Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW
An independent, not-for-profit law firm, Est. 1975

Volume 12, Issue 1 • Spring 2015

"...the ideals of empowerment are more than a concept. Children growing up in chaos and uncertainty need to learn how to problem solve and to participate in decisions that will impact their lives."

— Darin Mancuso, Foster Care Ombudsman

Also in this issue: Oregon's First Foster Care Ombudsman - Page 5; Overview of the Fitness To Proceed Process: Page 8

Branded for Life by the Modern Scarlet Letters

Do Convicted Sex Offenders Have Rights While on Parole, Probation, or Supervised Release?

By John Rhodes and Daniel Donovan

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When handling a federal criminal case, defense lawyers first primarily focus on guilt or innocence and second on the potential punishment and penalties, particularly on the U.S. Sentencing Guidelines and mitigation of the sentence under 18 U.S.C. § 3553(a). At sentencing, after imposition of the term of probation or months of imprisonment, defense lawyers often relax and fail to closely listen as the judge mechanically reads the list of standard and special conditions of supervision. As a result, lawyers frequently do not object to any special conditions.

Thus, when challenged on appeal, special conditions of supervised release are regularly reviewed under a plain error standard. More often than not, courts reject such challenges. However, recent case law, particularly

Continued on next page »

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in the Ninth Circuit, indicates that the time is ripe to object to, and litigate, special conditions of supervised release, particularly in sex offense cases.

For a very good general primer reviewing, and for challenging, special conditions in sex cases, read Jennifer Gilg's *The Fine Print and Convicted Sex Offenders: Strategies for Restrictive Conditions of Supervised Release*. Gilg is a federal defender research and writing attorney in the District of Nebraska.[1] Her article identifies cases in which appellate courts suggested that they may have reversed conditions of supervision had there been an objection below.[2]

Statutory Framework

For specified sex offenses, Congress requires a minimum supervised release term of five years and authorizes up to lifetime supervision.[3] The U.S. Sentencing Commission recommends the statutory maximum (i.e., lifetime) supervision for sex offenses.[4]

The conditions of supervised release are governed by 18 U.S.C. § 3583(d)(2). It details "explicit condition[s] of supervised release" the "court shall order."[5] The statute also permits a discretionary "further condition of supervised release, to the extent such condition –

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a).[6]

Section 5D1.3(a) of the Sentencing Guidelines lists "mandatory conditions" of supervised release.[7] Subsection (c) of that guideline lists the "standard" conditions of supervised release, routinely imposed in almost every federal case,[8] and in fact, conveniently for the judges, preprinted on the Judgment in a Criminal Case.

Subsection (d) of the guideline identifies "special conditions" to impose in cases with particular facts, including subsection (d)(7), where "the instant offense of conviction is a sex offense." U.S.S.G. § 5D1.3(d)(7) recommends:

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

The government "shoulders the burden of proving that a particular condition of supervised release

Continued on next page »

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The Juvenile Law Reader is published four times a year by:

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Youth, Rights & Justice is dedicated to improving the lives of vulnerable children and families through legal representation and advocacy in the courts, legislature, schools and community. Initially a 1975 program of Multnomah County Legal Aid, YRJ became an independent 501 (c) (3) nonprofit children's law firm in 1985. YRJ was formerly known as the Juvenile Rights Project.

The Juvenile Law Reader is distributed electronically free of charge. It is partially funded by the Office of Public Defense Services.

Tax deductible donations are welcome and can be sent to the YRJ offices.

Queries regarding contributed articles can be addressed to the editorial board.

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involves no greater deprivation of liberty than is reasonably necessary to serve the goals of supervised release."[9] In other words, special conditions must be justified.

Conditions must be understandable; that is, conditions of supervised release cannot be unconstitutionally vague. There is a "due process right to conditions of supervised release that are sufficiently clear to inform [the defendant] of what conduct will result in his being returned to prison."[10] And because conditions must involve no greater deprivation of liberty than is reasonably necessary to serve the purposes of supervised release, they cannot be overbroad.[11]

This article focuses on federal special conditions of supervised release and the concern of some appellate courts, in particular the Ninth Circuit, for the liberty of sex offender clients while they serve their terms of supervised release.

Case Law

The courts have rejected special conditions that unduly limit use of home computers and access to the Internet in cases that did not involve any use of computers.[12] In a case involving the conviction of a defendant for sexual contact with a minor, because a computer was not part of the crime, the First Circuit rejected a categorical residential Internet ban, explaining, "[i]n light of the ubiquitous presence of the Internet and the allencompassing nature of the information it contains, a total ban on [defendant's] Internet use at home seems inconsistent with the vocational and educational goals of supervised release."[13]

CC BY 2.0 PHOTO BY SIMON INGRAM

Conversely, when a computer was involved and particularly in child pornography cases, courts commonly have prohibited use of a computer with access to the Internet without prior approval of the probation office,[14] and then subject to monitoring by the probation office.[15] Under the facts of some cases, courts have approved absolute Internet bans.[16] Given society's increasing dependence on the Internet to conduct daily affairs, such bans are ripe for challenge and distinction, and many child pornography cases reject absolute bans.[17]

Indeed, in the Eighth Circuit, a broad computer and Internet ban, even if subject to written pre-approval by a probation officer, is not permitted if the defendant used a computer in the typical child pornography offense conduct, i.e., to receive

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« Branded continued from previous

and access child pornography.[18] The court summarized the offense conduct "as devoid of evidence that he has ever used his computer for anything beyond simply possessing child pornography."[19] The court stated the obvious: Absent evidence "for anything beyond simply possessing child pornography," such a broad prohibition is not justified on "an important medium of communication, commerce, and information-gathering."[20]

The court suggested a more narrowly tailored restriction "through a prohibition on accessing certain categories of websites and Internet content" coupled with random computer searches and filters.[21] Similarly, in a child pornography case, the Third Circuit reversed a lifetime ban on using computers and computer equipment as a greater deprivation of liberty than necessary, deeming such a prohibition "the antithesis of a 'narrowly tailored' sanction[,]" and emphasizing its lifetime duration.[22]

More recently, the Ninth Circuit and other circuits have called into question, and in some circumstances limited or rejected, several special conditions of supervision for sex offenders. The subject conditions include staying away from places frequented by children,[23] prohibiting possession or use of a camera phone,[24] banning possession or use of a computer capable of accessing the Internet,[25] ordering that the defendant not patronize any place where sexually explicit materials are available,[26] imposing residency restrictions,[27] prohibiting contact with persons under the age of 18 years (including the defendant's own children),[28] and ordering that the defendant not date or socialize with anyone with children under the age of 18 years.[29]

