OCEAN

# Substituting the Medical Model for a Psychoeducational Model: Civil Commitment Based on Correctional Guidelines of Criminogenic Factors Without Medical Justification Exceeds State Interests

This original OCEAN article breaks down the history of the MSOP, how it transitioned from a Medical Model to a Psychoeducational Model and why it matters.

**Daniel A. Wilson and Russell J. Hatton**

**2/7/2021**

# SUBSTITUTING THE MEDICAL MODEL FOR A PSYCHOEDUCATIONAL MODEL

## Civil Commitment Based on Correctional Guidelines of Criminogenic Factors Without Medical Justification Exceeds State Interests


**Daniel A. Wilson**

**Russell J. Hatton**[1]



Abridgment:

*The Minnesota Sex Offender Program is a blatant unconstitutional preventive detention scheme ruled by politics. Past and present Executive Directors confess that the "vast majority" of the men confined to MSOP are not mentally ill. It is not a hospital, does not employ medical staff, and does not offer psychiatric evaluations to the men confined. Instead, the men are "treated" for the same criminogenic factors required by federal law to determine the sentence duration of a convicted criminal.*




[1] Daniel A. Wilson (DAW) and Russell J. Hatton (RJH) are the co-founders of the OCEAN Newsletter which is dedicated to providing front line information about the MSOP scheme. Correspondence regarding this article may be voice mailed to (218) 351-1900: DAW: Ext: 106021; RJH: Ext: 70887

## OVERVIEW

In 2003, there was a highly publicized rape and murder in Minnesota. The effect was immediate and dramatic: Governor Tim Pawlenty issued an executive order to keep MSOP Executives from releasing any men from MSOP despite mental health status. Meanwhile, Minnesota County Attorneys increased referrals for commitment of those alleged to be SDP/SPP. Minnesotan authorities have a legitimate state interest to protect the public from sexual violence and to rehabilitate the mentally ill.[i] The public relies on the Department of Human Services (DHS) to rehabilitate Sexually Dangerous Persons (SDP) and Sexually Psychopathic Personalities (SPP) rather than punishing them for past crimes.[ii] The DHS attempts to rehabilitate this population by involuntarily "hospitalizing" them to the Minnesota Sex Offender Program (MSOP) which claims to provide psychiatric care and treatment.[iii] In the nine years prior to Pawlenty's order, a total of 237 individuals were referred to MSOP with only 181 men actually committed. But within a few months of Pawlenty's order, 235 individuals were referred. There are now just under 750 men and one woman committed to MSOP.[iv]

Many of the men that were sent to MSOP were not mentally ill.[v] MSOP Executives could not ignore this fact. By 2008, the Executives shifted their procedures away from State Operated Services, the DHS department responsible for administering psychiatric services to the mentally ill. Thus, DHS modified the entire MSOP and changed it from a Medical Model to a Psychoeducational Model program. Instead of treating mental illness, the new model focuses on the same criminogenic factors used to determine the sentence duration of a convicted criminal.

Civil commitment is for patients, not criminals. Yet, MSOP Executives removed every factor necessary to justify civil commitment and added the one factor that prohibits civil commitment: criminality.[vi]

In November 2013, MSOP actually made an attempt to release a large number of sane men. However, Governor Mark Dayton intervened and directed DHS Commissioner, Lucinda Jesson (now a Minnesota Appellate Judge), to oppose all discharges from the MSOP until the legislation made changes:

> ...I believe very strongly that professionals, not politicians, should make those very difficult decisions...
>
> Unfortunately, I do not believe that your attempts to establish a program of provisional release, as required by current law, can succeed, when surrounded by this political gamesmanship. Accordingly, I direct that you oppose any future petitions by sexual offenders for provisional releases...

Dayton goes on to list provisions he requires for the DHS Commissioner.

In the letter, the former Minnesota Governor confessed that MSOP is used as a "state tactic" to strengthen older weaker laws. He explains that MSOP bypassed the criminal court's prohibition against resentencing an offender to punishment longer than authorized at the time of the offense. He concludes his letter by ordering the Commissioner to wait until the end of the following legislative session before she considers any provisional discharge petitions.

