IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.:

_____, Plaintiff

v.

JARED POLIS, et al., Defendants.

RESPONSE TO MOTION TO DISMISS FROM THE DEFENDANTS

The Plaintiff, _____, pro-se, herewith responds to the Motion to Dismiss, DOC# ___, filed _____ (date) by the State Agency Defendants, comprising all but Governor Polis.

I. INTRODUCTION

The Plaintiff's operative complaint, _____, (hereafter, "Complaint") brings claims for violations of his Constitutional rights. These are the Eighth Amendment's proscription against denial of prescribed mental health care — medical care — to a prisoner, and the Fourteenth Amendment's proscription against denial of substantive and procedural due process of law based upon refusal to provide access to the Sex Offender Treatment and Monitoring Program (SOTMP) which is a mandatory component of his sentence and a statutory mandate under the Sex Offender Lifetime Supervision Act ("SOLSA").

The Plaintiff is a prisoner of the State of Colorado held by the Colorado Department of Corrections ("CDOC"). He was sentenced of a sex offense under SOLSA to an **indeterminate** number of years in prison. A psychosexual evaluator has, per statute, evaluated the Plaintiff and diagnosed him with a mental health disorder, and has prescribed him SOTMP as treatment.

The Plaintiff has been refused treatment for this serious mental health care need. He suffers with symptoms every day. The refusal of treatment renders the Plaintiff ineligible for parole. The refusal of treatment denies Plaintiff a segment of his sentence deemed necessary and appropriate to his rehabilitation and reentry into society. All Defendants participate in the refusal of care individually and jointly as a group.

II. PROCEDURAL HISTORY AND FACTS OF THE CASE

The Plaintiff was convicted of: _____

_____ on _____ (date). He was sentenced to ___ years to life — an **indeterminate** sentence — guilty of a sex offense under CRS §§18-1.3-1001 -- 18-1.3-1012, or "SOLSA". The Plaintiff is statutorily required to undergo treatment to the extent appropriate based upon an evaluation and diagnosis conducted by a licensed mental health clinician at the CDOC, as is mandated by CRS §§18-1.3-1006(1)(a) and 18-1.3-1009(b), "...successfully progressed in treatment..." which has been construed to mean **completed** treatment for all intents and purposes by CDOC and by the named Defendants specifically.

The Plaintiff has been defused access to the prescribed mental health treatment, SOTMP, and he suffers with the symptoms of his disorder every day.

The Plaintiff's PED is/was: _____ (date). This Plaintiff has no MRD on account of the "to life" SOLSA sentence. Without access to SOTMP, the Plaintiff is denied any meaningful parole eligibility; he will languish in prison indefinitely, in effect until his death.

On _____ (date), the instant Complaint was filed by the Plaintiff. This Response is timely filed on or before 21 days following the filing of the Motion to Dismiss, or on or before any date set by the Court following a Motion to Expand Time to Respond filed by the Plaintiff: _____ (date Response due). This Response is timely filed.

Other procedural events or relevant case facts include:

_____

_____

_____

_____

III. STANDARD OF REVIEW

In order to defeat a Motion to Dismiss, the Plaintiff's Complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A plausible claim is one that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) The Court must accept as true all well-pleaded factual allegations, and those allegations must be construed in the light most favorable to the Plaintiff. Erickson v. Pardus, 551 U.S. 89, 94 (2007). The Plaintiff's complaint "must include enough facts to nudge his claims across the line from conceivable to plausible." Twombly, supra.

The Plaintiff's Complaint is entitled to liberal construction so as to do substantial justice. Erickson v. Pardus, supra.

IV. OFFICIAL CAPACITY CLAIMS FOR DAMAGES

The Plaintiff acknowledges that the U.S. Constitution Eleventh Amendment does not permit a citizen to sue a sate in federal court for damages absent a waiver. The Plaintiff Acknowedges that an Official Capacity claim against a state agent represents only another way of naming the state itself. Monell v. Dept. of Social Services, 436 U.S. 658, 689, n. 55 (1977). To the extent the Court may determine that the Plaintiff has asserted and has not voluntarily dismissed any damages claims against the State in a previous motion, any claim for damages via a Defendant's official capacity, he does not argue against the dismissal of that claim.

