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The Minnesota Sex Offender Program: Federal Intervention Part 3 – The Ruling

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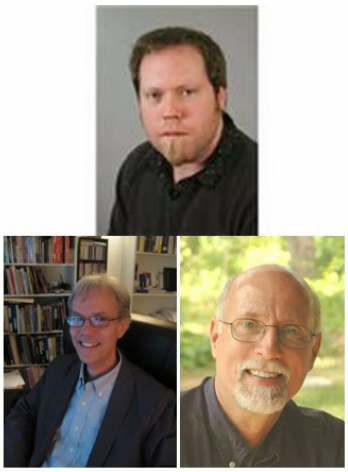
This opinion piece is the third of a three-part series regarding a class-action lawsuit brought by clients of the Minnesota Sex Offender Program (MSOP). Part 1 discussed some of the issues and concerns that led up to the federal trial. Part 2 reviewed the 2014 report from a team of experts appointed by the Federal Court to examine the program. On February 9, 2015, at the US District Courthouse in St. Paul, a federal trial commenced to determine the constitutionality of MSOP. After a five-week bench trial, the Federal Court has issued its ruling in Karsjens v. Jesson.



SAJRT Bloggers' Profile
Chief Blogger Kieran McCartan, Ph.D. and Associate Bloggers David S. Prescott, LICSW and Jon Brandt, MSW, LICSW are longtime members of ATSA. We are dedicated to furthering the causes of evidenced-based practice, understanding, and prevention in the field of sexual abuse.

On June 17, 2015, the US District Court for Minnesota ruled that the Minnesota Sex Offender Program (MSOP), and the underlying sexual offender civil commitment (SOCC) laws in Minnesota are unconstitutional. Federal Judge Donovan Frank, who has presided over three-and-a-half years of legal proceedings, wrote the ruling. The decision appears to completely reject the arguments that were put forth by the Attorney General's Office, which defended MSOP and the state of Minnesota. Reactions to the ruling were swift. Governor Mark Dayton immediately issued a statement that he disagreed with the ruling and that the state would continue to defend the constitutionality of MSOP. Eric Magnuson, former Chief Justice of the Minnesota Supreme Court and Chair of the SOCC Task Force said the decision is not appealable until Judge Frank issues a final order. Minnesota's ATSA chapter issued a statement, calling the ruling "fair and necessary."

Judge Frank's 76 page ruling is highly critical of both MSOP as a program and the underlying statutes of SOCC, describing them as, "a three-phased treatment system with 'chutes-and-ladders'-type mechanisms for impeding progression, without periodic review of progress, which has the effect of confinement to the MSOP facilities for life." (p.65) "Although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention." (p.67)

Even former MSOP Executive Director Dennis Benson did not try to defend the system, testifying that, "the politics around the program are really thick… politics guide the thinking

process of those involved in the [release] process… this program is going to, I think, eventually be deemed unconstitutional, and in its current form probably should be." (p.68)

The reasons for the Federal ruling of "unconstitutional," on face and as applied, can be summarized into the following areas of concern (from the "Conclusions of Law" p. 50-67):

- The statutes and the program do not provide for periodic, independent risk assessments to evaluate whether or not an individual continues to meet constitutional criteria for commitment. Those risk assessments that have been performed have not all been performed in a constitutional manner. MSOP acknowledged that they do not know which clients meet criteria for commitment or release.

- The statutes do not provide for judicial bypass – the ability for clients to seek relief from confinement by appealing directly to the courts.

- The statutes render discharge from MSOP more onerous than the statutory criteria for initial commitment. There is either no end to treatment, or clients who have completed treatment or sufficiently reduced their risk, remain confined. Release cannot be predicated on completion of treatment, or readiness to reenter the community, but rather on sufficient reduction of "dangerousness." There must be one unifying criteria for commitment and release.

- The statutes impermissibly transfer the burden to petition for a reduction of custody from the state to the client. MSOP staff acknowledged that there are many clients who could be safely treated in less restrictive alternatives (LRAs). MSOP only supports petitioning for clients in the final phase of treatment. MSOP has failed to assist clients in petitioning, and fails to provide discharge planning to all clients. The statutes do not require the State to take any affirmative action to petition for reduction of custody or discharge on behalf of clients who no longer satisfy criteria for continued commitment. The petition process can take years.

- The statutes allow for placement of MSOP clients in less restrictive alternatives, but LRAs are effectively not available for clients. There are no LRAs upon initial commitment, and few LRA's for clients who petition for conditional release. Only two clients are currently on provisional release, and no clients have ever been unconditionally discharged.

A key theme in Judge Frank's ruling stems more from what MSOP hasn't done than what it has, "Plaintiffs have shown that each Class Member has been harmed and their liberty has been implicated as a result of Defendants' actions. For example, Defendants created the MSOP's treatment program structure, developed the phase progression policies, and had the discretion to conduct periodic risk assessments of each Class Member and to petition on behalf of the Class Members, but have chosen not to do so. By failing to provide the necessary process, Defendants have failed to maintain the program in such a way as to ensure that all Class Members are not unconstitutionally deprived of their right to liberty." (p.51)

Judge Frank wrote, "Treatment has never been a way out of confinement for committed individuals." (p.64) "Contrary to Defendant's assertion that Plaintiffs allege merely a generalized concern, Plaintiffs have shown that all Class Members have suffered an injury in fact – the loss of liberty in a manner not narrowly tailored to the purpose for commitment." (p.50) "The overall failure of the treatment program over so many years is evidence of the punitive effect." (p.65) "Each of the reasons set forth above are an independent reason for the Court to conclude that section 253D is unconstitutional as applied." (p.65)

