

(Kw)

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
FIFTH DIVISION

JOE T. HUTCHENS

PETITIONER

v.

No. CV-2008-10842

FILED 02/17/2009 11:17:32  
Pat O'Brien, Pulaski Circuit Clerk  
CR2 By Kw

SEX OFFENDER ASSESSMENT COMMITTEE

RESPONDENT

**RESPONDENT BRIEF IN SUPPORT OF  
COMMUNITY NOTIFICATION LEVEL 3**

Come now the Respondent, Sex Offender Assessment Committee, by and through their attorneys, Dustin McDaniel, Attorney General, and Amy L. Ford, Assistant Attorney General, and for its Brief in Support of Community Notification Level 3 states as follows:

**HISTORY OF THE CASE**

On January 10, 2007, Joe T. Hutchens pled guilty to 8 counts of the charge Pandering or Possessing Visual or Print medium Depicting Sexually Explicit Conduct Involving a Child in the Circuit Court of Benton County, Arkansas. Each offense is a Class C Felony pursuant to Ark. Code Ann. §5-27-603. He was sentenced to five (5) years to be served in the Arkansas Department of Correction followed by an additional five (5) years suspended sentence on each count. The sentences were set to run concurrently. Hutchens was required to register as a sex offender and comply with reporting requirements and continue Outpatient Sex Offender Treatment while serving the suspended imposition of sentence. (R. Sec. 2, pp.23-29). Prior to his arrest and conviction, Hutchens served a court bailiff in Bentonville. He is a retired trooper with the Arkansas State Police. (R. Sec. 2, p. 14).

## STANDARD OF REVIEW

Judicial review of the decision by the SOAC concerning the assigned community notification level is governed by the Administrative Procedure Act ("APA"). A.C.A. § 25-15-201, *et seq.* The court's review is confined to the record and conducted without a jury, except that testimony may be taken in cases of alleged irregularities in the procedure before SOAC not shown on the record. Ark. Code Ann. § 25-15-212(g). The court may affirm SOAC's decision or remand the case for further proceedings. Ark. Code Ann. § 25-15-212(h). If the substantial rights of the offender have been prejudiced, the court may reverse or modify the decision by ruling that SOAC's findings, interferences, conclusions, or decisions are: "(1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error or law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion." *Id.*

It is not the role of the circuit courts or the appellate courts to conduct a *de novo* review of the record; rather, review is limited to ascertaining whether there is substantial evidence to support the agency's decision or whether the agency's decision runs afoul of one of the other criteria set out in section 25-15-212(h). *Arkansas Bd. of Exam'rs v. Carlson*, 334 Ark. 614, 976 S.W.2d 941 (1998). Decisions of the administrative Board are upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *Batiste v. Arkansas Department of Human Services*, 361 Ark. 46, 204 S.W.3d 521 (2005). In determining whether a decision is supported by substantial evidence, the record is reviewed to ascertain if the decision is supported by relevant evidence that a reasonable mind might accept as adequate to

support a conclusion. *Id.* Substantial evidence is evidence that is valid, legal, and persuasive and that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture. *Arkansas Board of Examiners v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998). The question is not whether the testimony would have supported a contrary finding, but whether it would support the finding that was made. *Id.* It is the prerogative of the board to believe or disbelieve any witness and to decide what weight to accord the evidence. *Id.*

Courts give a good deal of deference to the decisions of administrative agencies because it is felt that the agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts to determine and analyze legal issues affecting their agencies. *Ford Motor Co. v. Arkansas Motor Vehicle Comm'n*, 357 Ark. 125, 161 S.W.3d 788 (2004).