In *United States v. Wolf Child*, the defendant was convicted of attempted sexual abuse by attempting to have sex with a 16-year-old girl who was intoxicated and unconscious.[30] At sentencing, the district court imposed special condition 9, "which ordered in relevant part that Wolf Child 'shall not be allowed to do the following without prior written approval of United States Probation: (1) reside in the home, residence, or be in the company of any child under the age of 18; (2) go to or loiter near school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18; or (3) date or socialize with anybody who has children under the age of 18.'"[31]

After this special condition had been announced, defense counsel sought to clarify whether it barred Wolf Child from residing with or being in the company of his own daughters.[32] The judge responded: "Absolutely. … This man is now a convicted sex offender. And I will not allow him to have contact with children under the age of 18 without the approval of probation, as stated in the disposition. This man cannot be trusted with minor children, in the view of this court. And he will not be."[33] After defense counsel objected, "the judge replied, 'I understand. You may take that issue to the circuit if you wish to do so, counsel.'"[34] Wolf Child appealed.

The Ninth Circuit ruled that "it is clear from the record that the parts of special condition 9 that prohibit Wolf Child from residing with or being in the company of his children and socializing with or dating his fiancée are substantively unreasonable and may not be reimposed. Nothing in the record would support a finding that these restrictions on his fundamental liberties involve no greater deprivation of liberty than is reasonably necessary to accomplish the goals of deterrence, protection of the public, or rehabilitation."[35] In addition, the court deemed the special condition overbroad because it imposed "significant restrictions on Wolf Child's right to free association by prohibiting him from 'dat[ing] or socializ[ing] with *anybody* who has children under the age of 18' and from being '*in the company* of any child under the age of 18' without prior written permission from his probation officer."[36]

The Ninth Circuit held that "because the fundamental right to familial association is a particularly significant liberty interest, the district court was required to follow enhanced procedural requirements before imposing parts 1 and 3 of special condition 9" and, by failing to do so, the district court committed procedural error.[37] Second, the court held that "the imposition of parts 1 and 3 of special condition 9, as applied to Wolf Child's association with his daughters and fiancée, was substantively unreasonable and may not be reimposed upon remand" because there was no evidence

Continued on page 10 »

Oregon's First Foster Care Ombudsman

By Darin Mancuso

Editor's note: Darin Mancuso was hired to fill the position of Oregon's Foster Care Ombudsman in 2014 after the position was created under SB 123 in 2013. Mr. Mancuso had never worked inside the child welfare system, but he brings to the position a wealth of life and professional experience. He spent a brief time in foster care as a young child before being adopted. In his professional life, he held various positions in the Marion and Clackamas County juvenile departments, including working as the Drug Court Coordinator. What follows is Mr. Mancuso's personal account of the role of Foster Care Ombudsman, which has been a new opportunity for him and for the state.

 Photo By Thomas Hawk

Establishment of the Foster Care Ombudsman Position

I joined the Governor's Advocacy Office in Salem on March 31, 2014 as Oregon's first Foster Care Ombudsman. It became immediately apparent that I had much to learn in very little time. The strengths I brought to the new position did not include in-depth knowledge of the dependency and child welfare arena. However, I later learned that this was one of the reasons why I was hired.

While a person coming from the Child Welfare system would have the advantages of program and practice knowledge, that experience might also bring unconscious mindsets that could filter what they are seeing on a case. In this case a new set of eyes was desired. Although that makes perfect sense in theory, learning the intricacies of child welfare is no simple task, nor can that information be quickly assimilated. The foster care world is a vast spectrum of relative and non-relative foster care homes, extending to a range of independent residential facilities that serve Oregon children in the legal custody of DHS. It is imperative to have knowledge and respect for the systems in place before even thinking about recommending any change.

Senate Bill 123 became a law (ORS 418.200) effective January 1, 2014. Prior to my hiring, a Foster Care Bill of Rights had been drafted by multiple stakeholders and DHS program staff. At the point that I started, the draft was ready and waiting for the Attorney General's Office review and final input. With the law in place, and May 2014 being National Foster Care Awareness month, decisions were made shortly after my arrival to implement the Foster Child hotline sooner rather than later. The Youth Empowerment and Safety (YES) Line went live on May 12, 2014 as the outreach, promotion, and training aspect of the program was still in development.

Foster Youth Bill of Rights

Implementation of the Foster Children's Bill of Rights, the YES line and the foster youth grievance process across the state involves Child Welfare program offices, foster parents, judicial, legal and child advocacy partners. It is no small task. Just mailing out the Bill of Rights posters across the state would not suffice without a clear understanding of the concepts behind it.

Actually, there had been a Rights of Children policy in place for many years, but few people knew about it. As a result, the lack of knowledge

Continued on next page »

« Ombudsman continued from previous

of the policy's existence left children in foster care unaware of having any rights at all. To ensure institutionalization of these rights, I was summoned to join the DHS Well-Being Unit team and travel around the state conducting trainings at local Child Welfare offices where community partners were invited to join DHS staff and foster parents. Once the local service area received the training, the Bill of Rights poster would be disseminated to those branches for distribution and posting in foster homes. At this point, approximately 90% of the offices across the State have received the training.

Ombudsman Position

Senate Bill 123, which created my position and the language for the Bill of Rights, brought no additional monies beyond the costs to fund a full time position. This has led me to try to balance the need to train DHS and other stakeholders with being available to youth and others who call the YES Line for help and information.

In my studies on the art of being an Ombudsman, first and foremost, an Ombudsman is a fair and impartial person, who investigates and fact-finds without judgment and a great deal of objectivity. An Ombudsman also respects the rules and policies in place. Since coming into this role, I have attended Ombudsman trainings and met with multi-disciplinary Ombudsmen to learn more about governmental and organizational models.

The Long Term Care Ombudsman model utilizes more than 250 volunteers across the state who are assigned to various retirement facilities and adult foster homes that they visit regularly and conduct onsite investigations under the guidance of six Deputy Ombudsmen. The Foster Care Ombudsman program in California also uses volunteers, but their focus is on recruiting former foster children who are in college and wanting internships. It is clear to me that Oregon should consider models such as these and seek from Oregon's own current and former foster children to develop an approach that will be responsive to the more than 8,000 children and youth in care at any given time in our state.

The YES Line in January 2015 received a total of 12 complaints.

