

**SEX OFFENDER SUPERVISION  
AND  
COMMUNITY NOTIFICATION  
STUDY COMMITTEE REPORT**

**March, 2005**

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## I. THE COMMITTEE

The Sex Offender Supervision and Community Notification Study Committee was established by Sec. 14 of Act No. 157 (S.227) of the Acts of the 2003 Adjourned Session (2004).

The committee consisted of 13 members:

(1) Two members of the house of representatives, from different political parties, appointed by the speaker of the house: Representative Peg Flory, Esq. (R-Pittsford), *Vice Chair*, and Representative Bill Lippert (D-Hinesburg).

(2) Two members of the senate, from different political parties, appointed by the committee on committees: Senator John Campbell, Esq. (D-Windsor County), *Chair*, and Senator Vince Illuzzi, Esq. (Essex-Orleans Counties).

(3) The commissioner of the department of corrections or the director of the department of corrections' sex offender treatment program: Georgia Cumming, Program Director of Vermont Treatment Program for Sexual Abusers.

(4) The commissioner of the department of developmental and mental health services or his or her designee: John Pierce, Assistant Director for Mental Health.

(5) The defender general or his or her designee: Seth Lipschutz, Esq., Prisoners' Rights Division, Office of the Defender General.

(6) The executive director of the Vermont American Civil Liberties Union or his or her designee: Allen Gilbert, executive director.

(7) Two members at large appointed by the governor: Nancy Boucher and Melissa Hayden.

(8) The executive director of Vermont Legal Aid or his or her designee: Jack McCullough, Esq.<sup>1</sup>

(9) The executive director of the department of state's attorneys or his or her designee: Jane Woodruff, Esq., executive director.

(10) The commissioner of the department of public safety or his or her designee: Commissioner Kerry Sleeper.<sup>2</sup>

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<sup>1</sup> Jack McCullough replaced Eric Avildsen after the first meeting of the committee.

<sup>2</sup> Commissioner Kerry Sleeper replaced Kristin Chandler after the fourth meeting of the committee.

The Committee was staffed by Michele Childs, Legislative Counsel, and Shirley Adams, Committee Assistant.

## **II. THE COMMITTEE'S CHARGE**

Act 157 directed the committee to make findings and recommendations to the general assembly on the following:

(1) Whether posting information on registered sex offenders on the internet is a valuable and effective public safety tool. If information is posted, which offenders should be subject to the posting and what information should be available via the internet? Other issues to consider include whether internet posting increases risk to the victims of sex offenders and unintentionally publicly reveals their victimization; the effect of internet posting on an offender's reentry into a community and the risk for reoffense; and the effect of internet posting on persons who are not offenders, but share the same name as a listed sex offender.

(2) Issues regarding registered sex offenders who completed their maximum sentence for their sexual offense and are not under the supervision of the department of corrections after release from incarceration, including civil commitment, electronic monitoring bracelets, and alternative methods.

(3) Whether Vermont should employ the use of electronic monitoring bracelets, and if so, in what circumstances. The committee shall consider at a minimum the use of bracelets for registered sex offenders who are in the community and as an option to pretrial detention for any offender.

(4) Whether criminal records should be maintained at the Vermont crime information center if they are not fingerprint-supported.

(5) A review of the differences and similarities between juvenile sex offenders and adult sex offenders for the purpose of identifying appropriate responses to treatment, incarceration, and supervision of juvenile sex offenders.

## **III. MEETINGS AND WITNESSES**

The committee met six times in the last year: August 27, October 4, October 18, October 19, December 21, and January 31.

The committee heard testimony from the following witnesses:

Ballantyne, William, Psy.D. – Director of Claremont Child and Family Center, Division of West Center Behavioral Health/ Dartmouth-Hitchcock

Beinner, Wendy – Esq., Staff Attorney, Vermont Department of Developmental and Mental Health Services  
Bock, Steve – Michigan Department of Corrections  
Burgess, Brian – Administrative Judge, Vermont Judiciary  
Carson, Dan – Director, Health Services Section of the Legislative Analysts Office, California State Assembly  
Chandler, Kristin – Esq., Staff Attorney, Vermont Department of Public Safety  
Clements, William – Director, Vermont Center for Crime Justice Research  
D’Amora, David – MS, LPC, CFC, Center for Treatment of Problem Sexual Behavior, State of Connecticut, and Chair, Public Policy Committee, Association for the Treatment of Sexual Abusers  
Gold, Steve – Commissioner, Vermont Department of Corrections  
Greenspan, Owen – Justice Information Service Specialist, SEARCH (National Consortium for Justice Information Statistics)  
Huff, David – Ph.D., Justice System Analyst, Iowa Division of Criminal and Juvenile Justice Planning  
Janus, Erik – J.D., Vice Dean for Academic Affairs and Professor of Law, William Mitchell College of Law, Minnesota  
LaFond, John, J.D. – Edward A. Smith Missouri Chair in Law, the Constitution and Society, University of Missouri-Kansas City School of Law  
Lieb, Roxanne – Director, Washington State Institute for Public Policy  
McGrath, Robert – Clinical Director, Vermont Treatment Program for Sexual Abusers, Vermont Department of Corrections  
Schlueter, Max – Director, Vermont Crime Information Center, Vermont Department of Public Safety  
Treadwell, John – Esq., Assistant Attorney General, Vermont Attorney General’s Office  
Valerio, Matt – Esq., Vermont Defender General  
Woodruff, Jane – Executive Director, Vermont Department of State’s Attorneys and Sheriffs  
Wright, Nola – Esq., Assistant Attorney General, Kansas Attorney General’s Office  
Yates, Gary – Protech Monitoring, St. Petersburg, FL  
Zuccaro, Ed – Attorney, Chairperson, the Governor’s Commission on Prison Overcrowding

#### **IV. INTRODUCTION**

The committee was provided with excellent background information on Vermont’s sex offender population by Bob McGrath, Clinical Director of the Vermont Treatment Program for Sexual Abusers. This information provided important context for the committee to examine the issues posed by the legislature. According to Mr. McGrath, statistical data indicate that the number of sexual crimes in Vermont has remained stable in recent years, but the reports of such crimes has risen substantially. Even so, it is believed that sexual offenses are significantly under-reported. Vermont currently has approximately 420 sex offenders serving time in prison, 574 sex offenders on probation,

33 offenders on parole, and 62 offenders on furlough. This number has been slightly increasing over the last several years and is believed to be the result of increased reporting.

In order to properly understand and develop an appropriate response to sexual offenses, it is important to note that not all sex offenders are the same. Offenders vary with respect to a number of issues, including victim preferences, behavior preferences, motivation, and attitudes toward deviant behavior. Because of these differences, offenders' risk to sexually re-offend and supervision and treatment needs vary depending upon the individual.

More than 95% of Vermont's sex offenders are male. Of the male sex offenders in prison, approximately 70% are child molesters and 30% are rapists. Of the sex offenders being treated in the community, 75% are child molesters, 15% are rapists, and 15% are non-contact offenders such as exhibitionists and voyeurs.

Although most children who are sexually abused do not become abusers themselves, approximately 30% of all sex offenders were sexually abused themselves, with violent sexual offenders the most likely to have been sexually abused as a child. Of the approximately 350 sex offenders treated in the community, 75% are employed and 70% have at least a high school education. More than half of sex offenders are married. Some are professionals, and they represent all socio-economic levels. Sex offenders in prison are more often from a lower economic status.

The explanations for sexual offending require an examination of the offender's motive, combined with the offender's willingness and opportunity to commit the offense. Motives can include a sexual interest, desire for emotional closeness, a craving for power and control, or the manifestation of anger or a grievance.

The willingness of an offender to break with accepted social norms can be the result of substance abuse, stress, psychopathy, or a cognitive distortion. A cognitive distortion on the part of the offender would be evidenced by the belief that the fact that a woman went to the offender's apartment meant she wanted sex. It may also involve the misattribution of innocent gestures as sexual, as with a child smiling at the offender being interpreted as a sexual invitation. The offender knows there is something wrong with the situation but chooses to ignore the feelings. Substance abuse is a common theme in sexual abuse with 50% of all sexual offenses involving alcohol. Other offenders may have a psychopathy, or lack of empathy for others, and sexual offenses may be but one of many criminal offenses they commit.

