

MEMORANDUM

Date: November 17, 2006

To: Greig Veeder

From: David Miller / Steve Arvin

Re: Constitutional Issues Arising from SOCR

Questions Presented

- A. Under the United State Constitution, what is the permissible standard under which SOCR can detain sex offenders before they are released into the next stage of parole?
- B. Is SOCR's use of polygraphs in violation of the United States Constitution?
- C. Is SOCR's use of penile plethysmography in violation of the United States Constitution?

Short Answers

- A. The Constitution gives SOCR broad authority to detain sex offenders as they see fit until that offender's sentence ends, although the Due Process Clause of the Fourteenth Amendment may require SOCR to afford minimum due process rights to sex offenders when determining if they are to be released into the next stage of supervision or regressed back to the Department of Corrections.
- B. SOCR's use of polygraph tests could face constitutional challenges; however, these challenges can be avoided if SOCR conforms its use of polygraph tests to established Fifth Amendment requirements.

C. SOCR's use of penile plethysmography could face challenges under the First, Fourth, Fifth and Fourteenth Amendments, though with adequate pre-administration procedures, it satisfies all of these.

I. Introduction

The analysis in this memo rests on the assumption that the Sex Offender Containment (SOCR) Facility will operate as treatment program that rehabilitates parolees before they are released into the community as the next stage of their parole. Part II of this memo deals with the constitutionally permissible standard under which SOCR can detain sex offenders before they are released into the next stage of parole. Part III addresses constitutional issues arising from SOCR's contemplated use of polygraph testing. Part IV addresses constitutional issues arising from SOCR's contemplated use of plethysmography.

II. What is the constitutionally permissible standard under which SOCR can detain sex offenders before they are released into the next stage of parole?

Sex Offender Containment (SOCR) Facility has broad authority to detain an offender rehabilitated at SOCR as a condition of his parole. However, an offender might have a right, under the Due Process clause of the Fourteenth Amendment, to a hearing and other procedures regarding if he will be released.

A. *SOCR has broad authority to detain offenders*

What are an offender's rights at SOCR regarding when he can be released into the next stage of his parole? "There is no constitutional or inherent right of a convicted

person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979). Thus, as SOCR treats "convicted persons," it has considerable power to determine when residents should be released into the next stage of parole.

B. An offender's right to a hearing and other procedures

An offender at SOCR might have a right, flowing from the Due Process Clause of the Fourteenth Amendment and state law, to certain procedures when SOCR considers if he will be released into the next stage of his parole. The presence of a convicted person's protections hinges on whether the state statute, or rules and regulations, that guide that person's parole determinations create a liberty interest. If, under state law, a parole board's decision to grant parole is discretionary, then an inmate maintains no liberty interest and consequently no right to due process regarding his release to the next stage of parole. *See e.g. Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) (finding that lack of "'explicitly mandatory language,' *i.e.*, specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow," in statute demonstrated the absence of a liberty interest). And, in such a circumstance, if a parole board denies an inmate parole, it has no obligation to provide the inmate with an explanation for its decision. *See e.g. O'Kelley v. Snow*, 53 F.3d 319, 322 (11th Cir. 1995).

However, a liberty interest in parole is created if a state's parole system places "substantive predicates" on a parole board's discretionary authority and mandates release when the board finds that the necessary prerequisites have been satisfied. Bd. of Pardons