Method of complaint:
YES Line=9
Email=1
In-person=1
Governor's Office=1

District:
5 (Lane) = 6
2 (Mult.) = 1
15 (Clack.) = 2
3 (Marion) = 2
9 (Wasco) = 1

Role of Complainant:
Foster Parent (current/former)=8
Bio-Parent=1
Grandparent=2
Foster child=1

Age of Foster Child
0-4 = 7
5-8 = 3
13-15 = 1
22< = 1

Type of Complaint
(a complainant may indicate more than one complaint)
Reunification=4
Physical Abuse=3
Sexual Abuse=1
Caseworker=1
Access to Services=2
Adoption=1

Placement Type
Relative foster home = 4
Prof. foster home = 8
Residential = 0
Disposition
Informed/educated on policy = 7
Unfounded = 3
Referred to Field = 2
Pending = 3

In October of 2014, I attended the NW Ombuds Group (NWOG) meeting with the Governor's Advocacy Office Administrator and met with multi-disciplinary Ombudsmen from all over the West Coast and Canada. At this meeting, I learned more on what a difficult role Ombudsmen play as they operate within an agency as an autonomous entity and confidential spokesperson for the party initiating a complaint. While hearing this was not new, it was a relief to know that working behind the scenes is a common situation with Ombudsmen. Ombudsmen try to resolve complaints at

Continued on next page »

« Ombudsman continued from previous

the lowest level possible, they listen, they problem solve, they provide guidance, they monitor compliance, they investigate complaints, then track and report trends, offering recommended changes to policy and practice. Very often in an endeavor to elicit resolution or change, an ombudsman must be willing to work in the shadows and allow recognition for changes to go to leadership or another entity.

Aside from these elements, working with children has taught me that every interaction is a teaching opportunity and that being the person in the middle can create triangulation or a situation of rescuing that may not be ultimately beneficial for a child. What is important, however, is for children to be empowered, to be given guidance in navigating systems and processes, and to make informed decisions with an understanding of potential consequences.

The human brain is not fully developed until the age of 25, therefore, a child who has experienced trauma may have significant cognitive deficiencies or lack ability to exercise true empowerment or understand the responsibility that goes along with it. But the ideals of empowerment are more than a concept. Children growing up in chaos and uncertainty need to learn how to problem solve and to participate in decisions that will impact their lives.

Here are two examples of the types of calls received by the YES line:

A foster parent contacted the Ombudsman with a concern that the only treatment provider who has a contract with DHS that has skills with attachment disorders is a 2-hour drive each way. The foster parent has two toddlers and believes that the drive time is unrealistic. The foster parent learned of another provider in close proximity, but was told it is not an option. DHS expressed that their reluctance was due to the inability to sustain the service once the children are adopted. After several conversations with the agency, a contract was initiated with the provider in the foster parents' community.

An attorney contacted the Ombudsman on behalf of a foster baby whose foster parents were having difficulties accessing the prescribed medication under OHP. The foster parents were purchasing the medication using their own finances and it was quite costly. The caseworker was contacted and shared the same concerns and gave multiple reports on the efforts attempted and current status on this matter. The Ombudsman was able to connect the caseworker with parties at OHA and eventually the Complaint Coordinator who after several weeks was able to resolve the matter in the various systems.

YES Line

As of late December 2014, I had received over 50 calls since the YES line went live. So far, there is no common theme of incoming complaints, nor are the calls coming from primarily foster children, but from family members, attorneys, CASAs, therapists, foster parents, residential programs, DHS staff, former foster children and, of course, current foster children. Some calls have been serious allegations of physical abuse perpetrated by foster parents or their friends and family. Many calls have been about systemic issues regarding services or lack of access to services. Other calls have been that of providing guidance and being a sounding board. Often the professionals that serve this population complain of the agency not meeting their perceived expectations. Calls have ranged from a seven year-old foster child to an 80-year-old grandmother.

In this upcoming year, I anticipate many more challenges, opportunities, and growth for this program. No new program comes without hurdles and questioning of authority or how this will fit with current practices. With great needs and little funding, there is still much to hope for. Whatever the case, the goal is for children in foster care to be safe, to have their basic needs met and to have tools and resources that offer empowerment, guidance and most of all, a voice. With over 8,000 children in foster care on any given day in Oregon, the YES phone will continue to ring. With all my heart, I hope to make a difference and make sure that children coming into care will not be hurt anymore. ●

Overview of the Fitness To Proceed Process in Oregon

By Alex Palm, M.S.
Juvenile Fitness to Proceed Coordinator, Addictions and Mental Health

In 2013, the Oregon legislature passed a new law to establish statewide standards for addressing the needs of youth whose ability to effectively participate in their own trial is in question.

Oregon House Bill 2836 (ORS 419C.378-398) was written in response to an inconsistent approach to working with youth who are found unfit to proceed to trial. This statute sets a process for evaluating a youth's fitness to proceed in juvenile court. The statute also gives the Oregon Health Authority the responsibility of providing restorative services to address the unique needs of youth who are found unfit to proceed.

In order to be fit to proceed to trial, a youth must be able to understand the court process and his or her charges, be able to communicate and cooperate with his or her lawyer, and be able to participate in his or her own defense. In Oregon a youth may be found unfit to proceed if they are unable to meet these criteria because of mental illness, mental defect, or another condition.

Most states only consider a youth's fitness to proceed in connection with the presence of a mental disease or defect. Oregon's juvenile law extends to consider *other conditions* as reason to find a youth unfit to proceed. Other conditions may include anything that can be firmly connected to a youth not meeting the fitness to proceed criteria.

However, the statute does prohibit a court from finding a youth unfit to proceed solely due to the age of the youth, the youth's ability to recall the events of the alleged offense, or if there is evidence that the youth was under the influence of intoxicants or medication at the time of the alleged offense.

Any party to a proceeding, including the court, may raise the fitness to proceed question at any point in the trial. For a youth in juvenile court, a fitness to proceed evaluation may be completed by a psychiatrist, licensed psychologist, or a licensed clinical social worker who has been certified by the Oregon Health Authority to perform forensic evaluations.

A list of certified evaluators can be found at: http://www.oregon.gov/oha/amh/forensic-eval/Pages/index.aspx

Following the evaluation, the evaluator will submit a report to the court summarizing the evaluation and providing an opinion on the youth's fitness to proceed. If the evaluator believes that the youth is unfit to proceed to trial, he or she must also provide an opinion regarding the likelihood that the youth will gain or regain fitness to proceed in the near future. After the initial report has been filed, any party to the proceeding that disagrees with the opinions in the report may request a second evaluation by a different evaluator.

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« Fitness continued from previous

If multiple evaluations have been submitted, the judge will rule on fitness based on the preponderance of the evidence.