## MSOP IS NOT A LEGITIMATE CIVIL COMMITMENT SCHEME BECAUSE IT DOES NOT PROVIDE PSYCHIATRIC CARE AND TREATMENT, EMPLOY QUALIFIED PSYCHIATRIC STAFF, OR ADMINISTER PERIODIC PSYCHIATRIC EVALUATIONS.

In his dissenting opinion in 2014, Judge Edward Randall asserted:

> I dissent, as I have before, to express my view concerning the great myth that civil commitment is "remedial . . . for treatment purposes and . . . not for purposes of preventive detention."... Minnesota's Civil Commitment Act cannot be called "punishment" because that would be unconstitutional... The hell it is not punishment... The next great myth (close to being a "lie") is that it is for medical treatment... The third great myth or "lie," is that once you are civilly committed you have a rational due process chance to be medically discharged. [internal citations omitted][vii]

Judge Randall summarizes the true nature of the Minnesota Sex Offender Program: MSOP is preventive detention, unconstitutional, and does not treat the mentally ill.

MSOP split from State Operated Services, the DHS department responsible for dispensing approved psychiatric care and treatment to mentally ill people in the state.[viii]

MSOP Clinical Director, Jannine Herbert confessed, "...MSOP was pulled out from underneath state operated services, and we made a conscious decision to move away from that medical model approach..." [ix] Herbert affirms that the reason she changed the program from a Medical Model to a psychoeducational Model was because the program had grown. Before the court, she describes how the program grew significantly with, "...over 200 referrals that happened in one month in 2003..." She goes on to explain that the program use to be based on a Medical Model: "And when I say medical model, for example, medical model is very hospital-based..." When Herbert had completed the transformation, MSOP was, "...very much not a medical model design..." Herbert says.[x] MSOP Executives have deleted a program that supports a state interest in rehabilitating the mentally ill.

MSOP Executives employ unqualified staff. Current and past MSOP Executives used Administrative Variances approved by the DHS licensing board to separate from State Operated Services. The Legislative branch provides statutory limits to these variances. Specifically, the DHS commissioner cannot grant a permanent variance when conditions under which the variance is requested compromise the qualifications of staff to provide services.[xi] However, DHS ignored this statute and have replaced psychiatrists with, "licensed eligible psychologists" or a "mental health professionals." Although this particular variance might be legal if it was temporary, MSOP Executive Director Nancy Johnston admits: "The variances where approved indefinitely with the understanding the rules governing MSOP were outdated..." [xii]

Per state statute, the DHS commissioner also cannot grant a permanent variance if it will affect the health or safety of persons being served by the licensed program. Historically, state statute protected a patient's right to health and safety requiring medical evaluation for continuing medical care and treatment. Nonetheless, unqualified staff can now deviate from mandated psychiatric evaluations for the men at their facilities despite statutory regulation. The variance was approved despite state laws [xiii] and DHS rules [xiv] that require all such civil commitment facilities to provide medical evaluations. The men at MSOP do not receive psychiatric evaluations so there is no way to know who is being unnecessarily detained. MSOP Executives violate the health and safety of the men at MSOP by refusing to provide psychiatric evaluations to the men detained. MSOP Executives have systematically removed any rational relation to the original purpose of authorizing civil confinement.

DHS Executives have the authority to update administrative rules but cannot violate state statute to do so. DHS Executives broke the law to change the rules; ignoring the statutes that govern the variances. The Legislature is the only proper authority to change statue. But here's the rub: these Administrative Variances are "NOT PUBLIC" and for DHS eyes only.[xv] It is likely that the Legislature has never been aware of this scheme.

In summary, all legitimate civil commitment schemes provide a reasonable opportunity to be cured or improve the mental condition for which they were confined.[xvi] MSOP does not provide psychiatric care and treatment, employ qualified psychiatric staff, or administer periodic psychiatric evaluations. Therefore, MSOP is not a legitimate civil commitment program.

## INSTEAD OF A MEDICAL JUSTIFICATION, MSOP EXECUTIVES REQUIRE THE MEN TO ADDRESS THE SAME CRIMINOGENIC FACTORS APPLIED AT THE TIME OF SENTENCING.

