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Student Suspended for Malicious MySpace Page

SUMMARY: First Amendment free speech protections did not prevent a school district from suspending a student who created a phony MySpace.com page about her middle school principal that displayed his picture and indicated that he was a pedophile and sex addict. The United States District Court for the Middle District Court for Pennsylvania decided *J.S. ex rel. Snyder v. Blue Mountain School District* on September 18, 2008.

BACKGROUND: J.S., a fourteen-year old eighth grade student at Blue Mountain Middle School, was suspended for violating the school's dress code. In retaliation, J.S. and her fellow student and friend K.L., created a personal profile on MySpace.com of their principal, James McGonigle. They created the profile using J.L.'s home computer during non-school hours. Though they didn't identify McGonigle by name, the two students took a photo of McGonigle from the school's website and wrote an imposter profile that described him as a married, bisexual man living in Alabama. The list of personal interest attributed to the principal included sexual ones such as pedophilia. Moreover, the profile included obscenities.

News of the profile spread to the middle school the next day and K.L. told approximately eight students about it. More students heard about the website as the day went on, to the point there was a general "buzz" surrounding the profile. The website profile was publicly accessible for three days, after which J.S. set it to "private." J.S. and K.L. granted access to over twenty students to view the profile. McGonigle heard about the imposter profile two days after it was posted and was told the next day that it contained disturbing comments about him. A student provided him with a printout of the profile and he soon learned that J.S. and K.L. were involved with creating it.

McGonigle called J.S. to the office and met with her in the presence of a guidance counselor. J.S. at first denied any involvement but eventually confessed that she and K.L. had created it. McGonigle spoke with the parents of the two students about the profile and contacted MySpace to have the profile removed. The principal determined that creating the imposter profile had violated the school discipline code, which prohibited the making of false accusations against school staff members. He also found that the use of his photo on the website violated the school district's policy on using copyrighted material. Based on these violations, McGonigle suspended J.S. and K.L. from school for ten days. McGonigle was advised by the police that he could file criminal charges against the students but he declined to prosecute.

K.L. did not protest the suspension. However, J.S.'s parents filed a civil lawsuit on her behalf in federal district court against the school district, seeking a temporary injunction that would have banned the suspension. The district court refused to grant the injunction. Though J.S. served the suspension, the case continued in court as both sides conducted discovery. J.S. contended that the First Amendment precluded the school from suspending her for creating a profile that was non-threatening, non-obscene, and a parody. The school district argued that the First Amendment did not protect speech that was obscene and that had a negative impact on the school, even if it was created at home on non-school hours. The school district moved for summary judgment and the court granted the motion.

ANALYSIS: The U.S. Supreme Court and the lower federal courts have dealt with the reach of the First Amendment's protections into the nation's public schools for almost 40 years. In the *Tinker* decision (1969), the Supreme Court ruled that students and teachers do have First Amendment rights in school. Students may express their opinions if they don't substantially interfere with appropriate school discipline and with the rights of others. However, conduct by students that disrupts class work or involves substantial disorder is not protected by the constitutional guarantee of free speech. Since this decision the Supreme Court and other federal courts have had to determine where the boundaries are between students' free speech and school discipline.

J.S. argued that *Tinker* clearly controlled the legal argument. By creating the MySpace page she had not interfered with work of the school, she had not caused any disorder, and she had not interfered with the rights of others. The court disagreed, noting that *Tinker* dealt with political speech (the wearing of black arm bands to protest the Vietnam War). The present case did not involve political speech but rather offensive and vulgar slurs attributed to a school principal.

The court reviewed other decisions that involved freedom of speech in the public schools. In one Supreme Court decision the Court held that a student who gave a vulgar and lewd speech at a school assembly could be suspended for his actions. The Supreme Court found that a function of public education is to prohibit the use of vulgar and offensive terms in public discourse. Other court decisions have reinforced this holding by stating that the First Amendment does not protect lewd, vulgar, indecent, or plainly offensive speech.

In addition, a 2007 Supreme Court decision upheld the suspension of a student who had held up a banner referencing the smoking of marijuana at a school-sponsored social event. The school prohibited public expression that advocates the use of substances that are illegal for minors. The Supreme Court rejected the application of *Tinker* because the speech in question was not political.

The court concluded that the school could restrict speech that was vulgar and lewd. The profile included many vulgar and lewd words and it did not make a political statement. The language rose to the level of harassment and McGonigle could have pressed criminal charges against the students. Even though the website may not have caused a substantial disruption of the school, the school district was in its right to suspend the students.