The Plaintiff continues to assert official capacity claims for injunctive and declarative relief, or any further available relief. He continues to assert all individual capacity claims that have been made in the Complaint.

V. EIGHTH AMENDMENT DELIBERATE INDIFFERENCE TO A SERIOUS MENTAL HEALTH CARE NEED

The Defendants move the Court to dismiss Claim Three — Deliberate Indifference to Serious Mental Health Care Need under the Eighth Amendment on two grounds. The Defendants allege Plaintiff has failed to plead a plausible claim and that they are entitled to Qualified Immunity. Both arguments fail.

a. Sufficiency of Pleading, the requirements were met

The Plaintiff has pled sufficient facts for this Court to infer that these Defendants are liable for denying the Plaintiff SOTMP mental health treatment.

The Plaintiff filed his suit using a pre-prepared check-the-boxes and fill-in-the-blanks 42 U.S.C. §1983 Prisoner Complaint form. A "FACTUAL BACKGROUND" section is added to the form, pages 8 & 9. See: DOC# _____.

In this FACTUAL BACKGROUND section, this Plaintiff indicated:

The Plaintiff has indicated that he was diagnosed with a sex-specific mental health need and that SOTMP was prescribed as treatment. This averment of fact is well-pleaded and sufficient to fulfill the requirement that he show "he suffers from a serious mental disorder." Riddle v. Mondragon, 83 F.3d 1197, 1204 (10th Cir. 1996)

The Plaintiff indicates that his mental health needs result in symptoms that are "actual physical pain and distress" and are a "form of torture if untreated." (Complaint, ¶38) The Plaintiff describes at length the physical symptoms — considerably painful and harmful symptoms — suffered by untreated sex offenders. He avers affirmatively that he endures "one, several, or all" of these symptoms. He does not suffer "none." He indicates that he asserts his right to medical record privacy under HIPAA, but that he will provide a list of his specific symptoms that he suffers from his

sex-specific mental health diagnosis in an affidavit UNDER SEAL. (Id. @ ¶¶ 36→40)

The Plaintiff supports his factual averments with references to scholarly studies. These articles are written by researchers and are peer-reviewed by respected academic journals. The upshot of these articles — and multitudes of studies not cited — is that a person who is diagnosed with a mental health disorder like the Plaintiff has been diagnosed with a sex-specific mental health disorder is likely to endure considerable pain in the form of any of the enumerated symptoms.

These averments are well-pleaded and sufficient for the Court to be satisfied that the Plaintiff has suffered substantial harm; he is enduring considerable pain as a result of his untreated serious mental healthcare need.

The objective and subjective prongs of an Eighth Amendment claim like the Plaintiff's are explained in Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000) (citing both Farmer v. Brennan, 511 U.S. 825, 834 (1994) and Estelle v. Gamble, 429 U.S. 97, 102 (1976)), "The objective component is met if the deprivation is 'sufficiently serious;'" and, "A medical need is sufficiently serious 'if it is one that has been diagnosed by a physician as needing mandatory treatment...'" "The subjective component is met if a prison official 'knows of and disregards an excessive risk to inmate health or safety.'"

1. Objective Component

The objective component of an analysis of the sufficiency of the Plaintiff's Complaint has been met. The Plaintiff has averred that he has been seen by a "psychosexual evaluator," (Complaint, ¶ 4). He has averred that "sex offender evaluations are required by statute to be qualified and credentialled as sex-offender specific treatment providers by... (DORA)." Id. @ ¶15. He averred that he has been diagnosed with a sex-specific mental health need and prescribed SOTMP. His averrments are sufficient to meet the Objective Component of the Sealock analysis

2. Subjective Component

The subjective component of an analysis of the sufficiency of the Plaintiff's Complaint has been met. The Plaintiff has averred that the Defendants each personally participate in ratifying, maintaining, promulgating and effecting Administrative Regulation (AR) 700-19 and the Global Referral List (GRL). Id. ¶¶ 21, 22. The GRL is "effectively a sham." It is **not** a "waiting list." It is a lottery, or a rigged game of drawing straws, at the best. At worst, it is a cover for an arbitrary and capricious selection system of prisoners to be treated, chosen by the Defendants, as reflected in "miraculous placement[s]" enjoyed by some lucky prisoners. Id. ¶7.

