

Seeking Release Conditions and Protective Orders That Benefit Child-Victims

I. Introduction

Nearly all defendants will be released at some point during the criminal justice process, whether on bail, parole, or probation.¹ For crime victims who have suffered physical harm or psychological trauma, the idea that the person who harmed them may be released from custody can be terrifying. This fear may be heightened when the victim is a child. Many jurisdictions have passed legislation imposing mandatory release conditions on defendants charged with crimes against children.² Child-victims do not, however, need to rely on these explicit laws to ensure that their safety needs are met, nor do they have to rely on the prosecution to secure adequate protections. Child-victims, themselves or through counsel,³ may independently exercise their rights as victims and seek release conditions and protective orders as a requirement of a defendant's post-arrest or post-conviction release.⁴

Although every situation is unique and not all conditions may apply in every case involving a child-victim, the following general types of release conditions and protective orders may be sought: 1) restrictions on a defendant's ability to associate directly with the child-victim or others, including location-specific restrictions; 2) restrictions on indirect contact with a child-victim or others and on a defendant's Internet use; and 3) restrictions relating to custody and/or family court related obligations, and treatment and counseling. In general, courts have broad discretion in imposing release conditions, and practitioners should be aggressive in seeking all conditions necessary to ensure the safety and well-being of child-victims.⁵

II. Conditions Sought

A. Restrictions on a defendant's ability to associate directly with the child-victim and others.

Practitioners can ask for broad orders prohibiting "direct contact" with the child-victim.⁶ Practitioners can also ask for orders prohibiting direct contact with all minors.⁷ In addition to general "no contact" orders, prohibitions can specify that no contact occur at specific locations, such as at the child-victim's day care, local playground, or school.⁸ This can be particularly important when the child-victim and the perpetrator are classmates. In this situation, practitioners may seek an order requiring that the offender modify his or her attendance or class schedule to avoid contact with the child-victim; in at least two jurisdictions, this type of order is provided for explicitly by statute.⁹ It is also common for defendants convicted of sex

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crimes involving children to be prohibited from entering places frequented by minors.¹⁰ As with other conditions, location-specific prohibitions are generally upheld so long as they bear a reasonable relation to the underlying offense, public safety, or the rehabilitation of the offender.¹¹

In addition to prohibiting direct contact with the child-victim or with other minors, defendants may also be prohibited from associating with other individuals, including adults. This may be important, for example, when defendant's association with certain individuals or groups makes the defendant more likely to reoffend. For instance, a California court upheld a condition prohibiting a defendant from associating with two of his three brothers because the defendant had attributed his child molesting to their influence.¹² Courts will also uphold conditions banning affiliation with a group of individuals—felons or gang members, for example—as long as the condition does not proscribe unknowing or incidental encounters.¹³ Accordingly, practitioners should consider whether it is appropriate to request that the defendant be prohibited from interacting with certain individuals or groups, in addition to the child-victim and other minors.

B. Restrictions on indirect contact with the child-victim and others and restrictions on defendant's use of the Internet.

Practitioners can also ask for conditions that prohibit indirect contact between the defendant and a child-victim and others. Courts have found indirect contact to include the use of electronic means of communication, such as Facebook, MySpace, cell phones, or e-mail.¹⁴ In cases where the crime involved possession, receipt, or distribution of images of child sexual abuse, courts have affirmed restrictions on defendants' ability to access the Internet.¹⁵ In addition, orders prohibiting "indirect contact" or "any manner of contact" are generally held to prohibit defendants from using friends or parents to act as the defendant's couriers to contact the victim, even if an order does not make this prohibition explicit.¹⁶

C. Other restrictions: custody, family court obligations, and offender treatment.

Practitioners may wish to seek release conditions that relate to a defendant's child custody status or to other family court-related obligations. When presented

with family court orders, criminal courts have demonstrated some willingness to require defendants to abide by them or to honor support obligations.¹⁷ Lastly, as conditions of release, courts may require a defendant to undergo mental health counseling, engage in treatment or medication plans, or participate in classes focusing on issues such as parenting or anger management.¹⁸

III. Conclusion

Protecting child-victims during a defendant's release is critical to victim well-being and healing. One way of protecting child-victims is through imposition of release conditions and protective orders. Victims' rights afford child-victims standing to independently seek such requirements, which may include restrictions on the defendant's ability to directly or indirectly contact the child-victim or others, to use the Internet, to associate with certain groups, to comply with family court orders, to visit certain places, or to engage in certain activities. Practitioners should be thorough and creative when proposing release conditions and protective orders, as both judges and parole boards often have broad discretion to tailor these conditions to meet the needs of child-victims in accordance with their rights.