J.S. also argued that she should not be punished at school for a website she created at home. The court was not persuaded, finding that the use of the internet and cell phones had blurred the lines between on-campus and off-campus speech. Administrators had a right to be more concerned than ever before about off-campus speech that found

its way into the school building. In this case the website profile caused some disruption during school hours.

Finding no constitutional basis for overturning J.S.'s suspension, the court dismissed the lawsuit. The First Amendment did not protect lewd and vulgar speech created on the internet that had a direct impact on a public school.

EXCERPTS FROM THE COURT'S OPINION (By Judge Munley): "Plaintiffs argue that based upon *Tinker*, in order to restrain J.S.'s speech, the school must establish that her speech caused, or was likely to cause, a substantial and material disruption at the school. Because no such disruption occurred, nor was one likely to be caused, plaintiffs argue that defendant erred in restraining J.S.'s speech. After a careful review, we find plaintiffs' analysis of *Tinker* and its progeny to be unconvincing."

"The type of speech involved in *Tinker* is political speech. In the instant case, the speech is not political; rather, it was vulgar and offensive statement ascribed to the school principal. Therefore, we must look further into the case law to determine the standard we must use."

"These cases inform us that the *Tinker* analysis—the standard that the plaintiff asserts we should apply—is not always applicable to freedom of speech in public school settings. A school can validly restrict speech that is vulgar and lewd and also it can restrict speech that promotes unlawful behavior. In the instant case, there can be no doubt that the speech used is vulgar and lewd. . . The speech does not make any type of political statement. It is merely an attack on the school's principal. It makes him out to be a pedophile and sex addict. This speech is not the *Tinker* silent political protest."

"The facts that we are presented with establish much more of a connection between the off-campus action and on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code. J.S. lied in school to the principal about the creation of the imposter profile. Moreover, although a substantial disruption so as to fall under *Tinker* did not occur, as discussed above, there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an effect on-campus, we find no error in the school administering discipline to J.S."

COMMENTS AND QUESTIONS

1. Why did J.S. and K.L. create the imposter website?
2. Could the two students have been charged with a crime? If so, what would have been the crime?
3. Did the court grant a preliminary injunction?

The court looked at three United States Supreme Court cases to reach its conclusion. The first case was the *Tinker* case, which held that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". That case prohibited suspensions of students for wearing black armbands to protest the Vietnam War. The second was the 1986 decision in the *Fraser* case in which the justices upheld a suspension imposed on a student who used a graphic and explicit sexual metaphor during a speech at a school assembly. The justices held that it was appropriate for the school to prohibit the use of vulgar and offensive terms in the school setting. The final case was the 2007 *Morse* decision in which the Court upheld the suspension of the student who had held a banner that read "BONG HITS 4JESUS" during a school-sponsored trip. The court held that officials could restrict student speech at a school event when the speech promoted illegal drug use.

Taking into account these cases, the Court held that the school did not violate J.S.'s rights in punishing her speech on the MySpace page because the page was vulgar and lewd and promoted illegal behavior. The punishment could be imposed even though it might not have substantially disrupted the school. Do you agree with his reasoning?

The Court found a blurred line between off-campus conduct and behavior that transpires on school grounds. This will likely lead the Supreme Court to determine how far removed student speech can be from school grounds and still be roped in and punished, or censured, without violating a student's free speech rights. Was it fair for the school to punish the students when they created something on a home computer, when school was not in session, and where the creation was posted on an internet location not controlled by the school?

If the two students had, from the start, made the MySpace page "private," so the principal, the public, and most of the students could not see the profile, would the court have upheld the suspension? Do the court's reasons still make sense in that situation?

If the two students had created an imposter profile of the principal that was silly, nonsensical, and not vulgar, would the court have upheld school suspensions? What if students, and even teachers, found it so funny that much of class the following day was unproductive because everyone was talking and laughing about it?

Freedom of expression in public schools clearly has boundaries. What do you think would happen to a student who stood up at a football pep rally and started students chanting "fire the coach"? What do you think would happen if instead the student started a website that sought to mobilize students and the public to fire the coach? Should the student's First Amendment rights be the same or different for these two scenarios?