The GRL is an open admission and personal participation by each individual Defendant of the knowing state of mind — and open disregard — for the health and safety of prisoners and the fact that SOTMP treatment will be delayed or outrightly denied to mentally ill **patients** who have committed sex offenses. Each Defendant is either a treatment provider, an administrator of CDOC or the SOMB (Sex Offender Management Board), the Executive Director of the CDOC or of this State. These Defendants, their policy AR 700-19, and the GRL serve the "gatekeeper role" (cf. **Sealock** 218 F.3d @ 1211) between sex offender patients and SOTMP treatment. These Defendants are all — as a group and severally — responsible for implementing and upholding AR 700-19 and the GRL. Each Defendant knows that the GRL absolutely means patients are denied timely care within a reasonable bright-line timeframe. The GRL is a denial of timely medical care.

Considering arguendo — No legitimate medical practitioner would allow a Global Insulin List for Type I Diabetics. A Type I Diabetic denied insulin will suffer pain and eventually go blind or lose extremities, perhaps even die. Nor would legitimate medical professionals allow a Global Dialysis List for prisoners in renal failure, or a Global Penicillin List for syphilitic prisoners (unless it were the Jim Crow South and the prisoners were Black, as in Tuskegee). Legitimate mental-health professionals similarly would not stand for a Global Referral List for sufferers of a serious mental health need such as Major Depressive Disorder (MDD), schizophrenia, gender dys-

phoria, substance use disorder (SUD), or other mental healthcare need. Why are sex-specific mental health disorder sufferers expected to wait until they are within 4 years of a Parole Eligibility Date before being entered into a lottery for possible placement in treatment? Id. @ ¶ 16, see also C.R.S. §17-1-115.9(1)(a-b). Cf. Lerner v. Williams, 2023 U.S.Dist.LEXIS 90818 *14, n.5. (the court was "not convinced that Plaintiffs seek 'immediate and unfettered' [access] to the SOTMP... instead they seek reasonable or timely access, which the law seems to require.") Also, Tillery v. Raemisch, 2018 U.S.Dist. LEXIS 170894 *21 (The court held that Tillery had a liberty interest in accessing treatment during his incarceration within a **reasonable** period of time)(**emphasis** mine)

This Plaintiff prays the Court would impose its judgment as to what constitutes "reasonable" in a mental-health best-practices context where the Defendants have elected not to provide timely treatment. Treatment shall begin from the moment a diagnosed prisoner enters prison in a continuum of treatment options as he proceeds through the criminal justice system and is ultimately released from custody altogether. Cf. C.R.S. §16-11.7-103(4)(b)(I). It is the official duty of the Ex. Dir. of CDOC to carry out Article 11.7 of Title 16. C.R.S. §17-1-103(1)(l).

For an indeterminately sentenced prisoner, the Defendants exercise power to refuse him care for an arbitrary and capricious length of time. The Defendants have permitted inadequate staffing to create a backlog of patients waiting to access SOTMP treatment. These Defendants exercise direct control of staffing. (Complaint, ¶¶23-25) These Defendants created, promulgated, implemented, and directly control the operation of AR 700-19 — Id. ¶¶21-22 — policy that openly refuses care to prisoners until their PEDs, and years beyond. This is shameful! No reasonable administrator or mental healthcare proffesional refuses prescribed care to a man for years-and-years.

Defendant Polis signed Colo. SB 23-164 into law as a command to the rest of these Defendaats to deal with the "unnecessary backlog" of SOTMP patients. It authorized telehealth options. These CDOC

and SOMB Defendants have impeded the institution of these treatment options with onerous policy and custom. (Complaint, ¶¶ 27, 28)

If the only means for an indeterminately-sentenced prisoner to obtain treatment is to move him to a metropolitan area with providers available; Do it now! Utilize DRDC as a sex-offense treatment center and move diagnostics to the Canon complex in a swap. Place the Plaintiff on Community Corrections in a controlled CDOC facility in Denver or Colorado Springs. Or, change policy to allow his parole with treatment as a condition of parole. The Plaintiff must be given his prescribed care. The Defendants have openly admitted they are aware the indeterminately-sentenced are "likely to receive a parole deferral unless they are in SOTMP treatment..." See: EX 1 & 2.

