Sexually Violent Predator II: The Sequel

Gregory B. Leong, MD, and J. Arturo Silva, MD

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Perhaps no class of individuals is as universally despised by society as those who commit sexually violent crimes. In the past century in the United States, we have witnessed passage of three principal sets of laws to deal with these persons. The first two, the sexual psychopath laws and mentally disordered offender laws fell into disfavor for various reasons. However, beginning with Washington state's Community Protection Act of 1990,[1] which was reproduced by other state legislatures, the era of the sexually violent predator (SVP) commenced.

The Washington SVP law provided for the civil commitment of a sexually violent predator, who was described 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 if not confined in a secure facility."[2] Mental abnormality was 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."[2]

In contrast to civil commitment schemes for mental illness, the therapeutic intent of SVP statutes is dubious at best. In the case of the Washington SVP statute, as it states in the introduction to the SVP law, "The legislature further finds that the prognosis for curing sexually violent offenders is poor."[3] Despite opposition from many mental health professionals, SVP laws provided a politically expedient solution to dealing with the despised individuals who could no longer be incarcerated because of determinate sentencing schemes. As with other laws that encroach on individual liberties, the SVP statute of the state of Kansas found its way to the U.S. Supreme Court. The Kansas statute was modeled after the aforementioned 1990 Washington law. In its 1997 ruling in *Kansas v. Hendricks*, the U.S. Supreme Court in a closely contested decision of five to four held that the Kansas SVP law was civil and did not violate due process.[4]

Individuals in Washington's SVP program have been housed in the Special Commitment Center (SCC), except for the single female committee who is housed at the state prison facility for women. The SCC has been on the grounds of the state prison system since inception, in contrast to the SVP programs of many other states. Against this backdrop, individuals in the Washington state SVP program and their attorneys have been using every imaginable avenue of attack to dismantle the program. As a result, much litigation has appeared in both the state and federal courts, including cases brought by SCC committee Andrew Brigham Young, who had one of his cases, *Seling v. Young*, heard by the U.S. Supreme Court in 2000.[5] Similar to *Kansas v. Hendricks* in 1997, the U.S. Supreme Court's January 17, 2001, ruling in *Seling v. Young* has continued to shine the legal spotlight on the SVP controversy.

The Case

Andrew Brigham Young was convicted of six rapes over three decades. One day before his scheduled release from state prison in October 1990, the State

Dr. Leong is affiliated with the Department of Psychiatry and Behavioral Sciences, University of Washington School of Medicine, Seattle, and the Center for Forensic Services, Western State Hospital, Tacoma, Washington. Dr. Silva is affiliated with the Palo Alto Veterans Health Care System, California. The views and opinions expressed in this paper are solely those of the authors and do not necessarily reflect those of the University of Washington, Washington State Department of Social and Health Services, or Department of Veterans Affairs. Address correspondence to: Gregory B. Leong, MD, Center for Forensic Services, Western State Hospital, 9601 Steilacoom Boulevard, SW, Tacoma, WA 98498-7213. E-mail: leonggb@dshs.wa.gov

filed a petition to commit Young as an SVP. In a jury trial to determine whether Young qualified as an SVP, there was contradictory testimony from mental health experts. Young's experts posited that there is no mental disorder that makes a person likely to reoffend and that there is no way to accurately predict who will reoffend. The State's expert diagnosed Young as having a personality disorder not otherwise specified (with primarily paranoid and antisocial features) and paraphilia (sexual sadism or paraphilia not otherwise specified [i.e., rape]). The State's expert further concluded that it was more likely than not that Young would commit further sexually violent acts. In addition to the expert witnesses, past victims of Young's crimes testified. The jury unanimously voted that Young qualified as an SVP.

Subsequently, Young and another SCC committee challenged their SCC commitments in state court based on double jeopardy and *ex post facto* claims. The Washington State Supreme Court rejected these claims in *In re Young* because the SVP commitment law was civil.[6] Fellow SCC committee Richard Turay attempted to challenge the SVP law in federal district court, alleging unconstitutional conditions of confinement and inadequate treatment at the SCC.[7] In 1994, a jury concluded that the SCC failed to provide constitutionally adequate mental health treatment. The court appointed a special master to monitor progress of bringing the SCC program up to constitutional standards. The SCC currently operates under an injunction, with the Turay case still active in federal district court at the time of the *Seling v. Young* decision.[7] Turay also challenged his commitment as an SVP, claiming, among other things, that the conditions of confinement at the SCC rendered the SVP law punitive "as applied" to him, in violation of the Double Jeopardy Clause. The Washington State Supreme Court rejected Turay's claim in *In re Turay* based on its decision in the aforementioned *In re Young* case and the U.S. Supreme Court decision in *Kansas v. Hendricks*, given the similarity of the Kansas and Washington SVP laws.[8]