While the offender is imprisoned, the Director of the Bureau of Prisons is required to:

> ...provide all prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs or productive activities, according to their specific criminogenic needs, throughout their entire term of incarceration..." [xvii]

A key role of a sentencing court is to reduce criminogenic factors present in society. "Criminogenic" is defined as an adjective: "Tendency to cause crime or criminality." [xviii] These criminogenic factors are addressed by what the imposed sentence must provide to the convict: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." [xix]

The Department of Corrections (DOC) Commissioner orders those who have been convicted of a sex offense to participate in psychoeducational treatment. This particular type of treatment is not considered a "Medical Model" treatment. Instead, it is focused on criminogenic factors because the offender is not necessarily mentally ill and dangerous. This

rationale makes sense in the DOC because that population is considered criminal. However, civilly committed persons are entitled to, "...more considerate treatment..." than convicts, [xx] yet MSOP uses the same criminogenic factors to determine their "client's" progress in "treatment." The MSOP Theory Manuel is littered with statements about "criminogenics" [xxi] which is insufficient to reduce any risk posed to the public.[xxii]

A Psychoeducational treatment focused on criminogenic factors is misplaced in a civil commitment facility. For a civil commitment program to attempt to change a criminogenic profile is something foreign to jurisprudence. Civil commitment is expected to treat mental illness and dangerousness; not criminality. Criminality is not the same as dangerousness as one does not need to be a criminal to be considered for commitment. At least 12% of the men at MSOP do not have criminal records.[xxiii] Although criminality does not necessitate a sexual disorder or paraphilia,[xxiv] MSOP is making an attempt to "treat" crime. In doing so, they imply they are *medicalizing* crime, which professionals in the scientific community do not approved. In fact, Allen Frances, author of the DSM-5 says, "The proposal to create a mental disorder diagnosis for rapist has been raised and unequivocally rejected 5 times in the past 35 years..." [xxv] Crime is properly sanctioned by the criminal court and cannot be "treated."

Although, there is no evidence to show why the criminal sentence was insufficient for addressing criminogenic factors, they are now being reassessed by the MSOP. For those who do have criminal records, criminogenic factors were approved by the Legislature to address deterrence, retribution, risk and accountability to society. Criminogenic factors were properly before the criminal court when the offender was convicted of a crime. MSOP undermines the sentencing judge's ruling to a specific duration of incarceration by revisiting criminogenic factors.

In the MSOP Theory Manual, the responsivity principle states:

> ...interventions should be delivered in a manner consistent with offenders' learning styles, abilities, and personal circumstances. Important considerations include language, culture. Personality style or personality disorders, motivation, anxiety, mental disorder, cognitive abilities, and so forth..." [xxvi]

Despite the language in their own Manuel, each treatment plan is a boilerplate-one size fits all. MSOP Executives have effectively removed all medical justifications that would otherwise validate its Theory Manuel responsivity principle.

In summary, civilly committed persons are entitled to more considerate treatment than convicts.[xxvii] Convicts are subject to a psycheducational treatment focused on criminogenics factors. The men confined to the MSOP are also subject to a psycheducational treatment focused on criminogenics factors. Therefore, the men at the MSOP are receiving the wrong kind of treatment.

## CIVIL COMMITMENT CANNOT BE JUSTIFIED ABSENT SOME MEDICAL JUSTIFICATION. THEREFORE, MSOP MUST RELEASE THE MAJORITY OF THE MEN CONFINED BECAUSE THEY ARE NOT MENTALLY ILL.

MSOP Executives exceed their authority by enacting variances that remove a legitimate state interest to rehabilitate the dangerous mentally ill. In the United States Supreme Court cases *Kansas v Hendricks* and *Kansas v Crane* the Court identified two limitations when justifying a civil commitment scheme: 1) the state is prohibited from confining those who have committed sexual offenses as mental health patients without some medical justifications and 2) are limited to confining the dangerously mentally ill and committing those who have committed sexual offenses based on dangerousness alone is prohibited. DHS ignore both of these prohibitions by refusing to release men who are not mentally ill.