* * *

SOTMP is not a mere education and self-improvement program — It is medical treatment. This is the standpoint of the general assembly in the statutes that they have written and made into law. The whole of the sex-offense treatment statutes is couched in a mental health diagnosis and prescribed treatment model. Id. @ ¶¶10—15. If the SOTMP were a self-improvement program, or any other kind of educational programming, or some other form of prison programming, it would not be statutorily-mandated mental health treatment. It would not be a part of sentencing guidelines that cannot be waived. It would be within a judge's discretion to make SOTMP a part of a defendant's sentence, or to leave it out. SOTMP would not require a mental health professional that is accepted by the State Board of Psychologist Examiners (C.R.S. §12-245-302) or State Board of Unlicensed Psychotherapists (C.R.S. §12-245-702) and DORA (Dept. of Reg. Agencies) to diagnose the prisoner and prescribe SOTMP.

Because SOTMP is mental health treatment, it is not a privilege; it is an Eighth Amendment right. Like all medical care, treatment **must not be unreasonably delayed**. The Tenth Circuit recognizes the Estelle v. Gamble, 429 U.S. 97, 103 (1976) clear establishment of the right to be free from denial of prescribed medical and mental healthcare. Ramos v. Lamm, 639 F.2d 559, 574-5 (10th Cir. 1980)

b. Qualified Immunity

The Defendants are not entitled to qualified immunity.

(1) as argued above, the Plaintiff has provided ample facts to sufficiently plead a plausible Eighth Amendment deliberate indifference to serious mental health claim. This satisfies the first prong of the Qualified Immunity inquiry. (incorporated by reference here as if set forth in full)

(2) The denial of prescribed medical care to a diagnosed prisoner has been clearly established in the Tenth Circuit, and on-point cases exist to demonstrate that these Defendants were on notice of the proscription against refusing to provide prescribed treatment to a prisoner. Erickson v. Pardus, 551 U.S. 89, 90 (2007) stands as a case that clearly establishes the principle that prison officials may not intentionally deny or delay access to medical care or intentionally interfere with the treatment once it is prescribed.

In **Erickson**, a Colorado prisoner held at Limon Correctional Facility was denied treatment for his diagnosed Hepatitis C after it was prescribed. The SCOTUS held that someone cannot be denied prescribed treatment as a prisoner, citing **Estelle**, supra, and Helling v. McKinney, 509 U.S. 25, 35-37, (1993). These cases are not distinguishable on grounds of Hepatitis C vs. Mental Illness. (**Estelle** clearly established that prison officials run afoul of the Eighth Amendment prohibition of cruel and unusual punishment when they exhibit "deliberate indifference" to a convicted inmate's "serious medical needs.")

A diagnosis of a mental health disorder recognized by the APA, American Psychological Association, and found in their Diagnostic and Statistical Manual of Mental Disorders (DSM-5) is a serious medical, mental health, need. The Plaintiff has alleged that he has been diagnosed with a sex-specific mental health disorder by a CDOC diagnostician. (Complaint, ¶ 4)

A mental health professional's diagnosis must ethically be based upon an examination of the Plaintiff. It would be unethical to base a diagnosis on insubstantial information or techniques. See: (APA Ethical Principles of Psychologists and Code of Conduct, Std. 9.01,

2017) If the diagnosis of the Plaintiff has been fraudulently made, it is null and void.

Typical sex-offense specific diagnoses may include: Paraphilic Disorder-OS (otherwise specified) DSM §302.89; Paraphilic Disorder-NOS (not otherwise specified) DSM §302.9; Pedophilic Disorder DSM §302.2; any of the personality disorders, e.g. APD DSM §301.7, NPD DSM §301.81, or BPD DSM §301.83; or any other DSM diagnosis to include comorbid non-sex-specific diagnoses, e.g. MDD, GAD, etc.

