

stand trial and “substantially unlikely” to have side effects that would hinder the defendant in assisting counsel.

What is left unclear for forensic psychiatrists, despite the court’s agreeing with precedent that the evidentiary standard in all factors of *Sell* cases is clear and convincing evidence and the interpretation of the second criterion as above, is what “substantially likely” or “substantially unlikely” mean on a psychiatric level. The court did acknowledge that setting a number or percentage level of confidence to “substantial” risks inviting experts to tailor their testimonies to the desired result. The court seemed satisfied with the trial court’s interpretation that, “whether the percentages are twenty percent or thirty percent or ten percent, is not for me to decide, there’s just whether there’s substantial unlikely [*sic*] to have side effects [*sic*]: (*Cantrell*, p 1222). It remains to be seen whether courts outside of New Mexico will also be satisfied with these interpretations of *Sell*.

Expansion of Liberty Interests Under Parole Conditions: Beyond Antipsychotics

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Courts Must Justify Special Conditions of Release That Impact Liberty Interests

The United States Court of Appeals for the Ninth Circuit decided the case of *United States v. Cope*, 506 F.3d 908 (9th Cir. 2007), on November 5, 2007. At issue were the imposition of a lifetime of supervised release and the special conditions of release. Mr. Cope argued that it was unreasonable for the District Court to sentence him to a lifetime of supervised release. He also challenged certain special conditions of his supervised release on the grounds that he did not receive notice of the conditions before the district court’s announcement of the sentence, and that the district court failed to make adequate findings to support the special conditions of release. The specific

conditions of release that were contested were the requirements to take “all medications” and submit to plethysmography testing.

Facts of the Case

In September of 2003, San Bernardino Sheriff’s Department deputies discovered over 600 images and 20 videos of child pornography on Mr. Cope’s home computers, including “videos of sadistic and masochistic acts.” On March 10, 2006, he pleaded guilty to one count of possession of child pornography. He entered his plea pursuant to a plea agreement with the government in which both parties stipulated to a total offense level of 28 under the United States Sentencing Guidelines, including numerous upward adjustments relating to the possession of child pornography. The government conditionally agreed to seek the low end of the guidelines range for incarceration, but made no agreement as to what term of supervised release it would seek. In return, Mr. Cope agreed to waive his statutory right to appeal “any sentence imposed by” the district court, provided certain requirements were met. He retained his right to appeal most of the special conditions of his supervised release.

Following the change of plea hearing, the probation office prepared a pre-sentence report (PSR), using the November 2002 Sentencing Guidelines, recommending a total offense level of 25 and a criminal history category of II. According to the Guidelines, Mr. Cope’s prior conviction of attempted sexual assault on a child required a mandatory minimum sentence of 120 months for the current offense. Not included in the PSR report was the fact that the Guidelines also contain a policy statement recommending the statutory maximum term of supervised release for those convicted of sex offenses. The statute in effect at the time provided for a lifetime maximum term of supervised release. In response to the PSR, the government filed a sentencing memorandum recommending that Mr. Cope receive the maximum, lifetime term of supervised release. He filed a memorandum requesting a term of supervised release of less than life, specifically objecting to any special condition of supervised release of which he had not been given notice.

The district court held a sentencing hearing on July 10, 2006. After hearing from the parties, the district court sentenced Mr. Cope (58 years old at the time of sentencing) to 120 months in prison, the

statutory minimum, and a lifetime term of supervised release. The court also imposed special conditions of supervised release, including a requirement that he participate in sex offender treatment. As part of that treatment, the district court imposed conditions requiring him to submit to polygraph, penile plethysmography, and Abel testing (Abel Assessment for Sexual Interest) and to take all prescribed medication. Another condition prohibited him from possessing any materials “depicting and/or describing child pornography.” Although the district court notified the parties that it was considering a special condition requiring Mr. Cope to participate in sex offender treatment, it made no mention before its announcement of the sentence of subconditions relating to testing or medication.

Mr. Cope appealed to the Ninth Circuit, contesting that lifetime supervised release was unreasonable and that the district court erred in failing to articulate findings before imposing special conditions of supervised release.

Ruling and Reasoning

The Ninth Circuit held that the lifetime term was not greater than necessary and was reasonable in light of the nature of Mr. Cope’s offense. It further held that the district court did not err in failing to specify that he would be required to attend a sex offenders program. However, it was noted that the special conditions of required medication and testing, specifically plethysmography testing, were potentially “grave infringement[s] on liberty.” As such, statutory law requires a “thorough inquiry . . . before a court.” Therefore, the district court’s decision was vacated and remanded to permit all parties to address whether the special conditions were appropriate.

