NO. 44575-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DETENTION OF

CHARLES H. ROBINSON

STATE OF WASHINGTON, Respondent,

vs.

CHARLES H. ROBINSON, Appellant.

APPELLANT'S REPLY BRIEF

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This is a reply brief. I will not attempt to repeat arguments set forth in the Appellant's brief. I will only deal with gaps in the Respondent's arguments or with specific matters in their brief which seem in most urgent need of correction.

I. *The Trial Court Abused its Discretion when it Admitted Robinson's Video Deposition at the Beginning of the Trial.*

The respondent argues that Mr. Robinson's deposition is admissible for "any purpose" and cite to CR 32(a)(2) for this broad sweeping statement. Res. Br. 16. However, CR 32 is subordinate to the Rules of Evidence. CR 32 itself states in part:

> (A Use of Depositions. At trial any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party...."

Thus, the Rules of Evidence determine the extent to which a deposition is admissible into evidence. This is why the appellant's attorney objected at the time of submission of Mr. Robinson's video deposition at the beginning to the trial that he was present, he was available[1] and he may testify. App. Br. 11, I RP 36.

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[1] See Er 804(b)(1); *State v. Scott,* 48 Wn.App. 561, 564, 739 P.2d 742 (Div. I 1987) *affirmed* 110 Wn.2d 682(1988) ("ER 8054(b)(1) requires the proponent of the evidence to establish unavailability of the declarant before deposition testimony may be admitted at the time of trial." App. Br. at 17, Res. Br. at 14.

In *Kellogg v. Wilcox*, 46 Wn.2d 558, 286 P.2d 114 (1955) the defendant was present at trial and testified. The trial court refused to admit the defendant's entire deposition when it was offered by the plaintiff on rebuttal. The appellate court held this was not an abuse of discretion notwithstanding the rule that the deposition of a party may be used by an adverse party for any purpose pursuant to CR 32(a)(2).

In an earlier case, *Mosler v. Woodell*, 189 Wash.583, 66 P.2d 353 (1937) the appellate court ruled that the trial court properly rejected an offer by the defendants of the entire deposition of one of plaintiff's witnesses, where the witness was present at trial and testified. The witness denied making only one of the statements contained in the deposition. The appellate court reasoned that admission of the whole deposition might lead to the introduction of incompetent evidence.

Here, the admission of Mr. Robinson's video deposition at the beginning of the trial and before he either testified or not was error.

Likewise, the respondent agues that Mr. Robinson's video deposition is otherwise admissible pursuant to ER 801(d)(1). Res. Br. at 14. However, before a prior statement by a witness is admissible, the rule itself states:

> "(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (I) inconsis-

> tent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or ... ."

Since Mr. Robinson did not testify, his entire statements should not be admissible pursuant to this rule.

According to Karl B. Tegland, *5B Washington Practice* 371 (5th ed. 2007) "If the witness flatly refuses to give any substantive testimony whatsoever, the witness's prior statements are inadmissible because there is nothing to contradict."

The trial court abused its discretion according to the Civil Rules and according to the Rules of Evidence when it admitted Mr. Robinson's Video Deposition as substantive evidence in the respondent's case in chief.

II. *The Fifth Amendment Privilege Against Self-Incrimination Should Apply to Sexual Violent Predator (SVP) Cases.*

Contrary to Mr. Robinson's assertions in the appellant's brief, the respondent argued in its brief that Mr. Robinson does not have a Fifth Amendment Right against self-incrimination because SVP proceedings are civil in nature and that the law is well settled in Washington to that effect. Res. Br. 14-18. The respondent argues that based on *In re Pers. Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993) the fifth amendment privilege against self-incrimination does not apply to SVP proceedings.

Res. Br. 16-17.

According to *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980) when a petitioner has provided the "clearest proof" that "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention" that the proceedings are civil proceedings, the statute must be considered criminal. In that case the privilege against self-incrimination applies.

In *Allen v. Illinois,* 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) the issue was whether the 5th Amendment applies to an examination by psychiatrists to determine whether Allen should be declared to be a sexually dangerous person under Illinois' Sexually Dangerous Persons Act. Ill. Rev. Stat., ch. 38 sec. 105-101 *et seq.* (1985). Psychiatrists were not allowed to testify to Allen's statements to them. However, they were allowed to testify to their opinions that Allen was mentally ill and had criminal propensities to commit sexual assaults-based on their interviews with Allen.

There, the United States Supreme Court affirmed the Supreme Court of Illinois' opinion that the privilege against self-incrimination was not available in sexually-dangerous persons proceedings because they were "essentially civil in nature." *Allen v. Illinois,* 107 Ill.2d 91, 99-101, 89 Ill.Dec. 847, 481 N.E.2d 690 (1985). Res. Br. at 20, n.3.

However, the Illinois Statutory scheme is far different than Washington's Sexual Violent Predator Act. As the United States Supreme Court pointed out, the Illinois act provides that the committed person may apply for release at any time. Also, the Illinois act "...established a system under which committed persons may be released after the briefest time in confinement." *Allen v. Illinois*, 478 U.S. at 371. Contrary to this significant distinction, the Washington legislature has declared in its SVP Act that treatment for SVP's is questionable and long term treatment is part of the Act.

The Washington State legislature enacted RCW 71.09.010 entitled "Findings." That guiding enactment found that 71.05 RCW (Mental Illness) "is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment...." Whereas, by sharp contrast RCW Chapter 71.09 (SVP) is directed toward "a small but extremely dangerous group" whose "...treatment needs of this population are very long term...."

