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# MSOP: A County Attorney's Perspective

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## MSOP: A COUNTY ATTORNEY'S PERSPECTIVE

Mark A. Ostrem<sup>†</sup>

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### I. THE PROBLEM

For years, anyone involved in the “system”<sup>1</sup> has known that the Minnesota Sex Offender Program (MSOP)<sup>2</sup> must change. Why do others not see the problems and solutions as easily as I do? As a member of the Sex Offender Civil Commitment Advisory Task Force, established by Judge Frank’s order in *Karsjens v. Jesson*,<sup>3</sup> I experienced firsthand the scope of differing viewpoints.

I understand how Minnesota got here: we have a system with a pretty robust entry point and no realistic exit. For many years—and

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1. Sex offender civil commitment practitioners, including respondents, are primarily the persons referenced here.

2. Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities, MINN. STAT. § 253D.01 (2012). The Minnesota Sex Offender Program is the DHS entity charged with treating those sex offenders who are at the highest risk to reoffend sexually. Respondents are offered sex offender treatment programming in a secure setting along with services to reintegrate into the community at such time as they are deemed to have reduced their risk and public safety can reasonably be assured.

3. 6 F. Supp. 3d 916, 924 (D. Minn. 2014).

for some good and in hindsight not-so-good reasons—MSOP transformed, contorted, and distorted into what many now label as a “life sentence.”<sup>4</sup> Given the general criminal and treatment histories of MSOP clients, along with the public and legislative perception of these clients, successful completion became more of a concept and less of a reality.

From my perspective, a couple of offenders are largely responsible for the system as it is known today. Both were fairly high-profile offenders whose cases were considered so horrific that they shocked change into the commitment system. They were the cases of Dennis Linehan<sup>5</sup> and Alfonso Rodriguez.<sup>6</sup>

Linehan's history as a sexually violent offender<sup>7</sup> helped shape the Sexually Dangerous Persons Laws,<sup>8</sup> in some ways opening up the pipeline for a larger population of offenders to be committed. Meanwhile, Rodriguez's case dramatically expanded the number of offenders considered for commitment.<sup>9</sup> Shortly after the *Rodriguez* case, the number of referrals to the county attorney from the Department of Corrections exploded—236 in December of 2003 alone.<sup>10</sup> These two cases combined to affect dramatic growth in the population of committed sex offenders.<sup>11</sup>

As the Minnesota County Attorney Association representative to the Task Force, it has been repeatedly pointed out to me that the problem is entirely my fault. If county attorneys did not initiate so many petitions, Minnesota would not have so many persons committed to MSOP. People believe that if those in my position would just stop initiating petitions, the problem would be solved.

4. See § 253D.07, subdiv. 4 (“[T]he court shall order commitment for an indeterminate period of time . . .”).

5. See *Linehan v. Milczark*, 315 F.3d 920 (8th Cir. 2003).

6. See *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009).

7. See *Linehan*, 315 F.3d at 922–23.

8. See § 253D.01; see also *id.* § 253D.02, subdiv. 16 (defining “sexually dangerous person” (SDP)). With the addition of the SDP category, some offenders who may not have met the earlier definition, including Dennis Linehan himself, were ultimately committed.

9. See Caroline Palmer & Bradley Prowant, *Re-Thinking Minnesota's Criminal Justice Response to Sexual Violence Using a Prevention Lens*, 39 WM. MITCHELL L. REV. 1584, 1595–96 (2013) (discussing the growth in MSOP commitments following the murder of Dru Sjodin by Rodriguez).

10. William Donnay, Minn. Dep't of Corr., *Sex Offender Risk Management in Mn.DOC*, MINN. DEP'T HUM. SERVICES 7 (Nov. 1, 2012), [http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16\\_172754.pdf](http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16_172754.pdf).

11. See *id.*

## II. WHO ARE THESE PEOPLE?

A couple “typical” case types may be illustrative of why the solution is simply not limited to a reduction in filing petitions, contrary to what those referenced above seem to argue.

### A. *Juvenile Offenders*

Offenders whose histories came about as juveniles were a particularly difficult category for the Task Force to work through. Arguably, the level of brain development shares a correlation with one’s behavior, and I agree that the adult brain does not reach full development until sometime in a person’s early twenties.<sup>12</sup> However, when a prolific and dangerous juvenile sex offender has reached expiration of supervision, but has not completed treatment and continues to be at a very high risk to reoffend, it is worth asking “WWMD” (What Would Mark Do)?

The county attorney’s obligation is to protect public safety. In the case of a juvenile offender,<sup>13</sup> we lose jurisdiction to supervise the offender at age nineteen.<sup>14</sup> Do we let this untreated, unsupervised, prolific, and dangerous juvenile—and now adult—sex offender loose in our community? No. County attorneys have tried a myriad of options to retain some jurisdiction, such as mental illness commitments (clients do not meet the criteria), “voluntarily accepting services” (clients would not voluntarily accept services), or stays of commitment (illegal). The only option available in these cases has been MSOP. As noted above, we have a robust entry point without a realistic exit. The Task Force recognized the “need in

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12. See generally NAT’L INST. OF MENTAL HEALTH, NIH PUB. NO. 11-4929, *THE TEEN BRAIN: STILL UNDER CONSTRUCTION* (2011), available at [http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/teen-brain\\_141903.pdf](http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/teen-brain_141903.pdf).

