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## **Court Finds Sex Offender Conditions Violate Due-Process Rights**

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A federal judge's determination that state parole officials violated the constitutional due-process rights of a parolee never convicted of a sexual crime when they imposed sex offender conditions on him could impact other parolees similarly situated.

"This is going to have an impact on potentially 500 or 600 other parolees," says Scott Pawgan, lead counsel for parolee Ray Curtis Graham and a partner in Habern, O'Neil & Pawgan in Huntsville.

U.S. District Judge Sam Sparks of the Western District of Texas in Austin issued the order in which he made that determination in *Graham v. Owens, et al.* on Aug. 6, the same day he ordered a mistrial in the civil-rights suit because of comments Sparks made in the presence of the jury about testimony given by Laura McElroy, the Texas Board of Pardons and Paroles' former general counsel.

According to a transcript of the Aug. 6 hearing in *Graham*, lawyers for the defendants objected to Sparks' comments that McElroy was wrong in her testimony regarding due-process requirements for parolees and asked that the judge's comments be stricken from the record and that the jury disregard them. McElroy, now an assistant district attorney in Travis County, declines comment.

In his order in *Graham*, Sparks wrote that "the Court determines as a matter of law that the Defendants, while acting under color of the law of the State of Texas, violated Plaintiff's constitutional right to due process of law when they imposed sex offender conditions on him without affording him an 'appropriate hearing,' or making the explicit and considered finding that he constituted a threat to society by reason of his lack of sexual control."

Richard Gladden, another attorney representing Graham, says that federal and state judges are empowered to enter findings as a matter of law if there are no genuine issues of material fact for a jury to decide. When facts are undisputed, a court has jurisdiction before, during or after trial to enter findings as a matter of law, says Gladden, of counsel at Jackson & Hagens in Denton.

Sparks wrote in his order that the Texas Department of Criminal Justice Parole Division undisputedly followed a procedure under which Graham and his counsel were precluded from reviewing any information the division provided to the board about Graham, including a licensed sex offender treatment provider's evaluation of Graham. According to the order, Sparks also found that under the parole board's well-established policy, Graham and his counsel did not receive notice of any hearing or review and they weren't allowed to appear before the parole commissioners who made the determination about his case. In addition, Sparks found that undisputed evidence establishes that no one involved in the hearing ever made an explicit finding that Graham would be a threat to society because of lack of sexual control.

Sparks' order applies the 5th U.S. Circuit Court of Appeals' 2004 decision in *Coleman v. Dretke*. A three-judge panel of the 5th Circuit determined that the due-process clause of the 14th Amendment to the U.S. Constitution provided parolee Tony Ray Coleman a liberty interest in being free from the stigma of having to register as a sex offender and participate in a sex offender treatment program.

The 5th Circuit concluded in *Coleman* that absent a sex offense conviction, the Texas Department of Criminal Justice must afford a parolee "an appropriate hearing and find that he possesses this offensive characteristic before imposing such conditions." The decision established what is known as the *Coleman* process for determining whether parolees who have no sex-related convictions will have sex offender restrictions.

Senior Judge Thomas Reavley wrote the *Coleman* opinion joined by Judges Fortunato "Pete" Benavides and Edward Prado. In 2005, the 5th Circuit denied the defendants' motion for a rehearing en banc.

Jerry Strickland, spokesman for the Texas Office of the Attorney General, which represents Rissie Owens, chairwoman of the Texas Board of Pardons and Paroles, and other defendants in *Graham*, says, "We're reviewing his [Sparks'] order . . . but we won't be able to comment further on it at this time."

Bettie Wells, the parole board's general counsel, says there has not been a decision whether to appeal Sparks' order.

Wells also says that the parole board has not changed its procedures as a result of *Graham* or other suits brought by parolees. "Once the case becomes final, the agency, upon advice of our attorneys, will review our policies and procedures" to see if changes are needed, she says.