Two students, J.S. and K.L., created the imposter website. It is interesting to note that K.L.'s parents did not protest the suspension. Only J.S.'s parents filed a lawsuit. What would your parents have done? Do you think that J.S.'s parents showed good parenting skills in filing a federal lawsuit? Or, do you think a better parental course of action would have been to punish J.S. for creating the obscene page?

States May Require State-Issued Photo ID at the Polls

SUMMARY: The State of Indiana's election law, requiring citizens to present state-issued photo identification before being allowed to vote, did not violate the Fourteenth Amendment's Equal Protection Clause. The United States Supreme Court decided *Crawford v. Marion County Election Board* on April 28, 2008.

BACKGROUND: In 2005, Indiana enacted a law that requires citizens who vote on election day to present a piece of photo identification—state-issued driver's licenses and identification cards. This "Voter ID Law" applies to those voting in person during primary and general elections, but it does not apply to those voting through absentee ballots. An indigent voter or someone who objects to being photographed on religious grounds must execute an appropriate affidavit before a circuit court within 10 days following the election for votes from those individuals to count. A person who has photo identification but fails to present it on election day may vote, but that person's vote will count only if the person presents photo identification within 10 days of registering his or her vote. The state provides free photo identification to qualified voters.

The state believed that the law was necessary to protect the integrity of the election process and to prevent voter fraud. However, the Indiana Democratic Party disagreed, believing the law burdened the right of citizens to vote. (Partisan interests were put forward for why the law was enacted. Every Republican legislator voted for the law, while every Democrat legislator voted against it.) The Democratic Party immediately filed a lawsuit in Unites States District Court, challenging the constitutionality of the Voter ID statute. A second lawsuit was brought on behalf of several nonprofit organizations that represented groups of elderly, disabled, poor, and minority voters.

The plaintiffs in the consolidated lawsuits contended that the Voter ID Law substantially burdened the right to vote, which violated the Fourteenth Amendment to the U.S. Constitution. The plaintiffs also argued that the law imposed an election method that was neither necessary nor appropriate for avoiding election fraud. In addition, the lawsuit alleged that the statute would effectively disfranchise qualified voters who did not possess required identification and would impose an unjust burden on those who could not easily obtain this identification.

The plaintiffs submitted to the court a report prepared by its expert witness. The report concluded that as many as 989,000 registered voters in the State of Indiana did not possess a state-issued driver's license or photo identification card. The report also concluded that registered voters in groups of citizens with household incomes of less than $15,000 were twice as likely not to possess photo identification as citizens with incomes of more than $55,000.

The district court found no merit in the report's conclusions and dismissed the case. The court found that the plaintiffs had failed to prove that even one Indiana resident would not be able to vote because of the Voter ID law. It also rejected the expert's report, believing it to be unreliable and filled with many flaws. The district court estimated that the number of Indiana residents who lacked a state-issued driver's license or identification card was closer to 43,000 rather than 989,000.

The plaintiffs appealed the ruling to the Seventh Circuit Court of Appeals. The appeals court upheld the district court's ruling. The absence of any plaintiffs who could claim that the voting law would deter them from voting was telling to the appeals court. Moreover, the court concluded that the Democratic Party and the other organizations involved in the case objected to the law because it might require them to work harder to get all of their supporters to the polls. The U.S. Supreme Court granted review to resolve whether this type of voter identification scheme violated the Fourteenth Amendment.

ANALYSIS: The Supreme Court, in a 6-3 decision, upheld the constitutionality of the Indiana Voter ID Law. In an opinion by Justice Stevens, the majority of the Court examined the standards it uses to review election laws. For an election law to be constitutional, the state must convince the Court that the interests put forward to justify voting qualifications outweigh the burden imposed on citizens by the law. Each law must be evaluated on a case-by-case basis, with the Court balancing the interests on both sides.

Justice Stevens noted that Indiana had identified three legitimate interests to justify the additional burden on voters: modernizing elections, preventing voter fraud, and preserving voter confidence. The enactment of a federal law in 1993 required state driver's licenses applications to serve as voter registration applications but it also restricted the state's ability to remove names from the list of registered voters. As of 2004, it was estimated that the Indiana voting rolls were inflated by about 40%. The photo ID requirement would help purge the rolls of ineligible voters. The state had an interest in preventing voter fraud but Indiana had never in its history had a report of in-person voter impersonation at polling places. Nevertheless, the Court found that the state had a legitimate interest in guarding against such an occurrence. Finally, the state had an interest in safeguarding voter confidence. The legitimacy of government depended on such confidence and helped encourage people to vote.