If the court finds a youth unfit to proceed, and that it is likely that the youth will gain or regain fitness to proceed, the youth will be referred to participate in a restorative services program tailored to meet the youth's specific needs to gain or regain fitness to proceed. The Addictions and Mental Health division (AMH) of the Oregon Health Authority is responsible for providing restorative services to youth in Oregon who are unfit to proceed. To fulfill this responsibility, AMH has contracted with Trillium Family Services as the sole restorative service provider in the state. Each youth who participates in restorative services will have a unique restorative service plan based on their needs to gain or regain fitness to proceed. After the restorative service plan is developed, the youth will meet with a skills trainer to complete a psychoeducational curriculum focused on the skills necessary to participate in their trial and tailored to meet the needs of the individual.

Restorative services are delivered in 90-day cycles. At the end of each cycle, the restorative service provider will conduct and submit a new forensic report detailing the services that the individual has received and an opinion as to whether or not the youth remains unfit to proceed. If the service provider believes that the youth remains unfit to proceed, then the report must include an opinion regarding the likelihood that the youth will continue to benefit from restorative services. If the court finds that a youth remains unfit to proceed and will benefit from continued restorative services, then the youth will be ordered to another 90-day restorative service episode. A youth may participate in restorative services for no longer than three years, or the maximum time of commitment if the youth were adjudicated on all charges, whichever time is less.

One of the most explicit requirements in this statute is that a youth is not to be removed from his or her current placement solely for the purposes of a fitness to proceed evaluation or to receive restorative services. This provision intends to protect youth from being inappropriately placed in a residential facility or a psychiatric hospital setting for fitness to proceed evaluations or restorative services. The provision also furthers the goals of providing services for youth in the least restrictive setting possible and maintaining a healthy continuity of care for each youth. To satisfy this provision, Trillium Family Services' restorative service program can be administered in a variety of settings regardless of placement and should not interrupt or affect other treatment that the youth may be participating in. The restorative service program staff is committed to working with each youth and family to provide effective services in the least invasive manner possible.

For more information or questions about the juvenile fitness to proceed process, please contact Alex Palm, Oregon Health Authority Juvenile Fitness to Proceed Coordinator.

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to support limiting Wolf Child's "fundamental liberty interest in residing with and socializing with his intimate family members."[38] Third, due to overbreath, the court vacated and remanded parts 1 and 3 of special condition 9 "to the district court to consider whether it still concludes that it is necessary to impose similar but more narrowly drawn restrictions."[39]

In *United States v. Plumage*, after the filing of an *Anders* brief, the Ninth Circuit ordered new appellate counsel to brief the following three issues:

(1) Did the district court plainly err in imposing special condition of supervised release number six in the written judgment, which requires Plumage to receive advance written permission to "date or socialize with anybody who has children under the age of 18"? *See United States v. Soltero*, 510 F.3d 858, 865-67 (9th Cir. 2007) (per curiam) (conditions of supervised release may not be overly vague or drawn so broadly that they unnecessarily restrict otherwise lawful activities).

(2) Did the district court plainly err in imposing special condition of supervised release number seven in the written judgment, which prohibits Plumage from patronizing "any place where [sexually explicit] material or entertainment is available"? *See Weber*, 451 F.3d at 558 (nonmandatory supervised release condition must "involve no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release") (internal quotation marks omitted).

3) Did the district court plainly err in imposing special condition of supervised release number eight in the written judgment, when Plumage's offense did not involve use of a computer? *See United States v. Blinkinsop*, 606 F.3d 1110, 1123 (9th Cir. 2010); U.S.S.G. § 5D1.3(d)(7)(B)."[40]

In *Plumage*, the government conceded the error inherently identified in the first question, primarily based on *Wolf Child* and *United States v. Preston*, and invalidated the last clause (in italics below): "Defendant shall not be allowed to do the following without prior written approval of United States Probation following consultation with defendant's sex offender treatment provider: reside in the home, residence, or be in the company of any child under the age of 18; go to or loiter near school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18; or *date or socialize with anybody who has children under the age of 18*." The court of appeals remanded *Plumage* to the district court for reconsideration of the problematic special conditions of supervised release identified above by the Ninth Circuit.[41] On remand, the court did not reimpose the challenged conditions.[42]

In *Preston*, the Ninth Circuit also reviewed a condition of release seemingly unique to sex offenders – penile plethysmograph testing. The Ninth Circuit previously reviewed such testing as a condition of supervision in *United States v. Weber*.[43] In *Weber*, the court detailed the testing procedure, explaining "the male places on his penis a device that measures its circumference and thus the level of the subject's arousal as he is shown sexually explicit slides or listens to sexually explicit audio scenes."[44] Amplifying statutory language, the court ruled this level of intrusiveness triggered a particularly significant liberty interest, requiring "a thorough, on-the-record inquiry into whether the degree of intrusion caused by such testing is reasonably necessary to accomplish one or more of the factors in § 3583(d)(1) and involves no greater deprivation of liberty than is necessary, given the available alternatives."[45] In *Preston*, the government conceded error on this issue because the district court failed to make specific findings justifying such intrusion.[46]

Weber touched upon another supervised release condition largely unique to sex offense cases – polygraph testing. In *United States v. Antelope*, the defendant objected to release conditions requiring sex offender treatment including polygraph testing.[47] The court in *Weber* succinctly explained the mixed-bag ruling in *Antelope*:

> While we acknowledged the rehabilitative purpose behind the polygraph questioning, we held that requiring, as a condition of supervised release, that a defendant answer questions about potential criminal activity in

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« *Branded continued from previous* a polygraph examination was significantly incriminating and coercive to violate the Fifth Amendment. That conclusion, however, did not doom the condition. Rather, we held that a defendant retains his right against selfincrimination during the required polygraph testing and can refuse to answer any incriminating questions unless he is granted useandderivativeuse immunity under *Kastigar v. United States*. After *Antelope*, then, a district court may require, as a term of supervised release, that a defendant submit to polygraph testing, provided such a condition comports with the requirements of § 3583(d), but a defendant retains his Fifth Amendment rights during any such testing.[48]

Photo by thejbird CC By 2.0

Waiting until a client is on the precipice of self-incrimination to challenge a condition of release raises the issue of ripeness. The government seemingly, almost reflexively, invokes ripeness to supervised release challenges. Of course, whether a condition is justified, vague, or overbroad is not contingent on future events. Moreover, a challenge may be waived if not appealed immediately following judgment. And practically, an immediate challenge, even if deemed unripe by the appellate court, may remind the client to contact counsel when later implementation of the condition threatens his liberty.