Opportunity differs in that some offenders plan their crimes while others commit their crimes when an opportunity presents itself. Most sexual assaults are committed by someone known to the victim or the victim's family, regardless of whether the victim is a child or an adult. It is estimated that 90% of child victims and 66% of adult victims of

sexual abuse know their abuser.<sup>3</sup> Accordingly, most sexual offenses are through manipulation and verbal coercion of the victim rather than violent physical force.

Reconviction data suggest that most sex offenders do not reoffend. However, reoffense rates vary among different types of sex offenders and are related to specific characteristics of the offender and the offense. It is believed that about 40% of all sex offenders are a low-risk to sexually reoffend, at about a rate of 10% over the course of 10 years. Because of the many variables affecting reoffense rates, predicting whether a particular person will reoffend sexually is not an exact science, and we must rely on probabilities. The true rate of reoffense is difficult to determine because of under-reporting which is usually estimated to be 10-15% higher than convictions.

When a person is convicted of a sexual offense in Vermont and sentenced to a term of incarceration, the Department of Corrections conducts an initial assessment of the offender to determine the offender's risk and treatment needs. The department uses a number of scientific tools in assessing sex offenders, but the most common tool used in predicting whether an offender will reoffend is called the Static-99. The Static-99 considers a variety of factors that show some predictive value with regard to sexual reoffense, including: prior sex offenses, prior sentencing dates, noncontact sexual offenses, nonsexual violence, the relationship of the victim to the offender, the gender of the victim, the age of offender, and the offender's cohabitation history. This test aids the department in determining whether the offender has a low or high probability to sexually reoffend.

In Vermont, an offender who takes responsibility for his or her sexual offense and is determined to be at low risk will most likely be released after serving his or her minimum sentence and receive sex offender treatment in the community upon release. An offender designated as at moderate to high risk will be required to complete successfully the recommended prison treatment program in order to be considered for release at their minimum sentence. An offender who is of very high risk will also be required to complete a general violent offender program in prison. All sex offenders released into the community receive community-based sex offender treatment. According to the most recent study, slightly more than half of incarcerated sex offenders enter sex offender treatment. Of those offenders, slightly more than half completed the treatment.<sup>4</sup> More recently, the program completion rate of those who enter treatment has increased to

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<sup>3</sup> Tjaden, P., & Thoennes, N., *Full report of the prevalence, incidence, and consequences of violence against women: Findings from the national violence against women survey*. Washington, DC: National Institute of Justice, 2000.

<sup>4</sup> McGrath, R. J., Cumming, G., Livingston, J. A., Hoke, S. E. (2003). *Outcome of a treatment program for adult sex offenders: From prison to community*. *Journal of Interpersonal Violence*, 18, 3-17.

70%.<sup>5</sup> Incarcerated sex offender treatment is approximately 18 months to three years in duration and occurs toward the end of an offender's minimum release date. In community programs, approximately 85% of offenders who enter sex offender treatment complete the treatment. Vermont studies show that male sex offenders who complete treatment have a rate of reoffense that is six times lower than that of male offenders who do not complete treatment.<sup>6</sup>

## V. THE COMMITTEE'S FINDINGS AND RECOMMENDATIONS

### **Finding 1**

**Vermont is widely recognized as having one of the most comprehensive and innovative sex offender treatment programs in the country.**

Vermont is a recognized international leader in the management of sex offenders. It developed the first integrated statewide continuum of prison and community-based treatment programs. It pioneered the use of relapse prevention treatment and supervision strategies in 1983, and these approaches are now used by over 90% of programs throughout the United States. In 1997, the Center for Sex Offender Management, an organization sponsored by the United States Department of Justice, designated Vermont's sex offender management program as one of 12 national resource sites. The program has drawn visitors from correctional agencies throughout the United States and several countries, including Canada, England, Holland, Ireland, Poland, and Taiwan.

### **Finding 2**

**Currently, there is insufficient evidence to determine whether posting information about registered sex offenders on the internet is a valuable and effective public safety tool; however, the general assembly determined through passage of Act 157 that the majority of the public feels that the internet registry provides important information that can be used to protect families and expects such information to be a matter of public record.**

Providing information over the internet about registered sex offenders has become a common practice in most states. Vermont joined 47 other states this autumn with the adoption of its internet registry. The information that can be obtained through these registry websites varies greatly from state to state. Some states require information on all registered sex offenders to be posted. Other states require only certain sex offenders to be posted on the internet. In these states, the requisite factor for placement on the internet

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<sup>5</sup> Testimony of Georgia Cumming before the Sex Offender Supervision and Community Notification Study Committee, Fall 2004.

<sup>6</sup> McGrath, *supra* note 2 at 12.

is usually the type of sexual offense or that the offender has been designated as having a high risk to reoffend. For example, New Hampshire places sex offender information on the internet if the offender has been convicted of a sexual offense against a child or if the offender has an outstanding warrant for his or her arrest. Massachusetts employs a comprehensive risk assessment plan and places information about only high-risk sex offenders on the internet. Vermont has a combination of these approaches and publishes information on offenders who have been convicted of certain crimes, such as aggravated sexual assault, offenders who have an outstanding warrant issued for their arrest, and offenders who have been determined by the Department of Corrections to be at high risk or have not complied with treatment requirements.

The type of information posted on the internet about sex offenders also varies greatly. Most states provide at a minimum a name, photograph, and the offense for which the offender was convicted. Some states provide very detailed information about offenders, including their home street address and maps of sex offender residence locations. Vermont provides the offender's name and any known aliases; the offender's date of birth; a general physical description of the offender; a digital photograph of the offender; the offender's town of residence; the date and nature of the offender's conviction; if the offender is under the supervision of the Department of Corrections, the name and telephone number of the local Department of Corrections office in charge of monitoring the sex offender; whether the offender complied with treatment recommended by the Department of Corrections; a statement that there is an outstanding warrant for the offender's arrest, if applicable; and the reason for which the offender information is accessible on the internet.

The committee was not able to identify any studies or statistics regarding a correlation between the establishment of sex offender internet registries and rates of recidivism. The committee reviewed the available studies relating to sex offender recidivism rates before and after implementation of registry requirements and community notification procedures. However, both of these studies predated the use of the on-line registries.

The first study, published in 1995, was conducted in Washington State, the first state to have a community notification law. The study tracked the offenders who were the subjects of the highest level of community notification during the three years after implementation of the law. The study found that "community notification had little effect on recidivism as measured by new arrests for sex offenses or other types of criminal behavior. However, it may have had an impact on the timing of new arrests," meaning that those crimes committed by offenders subject to community notification were detected earlier than the crimes of those offenders not subject to community notification.<sup>7</sup>

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<sup>7</sup> Schram, Donna D., Ph.D. and Cheryl Darling Milloy, Ph.C., Washington State Institute for Public Policy, *Community Notification: A Study of Offender Characteristics and Recidivism*, October 1995.

In December 2000, Iowa officials conducted a study of recidivism rates of sex offenders before and after the implementation of a sex offender registry in the state. The study found that recidivism rates for sexual offenses are fairly low compared to other offenses. This can be attributed to any numbers of factors, including the fact that sexual offenses are typically under-reported. The study followed offenders for a period of four years and found that there were no significant differences in the recidivism rates of sex offenders who were on the registry and those offenders who were not on the registry.<sup>8</sup>

The committee agrees that successful reintegration of a sex offender into the community upon release from confinement is a key factor in determining whether that person will sexually reoffend. In consideration of this principle, some committee members expressed concern that the internet registry may have the unintended consequence of isolating those offenders to such an extent that they actually become more likely to reoffend. Although the internet registry is primarily intended to provide information to individuals who may have a concern about a particular person or are accessing the information in an effort to protect their family, secondary dissemination of registry information, whereby a person who personally accesses registry information shares the information with family, friends, and community members, may make the offender's reintegration into the community a public affair. While this may be an appropriate deterrent for some offenders, some committee members worried that this may have the effect of further isolation of the offender, making it difficult for the offender to obtain housing, employment, and social supports, with a result of increasing the likelihood of reoffense.