As to the burdens imposed by the Voter ID law, the Court concluded that none were more than an inconvenience. Making a trip to the Bureau of Motor Vehicles (BMV) could be in some cases inconvenient but this did not rise to a substantial burden on the right to vote. Moreover, the law permitted an eligible voter without photo identification to cast a provisional ballot and then, within 10 days, travel to the county clerk's office and execute an affidavit.

The Court majority ruled that the plaintiffs had not provided any evidence as to the number of voters who might be burdened by the new requirements. Therefore, the Court would not overturn the statute as being excessively burdensome.

Three dissenters disagreed, pointing out the difficulties the aged, the disabled, and the indigent would have in traveling to the BMV, paying for copies of birth certificates, or returning to the county clerk's office every election to complete an affidavit. The fact that Indiana could not show one example of in-person voter impersonation fraud demonstrated that the law was excessively burdensome.

EXCERPTS FROM THE COURT'S OPINION (By Stevens): "The only kind of voter fraud that [the Voter ID law] addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any

time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor though perpetrated using absentee ballots and not in-person fraud-demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election."

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."

"The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [the law]. The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning. . . if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."

"Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."

EXCERPTS FROM THE DISSENT (By Justice Souter): "Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country. The State recognizes that tens of thousands of qualified voters lack the necessary federally issued or state-issued identification, but it insists on implementing the requirement immediately, without allowing a transition period for targeted efforts to distribute the required identification to individuals who need it. The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposters at the polling places. It is impossible to say, on this record, that the State's interest in adopting its signally inhibiting photo identification requirement has been shown to outweigh the serious burdens it imposes on the right to vote."

COMMENTS AND QUESTIONS

Which political party was opposed to the Voter ID law? Which political party supported the law?

What type of identification is required to vote at a polling place in Indiana?

Had there been a history of voter fraud in Indiana?

This decision is a major victory for states that wish to impose stronger identification requirements on voting. Some states have photo identification requirements but allow a range of permissible credentials, including an employee badge or ID, a debit or credit card, a student ID, a retirement center ID, or a public assistance ID. The Indiana law is the most restrictive and could be adopted by other states, now that its constitutionality is certain.

The two major political parties see this type of voter ID law from opposite perspectives. Republicans have raised the issue of voter fraud since 2000, contending it is a serious issue. They cite isolated incidents around the United States as evidence. The Republicans would argue that the Indiana Law is a necessary election-security reform to preclude in-person election fraud. Democrats argue that the issue is not voter fraud but voter suppression. They believe that the Indiana law was designed to prevent or discourage the poor, the infirm, and the aged, who may vote for Democratic candidates, from voting. The Supreme Court, while acknowledging these partisan positions, found that the state could demonstrate legitimate interests for the photo ID requirements.

The majority indicates that it is a minor inconvenience to require a person who is poor, aged, disabled, and lacking private transportation to obtain a state-issued photo ID for voting. Do you think that this is a reasonable requirement to impose? There was no evidence of any voter fraud that the law addresses. Why do you think the Indiana legislature passed this law since there was no evidence of individual voter fraud? Should we as a society make voting harder without evidence of a real problem? Some might argue that the implementation of this law amounts to systematic voter suppression. Which is worse, individual voter fraud or systematic voter suppression?

Each state administers its elections through state laws and rules. Do you know what your state requires for voter identification? Where would you find out? Would it make more sense if we had a uniform national election law that governed voters and voting? Or, is it better to keep the federal government out of the voting business?

Does this decision increase your confidence in the voting process, or do you have less confidence in the voting process?

Jurors' Names Must be Made Public Before Trial

SUMMARY: The First Amendment presumes that the names of both prospective jurors and trial jurors must be made public prior to the empanelment of the jury. The Third Circuit Court of Appeals decided *U.S. v. Wecht* on August 1, 2008.

BACKGROUND: In 2006, a federal grand jury in Pittsburgh, Pennsylvania, indicted Dr. Cyril Wecht for unlawfully using his public office as the county coroner for private financial gain. Wecht was charged with theft of public services, mail and wire fraud, and theft from an organization receiving federal funds. The case was assigned to United States District Court Judge Arthur Schwab.

As the case proceeded toward trial, Judge Schwab conferred with the U.S. Attorney and Wecht's defense counsel on preparing a juror's questionnaire that contained 69 questions for prospective jurors to answer. The day after this meeting the federal judges for the Western District of Pennsylvania issued an administrative order that directed judges to identify prospective jurors during the selection process only by their assigned juror number. In addition, juror lists were deemed confidential and only available to the lawyers involved in the case.