Indeed, as a special condition of supervision, courts will typically order a convicted sex offender to enroll in, and complete, a sex offender treatment program. The Ninth Circuit has invalidated a condition requiring a sex offender treatment program "*which may include* inpatient treatment, as approved, and directed by the Probation Officer."[49] That condition left commitment to inpatient treatment to the discretion of the probation officer. The court recognized that "[i]n terms of the liberty interest at stake, confinement to a mental health facility is far more restrictive than having to attend therapy sessions, even daily."[50]

A treatment condition is advised by U.S.S.G. § 5D1.3(d)(7)(A). A standard-type treatment condition provides:

> The defendant shall enter and complete a sex offender treatment program as directed by and until released by the United States Probation Office. The defendant shall abide by the policies of the program to include physiological testing. The defendant is to pay all or part of the costs of treatment as directed by United States Probation.

There is thus the potential that a treatment provider or a probation officer may attempt to impose rules and policies that are more restrictive, and ultimately unconstitutional, than conditions that may be imposed by a court. Monitoring such overbreadth and unconstitutional delegation requires an ongoing relationship with clients.

> The time is ripe to object to, and litigate, special conditions of supervised release.

Counsel must be vigilant and prepared to challenge any overly restrictive, vague, or overbroad rules imposed by a treatment provider or a probation officer. A sentencing court cannot "abdicate its judicial responsibility" for setting conditions of release.[51] A condition "cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine

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is meant to protect, i.e., the delegation of 'basic policy matters to policemen … for resolution on an ad hoc and subjective basis.'"[52] In the context of determining what is pornographic, delegation of such authority creates "a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating."[53] A probation officer could well interpret the term more strictly than intended by the court or understood by the defendant.

In *Antelope*, the court of appeals ruled a condition prohibiting possession of "any pornographic, sexually oriented or sexually stimulating materials" to be impermissibly vague.[54] It followed an earlier ruling that "pornography" lacks any recognized legal definition, thus "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography.'"[55] The Third Circuit explained it best: "The term pornography, unmoored from any particular statute, has never received a precise legal definition from the Supreme Court, or any other federal court, and remains undefined in the federal code."[56] Consequently, "[r]easonable minds can differ greatly about what is encompassed by pornography."[57]

Highlighting the controversy in this area of law, the Eighth Circuit disagrees and routinely upholds conditions prohibiting the possession of pornography or sexually explicit material, as long as the district court makes individualized findings warranting the prohibition.[58] And the Fifth and Tenth Circuits interpret "pornographic, sexually oriented or sexually stimulating materials" in a "common-sense way."[59] Moreover, the appellate courts are split whether the ban can extend to adult pornography absent an adequate explanation.[60]

The principal holding in Antelope reversed the district court's revocation of probation and imprisonment of the defendant for refusing to participate in sex offender treatment based on the Fifth Amendment privilege against self-incrimination.[61] Given that sex offender treatment, including polygraph testing, is a commonplace special condition in sex offense cases, defense attorneys need to counsel their clients about their Fifth Amendment rights to remain silent during supervision.[62] If the defense attorney does not tell them, no one will.

The Fifth Amendment right against self-incrimination is not self-executing. The right must be affirmatively asserted to remain silent. "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the [Fifth Amendment] privilege, the government has not 'compelled' him to incriminate himself."[63]

However, "application of this general rule is inappropriate in certain well-defined situations."[64] "In each of those situations … some identifiable factor was held to deny the individual a 'free choice to admit, deny, or to refuse to answer.'"[65] The two main exceptions to the general rule – that the privilege must be claimed when self-incrimination is threatened – are situations in which a suspect is in police custody and cases in which the assertion of the privilege is penalized so that the option to remain silent is foreclosed and the incriminating testimony is effectively compelled.[66]

While imprisoned, clients suffer limited Fifth Amendment rights. Moreover, pursuant to the Adam Walsh Act, imprisoned sex offenders certified as sexually dangerous persons by the Attorney General or the Director of the Bureau of Prisons are subject to civil commitment when their prison terms expire.[67] Defense lawyers must assist clients in avoiding that certification and particularly caution them about participation in prison sex offender programs.

In the prison context, *McKune v. Lile* addressed the Fifth Amendment right against compelled incrimination in sex offender treatment.[68] A plurality of four Justices wrote that prisoners can be compelled to choose between (1) undergoing sex offender treatment that requires non-immunized potentially self-incriminating disclosures and (2) foregoing a host of prison privileges that

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are only available to treatment participants.[69] In dissent, four other Justices explained that such a choice rises to the level of compulsion that is prohibited by the Fifth Amendment.[70]

Justice O' Conner's concurrence focused on compelled self-incrimination and prison privileges:[71]

> I do not believe the consequences facing respondent in this case are serious enough to compel him to be a witness against himself. These consequences involve a reduction in incentive level, and a corresponding transfer from a mediumsecurity to a maximumsecurity part of the prison. In practical terms, these changes involve restrictions on the personal property respondent can keep in his cell, a reduction in his visitation privileges, a reduction in the amount of money he can spend in the canteen, and a reduction in the wage he can earn through prison employment. … These changes in living conditions seem to me minor. Because the prison is responsible for caring for respondent's basic needs, his ability to support himself is not implicated by the reduction in wages he would suffer as a result. While his visitation is reduced as a result of his failure to incriminate himself, he still retains the ability to see his attorney, his family, and members of the clergy. … The limitation on the possession of personal items, as well as the amount that respondent is allowed to spend at the canteen, may make his prison experience more unpleasant, but seems very unlikely to actually compel him to incriminate himself.[72]

She thus concurred in the plurality's conclusion – that Lile had not stated a Fifth Amendment claim cognizable under 42 U.S.C. § 1983 – because a forced choice between waiving the right against self-incrimination and foregoing certain prison privileges did not rise to the level of compulsion prohibited by the Fifth Amendment.