v. Allen, 482 U.S. 379, 380 (1987) (finding that language in statute stating that “the board shall release on parole . . . any [inmate] when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community” created a liberty interest); *see also* Sultenfuss v. Snow, 35 F.3d 1494, 1499-1503 (11th Cir. 1994); Price v. Barry, 53 F.3d 369, 370-71 (D.C. Cir. 1995). If such a liberty interest exists, the inmate has the right to a hearing to determine his parole. Greenholtz, 442 U.S. at 16. Furthermore, the parole board is required to advise an inmate of adverse information that might precipitate an unfavorable decision, and afford the inmate an opportunity to address it. *See* Williams v. Miss. Bd. of Prob. and Parole, 661 F.2d 697, 700 (8th Cir. 1981); *see also* Wilkinson v. Austin, 125 S.Ct. 2384, 2396 (citing Greenholtz, 442 U.S. at 15). Also, the board must inform the inmate as to why he failed to qualify for parole. *See* Greenholtz, 442 U.S. at 16 (finding that parole board's policy of informing prisoner "in what respects he falls short of qualifying for parole" satisfied Due Process, but that under Due Process the board was not required "to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release")

Ultimately, whether or not an offender at SOCR has these due process protections rests upon whatever authority (*i.e.*, statute or rules and regulations) guides the assessment process of SOCR or whatever body bears the responsibility of making such a decision.¹

¹ SOCR, of course, treats sex-offenders who are already on parole, rather than inmates whose paroles are pending. However, the court's statement in Greenholtz SOCR's that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence" suggests that Greenhols, Allen and the other cases discussed above apply equally to parolees who are, obviously,

If such authority contains "explicit mandatory language" as to when parole should be granted then an offender will likely have some due process rights available regarding whether he should be released into the next stage of parole. Thus, *Allen*, and the cases that follow it suggest that SOCR can satisfy the U.S. Constitution in making decisions as to when a parolee should be released by either 1) operating under an authority that lacks "explicit mandatory language" as to when an offender should be released, or 2) affording offender's minimum due process rights by informing them of adverse information that could result in denial of their release from SOCR, granting them a hearing, and informing those who are denied parole why they were not released.

III. Polygraph Tests

SOCR's use of polygraph testing raises three concerns under the United States Constitution. These are 1) that the test may violate an offender's Fifth-Amendment right against self-incrimination, 2) that the test may be unnecessary and overly burdensome, and 3) that the test may involve an unlawful delegation of judicial power.

A. *The Fifth Amendment Right Against Self-Incrimination*

SOCR's use of polygraph tests must conform to the Fifth Amendment right against self-incrimination as the tests could reveal heretofore undisclosed evidence of an offender's crimes. U.S. Const. amend. V. In *Minnesota v. Murphy*, the U.S. Supreme

"convicted persons." *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979)

(emphasis added).

Court found that an offender on probation maintains his right under the Fifth Amendment to refuse to answer a question implicating him in a future criminal proceeding, and the state cannot compel such answers by "revok[ing] probation for the legitimate exercise of [that] privilege." Minnesota v. Murphy, 465 U.S. 420, 438 (1984). Yet a state can bypass this limitation on its power and "validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." *Id.* at 434 n.7. Furthermore, under such circumstances, "a State [may revoke] probation for a refusal to answer that violated an express condition of probation or [use] the probationer's silence as 'one of a number of factors to be considered by the finder of fact' in deciding whether other conditions of probation have been violated." (citation omitted) *Id.* Thus, if an offender has been granted immunity from the criminal consequences of his statements he may be compelled to answer incriminating questions. Since *Murphy* courts have upheld the use of polygraphs within these Fifth Amendment parameters to monitor sex offenders on probation. *See e.g.*, United States v. York, 357 F.3d 14, 24-29 (9th cir. 2004); United States v. Lee, 315 F.3d 206, 211-13 (3d cir. 2003) (rejecting appellant's argument that "the added factor of the polygraph condition . . . bring[s] [his] sentence to the level where it is likely to compel him 'to be a witness against himself'"); United States v. Zinn, 321 F.3d 1084, 1090-92 (11th Cir. 2003).²

² *Murphy* and its progeny deal with offenders on probation while here SOCR treats offenders on parole. But the court in *Murphy* addressed convicted persons "*imprisoned or on probation* at the time he makes incriminating statements." Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (emphasis added). Thus, as a parolee "is constructively a prisoner," *Murphy* would seem to apply to parolees as well as probationers. 67 C.J.S. § 61 Pardon and Parole (2005).