13. This reference is to adult offenders whose only history of sex offenses was perpetrated when they were juveniles.

14. The aspiration of all juvenile delinquency prosecution is to rehabilitate. Thus, most of the time, if we truly want to educate, treat, and reintegrate the juvenile, we will use the delinquency system to offer as many services as we have available instead of moving the offender to adult court or extended juvenile jurisdiction (EJJ). Unlike adult cases, we do not have years to work with the offender before the expiration of supervision. Once the path is chosen to go delinquency, we cannot go back.

some cases for extending jurisdiction over juveniles who have engaged in sexually offending conduct.”<sup>15</sup>

### B. Adult Offenders

What about the typical adult offender reviewed for commitment? Those considered for commitment have a history of sex offenses—both charged and uncharged. Most often, those considered for commitment have failed a Sex Offender Treatment Program (SOTP) multiple times and have a history of poor supervision. The Department of Corrections (DOC) has a very good SOTP; unfortunately, not enough people get in, and not enough people have enough time “inside” to complete the program, which likely contributes to the frequent failures and poor supervision on the “outside.” Once again, we hit an expiration of a sentence with an untreated, unsupervised, prolific, and dangerous sex offender<sup>16</sup> who is about to be on the streets. At the Task Force, I described these offenders as Level 3+. The additional reality of many of these adults is that they are institutionalized. Most offenders considered for commitment have spent a large portion of their most recent adult life in jail, prison, or some other confinement system. These offenders often have no family or support system, and they are about to hit the streets unsupervised and lacking even the most basic living skills.

My first obligation is to protect public safety. So, I have two options: (1) release this person into the community, or (2) commit him or her to MSOP. The reality is that I only have one option—commitment.

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15. Memorandum from the Honorable Eric J. Magnuson and the Honorable James Rosenbaum, Chair & Vice Chair, Sex Offender Civil Commitment Advisory Task Force, to Lucinda Jesson, Comm’r of Human Servs. 4 (Dec. 2, 2013) [hereinafter Memorandum], available at <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6641B-ENG>.

16. All offenders required to register are assigned a level when they leave prison. At a recent community notification meeting it was shared that there are more than 11,000 predatory offenders registered in Minnesota. Of those, 6951 are unassigned as they did not go to prison, 2653 are Level 1, 1244 are Level 2, and 317 are Level 3. The population at MSOP is approximately 700. *Minnesota Sex Offender Program Statistics*, MINN. DEP’T HUM. SERVICES (Oct. 1, 2014) [hereinafter *MSOP Statistics*], <http://mn.gov/dhs/people-we-serve/adults/services/sex-offender-treatment/statistics.jsp>. The vast majority of sex offenders do not come under review for commitment. In fact, as noted, most sex offenders do not even go to prison.

### III. LESS RESTRICTIVE ALTERNATIVES TO COMMITMENT

Anyone being petitioned for commitment gets a significant forensic risk evaluation.<sup>17</sup> Generally, if the evaluator agrees that the petitioner meets the criteria and that there is no less restrictive alternative (LRA),<sup>18</sup> the petition moves forward. Right about now you should be hearing alarm bells sounding—what about that LRA?

There simply is no LRA to commitment. Most often there is no DOC supervision available, and without a level of supervision, there is no mandate for the offender to complete a SOTP. MSOP statutes commit respondents to one program: MSOP. MSOP has one entry point: Moose Lake.<sup>19</sup> The only other MSOP facility is in St. Peter, which is used for offenders getting close to completion of their commitments or those with specific physiological needs.

It took many meetings for the Task Force to work through these realities, but in the end we came up with some great ideas. From my perspective, the most important initiative is to create LRAs. We need to provide an environment where bona fide treatment can be provided at the same time as safe reintegration into the community. This sounds easy, but it is hard to accomplish.

In 2012, Olmsted County proposed an idea. We had a semi-secure residence location—a treatment provider that could provide in-house and outpatient treatment along with a plan for supervision. Since persons committed are the responsibility of the Department of Human Services (DHS), we made our pitch. DHS declined and, without its monetary support, the plan failed. Fiscally, the county would not take on the risk and the whole cost of the offenders without DHS paying its share.

As noted earlier, other options are simply not available. A stay of commitment is not available since that entails a commitment to MSOP that is not executed. Unlike a stay of execution of a criminal sentence where there is a local correctional option, DHS has no local options. Even if it were logistically viable, Minnesota statutes do not provide for a stay of commitment.

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17. MINN. STAT. § 609.1352 (2012).

18. *Id.* § 253D.07, subdiv. 3.

19. MINN. DEP'T OF HUMAN SERVS., DHS-6819 12-13, MINNESOTA SEX OFFENDER PROGRAM TREATMENT AT THE DEPARTMENT OF CORRECTIONS (2013), *available at* <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6819-ENG>.