Consequently, defense lawyers must educate their clients about asserting their right to remain silent in prison rather than leaving them to resort to post-hoc claims that self-incrimination while incarcerated was compelled in violation of the Fifth Amendment. The new era of federal civil commitment of sexually dangerous persons heightens the need for such advice.[73]

Another aspect of the Adam Walsh Act, the advent of federal sex offender failure-to-register prosecutions opens a new chapter in special conditions of supervision.[74] In *United States v. Goodwin*, the Seventh Circuit reversed inadequately explained special conditions because the defendant's offense history (lewd and lascivious act in the presence of a child and failure to register) did not justify the conditions without explanation.[75]

Failure to register is not per se a sex offense. And while most federal sex offenses involve computers and the Internet, the conviction requiring registration, particularly dated ones, may have nothing to do with such technology. Special conditions reflect the clients and the facts of a case, not boiler plate imposition. For that reason, in a failure-to-register case, the Second Circuit recently "held the [penile] plethysmographic condition does not bear adequate relation to the statutory goals of sentencing to outweigh the harm it inflicts, that it involves a greater

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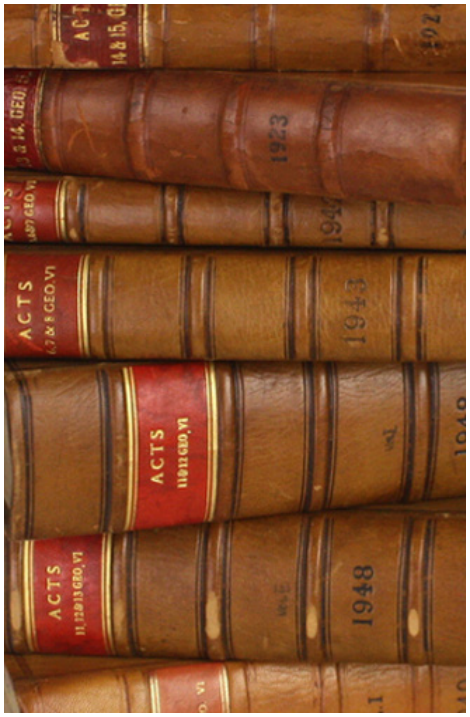
deprivation of liberty than is reasonably necessary to serve any of those statutory goals, and that it may not, consistent with substantive due process, be imposed on [the defendant.]"[76]

Sex offender conditions are being applied in all sorts of cases, typically, but not necessarily, based on prior sex offense convictions,[77] heightening the need for lawyers to pay very careful attention, before and during the sentencing hearing, to the imposition of conditions in all cases. In some cases, the courts of appeals have reversed such conditions when the sex offenses were dated and thus unlikely to serve the goals of deterrence or protecting the public.[78]

Practice Pointers

Defense counsel should take the following steps to prevent unwarranted, unreasonable, and unconstitutional special conditions of supervised release.

1. In the plea agreement, the defense attorney should not waive the client's right to appeal special



conditions of supervised release. Likewise, counsel should not waive a client's right to challenge special condition in post-conviction proceedings. If forced to waive these rights, counsel should negotiate language invalidating the waiver if objections are made to special conditions of supervised release.

2. Immediately following the change of plea, the defense lawyer should send a letter or email to the probation officer and object to the district court considering any special conditions of supervised release, whether listed or not listed in the Sentencing Guidelines, unless the defendant is provided, prior to sentencing, with the exact language of all proposed special conditions.[79]

3. If the probation officer fails to provide specific notice in the presentence investigation report, including the precise language of the proposed special conditions, the defense lawyer should object with detailed specificity in the PSR objections letter.

4. If counsel's objections regarding special conditions are unresolved, counsel should renew the objections in the sentencing memorandum.

5. At sentencing, if the district court fails to consider or grant defense objections to special conditions of supervision, either in whole or in part, the defense should lodge very specific objections to the offensive language in the district court's special conditions. The objections must be clear and precise. In non-sex offense or failure to register cases, the defense should particularly focus on whether the conditions reflect the client's current conduct or conversely, whether they are based on remote events and/or generic special conditions that do not reflect either the client's historic or current conduct.

6. If any of the special conditions of supervised release are unwarranted, unreasonable, or unconstitutional, defense counsel should appeal.

7. The client must be advised of his continuing Fifth Amendment rights to remain silent and against self-incrimination while in custody. The Bureau of Prison has its own sex offender treatment program for inmates. Given the advent of civil commitment under the Adam Walsh Act, Fifth Amendment rights are particularly important while the client is in custody.

8. Lawyers must advise clients of their continuing Fifth Amendment rights to remain silent and against self-incrimination while on supervised release. Sex offender treatment is a routine

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special condition of supervision. Treatment can involve, and in some instances require, self-incrimination. Furthermore, the lawyer and the client must remain vigilant because the treatment provider and/or the probation office may attempt to impose rules that are more restrictive than the court-imposed conditions, all of which must comply with the Constitution and statutory and case law.

9. The client should be urged to contact the lawyer if he has any concern regarding self-incrimination or overly restrictive or intrusive rules of sex offender treatment.

10. Special conditions in sex offender cases seem to be rapidly developing, especially as technology evolves. Counsel should recommend that the client contact counsel should the probation officer suggest that the client agree to modified conditions of supervised release.

Conclusion

The defense lawyer must listen to the district court's conditions of supervised release. Writing them down as the court announces them may help focus the attorney. A preserved legal issue is one foundation of a successful appeal. Several courts of appeals have closely scrutinized release conditions, particularly in the last several years, and, in some instances, invalidated or limited conditions that violate clients' liberties.

Defense lawyers must educate clients. Especially when defendants are sex offenders, restrictions on their liberty continue long after they serve their prison terms. They need to know their rights. And they need to be on guard for further infringements of their rights. Clients need to know that they can remain silent and know that they can contact defense counsel to protect their rights.

 Photo By Ville Miettinen

**Article end notes at this link: http://www.youthrightsjustice.org/media/3635/branded-endnotes.pdf

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CASE SUMMARIES

By Jennifer Stoller, YRJ Attorney

Department of Human Services v. A.L., 268 Or App 391 (January 7, 2015), Washington County.

The parents appealed a finding of dependency jurisdiction as to their 3 children. The paternal grandparents, with whom the parents usually lived, had always been the primary caregivers for the older 2 children, a relationship that is common in the family's culture (Chinese, of Mien descent). DHS placed the youngest child with the maternal grandfather shortly after birth. At trial, the parents maintained that the paternal grandparents would continue to be the primary caretakers for the children.

DHS argued that jurisdiction was necessary because of the parents' drug use and lack of responsibility for their children. DHS further argued that the grandparents were unsafe caregivers because (1) they were under indictment for contributing financially to a marijuana grow operation, (2) drug houses have a higher risk of robbery, (3) a 10-year-old founded disposition of physical abuse by the paternal grandfather, and (4) the paternal grandparents' violation of the safety plan. The parents maintained that, regardless of their parenting deficits, they demonstrated "protective capacity" by arranging for the paternal grandparents to continue as primary caregivers. The parents maintained that the paternal grandparents were safe caregivers.

