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 Defendants.

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 due process of law based upon refusal to provide that same care because it is a statutory mandate and parole readiness need.

Most concisely said; the Plaintiff is a prisoner held by the State of Colorado in the Colorado Department of Corrections (CDOC) he has received conviction(s) of sex crime(s), he has been sentenced to serve a **determinate** number of years in prison, and he is required to receive mental health treatment as a part of his sentence. The CDOC has, per statute, diagnosed the Plaintiff with a mental health disorder. The CDOC has refused to provide him treatment for his serious mental health need.

This denial of treatment has foreclosed the Plaintiff any opportunity to be meaningfully considered by the Parole Board for discretionary parole. The Plaintiff would be otherwise eligible.

II. PROCEDURAL HISTORY AND FACTS OF THE CASE

The Plaintiff was convicted of: _____

_____ on _____(date). He was sentenced to ____ years — a determinate sentence — guilty of a sex offense as defined under CRS §§16-11.7-102(2) & (3). Nothing in his Complaint alleges he mistakenly believes he is sentenced under SOLSA. He is crystal clear that he is sentenced under Title 16 Article 11.7. He is statutorily required to undergo treatment to the extent appropriate based upon an evaluation (diagnosis) conducted by a licensed mental health clinician at the department of corrections, as is mandated in CRS §16-11.7-105(1). He has been deprived the prescribed mental health treatment, SOTMP. He suffers with the symptoms of his disorder every day.

The Plaintiff's original PED was: _____ (date); his MRD is _____ (date). This is a difference of ____ years. _____

The Plaintiff filed the instant Complaint on _____ (date). Titled: _____
(write the title of your complaint above; e.g. "Prisoner Complaint")

The Defendants' Motion to Dismiss was filed _____ (date).

The Plaintiff additionally avers as follows: (add any other facts here that are relvant to your individual case and may be grounds for non-dismissal) _____

_____

_____

_____

_____

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 state in federal court for damages absent a waiver. The Plaintiff acknowledges 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 individial 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# _____. [write the document number, likely #1, at left. Details from pp. 8-9, below]

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 componentg 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 & 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** @ 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 a determinately sentenced prisoner, the Defendants say he can get his treatment after he has been mandatorily released at MRD. For a prisoner serving 24 years sentenced, this equates to waiting 18 years for treatment. Even if he were given treatment 4 years before his PED this would have equated to having been incarcerated and waited 4 years before being treated. This is shameful! What reasonable healthcare provider waits 18 years, or even the shorter 4 years to treat an illness? Plaintiff asks the Court to note the wide gulf between an MRD (mandatory release date) and a PED (parole eligibility date.)

Defendant Polis signed Colo. SB 23-164 into law as a command to the rest of these Defendants 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 a determinately-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 Cañon 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 not going to prioritize the treatment of determinately-sentenced patients in their Motion to Dismiss.

* * *

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.

* (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.)

VI. PROCEDURAL AND SUBSTANTIVE DUE PROCESS — LIBERTY INTEREST IN CONSIDERATION FOR PAROLE

Nothing of the Plaintiff's Complaint argues that he is entitled to parole or to a release from prison earlier than the completion of his sentence — as it is caracatured by the Defendants. His Complaint is not a habeas corpus. His argument is that he is entitled to reasonable timely access to SOTMP, through which he is able to participate in the parole process and to the benefit of being eligible for consideration for parole through his own volition and effort.

The Plaintiff incorporates by reference as if set forth in full here all previous sections of this Response. Plaintiff is sentenced to a non-SOLSA determinate number of years for a sex offense. He is a sex offender pursuant to statute and sentenced to participate in SOTMP treatment under statute and CDOC policy. See: C.R.S. §§16-11.7-102(2), -102(3), -105(1), and AR 700-19.