In reaching these conclusions, the Ninth Circuit relied on *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004), and *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006). In *Williams*, it was held that the special condition of release requiring an individual to take antipsychotic medications is a “grave infringement on civil liberty,” necessitating “thorough inquiry” before the court. In *Weber*, the *Williams* rule was extended to conditions of supervised release requiring those in sex offender programs to submit to penile plethysmography. The court reasoned that there must be an explicit finding on the record that the special condition of release “involves no greater deprivation of liberty than is reasonably necessary” to

address one of the following: the nature of the crime, the history and characteristics of the defendant, encouragement of deterrence, protection of the public, and provision of rehabilitation. In this inquiry, the government bears the burden of proof. The government argued that *Williams* did not apply in this case because the former refers only to “antipsychotic” medications. The Ninth Circuit rejoined: “There is nothing in *Williams* and *Weber* that would suggest that the holdings were limited to the treatments at issue. To the contrary, both decisions imply that the requirement of special findings applies to any imposed treatment or medication that implicates a particularly significant liberty interest.” The Ninth Circuit specifically noted “chemical castration” to be a goal of medication use in sex offender programs. The court stated that such treatment was “at the extreme end of the spectrum of intrusive medications and procedures” and implicated “particularly significant liberty interests.” The government conceded that, based on *Weber*, there was a need to argue the requirement for plethysmography before the court.

Discussion

This case involves several matters of importance to forensic psychiatrists. In *Cope*, the government contended that statutory precedent, as articulated by *Williams*, addresses only the use of “antipsychotics” and not other classes of medication. The Ninth Circuit refuted this assertion and broadened the interpretation of *Williams* and *Weber* by stating that the intent of the statutes is to require special proceedings when any significant liberty interest is at issue. The Ninth Circuit noted that “any and all” psychiatric medications could include antipsychotic drugs, which were defined as a significant liberty interest in *Williams*. The court further noted that “chemical castration” is often a goal of psychiatric treatment of sex offenders and defined this as a significant liberty interest. Thus, the Ninth Circuit noted that the district court must discuss separately the need for each medication which qualifies as a significant liberty interest before imposing the special condition of release requiring that the individual take “any and all” prescribed medication.

According to case law, as defined by *United States v. Cope*, release conditions requiring the use of psychiatric medications must provide specific justification for the use of certain categories of treatments which involve “special liberty interests.” Before *Cope*,

such treatments included antipsychotic medications and plethysmography. *Cope* interpreted *Williams* and *Weber* more broadly to include any treatment that involved “special liberty interests.” Drugs used to suppress testosterone levels were specifically named as involving a liberty interest. Thus, when forensic psychiatrists recommend treatment with antipsychotics, plethysmography, drugs to suppress testosterone level, or other interventions that might be perceived as affecting such liberty interests, their justification should include a reasoned explanation as to why a less invasive treatment is not adequate to address one or more of the factors mentioned earlier: the nature of the crime, the history and characteristics of the defendant, encouragement of deterrence, protection of the public, and provision of rehabilitation.

In summary, *United States v. Cope* broadens the interpretation of liberty interests as they relate to required psychiatric treatment for parolees, both with respect to specific treatments (*e.g.*, testosterone-suppressing agents) and to any treatment that might pose a liberty interest. Given this ruling, forensic psychiatrists should work closely with attorneys and courts to explain the rationale and necessity of any required psychiatric treatment for parolees.

Sexually Violent Predators and Civil Commitment Proceedings

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Civil Commitment Proceedings for Sexually Violent Predators in Custody May Not Proceed if the Original Conviction Is Reversed

Under California’s Sexually Violent Predator Act, Welfare and Institutions Code section 6601 et seq., a person can be civilly committed as a sexually violent predator (SVP) at the conclusion of a felony term, provided he or she has prior convictions for certain sexually violent offenses and a jury finds that the person has a mental disorder that makes it likely that

he or she will engage in sexually violent criminal behavior. In the present case, *In re Smith*, 178 P.3d 446 (Cal. 2008), after SVP commitment proceedings were initiated against Mr. Smith, the felony conviction that was the basis of his custody at the time of these proceedings was reversed on appeal. The district attorney declined to retry him. The question this case poses is whether an SVP commitment can nonetheless proceed under these circumstances. The California Supreme Court held that an SVP commitment would not be authorized in these circumstances and therefore reversed the decision of the court of appeals.

Facts of the Case

In 1982, David Smith was convicted of four counts of oral copulation with a child under the age of 16 years and one count of sodomy of a child under the age of 16 years. In 1988, Mr. Smith was convicted of 15 counts of committing lewd and lascivious acts on a child under the age of 14 years. Mr. Smith was released on parole in July 1995 and completed parole in July 1998. He was obligated to register as a sex offender because of his prior offenses. In April 1999, Mr. Smith moved to Colorado from California; then, nine days later, he moved to New York. He claimed that he sent a change-of-address card in a timely manner, but the officer responsible for sex offender registration testified that he did not receive any such card. When Mr. Smith did not appear in September 1999 to complete his annual registration, the police began searching for him and arrested him in New York.

Convicted of failing to register as a sex offender, Mr. Smith was sentenced to five years in state prison in October 2000. The court of appeals affirmed his conviction and Mr. Smith petitioned for a review of his conviction in the California Supreme Court. While Mr. Smith was awaiting appeal, he was referred to the State Department of Mental Health for evaluation as a possible SVP, pursuant to Welfare and Institutions Code section 6601. Two psychiatric evaluators agreed that he met the SVP criteria. The district attorney filed a petition to have Mr. Smith committed as an SVP. In March 2004, the court reversed his conviction. The district attorney elected not to refile charges against Mr. Smith, who was already due to be released on parole by the time his conviction was reversed. After his conviction was reversed, and before the SVP commitment proceedings