The court held that, even if DHS was successfully able to prove the parents' drug use and lack of basic parenting skills, DHS must also prove that placing the children in the care of the paternal grandparents put the children at risk of harm. The court found that an indictment alone is insufficient to prove a current and nonspeculative risk of harm when a search of the grandparents' home did not reveal any evidence of criminal activity that would create a risk of harm to the children. For the same reasons, the court found that the evidence regarding the risk of robbery was purely speculative. Citing confidentiality concerns, DHS refused to present evidence regarding the 10-year-old founded disposition of physical abuse, leaving the court without evidence of a nexus between the prior abuse and a current risk of harm. Finally, the court held that a single violation of a safety plan did not create a current risk of harm when the children were not endangered as a result.

The court pointed out that DHS seemed to assume that parents cannot give custody of their children to people who are not DHS-certified. However, the court must have jurisdiction for DHS to change the placement of children and parents are allowed to give care of their children to caregivers who do not pose a current risk of harm. The court reversed the jurisdictional judgment.

Department of Human Services v. L.C., 267 Or App 731 (December 24, 2014), Hood River County.

Mother moved to dismiss continuing dependency jurisdiction at a review hearing. The court had initially taken jurisdiction based on the family's homelessness and father's domestic violence against mother. Mother had called DHS after the domestic violence incident that lead to the filing of the petition. At the time of the review hearing, seven months after jurisdiction, mother had obtained her own housing, attended a domestic violence support group and attended a few sessions with a domestic violence counselor who discharged her from treatment. DHS found no safety threats in mother's home and was happy with mother's parenting. After his release from jail, father

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« Case Summaries continued from previous

had participated in a mental health assessment, domestic violence risk assessment (which rated him "high risk"), and a neuropsychological evaluation. He had also begun a year-long domestic violence treatment program. DHS wanted the court to retain jurisdiction because the parents hoped to reunite at some point in the future.

At a review hearing, DHS bears the burden of proving that the factual bases for jurisdiction continue to present a current, nonspeculative threat of danger. "[J]urisdiction cannot be based on generalizations about the risk of recurrence of certain types of conduct." There must be "individualized evidence that the parent's conduct is likely to recur and endanger the child." The court held that there was insufficient evidence that mother would fail to protect the children from father's domestic violence should it reoccur. Therefore, the court of appeals reversed the judgment continuing jurisdiction over the children.

Department of Human Services v. AF.,268 Or App 340 (December 31, 2014), Multnomah County.

In January 2013, DHS filed a dependency petition regarding the parents' 5 children, and the state brought a criminal case against father. In September 2013, father was convicted of multiple counts of sexual abuse against multiple victims, including two counts against one of his children. In December 2013, mother made admissions regarding some of the allegations in petition. Father contested jurisdiction at a trial in April 2014.

At trial, father and one of the children presented evidence that mother was actively engaged in services and consistently made protective statements about the children. Mother's counselor and the children's counselor recommended "increased autonomy from DHS and the court for mother and the children." The juvenile court entered a jurisdictional judgment and found that no one challenged mother's stipulations from December 2013.

However, the court of appeals found that father and the children did challenge mother's stipulations. They argued that, by the time of trial, mother had ameliorated the conditions and circumstances to which she had previously stipulated. The court of appeals vacated the jurisdictional judgment, finding that the juvenile court erred when finding that no party had challenged mother's stipulations. The court remanded for the juvenile court to determine whether a basis for jurisdiction exists.

Department of Human Services v. E.M., 268 Or App 332 (December 31, 2014), Multnomah County.

Father appealed from a judgment terminating his parental rights. Father anticipated being in custody at the King County Jail at the time of trial on December 2, 2013, and a video feed was arranged for him to participate in the trial. However, father was released from jail at approximately 4:50 p.m. on Wednesday, November 27, 2013, the day before Thanksgiving, and ordered to appear in court in King County the following Monday, December 2, 2013 to be indicted on additional charges.

Father did not appear personally at the termination trial on December 2, 2013, and DHS asked to allow presentation of a prima facie case in father's absence. Because father had not attempted to contact the court to resolve the time conflict, the juvenile court allowed the prima facie case over the objection of father's attorney. Father's attorney was excused and DHS proceeded with the prima facie case. While father's attorney did not explicitly ask for a continuance, the parties on appeal agreed

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there was an implicit motion for continuance.

The court of appeals held that the juvenile court abused its discretion in refusing to grant a motion for continuance. Being ordered to appear in two courtrooms at approximately the same time, even if the father did not inform the court of the scheduling conflict until the day of the hearing, obligates the court to grant a continuance or make other procedural accommodations. The court of appeals reversed the termination of parental rights judgment.

Department of Human Services v. T.L., 269 Or App 454 (2015), Clackamas County

After a permanency hearing at which father's counsel did not appear, the juvenile court changed the children's permanent plans away from reunification. Father's appellate counsel raised ineffective assistance of counsel for the first time on appeal. The court of appeals rejected that argument as unpreserved, finding that parties must first claim ineffective assistance of counsel in the trial court under ORS 419B.923.

The court analyzed State ex rel Juv. Dept. v. Geist, 310 Or 176, 796 P2d 1193 (1990), in light of the enactment of ORS 419B.923 in 2001. In Geist, the Supreme Court found that ineffective assistance of counsel claims are reviewable on direct appeal in termination of parental rights cases regardless of whether they were preserved in the trial court. A subsequent case extended this holding to other dependency proceedings. In this case, the court noted that, "a primary rationale for the court's decision in Geist was the absence of a 'procedure for vindicating the statutory right to adequate counsel.'" 269 Or App at 460, citing Geist, 310 Or at 185. Citing Dept. of Human Services v. A.D.G., 260 Or App 525, 317 P3d 950 (2014), the court held that ORS 419B.923 allows for claims of ineffective assistance counsel (though the statute does not expressly provide for such claims). The court further found that first addressing such claims in the trial court would likely shorten litigation time since (1) ORS 419B.923(7) allows such motions to be heard while an appeal is pending, and (2) the appellate record is rarely sufficiently developed that the issue of ineffective assistance of counsel can be resolved without a remand for fact finding. Finally, the court held that appeals from trial court rulings on ORS 419B.923 motions should be reviewed for the "fundamental fairness" legal standard established in Geist.