Despite the lack of empirical data on the effect of internet registries on public safety, the committee notes that the general assembly determined through passage of Act 157 that there is a strong public perception that internet registries serve a vital role in protecting public safety by providing the public with an important tool to protect their families. A minority of members of the committee believes that the public's use of Vermont's new internet registry in itself is an indication that it is an effective and valuable public safety tool. The general assembly determined that the public feels safer knowing it can access sex offender information if it so chooses, and expects to have access to information on sex offenders who may pose a threat to the public. Due in part to this perception, the general assembly found it to be in the state's interest to provide the information to the public.

At this time, sufficient data have not been systematically collected and analyzed to determine what effect internet registries have on public safety. The committee anticipates that future studies will look to determine if there is any correlation between internet registries and recidivism. The committee believes that Vermont policymakers should take such studies into consideration prior to expanding or changing the internet registry.

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<sup>8</sup> Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center, Iowa Department of Human Rights, *The Iowa Sex Offender Registry and Recidivism*, December 2000.

### **Finding 3**

**Based upon the testimony provided to the committee and the current infrastructure in the state, civil commitment of sex offenders is not a viable option for use in Vermont at this time. However, the committee finds that there are steps that can be taken now to reduce the chances that untreated violent sex offenders will be released into communities without supervision. Focusing funds on sexual violence prevention, investigation and prosecution of sexual crimes, sex offender risk assessments, additional sex offender treatment prison programs, and more intensive community supervision can help us achieve this goal.**

The first state laws providing for civil commitment of sex offenders were enacted in the 1930s. At that time, it was commonly believed that sex offenders were mentally ill and psychiatrists could cure them. Thus, these laws authorized the state to place sex offenders in psychiatric facilities for involuntary treatment rather than in prison for punishment. By the 1960s, over half of all states had some type of civil commitment law for sex offenders. During this time, rehabilitating criminal offenders gained favor, and sexual deviancy was believed to be particularly disposed to mental health treatment.

However, in the 1970s, public opinion began to swing the other way, favoring incarceration of sex offenders. This new approach was based upon the premise that there was no scientifically proven treatment for sexual deviants, and that the state should punish such offenders for their crime and provide treatment in prison for those who requested such treatment. States began to repeal their sex offender civil commitment laws, and by 1990, only a few remained.

The next wave of civil commitment laws began in 1990 with the enactment of a statute in Washington State. These “modern day” civil commitment laws, also known as sexual predator laws, are different from previous laws in that the civil commitment occurs after completion of a term of incarceration, instead of in lieu of incarceration. The offender is committed to a hospital, not a prison, and the length of commitment can be from one day to life. The goals of the commitment are community protection and rehabilitation of the offender. Currently, 17 states have such civil commitment laws.

There are three criteria for civil commitment of a sex offender. The first is that the offender must have committed a “qualifying offense.” This means that the offender has committed a sexually violent predatory offense involving contact against a victim who is not a family member. Second, the offender must have a diagnosed mental disorder, such as pedophilia or antisocial personality disorder. Finally, the offender’s mental disorder must make the offender at risk to likely reoffend.

While civil commitment laws vary from state to state, there is a similar process of commitment among all. Prior to release from prison, an offender will go through an initial screening process. A state review committee will evaluate the offender’s information and recommend on average about 10% of the cases for further review.

Depending upon the state, either the attorney general or a state's attorney will file a petition seeking the commitment of the offender. The offender has a right to a trial and independent expert testimony to contest the action. If the offender is committed, he or she has the right to periodic reexaminations and hearings to determine if release is appropriate.

The constitutionality of these civil commitment laws has been challenged in recent years. In 1997, in *Kansas v. Hendricks*, the U.S. Supreme Court concluded that state legislatures have broad discretion to define the mental condition that forms the basis for who can be civilly committed because they pose a potential danger to the community. The Court also declared that the Kansas sexual predator civil commitment act did not establish a criminal proceeding, and involuntary commitment was not punitive in nature. Therefore, the Kansas law did not violate either the Double Jeopardy or Ex Post Facto clauses of the U.S. Constitution, which prohibit more than one prosecution for the same crime and retroactive criminalization of an act.<sup>9</sup> In revisiting the Kansas sex offender commitment law in 2002 in *Kansas v. Crane*, the Court held that the mental condition suffered by the offender must make it seriously difficult for the offender to control his or her behavior.<sup>10</sup>

The committee finds that sex offender civil commitment laws are well-intentioned, but are not the best use of Vermont's resources for protecting the public from potentially dangerous sex offenders. The annual costs of such programs range from an estimated \$46,500 in South Carolina to \$125,000 in California per offender, with an average state expenditure of about \$100,000 per offender.<sup>11</sup> True costs are difficult to determine because some states that report costs for civil commitment include the capital, evaluation, and legal costs, while others do not. The committee is concerned that such a program in Vermont would be costly and divert scarce mental health resources from other mental health programs and patients to a relatively small number of sex offenders.

According to Erik Janus, Vice Dean for Academic Affairs and Professor of Law at William Mitchell College of Law in Minnesota, civil commitment costs in Minnesota use 87% of the sexual violence funds available in the state, and this money is spent on a small fraction of the number of sex offenders, while most recidivists are released back into the community. Out of more than 6,000 reported sexual assaults a year in Minnesota, only 20 offenders are civilly committed.

Most states with civil commitment laws have released few, if any, sex offenders. Testimony indicates that public sentiment about such offenders makes it very difficult politically to discharge these offenders. Minnesota currently has about 250 sex offenders

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<sup>9</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>10</sup> *Kansas v. Crane*, 534 U.S. 407 (2002).

<sup>11</sup> Testimony of Bob McGrath before the Sex Offender Supervision and Community Notification Study Committee, Fall 2004.

in civil commitment and has not “graduated” a single offender since initiation of the program. This has resulted in annual costs of \$25-27 million, not including litigation or capital costs. Of these 250 offenders, only 60% are participating in treatment, because, according to Janus, they have no incentive to participate in treatment if they know they are not going to be released. Thus, Minnesota is essentially warehousing sex offenders in mental health facilities at a cost far higher than that to incarcerate them in prison. Minnesota is an example of what is going on in many other states with sex offender civil commitment laws where a substantial and disproportionate amount of money is being spent on a small number of offenders. According to David D’Amora, Chair of the Public Policy Committee of the Association for the Treatment of Sexual Abusers, victim advocacy organizations in Connecticut opposed the establishment of a sex offender civil commitment law there, in part, because they did not want the state to spend a significant amount of money on a few offenders, when that money could be used elsewhere to support programs that more directly benefit victims and the community. Our committee finds that such funds in Vermont would be better spent to address sexual violence prevention, investigation, and prosecution, offender risk assessments, additional treatment in prison, and more intensive supervision of offenders in the community. An investment of funds at these earlier stages will be more effective in reducing the number of potentially dangerous, untreated sex offenders on the streets than using the money to remove a few offenders from the community each year through civil commitment.

A recent study in Washington State, the first state to pass a sexual predator civil commitment law, demonstrates that civil commitment laws do not necessarily provide the level of protection that the public thinks they do. The Washington State Institute for Public Policy conducted a six-year study as a follow-up of released sex offenders who were recommended by a special committee for civil commitment under Washington’s sexually violent predator law, but no petition was filed by prosecutors. Prosecutors elected to file petitions seeking commitment in only about one-third of referrals based upon whether the prosecutor believed the offender met the statutory and constitutional requirements for commitment. The study group comprised 89 sex offenders released into the community between July 1990 and July 1996. More than half of the subjects (57%) were convicted of new felony offenses, with almost one-third (29%) reoffending with a sexual offense, and 16 percent failing to register as sex offenders. Forty-four percent were incarcerated at the end of the six-year study.<sup>12</sup> This study reveals that those offenders who were referred for commitment have a high rate of reoffense, but it also is exemplary of the fact that civil commitment laws are limited in their ability to protect the public.

