

and insufficient to support the defense. Collateral information could include witness statements regarding observed behaviors, official police accounts, victim interviews, and medical or mental health records that document emotional disturbance. Several sources of collateral information were potentially available to the forensic expert in this case. Since the evidence must show that some triggering event caused the defendant to have EED, testimony from the son P.J. might have confirmed the alleged triggering event; however, P.J. testified that he looked both ways and did not cross in front of oncoming traffic. If attendees of the festival had observed P.J. carelessly walking in front of traffic or had heard Mr. Padgett yell at his son from his truck, their observations might have provided enough supporting evidence to allow the expert to testify about Mr. Padgett's alleged EED without Mr. Padgett's testifying. Moreover, witness observations of Mr. Padgett's reaction following the episode in which P.J. allegedly carelessly crossed the street may have revealed Mr. Padgett's emotional response to the event as enraged, inflamed, or disturbed. Other potential witnesses who may have observed his emotional reaction may have included officers who arrived at the scene and subsequently interviewed him and witnesses who may have observed his repetitive blinking and difficulty breathing. The court's statement that only some evidence must be present to support a claim of EED to allow an expert to testify about the triggering event and emotional disturbance seems to indicate that the threshold is relatively low for allowing the expert to testify, but may indeed prove difficult, such as in this case, when the defendant does not testify.

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Mandatory Admission of Guilt in Sex Offender Programs

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Pennsylvania's Statute Requiring Sex Offenders to Participate in a Sex Offender Program, Including Admission of Guilt to Gain Parole Eligibility, Is Upheld by the U.S. Third Circuit Court of Appeals

In 2000, the Pennsylvania General Assembly enacted 42 Pa. Cons. Stat. Ann. § 9718.1 (2001). The statute provides that sex offenders' eligibility for parole is contingent on attending and participating in a Department of Corrections sex offender program. In *Newman v. Beard*, 617 F.3d 775 (3rd Cir. 2010), the U.S. Court of Appeals for the Third Circuit affirmed a judgment in favor of the defendants: the Pennsylvania Department of Corrections, the Probation and Parole Board of Pennsylvania, and the Sexual Offenders Assessment Board. The court held that the program's requirement for sex offenders to admit guilt to attend did not violate either Mr. Newman's First Amendment and due process rights or the Ex Post Facto Clause of the Constitution.

Facts of the Case

In 1987, Clifford T. Newman was convicted of two rapes and related sexual offenses by a Pennsylvania jury. He was subsequently sentenced to 20 to 40 years of imprisonment. He persistently claimed that he was innocent of the crimes and exhausted his direct and postconviction appeals. In 2000, the Pennsylvania General Assembly enacted 42 Pa. Cons. Stat. Ann. § 9718.1, restricting sex offenders' eligibility for parole by requiring attendance and participation in a Department of Corrections sex offender program. The only program available in Mr. Newton's facility required that inmates admit guilt to attend. Mr. Newman, who continued to maintain his innocence, did not attend the program because of this requirement.

In 2007, Mr. Newman went before the parole board and was denied parole for reasons that included his failure to complete the sex offender treatment program. He filed a *pro se* civil action complaint, alleging that the parole board violated his First Amendment right, his right to due process, and the Ex Post Facto Clause of the

Constitution by allowing his refusal to admit his guilt to have an adverse effect on his eligibility for parole. The magistrate judge issued a report and recommendation in favor of dismissal of his claim, stating that there is no federal or state right to parole. The district court summarily adopted the recommendation and dismissed the complaint. The United States Court of Appeals, Third Circuit, affirmed the judgment of the district court.

Ruling and Reasoning

The U.S. Court of Appeals considered three major questions when formulating its decision. First, it considered whether the parole board violated Mr. Newman's First Amendment rights. He contended that his rights were violated by the parole board's requiring him to "state a belief that he does not hold to be true" to obtain parole (*Newman*, p 769). The court of appeals referred to the rulings in *Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977), and *Pell v. Procunier*, 417 U.S. 817 (1974), which state that limitations on constitutional rights, including the First Amendment, may be acceptable in the incarcerated setting if it "serves legitimate penological objectives." The court then recognized the ruling in *McKune v. Lile*, 536 U.S. 24 (2002), that there are legitimate, therapeutic purposes in requiring an admission of guilt in the treatment of sex offenders. Since Mr. Newman did not claim that his admission of guilt was contrary to legitimate penological objectives, including rehabilitation, the Third Circuit dismissed his first claim related to his First Amendment right.

The second major question considered by the Third Circuit was whether the parole board violated Mr. Newman's Fourteenth Amendment rights. The justices held that the parole board's reasoning was not arbitrary and did not "shock the conscience." They referred to the ruling in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), that the Constitution does not establish a federal liberty interest in parole under due process. The appeals court then reviewed the findings in *Banks v. Board of Probation & Parole*, 4 Pa. Commw. 197 (Pa. Commw. Ct. 1971), which state that a prisoner in Pennsylvania has a right to apply for parole and have that application "fairly considered." The court of appeals reasoned that Mr. Newman did not, therefore, have a federal or state right to parole. They then turned to a review of statutes guiding parole procedures in Pennsylvania. In 61 Pa. Cons. Stat.

