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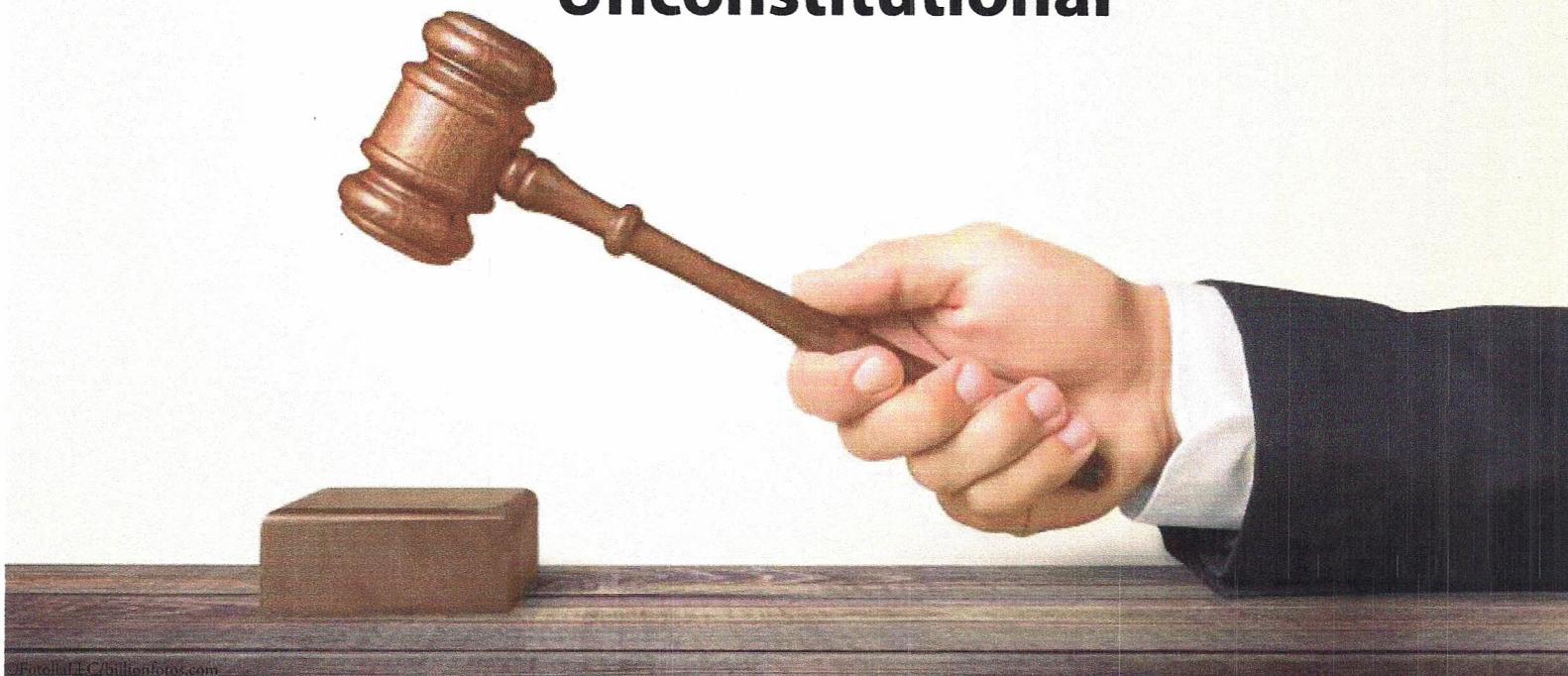
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VOICE



# PCSOT Procedures Determined To Be Unconstitutional



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Both Federal Appellate and State Supreme Courts recently determined that convicted sex offenders cannot be required to answer questions during standard Disclosure or Maintenance polygraph examinations without violating Fifth Amendment protections against self-incrimination. Essentially, the Courts found that revocation of probation or denial of supervised release as a consequence of invoking Fifth Amendment rights to be unconstitutionally compulsive because such actions would inflict potent sanctions

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unless the privilege is surrendered.