Going forward, it appears that the standard for commitment, from initial confinement to criteria for release, must be the same (p.73): "It is constitutionally mandated that only individuals who constitute a 'real, continuing, and serious danger to society' may continue to be civilly committed to MSOP." (p.60) "… discharge must be granted if the individual is *either* no longer dangerous to the public *or* no longer suffers from a mental condition requiring treatment." (p.62)

In the closing pages of Judge Frank's ruling, he opined that Minnesota's SOCC system is flawed for essentially two distinct, but interconnected reasons: (1) that society is frustrated with our inability to effectively mitigate crime broadly and sexual violence specifically, with sexual offenders being the target of "society's opprobrium," and (2) the blurry relationship with our criminal justice system. Judge Frank concluded, "Consequently, the Court observes that, in light of the current state of Minnesota's sex offender civil commitment scheme, it is not only the 'moral credibility of the criminal justice system,' that is at stake today, but the credibility of the entire system, including all stakeholders that work within the system, and those affected by the system, not forgetting those who have been convicted of crimes, their victims, and the families of both." (p.68-72)

Eric Janus, William Mitchell College of Law President and Dean, has been a longtime critic of SOCC, and has described the federal ruling as a "sweeping condemnation" of sexual offender civil commitment in Minnesota. Professor Janus has warned for more than two decades that SOCC is deceptively enticing, deeply flawed public policy, and constitutionally tenuous. The federal courts have warned for two-decades that if SOCC becomes de facto preventive detention, they will intervene – and they did.

What's Next?

Judge Frank has exercised judicial restraint for more than three years, but wrote in his powerful ruling, "As the Court has stated in a number of previous orders, and will now say one last time, the time is now for all of the stakeholders in the criminal justice system and civil commitment system to come together and develop policies and pass laws…" (p.74)

Judge Frank concluded his ruling with a request for top political leaders of Minnesota, and other stakeholders, to come together to discuss solutions at a "Remedies Phase Pre-hearing Conference" at the US District Courthouse in St. Paul, on August 10, 2015. Judge Frank acknowledged that he cannot compel political leaders to attend, and given that one invitee, Governor Dayton, has said the state will defend the constitutionality of MSOP, it's too soon to know if the Executive branch is planning to appeal or ready to engage in "remedies." Perhaps, after 20 years of complacency within state government, the state isn't taking it seriously when the Federal Court says, "Recognizing that the MSOP system is unconstitutional, there may well be changes that could be made immediately, short of ordering the closure of the facilities…" (p.4)

Perhaps it is too soon to know the reach of this federal ruling, but there are ramifications, for example, for a similar, concurrent federal lawsuit in Missouri. Interestingly, Minnesota and Missouri are both in the Eighth Circuit of the US Court of Appeals, which means that an appeal from either or both states would be heard by the same Court. While Judge Frank's ruling is binding in Minnesota, a Federal Appeals Court ruling would be binding within the Circuit, and a federal court ruling in any part of the US can be influential across the country. Undoubtedly, SOCC programs in all 20 states are taking note of this ruling, and the 30 states that don't have SOCC might be thinking twice about going down that road.

When a Federal Court drops the judicial "nuclear bomb" of "unconstitutional" on laws within the US, it is not just a legal opinion, it should be seen as a wake-up call that we have gone astray of "our constitution" – a set of human values that are so bedrock to a civilized society, and

humanity, that we have enshrined those principles in the US Constitution - to be certain that they guide the formation of all laws and public policies, especially when causes, and people, are unpopular.

In recent years, many of our colleagues in the broadly related fields of psychology, social work, criminal justice, and mental health have also been deeply concerned about the troubling legal and ethical underpinnings of SOCC. It is easy to forget that practicing mental health at its junction with the legal system can be an ethical minefield.

Many of our "civil laws" in the US, regarding the management of those who have sexually offended, from the sex offender registry, to residency restrictions, to SOCC, are not well grounded in science or research. While recognizing, with great respect, all the professionals working at or near the front lines of SOCC treatment programs, perhaps Judge Frank's ruling is also a reminder for all who work in SOCC to examine our individual professional roles in supporting a system that most knew was broken, long before it was "unconstitutional." It is tempting to engage in unproductive finger pointing or think that the Minnesota experience can't happen elsewhere. Colleagues would be wise to study the events in Minnesota in order to understand what happened, and develop innovative ways of preventing similar occurrences elsewhere. If we are going to use SOCC, we should do it in the most effective and ethical ways possible.

This is the beginning of a new era for MSOP and sexual offender civil commitment in Minnesota. We might start by being honest about whether we see *sex offenders* as "broken" or just "evil," and whether we are going to offer veritable treatment, or just be really mad at them. Judge Frank's ruling explains that there are constitutional safeguards in the criminal justice system that do not exist in the civil commitment system, and that we should be mindful of that in forging solutions. If we replace endless SOCC with endless prison sentences, it might be a lot more constitutional and a lot less just. If stakeholders can avoid getting hijacked by anger, fear, or vengeance; and considerate new laws emanate from sound research, best practices, and constitutional principles, we can reform MSOP into a model program for SOCC, and show Minnesota, the Federal Courts, and the rest of the world that we can offer sincere hope and effective rehabilitation to people who were once thought to be evil or irreparably broken, and return them safely back to their communities and to their families.