Cross-agency supervision between DHS and DOC is also unavailable. The two agencies have vastly different missions—one provides services and the other provides correctional facilities and supervision.<sup>20</sup> These are all issues that need to be addressed in order to create local alternatives to commitment.

#### IV. EXIT PLAN

Only those offenders at a disproportionately high risk of reoffending are committed. In order to be released the person must reduce his or her risk level. The most obvious way to reduce risk level is completion of an SOTP. Of the nearly 700 persons committed,<sup>21</sup> only a couple have been provisionally discharged back into the community, in part due to progress in the SOTP.<sup>22</sup>

But the reality is that risk can and is reduced in many ways. Age, for example, can alter risk level. Those mentioned earlier whose offending behaviors occurred as a juvenile may “grow up” and grow out of their offending behaviors. Some offenders simply become elderly. As of this writing, the age range at MSOP is twenty to ninety-two.<sup>23</sup> Age, infirmity, and education are some factors independent of SOTP completion that can lower risk to a more manageable level. Identifying persons whose risk levels have been materially reduced is critical. Recently, DHS proposed a plan to move a cadre of committed offenders to a facility in Cambridge, Minnesota. As you may have heard, that plan went over like a lead balloon.<sup>24</sup>

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20. See *What We Do*, MINN. DEP'T HUM. SERVICES, <http://mn.gov/dhs/general-public/about-dhs/what-we-do/index.jsp> (last visited Jan. 15, 2015); see also *Mission and Goals*, MINN. DEP'T CORRECTIONS, <http://www.doc.state.mn.us/PAGES/index.php/about/mission-and-goals/> (last visited Jan. 2, 2015).

21. *MSOP Statistics*, *supra* note 16.

22. See Amy Forliti, *Southern Minnesota Sex Offender Granted Provisional Discharge*, TWINCITIES.COM (Dec. 5, 2014, 12:01 AM), [http://www.twincities.com/localnews/ci\\_27076737/minnesota-sex-offender-gets-provisional-discharge/](http://www.twincities.com/localnews/ci_27076737/minnesota-sex-offender-gets-provisional-discharge/); see also MINN. STAT. § 253D.30 (providing requirements for provisional discharge).

23. *MSOP Statistics*, *supra* note 16.

24. See Dan Browning, *Sex Offenders Not Wanted in Cambridge*, STAR TRIB. (Minneapolis), Oct. 2, 2013, at B1, available at 2013 WLNR 24678521; *Minnesota Sex Offender Program: Cambridge Information*, MINN. DEP'T HUM. SERVICES, [http://www.dhs.state.mn.us/main/groups/agencywide/documents/defaultcolumns/dhs16\\_180235](http://www.dhs.state.mn.us/main/groups/agencywide/documents/defaultcolumns/dhs16_180235) (last updated Nov. 5, 2013).

While the current statutes provide for transfers and provisional discharges,<sup>25</sup> once again, MSOP has no facilities or local options. Over the years, the exit system has been pinched off. I do not advocate for any outright discharges, but it is unrealistic to keep our heads buried in the sand and refuse to acknowledge that some of these folks can be safely managed in the community.

## V. WWMD

The Task Force ultimately put together a pretty good report chock-full of recommendations.<sup>26</sup> Did I agree with every single nuance? No—no one did. But we did make a list of recommendations that will largely fix the lack of LRAs and provide some measure of triple check on the entry pipeline. We also made significant recommendations on evaluating current clients and suggestions on how to move them through reduction of risk to reduction in custody.<sup>27</sup> The recommendations are also realistic options that can be implemented and do not require a wholesale gutting of the program.<sup>28</sup>

The Task Force also made several recommendations that will ultimately help avoid the commitment process for some offenders.<sup>29</sup> Extending the jurisdiction of the court for juvenile sex offenders will allow longer treatment opportunities while the brain develops.<sup>30</sup> Changes in sentencing laws that would allow for DOC treatment opportunities would help provide the DOC with more resources for additional SOTP beds.

The legislature has tried to ignore the issue for far too long. The legislation is ready, it is right, and it is time to stop assessing blame. We cannot go back and change history, but we can put into

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25. MINN. STAT. § 253D.29 (transfer); *id.* § 253D.30 (discharge).

26. *See generally* Memorandum, *supra* note 15.

27. *Id.* at 14.

28. I would be remiss if I did not acknowledge my opinion that the current SOTP provided at MSOP is high quality. We cannot lose sight of these clients. These are people who for many reasons have failed in one or more other programs and the level of risk they bring makes completion a journey. Unlike community treatment, each client at MSOP has an individual treatment plan. As Jannine Hebert, MSOP Executive Clinical Director, commented on the provision of services, "It's complicated." Jannine Hebert, MSOP Treatment Dir., Dep't of Human Servs., Remarks at the CLE Presentation at the Minnesota Sex Offender Fall Program (Sept. 26, 2013).

29. Memorandum, *supra* note 15, at 2–3.

30. *Id.* at 3–4.



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place a more appropriate plan that will avoid some commitments and give realistic opportunities for reduction in risk and, ultimately, safe reintegration into the community.