

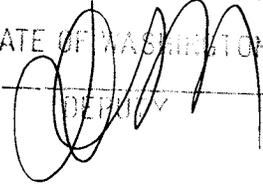
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY



STATE OF WASHINGTON, RESPONDENT

v.

MATHEW JAGGER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Buckner, Judge

No. 06-1-04063-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to present any authority that the enactment of a new provision in Washington's criminal code regarding sexually violent predator escape, RCW 9A.76.115, has any relevance to the determination of whether the sexually violent predator laws found in RCW 71.09 are civil or criminal?

2. Has defendant failed to present the "clearest proof" that there has been any change or alteration in how sexually violent predators are housed or treated since the enactment of RCW 9A.76.115 so as to call into question the Supreme Court's determination that the sexually violent predator laws are civil in nature?

3. In light of defendant's failure to provide any factual or legal basis for reassessing the Washington Supreme Court's determination that the sexual violent predator laws do not implicate double jeopardy and ex post facto concerns because they are civil in nature, should this court reject defendant's claims based on the double jeopardy and ex post facto clauses?

4. As a Legislature acts within its appropriate powers in determining that a certain set of circumstances justifies an increased criminal penalty, and as the United States Supreme Court has held that a sentence that is within the range authorized by the legislature constitutes punishment only for the offense of conviction, has defendant failed to present a cognizable double jeopardy claim by arguing that the harshness of the sentence for sexually violent predator escape indicates that Legislature is predicated on the punishment on the predator's prior criminal history?

5. Has defendant failed to meet his burden of showing that RCW 9A.76.115 fails to meet the rational basis test so as to succeed on his claim that the statute violates equal protection?

6. Has defendant failed to meet his burden of showing the unconstitutionality of RCW 9A.76.115 beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

On August 30, 2006, the Pierce County Prosecutor's office filed an information charging appellant, Mathew Jagger (defendant) with one count of attempted escape of a sexually violent predator in violation of

RCW 9A.28.020 and 9A.76.115 in Pierce County Case No. 06-1-04063-7.

CP 1. The declaration for determination of probable cause indicated that defendant had been committed as a sexually violent predator at the Special Commitment Center (SCC) at McNeil Island, and that he was found one night between the inner and outer secured perimeter fences without having authorization to be there. CP 2. According to the affidavit, defendant admitted that he was trying to escape and had placed a dummy in his bed so that his absence would not be noticed. *Id.* The State later filed a corrected information, but it did not change the nature or number of the charges. CP 5.

Defendant brought a motion to dismiss, challenging the constitutionality of the sexually violent predator escape statute, RCW 9A.76.115, alleging violations of double jeopardy and the prohibition against ex post facto laws as well as a violation of equal protection. CP 6-17.

The motion to dismiss came on for hearing before the Honorable Rosanne Buckner. RP 4. The court denied defendant's motion to dismiss, finding that RCW 9A.76.115 did not violate equal protection, double jeopardy, or the prohibition against ex post facto laws. CP 47; RP 18-20. The court entered findings of fact and conclusions of law on this ruling.

CP 41-46.¹ The court also entered a certification pursuant to RAP

2.3(b)(4). CP 40.

Defendant successfully sought discretionary review of this ruling prior to resolution of the criminal charge below. CP 49-50.

C. ARGUMENT.

1. AS DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT INVOLUNTARY COMMITMENT UNDER WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAWS CONSTITUTES CRIMINAL PUNISHMENT, HIS CONSTITUTIONAL CHALLENGES PREDICATED ON THE DOUBLE JEOPARDY AND EX POST FACTO CLAUSES ARE MERITLESS.

Statutes are presumed to be constitutional; the party challenging the constitutionality of a statute bears a heavy burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996). It is the duty of a court, if possible, to construe a statute so as to uphold its constitutionality. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008); *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985).