> "Each adult sex offender... who has committed a sexual offense sentenced by the court for an offense committed on or after January 1, 1994, shall be required... to undergo treatment... pursuant to §16-11.7-104..."
> C.R.S. §16-11.7-105(1)

> "Offenders classified as a S5... will be recommended for sex offense specific treatment **during their incarceration.**"
> AR 700-19(IV)(E)(1)

The Colorado Parole Board is a creature of statutory construction, C.R.S. §17-2-201, working as an independent entity under the administration of the CDOC in a so-called "Type 1 transfer." The General Assembly has mandated that the Parole Board create a set of guidelines and standards. The Parole Board Release Guidelines Instrument (PBRGI) is published pursuant to C.R.S. §17-22.5-107(1) and in accordance with §17-22.5-404. The PBRGI uses a matrix of risk and readiness to recommend "release" or "defer" to the Parole Board. Departures from the recommendation of the guideline matrix must include the explanation for the departure. C.R.S. §17-22.5-404(6)(b). The Parole Board does not enjoy **unfettered** discretion in release decisions; The PBRGI narrows their discretion with

standards and guidelines based upon specific criteria.

The PBRGI is not used to make release decisions for determinate (or indeterminate) -sentenced sex offenders. In the Colorado Department of Criminal Justice publication of Parole Decisons (https://ors.colorado.gov) they write:

> "For individuals classified in CDOC as sex offenders, pursuant to §17-22.5-404(4)(c)(II), C.R.S., parole release decisions are guided by criteria created and managed by the Sex Offender Management Board (SOMB) and the Sex Offender Treatment and Monitoring Program at CDOC.*" n.*: "The determinate-sentence and indeterminate-sentence criteria and information regarding sex offender management may be found in the following documents: Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioural Monitoring of Adult Sex offenders (2023), specifically in Appendix Q ..." (Colo. Div. of Crim. J. (2023). Analysis of Colorado State Board of Parole Decisions: FY 2021 Report, p. 72)

The SOMB write in their Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitoring of Adult Sex Offenders, Appendix Q, pp. 336-7, as follows:

> "Appendix Q: Parole Guidelines for Discretionary Release on Determinate-Sentenced sex offenders.
> These guidelines are designed to inform the Parole Board of information regarding progress in treatment, or criteria information for those not currently in treatment, for determinate-sentenced sexual offenders. Those offenders who have demonstrated treatment progress or meet certain criteria may be better suited for consideration of discretionary parole. These guidelines may be considered as a component in the decision-making process of the Parole Board among other components considered (e.g. lack of mandatory parole, Code of Penal Discipline/institutional behavior, risk assessment, victim input, etc.)
>
> 1. In treatment at the Department of Corrections
> A. Use the same treatment criteria as the indeterminate sentence offenders based on the standard format
> 1. Meets the criteria for successful progress in treatment in prison, or
> 2. Does not meet the criteria for successful progress in treatment in prison
> 2. Not in treatment at the Department of Corrections
> A. Not on a waitlist for treatment (signified by a "D" designation)
> 1. Lack of recommendation for discretionary parole

B. On wait list for treatment (signified by a "R" designation)
1. Not designated Sexually Violent Predator (SVP), and
2. No history of prior sex crime conviction or adjudication (1 sex crime conviction), and
3. No history of parole or community corrections revocation during the current sentence to the Department of Corrections, and
4. Does not have a "P" designation signifying a treatment placement refusal or failure.

No objection to recommendation for discretionary parole

C. On wait list for treatment
1. Designated a SVP, or
2. Have 2 or more sex crime convictions or adjudications, including factual basis, or
3. History of parole or community corrections revocationsduring the current sentence to the Department of Corrections, or
4. On the waitlist with a "P" designation signifying a treatment placement refusal or failure

Objection to recommendation for discretionary parole

The foregoing was taken from the Colorado Department of Public Safety Division of Criminal Justice, SOMB. (2025). Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitoring of Adult Sex Offenders. Available at www.colorado.gov/dcj

* * *

The statutes give release discretion to the Parole Board; the Parole Board's policy is to accept the recommendation of the SOMB based on policy in Appendix Q (supra). For this determinately-sentenced Plaintiff the ability to access SOTMP, or not access SOTMP, is the single determining factor which decides if parole is available to him or if he has been arbitrarily and capriciously denied eligibility for consideration due to no cause within his control.