## **People v. Roberson: Colorado Supreme Court Case No.13SA268, May 16, 2016**

Bryan Roberson was convicted of sexually assaulting his nine year old niece. In a pre-sentence report, the Colorado Probation Department recommended the Roberson participate in a Sex Offender Management Board (SOMB) approved sex offender treatment program that would include event specific

ic, sexual history disclosure and routine probation compliance or maintenance polygraph examinations. Roberson, who continues to deny the event for which he was convicted, was warned during sentencing that his continued denials could result in "far more serious consequences than sex offender intensive supervision probation (SOISP)". Roberson appealed his judgement and sentence and, upon advice of counsel, informed both his Probation Officer and treatment providers that he would not speak about anything relevant to his case or that might be used against him if his case went back to trial. During a subsequent PCSOT polygraph examination, Roberson was asked if he had viewed any child pornography or had sexual fantasies regarding minors since being put on probation. Roberson declined to answer these questions, invoking his Fifth Amendment right against self-incrimination. The Probation Department then filed to revoke Roberson's SOISP. The District Court denied Probation's request to revoke due to "three controlling factors":

1. Roberson had invoked his Fifth Amendment right and his fear of self-incrimination was reasonable in light of the Prosecutor's admission that on retrial he would use any available evidence allowed under the Colora-

do Rules which therefore would include any admissions to the Maintenance polygraph questions;

2. Roberson's case was on appeal, he had testified at trial and therefore risked possible new perjury charges; and
3. Roberson had not been granted any use immunity or assurances with regard to information he might provide during treatment.

When the People appealed, the Colorado Supreme Court, hearing the case directly, on the matter of whether Roberson had viewed child pornography since placed on probation, sustained the District Court's decision that Roberson's probation should not be revoked because of his lawful invocation of his Fifth Amendment right to remain silent to questions that could lead to self-incrimination. The Supreme Court was unable to determine if questions regarding sexual fantasies would have the same effect and returned this issue back to the District Court for further review.

It is important to note that since Roberson had been sentenced to probation before the issue of self-incrimination arose, the Supreme Court determined that Roberson had established a liberty interest, and "since parole is

more akin to imprisonment than probation is to imprisonment", hinted that it might reach a different conclusion regarding prisoners undergoing sex offender treatment while incarcerated.

Oddly, on the same date that this opinion was released, the Colorado Supreme Court found that convicted sex offenders who tried to invoke their Fifth Amendment rights by refusing to enroll or participate in a sex offender treatment program could, in fact, have their probation revoked (People v. Ruch, CSC No.13SC587, May 16, 2016). In short, the Supreme Court found that the Fifth Amendment privilege is an option of refusal, not a prohibition of inquiry.

#### **Von Behren v. U.S.: U.S. Court of Appeals, 10<sup>th</sup> Circuit No.15-1033, May 10, 2016**

After being convicted of distributing child pornography, Brian Von Behren served 121 months in prison and was about to begin three years of supervised release. At this time, the Colorado Probation Department requested that his release conditions be modified to require Von Behren to participate in a SOMB certified sex offender treatment program that would include sexual history polygraph examinations targeting sexual crimes

for which he was never charged. As per SOMB Guidelines, Von Behren was presented with a non-negotiable agreement requiring a non-deceptive sexual history polygraph opinion and entitling the treatment providers to report "any occurrence or potential occurrence of any sexual offense to Human Services, law enforcement, probation, parole, victims, potential victims, parents, spouses, school personnel, employers or other appropriate authorities". When Von Behren objected, claiming Fifth Amendment protection, the District Court agreed that the sexual history polygraph questions were an unconstitutional violation of his rights and modified the terms of his supervised release to preclude him from having to admit to any criminal activity other than the offense of his conviction. In apparent violation of this order, Von Behren's treatment provider then demanded that he participate in a sexual history polygraph which would include questions about possible criminal sexual activities not specific to the event of his conviction. When Von Behren again appealed, the Court reversed itself deciding that admissions to sexual history polygraph questions were not a violation of Fifth Amendment protections after all, because Von Behren would not be required to "specify the time, place, victim's identity or others

involved" and further, therefore, the issue of compulsion need not be considered. The 10<sup>th</sup> Circuit Court of Appeals, however, reversed again, finding that both the SOMB Agreement terms to be unconstitutionally compulsive and answers to the proposed sexual history polygraph question incriminating, thus a violation of Fifth Amendment protections even if there were no corroborating follow-up questions to any admissions.