In 1993, the Washington Supreme Court found that the sexually violent predator provisions of the Community Protection Act of 1990 (hereafter "SVP laws"), were constitutional against claims that the statute

¹ See Appendix A (Findings of Fact).

violated the double jeopardy clause and the prohibition against ex post facto laws. *In re Detention of Young*, 122 Wn.2d 1, 18-25, 857 P.2d 989 (1993). The SVP laws are codified in chapter 71.09 of Title 71 of the Revised Code of Washington -a title concerned with mental illness. Under the terms of the SVP laws, persons who are determined to be a “sexually violent predator” may be involuntarily committed to a special facility, which are called Special Commitment Centers (“SCC”). *Young*, 122 Wn.2d at 11-13. The act does not require that a person be convicted of a sexually violent offense before he or she can be found to be a sexually violent predator. RCW 71.09.030(3) (permitting a petition to be filed against a person charged but found incompetent to stand trial). It does require that the person “suffer[] from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(16). In rejecting the constitutional challenges, the court noted that double jeopardy and ex post facto considerations are applicable to criminal matters. It examined the SVP laws, and concluded that these provisions were civil rather than criminal in nature, with twin goals of incapacitation and treatment, thus double jeopardy and ex post considerations did not apply. *Young*, 122 Wn.2d at 22-23, 59.

In *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), the United States Supreme Court examined Kansas’s SVP laws, a statutory scheme similar to Washington’s, and found

controlling the manifest intent of the Kansas Legislature to create a civil commitment scheme. The Court stated that it could not be shown by the "clearest proof" that the Kansas scheme was so punitive in purpose or effect as to negate legislative intention to deem it civil. *Hendricks*, 521 U.S. at 361-369. The Court relied on two established precepts: 1) "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment[;]" and, 2) there is a legitimate nonpunitive governmental objective in taking "measures to restrict the freedom of the dangerously mentally ill." *Hendricks*, 521 U.S. at 363. The essential conclusion from *Hendricks* is that a state's sexually violent predator statute may be considered a proper form of civil commitment if it requires proof of both a future dangerousness and a mental abnormality or illness that results in an inability to control sexually dangerous behavior. *Id.* at 358. The Court found that as the involuntary commitment pursuant to Kansas's Act was civil in nature, the statute did not violate the double jeopardy or the ex post facto clauses because the detention was not punishment even though it might occur after service of a prison term. *Id.* at 370-371.

Relying on *Hendricks*, courts in fourteen states have determined that their SVP civil commitment schemes are civil, not criminal. *See In re Leon G.*, 204 Ariz. 15, 59 P.3d 779, 782 (Ariz. 2002); *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 969 P.2d 584, 606-11 (Cal. 1999); *Westerheide v. State*, 831 So. 2d 93, 103 (Fla. 2002); *In re Det. of*

Samuelson, 189 Ill. 2d 548, 727 N.E.2d 228, 234-35, 244 Ill. Dec. 929 (Ill. 2000); *In re Det. of Garren*, 620 N.W.2d 275, 279-83 (Iowa 2000); *In re Hay*, 263 Kan. 822, 953 P.2d 666, 673 (Kan. 1998); *Commonwealth v. Bruno*, 432 Mass. 489, 735 N.E.2d 1222, 1230-32 (Mass. 2000); *In re Linehan*, 594 N.W.2d 867, 870-878 (Minn. 1999); *Morales v. State*, 104 S.W.3d 432, 436 (Mo.App. 2003); *In re Civil Commitment of J.H.M.*, 367 N.J. Super. 599, 845 A.2d 139, 144 (N.J. Super. Ct. App. Div. 2003); *In re M.D.*, 1999 ND 160, 598 N.W.2d 799, 805-06 (N.D. 1999); *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311, 316-17 (S.C. 2001); *In re Commitment of Fisher*, 164 S.W.3d 637, 646 (Tex. 2005); *In re Commitment of Rachel*, 254 Wis. 2d 215, 647 N.W.2d 762, 777-78 (Wis. 2002); *see also McCloud v. Commonwealth*, 269 Va. 242, 609 S.E.2d 16, 21 (Va. 2005) (noting that "a proceeding under the [SVP laws] is a civil one" but not relying upon *Hendricks*).

In 1999, the Washington Supreme Court reaffirmed its holdings in *Young* regarding the civil nature of the SVP laws when faced with a challenge that a detention under the SVP laws had become criminal because some of the conditions of care at the Special Commitment Center ("SCC") were inadequate. *In re the Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999). The court articulated the error in Campbell's challenge to the SVP laws:

Campbell cites no precedent for the proposition that whenever a statute is unconstitutionally administered, such flawed administration renders the statute itself unconstitutional. Indeed, the State correctly notes that ‘[Campbell's] argument confuses the issue of a committed individual's due process rights following a valid commitment under the Statute with the analysis of whether the Statute's scheme for involuntary commitment is constitutional.’