A lengthy dissent pointed out that the majority's reasoning closely follows that of the Court of Appeal's opinion overturned by the Supreme Court in Geist. The dissent argued that the juvenile code contained a similar set-aside statute when Geist was decided, and it is implicit in that case that the set-aside statute did not constitute an express remedy for ineffective assistance of counsel claims. The dissent expressed concern that the majority opinion will require the extra step of a set-aside motion even in cases such as this where the record is sufficiently developed to allow an appellate decision on an ineffective assistance of counsel claim. Finally, the dissent also pointed out the practical challenges for a party in filing a motion to set aside when represented by the counsel whose actions created the ineffective assistance of counsel claims. ●

Case Summaries

By YRJ Staff

U.S. Supreme Court Grants Cert. on Issue of Children's Statements to Mandatory Reporters

On October 2, 2014, the U.S. Supreme Court granted certiorari in the case of Ohio v. Clark, (13-1352). In this case the State of Ohio appeals from a decision of the Supreme Court of Ohio [State v. Clark, 2013-Ohio-4731]. The Ohio Court held that a child's statement to his teachers about physical abuse constitutes testimonial evidence barred by the Confrontation Clause when the child has been found incompetent to testify. The issues on cert. include:

- whether a mandatory reporter's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and

- whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

An Amicus brief has been submitted in support of the Respondent by groups including The Family Defense Center, New York University School of Law Family Defense Clinic, Youth, Rights and Justice, Attorneys at Law.

Pennsylvania Supreme Court Rules Sex Offender Registration Unconstitutional for Youth

Pennsylvania's Supreme Court has ruled that lifetime sex offender registration requirements violate juvenile offenders' due process rights by utilizing the irrebutable presumption that all juvenile offenders "pose a high risk of committing additional sexual offenses." In the Matter of J.B., [J-44A-G-2014]. The Court found that the Registration Act's irrebutable presumption encroached on the juveniles' constitutionally protected right to reputation because it is not universally true that there is a high risk of sexual re-offense for juveniles and there is a reasonable alternative means for determining the presumed fact. The Court also found that being a registered sex offender affects children's "ability to obtain housing, schooling, and employment, which in turn hinders their ability to rehabilitate." The Court also held that the opportunity to apply for relief after twenty-five years was not a meaningful opportunity to challenge the presumption. http://www.pacourts.us/assets/opinions/Supreme/out/J-44A-2014mo.pdf?cb=2

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Accomplice Liability

In State v. J.M.M., 268 Or App 699 (2015) and State v. E.L.A.S. ___ Or App ___ (2015), the Court of Appeals once again rules that mere presence at the planning and scene of a crime and acquiescence in its commission is not sufficient to establish accomplice liability.

In J.M.M., the evidence established that the youth knew about the burglary at a church and was present, but remained outside the church and

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« Case Summaries continued from previous

did not serve as a lookout or participate in removing the stolen property. At trial the prosecution had argued that the youth's failure to remove himself from the scene made him guilty under an accomplice theory of the case. The Appellate Court cited State v. Moriarty, 87 Or App 465, 468, rev den, 304 Or 547 (1987) indicating that "[t]he smallest degree of collusion between accomplices is sufficient for aiding-and-abetting liability.", but went on to find that under the facts of this case, the youth was "only a witness, not an accomplice", citing State v. Crawford, 90 Or App 242, rev den, 306 Or 195 (1988), and "must have done more to be liable as an accomplice." 268 Or App at 705.

In E.L.A.S., a per curiam opinion, a jurisdictional finding for a theft in the third degree based on accomplice liability, where youth was present when two boys stole sandwiches from a store and did not stop them, was reversed. Citing J.M.M. the Court found this conduct to be insufficient to constitute aiding and abetting.

Initiating a False Report – Don't Lie to Your Father!

In State v. J.L.S., 268 Or App 829 (2015), the youth, who had decided to go from his home in Depoe Bay to Portland without permission, upon being picked up by his father told him he had been kidnapped. The father made a police report and the youth continued the kidnapping ruse until confronted with texts that indicated his true intent. The police detective, being less gullible than the father apparently, told the youth she did not believe his story but if he persisted the Major Crime Team would have to be called out. The detective transmitted the false report to the MCT, but did not activate that body. Analyzing the language of ORS 162.375, the Court concluded that there was sufficient evidence to support the adjudication because the youth had repeatedly and falsely asserted a false report which was transmitted to the MCT, an organization that deals with emergencies involving danger to life or property.

Waiver

In State v. J.C. N.-V., 268 Or App 505 (2015), the Court of Appeals interpreted one of the statutory threshold requirements for waiver of a juvenile to adult court for prosecution and sentencing. That statutory criterion (ORS 419C.349 (3)) reads: "The youth at the time of the alleged offense was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved." The court issued an en banc decision and held that the language required youth to "understand what they are doing in a physical sense and understand that their actions are wrong or will likely have criminal consequences." Applying this interpretation the majority found that the evidence in the case supported the trial court's findings and that the youth, aged 13 years and 8 months at the time of the conduct alleged, was properly waived for trial as an adult. ●

Resources

Model Licensing Standards for Family Foster Homes

Proposed by ABA Center on Children and the Law

By Charlie Flewelling, YRJ Law Clerk

The ABA Center on Children and the Law has published recommendations for state licensing standards for family foster care homes. The rationales for offering national Model Standards include the wide latitude that states currently have in setting standards and the goal of assuring that all foster placements are safe and appropriate.

The suggested standards are clear, short, and cover a range of topics from eligibility for foster parents, to home studies, capacity and sleeping

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standards, and checks for criminal history records as well as history of abuse and neglect. A useful interpretive guide accompanies the standards, adding a statement of intent for each standard, and guidelines for implementation, assessment, and evaluation. Several principles are also given, foremost being "use the least enforcement necessary."

The Model Standards are not intended to be minimum guidelines but rather the sole "criteria necessary to license a safe home." Oregon already has standards for certification of foster parents that differ from the proposed federal standards and in some cases would be weakened by adoption of these Model Standards. Minor differences exist, an example being that Oregon requires smoke and carbon monoxide detectors in homes where the Model Standards only require smoke detectors. A much larger difference is that Oregon includes a Bill of Rights for both foster parents, and foster children, which commit to respecting the rights of those in the foster care system while honoring due process.

While in many respects the Oregon standards go beyond the suggestions contained in the Model Standards, the Model Standards are nonetheless useful in reviewing standards to assure best practices and outcomes in providing protections and care for our most vulnerable populations.

Model Licensing Standards for Family Foster Homes can be found at: http://grandfamilies.org/Portals/0/Model%20Licensing%20Standards%20FINAL.pdf

Oregon Standards for Certification of Foster Parents and Relative Caregivers can be found at: https://apps.state.or.us/Forms/Served/de9303.pdf?CFGRIDKEY=DHS%25209303,9303,Certification%2520Standards%2520for%2520Foster%2520Homes%2520,,DE9303.pdf,,,,,,https://apps.state.or.us/cf1/DHSforms/Forms/Served/-,,https://apps.state.or.us/cf1/DHSforms/Forms/Served/- ●

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