In addition to the general fiscal concerns, the committee finds that implementing a civil commitment program in Vermont would serve further to burden our struggling state mental health services. Vermont is striving toward mental health parity with physical

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<sup>12</sup> Milloy, Cheryl, Ph.D., *Six Year Follow-up of Released Sex Offenders Recommended for Commitment Under Washington’s Sexually Violent Predator Law, Where No Petition Was Filed*, Washington Institute for Public Policy (2003).

health. Declining federal Medicaid money and modest increases in state revenues have made it difficult to fund our mental health system. Mental health costs are expected to be one of the fastest growing budget items in the next few years, and Vermont is expected to face a substantial shortfall in the budget, due, in part, to these costs. Any substantial addition to mental health services, such as civil commitment of sex offenders, would likely result in a diversion of funds from other important mental health programs. The committee believes this would not be in the best interests of our mental health system or most Vermonters.

Housing of sex offenders who have been civilly committed also poses a problem for Vermont. According to Wendy Beinner, Staff Attorney for the Vermont Department of Developmental and Mental Health Services, it is inappropriate to house sexually violent offenders in the same facility as other mental health patients due to the possibility of abuse. At this time, there does not appear to be any available residential facility in which Vermont could house sex offenders who were committed. Assistant Attorney General John Treadwell, while expressing the office's support for the concept of civil commitment, also voiced concern about placement of dangerous offenders in the same facility as a vulnerable population. The committee believes that both the legislature and the administration should focus on the current needs of the state mental health services, including addressing needs concerning the state hospital, before considering additional capital and program costs in this area.

The committee relied heavily on two days of witness testimony on civil commitment as the basis for these findings. The drawbacks of civil commitment were confirmed by the testimony of Mr. McGrath who has consulted to several states with civil commitment statutes and has served on the treatment advisory boards of two civil commitment programs. Mr. McGrath said that many legislators in those states who were initially supportive of civil commitment of sex offenders have subsequently expressed considerable concerns about their statutes after discovering the inherent complications with these programs, and the fact that they are not the panacea they originally thought they would be. Their concerns include the high and rising costs of civil commitment, the failure of these laws to capture many sex offenders the public views as high risk, and the failure of programs to successfully treat and release committed offenders.

### **Recommendation**

**The state should not pursue civil commitment of sex offenders at this time, but should invest resources at earlier stages in the investigation, prosecution, sentencing, and treatment of offenders, as proposed elsewhere in this report, to reduce the number of unsupervised high risk offenders in the community.**

The committee shares the public's concern about untreated violent sex offenders in the community, and recognizes that unique strategies need to be developed to address these high risk offenders. The number of offenders who are considered high risk and violent may be few, but communities rightly feel threatened by their presence, and it is essential

that the state devise a plan to protect the community from these offenders while providing the offender with an opportunity to reform. However, the committee does not believe that there is adequate evidence that civil commitment is the best use of state resources in trying to protect the community against potentially dangerous sex offenders. Rather, alternatives to civil commitment that deal with potential recidivists at stages prior to release from prison hold greater promise in reducing recidivism. The goal is to identify potentially high risk offenders at an earlier stage and utilize the existing criminal justice and corrections systems in a manner that ensures appropriate criminal sentences and encourages treatment during incarceration. The reality is that most offenders will be released from prison, and the vast majority will not meet the constitutional standard for civil commitment. Some dangerous sex offenders will be released back into the community with or without a sex offender civil commitment law. Therefore, it is the state's responsibility to focus limited resources on strategies to reduce the number of untreated, high risk offenders who are released from prison with no community supervision, and doing so means frontloading resources in investigation, prosecution, sentencing, and prison treatment of offenders as recommended by specific proposals elsewhere in this report.

#### **Finding 4**

#### **Special investigation units for child and adult sexual abuse and family violence are successful models for improving the quality of cases brought to trial and for providing advocacy on behalf of the victim.**

Special investigation units are devoted solely to the investigation, victim advocacy, and prosecution of child physical and sexual abuse, other family abuse, and sexual violence. The Department of State's Attorneys currently has two such special units in place, one in Chittenden County known as CUSI, and one in Franklin County known as NUSI. These special investigation units are multidisciplinary task forces comprising specially trained investigators, victim advocates, DCF workers, and prosecutors, whose caseload is confined to child sexual and physical abuse, family abuse, and sexual violence. The expertise these units garner with their specialized training translates into one of the most effective prosecution models currently in existence. Because the caseload is limited, the investigations are more thorough and more expertly performed than in other models. As a result, many of the defendants confess their involvement in their crime. This in turn leads to resolution of the case short of trial. If a victim, especially a child, does not have to go through the rigors and stresses of testifying, the child is not revictimized. Another advantage to this model of investigation and prosecution is that due to the smaller caseload per attorney, victim advocate, and investigator, there is a correspondingly greater amount of time devoted to each individual case. This has a positive effect on advocacy for the victim, the quality of the case for prosecution, and the quality of the case for trial.

## **Recommendation**

**Special investigation units should be expanded into additional regions of the state.**

The committee endorses and supports the special investigation unit model of prosecution. Moreover, the committee feels that there should be more units established around the state. Ideally, these units should be established in every county and funded by the state. However, we strongly recommend at a minimum that regional special investigation units should be created and funded by the state in at least three other areas.

## **Finding 5**

**Vertical prosecution, whereby one person in a state's attorney's office handles a criminal prosecution from start to finish, is the most effective way to ensure fair and successful prosecution of sexual offenses.**

Vertical prosecution is the philosophy of prosecution that once a case is received in a prosecutor's office for a charging decision, the prosecutor who makes the charging decision should ultimately handle the case from that point on through final appeal. In practice, victims will always be meeting with the same prosecutor who is assigned to the case. This means that when a case first comes into an office, a victim will have a face to put with a name. It also means that if there ever comes a time for a deposition of the victim, that same prosecutor will be doing the deposition preparation for that victim. Ultimately, the most positive result from this one-on-one relationship is that a solid, trusting relationship can be built between prosecutor and victim. This promotes victim knowledge and victim trust in the system.

Vertical prosecution also enhances the likelihood that the prosecutor is very familiar with the facts of the case and is not thrust into a situation in which he or she is handed a file the morning of a court event. Any pretrial discovery, such as a deposition, will be handled by the same prosecutor, which will reinforce the knowledge that the prosecutor has of the strengths and weaknesses of the case. That in turn will make for a better result in the long run, as knowledge of the case provides the best position from which to assess the case. Vertical prosecution also extends postverdict to the appellate phase: in theory, to be able to handle adequately the transcript of a trial, one actually has to live through it, because the words on paper do not transmit the atmosphere and drama of the court room.

While vertical prosecution is the preferred method of prosecution, it is not always possible, especially in the larger offices around the state. When there are three and four court rooms operating and three or four court clerks scheduling court events with no coordination as to which prosecutor is assigned to which case (this happens to defense attorneys, as well), it is sometimes impossible for a prosecutor to be able to cover three or

four of his or her cases that are scheduled at the same time in different court rooms. While this goal was more obtainable in the smaller counties that have two or three attorneys and only one presiding judge, it is becoming more common to see double judging in the offices with two or three attorneys, making vertical prosecution very difficult.

### **Recommendation**

**Vertical prosecution should be the model when proceeding with charges against a person charged with a sexual crime and should be used whenever possible.**

### **Finding 6**

**Appropriate sentencing of sex offenders is aided by the provision of the information to the court from the Department of Corrections through a specialized presentence investigation and psychosexual evaluations.**

Presentence investigations (PSI) are conducted by the department of corrections and essentially provide the background information regarding an offender and his or her crime for which that offender is awaiting sentencing. The investigations serve a number of functions, including assessing the offender's risk to the community, the offender's amenability to sex offender treatment, the impact of the crime on the victim, and recommended conditions of supervision if the offender is to be released back into the community. They are an essential tool for the court in determining the most appropriate sentence for a sex offender and should be conducted by specially-trained probation officers.