To be sure, the entire scheme of combined sex-offender treatment, civil commitment, registration — all of the not-prison-time ancillary repurcussions of sex crime convictions — are constitutional **only** if they are based in mental illness or mental abnormality. Kansas v. Hendricks, 521 U.S. 346 (1997). (Plaintiff avers compulsory mental health treatment and monitoring in SOTMP mandated by statute is comparable to a civil commitment as in **Hendricks**)

Either the Plaintiff is legitimately mentally ill, has been diagnosed with a serious mental health need and prescribed SOTMP as a treatment — **or** — the Plaintiff is not ill, the state has committed a massive fraud on the Plaintiff and defrauded the taxpayer and all stakeholders.* If the Plaintiff is not mentally ill the constitutionality of C.R.S. Title 16 Article 11.7 collapses and must be struck. So too must SOLSA be struck entirely.

* (The Plaintiff avers that it is a breech of the public trust to wastefully imprison sex offenders at an average cost of $56,766 per year untreated if they could be treated and released at lower cost and no greater risk to the taxpayer (public) who are these that must foot the bill. See: C.R.S. §24-18-103)($56,766/yr figure quoted in CDOC FY 2024 Statistical Report, p. 8, www.colorado.gov/CDOC.)

(3) The Defendants have **personally participated** in the deprivation suffered by the Plaintiff, and this has been sufficiently pled by the Plaintiff in his Complaint.

The named Defendants are Governor Polis*, CDOC Ex. Dir. Stancil, SOTMP Head Retting, SOMB Head Lobanov-Rostovsky, SOTMP Admin. Talley, and FCF Warden Stucker. Each of these Defendants is in direct control of CDOC policy and/or SOTMP policy, and staffing. This is incontrovertible. These job responsibilities inhere to each of these Defendants' respective job titles.

The Motion to Dismiss tells this Court that the Plaintiff never alleges personal participation by the Defendants. This is factually false. The Plaintiff has explicitly pled that these Defendants — each of them — has participated in promulgating, creating, implementing, and possessing responsibility for the continued operation of a policy that caused this Plaintiff's harm. He pled a very specific policy: AR 700-19. He pled that they have acted with deliberate indifference; and to avoid conclusory language, he explains how. (Complaint, ¶¶21-25 & 31) Further, these Defendants directly control staffing; hiring treatment providers. These Defendants "participate directly and individually in staffing decisions at CDOC." Id. ¶25.

It is true that the Complaint routinely uses the collective "these Defendants", which is totally reasonable in context. The Plaintiff's Complaint is premised on **These Defendants** as policy makers — executive heads of: the State, the CDOC, the SOTMP, the SOMB — who each execute their duties of their jobs through policy and staffing decisions. In paragraph 31 of the Complaint, These Defendants are addressed individually by their respective titles, alleging a duty to provide prescribed mental health care.

Just as a pronoun refers back unambiguously to the subject of a sentence, in the Complaint "These Defendants" refers back with

*Governor Polis does not participate in the instant Motion to Dismiss

no ambighity to "Polis, Stancil, Talley, Retting, Lobonov-Rostovsky and Stucker." It would have been unwieldy to have named these Defendants repeatedly over-and-again. Also, unnecessary. Of Course These Defendants were responsible for AR 700-19 and for staffing; jointly, severally and individually. This was their job.

The Complaint explicitly states that policy AR 700-19 operates to create the "Global Referral List" (GRL), which is not a waitlist but instead a "sham". Id. ¶21. The GRL and its implementation makes each Defendant individually and collectively liable for denial, for refusal, of timely treatment to the Plaintiff.

Insufficient staffing has caused this Plaintiff to be refused timely treatment. Defendant Polis signed into law Colorado Senate Bill 23-164. Id. ¶27. This bill is an additional acknowledgement of the shortage of staff and the "unnecessary backlog" of prisoners that are refused access to SOTMP healthcare. No Defendant can reasonably claim ignorance of the refusal of access to care; These Defendants cannot deny the knowing, willful and wanton state of mind of continued operation of AR 700-19 following passage of this legislation.

