



CSOR

*Though I have fallen,
I will rise. - Micah 7:8*

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Judge John Kane and the United States v. Cheever
From the United States District Court for the District of Colorado
Criminal Case No. 15-cr-00031-JLK (D. Colo. July 18, 2016)
Susan Walker

Here Comes the Judge!

Recently Colorado District Courts and the 10th Circuit Court have come up with some rulings that may reduce or perhaps someday eliminate the use of “sorcery” via polygraphs, plethysmographs and other visual tests utilized with those who have sexually offended. Because of the elegance yet clarity of the Judge’s writing in this Addendum to Memorandum Opinion and Order on Sentencing, I want to quote what the Judge says. Admittedly, this Memorandum of Opinion is not likely to result in major changes in the system, but it certainly makes me feel good that Judge Kane understands the basics of human dignity and respect, and the harm of continued unfettered use of instruments of pseudoscience. (Susan)

The Presentence Investigation Report for this case prepared by the United States Probation Office contains in its proposed special conditions at paragraph 3 pertaining to sexual evaluation and treatment a generalized provision which I refuse to include in my judgment and sentencing order. The Tenth Circuit has held that a district court cannot delegate the decision of whether to subject a defendant to residential treatment or penile plethysmograph testing to a probation officer and that penile plethysmograph testing “must be imposed by the district court and supported by particularized findings that it does not constitute a greater deprivation of liberty than reasonably necessary to accomplish the goals of sentencing.” *United States v. Mike* 632 F.3d 686,696 (/case/us-v-mike-4#p696) (2011). Despite this clear ruling, the Probation Office persists in including the generalized provision in its Presentence Reports and Recommendations in child pornography cases without indicating that a hearing before the court based on the discrete circumstances of the case is required nor has the government advised the court or requested a hearing in these cases.¹⁰

Three years after Mike, following a thorough analysis, my colleague, Judge Blackburn held that a condition of supervised release requiring plethysmograph testing would not be permitted without the court making factual findings and conclusions on an individualized determination “that (1) such testing will promote the goals of supervised release in relation to (the named defendant) in particular; and (2) such testing would involve no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release in the case of (the named defendant).” *United States v. Behren*, 65 F.Supp.3d 1140, 1156 (2014).

I scarcely know where to begin in expressing reasons for rejecting this proposal. What leaps from the page is the expectation to introduce on the freedom, however limited, of a person on supervised release for 15 years by requiring him to comply with unarticulated rules and restrictions specified by an unnamed contract agency that may presently exist or be formed in the future and comprised of individuals over whom the court has no authority or capacity to monitor.

The Probation office advises that contract agencies will not provide their services without the provision requiring the person to submit to polygraphs, plethysmographs and visual reaction time measurements.

The stark solution to that problem is this: If a contracting agency or therapist will not provide sex offender evaluation and treatment without using these or similar devices, the Probation Office will need to find another who will. Failing this, the special condition will be abated until a court-approved source providing sexual evaluation and treatment without these tests can be secured...

If, indeed, a condition is rational, it should be enforced. The proposed special condition, however, does not meet the test of even minimal rationality, much less is it one that does not introduce into the province of fundamental freedoms.

The Judge, now having shared his frustrations over this situation, goes on to share reasons why the proposed condition does not meet the test of even minimal rationality! The argument is convincing to say the least! (Susan)

The penile plethysmograph fails to meet the standards of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (/case/daubert-v-merrell-dow-pharmaceuticals-inc) (1993) which requires 1) that the theory or technique can be or has been tested; 2) the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation is known; 4) there are operational standards for using the technique; and 5) the theory or technique has been generally accepted in the particular scientific field.

As stated by the Court of Appeals for the Fourth Circuit, "The scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool, because although useful for treatment of sex offenders, it has no accepted standards in the scientific community." *U.S. v. Powers*, 59 F3d 1460, 1471 (4 Cir. 1995). Since its adoption, the penile plethysmograph has raised a number of questions, namely, whether sexual desires are capable of the calibration that the device suggests.¹² While there is surely a correlation between sexual attraction and erectile responses, the Penile Plethysmograph takes examination a dangerous step further, bearing a striking resemblance to such pseudoscientific practices as phrenology¹³ and physiogamy.¹⁴ The credibility of the penile plethysmograph is highly disputed in the scientific community as it is susceptible to errors and lacks the standardization that could affirm the reliability of its results.

It is not possible to share all of the Judge's opinion, but there are a couple of more thoughts that I think it is imperative for you to know about. They follow. (Susan)

In his concurring opinion in *United States v. Weber*, Judge Noonan wrote: Judge Berson's excellent opinion is deserving of support. I would, however, go beyond it to hold the Orwellian procedure at issue to be always a violation of the personal dignity of which prisoners are not deprived. The procedure violates a prisoner's bodily integrity by affecting his genitals. The procedure violates a prisoner's mental integrity by introducing images into his brain.

The procedure isolates a prisoner's moral integrity by requiring him to masturbate. By committing a crime and being convicted of it, a prisoner does not cease to be a person. A prisoner is not a mere tool of the state to be manipulated by it to achieve the purposes the law has determined appropriate in punishment.