In addition to the specialized PSI, psychosexual evaluations can be a very useful tool in determining a sex offender's risk and can aid in appropriate sentencing. A psychosexual evaluation is conducted by a mental health professional and serves a function similar to PSI, as well as determining the mental health status of the offender.

### **Recommendation**

**Specialized presentence investigations should be conducted in connection with any registrable sexual offense convictions when possible, and the court should require a specialized presentence investigation in all cases involving a second or subsequent sex offense conviction. In addition, a court should order a psychosexual evaluation of a sex offender prior to sentencing upon motion of the state's attorney or the defense attorney, or by its own motion, if such an evaluation is found to be essential to determining an appropriate sentence.**

One of the keys to protecting the community from potentially dangerous sex offenders is ensuring that these offenders receive appropriate prison sentences and sex offender

treatment. To this end, it is essential that the court be provided with the best information possible in making its sentencing decision. It is the recommendation of this committee that in cases involving sexual crimes, presentence investigations should be conducted whenever possible and should be required prior to sentencing a sexual recidivist. Psychosexual evaluations, while somewhat costly, should also be considered as an important tool in determining the appropriate sentence and treatment for a sexual offender.

### **Finding 7**

**While Vermont law provides for the possibility of lengthy prison sentences for convicted sex offenders, many sex offenders actually receive a prison sentence that is substantially below the maximum allowed. While the circumstances as to why some potentially dangerous offenders receive somewhat short prison sentences vary greatly, the committee finds that the utilization of the presentence strategies mentioned in earlier findings in this report can help to identify properly prior to sentencing those offenders who are most deserving of longer prison terms.**

In Vermont, criminal penalties for sexual offenses provide for the possibility of long prison terms and are similar to the laws of many other states.<sup>13</sup> With the exception of the crime of lewd and lascivious conduct with a child,<sup>14</sup> Vermont does not provide mandatory minimums for sexual offenses, but rather provides courts with broad discretion to sentence the offender appropriately, depending upon the circumstances of the crime. A review of sentencing and corrections figures shows that many sex offenders are sentenced far below the allowable maximum prison term. While this may be appropriate for some offenders, other sex offenders who are later determined to be high risk should have received a more lengthy sentence. The more information that is gathered and shared about the offender prior to sentencing, the more appropriate the sentence.

Vermont currently has two laws that provide for enhanced criminal penalties for offenders who are convicted of multiple crimes. Under Vermont's violent career criminal law, a person who has two convictions for a felony crime of violence may be sentenced to imprisonment up to and including life upon a third conviction of a felony crime of violence. Felony crime of violence includes sexual assault, aggravated sexual assault, and lewd and lascivious with a child when the child is under the age of 13 years and the defendant is 18 years of age or older.<sup>15</sup> In addition, Vermont's habitual offender

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<sup>13</sup> The maximum prison term for sexual assault is 20 to 35 years, depending upon the elements of the crime. 13 V.S.A. § 3252. The maximum prison term for aggravated sexual assault is life. 13 V.S.A. § 3253.

<sup>14</sup> The prison term for lewd and lascivious conduct with a child is 1 to 5 years for a first offense, 2 to 10 years for a second offense, and 3 to 20 years for a third or subsequent offense. 13 V.S.A. § 2602.

<sup>15</sup> 13 V.S.A. § 11a.

law provides that a person who is convicted of three felonies may be sentenced on the fourth felony conviction up to and including life in prison.<sup>16</sup> All sexual crimes, except for prohibited acts such as prostitution and first offense possession of child pornography, are felonies.<sup>17</sup>

If an offender is properly identified as a high risk recidivist at an early enough stage, a sentence of up to life in prison may be appropriate through the use of the aggravated sexual assault, violent career criminal, or habitual offender laws. If the offender participates in treatment while in prison, he or she may later be determined to be appropriate and eligible for parole. Under these circumstances, the person would be released back into the community but would still be under the supervision of the department of corrections, subject to certain conditions of release and receiving ongoing sex offender treatment.

### **Recommendation**

**The general assembly should explore whether, within the context of Vermont's existing penalty system for sexual crimes, it is possible to identify the small number of sex offenders who are determined through a presentence investigation and psychosexual evaluation to be violent sexual predators who pose a high risk to the community, and track these individuals accordingly through appropriate charges and sentencing, resulting in longer prison terms for these individuals.**

The committee believes that the statutory penalties for sexual offenses are adequate for most sex offenders. However, the general assembly should consider specific cases in which an untreated, high risk sex offender was given a sentence of imprisonment far below the maximum to understand why the sentence was such and how we can better target these individuals for a more appropriate sentence. An examination of this issue should include a discussion of ways to better utilize our existing laws, as well as whether the laws should be amended or new laws enacted to specifically address the most dangerous untreated offenders.

### **Finding 8**

**A comprehensive systems approach for higher risk sex offenders in the community can promote public safety and aid in rehabilitation.**

A comprehensive systems approach employs longer and more intensive community supervision of higher-risk sex offenders coupled with regular polygraph tests and pre- and post-incarceration treatment to promote rehabilitation.

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<sup>16</sup> 13 V.S.A. § 11.

<sup>17</sup> See Chapters 59, 64, and 72 of Title 13.

Colorado established an innovative systems approach in the early 1990s involving multidisciplinary case management teams, each comprised of a specialized probation or parole officer, a treatment provider, and a forensic polygraph examiner. These three professionals collaborate, prioritizing community safety and the protection of former victims. By working together in what they term a containment model, they can create a program that addresses the specific treatment and supervision needs of a particular offender to assist that offender in reintegrating safely into the community.

Maricopa County, Arizona, has used a containment approach since 1986 and has seen a substantial drop in rates of sexually reoffenses. A study examined 1,700 sex offenders who participated in the containment program from 1993 to 1998 and found that they reoffended at a rate of only 1.6%. Such offenders normally reoffended at a rate of about 14%.

Currently, Vermont utilizes many of the components of the systems approach. However, the current department assignment of probation and parole officers based upon geographic area, rather than specialization, hinders its full implementation. There are definite benefits to specialized caseloads which could help the state improve supervision and successful treatment of sex offenders in the community.

Ideally, in each county some probation and parole officers should be specially trained to work with sex offenders. These officers can provide more consistent and intensive case management and impose and enforce conditions uniquely suited to aiding the offenders' reintegration into the community and, hopefully, reducing the likelihood of reoffense. If officers were organized in this manner, the case loads of 40 offenders per officer would most likely be acceptable. Vermont currently has one polygraph examiner who works with sex offenders, and this appears to be sufficient at this time.

### **Recommendation**

**Vermont should enhance and support a systems approach of community supervision of sex offenders, and the Department of Corrections should assign specialized probation officers to work only with sex offenders.**

The systems approach has shown success in other communities outside our state. Closer supervision of sex offenders by a team of professionals that is knowledgeable about the specific needs and challenges posed by sex offenders who are reentering the community will undoubtedly provide benefits to both the offender and his or her community. The committee recommends that state officials consider ways in which we could move to a systems approach on a statewide basis over a period of the next few years and how we can best replicate that model in rural areas of the state where concentration of offenders makes such a model more challenging from an administrative perspective.

**Finding 9****The use in Vermont of electronic monitoring bracelets may hold promise as an effective tool for supervising sex offenders in the community.**

Currently, electronic monitoring bracelets that utilize global positioning satellite technology are being used in other states to monitor criminal offenders in the community. These systems combine electronic tracking, crime-mapping, and web-based data integration to provide information to law enforcement and corrections personnel about the movements of offenders. The goal is to reduce recidivism and encourage compliance with conditions by removing anonymity on the part of the offender.