Therefore, SOCR may apply polygraph testing and compel an offender to answer questions so long as the offender has been granted immunity from facing criminal consequences for his answers.³ If the offender refuses to answer questions, this response may be assessed against him in determining if the parole should be revoked and when he should be released into his next stage of parole. If the offender, however, is not granted immunity from the future criminal consequences of his statements then he may refuse to answer questions on Fifth Amendment grounds, and SOCR may not compel such answers via revocation of his parole.

If an offender refused to respond in a polygraph examination on legitimate Fifth Amendment grounds, could that refusal be assessed against him in determining when he

³ In 2006, the Colorado Legislature removed the statute of limitations for several sexual offenses, so there is no limit on when such charges can be prosecuted. C.R.S. 16-5-401 (1) (a) (2006) (no limit for any sex offense against a child, also including any attempt, conspiracy, or solicitation to commit any sex offense against a child). As a practical reality—especially in light of the extended statute of limitations described above—a prisoner held within SOCR could not reasonably rely on a promise of immunity offered by anyone other than a prosecuting court or prosecutor, given there is no procedure for enforcement of an attempted grant of immunity by the equivalent of a half-way house or Department of Corrections facility. Accordingly, unless immunity were effectively offered, the law makes it clear that a person asserting his 5th Amendment right against self-incrimination could either effectively be granted immunity to overcome such privilege, or be rejected from the program, if called for, for asserting such privilege, and that such rejection would not constitute a violation of his constitutional rights. *See, e.g., United States v. Zinn*, 321 F.3d 1084, 1090-92 (11th Cir. 2003). *But see, United States v. Antelope*, 395 F.3d, 1128, 1137-1138 (9th Cir. 2005) (inmate under supervised release could not be sent back to prison for reasonably relying on his 5th Amendment right to be free from compelled self incrimination for refusing to disclose his prior sexual history).

should be released from SOCR? In *McKune v. Lile*, the U.S. Supreme Court considered if curtailment of a prisoner's privileges--"visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges"--for his refusal to disclose his prior sexual history in a sex treatment program constituted compulsion of self-incrimination under the Fifth Amendment.

McKune v. Lile, 536 U.S. 24, 29-31, 48, 55 (2002). The Court found it did not: "A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of life." *Id.* at 37-38. Here, SOCR serves a legitimate "penological objective." Moreover, while denial of a parolee's release into the community is more severe than the privileges revoked by the prison in *Lile*, a court is unlikely to consider it the imposition of an "atypical and significant hardship." Hence *Lile* suggests that a program such as SOCR may consider the offender's reaction as a factor against him in determining when he should be released into the community as the next stage of his parole. However, it is important to note that this interpretation of the Fifth Amendment only elicited the support of a plurality in *Lile*; thus, it is unreliable precedent.

B. Unnecessary and overly burdensome

Polygraph testing of offenders in treatment programs has been challenged on the grounds that it is may be unnecessary and overly burdensome. In *Lee*, the appellant claimed that polygraph testing during his probation was "unnecessary and overly burdensome" because "many courts do not admit polygraph results into evidence." Lee,

315 F.3d at 213. The court rejected this argument--the polygraph was necessary because its "result[s] may still be used by the probation officer to enhance supervision and treatment" of the offender; and it was not overly burdensome because the "requirement that [the appellant] be subject to polygraph testing does not substantially increase the burden on him." *Id.* at 214. Here, SOCR could rebut a similar argument because polygraph testing assists SOCR's "supervision and treatment" of offenders, nor would requiring parolees to submit to polygraphs be any more "burdensome" on them than the probationer in *Lee*.

