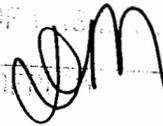


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DIVISION II

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STATE OF WASHINGTON
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NO. 37352-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATHEW JAGGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Roseanne Buckner, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

- 1. THE SEXUALLY VIOLENT PREDATOR ESCAPE STATUTE IS INCONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT THAT COMMITMENT AS A SEXUALLY VIOLENT PREDATOR BE CIVIL.**

Mr. Jagger is challenging the constitutionality of the SVP escape statute because it is inconsistent with the civil nature of SVP commitment. Respondent State of Washington properly acknowledges that the Washington State Supreme Court in In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), and the United States Supreme Court in Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), upheld SVP commitment statutes as constitutional only after determining that the conditions of commitment were civil, not punitive. Brief of Respondent (BOR) 5-6.

The State does not acknowledge that in Young and Hendricks, the crux of the issue for the courts was that the SVP statutes at issue would violate the prohibition against double jeopardy and constitute *ex post facto* laws if the laws were penal rather than civil.

First, petitioners claim that the act violates the *ex post facto* clause and the prohibition against double jeopardy. Resolution of the issues depends on

whether the law is civil or criminal in nature.

Young, 122 Wn.2d at 10; see Hendricks, at 360-361.

Instead, the State notes that it is theoretically possible under the SVP statute to be committed without having first been convicted of a sexually violent offense, if one has been charged with the offense, but found incompetent to stand trial. BOR at 5 (citing RCW 71.09.030(3)). Mr. Jagger's commitment, however, like the commitment in virtually every case, was based on a prior conviction and therefore raises double jeopardy and *ex post facto* concerns.¹ See In re Detention of Jagger, No. 58002-7 (filed 7/30/07). Moreover, it is only because the SVP statute is civil rather than penal that a person found incompetent to stand trial can be committed. A person who is civilly committed under the SVP statute is not entitled to all of the due process rights guaranteed to criminal defendants. See, e.g., In re Detention of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007) (no right to confront witnesses). If the SVP commitment statute

¹ Counsel for Mr. Jagger is unable to locate any SVP commitment where the petition was based on a charged crime only.

resulted in punitive, rather than civil, commitment, it would be unconstitutional on double jeopardy, *ex post facto*, Fifth Amendment, Sixth Amendment and Fourteenth Amendment grounds.

Second, contrary to the argument of the State, the fact that SVP commitment does not exempt those who have been committed from prosecution for other crimes, such as rape, is not relevant. Escape is a unique crime which is predicated on lawful confinement associated with being held in custody on criminal charges or convictions.² Moreover, person

² The State contends that escape by an involuntarily committed person from a mental hospital can be punished as second degree escape because the mental hospital is a "detention facility," or "place used for confinement of a person . . . confined pursuant to an order of a court." BOR at 18. Appellant has been unable to find any authority for this interpretation of RCW 9A.76.010(2), or any case reporting an escape conviction based on leaving a mental institution after a commitment unrelated to a criminal charge or conviction.

Such an interpretation would be inconsistent with RCW 72.23.160, governing "apprehension and return" of a patient who escapes from a state hospital and which provides that "[i]f a patient shall escape from a state hospital the superintendent shall cause immediate search to be made for him and return him to said hospital wherever found. Notice of such escape shall be given to the committing court who may issue an order of apprehension and return directed to any peace officer within the state. Notice may be given to any sheriff or peace officer, who, when requested by the
(continued...)

prosecuted for crimes other than escape do not receive harsher sentences because of their SVP commitment; there is no "SVP burglary" or "SVP rape."

The fact that escape is a crime which enforces custody, raises specific issues: whether the fact that the commitment is enforced by threat of criminal prosecution alters the nature of the underlying custody; whether the unique severity of the punishment for SVP escape renders the underlying commitment penal; and whether the fact that the escape is punished as a sex offense constitutes further punishment for a prior conviction.

No other escape in Washington can be punished as a class A felony or with an indeterminate sentence, even if the prisoner has been convicted of aggravated murder, a third strike, the second sex-

²(...continued)
superintendent, may apprehend and detain such escapee or return him to the state hospital without warrant."