There are two types of GPS monitoring: active and passive. Active systems can actually alert law enforcement if an offender enters an exclusion zone, such as a pawn shop for a burglar or a liquor store for a person convicted of DUI. Passive systems store information from the satellite which can be later referenced by an offender's probation officer or law enforcement. The phone technology required for these systems can be problematic, and the committee believes that only a passive system could be adequately reliable in Vermont at this time. The average cost for a passive system is about \$5.00 a day per offender and includes training, equipment, tracking, and correlations with law enforcement and corrections data.

This technology has the potential for significant benefits for public safety in Vermont. The primary goal, as noted earlier, is to reduce recidivism. Initial studies and anecdotal evidence suggest that those offenders who are subject to GPS monitoring have a lower reoffense rate than similar offenders who are not tracked. The information obtained from these systems can also be used for the purpose of crime resolution and the exclusion of a suspect. If a burglary occurs at a particular location, law enforcement can check the whereabouts of braceleted offenders with a previous burglary conviction to determine if they were in the vicinity of the recent offense. Further, there is potential for a substantial cut in prison costs if the bracelets are used in lieu of incarceration. The Governor's Commission on Corrections Overcrowding recently reported that if Vermont released 400 nonviolent offenders subject to GPS monitoring into the community, the state could make those prison beds available for the return of 400 inmates who are housed in out-of-state facilities. It is estimated that such a proposal would result in a net savings of \$9.4 million.<sup>18</sup>

While GPS systems are being used in a variety of ways in other states, they are most often used on offenders who would otherwise be incarcerated. This includes defendants awaiting trial, parolees, and technical violators of probation. The systems are also being used with sex offenders under community supervision in Michigan and Florida. While

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<sup>18</sup> *Report and Recommendations of the Governor's Commission on Corrections Overcrowding*, August 2004.

the committee believes this technology holds promise as an important corrections supervision tool in Vermont, the committee is not in agreement as to the circumstances under which this technology should be used with sex offenders. Some committee members feel that GPS monitoring should be used only in lieu of incarceration, while others believe it should be used as an additional tool to monitor sex offenders.

### **Recommendation**

**Prior to implementing GPS technology to monitor sex offenders in the community, a pilot project should be established and evaluated to determine the technology's general effect on public safety with respect to all offenders, and in what circumstances the technology should be utilized.**

### **Finding 10**

**Compliance with current law requiring fingerprinting of felons is poor, and therefore, the committee finds that any expansion of the fingerprinting laws or destruction of records that are not fingerprint-supported is premature.**

In 2003, the Vermont Crime Information Center (VCIC), the state repository for compiled criminal history records, adopted a policy that it would no longer retain records of criminal offenses for which there were no fingerprints to support the record. In 2004, the general assembly in Act 157 mandated that the center continue to keep records for offenses even if they were not fingerprint-supported.

VCIC provides criminal history records to those who make criminal justice decisions such as law enforcement, state's attorneys, and judges, and to employers and licensing agencies on a limited basis. VCIC strives for accurate, complete, and timely dissemination of these records. The primary reason for adopting a "no print, no record" policy is for record integrity – to ensure the proper identification of a person arrested, charged, or convicted of a crime. VCIC estimates that 14.5% of defendants on file with the center have at least one alias. If fingerprints are not taken in connection with a particular offense to ensure that the person arrested for the crime is indeed the person claims, the state runs the risk of improperly identifying the actual suspect and falsely accusing an innocent person. The lack of fingerprints not only can lead to inaccurate records, but reliance on these records can result in faulty decisions made by prosecutors and judges, in identity theft, in false arrest, and in licensing and employment disqualifications.

The committee is sympathetic to the concerns of VCIC in trying to protect record integrity. However, the committee is convinced that the current solution lies not in adopting a "no print, no record policy," but rather in improving compliance with existing fingerprinting laws to ensure that the criminal records of more serious offenders are fingerprint-supported. In recent years, the Vermont general assembly has made

substantial changes to state laws regarding who may and who shall be fingerprinted in connection with an arrest or citation for a criminal offense.<sup>19</sup> These changes have expanded the number of suspects who may be fingerprinted. The current statute requires law enforcement to fingerprint all persons cited or arrested for a felony and permits law enforcement the discretion to fingerprint persons cited or arrested for a misdemeanor committed in the presence of the officer or for a misdemeanor for which the officer could arrest the person according to the criminal rules.<sup>20</sup> The intent of the law is for law enforcement officers to be the persons primarily responsible for obtaining fingerprints.<sup>21</sup> The law takes into account the fact that fingerprinting a person at the time of arrest may not always be possible due to constraints posed by staffing or location or condition of the suspect. Thus, the statute provides that if the suspect is not fingerprinted at the time of arrest or citation, he or she shall be ordered to report for fingerprinting at a time and place set by the court. If the defendant is subsequently convicted and sentenced to a term of imprisonment and still has not been fingerprinted, the court shall order fingerprinting as a condition of probation. Finally, if an offender is incarcerated and fingerprints have not been taken in connection with the crime for which the offender is serving time, the department of corrections is required to fingerprint the offender. According to Max Schlueter, director of VCIC, currently 20% of persons arraigned for a felony in Vermont are never fingerprinted in connection with that felony charge.<sup>22</sup>

Clearly, the general assembly has recently given extensive consideration to fingerprinting policies and decidedly rejected mandatory fingerprinting of all persons cited or arrested for a crime. The legislature created a system whereby the most serious offenders were required to be printed, other offenders were permitted to be printed, and some persons who were suspected of minor, nonviolent offenses committed outside the presence of the officer could not be printed under most circumstances. Though legislators did not want all suspects fingerprinted, they gave no indication that they no longer wanted the state to maintain a criminal history record on such persons, and in Act 157 they specifically directed VCIC to continue to maintain such records. In consideration of these facts, the committee finds that the most pressing problem with regard to the integrity of criminal

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<sup>19</sup> See Act No. 151 (S.200) of the Acts of the 1999 Adjourned Session (2000) and Act No. 131 (H.750) of the Acts of the 2001 Adjourned Session (2002).

<sup>20</sup> 20 V.S.A. § 2061.

<sup>21</sup> “A law enforcement officer shall take, or cause to be taken, the fingerprints and photographs of a person if the person is arrested or given a summons or citation for a felony or for being a fugitive from justice.” 20 V.S.A. § 2061(a) (emphasis added). “A law enforcement officer may take, or cause to be taken, the fingerprints and photographs of a person who is arrested or given a summons or citation for a misdemeanor, only in the event that the officer would be permitted to make an arrest under Rule 3 of the Vermont Rules of Criminal Procedure.” 20 V.S.A. § 2061(b) (emphasis added).

<sup>22</sup> This figure excludes persons for whom the charge is dismissed or persons who are acquitted of the charge.

history records lies not in the lack of fingerprints for minor misdemeanor offenses but in the current lack of compliance with Vermont's fingerprinting laws.

**Recommendation**

**The committee recommends strongly that all officials charged with a responsibility for fingerprinting take the necessary measures to ensure 100% compliance with the existing fingerprinting laws. VCIC should continue to obtain and manage records that are not fingerprinted-supported, at least until there is better compliance with existing fingerprinting laws.**

Improving compliance with existing fingerprinting laws to ensure that the criminal records of more serious offenders are fingerprint-supported is essential and would increase record integrity while respecting the legislature's intent that minor misdemeanants not be fingerprinted. To this end, law enforcement must do a better job of obtaining the fingerprints of persons cited or arrested for a felony, and other state officials must be diligent in ensuring that such fingerprints are obtained if fingerprinting at the time of citation or arrest is not possible.