Campbell, 139 Wn.2d at 348. The Court stressed that a court's task in evaluating a statute's constitutionality is “to look at the statute *on its face*, not whether it is adequately applied.” *Id.* (emphasis in original)

A legislature's designation of a penalty as civil is entitled to considerable deference and that designation will not be overborne unless the statute, considered on its face and without reference to the level of sanction imposed in the particular case, is clearly so punitive as to render it criminal despite the legislature's intent to the contrary.

Winchester v. Stein, 135 Wn.2d 835, 853, 959 P.2d 1077 (1998).

Despite the above authority clearly establishing the civil nature of SVP laws in general, and Washington's SVP laws in particular, defendant asks this court to return to the question of whether the SVP laws are criminal or civil in nature. He argues that the Washington Supreme Court's determination that they are civil in nature is no longer authoritative due to Legislature's enactment in 2001 of the sexually violent predator escape statute, RCW 9A.76.115, asserting that this

provision has somehow transformed the provisions of RCW 71.09 into criminal punishment. The sexually violent predator escape statute provides:

(1) A person is guilty of sexually violent predator escape if:

(a) Having been found to be a sexually violent predator and confined to the special commitment center or another secure facility under court order, the person escapes from the secure facility;

(b) Having been found to be a sexually violent predator and being under an order of conditional release, the person leaves or remains absent from the state of Washington without prior court authorization; or

(c) Having been found to be a sexually violent predator and being under an order of conditional release, the person:
(i) Without authorization, leaves or remains absent from his or her residence, place of employment, educational institution, or authorized outing; (ii) tampers with his or her electronic monitoring device or removes it without authorization; or (iii) escapes from his or her escort.

RCW 9A.76.115.

Defendant has presented no authority to support his contention that the fact that the Legislature has enacted a new crime within Washington's criminal code is relevant to the analysis of whether the SVP laws found in RCW 71.09 are civil or criminal. Under *Young* and *Campbell*, the provisions to be analyzed in assessing the civil or criminal nature of the SVP laws are those found in RCW 71.09.

The fact that a person has been found to be a sexually violent predator does not exempt him from prosecutions for violations of the criminal code. If a sexually violent predator commits a rape, assault or murder while he is confined in a SCC, or while out on a conditional release, he is subject to prosecution for that new offense. The fact that criminal punishment may be imposed upon conviction for the new offense does not transform the previous involuntary civil commitment into criminal punishment. Defendant has not shown that the mere existence of RCW 9A.76.115 alters or affects the current conditions of incarceration for someone committed as a sexually violent predator. Defendant presented no evidence below that there has been any change in how sexually violent predators are housed or treated since the enactment of RCW 9A.76.115. RP 1-18; CP 6-17. Most sexually violent predators will never be affected by the provisions of RCW 9A.76.115, because most do not try to escape from confinement. If a predator does try to escape, then he may be prosecuted for his new offense. If a sexually violent predator is convicted of a new offense - be it escape or rape or assault - then he will be subject to criminal punishment, but the criminal punishment is for his new offense, and not his status as a sexually violent predator.

The Iowa Supreme Court has rejected a claim with respect to its SVP laws that is nearly identical to the one raised here. *In re Detention of Bradford*, 712 N.W.2d 144 (Iowa 2006). Prior to *Bradford*, the Iowa

Supreme Court had earlier determined that its SVP laws were civil in nature rather than criminal. *In re Det. of Garren*, 620 N.W.2d 275, 283-86 (Iowa 2000). Bradford contended that when the Iowa Legislature added a new provision to the SVP laws making it a crime for a predator to leave a secure facility without permission, that this transformed the statute from civil to criminal. The Iowa escape provision was contained within the same chapter as the SVP laws. The Iowa court held that while the new provision “makes it a criminal offense to escape after being committed, it does nothing to alter the civil nature of the underlying commitment.”

Bradford, 712 N.W.2d at 148. It stated:

The criminal penalty is not imposed because the person is in [SVP] confinement, but because he has committed the crime of escape while being so confined. Furthermore, we will not assume that the legislature's placing of a criminal provision within a statute we have held to be civil in nature evidences an intent to transform the whole chapter into one that is criminal in nature. This inference sought by Bradford falls short of the "clearest proof" required to make [Iowa's SVP laws] criminal in nature.