Practice Pointers

- Although courts have interpreted the broad requirement of "no indirect contact" to prohibit contact via the Internet or by third person, a better practice when asking for conditions is to be explicit regarding the types of contacts prohibited, thus putting defendant on specific notice.
- Although criminal courts are often willing to incorporate family court orders into their release conditions, it is best not to rely on the courts to coordinate this information. A child-victim practitioner will want to have copies of all family court orders

on hand to present to the criminal court and to have the criminal court formally incorporate the terms into its order.

- In considering whether to request an explicit prohibition on the defendant visiting specific locations that a child-victim frequents, practitioners should evaluate whether identifying such locations will provide the defendant with new information regarding the victim that may further endanger that victim.

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¹ See, e.g., Thomas Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts 2* (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf> (last visited July 19, 2012).

² See, e.g., 18 U.S.C. § 3142(c)(1)(B)(xiv) (federal statute mandating imposition of home detention and electronic monitoring as conditions of a defendant's release on specified charges involving a minor-victim); N.C. Gen. Stat. § 15A-534.4 (state statute requiring court to impose certain conditions of release in cases involving sex offenses and crimes of violence against child-victims); Tex. Code. Crim. Proc. Ann. art 17.41 (West 2009) (state statute listing conditions of bond courts may impose when defendant is charged with specified offenses against a child-victim); W. Va. Code § 62-1C-17a (state statute requiring court to impose certain conditions of bond when defendant is charged with child abuse).

³ See *Child-Victims' Independent Participation in the Criminal Justice System*, NCVLI Child-Victims' Rights Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.) (August 2012).

⁴ Child-victims have standing to seek release conditions or protective orders by invoking victims' rights in their jurisdiction. For example, child-victims may assert at defendant's release proceedings their rights to be heard, to protection, and to be treated with fairness and respect and to be free from intimidation, harassment, and abuse.

See Fundamentals of Victims' Rights, A Summary of 12 Common Victims' Rights, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.) (November 2011).

⁵ Conditions of post-arrest release are limited by the excessive bail clause of the United States Constitution, U.S. Const. amend. VIII, and by parallel state constitutional and statutory provisions. See, e.g., Conn. Const. art. I, § 8 ("No person shall be . . . deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed."); N.H. Rev. Stat. Ann. § 534:6 ("If by such copy it appears that the person is imprisoned on criminal process before a magistrate for want of recognizance, and that excessive bail or recognizance is required, the court or justice shall decide what bail is reasonable, and he shall, on giving such bail, be discharged."). In general, bail and bail release conditions become excessive only when not reasonably necessary to ensure a defendant's appearance at trial or to achieve another compelling government interest. See *Galen v. City of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) (discussing United States Supreme Court case law on excessive bail clause). Advocates for child-victims should argue that upholding a victim's constitutional or statutory rights constitutes a compelling government interest. Judges and parole boards have even greater latitude in setting conditions of release in the post-conviction context. In general, conditions of parole or post-conviction release need only be: reasonably related to the government's interest in rehabilitation or protecting society from recidivism; not unduly restrictive or broader than necessary; and statutorily authorized. See, e.g., *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003); *State v. Rivers*, 878 A.2d 1070, 1074 (Vt. 2005).

⁶ See, e.g., *State v. Credeur*, 328 So. 2d 59, 64 (La. 1976) (upholding a no contact and communication order between defendant and his children where defendant's children were the victims); *Commonwealth v. Kendrick*, 841 N.E.2d 1235, 1236 (Mass. 2006) (upholding probation revocation based on violation of special condition that defendant have "[n]o contact [with the child-]victim [and][n]o contact [with any] children under 16 [years] of age.").

⁷ See, e.g., *State v. Garcia*, 113 P.3d 406, 411 (N.M. Ct. App. 2005) (affirming the imposition of probation condition that prohibited contact with children under 18 following defendant's conviction of criminal sexual contact with his adopted daughter); *State v. Crocker*, 771 P.2d 1026, 1027–28 (Or. Ct. App. 1989) (stating that when the defendant was convicted of raping his

stepdaughter, a condition that prohibited his presence in a residence or vehicle with a child of either gender under eighteen years was valid).