If the Defendants care to finger-point at one-another for the staffing scarcity, that is their prerogative. The Plaintiff will permit These Defendants to divvy the blame among themselves, and they may take equal shares or proportion shares according to their choosing — but none is blameless.

The failure to hire treatment providers in an amount to care for the thousands of sex offenders prescribed SOTMP is deliberately indifferent to the Plaintiff's serious mental health care need. So is the failure to implement telehealth, or create additional programs at additional facilities, or change AR 700-19, or in any way perform any action to relieve the logjam of patients. These are the "affirmative links" that Defendants claim to be incapable of reading from the Complaint in their Motion to Dismiss.

c. Plaintiff alleged an objectively serious medical condition requiring treatment.

The conceit that Plaintiff fails to allege a serious medical condition requiring treatment is fatal to These Defendants' continued operation of SOLSA with its lifetime commitment provision. If this were true, the U.S. Supreme Court would strike SOLSA as unconstitutional immediately. The Defendants' argument that the Plaintiff suffers no mental health illness that has been duly diagnosed collapses the legal backbone of SOLSA.

SOLSA became Colorado law in 1998, immediately on the heels of the SCOTUS holding in Kansas v. Hendricks, 521 U.S. 346 (1997) which found a lifetime civil commitment based upon a determination of a "mental abnormality", "mental illness", or "personality disorder", which was not intended as punitive does not violate due process. Colorado's Sex Offender statutes, especially SOLSA, are couched in in the language of mental health diagnosis and treatment, and the lifetime supervision provision is not intended to increase punishment. (Complaint, ¶10)(CRS §§18-1.3-1004(2)(a) & (3))(People v. Dash, 104 P.3d 286, 291 (Colo. App. 2004))

The Defendants' abject failure to recognize that every person convicted of a sex crime under SOLSA is seen by an evaluator and diagnosed with a mental health disorder could be reflective of an ignorance of the SOLSA statutes. The lifetime supervision provision militates a diagnosis of a serious mental health disorder by an evaluator — or — SOLSA is unconstitutional.

The Plaintiff **does not** allege that his conviction or his "sex offender status" stands in the place of a diagnosis of mental health disorder. He pled that a licensed clinical evaluator has made a sex-specific mental health diagnosis. (Complaint, ¶¶4, 15, 32) Regardless, reliance on unpublished cases that ask a Court to infer a mental illness from a conviction alone by the Defendants is misplaced. The Plaintiff sufficiently pleads facts of a diagnosed mental health need and prescribed mental health treatment.

Plaintiff's diagnosis and prescribed treatment is sufficient to demonstrate that the Defendants knew of the Plaintiff's need and disregarded the risk to Plaintiff's mental health.

Any claim by the Defendants that the diagnosis of mental illness is ingenuine or lacking in medical necessity or that the prescribed SOTMP is merely part of a "sentencing scheme" or "parole framework" or otherwise not clinically necessary renders SOLSA unconstitutional and it thereby would need to be struck down by the court.

An allegation by the Defendants that SOTMP is not mental health treatment and instead part of a sentencing scheme or parole framework belies the very nature of SOTMP. The courts have repeatedly held that SOTMP is not **punishment**; i.e. a part of sentencing or a parole release requirement. It is mental health care. Diaz v. Lampela, 601 F.App'x 670, 675-6 (10th Cir. 2015) Chambers v. Colo. Dep't of Corr., 205 F.3d 1237, 1242 (10th Cir. 2000); Lerner, infra (citing Manaois, 488 P.3d 1099, 1109 (Colo. 2021))

The State, and These Defendants, cannot have it both ways. Either SOTMP is medically necessary and prescribed mental health treatment, or it is punishment. If SOTMP is not prescribed treatment for a mental health disorder, then SOLSA is unconstitutional and SOTMP is an ex post facto punitive measure. The entire lifetime supervision commitment under SOLSA is collapsed.