On this matter, the Standards and Guidelines take the place of unfettered discretion. If the prisoner receives SOTMP, he will be eligible for parole. If he doesn't win the SOTMP lottery and does not receive SOTMP, he will not be eligible for consideration for parole. The CDOC refuses treatment to prisoners in its custody to

whom it's been prescribed. The prisoner-patient has no agency in the choice to receive SOTMP; the Defendants control all access.

In Board of Pardons v. Allen, 482 U.S. 369 (1987) the U.S. Supreme Court affirmed that when state law uses substantive predicates limiting discretion — such as the PBRGI — a liberty interest arises. (abrogated on other grounds) (Cf. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979))

The Plaintiff's Complaint alleges that the PBRGI establishes structured release criteria which include App'x Q that govern the Board's discretion. The CDOC's administrative regulations intertwine SOTMP and parole readiness. The CDOC Defendants then limit their prisoners' access to the very treatment that is required in order to gain parole readiness. This denial functionally forecloses the Plaintiff's meaningful consideration before the Board at his parole eligibility date.

The Tenth Circuit held that purely discretionary parole systems do not create liberty interests, e.g. Schuemann v. Colo. State Bd. of Adult Parole, 624 F.2d 172 (10th Cir. 1980); Boutwell v. Keating, 399 F.3d 1203 (10th Cir. 2005); Straley v. Utah Bd. of Pardons, 582 F.3d 1208 (10th Cir. 2009) — they do not hold that denial of an eligibility requirement through no fault of a prisoner's own which forecloses his consideration doesn't give rise to a cognizable liberty interest.

At minimum, whether the PBRGI in conjunction with SOMB App'x Q meaningfully limits discretion is a fact-bound inquiry making dismissal at the Motion to Dismiss stage inappropriate. Discovery will permit access to evidence which supports the Plaintiff.

Good Time/Earned Time

The award of good time and earned time are relevant to the calculation of a parole eligibility date. C.R.S. §§17-22.5-301, -302. The accumulation of good time and earned time are awards for good conduct, attendance in work assignments, education, double bunking, etc. Current law holds that the time does not "vest"

may be withheld or withdrawn. Therefore the earned time/good time has no practical effect on a **mandatory** release date.

Policy requires a disciplinary hearing to sanction a prisoner with a deduction of awarded good time/earned time. See broadly AR 150-01. Depriving a prisoner of earned time/good time is within the discretion of the CDOC but is not a decision made arbitrarily or capriciously without due process.

A prisoner who successfully completes either Track I or Track II SOTMP will earn a 30 day award for the completion, plus an additional 30 day award for meeting SOMB criteria. The award is only applicable prior to a PED. See: AR 625-002 Earned Time Matrix. A prisoner will only enjoy a benefit of 60 days awarded if he is given opportunity to timely participate in SOTMP.

Capricious deprivations which result from the deliberately-indifferent conduct of state officials and employees who operate an improvised mental health care system in the prison is equivalent to the arbitrary abrogation of the Plaintiff's state-created right to obtain earned time and good time credits. The Plaintiff is deprived of the liberty interest implicated in the Colorado General Assembly's statutes governing parole and the Parole Board's PBRGI which creates an expectation that imprisonement can be shortened by good behavior, attendance in work assignments, education, participation in treatment, etc. without any due process. Cf. Wolff v. McDonnell, 418 U.S. 539, 557 (1974). The CDOC has denied the Plaintiff an opportunity to participate in SOTMP.