Bradford, 712 N.W.2d at 148.

Unlike the Iowa Legislature, the Washington Legislature enacted a new crime of sexually violent predator escape and placed it within the criminal code rather than include it with the title pertaining to the SVP civil commitment procedures. This indicates no legislative intent to transform the civil nature of the SVP laws. As noted in the Appellant's opening brief, several states that have SVP laws also have provisions

criminalizing escape from SVP commitment. *See* Appellant's opening brief at pp 13-14. Yet, as noted above, all of these states have found that their SVP laws are civil in nature. *See also Bradford*, 712 N.W.2d at 148-149.

There is no authority or evidence supporting defendant's contention that the criminalization of escape from an SVP commitment facility transforms the nature of the involuntary commitment into criminal punishment. Defendant's constitutional challenges are dependent upon a showing that involuntary commitment as a SVP constitutes criminal punishment. The burden is on the defendant to show "clear proof" that the SVP laws are criminal in nature and he has failed to do so. The holdings of *Young* and *Campbell* are controlling in this case, and any constitutional challenges based upon the double jeopardy and ex post facto clauses are without merit.

2. THE LEGISLATURE IS CHARGED WITH
DETERMINING THE PENALTY FOR SVP ESCAPE;
ITS DECISION THAT AN INDETERMINATE LIFE
SENTENCE IS APPROPRIATE DOES NOT VIOLATE
DOUBLE JEOPARDY.

The United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution provides that no person shall "be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. The federal and state double jeopardy provisions afford the

same protections. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). The prohibition against double jeopardy includes protection against multiple punishments for the same offense. *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). Beyond these constitutional constraints, "the legislative branch has the power to define criminal conduct and assign punishment for such conduct." *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *Ex parte United States*, 242 U.S. 27, 42, 37 S. Ct. 72, 61 L.Ed.129, 140 (1916).

The determination of punishment is a function of the Legislature and it acts in the public interest to provide a safe society. *See State v. Brayman*, 110 Wn.2d 183, 192-193, 751 P.2d 294 (1988). The Legislature determined the penalty for sexually violent predator escape (SVP escape) should be severe. SVP escape is a Class A felony with a minimum term of sixty months, and is subject to an indeterminate life sentence under RCW 9.94A.712.² RCW 9A.76.115. The Legislature did not designate SVP escape to be a sex offense; it simply made the crime subject to the provisions of RCW 9.94A.712. *Id.* Defendant seems to be arguing that the only explanation for the imposition of such a harsh penalty is that the legislature must be taking into consideration a sexually

² See Appendix B.

violent predator's criminal history³, and that to do so would violate double jeopardy. This indicates a fundamental misunderstanding of the scope and nature of double jeopardy protections.

The United States Supreme Court has repeatedly found that a sentencing court or legislature may take the circumstances surrounding a particular course of criminal activity into account in determining an appropriate sentence for a conviction arising therefrom, without violating double jeopardy. *Witte v. United States*, 515 U.S. 389, 403-04, 115 S. Ct. 2199, 132 L.Ed.2d 351 (1995); *Williams v. Oklahoma*, 358 U.S. 576, 79 S. Ct. 421, 3 L.Ed.2d 516, (1959);

Similarly, we have made clear in other cases, which involved a defendant's background more generally and not conduct arising out of the same criminal transaction as the offense of which the defendant was convicted, that "enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction." In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

³ As noted earlier, a person may be determined to a sexually violent predator even in the absence of any convictions for a sexually violent offense. RCW 71.09.030(3). Thus, a prior conviction is by no means a prerequisite for conviction of SVP escape.

Witte, 515 U.S. at 400 (internal citations omitted). Thus, a legislature is free to enact recidivist statutes without concern of violating double jeopardy because "the accused is not again punished for the first offence" but rather "the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." *Moore v. Missouri*, 159 U.S. 673, 677, 16 S. Ct. 179, 40 L.Ed.301 (1895). When a legislature "has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment *only* for the offense of conviction for purposes of the double jeopardy inquiry." *Witte*, 515 U.S. at 403-04 (emphasis added).