## Special Conditions

In January 2008, Graham filed a civil-rights suit against Owens; Stuart Jenkins, director of the Texas Department of Criminal Justice (TDCJ) parole division; all of the parole board members; and most of the parole commissioners. Graham sued Owens and Jenkins individually and in their official capacities.

In his first amended complaint, filed Feb. 4, 2008, Graham alleges the following: In 1980, Graham was indicted on charges of burglary of a habitation, theft of a motor vehicle and aggravated rape. He pleaded guilty to the burglary and theft charges in 1982, but the trial court dismissed the rape charge as part of a plea bargain. Graham entered a "plea in bar" to the rape accusation, but the trial court did not make findings of fact as to whether Graham posed a threat to society because he lacked sexual control.

According to the judgment in the plea in bar in *State v. Graham*, Graham pleaded guilty to the rape charge. Gladden says that, as part of a plea agreement, the trial court did not convict Graham of aggravated rape. As noted in the judgment, however, the trial court took Graham's guilty plea on the rape charge into consideration in sentencing him on the burglary and theft charges.

As alleged in Graham's first amended complaint, the trial court sentenced Graham to 15 years in prison, and he was released on parole in January 1985. At the time of Graham's release, parole officials did not impose any special conditions on him based on a finding that he was a sex offender.

Graham further alleges that beginning in March 1985, the state sent him to prison two more times on various charges — none of them sex-related — and subsequently released him on parole. When Graham was released on parole after serving each sentence, parole officials made no findings that he constituted a threat to society because of his lack of sexual control. In February 1993, Graham was convicted of attempted murder and was not released on parole until 2003. Upon Graham's release, parole officials placed him on the Super Intensive Supervision Program, required him to participate in a substance abuse treatment program and prohibited him from having contact with the attempted murder victim.

However, Graham further alleges in the amended complaint that none of the special conditions were imposed as a result of any suspicion or accusation that he was a sex offender. But in November 2007, the defendants notified Graham that they were considering the imposition of "Condition X," special requirements imposed on sex offenders, as a condition of his parole, Graham alleges.

As alleged by Graham in the amended complaint, the written notice the defendants sent him did not provide a summary of the evidence or any other means by which he could discern the basis that would justify imposition of sex offender conditions on him. Graham alleges that in the week prior to sending him the written notice, a parole board panel voted to require, as a condition of his parole, that he submit to a psychological evaluation

designed to determine whether he posed a risk for committing future sexual offenses.

The amended complaint includes the following allegations: After receiving the notice of the parole board panel's vote, Graham submitted to the evaluation by Dr. David Stebbins, a licensed sex offender treatment provider, who gave the defendants a copy of his written evaluation of Graham on the same day as the evaluation. The defendants did not provide Graham a copy of the evaluation. Although the defendants allowed Graham to submit a written response to the notice that the defendants were considering imposing sex offender conditions on him, they did not allow Graham or his counsel to appear at the Dec. 14, 2007, hearing at which a parole board panel considered the evidence in support of imposing those conditions. Consistent with the defendants' official policy, the parole board panel did not make a finding that Graham constitutes a continuing threat to society because of lack of sexual control before voting to impose the sex offender conditions on him. The defendants notified Graham of the decision to place him under sex offender restrictions on Dec. 17, 2007. If Graham does not participate in sex offender treatment, as required by the panel, he faces parole revocation.

"It's an absolute denial of procedural due process," contends Bill Habern, another attorney representing Graham. Habern, of counsel at Habern, O'Neil, says the imposition of sex offender conditions also prevents Graham from becoming a minister, as he had planned.

In their proposed answer, filed May 1, 2008, the defendants, among other things, deny that they violated Graham's 14th Amendment right to due process and deny that any policy or procedure they have used denied him of any constitutionally protected right. The defendants allege Graham was given notice and opportunity to be heard regarding the parole board's consideration of imposing sex offender conditions on him. They also assert that Graham exercised his opportunity to be heard and filed a response along with a psychological evaluation and a polygraph that he failed and that were presented to the board.