* * *

VI. PROCEDURAL AND SUBSTANTIVE DUE PROCESS — LIBERTY INTEREST IN TIMELY ACCESS TO SOTMP

The Plaintiff is a prisoner held by the CDOC and is refused access to the SOTMP by the policy AR 700-19, which was promulgated, created, implemented and its operation continued by these Defendants. His sentence will result in a **de facto life sentence** if the Court fails to grant relief because SOTMP is a mandatory component of his sentence necessary for parole eligibility. His **liberty interest** in accessing SOTMP is clearly established by the weight of on-point cases eminating from this court. See: Beebe v. Heil, 333 F.Supp.2d 1011, 1016-17 (D. Colo. 2004); Tillery v. Raemisch, 2018 U.S.Dist.LEXIS 170894 *7; Lerner v. Stancil, 2023 U.S.Dist. LEXIS 90078 *16-28; Lerner v. Williams, 2023 U.S.Dist.LEXIS 90818 *14; Lerner v. Retting, 2025 U.S.Dist.LEXIS 85445 *13-14. The Plaintiff acknowledges these cases are "unpublished," and no single one taken alone is precedential. The aggregated weight of these cases taken as a whole clearly establishes the law.

"For a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision, or the **clearly established weight of authority from other courts** must have found the law to be as plaintiff maintains." (**emphasis** mine) Baer v. Heil, 2011 U.S.Dist.LEXIS 109053 * 19; Allen v. Zavaras, 2011 U.S.Dist. LEXIS 32475 *10; Cortez v. McCauley 478 F.3d 1108, 1114-15 (10th Cir. 2007) In 2011 when **Baer** and **Allen** were decided, there was insufficient "weight", but in 2026 this is no longer true. **Cortez** is an excessive force case, but the clearly established definition applies in a 14th Amendment context as well as it does a 4th Amendment context.

These Defendants individually participated in the creation and continued operation of AR 700-19 and its GRL, and the failure to staff the CDOC with sufficient treatment providers to treat the prisoners in their care with prescribed SOTMP. These Defendants knew that the GRL would lead to the inability to timely access SOTMP, because that was what the policy was designed to do.

Qualified Immunity not available for Fourteenth Amendment Right to Due Process Violatons

The Defendants are not entitled to Qualified Immunity for their violations of the Plaintiff's Procedural and Substantive Due Process rights violations. The Defendants are on notice that these violations are proscribed by clearly established law that is sufficiently on-point. The Plaintiff incorporates by reference all preceding sections of this Response here as if set forth in full.

The Defendants have each individually participated in the creation, maintenance, promulgation, and enforcement of policies that require SOTMP treatment in order for a prisoner in their custody to be considered for discretionary parole. These same Defendants then deny that same SOTMP to the Plaintiff, rendering him ineligible. He suffers a grievous loss in being meaningfully heard, he is denied any process to resolve the deprivation of SOTMP, the denial is based upon the arbitrary and capricious GRL SOTMP lottery "sham" institued by AR 700-19.

The expectation of being capable of shortening his imprisonment through reaching milestones in good conduct, work, education, and of course mental healthcare are dashed without any recourse. All federal judges' consciences must be shocked by this clear denial of a liberty interest created by statute and policy.

The Tenth Circuit recognizes that where state actors have personally participated in violation of a plaintiff's rights, as these Defendants have in the instant case against this Plaintiff, the inquiry turns to assessing whether the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing is violative of that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987) This Plaintiff has presented substantial authority throughout Section VI of this Response for this Court to find that the right was both 1) violated; and 2) it was clearly established.

VII. CONCLUSION

Treatment delayed is treatment denied. Superficially it is a derivative mimicry of the age-old legal maxim. Yet it applies powerfully to the claims made by the Plaintiff. The Defendants grouse that the Plaintiff hasn't been denied treatment, he just hasn't received it yet. He can have it if the Defendants' resources free up, or merely wait until he is mandatorily released from prison. This is a denial of care. Meanwhile, he suffers cruel and unusual punishment at the Defendants' hands, mired in the physical pain of symptoms of his illness.

Further, adding insult to his injury, his eligibility for the parole that could release him to a situation where he could be treated in the community where treatment resources are available was foreclosed arbitrarily and capriciously by the same Defendants that denied him care. Joseph Heller himself couldn't have concocted a better Catch-22.

The Defendants' Motion to Dismiss must be denied.

Respectfully submitted this ___ day of _____, 2026.

