Proceedings Under Washington's New Statutory Scheme Providing for the Indefinite Involuntary Commitment of Sexually Violent Predators Are Civil, Not Criminal, in Nature

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The Washington State Legislature recently enacted a statutory scheme providing for the indefinite involuntary commitment of any person found to be, beyond a reasonable doubt, a "sexually violent predator."[1] A sexually violent predator is defined under the Washington Act as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."[2] " 'Predatory' means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."[3]

If and when a person is found to be a sexually violent predator, he or she is then "committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[4]

Whether proceedings under Washington's new statutory scheme are essentially civil or criminal in nature is of substantial constitutional import, both in analyzing the scheme's facial constitutionality and also in ascertaining the rights of individu-

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1. WASH. REV. CODE §§ 71.09.010-.120 (Supp. 1990-91) [hereinafter the Act]. This legislation became effective July 1, 1990.

2. *Id.* § 71.09.020(1). "Mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." *Id.* § 71.09.020(2).

3. *Id.* § 71.09.020(3).

4. *Id.* § 71.09.060(1).

als proceeded against under the statute.[5] Many constitutional protections apply in the criminal context but not in the civil context.[6] Still other constitutional precepts, wholly applicable in the criminal arena, have only limited applicability in the civil context.[7] As the following analysis shows, proceedings under the Act must be regarded as civil in nature.

Whether a particular proceeding is characterized as civil or

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5. The Washington Supreme Court is presently considering on direct review the consolidated cases of two of the first individuals committed under the Act. *In re* Young, No. 57837-1 (Wash. filed Feb. 4, 1991). In these first cases to reach the supreme court under the new law, the court is expected to rule on whether proceedings pursuant to the statutory scheme are essentially civil or criminal in nature.

6. *See, e.g.*, United States v. Ward, 448 U.S. 242, *reh'g denied*, 448 U.S. 916 (1980) (discussing the distinction between civil and criminal penalties). For example, the double jeopardy doctrine protects an accused from being twice put in jeopardy for the same offense. Beckett v. Department of Social & Health Serv., 87 Wash. 2d 184, 550 P.2d 529 (1976), *overruled on other grounds*, 100 Wash. 2d 832, 676 P.2d 444 (1984); Dunner v. McLaughlin, 100 Wash. 2d 832, 676 P.2d 444 (1984). The doctrine does not apply, however, "unless the sanction sought to be imposed in the second proceeding is punitive in nature so that the proceeding is essentially criminal." *Beckett*, 87 Wash. 2d at 188, 550 P.2d at 523; *see also* Helvering v. Mitchell, 303 U.S. 391 (1938).

As another example, the prohibition against ex post facto laws precludes any law that: (1) "aggravates a crime or makes it greater than it was when committed"; (2) "permits imposition of a different or more severe punishment than was permissible when the crime was committed"; (3) changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed"; or (4) "is made retroactive and disadvantages the offender." State v. Edwards, 104 Wash. 2d 63, 70-71, 701 P.2d 508, 512 (1985). The constitutional prohibition against ex post facto laws applies, however, only to laws inflicting criminal punishment. Zahradnik v. Department of Licensing, 31 Wash. App. 771, 775, 644 P.2d 742, 744 (1982); Johnson v. Morris, 87 Wash. 2d 922, 927, 557 P.2d 1299, 1304 (1976).

7. For example, the Fifth Amendment privilege against self-incrimination provides that no person "shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. The privilege "not only permits a person to refuse to testify against himself at a criminal trial at which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, . . . [to the extent that] the answers might incriminate him in future criminal proceedings." Allen v. Illinois, 478 U.S. 364, 368 (1986) (quoting Minnesota v. Murphy, 465 U.S. 420, 426, *reh'g denied*, 466 U.S. 945 (1984)). The Washington State Constitution provides: "No person shall be compelled in any criminal case to give evidence against himself. . . ." WASH. CONST. art. 1, § 9. This state constitutional provision has been construed to be "identical in scope to the Fifth Amendment." State v. Wheeler, 108 Wash. 2d 230, 240, 737 P.2d 1005, 1010 (1987).

As another example, due process in the criminal context in Washington state requires that a jury be unanimous in its verdict. WASH. CONST. art. 1, § 21; State v. Stephens, 93 Wash. 2d 186, 190-91, 607 P.2d 304, 306 (1980). Yet in civil proceedings in this state, including civil commitment proceedings, due process guaranties are satisfied when a verdict is reached by 10 members of a 12-member jury, or by 5 members of a 6-member jury. WASH. REV. CODE § 4.44.380 (1989); Dunner v. McLaughlin, 100 Wash. 2d 832, 844-45, 676 P.2d 444, 451-52 (1984).

criminal is first of all a question of statutory construction.[8] The Washington legislature has characterized proceedings pursuant to the Act as "involuntary commitment" proceedings;[9] second, the legislature has explained the Act's necessity by contrasting it to the state's more general involuntary civil commitment act;[10] and finally, the legislature has located the Act in a new chapter of Title 71 of the *Revised Code of Washington*, the title for "Mental Illness." Accordingly, the legislature clearly has indicated that proceedings under this Act should be regarded as civil, not criminal, in nature. The legislature thus intended that when the state proceeds against a person as an alleged sexually violent predator, it is "to proceed in a nonpunitive, noncriminal, manner,"[11] "without regard to the procedural protections and restrictions available in criminal prosecutions."[12]