The prisoner retains his humanity and therefore his purposes transcend those of the state...Similarly, a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.

A last thought from the Judge which I believe puts the icing on the cake. See if you agree! (Susan)

The special condition requiring Cheever to submit to plethysmograph testing is specifically rejected. So, too, until such time as I am presented by the government with proof that the polygraph and the visual reaction time measurement device will meet the goals of supervised release as applied to a particular defendant, that such testing will involve no greater deprivation of liberty than is necessary for the particularized supervised release of an individual defendant and that there are no alternative measures, techniques or devices available that are any less intrusive to freedom of thought, they, too, are rejected.

s/John L. Kane

At Last...A Ruling on the Sex History Polygraph Cases Regarding Self-Incrimination

The SOMB has come up with at least a temporary fix for both the person with the offense and the treatment provider in terms of protection against self-incrimination, and the threat and/or reality of a lawsuit against the therapy company. At the SOMB Board Meeting on August 19, 2016, Judge Kopcow, Chair of the Board, made it clear that the new language needed to be adopted immediately, as the wait period for a decision had been significant in light of when the court cases (i.e. VonBehren and Robberson and Ruch) came out.

The Board responded in a similar, but slightly less vehement way than it did when the Outside Evaluators' Report was discussed for the first time. In light of the dire forecasts by some Board members in term of their hands being tied in this new way, one member of the Board stated that the "sun would come out tomorrow" as it always does in spite of this change. I encouraged creativity and the willingness to try new ways of approaching disclosure issues. To some on the Board, this appears to be an issue of belief, and not science or law. Here is the new Adult Standard and Guideline (at least for now) as it applies to not incriminating oneself via the sex history polygraph:

- 3.160 A provider shall employ treatment methods that are supported by current professional research and practice:
- I. Offense-specific treatment for sex offenders shall:
 - 2. Require offenders to disclose all current sex offending behaviors and complete a full sex history disclosure. If the offender refuses to answer sexual offense history polygraph questions, then the provider shall meet with the supervising officer to identify and implement alternative methods of assessing and managing risk and needs. The provider shall not unsuccessfully discharge an offender from treatment for solely refusing to answer sexual offense history questions, including sexual offense history polygraph questions;

 - M. An offender can be moved to a maintenance phase of treatment when the Community Supervision Team reaches consensus that the sex offender has:
 - Completed the non-deceptive sexual history disclosure polygraph process. For offenders who refuse to answer sexual offense history questions, including sexual offense history polygraph questions, providers shall refer to Standard 3.160 I.2 to determine how to respond.

The language utilized is similar to language we have heard before. The SOMB has always said that people cannot be terminated from treatment just on the basis of a polygraph. This time, it is specifically the sex history polygraph. In practice, we are pretty sure that at times, clients have been terminated just because of polygraph results.

The hard part is that since the therapist, polygrapher and supervising officer are “in charge” and make these decisions in isolation and sometimes speak in somewhat clouded terms with the client regarding cause of termination, clients are not sure why they are terminated. My son was terminated from a treatment program shortly after release from prison eight years ago, and didn’t receive the termination letter until four years later, after asking repeatedly for it. We could only imagine what the reason(s) were for the termination, including that the treatment program was angry that he asked to return to his pre-incarceration treatment program. After receiving the unprofessionally and otherwise poorly written letter, we knew little more in terms of legitimate information regarding termination.

It will take some time to sort out the possible responses to inappropriate sex history questions, although I am told by Jeff Jenks that at least some polygraphers have already started rewording questions in a way that makes answers less likely to be self-incriminating. You can be sure that therapists and polygraphers, if they are smart, are going to be very careful in their question design. Whether clients will refuse to answer certain questions or not remains to be seen. It is clear that therapists and polygraphers on the SOMB are concerned about this new wrinkle in their tightly knit “Containment Model” (which will now be called the TEAMS Model).

Englewood Residency Restrictions

Fifty out of One Hundred Registrants to Lose their Homes!

Monday night the 15th of August, a group of advocates for those with a sexual offense, including two members of the Sex Offender Management Board, attended an Englewood, Colorado City Council Meeting. One agenda item was the issue of Article 34, the Englewood residency restriction rule. Adopted in 2006, and not seriously enforced since then, the temporary City Attorney and the police are proceeding with letters to tell fifty men who do not fit the “grandfathered” definition, that they must leave their homes in the next thirty days.

Approximately six of us testified, talking about the fact that literature/research does not support residency restrictions, and that the vast majority of people who commit sexual crimes are family members, neighbors, friends, coaches, teachers, legislators etc. Those who have received treatment and supervision either on the outside (probation and/or parole) or inside of The Colorado Department of Corrections, have incredibly low recidivism rates. Research was shared from the ATSA (Association for the Treatment of Sexual Abusers) “white paper” and from Dr. Jill Levinson’s work.