C. An unlawful delegation of judicial power

Polygraph testing of offenders in treatment programs has been challenged on the grounds that it entails an unlawful delegation of judicial power. In *York*, the appellant claimed that court ordered polygraph testing by his probation officer "as a means to insure that he is in compliance with the requirements of his therapeutic program [during his probation]. . . unlawfully delegates to non-judicial officers the power to determine matters of punishment"; *York*, 357 F.3d at 21; *see also Zinn*, 321 F.3d at 20-21. The Court rejected this argument because the "court left no significant penological decision to the discretion of the Probation Office: the court itself determined that [the appellant] 'is to participate' in a treatment program for sex offenders and that [the appellant] 'shall be required' to submit to polygraph testing to confirm his compliance with his treatment regimen." *York*, 357 F.3d at 21. Here, SOCR contemplates the treatment of parolees rather than probationers; hence an offender would enter SOCR at the discretion of a parole board rather than a court. Parole board members are not necessarily "judicial officers," 16 C.J.S. § 1707 Constitutional Law (2005), thus, under SOCR a "non-judicial"

officer could arguably be "determining matters of punishment" and the delegation of power claim might have some merit. However, as the court in York noted: "Courts are not prohibited from 'using non-judicial officers to support judicial functions, as long as the judicial officer retains and exercises ultimate responsibility.'" York, 357 F.3d at 21 (quoting United States v. Allen, 312 F.3d 512, 515-16 (1st Cir. 2002)). Given this fact, and the wide latitude that courts in the past have granted to parole boards to place inmates in various facilities, it is difficult to imagine that a court will find that SOCR constitutes an unlawful delegation of judicial power.

IV. Penile Plethysmography

SOCR's use of penile plethysmography raises four constitutional issues: 1) the Fourth Amendment right against unreasonable searches and seizures; 2) the First Amendment right to religious freedom and the right to inclinations and fantasies; 3) the Fifth Amendment right against self-incrimination; and 4) the Fourteenth Amendment protection against denial of a fundamental liberty interest.

A. *The Fourth Amendment right against unreasonable searches and seizures*

The use of plethysmography in sex-offender treatment programs has been challenged as a violation of the Fourth Amendment right against unreasonable searches and seizure. *Walrath v. United States* typifies such a challenge. 830 F. Supp. 444 (N.D. Ill. 1993). In *Walrath*, the appellant challenged the requirement that he undergo plethysmograph testing as a condition of his parole. In considering this claim, the Court noted that parolees enjoy only "[a] conditional liberty properly dependent on observance of special parole restrictions," (citation omitted) *id.* at 446, and "Fourth Amendment

protection against unreasonable searches and seizure is one of the rights reduced by parole or probation status." *Id.* at 447. To uphold the plethysmograph's constitutionality, therefore, the Court required only "a reasonable relationship" between plethysmograph testing and the state's interest in rehabilitating sex offenders. *Id.* In order to achieve its goal of rehabilitation the state was already authorized to "require a parolee to participate in a drug or mental health treatment program," and the Court found the plethysmograph was "not exceptionally more intrusive than other physical [examinations]," involved in such a program, "which may involve full nudity and internal probes." *Id.* Furthermore, while the Court recognized that the plethysmograph was more intrusive than other state executed mental examinations in that it "taps directly into involuntary responses," this intrusion was outweighed by the state's need to "accurately assess a patient's condition, so that it may effectively intervene." *Id.* Thus, the plethysmograph was a "reasonable condition" of the appellant's parole and within the parameters of the Fourth Amendment. *Id.*

Here, SOCR treats parolees like the appellant in *Walrath* whose rights are "reduced" by parole status. And, as in *Walrath*, a "reasonable relationship" between SOCR's use of plethysmographs for rehabilitative means and its need to "accurately assess a patient's condition" is easily found. Hence SOCR's use of plethysmographs would likely satisfy the Fourth Amendment's right against unreasonable searches and seizures.