Printed name: _____

Signature: _____

The foregoing Response was compiled and prepared at the Plaintiff's specific direction with the assistance of lay-person Eric St. George pursuant to Johnson v. Avery, 393 US 483 (1969), and Bounds v. Smith, 430 US 817 (1977)

CERTIFICATE OF SERVICE: I attest that I did cause a true copy of the foregoing to be served upon the Defendants' counsel by means of electronic service, or by first-class mail with sufficient postage affixed at the address(es) below:
Office of the Atty. Gen. 1300 Broadway, 10th Fl., Denver, CO 80203 service@coag.gov

EXHIBIT 1

COLORADO BOARD OF PAROLE
1600 W. 24th Street, Building 54
Pueblo, Colorado 81003
Telephone: 719-583-5800
Fax: 719-583-5805
Website: www.doc.state.co.us

DATE: November 6, 2018

TO: Parole Board Members and Staff

FROM: Kristen Hilkey, Chair

RE: Colorado Lifetime Supervision Act

Recently, the Attorney General's Office reviewed the Colorado Lifetime Supervision Act and Colorado Revised Statutes (C.R.S.) and it was determined that sentenced offenders who fall under the Colorado Lifetime Supervision Act and C.R.S. must have "successfully progressed in treatment" to be considered for parole.

In 1998 the Colorado Legislature passed the Colorado Lifetime Supervision Act. Under this type of sentence, offenders must serve the term of their minimum sentence in prison and participate and progress in "treatment" in order to be considered a candidate for parole.

C.R.S. 18–1.3–1004(3) provides that "[e]ach sex offender sentenced pursuant to this section shall be required as a part of the sentence to undergo **treatment to the extent appropriate pursuant to section 16–11.7–105**, C.R.S." Further, C.R.S. 18-1.3-1006 (1)(a) requires that "in determining whether to release the sex offender on parole, the parole board shall determine whether the sex offender **has successfully progressed in treatment** and would not pose an undue risk to the community if released under appropriate treatment and monitoring requirements...."

Effective immediately, any sex offender that falls under this Act and C.R.S. will be required to have successfully progressed in treatment in order to be considered for parole.

EXHIBIT 2

COLORADO
Department of Corrections
Office of Clinical & Correctional Services

Division of Clinical Services
P. O. Box 300
Canon City, CO 81215
P 719.26.4308

DATE: 10.24.2018

RE: SOTMP Revisions and Parole Board Communication
FROM: Leonard Woodson III
Administrator
Sex Offender Treatment and Monitoring Program

The Attorney General's office has provided direction for the Colorado Board of Parole regarding sex offenders sentenced under the Lifetime Supervision Act. Offenders with a lifetime supervision (LSX) designation are likely to receive a parole deferral unless they are in SOTMP treatment or meeting the Lifetime Supervision Treatment Progress Criteria for Parole.

To meet the liberty interests of lifetime supervision sentenced offenders, the SOTMP will prioritize offenders with a LSX designation for Track I treatment according to parole eligibility date (PED). Determinant sentenced offenders may have the opportunity to participate in Track I as the second priority by PED. The Track 2 component of SOTMP is designed for offenders who present with an above average to well above average risk for sexual recidivism and will remain prioritized by PED.

In order to better assist the parole board in making release decisions the SOTMP has agreed to provide the following information in regarding offenders who are not currently assigned to sex offender treatment:

- Sexual Violence Diagnostic (SVD) current code and history
- Sex offender treatment history (including community treatment when applicable)
- Return to SOTMP treatment status (when applicable)
- Static risk for sexual recidivism

The SOTMP will continue to provide the following information regarding current SOTMP assigned offenders.

- Static and dynamic risk for sexual recidivism
- SOTMP Parole Board Summary
    - Lifetime Supervision Treatment Progress Criteria for Parole status
    - Narrative history of SOTMP participation

The SOTMP will provide information to the parole board via the offender portal "Offender Parole Documents." Please contact Chief of Behavioral Health, Joy Hart or SOTMP Administrator Lenny Woodson if you have any questions about this matter.

Leonard E. Woodson III, LPC
SOTMP Administrator