

the homeless mentally ill when they expanded the definition of grave disability. In fact, Ms. Wetherhorn was noted to be homeless in Alaska for 3 months (during most of January, February, and March) and that alone may be more dangerous than homelessness in most states in the contiguous United States.

Penile Plethysmography Testing for Convicted Sex Offenders

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Plethysmography Testing Requirements for Supervised Release of Sex Offenders Deemed an Undue Deprivation of Liberty When Less Invasive Testing Methods Are Available

Penile plethysmography tests a man's level of sexual arousal and "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, in determining his level of sexual attraction by measuring minute changes in his erectile responses" (Odeshoo JR: Of penology and perversity: the use of penile plethysmography on convicted child sex offenders. *Temp Pol Civ Rights Law Rev* 14:1, 2004). American sex offender treatment programs utilize this test widely, and U.S. courts mandate plethysmography frequently as a term of supervised release. Penile plethysmography, polygraph, and Abel tests are utilized to monitor whether a supervised-release sex offender is at increased risk of reoffending.

In *U.S. v. Weber*, 451 F.3d 552 (9th Cir. 2006), Matthew Henry Weber filed an appeal for relief from his terms of supervised release mandated by the U.S. Central District of California. The court required that on release from prison, Mr. Weber could be compelled to submit to penile plethysmography evaluation if his probation officer deemed such testing

warranted. The defendant petitioned the Ninth Circuit Court of Appeals to remove this supervised-release condition, arguing that penile plethysmography was not "reasonably related to deterrence, rehabilitation, or public safety, and even if one of these interests was met, penile plethysmography was an unreasonable and unnecessary deprivation of liberty."

Facts of the Case

In May 2001, Mr. Weber brought his personal computer to an electronics store for servicing. Store staff discovered several child pornography photographs on the hard drive and reported the discovery to the FBI. The FBI interviewed Mr. Weber and seized his computer. He denied knowing that these photographs were on his computer. Upon detailed inspection, the FBI discovered hundreds of sexually explicit images involving children on the computer's hard drive. Subsequent investigation revealed that Mr. Weber possessed a second computer that also contained child pornography.

On January 17, 2003, Mr. Weber was indicted in U.S. Federal District Court on one count of possession of child pornography. He subsequently pleaded guilty to the charge. On March 4, 2005, the Central District of California sentenced Mr. Weber to 27 months in prison with 3 years of supervised release. He completed his prison term and enrolled in a sex offender treatment program required under his supervised release, which mandated that he participate in all psychological testing deemed necessary by his probation officer, including polygraph, Abel testing, and penile plethysmography.

Ruling and Reasoning

The U.S. Ninth Circuit Court of Appeals ruled in this case that penile plethysmography was an unreasonable and unnecessary deprivation of a defendant's liberty. The court held that while Mr. Weber had not yet been ordered to submit to plethysmography testing, his case was ripe for judicial review. The court ruled that, although a district court is normally allowed wide latitude in setting conditions of supervised release, these conditions "are permissible only if they are reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the offender" (*Weber*, p 558). Terms of supervised release must be related to at least one of these goals and not involve any "unreasonable and unnecessary" deprivation of liberty.

The court viewed penile plethysmography as an intrusive procedure, both physically and psychologically, likening the procedure to a device from a George Orwell novel. The court utilized a standard of review involving tests that are “nonroutine manipulative intrusions on bodily integrity” and that such tests “will be scrutinized” (*Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992)) to determine whether there are less intrusive options. Also, the court maintained that the government has the burden of proof to show “that a particular condition of supervised release involves no greater a deprivation of liberty than is reasonably necessary to serve the goals of supervised release” (*U.S. v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991)).

While the court concluded that the level of accuracy of penile plethysmography reported in the scientific literature is low and that the test’s true validity is academically controversial, this test could be a required condition for supervised release if there was evidence supporting the efficacy of this test over less intrusive procedures, such as the Abel and polygraph tests.

However, the court ruled in this case that the government did not meet the required burden of proof to show that plethysmography was necessary over other testing options. The U.S. Court of Appeals vacated Mr. Weber’s supervised release condition and remanded the case.

Discussion

The case of *U.S. v. Weber* revolves around the convicted child sex offender’s right to individual dignity. The Ninth Circuit Court of Appeals concludes that penile plethysmography is a highly intrusive procedure contrary to the basic human rights that prisoners do not relinquish once incarcerated. As Judge Noonan noted, “by committing a crime and being convicted of it, a person 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” (*Weber*, p 571).

In reviewing the merits of penile plethysmography, applying a “reasonable and necessary” standard coupled with the requirement that the government shoulder the burden of proof to show that such testing is merited, the court is expressing its disquiet over a common psychological test format used on released sex offenders. Mandatory penile plethysmography to

gain supervised release places the convicted sex offender in the paradox of abrogating his right to personal dignity to secure his release from prison.

U.S. v. Weber brings to the forefront the debate over plethysmography’s psychiatric merits. Given the number of human rights concerns surrounding penile plethysmography, the limited efficacy of the test, and the ready availability of other testing alternatives, *U.S. v. Weber* calls into question the wisdom of utilizing penile plethysmography as a sex offender testing device.

Although the court established broad guidelines for the use of plethysmography, it did not specify what level of evidence the government must show to display a requirement for plethysmography over other sexual response tests. This ambiguity leaves the matter of use of plethysmography during supervised release unresolved and subject to further judicial review.

Americans With Disabilities Act, Wrongful Death, Equal Protection, Immunity

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The First Circuit Affirms the District Court’s Summary Judgment Regarding Wrongful Death and Failure to Accommodate Mental Illness

In *Buchanan v. Maine*, 469 F.3d 158 (1st Cir. 2006), Daniel Buchanan, brother of Michael Buchanan (deceased) and representative of his estate, appealed to the U.S. District Court for the District of Maine’s summary judgment in favor of the defendant (County, State of Maine, two deputy sheriffs, and a case manager) in a suit for wrongful death under 42 U.S.C.S. § 1983 (1996) and for failure to accommodate Mr. Buchanan’s mental illness under