MSOP should release the majority of the men at MSOP. The Variance Request states: "The vast majority of patients committed to the Minnesota Sex Offender Program do not experience symptoms of mental illness that require psychiatric treatment..." [xxviii] Minnesota's Supreme Court has stated that an individual, "...may be held as long as he is both mentally ill and dangerous, but no longer," [xxix] The United States Supreme Court has stated that civil commitment is not justified, "...absent some medical justification for doing so..." [xxx] MSOP Executives would argue that although the men may not have a "mental illness" perhaps they have a "mental disorder." But the Minnesota Appellate Courts opined that there is no difference between a mental illness and a mental disorder to justify civil commitment.[xxxi] The courts clarified this lack of distinction stating the key to these mental

conditions are expressed in the individuals inability to control his dangerousness.[xxxii] In addition, the United States Supreme Court prohibits continued commitment for treatment based on risk, recidivism factors and dangerousness alone.[xxxiii] Therefore, men at MSOP are entitled to release once they are in remission of a sexual disorder and their conduct is brought under control.[xxxiv]

In summary, civil detainees may be held as long as they are both mentally ill and dangerous, but no longer. [xxxv] The vast majority of those committed to MSOP are not mentally ill.[xxxvi] Therefore, the vast majority of those at the MSOP must be released.

## CONCLUSION

All legitimate civil commitment schemes provide a reasonable opportunity to be cured or improve the mental condition for which they were confined.[xxxvii] Civil detainees may be held as long as they are both mentally ill and dangerous, but no longer, [xxxviii] and are entitled to more considerate treatment than convicts.[xxxix]

MSOP does not provide psychiatric care and treatment, employ qualified psychiatric staff, or administer periodic psychiatric evaluations. The vast majority of those committed to MSOP are not mentally ill.[xl] The men confined to the MSOP are subject to the same psycheducational treatment focused on criminogenic factors as convicts. Therefore, MSOP is not a legitimate civil commitment scheme, the men at the MSOP are receiving the wrong kind of treatment and the vast majority of those at the MSOP must be released.

---

[i] *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) citing *Kansas v Hendricks*, 521 U.S. 346, 356 (1997); *Foucha v Louisiana*, 504 U.S. 71, 80 (1992); *Addington v Texas*, 441 U.S. 418, 426 (1979).

[ii] Per Minnesota Statute, 253D.02, Subd. 11, a person with a Sexual Psychopathic Personality (SPP) has, "...such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons." Per Minnesota Statute 253D.02, Subd. 12(a) 1-3, a

Sexually Dangerous Person (SDP) has: 1) "...engaged in a course of harmful sexual conduct..." 2) "has manifested a sexual, personality, or other mental disorder of dysfunction; and" 3) "as a result, is likely to engage in acts of harmful sexual conduct..." Note: SDP/SPP commitments were governed by the Minnesota Commitment and Treatment Act (MCTA). See Minn. State. 253B.01-24 (2010 & Supp. 2011) In 2013, the legislature amended the MCTA by removing provisions regarding SDP and SPP commitments form chapter 253B and moving them to a new chapter (253D), entitled the "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities." 2013 Minn. Laws ch. 49, 1-22, at 210-31

[iii] *Allen v Illinois*, 478 US 364, 373 (1986).

[iv] Paul McEnroe and Warren Wolfe, "Audit: Sex Offender Program Wastes Money, is Inconsistent: Legislative Auditor Calls for Better Therapy, Cheaper Alternatives" *Star Tribune*, 12 Mar. 2011, pmcenroe@startribune.com, (612) 673-1745, wolfe@startribune.com (612) 673-7253

[v] Variance Request Application for Rule 9515.3030, Subp. 2. Psychiatric evaluation.

[vi] *Linehan IV*, 594 N.W.2d at 878; *Linehan III*, 557 N.W.2d at 184; *Blodgett*, 510 N.W.2d at 916.

[vii] *In the Matter of the Civil Commitment of: Eric John Eischens*, COURT OF APPEALS OF MINNESOTA, 2014 Minn. App. Unpub. LEXIS 622, A14-0013, June 23, 2014. Judge Edward Randall dissenting. n.4, 5

[viii] Per Minn. Stat. § 246.50 Subd. 3. State facility: State facility means any state facility owned or operated by the state of Minnesota and under the programmatic direction or fiscal control of the commissioner, except the Minnesota sex offender program under chapter 246B. State facility includes regional treatment centers; the state nursing homes; state-operated, community-based programs; and other facilities owned or operated by the state and under the commissioners control.