The day after the administrative order was issued, Judge Schwab filed his own pretrial order on how juror information would be treated in the Wecht trial. Schwab's order, while acknowledging the administrative order, went even further in restricting access to juror names. He ordered that the lawyers receive the completed juror questionnaires without the last page, which contained the prospective jurors' names and addresses. Neither the federal prosecutor nor Wecht's lawyer objected to the order.

In November 2007, as Wecht's trial date approached, Judge Schwab issued an order setting out the restrictions on juror identification. In addition to his prior restrictions, the prospective jurors would not be questioned in open court. Instead, both sides would challenge potential jurors using just the written questionnaires. Wecht objected to jury anonymity, as did several news organizations. The judge issued an order adhering to his juror selection methods, which gave no indication that the news organizations would gain access to the names and addresses of the prospective jurors and trial jurors at any time before or after the trial. The news organizations filed an appeal with the Third Circuit Court of Appeals, arguing that juror anonymity violated the First Amendment.

ANALYSIS: A general rule in federal and state appeals courts is that parties in a criminal case cannot immediately appeal trial orders and rulings by the judge. Instead, any potential errors must be addressed in an appeal that follows the trial. However, in narrow circumstances the appeals court will permit an immediate appeal of an order if appellate review will conclusively determine the disputed question, resolve an important issue completely separated from the underlying criminal case, and which would be effectively unreviewable on appeal after the trial. The Third Circuit determined that the order was immediately appealable, as it met all three conditions. The third condition was the most important, for the news media would not have the chance to discover the names of jurors before or during the trial if it had to wait for the conclusion of the trial and an eventual appeal.

Turning to the merits of the case, the appeals court found that the judge's order was improper and that the names of jurors must be made public before final selection of the jury. (It should be noted that the appeals court issued an order to this effect in January 2008 but did not file its opinion explaining its decision until August 2008.) In 1980, the U.S. Supreme Court had ruled that under the First Amendment the public had the right to attend criminal trials. The media organizations contended that this presumption of openness included a First Amendment right of access that requires disclosure of jurors' names.

The appeals court applied an experience and logic test, based on another U.S. Supreme Court decision, to determine whether the identities of prospective jurors were presumed public information. Under the experience element, the court examined whether the disclosure of jurors' names had been historically presumed to be public. The court found that juries have always been selected from local populations in which most people knew each other. Therefore the traditional public nature of jury selection suggested that the names of jurors were public. In addition, there were very few cases until the 1970s where jury anonymity was permitted.

Logic, the second element of the two-part test, focused on whether making the names of jurors' public plays a positive role in the functioning of the criminal justice system. The appeals court found that it did. The knowledge of juror identities allows the public to verify the impartiality of jurors, which ensures fairness, the appearance of fairness, and public confidence in the system. The court did acknowledge that public access to jurors' names created risks, including threats against jurors or their family members by the criminal defendant, and a reluctance by individuals to serve on high-profile cases. Despite these risks the appeals court concluded that the judicial system benefits from a presumption of public access to jurors' names.

Though the court created a presumption for allowing the identification of jurors, it pointed out that a judge could overcome this presumption by producing detailed findings of a compelling government interest to keep the names confidential. The appeals court ruled that the justifications for confidentiality made by Judge Schwab did not meet this standard. He justified juror anonymity to prevent the media from publishing stories about them and to prevent friends or enemies of Wecht from trying to influence jurors. The appeals court found the supporting evidence too general to overcome the presumption.

One of the three judges dissented, believing the news media should not have been allowed to appeal Judge Schwab's order. In addition, the judge contended that it has been the tradition of the courts to permit each trial judge broad discretion as to whether juror identifies are disclosed before trial.

The appeals court vacated Judge Schwab's order as to juror identification but permitted him to conduct jury selection through reviews of the juror questionnaires. The case proceeded to trial but in April 2008 the jury was unable to make a decision. The government intends to retry Dr. Wecht.

EXCERPTS FROM THE COURT'S OPINION (By Judge Smith): "The first question before us is whether the "experience and logic" test establishes the existence of a presumptive First Amendment right of access to obtain the names of both trial jurors and prospective jurors prior to empanelment of the jury. We conclude that it does. . . Based on the evidence before us, it appears that public knowledge of jurors' names is a well-established part of American judicial tradition . . . We do not dispute that a trial judge has historically had the power to issue such an order in special cases. We conclude only that a tradition of

openness exists and that anonymous juries have been the rare exception rather than the norm."