Finally, the State's citation to State v. Edwards, 93 Wn.2d 162, 606 P.2d 1224 (1980), is misplaced. Edwards considered whether the sexual psychopathy statute required sentencing before commitment. There was no issue of escape in Edwards and no issue of whether Western State Hospital was a detention facility; Edwards was charged with first degree escape because he pled guilty to rape and robbery.

offense under the two-strike law, or multiple violent offense. No other escape conviction in Washington is punished as a sex offense because, contrary to the assertions of the State, only sex offenses and offenses committed with sexual motivation are punished under RCW 9.94A.712. Further, the general escape statutes have affirmative defenses, while SVP escape does not. See RCW 9A.72.110, .120, .130.

Moreover, Washington's SVP escape statute is uniquely harsh nationwide among states which punish escape from commitment under an SVP statute. See Opening Brief of Appellant (AOB) at 13. In particular, in In re Detention of Bradford, 712 N.W.2d 144 (Iowa 2006), the one case in which the court gave any consideration to whether the enactment of a SVP escape statute made the commitment penal rather than civil, the escape resulted in a simple misdemeanor conviction, a sharp contrast with the punishment for SVP escape in Washington. In Washington, a person convicted of SVP escape is not going to get a misdemeanor or one-year sentence; he or she potentially faces being in prison for the rest of his or her life.

The underlying issue then for this Court is whether criminal sanctions for escaping from a sexual predator facility is inconsistent with the constitutional restrictions on a civil commitment statute; that is, inconsistent with the goal of current treatment, inconsistent with having less restrictive conditions than prison, inconsistent with having conditions similar to other involuntarily-committed mental patients and inconsistent with lack of concern for criminal culpability. Clearly, punishing escape from treatment as a class A felony with a minimum term of 60 months and an indeterminate sentence creates a prison-like condition, is overwhelmingly focused on punishment rather than treatment and shows a concern for criminal culpability. Criminal sanctions for SVP escape are evidence of a scheme to assure that the escapee does not receive treatment but instead is returned to prison, potentially for the rest of his or her life.

Rather than address this issue, the State cites In re Detention of Campbell, 139 Wn.2d 341, 986 P.2d 771 (1999), to suggest that once a statute has been found constitutional, it cannot be challenged in the

future. BOR 7-8. But Campbell is not relevant to the issues here. In Campbell, the issue was whether the inadequacy of the care at the Special Commitment Center made the commitment there punitive and criminal. Here, we are not concerned with the adequacy of the implementation of a statute, but with a legislatively-approved change to the conditions of confinement of persons committed under the SVP statute. If this *statutory* change to confinement makes commitment penal rather than civil, the SVP statute is unconstitutional, just as it would be if the legislature changed the statute to provide that those committed under the SVP statute would be confined in prison or confined without treatment.

Neither Young nor Campbell upheld the SVP statute as it currently exists, after the addition of the SVP escape to the criminal code. And as the state acknowledges, the enactment of the SVP escape statute has changed the conditions of confinement and made them more restrictive and potentially punitive:

By enacting RCW 9A.76.115, the Legislature sent a clear message to sexually violent predators that any disregard of a court's commitment order by means of escape will

make them subject to significant criminal punishment. A predator in a secure facility concerned about the punishment consequences for escape may be deterred from planning an escape and, instead, focus his energies on his treatment as the most effective means of obtaining his long term release from confinement.

BOR 22. In other words, in enacting the SVP escape statute, the Legislature intended to send a clear message that commitment is being enforced with a huge threat of punishment. The same rationale would apply to any harsh condition which would motivate a committed person to try treatment as the only hope for ever gaining release from commitment. Moreover it ignores the fact that a person convicted with an attempted escape may be permanently removed from the treatment which he has been deemed, by his very commitment, to need. Further, treating persons committed under the SVP statute differently from other persons who are mentally committed is directly at odds with the analysis in Hendricks that the statute is constitutional only because they are treated the same as other involuntarily-committed patients in state mental hospitals. Hendricks, at 363.

For these reasons and for the reasons set out in the Opening Brief of Appellant at 5-18, the SVP

escape statute is inconsistent with a civil SVP commitment statute.