The Washington Legislature established that the sentencing range for SVP escape shall be a minimum sixty month term, followed by an indeterminate life sentence. RCW 9A.76.115. In doing so, it assessed the circumstances surrounding a particular course of criminal activity. Evidently it concluded that the escape of a person who has been found to be mentally ill, and likely to commit violent sexual offenses if not confined, presented extremely dangerous circumstances of a person in need of treatment flouting the authority of the court and putting the public at risk. It is not surprising that the Legislature considered this situation worthy of a severe sentence. Under *Witte*, a sentence within this legislative range constitutes punishment only for the crime of SVP escape

for the purposes of the double jeopardy inquiry. In sum, defendant has failed to present a cognizable double jeopardy claim.

3. RCW 9A.76.115 IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST AND DOES NOT VIOLATE EQUAL PROTECTION.

Under the equal protection clause of the Washington State Constitution, article I, section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *In re Young*, 122 Wn.2d at 44; *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). The protections provided by the state and federal constitutions are the same. *State v. Shawn P.*, 122 Wn.2d 553, 560-61, 859 P.2d 1220 (1993); *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

Courts use one of three tests to determine whether there is an equal protection violation. Strict scrutiny is applied when a classification affects a suspect class or a fundamental right. *Westerman v. Cary*, 125 Wn.2d 277, 294-95, 885 P.2d 827, 892 P.2d 1067 (1994). Intermediate scrutiny may apply in certain circumstances, such as when a classification affects both a liberty right *and* a semi-suspect class not accountable for its status. *Id.* A statutory classification that implicates physical liberty is not subject to the intermediate level of scrutiny under the equal protection clause unless the classification also affects a semi-suspect class. *Coria*, 120

Wn.2d at 171; *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994). Sex offenders are not a suspect class for the purposes of equal protection review. *Ward*, 123 Wn.2d at 516. Division I of the Court of Appeals has held that sexually violent predators do not constitute a suspect or semi-suspect class. *In re Detention of Brooks*, 94 Wn. App. 716, 720-23, 973 P.2d 486, (1999), *affirmed in part, reversed in part*, 145 Wn.2d 275, 36 P.3d 1034 (2001). California and Illinois appear to be the only other states that have addressed whether sexually violent predators constitute a suspect class; both concluded that they are not. *People v. Sumahit*, 128 Cal App.4th 347, 354 n.3, 27 Cal. Rptr.3d 233, 238 n. 3 (2005); *People v. Runge*, 346 Ill. App.3d 500, 508, 805 N.E.2d 632, 639 (2004). A statute that does not affect fundamental rights or create a suspect classification is subject to minimal judicial scrutiny under the rational basis test. *Ward*, 123 Wn.2d at 516. Defendant appears to concede that the rational basis test is applicable to his claim. Appellant's brief at p. 22.

The Legislature may prescribe laws to promote the health, peace, safety, and general welfare of the people of Washington. *State v. Brayman*, 110 Wn.2d 183, 192-193, 751 P.2d 294 (1988). The Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest. *Brayman*, 110 Wn.2d at 193. A statute is a valid exercise of police power if it tends to promote a valid state interest and bears a reasonable and substantial relationship to accomplishing its purpose. *Id.*

Washington courts have repeatedly applied the rational relationship test to the statutes creating differing classes of persons for purposes of involuntary commitment statutes. See *In re Detention of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). Rational basis is highly deferential, and a legislative enactment reviewed under rational basis will be upheld unless the individual challenging the classification can show that “it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” *Id.* (quoting *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)).

Persons involuntarily committed for mental health reason other than being a sexually violent predator are subject to criminal penalties for escape under the statute proscribing escape in the second degree. RCW 9A.76.120.⁴ Involuntarily committed persons may be charged with second degree escape under RCW 9A.76.120(1)(a) for knowingly escaping from a detention facility because a state mental hospital meets the definition of “detention facility” as it is a “place used for the confinement of a person...confined pursuant to an order of a court.” RCW 9A.76.010(2); see also *State v. Edwards*, 93 Wn.2d 162, 164, 606 P.2d 1224 (1980)(noting Edwards’s criminal escape conviction for escaping from the sexual psychopathy program at Western State Hospital). Under the current escape in the second degree statute, there is an express provision

⁴ See Appendix C.

proscribing escape for persons committed under RCW 10.77 for a sex, violent or felony harassment offense who are under an order of conditional release. RCW 9A.76.120(1)(c).