§ 331.19 (2007), the state of Pennsylvania declared that the parole board has the duty to consider "the general character and background of the prisoner" and "the conduct of the person while in prison and his physical, mental, and behavior condition history." This was consistent with the statutory language in 1988 when Mr. Newman was sentenced as well. The Third Circuit found that the parole board gave Mr. Newman's application for parole due consideration and included factors other than his failure to complete the treatment program in their reasoning for rejection. Therefore, the court held that the parole board did not violate Mr. Newman's rights to either substantive or procedural due process.

The third major question considered by the Third Circuit was whether the district court erred by dismissing Mr. Newman's Ex Post Facto claim. The Third Circuit ruled in *Richardson v. Pa. Board of Probation & Parole*, 423 F.3d 282 (3d Cir. 2005), that "the ex post facto inquiry has two prongs: (1) whether there was a change in the law policy which has been given retrospective effect and (2) whether the offender was disadvantaged by the change." Mr. Newman argued that the parole board violated both prongs. The court ruled that 42 Pa. Cons. Stat. Ann. § 9718.1 was indeed applied retrospectively to Mr. Newman. However, as Mr. Newman had not alleged that he would have been paroled but for § 9718.1, the court of appeals held that he did not meet the second prong and that the district court had properly dismissed his ex post facto claim.

Discussion

This case is an important addition to the body of cases that address the management of convicted sex offenders. The courts have established that sex offenders are a special class of offender and that they are therefore subject to additional scrutiny and rehabilitation. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), Mr. Hendricks, convicted of sexually molesting children, was civilly committed under Kansas's new Sexually Violent Predator Act, enacted shortly before his release. He challenged his commitment on substantive due process, double jeopardy, and ex post facto grounds. The U.S. Supreme Court rejected each of his claims. The Court ruled that his due process rights were not violated, explaining that Kansas did not need to prove mental illness for civil commitment, only a "mental abnormality" and dangerousness. The justices also held that his double jeopardy

and ex post facto claims were not valid, since the commitment was a civil, not a criminal, proceeding.

In *McKune v. Lile*, 536 U.S. 24 (2002), Mr. Lile, a convicted sex offender in Kansas, refused to participate in a sexual abuse treatment program that required written admission of responsibility and disclosure of all prior sexual activities, including those that could potentially qualify as uncharged criminal offenses. He claimed that participation in the program violated his Fifth Amendment rights. His refusal to participate led to a transfer to a higher-security unit and the loss of privileges. The Supreme Court ruled against him, stating that sex offenders are a “serious threat” and that rehabilitation programs are necessary to reduce recidivism. The Court held that it is therefore acceptable to require sex offenders to accept responsibility for their prior conduct to promote rehabilitation. It also held that immunity from prosecution should not be offered, as doing so would undermine the state’s legitimate interests in future prosecution. The Court added that the “potential for additional punishment reinforces the gravity of the participants’ offenses and thereby aids in their rehabilitation” (*McKune*, p 34).

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), Mr. Comstock and four other inmates filed suit challenging the federal government’s authority to detain them indefinitely under the civil commitment provisions of the Adam Walsh Act. The Supreme Court ruled against Mr. Comstock, stating that a sexually dangerous federal prisoner may be held beyond the date that he would otherwise be released and that doing so does not violate the Necessary and Proper Clause of Article I of the U.S. Constitution.

In each of these cases, the Supreme Court limited the rights of sex offenders to protect public safety and to serve penological interests. In *Newman v. Beard*, the U.S. Third Circuit followed suit and tightened the guidelines for parole of convicted sex offenders.

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Required Sex Offender Treatment and Due Process Rights

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Iowa’s Supreme Court Rules That the Requirement to Participate in Sex Offender Treatment Programs Violates Due Process Rights

In *Dykstra v. Iowa*, 783 N.W.2d 473 (2010), the Supreme Court of Iowa ruled that Iowa’s Department of Corrections (IDOC) procedural implementation of Iowa Code § 903A.2 (1) (a) (Supp. 2005), which states that “an inmate required to participate in sex offender treatment program” (SOTP) will not be eligible for a reduced sentence unless the inmate participates and completes such a program, violated due process rights because of the lack of procedural protections as outlined in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Facts of the Case

In 2005, John Dykstra pleaded guilty to charges of simple assault (misdemeanor) and dependent adult abuse (class “D” felony). Original charges had included third-degree sexual assault and dependent-adult abuse, but these were pleaded down to simple assault and dependent-adult abuse. The third-degree sexual assault charge was based on the allegation that he had forced his wife to perform oral sex on him, and the dependent-adult abuse charge was due to his not paying his wife’s nursing home bills. He was sentenced to 30 days for the simple assault charge and a term of five years or less for dependent-adult abuse. His prior criminal history included two charges for indecent exposure; a burglary conviction (which involved stealing sexually explicit materials); and a prostitution solicitation charge.

Mr. Dykstra had been convicted of a sexual offense in 1983 and was on the sex offender registry. In December 2005, while in the IDOC serving time on the dependent-adult abuse charge, he was told he would be required to participate in the sex offender treatment program. IDOC based its requirement on