"The Statute thus creates a class of persons who, by definition, are not likely to be "cured", and thus not likely to ever be released." J. Johnson dissent, *In re Pers. Restraint of Young*, 122 Wn.2d at 70. According to *In re Det. Of Danforth*, 173 Wn.2d 59,81, 264 P.3d 783 (2011): "[C]ommitmet is a deprivation of liberty, it is incarceration

against one's will, whether it is called "criminal" or "civil" *In re Det. of D.F.F.*, 172 Wn.2d 37, 40 n.2, 256 P.3d 357 (2011) (quoting *In re Application of Gault*, 387 U.S. 1,50, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)."

Another distinction between the Illinois Act and Washington's Sexual Violent Predator's Act is that *Allen v. Illinois* involved the issue of the Fifth Amendment and the compulsory examination by psychiatrists; whereas the issue in the case at bench is the Fifth Amendment's application to SVP proceedings to determine whether the person is a sexually violent predator after the psychiatric evaluation. See RCW 71.09.040(4) (order for psychiatric evaluation) followed by RCW 71.09.050 (conduct of the trial court to determine whether the person is an SVP.)

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself. Another distinction relating to the respondent's Fifth Amendment argument is that Mr. Robinson is not arguing that his statements may be used against him in future criminal proceedings. Rather his argument is that because Washington's SVP statute is essentially criminal in nature he was entitled not to answer any questions during his video-deposition, which was intended to be used against him in trial. App. Br. 6-7; I RP 35-6.

Individual states should not be allowed to circumvent the commands of the Fifth Amendment by merely classifying SVP statutes as civil in nature when they are more criminal in nature. Like Washington's infamous Sexual Predator Act, sexually dangerous persons commitments often result in "far longer imprisonment" than a conviction for an underlying sexual offense. See generally, *United States ex rel. Stachulak v. Couglin,* 520 F.2d 931 (7th Cir. 1975).

It was stated in the dissenting opinion in *Allen v. Illinois,* by Justice Stevens:

> "The sexually-dangerous -person proceeding similarly may not escape a characterization as "criminal" simply because a goal is "treatment." If this were not the case, moreover, nothing would prevent a State from creating an entire corpus of "dangerous person" statutes to shadow its criminal code."

Allen v. Illinois, J. Stevens dissenting opinion, 478 U.S. at 381, 106 S.Ct. 2998.

It is noteworthy that the Fifth Amendment privilege is recognized by the legislature as being applicable in the involuntary treatment act under chapter 71.05 RCW. For instance, that statutory scheme, which applies to treatment of mentally disordered persons, expressly states that the legislature's intent is "To safeguard individual rights;" RCW 71.05.010(3). In addition, RCW 71.05.200(1)(c) states" "That the person

has the right to remain silent and that any statement he or she make may be used against him or her."

This privilege against self-incrimination was bestowed by the legislature in those very same civil proceedings without the condition or requirement that this invaluable right was limited to situations where the answers might incriminate the person in future criminal proceedings only. cf. *Mallory v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Minnesota v. Murphy,* 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). Also, this individual right was acknowledged in spite of the need to reach a correct diagnosis concerning the existence of a mental illness and the need for treatment.

The ultimate determination and characterization of the Sexual Violent Predator Act rests with the judiciary and the courts and not with the legislature's omission of this paramount right from the act. This is a federal and state constitutional question in addition to the legislative goals of treatment and rehabilitation.

Because of the legislature's commitment to long-term treatment the SVP Act is exercised in a punitive fashion. The statute is described as "...masquerading as a civil commitment law when its purpose is penal." J. Johnson dissenting *In re Pers. Restraint of Young*, 122 Wn.2d at 61.

It has been stated that the traditional aims of punishment are retribution and deterrence. These issues were considered in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). The *Kennedy* court held that enactments of Congress were invalid because Congress employed the sanction of deprivation of nationality as punishment for the offense of leaving the country to evade military service, without affording procedural protections guaranteed by the Fifth and Sixth Amendments.

Kennedy stands for the proposition, apparent under the omissions in the SVP Act, that in times of crisis, constitutional guarantees are vulnerable to the pressures of public opinion and expediency.[2]

Because of the reasons previously outlined in the Appellant's opening brief, the SVP procedures must be deemed to be essentially criminal rather than civil. App. Br. 19-22. Consequently, Mr. Robinson was entitled to exercise his Fifth Amendment Right against self-

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[2] "The Statute was enacted in response to intense public outcry over two brutal sex crimes: the rape and mutilation of a Tacoma boy, and the rape and murder of a Seattle woman." J. Johnson dissenting, *In re Pers. Restraint of Young*, 122 Wn.2d at 66. (Citing Boerner, *Confronting Violence : In the Act and in the Word,* 15 U. Puget Sound L. Rev. 525 (1991-1992)).

incrimination in these proceedings.

Dated this 5th day of January 2014.

Respectfully submitted,

James L. Reese, III
Attorney for Appellant

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 6th day of January, 2014, I deposited in the mails of the Unites States of America, postage prepaid, the for filing the original and one (1) copy of Appellant's Reply Brief in In re the Detention of Charles H. Robinson, Court of Appeals Cause No. 44575-1-II, to the Court of Appeals at 950 Broadway, Ste. 300, Tacoma, WA 98402; deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Counsel for Respondent Fred Wist, Attorney General's Office, Criminal Division, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104/ Jeremy S. Bartels, Attorney General's Office, Criminal Division, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104; and mailed one (1) copy of the same to Appellant at his last known address: Charles Robinson, P.O. Box 88600, Steilacoom, WA 98388.

James L. Reese, III

Signed and Attested to before me this 6th day of January, 2014 by James L. Reese, III.

Julia T. Reese
Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 04/04/17