**SEX OFFENDER SUPERVISION AND COMMUNITY  
NOTIFICATION STUDY COMMITTEE**

/s/ John F. Campbell  
Sen. John Campbell, Chair\*  
Windsor County

/s/ Peg Flory  
Rep. Peg Flory, Vice Chair  
Rutland-6

Sen. Vincent Illuzzi  
Essex-Orleans County

/s/ William J. Lippert, Jr.  
Rep. William Lippert  
Chittenden 1-1

/s/ Georgia Cumming  
Georgia Cumming  
VT Center for Prevention & Treatment  
of Sexual Abuse

/s/ John E. Pierce  
John Pierce  
Department of Health

/s/ Seth Lipschutz  
Seth Lipschutz\*  
Prisoners' Rights Office

/s/ Jack J. McCullough, III  
Jack McCullough\*  
Vermont Legal Aid

/s/ Kerry L. Sleeper  
Commissioner Kerry Sleeper\*  
Department of Public Safety

/s/ Allen Gilbert  
Allen Gilbert\*  
American Civil Liberties Union

/s/ Jane Woodruff  
Jane Woodruff  
Dept. of State's Attorneys & Sheriffs

/s/ Nancy Boucher  
Nancy Boucher\*  
Randolph, VT

/s/ Melissa A. Hayden  
Melissa Hayden\*  
Rutland, VT

\* The signature of this Committee member is limited and/or explained by a statement included in the Appendix.

# **APPENDIX A**

COMMITTEES:

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INSTITUTIONS

SEX OFFENDER SUPERVISION  
AND NOTIFICATION STUDY COMM., Chair  
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Addendum to Findings and Conclusions regarding Civil Commitment of  
Sex Offenders in Vermont

Senator John F. Campbell

Chairman,

Sex Offender Supervision and Community Notification Study Committee

Act No. 157 of the *Acts of the 2003 Adjourned Session* adopted the formation of the Sex Offender Supervision and Community Notification Study Committee. Its general charge was to make findings and develop recommendations on a multitude of issues regarding sex offenders in the State of Vermont. One of the major issues discussed was the feasibility of civil commitment of sex offenders in Vermont.

We were extremely fortunate to have two of this country's top experts in the field of sex offender treatment work with the committee: one as a member, Georgia Cummings (Vermont Department of Corrections); the other as a consultant and witness, Robert "Bob" McGrath (Vermont Department of Corrections). Without their assistance, guidance, and surplus of knowledge, we would have been unable to discuss the merits of this very weighty issue in the time allotted.

The committee was advised that there are a number of sex offenders who, while incarcerated and/or during post release, have failed to complete the sex offender treatment program; refused to engage in the sex offender treatment program completely; or *have* completed the sex offender treatment program, but continue to pose an unacceptable risk to re-offend. The majority of our committee recognized that, when released back into our communities, certain of these individuals will pose a serious threat to our families, friends, and neighbors.

These types of offenders, and the risk they pose, are not unique either to the State of Vermont or to the country collectively. There are those who subscribe to the theory of “lock them up and throw away the key.” While that may be appealing to some, especially in light of their heinous act(s), it is unrealistic. Constitutional safeguards do not allow continued imprisonment when an individual has served his or her maximum sanctioned sentence. Short of receiving a life sentence without the chance of parole, those incarcerated by our judicial system will re-enter society at some point in time.

With this in mind, some states have sought other ways in which to protect their citizens from these offenders, considered by many to be the “worst of the worst.” The most common method is through the passage of civil commitment laws: a process which allows states to seek the indefinite institutional confinement of sex offenders who suffer from a mental abnormality or personality disorder that make them likely to commit additional sex offenses or other acts of violence in the future.

The issue of civil commitment in Vermont recently surfaced in the Spring of 2004 when a particularly violent convicted sex offender was released from the custody of the Vermont Department of Corrections after serving his maximum sentence. While incarcerated, he refused all sex offender treatment offered by the department. Many people in the law enforcement and Department of Corrections community strongly believe that this individual poses a significant threat to the safety of the public and is very likely to re-offend.

The cries from the community to which he was released came swiftly and with strident resonance and reverberation. It was quite clear that the majority of the citizens wanted this man back in jail. Unfortunately, the fact remained that he served his maximum sentence and, under our system of jurisprudence, *had* to be released. No other options were available.

The charge of protecting the public from sex offenders who pose a risk to society falls to the federal, state, and local law enforcement agencies, judiciaries, and rehabilitative organizations. They are expected to utilize all available tools to ensure the safety of the citizens living in their communities. However, in carrying out their duties, these groups must recognize and preserve the constitutional rights of offenders. Whether viewed as “limitations” or “protections,” no person, organization, or agency may exceed the established statutory or constitutional boundaries.

Therefore, when a sex offender who still poses a threat to society serves his or her maximum sentence, we cannot, nor can any other state, simply choose to keep him or her incarcerated in the name of public safety. To do so

would be violative of the Double Jeopardy, *Ex Post Facto*, Due Process, and Equal Protection clauses of the United States Constitution. The only method currently available to separate these individuals from society is through “civil institutionalization,” or civil commitment as it is commonly called.

In upholding the Kansas civil commitment law in the case of *Kansas vs. Hendricks*, the United States Supreme Court held that because the purpose of the law was *rehabilitative* rather than *punitive* and carried out in the *civil* rather than *criminal* arena, the law did not violate the above-stated clauses of the Constitution. However, certain requirements and criteria must be met and followed by a state in order to avoid conflict with constitutional protections. Failure to do so would be fatal to any proposed legislation; therefore, the question for this committee then became whether the State of Vermont had the proper infrastructure and services available to meet these conditions.

The answer was clearly no. In addition to the fact that no witness was able to articulate what the proposed commitment process would actually look like, the following critical questions were not answered:

- ❖ where would these individuals be housed;
- ❖ whether this facility would be a new or existing structure;
- ❖ would this facility stand alone and be physically separate from other buildings;
- ❖ under what physical conditions would the individual be housed;
- ❖ what types of treatment would be available;
- ❖ what is the plan for staffing; and
- ❖ what financial resources would be available from the state.

Furthermore, the recent decertification and proposed closing of the Vermont State Hospital in Waterbury and the clear uncertainty of our state’s mental health policies create a major obstacle in the implementation of a civil commitment procedure.

Due to the nature of civil commitment and, based upon existing legal and clinical authorities, these questions and the State Hospital decertification assume far more than practical significance; they go to the very question of whether providing a procedure to civilly commit a sex offender in Vermont would be constitutional. The cobbling together of a plan after the fact could effectively undermine any claim on paper that our commitment process is “civil” rather than “criminal,” or more precisely, “rehabilitative” rather than “punitive.”

The Committee's recommendation as to the viability of civil commitment at this time was difficult to reach. Without adequate funding and an infrastructure that would support such a program the constitutional requirements cannot be met. Based upon the information the committee had, as of the date of its last meeting, it appears that the state lacks the resources to create and sustain such a process in a manner that would be constitutional. In my opinion, even if the constitutional prerequisites were currently in place, in order for civil commitment to be utilized effectively and appropriately, it would have to serve as one part of a comprehensive continuum of responses. In fact, civil commitment should be seen as the last response.

While it seems that Vermont is not in the position to implement an extensive civil commitment process at this time. However, there are certain improvements to our current system that can and should be made in order to provide a greater level of protection for our communities. They include:

- ❖ Creation of specialized sexual assault investigative task forces throughout the state.
- ❖ Implementation of Vertical Prosecution in sex offender cases.
- ❖ Order pre-sentence investigations on sex offenders to determine their risk, which will aid in appropriate sentencing.
- ❖ Review and utilize habitual offender law and aggravated sexual assault statute (lifelong probation and parole).
- ❖ Perform more psychosexual examinations.
- ❖ Train and place specialized sex offender probation officers.
- ❖ Increase the number of polygraph examiners throughout the state.
- ❖ Strengthen our sex offender treatment programs.
- ❖ Improve our current mental health facilities so that we are in a position to house and treat the offenders who may be placed there as a result of the civil commitment process, if enacted in the future.
- ❖ Lengthen sentences for certain violent sex offenses

I am not prepared at this time to completely abandon the possibility of enacting some form of civil commitment process. In fact, I would entertain such a law provided that the administration and its agencies meet the constitutional requirements. I would also require that safeguards were in place to assure that the process did not supplant good criminal investigations, effective prosecutions, and appropriate sentencing and treatment practices. In other words, I could support a bill that created a civil commitment process that

would both uphold an individual's constitutional rights and not become a substitute for the criminal justice system.