### **PROCEDURES FOR SEX OFFENDER ASSESSMENTS**

Sex Offender assessments are performed by SOSRA, under the direction and oversight of the SOAC. Ark. Code Ann. § 12-12-917(b). SOAC promulgates guidelines and procedures for the assessments pursuant to Ark. Code Ann. § 12-12-913(c). (R. Sex Offenders Guidelines and Procedures, 2007 ed. hereinafter "Guidelines") The guidelines "identify factors relevant to a sex offender's future dangerousness and likelihood of re-offense or threat to the community[.]" Ark. Code Ann. § 12-12-913(c)(2)(A), and "address the extent of the information to be disclosed and the scope of the community to whom disclosure shall be made as these factors relate to the: (i) Level of the offender's dangerousness; (ii) Sex offender's pattern of offending behavior; and (iii) Need of

community members for information to enhance their individual and collective safety.”

Ark. Code Ann. § 12-12-913(c)(2)(B).

Community Notification Assessments may include, but are not limited to, the following:

- A review of the sex offender’s criminal history, with particular attention given to any offense that was sexual or violent in nature.
- An interview of the sex offender completed by SOSRA staff.
- A polygraph examination or a Voice Stress Analysis in cases in which SOSRA staff do not believe that they have adequate information to accurately assess the offender.
- A thorough review of any mental health records available to SOSRA staff at the time of assessment that may be relevant to the offender’s risk to the community.
- Psychological testing when deemed necessary by SOSRA psychologists.
- Other information that is relevant to the offender’s offense history and/or pattern.
- Completion of appropriate actuarial instruments designed to assess individuals convicted of sexual offenses.

(R. Guidelines, P.8).

The Sex Offender Registration Act sets out the following non-exclusive list of records and documents to be made available for the assessment: police reports; statements of probable cause; pre-sentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; violation and disciplinary reports; all psychological evaluations and psychiatric hospital reports; sex offender or sexually violent predator treatment program reports; juvenile court records; victim impact statements; investigation reports to the State’s child abuse hotline; and statements of medical providers treating victims of sex offense indicating the extent of injury to the victim. Ark. Code Ann. § 12-12-917(c)(1).

Based on the historical data and information obtained during the assessment, offenders are assigned to one of four risk levels to the general public. Level 1 is low risk;

level 2 is moderate risk; level 3 is high risk; and level 4 is considered a sexually violent predator. (R. Guidelines pp. 14-15). Higher risk levels lead to more widespread notice to the public that the individual is a sex offender. In this case, Hutchens was assessed a Level 3 which requires broader notification than Level 1 or Level 2. Level 1 notification to the public is limited to law enforcement agencies, the offender, adult members of the household where the offender is residing and victims. Level 2 adds the requirement to notify heads of agencies and organization that serve individuals in the offender's target group, state licensing board and prospective employers who have requested to be notified and individuals, or heads of families with individuals, within the offender's target group who are likely to encounter the offender. Level 2 also requires that the offender be placed on the public website if his victim was less than fourteen (14) years of age. Ark. Code Ann. § 12-12-12-913(j). In this case, the "pictures" Hutchens' possessed depicted prepubescent child victims. His stated interest in his online profile included preschools, The Young Ones, Child's Play Series and Puberty. (R. Sec. 2 p. 54-54). Level 3 encompasses all the notification methods of Levels 1 and 2 but adds notification to members of the community the offender is likely to encounter as well as website notification. (R. Guidelines, pp. 20-21) and Ark. Code Ann. §12-12-913(j). Without expanded notification, the offender may sit inside his home and make contact with unsuspecting children through internet contact.

**PETITIONER IS NOT  
ENTITLED TO A "HEARING".**

The Arkansas Supreme Court has recently ruled that an offender is not entitled to a face to face hearing before the Arkansas Sex Offender Assessment Committee during

the administrative review process. *Burchette v. Sex Offender Screening and Risk Assessment Committee* (07-408, October 23, 2008).

... Burchette had a meaningful opportunity to be heard under the facts of this case because of the procedure which included the face-to-face SOSRA interview and the SOAC review. Burchette's procedural due-process rights under either the Arkansas or United States Constitutions were not violated by denying him a second face-to-face interview before SOAC.