"We next consider whether presumptive public access to jurors' names prior to empanelment "plays a significant positive role in the functioning" of the criminal justice system. Public access to jurors' names is not without risks. First, when the names of jurors are public, friends or enemies of a criminal defendant may find it easier to influence the jury's decision. In an extreme case, this could take the form of threats to the jurors or their family members. Second, if jurors know that the media will attempt to contact them or their families, they may resist serving on high-profile cases at all because they fear that their privacy will be threatened. Third, public knowledge of jurors' identities might actually increase the risk of misrepresentation at *voir dire*, because some jurors will be tempted to lie in order to avoid the disclosure of embarrassing information. Despite these risks, we believe that the judicial system benefits from a presumption of public access to jurors' names. A criminal jury trial vests twelve randomly-selected citizens with the power to decide the fate of someone who the state has targeted for prosecution. We cannot reconcile the Supreme Court's conclusion that the public has the right to see the process in which this power is exercised and to see the process that selects those who will exercise the power with the conclusion that the public has no right to know who ultimately exercises this power."

"The District Court must articulate some reason to conclude that the risks that such people pose to the jurors are serious and specific enough to justify depriving the public (and, in this case, the defendant) of knowledge of the jurors' identities. Because the District Court did little more in this case than quote factual assertions that Wecht offered in *opposition* to jury anonymity, we conclude that it did not overcome the presumption in favor of disclosure."

EXCERPTS FROM THE DISSENT (By Judge Van Antwerpen): "The question presented in this appeal is not whether the media has a right of access to Dr. Wecht's *voir dire* proceedings, however. The question is far more narrow: whether the First Amendment right of access necessarily includes a constitutional right to know the names of prospective and trial jurors prior to the empanelment of the trial jury. The Majority concludes that the right of access includes a constitutional right to know the identities of all jurors, which in turn requires disclosure by the District Court before the trial begins. The Majority is incorrect that 'access' necessarily includes the identities of the prospective and trial jurors. Additionally, the First Amendment does not require disclosure of the names to the media prior to the empanelment of the trial jury.

"A review of the case law, legislation, and local court procedures of the courts in our Circuit and that of a variety of other jurisdictions reveals that the 'right' to know the names of the jurors is not, as the Majority suggests, clearly defined. If anything, a more thorough review of historical and modern jury practices suggests that the 'experience' is one of giving discretion to district judges over the conduct of *voir dire*, including the discretionary ability to withhold the names of prospective and trial jurors."

COMMENTS AND QUESTIONS

What job did Dr. Wecht perform?

Who appealed Judge Schwab's order?

What information would the lawyers and judges use to select jurors?

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…" Therefore, the public nature of criminal trials is unquestioned in American law. However, some legal proceedings are conducted in private. For example, juvenile courts adjudicate many young people for criminal acts with the doors closed to the public and the media. Another example would be criminal trials involving national security secrets; a court can hold sessions from which the public is barred.

The news media is especially vigilant whenever a trial judge attempts to place limitations on public access to a criminal trial. While judges may bar cameras from a courtroom, they cannot bar reporters. The news media claims they act responsibly with public information, citing the non-disclosure of the identities of sexual assault victims. However, in high-profile trials jurors are often contacted immediately after the conclusion of the trial and asked to discuss their impressions of the evidence and jury deliberations.

The appeals court required the release of jurors' names and addresses in part because of the history of juries dating back to the Norman Conquests in England. People in small, rural communities undoubtedly know their neighbors (and jurors) better than people in urban areas. Does the disclosure of jurors' identities make sense today when most people live in urban areas and know very few of their neighbors? Is disclosure of the names more necessary now?

On the other hand, the trial judge was concerned that this was a high-profile case that could lead to jurors being harassed and threatened by friends and enemies of Dr. Wecht. The news media usually only requests jurors' identities in high-profile cases. What would the judge have to show to overcome the presumption of disclosure? Would a judge ever be able to provide enough evidence *before* a trial to overcome the presumption?

Given the aggressiveness of the news media in today's society and the potential for in-depth examination of jurors' lives, are there times when jurors' names should not be made public? Should there be restrictions on what the media can do with those names? In what types of cases would releasing the names of jurors to the media not be justified?