## **Discussion**

Roberson and Von Behren were both convicted sex offenders facing general question Disclosure and Maintenance polygraph examinations neither actually took. Roberson, however, was on probation at the time the Fifth Amendment issues arose and therefore had a liberty interest while Von Behren was in prison seeking supervised release. Both Courts determined that both offenders faced significant consequences (revocation or denial of probation) by invoking their right against self-incrimination because even uncorroborated admissions to general criminal sexual activity questions created a chain of evidence resulting in an unconstitutional compulsion to waive rights. Colorado Child Abuse reporting procedures (CRS 19-3-207) require County Departments reports of suspected abuse to contain exten-

sive details about the victim, suspect and person reporting the suspected abuse. Clearly then, even if examiners don't ask admission follow-up questions and/or new criminal charges don't actually result from such admissions, the Roberson and Von Behren decisions have determined that the mere fact that they could is sufficient to establish an unconstitutional denial of privilege. Also, while the Court in Roberson focused on the proposed polygraph questions, the Court in Von Behren included the SOMB required Agreement which mandated a non-deception polygraph opinion to the proposed polygraph questions. Unfortunately, the media has framed everything as a polygraph issue as in the Denver Post's *Colorado Sex Offenders Lie Detector Win Could Have Big Impact*. Also, while the Colorado Supreme Court stayed its decision, the federal 10<sup>th</sup> Circuit has not.

At the heart of these decisions is the inherent conflict between Colorado's originally expressed desire to rehabilitate sex offenders and the present legislative mandate to improve community safety and protect victims (CRS 19-3-304). Nowhere is this expressed more clearly than the 1998 name change of standards and guidelines authority from the original 1992 Sex Offender Treatment Board to the present Sex Offender Management

Board. The various Colorado statutes requiring individuals and organizations to report suspected child abuse has grown to become very extensive and unequivocal. In contrast, Oregon, which was in the forefront of PCSOT, grants numerous occupational exceptions and allows for a great deal of discretion with regard to who has to report what, to whom, when. Oregon also specifically prohibits the use of polygraph results in parole violation hearings (2013 ORS 144.270 (4)(b) (J). Similarly, Minnesota recently confirmed that polygraph could be used in treatment, monitoring and evaluating sex offenders but results could not be used as evidence of parole violations (Minnesota Court of Appeals v. Nowacki, A15-1328, May 23, 2016). The Colorado SOMB and treatment providers should not be surprised by this turn of events. As a consultant in the design of the original program, I and others pointed out the need for use immunity as well as the systemic problems with lower general question screening test validity and reliability, the effects of habituation from repeated testing and the use of fantasy and belief therapy questions in structured polygraph examinations. The Roberson and Von Behren decisions do not appear to effect event specific sex offender polygraph examinations. Ironically, the Colorado Probation Depart-

ment appears to have recognized that there were fundamental conflicts between policy and practice as it already had in place a "modified sort of an appeal group" who could circumvent Disclosure and Maintenance polygraph testing while convictions were being appealed. Even if the Roberson and Von Behren decisions are limited to convicted sex offenders appealing judgements and sentences as well as the incarcerated seeking supervised release, it would not be long before most convicted sex offenders would act to be included in groups exempt from Disclosure and Maintenance testing. Examiners in Colorado and the other states effected by the federal decision (Kansas, Utah, New Mexico, Oklahoma and Wyoming) should seek independent legal consul regarding their liability should they continue to provide polygraph services for SOMB certified sex offender treatment providers should the SOMB, Department of Probation or umbrella treatment agency decide to continue PCSOT Disclosure and Maintenance examinations under the State Court's stay. Examiners in other jurisdictions should review any applicable child abuse reporting requirements and use immunity clauses in light of the Roberson and Von Behren decisions should similar litigation involve their own polygraph services.