The Parole Board's policy is to deny determinate-sentenced sex offenders parole who have not progressed in SOTMP. The Defendants say the Plaintiff can wait for mandatory release. This robs him of any true benefit of good time/earned time. His good conduct, performance at work, attainment of education, double-bunking has zero value. His willingness to attend SOTMP which is not available has no value. Plaintiff will reap no benefit from his efforts in rehabilitating himself. These Defendants offer all stick and no carrot.

Parole is partial liberty

A parolee can do many things that a prisoner cannot. He can be gainfully employed. He is free to be with family and friends and to form the other enduring attachments of normal life. The Supreme Court recognized that the liberty of parole includes many of the core values of unqualified liberty. Morrissey v. Brewer, 408 U.S. 471, 482 (1972)

In **Morrissey**, the SCOTUS held that termination from parole inflicts a 'grievous loss' on the parolee and is due "some orderly process" even if "informal." The Plaintiff contends that denial of SOTMP required for parole eligibility is equal to being terminated from parole before it has ever been granted. And, the GRL SOTMP lottery is no orderly process. If the GRL were orderly — not a "sham" — then sex offenders would be timely treated before their PEDs and not be treated whenever the Defendants found convenient.

A determinately-sentenced sex-offender prisoner with risk in the lower range and readiness on the higher range of the scales, who performs his work assignment, earns an education, conducts himself without rule violations, and gets SOTMP will **by policy** be recommended for parole by the SOMB pursuant to App'x Q. With an acceptable parole plan he'll be a shoo-in before the Parole Board, and released. Without SOTMP, his chances are foreclosed before he ever steps foot before the Parole Board and has lost all chance to be meaningfully heard. Parole is a substantial change from conditions of incarceration and implicates a cognizable liberty interest.

Has the Supreme Court evaluated placement of a prisoner that disqualifies him for parole deppite being otherwise eligible? Wikinson v. Austin, 545 U.S. 209 (2005)

Yes. In the case of Wilkinson v. Austin, 545 U.S. 209 (2005) the SCOTUS found that a prisoner had a liberty interest in avoiding placement in Supermax facility Ohio State Penetentary (OSP). The placement in OSP rendered an otherwise-eligible-for-parole prisoner ineligible for parole, and a liberty interest exists in avoiding that placement. Wilkinson, @224. Alone, a short-term placement at

OSP did not amount to an "atypical and significant hardship within the correctional context." When the placement was reviewed just **annually**, the liberty interest was established. The Court had taken into account the harsh conditions of the Supermax; this Plaintiff will compare the challenges of suffering with the symptoms of mental illness to harsh prison conditions.

Weigh this against the Plaintiff's placement in a facility with mental health resources so scaree he is denied SOTMP treatment for years and years, limited only by the length of his prison sentence which eventually requires mandatory release. This has a strong similarity to **Wilkinson**. For the duration the Plaintiff remains placed outside of an SOTMP treatment program, he is disqualified for "**meaningful**" parole consideration. Mathews v. Eldridge, 424 U.S. 319, 333 (1976)("the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (Parole hearings are annual +.)

This Plaintiff will endure painful symptoms and mental anguish that result from his sex-specific mental illness with which he's been diagnosed. The difference between the Plaintiff's pain and anguish and the harsh conditions of the OSP Supermax prisoners' pain and anguish differ only in quality and not in quantity. The Wilkinson case and the instant case are indistinguishable.

The Plaintiff has a liberty interest in avoiding being placed into circumstances in which he is denied SOTMP treatment. Because he suffers an atypical and significant hardship in relation to the ordinary incidents of prison life; i.e. the CDOC & SOMB along with the Parole Board policies deprive him of the opportunity to shorten the time he is imprisoned through his positive actions -- good conduct, work performance, education -- he is denied a liberty interest under Sandin v. Conner, 515 U.S. 472, 484 (1995)

The Plaintiff's placement into a deprioritized class of prisoner — determinate vs. indeterminate — exacerbates the circumstances. See Exhibits 1 & 2.

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 mimicky 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