Prior to the enactment of the specialized statute proscribing SVP escape, predators escaping from a SCC could be prosecuted for second degree escape for escaping from a “detention facility.” *See* former RCW 9A.76.120 (1995); *see also* CP 18-29. Laws of Washington 1995, ch. 216, sec. 15.

Since 1995, predators escaping from an order on conditional release could also be prosecuted for escape in the second degree as it included this provision:

(1) A person is guilty of escape in the second degree if:

...
(c) Having been found to be a sexually violent predator and being under an order of conditional release, he or she leaves the state of Washington without prior court authorization.

Former RCW 9A.76.120 (1995) Laws of Washington 1995, ch. 216, sec. 15. Escape in the second degree is a Class C felony with a statutory maximum term of five years. RCW 9A.76.120(3); RCW 9A.20.021(1)(c).

With the enactment of RCW 9A.76.115, the Legislature enacted greater penalties for an escape of a person involuntarily committed under the SVP laws. SVP escape is a Class A felony with a minimum term of sixty months, and is subject to an indeterminate life sentence under RCW

9.94A.712.⁵ RCW 9A.76.115. Defendant asserts that this violates equal protection as there is no reason to treat sexually violent offenders who escape differently from other involuntarily committed persons, or from prisoners who escape.

In order to invalidate the statute based on equal protection grounds, the party challenging the statute must show, beyond a reasonable doubt, that no state of facts exists that justify the challenged classification. *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869 (1980). “A legislative distinction will withstand a minimum scrutiny analysis if, first, all members of the class are treated alike; second, there is a rational basis for treating differently those within and without the class; and third, the classification is rationally related to the purpose of the legislation.” *O’Hartigan v. State Dep’t of Pers.*, 118 Wn.2d 111, 122, 821 P.2d 44 (1991).

The prohibition against sexually violent predator escape applies to all sexually violent predators and treats all members of that class equally; the first part of the test is satisfied. Secondly, there is a rational basis for treating those within and without the class differently. Washington’s SVP laws focus on a particularly dangerous group of offenders. *Young*, 122 Wn.2d at 32. As noted by one court, the “state’s interest in treating sex predators and in protecting society from their actions is not only

⁵ See Appendix B.

legitimate, it is irrefutably compelling". *Brooks*, 94 Wn. App. at 721-722. The Supreme Court has stated that there are "good reasons to treat mentally ill people differently than violent sex offenders" as sexually violent predators are, in general, considerably more dangerous than are the mentally ill, and treatment methods differ markedly. *Young*, 122 Wn.2d at 44-45. In enacting RCW 71.09, the legislature noted that "the treatment modalities for [sexually violent predators] are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act." RCW 71.09.010. Thus, there is significant basis for treating sexual violent predators differently from others who are mentally ill and involuntarily committed. Harsher penalties increase the deterrence factor. As sexually violent predators are more dangerous, the legislature has a greater interest in trying to deter them from escaping, than it does others who are involuntarily detained.

There is also a basis for treating sexually violent predators differently from criminals held in prison. Prisoners have committed a crime, but have not been shown to "suffer[] from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16). A prisoner may have posed a danger to their past victim, but not every criminal poses a danger of future criminal activity. A prisoner may be incarcerated due to a crime that arose inexorably out a set of circumstances that are unlikely to reoccur. The victim of a prisoner's

crime may have been chosen based upon a long term hatred arising from a past wrong. Many prisoners are incarcerated on much less serious crimes than sexually violent offenses. There is no showing that, as a class, most “prisoners” are likely to engage in predatory acts of sexual violence if not confined in a secure facility as are sexually violent predators. Thus, there is a basis for treating sexually violent predators differently from prisoners.

The SVP escape statute is rationally related to the purpose of the legislation. The civil SVP laws have the twin goals of treatment and incapacitation of the mentally ill. *Id.* at 33. For both of these goals to be accomplished, the State must know the whereabouts of the predator. 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. Predators who have obtained a conditional release are no longer bound by locked doors and secured walls; the penalties for escape act as a deterrent to any conditionally released predator contemplating evading the court’s

authority by leaving the state or by failing to abide by certain restrictions placed upon him. In short, RCW 9A.76.115 encourages a predator to comply with a court's involuntary commitment order; this means that the predator will be available for the treatment offered to him. Even if he refuses to cooperate with treatment, public safety is promoted by encouraging predators to stay where they are supposed to be under the terms of their commitment order. Treatment of the mentally ill and protection of the public are valid government objectives, and the rational basis test is satisfied. *See also People v. Runge*, 346 Ill. App. 500, 509, 805 N.E. 2d 632, 639 (2004) (finding no equal protection violation for statute criminalizing escape by persons involuntarily committed under SVP laws, but not escapes committed by persons involuntarily committed for other reasons).