B. *The First Amendment*

SOCR's use of plethysmography raises two First Amendment concerns: 1) the right to religious freedom, and 2) the right to inclinations and fantasies under *Jacobson v. United States*

1. The First Amendment Right to Religious Freedom

Offenders have objected to the use of plethysmograph tests, which require offenders require to "view sexually explicit materials, to fantasize about perverse acts, or to engage in masturbatory activity," Jason R. Odesloo, Of Penology and Perversity: The Use of Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 25 (2004), on the ground that these test conditions offend their religious convictions and therefore impinge upon their First Amendment right to religious freedom.

Searcy v. Simmons provides a thorough constitutional analysis of such a claim. In *Searcy*, the Court applied four factors to determine whether a prison regulation which restrains an inmate's sincerely held religious beliefs is reasonable: (1) whether the regulation has a logical connection to legitimate governmental interests invoked to justify it; (2) whether alternative means of exercising his religion remain open to the inmate; (3) the impact that accommodation of the inmate's asserted right would have on other inmates, prison personnel and allocation of prison resources generally; and (4) whether there is an alternative that fully accommodates the inmate's rights at *de minimis* cost to valid penological interests." Searcy v. Simmons, 68 F.Supp.2d 1197, 1202 (D. Kan. 1999). Regarding the first factor, the court deferred to the judgment of prison officials that plethysmograph tests serve a "legitimate correctional goal." *Id.* The second factor weighed against the plaintiff because he "retain[ed] the right to choose not to participate in the sexual abuse treatment program," notwithstanding the fact that the plaintiff's refusal to participate could prompt the loss of his privileges. *Id.* Concerning factor three, the Court found that excusing the Plaintiff from testing could "detract from prison

officials' ability to provide uniform and effective rehabilitative treatment for plaintiff and other sex offenders," and "cause resentment and discontent among other participants, thus frustrating prison officials' goal of rehabilitation and treatment." *Id.* at 1203. Finally, the court found no "alternative" that would "have a *de minimis* cost to valid penological interests." *Id.*

SOCR's plethysmography tests would likely survive a similar First Amendment attack. 1) As in *Searcy*, a court would likely defer to SOCR's judgment that plethysmography provides a logical connection to the legitimate government interest of rehabilitation. 2) As in *Searcy*, SOCR would presumably allow an offender to opt out of plethysmography testing, though that option might lead to the loss of the offender's privileges and potentially delay his release into the community. 3) As in *Searcy*, exempting particular offenders from plethysmography tests could disrupt SOCR's rehabilitative goals. 4) As in *Searcy*, no alternative to plethysmography exists that "fully accommodates the inmate's rights at *de minimis* cost to valid penological interests."

Finally, it is worth noting that so far constitutional attacks on plethysmography have failed in large part because formerly the state needed only to demonstrate that it had a rational basis for employing plethysmographs. *See e.g. Searcy v. Simmons*, 68 F.Supp.2d 1197, 1202 (D. Kan. 1999); *Von Arx v. Schwarz*, 517 N.W.2d 540, 545 (Wis. Ct. App. 1994). However, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USCA § 2000cc (2000), could significantly change this dynamic. RLUIPA forbids the government from imposing a "substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government can demonstrate it "is in furtherance of a compelling governmental interest; and is the least

restrictive means of furthering that compelling governmental interest." 42 USCA § 2000cc-1(a)(2). This heightened standard of a "compelling government interest" could make satisfying the constitutionality of plethysmography much more difficult, although it has yet to be utilized in a First Amendment challenge. *But see Kilaab Al Ghashiyah v. Dept. of Corr.*, 250 F.Supp.2d 1016, 1021-34 (E.D. Wis. 2003) (dismissing a prisoner's claim under RLUIPA that his religious rights were violated because RLUIPA violates the United States Constitution's Establishment Clause).