[ix] *Karsjens v Jesson*, Case No. 11-CV-3659 (DWF/JJK), March 5, 2015, pp. 4001, 4002

[x] *Karsjens v Jesson*, Case No. 11-CV-3659 (DWF/JJK), March 4, 2015, pp. 3882 - 3884

[xi] Minn. Stat. 245A.04, subd. 9

[xii] Letter addressed to Daniel Wilson dated January 21, 2020. Signed by Nancy Johnston.

[xiii] Minn. Stat. 253B.03 Rights of Patients, Subd. 5. Periodic assessment: "A patient has the right to periodic medical assessment, including assessment of the medical necessity of continuing care and, if the treatment facility declines to provide continuing care, the right to receive specific written reasons why continuing care is declined at the time of the assessment. The treatment facility shall assess the physical and mental condition of every patient as frequently as necessary, but not less often than annually..."

[xiv] Administrative Rule 9515.3030, subpart 2. Psychiatric evaluation. A psychiatrist must evaluate each person within three working days after the person is admitted and reevaluate each person at least annually.

[xv] Copies available upon request from authors.

[xvi] *Seling*, 531 U.S. at 255; *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000)

[xvii] 18 U.S.C.S. 3621 (h) (6)

[xviii] *Black's Law Dictionary*, 9th ed., West Publishing (2009)

[xix] 18 U.S.C.S. 3553 (a)(2)

[xx] *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000); *Seling*, 531 U.S. at 255

[xxi] MSOP Theory Manual p. 8, 9, 21, 26, 31, 34,

[xxii] Daniel Montaldi, "A Study of the Efficacy of the Sexually Violent Predator Act in Florida" 41, *Wm. Mitchell L. Rev.*, 2015, p. 780

[xxiii] James R. Nobles, "Evaluation Report, Civil Commitment of Sex Offenders," *Office of the Legislative Auditor,* March 2011, p. 7

[xxiv] Allan Frances MD, "Going for Wins in Sexually Violent Predator Cases" *Psychiatric Times*, 8 July 2011, Http://rrwr,v. psvchiatrictimes.com/ bloo/cpuchincrisis/contenUarticle/ 10168/1900563

[xxv] Allen Frances M.D., "DSM 5 in Distress," *Psychology Today*, 22 Feb. 2013

[xxvi] MSOP Theory Manual p. 10
[xxvii] *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000); *Seling*, 531 U.S. at 255
[xxviii] Variance Request Application for Rule 9515.3030, Subp. 2. Psychiatric evaluation.
[xxix] *In re Linehan*, 557 N.W.2d 171, 192 (Minn. 1996) reaffirming the holding from *Foucha v Louisiana*, 504 U.S. 71, 76 (1992). See also *Kansas v Hendricks*, 521 U.S. at 356-57 (citing *Foucha*, 504 U.S. at 80).
[xxx] *Foucha v Louisiana* (1992) p. 83 Justice O'Connor concurring
[xxxi] *Hince v O'Keefe,* 594 N.W.2d 905,913-18 (Minn. App. May 18, 1999) citing *Kansas v Hendricks,* 521 U.S. 346, 360 (1997)
[xxxii] *Hendricks,* 521 U.S. at 360
[xxxiii] *Hendricks*, 521 U.S. at 358
[xxxiv] *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994)
[xxxv] *In re Linehan*, 557 N.W.2d 171, 192 (Minn. 1996) reaffirming the holding from *Foucha v Louisiana*, 504 U.S. 71, 76 (1992). See also *Kansas v Hendricks*, 521 U.S. at 356-57 (citing *Foucha*, 504 U.S. at 80).
[xxxvi] Variance Request Application for Rule 9515.3030, Subp. 2. Psychiatric evaluation
[xxxvii] *Seling*, 531 U.S. at 255; *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000)
[xxxviii] *In re Linehan*, 557 N.W.2d 171, 192 (Minn. 1996) reaffirming the holding from *Foucha v Louisiana*, 504 U.S. 71, 76 (1992). See also *Kansas v Hendricks*, 521 U.S. at 356-57 (citing *Foucha*, 504 U.S. at 80).
[xxxix] *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000); *Seling*, 531 U.S. at 255
[xl] Variance Request Application for Rule 9515.3030, Subp. 2. Psychiatric evaluation