The defendants also argue in their proposed answer that Graham has not stated a claim upon which relief can be granted under 42 U.S.C. §1983. They assert that at all times they acted in good faith and allege they are entitled to immunity from damages.

Gladden says Sparks indicated during the trial that he will schedule another trial in *Graham*. The issues in the next trial, Gladden says, will be whether the policies and procedures used by the defendants harmed Graham and, if so, what damages he should receive.

Sparks noted in his order that the document the parole board panel members initialed at the conclusion of the *Coleman* process and which imposed the sex offender conditions on Graham stated only that Graham had engaged in unlawful sexual conduct and could pose a threat to society. "This is an incorrect, and drastically lower, standard than the one that the 5th Circuit has set forth as law," Sparks wrote.

As required by Sparks' order, the parole board conducted another *Coleman* hearing for

Graham on Aug. 10 to determine whether he should remain on sex offender restrictions. Gladden says the parole board had not notified Graham of its decision by *Texas Lawyer*'s presstime Aug. 13.

## Due Process

Sparks is the second federal judge in Austin to find that the state is violating the due-process rights of parolees who have sex offender conditions imposed on them despite never having been convicted of sexual offenses. On March 24, U.S. District Judge Lee Yeakel declared in his findings of fact and conclusions of law in *Meza v. Livingston, et al.* that "the State failed to afford [Raul] Meza 'a hearing meeting the requirements of due process' when it imposed sex-offender conditions on his parole."

According to Yeakel's findings, Meza pleaded guilty in 1982 to murdering a 9-year-old girl and admitted to sexually assaulting the girl during the course of the murder. When the state released Meza on parole in 2002, it placed a number of restrictions on him, including the sex offender conditions.

As noted in Yeakel's findings, Meza argues that *Coleman* requires a hearing at which the state must show that Meza lacks sexual control. In his suit, Meza sought an injunction to prevent the defendants from imposing sex offender conditions without due process. As further noted in Yeakel's findings, the defendants argue that the 5th Circuit's decision does not require a hearing or written findings regarding Meza's lack of sexual control.

Brad Livingston, TDCJ's executive director, and the other defendants in Meza's suit for declaratory judgment have appealed Yeakel's judgment, also issued March 24, to the 5th Circuit.

Jim Harrington, director of the Texas Civil Rights Project, represents Meza but did not return a telephone call seeking comment.

Melinda Bozarth, TDCJ's general counsel, says her agency has changed its procedure in response to Sparks' concerns in *Graham*. Prior to a hearing on imposing sex offender restrictions, a parolee now receives a copy of a licensed treatment provider's evaluation of whether the parolee is at risk of committing a sexual offense in the future.

"We changed the procedure because we knew the court [Sparks] had some concerns about the procedure," Bozarth says.

But Bozarth says the parole board, not TDCJ, is responsible for holding the hearings.

Austin solo Gary Cohen, who represents offenders in parole revocation proceedings, says the issue raised by *Graham* and *Meza* is how much due process is due to parolees in these situations. "The 5th Circuit, when they handed down *Coleman*, didn't spell that out," Cohen says.

Cohen says he expects the *Graham* defendants to appeal Sparks' decision to the 5th Circuit. "I am hoping the 5th Circuit will lay down specific requirements about what constitutes a meaningful hearing," he says. "If that occurs, I think there will be a lot fewer people who meet the conditions required by law."

Williamson County District Attorney John Bradley, who has followed the *Graham* and *Meza* cases, says, "TDCJ has done all that it has to do under the law."

Bradley says TDCJ and the parole board must protect the public from dangerous sex offenders. If TDCJ and the parole board don't put conditions on parolees at risk of committing sex offenses, and a child dies, "that's a pretty serious consequence," he says.

But Bradley says he is troubled by Sparks' finding that the parole board did not make the required finding that Graham constituted a threat to society because he lacks sexual control. At a minimum, someone making the determination to impose sex offender conditions on a parolee should certify that the parolee poses such a risk, Bradley says.

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