2. The right to inclinations and fantasies under *Jacobson v. United States*

Jason Oshedo raises a First Amendment concern that has not been tested in court but merits consideration. *See Jason R. Odeshoo, Of Penology and Perversity: The Use of Plethysmography on Convicted Child Sex Offenders*, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 25 (2004). Oshedo's concern over plethysmograph's constitutionality arises from *Jacobson v. United States*. 503 U.S. 540 (1992). In *Jacobson*, the Defendant was induced by "repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal," to buy illegal pornography. *Id.* at 543. The Defendant was subsequently convicted, *id.* at 547, but on appeal the Court held that the Defendant had been entrapped and overturned the conviction. *Id.* at 553-54. Specifically, the Court objected to purported relevance of evidence documenting the Defendant's interest in photographs of young boys. *Id.* at 543-45. "[A] person's inclinations and fantasies" the Court stated, "are his own and beyond the reach of the government. . . ." *Id.* at 551-552 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)).

SOCR's use of plethysmography runs the risk of violating *Jacobson*, for as Oshedo points out: "The procedure not only puts a person's desires and fantasies within government reach, it purports to lay bare a detailed and complete inventory of the offender's sexual inclinations--his attraction to males versus females, his attraction to children versus adults, as well as the particular age ranges, and even anatomical features, by which he is aroused." This theory gives rise to relevant, though as of yet untested, First Amendment concerns.

C. The Fifth Amendment Right Against Self-Incrimination

Like polygraph tests, SOCR's use of plethysmography could face challenges under the Fifth Amendment's right against self-incrimination because the tests could reveal heretofore undisclosed evidence of an offender's crimes. U.S. Const. amend. V. In *Walrath*, the court rejected a Fifth Amendment's challenge against the use of plethysmography in a sex-offender treatment program. The court found a plethysmograph 1) "is not testimonial, but is rather a physical test of [the appellant] sexual reactions", 2) is not used to gather information that may incriminate an offender, but rather "the test is designed to determine how best to help him overcome any sexual deviance he might still harbor," and 3) "there is no indication that any results from [the Plaintiff's] plethysmograph could be used to criminally prosecute him for other acts." Walrath v. United States, 830 F. Supp. 444, 446 (N.D. Ill. 1993). Hence *Walrath* suggests that plethysmography inherently avoids the circumstances that give rise to a valid Fifth Amendment self-incrimination claim; and, even if plethysmography does give rise to such a claim, SOCR could avoid many Fifth Amendment limitations by affording offenders the same kind of immunity to the use of their responses in a criminal

proceeding that would alleviate Fifth Amendment concerns over polygraph testing. See discussion *supra* III.A.

D. *The Fourteenth Amendment Fundamental Liberty Interest*

Previous case law recognizes that certain bodily intrusions are so significant as to implicate liberty interests guaranteed under the Fourteenth Amendment Due Process Clause. See *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L. Ed. 2d 662 (1952); *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L. Ed. 2d. 662 (1985). Recent Ninth Circuit law holds that in light of a California statute that requires the court to determine the need for imposing certain conditions upon the release of an inmate, before penile plethysmography would be judicially approved a specific finding justifying the need for the imposition of such a procedure would have to be shown in the record. *United States v. Weber*, 451 F.3d 552, 566 (9th Cir. 2006). This line of cases has not, to date, been extended into Colorado or the Tenth Circuit case law, but it has attained controlling status within the Ninth Circuit. See *e.g.*, *United States v. Yoder* 2006 U.S. App. LEXIS 23637 (9th Cir. Cal. Sept. 14, 2006) at 5-6; *United States v. Belman*, 2006 U.S. App. LEXIS 23619 (9th Cir. Cal. Sept. 14, 2006) at 3.

V. Conclusion

In sum, SOCR involves a number of circumstances that give rise to constitutional concerns. The most salient of these concerns are whether a sex-offender has a right to procedural protections when determining if he will be released or regressed; the potential of polygraph testing to violate the Fourth or Fifth Amendment; and the possibility that plethysmograph testing might violate the First or Fourteenth Amendment. Yet, while

these concerns could affect how SOCR employs its methods of sex-offender management, they do not preclude the use of these programs altogether.