A determination of the Washington legislature's intent does not complete the analysis, however. When the party challenging the legislation provides "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 be civil, the proceedings must be considered criminal in nature.[13] As a matter of law, a respondent challenging the Act on such a basis cannot even begin to meet that level of proof, given the United States Supreme Court's 1986 holding in *Allen v. Illinois*.[14] In *Allen*, the Court made it clear that a statutory scheme similar to Washington's, which provides for the indefinite involuntary commitment of persons found to be sexually dangerous, is properly regarded as civil, not criminal, in nature.[15]

In *Allen*, a person who was committed under the Illinois Sexually Dangerous Persons Act claimed that proceedings under that Act must be regarded as criminal for purposes of a criminal defendant's Fifth Amendment guarantee against compulsory self-incrimination.[16] The Court rejected Allen's con-

8. *Allen*, 478 U.S. at 365; United States v. Ward, 448 U.S. 242, 248, *reh'g denied*, 448 U.S. 916 (1980).

9. WASH. REV. CODE § 71.09.080 (Supp. 1990-91).

10. *Id.* § 71.09.010. Proceedings pursuant to RCW 71.05 are civil in nature. MPR 3.4(a) (1991); *Dunner*, 100 Wash. 2d at 844-45, 676 P.2d at 451-52.

11. *Allen*, 478 U.S. at 368.

12. *Id.* (quoting *Ward*, 448 U.S. at 249).

13. *Id.* at 369; *Ward*, 448 U.S. at 248-49.

14. 478 U.S. 364 (1986).

15. *Id.* at 375.

16. *Id.* at 370.

tention, and held that proceedings under the Illinois scheme are civil in nature. The Court explained its rationales as follows:

> Under the Act, the State has a statutory obligation to provide "care and treatment for [persons adjudged sexually dangerous] designed to effect recovery," in a facility set aside to provide psychiatric care. And "[i]f the patient is found to be no longer dangerous, the court shall order that he be discharged." While the committed person has the burden of showing that he is no longer dangerous, he may apply for release at any time. In short, the State has disavowed any interest in punishment [of those it commits under the statutory scheme], provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of "the traditional aims of punishment—retribution and deterrence."[17]

In all aspects found critical in *Allen*, Washington's new legislation is indistinguishable from Illinois' Sexually Dangerous Persons Act. Specifically, Washington's new law: (1) disavows any interest in punishing those committed under its provisions, as such persons are committed involuntarily only "until such time as the [given] person's mental abnormality or personality disorder has so changed that the person is safe to be at large;"[18] (2) provides treatment for those committed;[19] and (3) establishes a procedure by which committed persons may be released after only a brief time in confinement, as such persons may petition for release at any time.[20] *Allen* thus indicates that Washington's new enactment must be regarded as essentially civil in nature. All case law discussing similar legislation that has existed in this state compels the same conclusion.[21]

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17. *Id.* at 369-70 (citing the Illinois Sexually Dangerous Persons Act, ILL. REV. STAT. ch. 38, para. 105-09 (1985)). The *Allen* court also made it clear that proceedings under the Illinois scheme are not transformed into proceedings of a criminal nature simply because: (1) a person cannot be proceeded against under the state's legislation unless he has previously been charged criminally; (2) proceedings pursuant to the legislation are accompanied by many procedural safeguards usually found in criminal trials; or (3) a person committed pursuant to the legislation may be housed and treated in a facility that also houses and treats criminal convicts. *Allen*, 478 U.S. at 371-72.

18. WASH. REV. CODE §§ 71.09.090(2), -.100 (Supp. 1990-91).

19. *Id.*

20. *Id.*

21. Washington's sexual psychopathy law, presently applicable only to persons whose "crimes or offenses [were] committed before July 1, 1984," WASH. REV. CODE ch.

The Act is presently being challenged on multiple constitutional grounds in the first cases to reach the Washington Supreme Court.[22] Many of these challenges are ultimately premised on the Act's allegedly criminal nature. These particular challenges to Washington's sexual predator legislation will fail if the court concludes, appropriately, that proceedings under this new scheme are of a civil, not criminal, nature.

71.06.005 (1989), provides for indefinite involuntary commitment for treatment of sexually dangerous persons. *See* WASH. REV. CODE ch. 71.06 (1989), *repealed prospectively by* 1984 Wash Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)). In discussing that legislation, Washington state's appellate courts have made it clear, both implicitly and expressly, that those proceedings are civil, not criminal, in nature. *See, e.g.*, State v. Huntzinger, 92 Wash. 2d 128, 133, 594 P.2d 917, 919 (1979) ("[T]he existence of the procedures for determining sexual psychopathy in itself indicates legislative recognition of an alternative to criminal punishment through segregation, treatment and rehabilitation of sexual psychopaths."); State v. Gann, 36 Wash. App. 516, 522, 675 P.2d 1261, 1265 (1984) ("Although the sexual psychopathy proceeding is ancillary to the criminal prosecution, . . . it involves civil rather than criminal commitment."); State v. Bunich, 28 Wash. App. 713, 718, 626 P.2d 47, 49, *review denied*, 95 Wash. 2d 1024 (1981) (explaining that the "purpose of civil commitment for sexual psychopaths is *not* punitive" and concluding that sexual psychopathy proceedings are not essentially criminal).

22. *In re* Young, No. 57837-1 (Wash. filed Feb. 4, 1991); *see supra* note 5.