**SUBSTANTIAL EVIDENCE EXIST TO  
SUPPORT AN ASSESSMENT LEVEL 3.**

Substantial evidence can be found in the Record and outlined in the final administrative order entered by the SOAC Secretary, Jan Dewoody Scussel, on September 4, 2008 to support the assessment of a community notification of Level 3 in this matter. (R. Sec. 3, pp. 4-7).

Actuarial tools are utilized by the assessment team to determine a level of recidivism based upon known factors. Recidivism is defined as "[a] tendency to relapse into a habit of criminal activity or behavior." Black's Law Dictionary, 7<sup>th</sup> ed. (1999). Recidivism is not the measure of "getting caught" but of re-offending. The actuarial tools are the Vermont Assessment of Sex Offender Risk (VASOR) and the Static-99. The VASOR is a risk assessment scale for adult male sex offenders. The Static-99 is a similar actuarial tool used to measure sex offense recidivism risk based on objective information, such as official criminal history, victim characteristics, and age. The ten (10) "static predictors" involve the age of the offender, convictions whether the index offense or other sex offense convictions, non-sex offenses, violence, unrelated victims, stranger victims and male victims. In the case, the use of the Static-99 instrument is not appropriate for the type of crime this offender was convicted, i.e. child porn. The

VASOR score was low primarily due to the fact there is no violence involved. However, other evidence supports a higher community notification level. Considerations for increased notification include:

If the offender's offense history, behavior, or victim characteristics (e.g., extremely young victim, stranger victim, extra-familial victim, etc.) indicates community notification should go beyond the recidivism risk suggested by the actuarial instruments.

(Guidelines, pp.15-16). Hutchens' victims were prepubescent children. His interest centered on young children engaging in oral or vaginal sex. He spent considerable time on his computer viewing child porn. His Yahoo profile labeled "dadsluv2002" gave the assessment unit cause for concern of a law assessment level. His states interest included "Preschools" "Strangers with Candy" "Kinki Kids" "Child Play series" and "Puberty". The investigation revealed that this website was accessed 109 times from three (3) different IP addresses between October 10, 2004 and October 30, 2004; 119 times between June 8, 2005 and June 29, 2005. It was discovered that his home computer contained multiple images of what can only be described as child pornography. Additionally, child pornography was also found on the county owned computer utilized by Hutchens in his position as a court bailiff. (R. Sec. 2, pp.54-57).

During his interview, Hutchens admitted communicating with a woman that called herself Miss Understood in order role play that she was a little girl having sex with daddy. Hutchens also admitted he masturbated to pictures of preadolescent children, ages 2, 3 - 12, 13. (R. Sec. 2, pp.1-6). To protect Long's target victim group Level 3 notification is necessary.

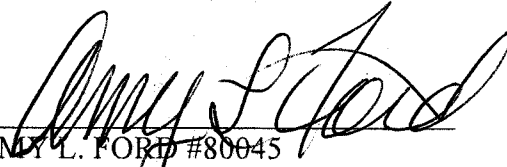
Wherefore, Respondent, Sex Offender Assessment Committee prays that the Complaint and Petition for Judicial Review filed herein be denied, that the community

notification level determined by the Sex Offender Screening and Risk Assessment and upheld by the Sex Offender Assessment Committee be affirmed, and that Petitioner be required to pay the cost of this action.

Respectfully submitted,

DUSTIN McDANIEL  
Attorney General

By:

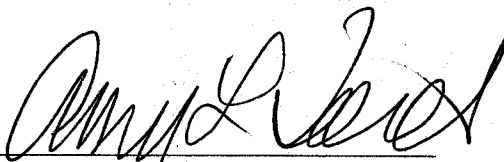
  
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### **CERTIFICATE OF SERVICE**

I, Amy L. Ford, Assistant Attorney General, do hereby certify that I have served the foregoing document by mailing a copy of same by U.S. Mail, postage prepaid, this 17th day of February, 2009 to:

Mr. Jeff Rosenzweig  
Attorney at Law  
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AMY L. FORD