Defendant has failed to meet his burden of proving RCW 9A.76.115 violates equal protection.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to uphold the trial court's determination that defendant has failed to meet his burden of showing the unconstitutionality of the SVP escape statute, RCW 9A.76.115. The State asks this court to remand the case to the trial court so that the prosecution of the attempted escape may proceed.

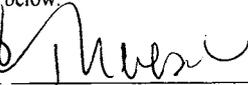
DATED: August 15, 2008.

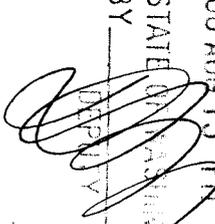
GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

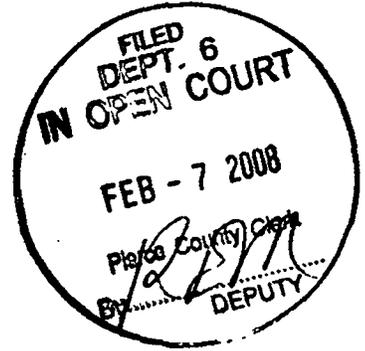
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-15-08 
Date Signature

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APPENDIX “A”

Findings of Fact and Conclusions of Law



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-04063-7

vs.

MATHEW JOHN JAGGER,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: MOTION TO DISMISS

Defendant.

THIS MATTER having come on before the Honorable Rosanne Buckner, Judge of the above entitled court, for a hearing on the defendant's motion to dismiss on the 10th day of January, 2008, the defendant having been present and represented by attorney MELANIE L. MACDONALD and LAURA S. CARNELL, and the State being represented by Deputy Prosecuting Attorney STEPHEN M. PENNER, and the court having heard the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

That on August 30, 2006, an Information was filed charging the defendant with ATTEMPTED ESCAPE OF A SEXUALLY VIOLENT PREDATOR, contrary to RCW 9A.28.020 and RCW 9A.76.115, and alleged to have been committed on July 21, 2006.

**POOR QUALITY
ORIGINAL**

06-1-04063 7

II.

That on November 6, 2007, the defendant filed a motion to dismiss the charge, arguing that RCW 9A.76.115 was unconstitutional.

III.

That on January 10, 2007, a hearing was held during which the Court heard argument from the defendant and the State regarding the defendant's motion to dismiss.

IV.

At the time of the alleged offense herein, July 21, 2006, the Sexually Violent Predator Escape statute, RCW 9A.76.115, stated in its entirety:

§ 9A.76.115. Sexually violent predator escape

(1) A person is guilty of sexually violent predator escape if:

(a) Having been found to be a sexually violent predator and confined to the special commitment center or another secure facility under court order, the person escapes from the secure facility;

(b) Having been found to be a sexually violent predator and being under an order of conditional release, the person leaves or remains absent from the state of Washington without prior court authorization; or

(c) Having been found to be a sexually violent predator and being under an order of conditional release, the person:

(i) Without authorization, leaves or remains absent from his or her residence, place of employment, educational institution, or authorized outing;

(ii) tampers with his or her electronic monitoring device or removes it without authorization; or

(iii) escapes from his or her escort.

(2) Sexually violent predator escape is a class A felony with a minimum sentence of sixty months, and shall be sentenced under RCW 9.94A.712.

V.

At the time of the alleged offense herein, July 21, 2006, the Escape in the First Degree statute, RCW 9A.76.110, stated in its entirety:

06-1-04063-7

§ 9A.76.110. Escape in the first degree

(1) A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the first degree is a class B felony.

VI.

At the time of the alleged offense herein, July 21, 2006, the Escape in the Second Degree statute, RCW 9A.76.120, stated in its entirety:

§ 9A.76.120. Escape in the second degree

(1) A person is guilty of escape in the second degree if:

(a) He or she knowingly escapes from a detention facility; or

(b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody; or

(c) Having been committed under chapter 10.77 RCW for a sex, violent, or felony harassment offense and being under an order of conditional release, he or she knowingly leaves or remains absent from the state of Washington without prior court authorization.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the second degree is a class C felony.