In the meantime, I recommend that we spend our limited resources on improving our current system, as outlined above.

# **APPENDIX B**

## Addendum to Findings and Conclusions regarding Civil Commitment in Vermont

Commissioner Kerry L. Sleeper, Department of Public Safety

In order for members of the public to critically evaluate the findings in this report they must be able to assess the information the committee relied upon, and conversely did not consider, in reaching its conclusions. The findings noted in this report stem from the testimony and evidence received by the study committee as much as the findings reflect what the committee did not hear or review.

The most notable missing piece to the study committee's consideration of how best to address the prevention and treatment of violent offenders was any effort to evaluate the costs incurred by all of us when a person becomes a victim of a violent crime. The committee appropriately focused on the costs of a civil commitment process, but it failed to consider the competing costs (social, economic, mental and physical wellbeing) incurred to society and our citizens each time a violent offender hurts a member of our community.

The direct and hidden costs to society when person is violated sexually or physically are significant. How much does the state of Vermont spend each year on children who are placed in the custody of SRS because a family member sexually or physically abused them? What is the cost to our community when a person is so damaged psychologically as a result of their victimization that he/she is unable to finish school, maintain employment, becomes drug and/or alcohol dependant, or fails to form healthy relationships etc? How can we conclude that the costs of a civil commitment process are too great without first assessing the costs of not undertaking a civil commitment process? How much would any of us be willing to pay if by doing so we could prevent one person or one child from becoming the victim of a violent crime? These questions need to be answered before we can conclude that the cost of using a tool to reduce the number of violent offenders in our communities comes at too high a price.

Although the committee and the report focused *prospectively* on what we can do to better; the committee and the report failed to focus on the issue that is in front of us today, and that which is the driving force behind establishing a civil commitment process: What do we do with the offenders currently under sentence and subject to release of the next few years who are at risk to re-offend? We are talking about violent offenders who refuse any treatment and, as a result, will become virtual ticking time bombs upon their release into the community. While this committee has been meeting, two untreated sexual offenders completed their sentences and have been released from the Vermont Department of Corrections into our community. Both of these offenders are regarded as dangerous and likely to re-offend.

The report suggests that we should not consider civil commitments because the number of offenders likely to re-offend is not so alarming as to warrant the cost of establishing a civil commitment process for certain violent offenders. In so doing the

report appears to argue that our citizens should take comfort in statistics that “*suggest*” that most sex offenders do not re-offend and that 40% of all sex offenders are at *lower* risk to re-offend. But here the report also correctly notes that the “true rate of re-offense is difficult to determine because of under-reporting....” Three points should be made regarding these findings.

First, we should not ask our citizens to assume a risk that we would not assume for ourselves or our families, neighbors and friends. It is easy to conclude that a percentage attached to a risk of re-offense is acceptable when it is a hypothetical exercise because the offender is released in a town far away or we are not members of the class of likely victims. The truest measure of whether a percentage assigned to a risk of re-offense is acceptable is one that we are prepared to personally assume when, for example, a convicted, untreated pedophile with a 5 % chance of re-offending moves in right next door to your sister and her children, or to you and your children. I am of the opinion that if we are not willing to allow ourselves, families or friends to be directly exposed to violent offenders that we “think” may be at lower risk to re-offend, then we should not ask our citizens to accept that level of risk.

Second, given the fact that many victims of sexual offenses do not report the offense even the most conservative assessment of risk to re-offend is lower than we know it should be. Third, no one can guarantee that an offender with a proscribed risk to re-offend will in fact not re-offend. What we know instead is that no expert is able or willing to assign a violent offender the risk level of zero. There is always some chance of re-offending. When it comes to releasing untreated violent offenders into our community, what hangs in the balance is worth preventing: the effect of violent assaults on our citizens and vulnerable populations.

The report correctly finds that there are improvements that we can make to our criminal justice system that will assist us in investigating and apprehending violent offenders and preventing violent crime. I fully support these measures.<sup>23</sup> However, I note that the report appears to be offering these alternatives as if to say that because other tools exist we should refuse to use the tool of a civil commitment process. In fact, we can and should use all lawful measures that will eliminate the threat that certain violent offenders pose to our citizens and avoid the enormous costs that are the reality of violent crime.

Finally, I would like to take this opportunity to thank the Senator Campbell, the chairperson of the committee, for his leadership. By statute, the committee was limited by time and hence in its ability to fully consider this issue. The members assigned to this committee by statute also represented divergent interests. In spite of all of this, Sen. Campbell assisted the committee in reaching consensus on many important points.

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<sup>23</sup> I would like to expand on area touched upon briefly by the majority. Money and resources should be directed to increase the number of polygraph examiners.

# **APPENDIX C**

## CONCURRING OPINION

We agree with the majority opinion that the evidence does not justify Vermont's initiating a civil commitment process at this time. We write separately, however, to express our view that the evidence justifies a much more negative conclusion.

Committee Finding 3 states, "Based upon the testimony provided to the committee and the current infrastructure in the state, civil commitment of sex offenders is not a viable option for use in Vermont at this time." This finding implies that this lack of viability is based in part on a paucity of evidence in support of the effectiveness of civil commitment, but that such evidence may be available. It further suggests that the conclusion not to support civil commitment is based in part on limitations of the current Vermont infrastructure, and that at some time in the future circumstances may change that would make available the infrastructure necessary for civil commitment. Based on our review of the evidence, we do not believe that these implications are correct. We think the evidence is clear that civil commitment is ineffective, that it may violate the Vermont Constitution, that it is contrary to important Vermont values, and that it may actually detract from public safety efforts.

In its investigation the committee heard testimony from experts who have studied civil commitment in other states. The overwhelming preponderance of evidence from those states demonstrates that there is no evidence that civil commitment is effective in treating sex offenders. Three areas must be considered:

First, the committee heard testimony that a large number of offenders sentenced to civil commitment do not participate in treatment, and many of those who do may not qualify for discharge. The result is that, intentionally or not, civil commitment amounts to no more than an extended, indefinite sentence of incarceration, rather than a program to identify, treat, and cure any mental disorder that may lead the offender to re-offend. Because Vermont law embodies the principle that involuntary commitment is only justified to treat a mental illness, we should not adopt a practice that holds no real prospect for effective treatment, and simply incapacitates or confines the affected persons. If the real issue is the length of sentences for sex offenses, that issue should be addressed directly, and not accomplished under the guise of providing treatment.

Second, there is no evidence that civil commitment is effective even for those offenders who voluntarily participate in treatment. The evidence shows that recidivism rates in states that have adopted civil commitment are no better for offenders who have successfully completed civil commitment and been released than for offenders who were eligible for civil commitment but were released without being civilly committed.

Third, the evidence shows that civil commitment is detrimental to public safety. Civil commitment is expensive -- more expensive, in fact, than either incarceration or community supervision. Mandating civil commitment would divert resources from known, effective public safety measures to the civil commitment process. Since resources

for public safety are limited, this diversion of resources actually increases, rather than reduces, the risk of harm to the public, both from sex offenders and others.

For these reasons, we assert that the evidence shows that civil commitment is ineffective and a harmful diversion of resources, and should not be adopted at this time or any other time.

*/s/*

John J. McCullough III  
Project Director  
Mental Health Law Project  
Vermont Legal Aid, Inc.

*/s/*

Allen Gilbert  
Executive Director  
ACLU-Vermont

*/s/*

Seth E. Lipschutz  
Prisoners Rights Office  
Office of the Defender General

# **APPENDIX D**

I would like it known that I agree 100% with Commissioner Kerry Sleeper's addendum to the Finding & Conclusion regarding Civil Commitment in Vt.

This state has to come up with some solution. We CAN NOT continue to release these dangerous sex offender's into any community nor move them to another state as we recently did. This does not protect their next victim.

There is not one of us that would want to have a dangerous sex offender living next door to us or to our loved ones.

Nancy Boucher

# **APPENDIX E**