Serving on a jury is the responsibility of all citizens. If you were called for jury duty and found yourself in the pool of prospective jurors for a high-profile criminal case, would you want to serve if the news media, as well as friends and family of the defendant, knew your name and where you lived? If you agreed to serve and were seated on the jury, would you be concerned that your service might put you and your family in jeopardy?

Parolee Banished To One County in State

SUMMARY: It was not unconstitutional in the State of Georgia for a court to set as a condition for parole and probation that a felon be confined to only one county in the state. The Georgia Supreme Court decided *Terry v. Hamrick* on June 30, 2008.

BACKGROUND: In 1995, Gregory Mac Terry pled guilty in Douglas County, Georgia, to the charges of aggravated stalking, aggravated assault, reckless driving, attempting to elude a police officer, passing within 200 feet of oncoming traffic, driving with a suspended license, and criminal trespass. The charges were based on an incident where Terry had threatened his ex-wife, who had previously obtained a protective order prohibiting Terry from visiting her. Terry, who had an obsession about his former wife, came to her house and said he wanted to go for drive. He directed her how and where to drive, at one point insisting that she stop the vehicle. He held a pair of scissors to her chest, seeking reassurances about their relationship. When Terry stopped to buy gas, his wife convinced a clerk to dial 911.

While in jail Terry sent his ex-wife letters she took to be threatening. In one letter he stated that "when I'm released, even if it's after a hundred years," he would find her. He also wrote to his son, who asked him to stop writing him. Terry ignored this request and continued to write to his son.

The trial court sentenced Terry to serve a total of 30 years, with 20 in custody. The judge also banished Terry from every county in the state (159 in total) except Toombs — a county of about 26,000 people that includes the city of Vidalia. The order stated that if "he is seen in the State of Georgia, other than Toombs County, during the term of this Sentence, it would be a violation of his parole and probation." Terry had no connection with Toombs County, which is 200 miles from Douglas County. The banishment was designed to prevent Terry from harassing his former wife. The judge noted in his findings that Terry's obsession with her could lead to violent conduct again.

In 2006, Terry filed a petition for a writ of habeas corpus, alleging a number of irregularities with his guilty plea and asserting that his sentence was unconstitutional because it included the banishment condition of parole and probation. The trial court denied his petition on all grounds. Terry then appealed his case to the Georgia Supreme Court.

ANALYSIS: A section of the Georgia constitution states that "Neither banishment beyond the limits of the state nor whipping shall be allowed as punishment for crime." In a 1974 decision the Georgia Supreme Court addressed the banishment provision. In that case a defendant had been banished from seven counties. The court held that the constitution defined banishment narrowly. It applied only to banishment beyond the state limits.

Terry argued that by banishing him from 158 of Georgia's 159 counties the state had, in effect, banished him "beyond the limits of the state." The Supreme Court disagreed and ruled that banishment from various counties was not prohibited by the constitution or the laws of Georgia. The court did, however, acknowledge that banishment conditions were not unlimited. These conditions could not be unreasonable or fail to bear a logical relationship to the defendant's rehabilitation plan.

The court rejected Terry's claim that there was no logical relationship between his banishment to Toombs County and the rehabilitation plan. Terry's obsession with his ex-wife and his violent conduct clearly authorized the trial court to be concerned for the safety of his ex-wife when Terry was released from prison. The rehabilitative plan promoted the victims' protection, for Terry had in the past violated no-contact orders. His movements needed to be curtailed to protect his ex-wife.

Terry complained that the banishment provision interfered with his rehabilitation. He was not paroled earlier because he could not go to a halfway house that had been assigned to him because it was not in Toombs County. The court rejected this claim and noted that he was eligible for parole in 2009. The court rejected a change in his parole because the banishment condition was not unreasonable and it did bear a logical relationship to the rehabilitation plan.

One justice dissented, noting that once Terry took a step outside of prison he would immediately be in violation of his parole because the prison is not in Toombs County. With no ties to this county, Terry will have limited options for securing a job and housing. In addition, the restriction had already prevented Terry from enrolling in a work-release program. Under these circumstances Terry would likely have to leave Georgia. Therefore, his banishment was unreasonable and unconstitutional.