⁸ See, e.g., *In re Lataya R.*, No. A094716, 2002 WL 254427 (Cal. Ct. App. Feb. 22, 2002) (affirming court's imposition of condition that probationer stay away from the child-victim's high school, even though crime did not occur on school property); *People v. Delvalle*, 31 Cal. Rptr.2d 725, 730-31 (Cal. Ct. App. 1994) (upholding a condition of probation requiring the defendant to stay away from elementary schools, daycare centers, and parks); *State v. Simonetto*, 606 N.W.2d 275 (Wis. Ct. App. 1999) (upholding a condition of probation prohibiting defendant from going places where children may congregate, such as schools, daycare centers, and playgrounds).

⁹ See Fla. Stat. Ann. § 960.001(1)(s) ("If the victim or any sibling attends or is eligible to attend the same school as that of the offender; the appropriate agency shall notify the victim's parent or legal guardian of the right to attend the sentencing or disposition of the offender and request that offender be required to attend a different school."); Wash. Rev. Code § 13.40.215(5) (providing that "[u]pon discharge, parole, transfer to a community residential facility, or other authorized leave or release, a convicted juvenile sex offender shall not attend a public or approved private elementary, middle, or high school that is attended by a victim or a sibling of a victim of the sex offender").

¹⁰ See, e.g., *United States v. Wiedower*, 634 F.3d 490, 498 (8th Cir. 2011) (collecting cases); *Rearden*, 349 F.3d at 620 (upholding condition that prohibited defendant from "frequenting or loitering within one hundred feet of schoolyards, parks, public swimming pools, playgrounds, youth centers, video arcade facilities, or other places primarily used by children under the age of eighteen"); *United States v. Paul*, 274 F.3d 155, 166 (5th Cir. 2001) (upholding supervised release condition instructing defendant to avoid "places, establishments, and areas frequented by minors"); *Crocker*, 771 P.2d at 1028 (upholding condition of probation that defendant not be present in any private home, residence, or vehicle in which there are children under the age of 18).

¹¹ See *Rearden*, 349 F.3d at 620; see also *People v. Brockelman*, 933 P.2d 1315, 1319 (Colo. 1997) (upholding probation condition excluding probationer from town where the victim lives); *State v. Meyers*, 168 P.3d 645, 650 (Mont. 2007) (upholding condition barring residency in the same county as the victim). But see *State v. Muhammad*, 43 P.3d 318, 323-24 (Mont. 2002) (discussing cases of geographic restrictions

and invalidating condition of probation that excluded probationer from being within same county as victim for any reason).

¹² *People v. Wardlow*, 278 Cal. Rptr. 1, 4 (Cal. Ct. App. 1991) (upholding condition of probation prohibiting defendant from associating with two of his three brothers was reasonable where defendant attributed his child molesting to their influence).

¹³ See, e.g., *State v. Lo*, 599 N.W.2d 659 (Wis. Ct. App. 1999) (upholding condition based on court's interpretation that probation condition restricted defendant from having contact with individuals whom he knows, or reasonably should know, are members of a gang).

¹⁴ See, e.g., *Commonwealth v. Myers*, No. 10-P-382, 2010 WL 5059537 (Mass. App. Ct. Dec. 3, 2010) (affirming probation revocation where defendant violated the terms of his probation by making contact with the victim through her Facebook and MySpace accounts, and defendant was prohibited from contacting the victim directly, indirectly, or through a third party).

¹⁵ See, e.g., *United States v. Tome*, 611 F.3d 1371, 1376-77 (11th Cir. 2010) (finding that the imposition of a one-year ban on Internet use was an appropriate condition of release, where the original conviction involved possession of child sexual abuse images) (collecting similar cases). But see *United States v. Miller*, 594 F.3d 172 (3d Cir. 2010) (finding special condition of supervised release that imposed a lifetime limitation on defendant's Internet use was a greater restraint on liberty than was reasonably necessary).

¹⁶ See, e.g., *Arias v. State*, 751 So. 2d 184, 187 (Fla. Dist. Ct. App. 2000) (holding that the trial court could revoke probation based on defendant's indirect contact with the child-victim through a third party; condition of probation was that defendant not associate with the victim in any manner whatsoever).

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