of dubious scientific claims to justify civil commitment constitutes another variation of pretextuality, one that 'provides a legitimizing cover, allowing the state to cast the constitutionally doubtful preventive detention of dangerous individuals as constitutionally safe civil commitment.'[257]

"The *Hendricks* decision hinges on treatment – because the statute's purpose was treatment and not punishment, the Court found that it passed constitutional muster. But treatment was merely a pretext for the Kansas civil commitment statute. The Court ignored facts that showed that treatment was not the bona fide goal of Kansas' confinement of Hendricks, [258] and failed to consider compelling evidence that the treatment of sex offenders was entirely unproven.[259] Twelve years after *Hendricks*, the efficacy of sex offender treatment is still far from widely accepted.[260] Although courts are reluctant to become involved in 'battles of the experts,' over whether treatment works, given the high constitutional values at stake, the judiciary cannot afford to ignore the contested state of scientific research on the treatment of sex offenders in civil commitment.[261] The law has developed tools to evaluate the acceptability of scientific evidence,[262] and courts must be cautious about premising decisions on unproven science.

pp. 321-23: "Scholars have argued that science plays an especially important role in civil commitment proceedings, in which scientific testimony on diagnoses and future risk of harmful behavior are determinative of indefinite confinement.[263] The question of what is 'good science' plagues courtrooms and has been the subject of much scholarship.[264] Some have argued that critics of 'junk science' in courtrooms carry their own political agendas.[265] It is clear, nevertheless, that in the scientific community, the meaning and validity of diagnoses assigned to sex offenders,[266] the reliability of actuarial assessments of future dangeroiusness,[267] and the efficacy of treatment[268] are deeply contested. While diagnosis and predictions of future dangerousness are the elements that determine whether a sex offender will face indeterminate detention, the efficacy of treatment is the linchpin to the constitutionality of the civil commitment enterprise.[269]



"If one accepts for a moment the premise that civil commitment is not punitive and is on that basis distinguishable from imprisonment, the question becomes what standard should apply to civilly committed sex offenders' First Amendment claims. An application of the Turner test with civil-confinement-related interests simply substituted for penological interest is inappropriate because *Turner* drew on a long line of prison cases. The great deference to prison administrators' goals stems from the well-established primacy of prison security as a penological goal. Because *Hendricks* held that the purpose of sex offender civil confinement is not punitive,[272] courts would need to look to First Amendment free speech cases outside of the incarceration context to develop a standard for analyzing the rights of civilly committed sex offendeers.[273] One potential model is the treatment of students' First Amendment rights at school.

pp. 323-25: "In *Tinker v. Des Moine Independent School District*, the Supreme Court declared that neither students nor teachers 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'[274] The Court held that freedom of speech may be restricted by school administrators only with a showing that such expression 'materially and substantially' interferes with appropriate discipline.[275] *Tinker* acknowledges that students' First Amendment rights are affected by the 'special characteristics of the school

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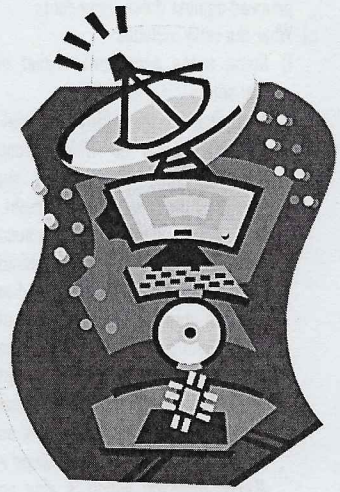
environment,' noting that schools educate 'the young for citizenship' but that school officials have the 'comprehensive authority ...to prescribe and control conduct in the schools,' albeit in a manner 'consistent with fundamental constitutional safeguards.'[276] The *Tinker* rule has been modified by subsequent decisions holding that school officials can restrict vulgar and lewd student speech,[277] school-sponsored student speech,[278] and student speech that promotes (or can be reasonably interpreted as promoting) drug use,[279] regardless of whether such speech has caused a disruption. A standard that similarly acknowledges the right of civilly committed sex offenders to speak freely unless such expression materially and substantially interferes with the administration of civil commitment centers would put a higher burden on administrators to justify restrictions than the extremely deferential Turner test.