EXCERPTS FROM THE COURT'S OPINION (By Justice Hines): "Although Terry asserts that there is no logical relationship between the limitation that he remain in Toombs County during his probation and the rehabilitative scheme, the habeas court found otherwise. As the habeas court noted in its order, the trial court imposed the condition because of "the trial court's concern with the Terry's continued obsession with his ex-wife." And, there was more than ample basis for the trial court to have such concern. To commit his crimes, Terry violated a protective order regarding his ex-wife, and entered her home to await her arrival; he was psychologically evaluated as obsessed with her; he was "fixated on winning his family back"; and he was contemplating suicide at the time he committed the crimes, which included placing his ex-wife under his control."

"The trial court has broad discretion in fashioning probation conditions. The rehabilitative scheme devised promoted the victim's protection; it was Terry whose movements had to be curtailed, not hers, and a scheme that allowed her to move freely about most of the state without fear of Terry was appropriate. The requirement that Terry remain in Toombs County is properly protective of the victim, and logically related to the rehabilitative scheme. . . Also, the habeas court determined that the ten-year period of time during which the banishment provision was effective was not unreasonable, and, given the evidence of Terry's obsession with his ex-wife, this was not error."

EXCERPTS FROM THE DISSENT (By Justice Benham): "Even assuming Terry could comply with the terms of his probation upon his release and travel to Toombs County without setting foot in any other Georgia county, it is still likely that he will be forced to leave the state in lieu of serving his probation in Toombs County because of his lack of ties to the county and limited options to obtain employment, housing, and rehabilitative services."

"Because of the severity of the banishment, there is also no opportunity for authorities to give thought or analysis as to whether Terry could participate in the work-release program in a less restrictive manner, while still limiting any danger to his ex-wife or society at large."

COMMENTS AND QUESTIONS

What was the status of the relationship between Terry and his ex-wife?

Who did Terry write to when he was in jail awaiting sentencing?

How far is Toombs County from Terry's home in Douglas County?

Persons paroled from prison must report to a parole officer on a regular basis. In addition, there are usually other conditions of parole that limit the movement of parolees and restrict their freedom. The goal of parole is that parolees will rehabilitate themselves and become law-abiding citizens. If they break the conditions of parole they can be returned to prison to serve the remaining part of their sentence. In this case, one of the conditions of parole was that Terry would be banished from all but one county in the State of Georgia.

The concept of banishment – a form of exile - has its origins in Greek and Roman times. In ancient times, banishment was an effective punishment because it contemplated that offenders leaving a small community would necessarily wander in the wilderness, shamed by their loved ones and unwelcome in other settlements. In its original form, banishment had a twofold purpose; first, challenge the physical survival outside one's protected community and, second, the psychological and emotional damage from being expelled from one's community.

Banishment seems to be a rather archaic concept in modern criminal justice. However, the United States Constitution does not prohibit banishment, as long as the punishment and sentencing meet the substantive and procedural requirements of due process. Banishment is still employed in a handful of states as an alternative to incarceration.

In today's society, banishment may not be as effective. As towns and communities are closer together, banishment allows the freedom to move to another location and to perpetrate the same crimes against an unknowing and unsuspecting community. One community's exile may become the neighboring community's problem. In this case, how would you feel if you were a resident of Toombs County, Georgia? Is Toombs County the dumping ground for Georgia criminals?

How do you feel about the use of banishment as an alternative to incarceration? Should it be used in today's society?

How do you feel about the use of banishment in the instant case? The dissenting justice believes that banishment will hurt Terry's chances to be rehabilitated. Do you think that restricting a person to one county is too burdensome? The trial judge in this case focused on the right of the ex-wife to be protected from Terry's obsessive and violent behavior. If Terry remains obsessed, is there anything to stop him from driving back to his home county and stalking his victim? Are there better solutions for protecting the victim from the parolee than banishment? Terry has obviously reduced his prison sentence through the accumulation of good time. This means that he has not been a disruptive inmate and that the parole board may very well grant him parole in 2009. Is there any evidence in the court's decision that describes whether, after 15 years, he is still obsessed about his ex-wife? If not, is it unfair to Terry that his future rehabilitation will be impaired by a banishment imposed when he was mentally ill? If Terry does not like the banishment option, he is free to refuse parole and serve out the remainder of his prison sentence. Do you think this is reasonable?

Do you think that banishment is an appropriate condition of parole? What restrictions should be placed on the use of banishment? For example, should there be a specific purpose relating to the rehabilitation of the offender? Should the affect on the general populace be considered before instituting banishment?

Can you think of a situation in an institution that you are involved with that uses banishment as a form of punishment? Expelling someone from school is a form of banishment, isn't it?

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