VII.

At the time of the alleged offense herein, July 21, 2006, the Escape in the ~~Second~~ ^{Third} Degree statute, RCW 9A.76.130, stated in its entirety:

§ 9A.76.130. Escape in the third degree

(1) A person is guilty of escape in the third degree if he escapes from custody.

(2) Escape in the third degree is a gross misdemeanor.

VIII.

At the time of the alleged offense herein, July 21, 2006, the sentencing statute governing the maximum penalty for Escape in the First, Second and Third Degree, RCW 9A.20.021, stated in its entirety:

§ 9A.20.021. Maximum sentences for crimes committed July 1, 1984, and after

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

CONCLUSIONS OF LAW

That the Court has jurisdiction of the parties and the subject matter.

06-1-04063-7

II.

That imposition of punishment under RCW 9A.76.115 punishes the discrete act of escaping from civil commitment as a sexually violent predator.

III.

That imposition of punishment under RCW 9A.76.115 does not punish a defendant for the earlier, predicate crimes which formed part of the basis for the civil commitment as a sexually violent predator.

IV.

That imposition of punishment, including criminal confinement, under RCW 9A.76.115 does not transform the underlying civil commitment into a criminal detention.

V.

That criminalizing the escape from civil commitment of persons committed for being sexually violent predators, while not criminalizing escape of other civilly committed persons, is rationally related to the legitimate state interest of protecting the public from those individuals judicially determined to be highly likely to commit future acts of sexual violence if not treated.

VI.

That therefore RCW 9A.76.115 does not violate the constitutional prohibition against *ex post facto* laws.

VII.

That therefore RCW 9A.76.115 does not violate the constitutional prohibition against double jeopardy.

06-1-04063-7

VIII.

That therefore RCW 9A.76.115 does not violate the constitutional requirement for equal protection of the laws.

IX.

That, accordingly, the defendant's motion to dismiss is denied.

DONE IN OPEN COURT this 7 day of February, 2008.


JUDGE

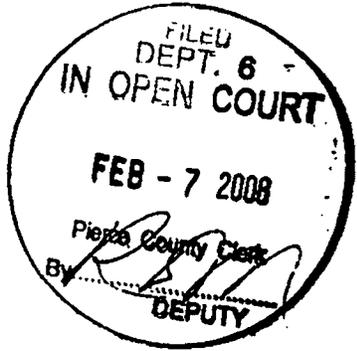
Presented by:


STEPHEN M. PENNER
Deputy Prosecuting Attorney
WSB # 25470

Approved as to Form:



Attorney for Defendant
WSB # 21860



Approved as to Form:



Attorney for Defendant
WSB # 16802

EP

APPENDIX “B”

RCW 9.94A.712

§ 9.94A.712. Sentencing of nonpersistent offenders. (Effective until August 1, 2009.)

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);

committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) (a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c) (i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the

offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6) (a) (i) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(ii) If the offense that caused the offender to be sentenced under this section was an offense listed in subsection (1)(a) of this section and the victim of the offense was under eighteen years of age at the time of the offense, the court shall, as a condition of community custody, prohibit the offender from residing in a community protection zone.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

HISTORY: 2006 c 124 § 3; (2006 c 124 § 2 expired July 1, 2006); 2006 c 122 § 5; (2006 c 122 § 4 expired July 1, 2006); 2005 c 436 § 2; 2004 c 176 § 3. Prior: 2001 2nd sp.s. c 12 § 303.

APPENDIX “C”

RCW 9A.76.120

§ 9A.76.120. Escape in the second degree

(1) A person is guilty of escape in the second degree if:

(a) He or she knowingly escapes from a detention facility; or

(b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody; or

(c) Having been committed under chapter 10.77 RCW for a sex, violent, or felony harassment offense and being under an order of conditional release, he or she knowingly leaves or remains absent from the state of Washington without prior court authorization.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the second degree is a class C felony.

HISTORY: 2001 c 287 § 2; 2001 c 264 § 2; 1995 c 216 § 15; 1982 1st ex.s. c 47 § 24; 1975 1st ex.s. c 260 § 9A.76.120.