"Clearly, the functions and characteristics of civil commitment facilities are entirely different from those of schools. A First Amendment rule based on *Tinker* must take into account the special characteristics of civil commitment facilities, including security concerns and their underlying purposes of providing treatment and incapacitating sex offenders. With these characteristics and purposes in mind, courts might conduct a fact-specific inquiry to determine whether the speech a commitment facility seeks to limit would substantially and materially interfere with the center's administration. In *Tinker*, the Court noted that the donning of black armbands to protest the Vietnam War by high school students was a 'silent expression of opinion'[280] and that there was 'no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone.'[281] The Court also found that there was no evidence that the actions resulted in violence or threats of violence or the disruption of classes.[282] In the sex offender commitment facility context, the Court in *Rivera* might have looked to whether the sexually explicit letter from the plaintiff's girlfriend threatened to disrupt the administration of the center.[283] The letter was presumably mailed from one consenting adult to another. While the court noted that sexually explicit materials might interfere with treatment goals, a fact-specific inquiry would determine whether the letter undermined the plaintiff's treatment. Such an inquiry would likely raise difficult questions, reminiscent of *Youngberg*, should a facility's assertion that such a letter was contrary to treatment goals be accepted at face value? In *Tinker*, the Court questioned the school's assertion that the wearing of armbands was inherently disruptive, a reminder that the judiciary has not always deferred so completely to institutional administrators. A court is more likely to follow the considerable deference to hospital administrators in *Youngberg*, however, as the civil commitment of people with mental illnesses is more analogous to sex offender civil commitment than is a public secondary school, characterized by the Court in *Tinker* as 'a marketplace of ideas.'[284].



pp.325-26: "Even if courts gave more deference to civil commitment administrators than to the school administrators in *Tinker*, once the extreme deference of *Turner* is removed, a global policy that bans all sexually explicit materials would become suspect. Where the goal is treatment, not punishment, a strong argument can be made that policies in treatment centers should be individualized, since sex offenders are a heterogeneous group.[285] In prisons, by contrast, policies address universal institutional needs, such as security. Individual facts might still support interference with mail in a civil commitment facility. If the facts showed that a civilly committed sex offender was sexually coercing others at the commitment center, and such behavior was linked to his possession of sexually explicit materials, a court might find that the restriction on speech was justified because of material and substantial interference with the administration of the center.[286]

"Applying this test to the facts in *Fogle v. Bellow-Smith*, No. 4:06CV0227-ERW, 2007 WL 2507756, at *1, 7-8 (E.D. Mo. Aug. 30, 2007), a court would inquire whether the 'read order' for the plaintiff's mail was justified because unscrutinized mail materially and substantially interfered with the administration of the Missouri Sexual Offender Treatment Center. While the Center might argue that by breaking the phone card rules, the plaintiff had substantially interfered with rules of the Center and, therefore, with its orderly administration, the court might ask how reading the content of the plaintiff's mail related to such interference. The court's account of the facts of the case does not indicate how the content of the letters relates to the receipt of phone cards.

pp. 326-27: "The risk to modeling an analysis of the First amendment rights of civilly committed sex offenders on Tinker and the subsequent school cases is that the exceptions could swallow the rule, as civil commitment facility administrators are likely to argue the same interests advanced by prison officials: security, safety, and the need to create incentives for good behavior. If these interests resemble penological interests, it is because they are such interests. Even a new standard might slide into the prison standard because, as the federal courts have implicitly recognized, sex offender civil commitment is penological in nature. Attempts to find a more appropriate First amendment standard inevitably lead back to the prison cases, revealing the pretextuality of the *Hendricks* holding that civil commitment is not punitive and is thereby constitutional.

"The constitutional implications of confining individuals without clear criteria for future dangerousness or mental impairment and without the due process protections of the criminal justice system have been much discussed. The First Amendment infringements that accompany civil commitment also deserve serious attention. With the First Amendment's exalted place in the American constitutional scheme,[288] the Supreme Court has warned that any such restriction is only justified by 'clear and present danger.'[289] The future danger to public safety posed by any individual sex offender is speculative, but the danger to such an offender's First Amendment rights, by contrast, is manifest. First Amendment rights are being abridged by the application of the prison standard to persons with civil status – clearly, presently, and dangerously.

"The State cannot have it both ways. If confinement of a sexually violent predator is civil for the purposes of evaluation under the Ex Post Facto Clause, that confinement is civil for the purpose of determining the rights to which the detainee is entitled while confined. Civil status means civil status, with all the ...rights that accompany it."[290]

* * * * *

Sidebar: Also of interest on this point:

Did you know that two states' sex offender commitment facilities already allow "computers equipped with Internet access, monitored by: staff observation and computer software limiting access and tracking sites visited"? What? No scandals?? What makes Minnesota so special that we can't get this here? For a really good article about the dim view taken by federal courts – including the 8th Circuit – about such Internet restrictions, see: Ariana Deskins, "Internet Use and Sex-Crimes Convicts: Preserving the First Amendment Rights of Sexual Offenders through the Framework of United States v. Albertson," 91 U. Detroit Mercy L. Rev. 29

Editor's Closing Note: In the last issue of The Legal Pad, I discussed the need for Internet access for MSOP residents.. I also discussed points made by Prof. Deskins supporting the proposition that sex offenders, like all others not in prison, have a First Amendment right to access to the Internet.