2. TO CONVICT MR. JAGGER OF ESCAPE WOULD BE TO VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

The State argues that SVP escape does not violate the prohibition against double jeopardy because it is akin either to a recidivist statute or a sentencing enhancement. BOR 12-16.

First, this argument overlooks the implicit holdings of Young and Hendricks, that it would violate double jeopardy if the commitment under an SVP statute were penal rather than civil in nature. Appellant's argument is that punishing escape from commitment under the statute makes it penal.

Further, the SVP escape statute involves neither a sentence enhancement nor a recidivist penalty. It is not an escape conviction with an enhancement for persons committed under the SVP statute who escape from custody. If that were the case, the maximum conceivable sentence would be 120 months, the statutory maximum for first degree escape. See RCW 9.94A.537(b) (exceptional sentence may not exceed the statutory maximum for class of felony as set out in RCW 9A.20.021). It is not a

recidivist statute such as the two or three strikes law; all prior offenses are counted only as offender score.

Instead, SVP escape is a conviction which is treated as a sex offense even though it has no element of sexual conduct. RCW 9A.76.115. It is a second punishment for the prior sex offense for which a full term has already been served; absent that prior conviction, the escape could not be punished as a sex offense. Moreover, the underlying sex offense conviction was enforced by the threat of an escape conviction. That sentence was fully served and Mr. Jagger could not have received any additional punishment for escape absent his commitment as a sexual predator based on that conviction. The SVP escape statute constitutes additional punishment for the same conviction and violates the prohibition against double jeopardy.

The State cites to Witte v. United States, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), which held that prosecuting the defendant for a crime involving the same cocaine as was used to determine the offense level for a different, prior crime did not violate double jeopardy. The Witte

court held, however, that although the cocaine was used to determine a higher base offense level under the Federal Sentencing Guidelines for the prior crime, it did not result in a higher penalty than authorized by the legislature for the prior crime. In sharp contrast, a person convicted of SVP escape receives a longer sentence than is legislatively-authorized for any other type of escape conviction.

The SVP statute constitutes a second punishment because it results in a non-sex crime being punished as a sex offense solely because of the prior conviction for a sexual offense and because it results in a higher standard range sentence than for any other escape conviction. It is further punishment for the underlying sex offense which supported the SVP commitment and violates double jeopardy.

3. TO CONVICT MR. JAGGER OF ESCAPE WOULD BE TO VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF LAW.

The state argues that the class to be considered for purposes of the equal protection issue is the class of all sexually violent predators, who are treated similarly under the SVP escape statute; and that there is a reason for

treating persons committed under the SVP statute more harshly than persons in prison or involuntarily committed to mental hospitals-- that those committed under the SVP statute are more dangerous than other mentally ill persons and criminal prisoners. BOR 20-22.

Mr. Jagger asserts that the class should be all persons who could be charged with escaping confinement. AOB at 23. Of this class, only persons charged with SVP escape could receive a class A felony conviction with an indeterminate sentence. Those serving a third-strike sentence or sentences for aggravated murder or multiple violent offenses can receive no more than 120-month sentence if they escape.

Even if the class is defined narrowly as only those who could be charged with SVP escape, there is no rational grounds for treating this class more harshly than the class of those who escape from prison. Indeed, all of the people who have been civilly committed at one time served prison sentences and there can be no rational basis for treating these same people more severely while in treatment than when in prison.

Most importantly, the rationale for commitment under the SVP statute is treatment; and, if that is not the goal of the statute, it is unconstitutional. There is no rational relationship between that goal and harsher punishment for escaping from treatment. In fact, the SVP escape statute would be at odds with treatment and release to the least restrictive alternative or the community. The SVP escape statute unconstitutionally denies equal protection of law as guaranteed by the state and federal constitutions.

B. CONCLUSION

Appellant respectfully submits for the reasons stated above and in his opening brief that the order of the trial court should be reversed and his case remanded for dismissal of the charge of sexually violent predator escape which has been filed against him.

DATED this 12th day of September, 2008

Respectfully submitted,


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Certification of Service

I, Rita Griffith, attorney for Mathew Jagger, certify that on September 12, 2008, I mailed to each of the following persons a copy of the document on which this certification appears:

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Dated this 12th day of September, 2008.



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