After a vote of four to two council members against allowing a 45-day moratorium on the letters so the council could look at the issue, review research etc., there was still a commitment by Mayor Joe Jefferson to hold a study group to review this more closely. He stated that obviously, in light of our testimony, things had changed since 2006 when Arapahoe County Courts etc. (under D.A. Carol Chambers) swooped into Englewood and declared that if the residency restrictions were not adopted, there would be “mayhem” in Englewood as sexual offense registrants took over the city!

A couple of days later, the television news announced that Alison Ruttenberg, Attorney from Boulder, was representing three men from Englewood in a challenge to their right to live in 90% of the city. With Alison’s other case questioning whether registration is punishment going on to trial, thanks to Judge Matsch, we can look forward to some interesting and hopefully positive results in one or both of these cases. NOTE: The Ryals Case represented by the ACLU became moot when Mr. Ryals got off the registry. The ACLU also ran out of funds to continue to fight the City of Englewood on this issue.

TIPS FOR SUCCESS ON PAROLE

By Mark Walker

(Editor's note: This will be an ongoing series from those who are living it.)

- Managing Finances

Parole can be demanding, not only of your time but your money as well, depending on what your conditions are. It is therefore very important to avoid all unnecessary financial stress. As soon as I got a job and knew what my income and expenses would be, I immediately worked to create a detailed and prioritized budget. If you've never made a budget, I strongly recommend you learn how; there are probably books in the facility library that will teach you. I also made it a point to keep track of everything I spent, and to carefully balance my checkbook and reconcile my bank accounts regularly. The point is – watch your money closely, so you can be sure you will have what you need to pay for the most important things in your life – housing, parole expenses, transportation, etc.

It is also important to think about how you will build your credit. If you have been down for a while you may have no credit at all – not bad, not good. This is actually a great place to start if you do it right. I quickly got a low-limit credit card. It had a high interest rate, but I only used it to buy gas and then paid it off every month with the money I had in my budget for gas. Just by doing that I was able to build a really good credit rating pretty quickly, without borrowing a lot of money or paying any interest. That was a huge help a few years ago, when I was finally ready to buy a house. I had no problem getting a loan, because my credit was great.

- Family Support

It is certainly possible to be successful on parole without family support, but if you do have committed family supporting you it is an incredible gift. Their support while you are on the inside can give continuity to your transition because the relationships remain relatively stable. Also, their support on the outside can make your obstacles much smaller in the areas of transportation, housing, and finances. Of course, relying on your family's help in any of these areas for too long can quickly put a strain on your relationships. However, if your family can help you to alleviate these kinds of stresses in the first few months after you are released, it can greatly increase your potential for success. If you have no family to support you, I recommend doing what you can to invest in relationships with friends, ministers, and organizations on the streets who can help to fill some of that role.

- Relationship with Your Parole Officer

There are few things more important to your success on parole than building a foundation of trust with your PO.

This will be harder with some officers than with others, but you can't control what officer you are assigned or what their attitude is – you can only control how you choose to interact with them. Honesty is a priority, even if you screw up. Don't be afraid to discuss your feelings and struggles with your officer, depending on how your relationship is with them.

Remember that building trust takes time, and your PO will challenge you – especially at first – to see if you will follow their rules and whether or not you can take no for an answer, even when it doesn't make sense. Be patient, and don't demand things you think you "deserve" or get angry with them for their treatment of you. Over time, if you are cooperative and honest and you work hard to be successful, the relationship will improve. A good relationship with your PO can make your time on parole a totally different experience, so put your best effort into it.

- Employer Support

It will be a great help if you are able to find an employer who will show you understanding and flexibility on the job. In order to have understanding, you must be up front with your potential employers about your background and your parole conditions. If you have to drop UAs, you might have to leave work early or come in late. You might have to take time off for appointments with your PO, or for any treatment you are required to do. Make sure your prospective employer knows what he or she is getting into before they hire you. As long as they understand what you will need, they can tell you whether or not they can give you the flexibility to be able to take time off or adjust your schedule when needed. Do not expect parole to work around your job; try to find a job that will work around your parole. It is better to get turned down for a job up front because an employer can't be flexible, than it is to get fired later because your parole requirements are interfering with your job in ways the employer did not expect.

- Building Friendships

One of the most important things you can do when you are released is to invest in new relationships, and work to surround yourself with healthy community. This should include positive people at your job, in your faith community, and successful participants in treatment programs you may be required to attend. To be able to do this it is important to be transparent – you have to let people know the real you. You should think about sharing as much as possible with people about where you came from and what you have been through. This is particularly vital for your relationships with parole, employers, and treatment, but it is important for healthy friendships as well. A word of caution – you may find it difficult to re-establish healthy social boundaries in your relationships.

- Hope

Never underestimate the power of the vision of a bright future. Hope is an expectation of something coming in the future that gives us energy and motivation for today. The system we find ourselves in is not conducive to hope. It probably will not offer you much in the way of hope, so it will be important for you to find your own hope. That means working intentionally to develop a positive vision for your future. This should go beyond just setting individual goals to a big-picture idea of what you want your life to be.

Hope is being able to see that there is light despite all of the darkness.

Desmond Tutu

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