Because MSOP is not imprisonment or (at least, according to the insistence of state lawyers) any form of punishment, and is claimed to be free of any punitive effects, our constitutional rights, unlike those of prisoners, are intact. Therefore, we are not under the limiting effect on those rights as to prisoners posed by *Turner v. Saffley*. Access to the Internet is elemental to the right to unfettered communication which is at the core of all First Amendment free speech rights. This includes the right to information and exchange of ideas. Thus, if MSOP is to continue to exist at all, it must honor that right of Internet access. In the modern age, to refuse such access is to bury people alive in a dark cave, cut off from the world. This it may not do.

* * *

Download Now

Status Update on the Stone Media Lawsuit

by Ray Semler and Charles Stone

Let's talk about the Media Lawsuit that was filed by Charles Stone, April 2011. Mr. Stone filed this suit as a result of MSOP not

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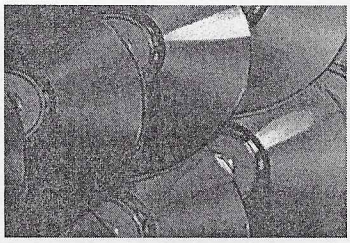
following the original 2007 Media Policy that was determined by the *Kruger* lawsuit that resulted in a settlement being reached between the parties in 2007. MSOP is required to follow the 2007 Media Policy, as upheld in *Ivey v Mooney 2008* when the court stated "The *Kruger* Settlement requires MSOP staff to apply the 2007 Policy, rather than the statutory language of section 246B.04, subdivision 2, in determining



whether materials are allowed or prohibited."

So what does this mean to <u>everyone else</u> here at MSOP?

1. This effects <u>everybody</u> – not just Charles Stone.
2. Recently with the help of Ray Semler, Mr. Stone filed a Motion for Appointment of Counsel because of the complexity of the issues in the case, Motion for Class Certification, and Motion for Time to Extend the time to Reply to Defendants Answer to the Complaint.
3. Mr. Stone received a Notice from the Clerk of Court on Tuesday, May 2, 2017, in which he was to call the Clerk's office to set a date for the hearing on the Appointment of Counsel and Class Certification.
4. The Clerk then informed Mr. Stone that they would be sending out a briefing schedule on the Motions pending before the Court at the end of the week. (5-5-17). That would mean that Mr. Stone should receive this information from the Court either Monday, May 8, 2017 or Tuesday, May 9, 2017. As soon as Mr. Stone receives notice from the Clerk's Office, all clients within the MSOP will be notified of the status of the case.
5. This will not affect the *Karsjens* case that will be filed with the U.S. Supreme Court in the next few weeks by Gustafson and Glueck. This case was on stay, but the stay was lifted on April 14, 2016.
6. Mr. Stone received notice from the Court today (May 8, 2017) that the Motion for Class Certification was denied without prejudice. The Motion for Appointment of Counsel was also denied without prejudice. This does not mean that we cannot file these motions again at a later date, as we will.
7. The original 2007 Media Policy – outlines the following:
   a) All Media "G", "PG" & "PG-13" are automatically allowed without review. (Section E, Par 1)
   b) All Video games with ESRB rating of "EC," "E," "E10+," or "T" allowed without review. (Section E, Par 2)
   c) "R" rated movies for review must meet the criteria to be prohibited as: (Section A, Par 7)
      a. sexual intercourse, including any type of vaginal, oral or anal penetration;
      b. human genitalia in a lewd and explicit fashion;
      c. masturbation;
      d. excretory functions;
      e. sexual relations between a human being and an animal; or
      f. sadomasochistic abuse.

      Elsewhere in policy (Section A, Par 4) states in part "videos of the unclothed or clothed figure of a minor child posing in a sexually suggestive posture or sexual manner."
   d) Allows clients to record from the cable system, programming that is broadcasted and be viewed at a later time.
   e) Allows clients to own and have in their possession and in the client rooms video gaming systems and games
   f) Allows clients to own and have in their possession and in the client rooms personal computer systems.
   g) The 2007 Media Policy stated restrictions that could be imposed for said violations:

      Section F, Paragraph 2 states:

      "Any patient who has used his computer -- or any other media source and/or equipment -- to store, view, disseminate or copy materials that he had notice are prohibited under this procedure, will lose access to that computer, media source and/or equipment for a time to be determined by the Treatment Team dependent upon the severity of the violation. Restrictions for the first instance may be up to six months. Subsequent violations may result in an imposition of a restriction for more than six months"
8. The following is what the Federal Court stated in its Report and Recommendation which was filed on July 15, 2016, by Magistrate Judge Janie S. Mayeron:
   a) Plaintiff stated a cognizable Claim against Defendants (specifically in regards to Liggett and Moser) for violation of Constitutional rights under the First Amendment.
   b) The court stated that Defendants, specifically Liggett and Moser are personally responsible for implementing and carrying out the unconstitutional media policy not in conformance with the *Kruger* Settlement. See also Media Policy 2007. The Court also stated in its March 17, 2017 Order Adopting the Report and Recommendation that Defendants Benson, Jesson, Prescott, Carlson, and Lundquist because these officials had some authority to direct and supervise the implementation of the Media policy, these official duties are sufficient to permit Stone's claims for prospective injunctive relief to proceed against these Defendants.
   c) What the reply includes:
      1) Stone seeks prospective relief in this action.
      2) Accordingly, the 1983 official-capacity claims on which Stone seeks prospective relief is not barred by the Eleventh Amendment.
      3) The Court held that because Plaintiff stated a claim against Defendants, they are not entitled to qualified immunity at this stage of the proceedings. The court has also said this very same thing in not *Karsjens*; but in *Knutson v. Ludeman* (dealing with visitation which is on the Lexis Nexis, and *Dale Williams v. Nancy Johnston*, which is also on the Lexis Nexis).
      4) The Court in its Report and Recommendation and further adoption on March 17, 2017, held that all claims seeking dismissal of Plaintiff's 1983 individual capacity claims against Liggett and Moser is denied. For those of you who do not understand, the Defendants filed a motion to seek dismissal, and the Court denied their motion. There will come a time when the Court will allow Plaintiff to file a motion for leave to amend the complaint to cure (fix) any deficiencies. Plaintiff will be filing this motion relatively soon, as he must abide by the pre-trial scheduling order ordered by the Court on March 28, 2017.
      5) All claims seeking dismissal of plaintiff's 1983 official capacity claims for prospective injunctive relief is denied. Again, that means that the Defendants (Liggett and Moser) filed a motion to have this dismissed, and the Court denied their motion.
9. Now, what does that mean?
   a) As stated above, the Court denied the motion for class certification without prejudice. However, it will be filed again at a later date, as it will apply to everyone in the MSOP facility (725 clients). In denying the motions for such class certification and for appointment of class counsel, the judge provided instructions to Mr. Stone to guide him in re-filing those motions later to avoid technical defects and to remedy needed omissions.
   b) When Mr. Kruger filed his suit, he did not just do it for him, he did it for the greater good and cause of the institution.
   c) If Kruger would have filed that suit on his behalf only, where would everyone in MSOP be with the media? Everyone would be fighting that issue on an individual basis. My hope is that the Court will see what MSOP is doing and has done since Kruger settled his lawsuit in 2007, and certify this action as a class.
   d) One last thing, I would like to point out. The Court in *Ivey* stated the following:

      "Footnote 8: Ivey briefly adds that further discovery should be allowed as to MSOP's implementation of the 2007 Policy. However, as noted above, the record already includes evidence as to how that Policy was applied to Ivey. Ivey does not address what any further discovery would demonstrate. Cf. Fed. R. Civ. P. 56(f) (requiring a party opposing summary judgment as premature to submit an affidavit specifying what it believes it will discover). In those circumstances, the Court finds no basis for delaying judgment. THE COURT NOTES, HOWEVER, THAT THIS RULING DOES NOT FORECLOSE FURTHER CHALLENGES SHOULD MSOP FAIL TO ENFORCE THE 2007 POLICY IN A CONSTITUTIONAL MANNER IN THE FUTURE."

      Again, citing the *Kruger* settlement in 2007 that was for the whole institution.

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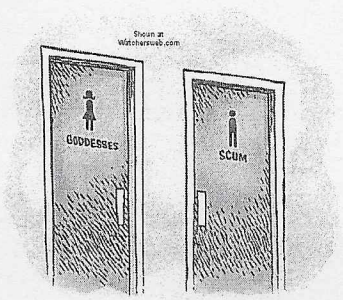

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