The instant case started in 1994, after Young's failed challenge of his SCC commitment in state court. Young filed a writ of *habeas corpus* against the superintendent of the SCC (Seling). The federal district court granted the writ based on substantive due process violations, as the Washington law was viewed as criminal and not civil and therefore the double-jeopardy and *ex post facto* constitutional protections applied. During the ensuing appeal by the State, the U.S. Supreme Court decided *Kansas v. Hendricks*, which held that the Kansas SVP law did not violate substantive due process requirements. As a result, the Ninth Circuit Court of Appeals remanded Young's case to the federal district court for reconsideration in light of *Kansas v. Hendricks*. On remand, the district court denied the writ. Young again appealed, and the Ninth Circuit reversed and remanded in part and affirmed in part.[9] The court ruled that Young's confinement did not violate substantive due process, procedural due process, or equal-protection constitutional guarantees, and Young did not seek review of these in the present U.S. Supreme Court case.

The issue for the U.S. Supreme Court became the Ninth Circuit's reversal of the district court's determination that the Washington SVP law was civil. If the law were not civil, then Young would have potential double-jeopardy and *ex post facto* claims. The Ninth Circuit reasoned that the actual conditions of the SCC commitment could divest a facially valid statute of its civil nature. After review of Young's claims, which included, among other things, the location of the SCC within the grounds of a state prison facility, the implementation of excessive security measures, the videotaping of treatment sessions, the withholding of privileges if the committee refused treatment, and the lack of certified sex offender treatment providers, the Ninth Circuit concluded that if Young's claims were proved, then the SVP law as applied would be punitive. The Ninth Circuit remanded the case back to the district court for a hearing to determine whether the conditions at the SCC rendered the SVP law punitive as applied to Young. The U.S. Supreme Court accepted the petition for a writ of *certiorari*, to resolve the conflict now arising between the Ninth Circuit's ruling and the Washington Supreme Court's ruling.

The Majority Opinion

Justice O'Connor authored the opinion with seven of the remaining justices signing the ultimate order. The analysis of the Ninth Circuit's interpretation of Young's as-applied challenge became a focal point for the case. The Court recognized that, although serious, Young's claims of overly restrictive confinement, inadequate treatment, and what amounted to indefinite commitment were similar to those raised in *Kansas v. Hendricks*. The Court analyzed Young's claims of double-jeopardy and *ex post*

facto violations under the assumption that the Washington law was civil. The Court agreed with the State that an as-applied analysis would be unworkable, because such an analysis would never conclusively resolve whether a particular scheme was punitive and, by extension, whether the double-jeopardy and *ex post facto* claims were valid. The Court cautioned that Young's as-applied challenge "would invite an end run around the Washington Supreme Court's decision," because the Washington SVP statute was civil for purposes of the present case, and that whether the Washington SVP law was criminal or civil was not at issue. The Court acknowledged that the SCC's conditions of confinement were not addressed, and questions about the SCC's conditions and the treatment regimen belonged in the Washington state court system.

The Court reversed the Ninth Circuit's ruling and remanded the case for further proceedings.

Other Opinions

Justices Scalia and Souter wrote a concurring opinion and Justice Thomas wrote an opinion concurring in the judgment. Considered together, the opinions of these three justices agreed with the ultimate opinion to reverse the Ninth Circuit's ruling but offered less support for any potential challenge by SVPs. Justice Stevens authored the sole dissenting opinion and challenged the majority's assumption that the SVP law was civil. He was unconvinced that Washington's SVP Act was actually civil, given Young's allegations.

Discussion

The near unanimous vote of 8 to 1 suggests strong support for the SVP law by the U.S. Supreme Court. This decision must be contrasted to the narrow five-to-four majority vote on the previous SVP case of *Kansas v. Hendricks*. On closer inspection, the vote could be considered to be six justices wanting to leave the door open for challenges to SVP commitments (the five signing only the majority opinion and the one dissenter) and three others wanting to limit such challenges. In other words, the Court has not ruled out the possibility of further legal consideration regarding the constitutionality of SVP statutes. Although *Seling v. Young* attempted to resolve the divergent opinions on the constitutionality of Washington's SVP statute as a result of conflicting opinions by the Ninth Circuit and Washington Supreme Court, no new issues were raised, and its impact was essentially limited to a technical legal discussion involving appropriate application of the as-applied claim.

Regarding the state of Washington, birthplace of SVP laws, it is clear but ironic that the State had given relatively little thought to implementing SVP legislation. Consequently, the SCC has recently become one of the more frequent, if not the most frequent, topics of local public debate. This is not surprising, because the SVP issue is raising increasing concerns among the general public who fear an anticipated release of an SCC committee into the community. The SVP treatment program envisioned a gradual transition into the community upon attainment of clinical goals. The object of controversy has been the attempted establishment of halfway houses to allow this transition. Communities have reacted negatively to the potential placement of SVPs into a halfway house located in their backyard. To comply with the federal district court's orders in the Turay case, transitional housing is required. So desperate is the state of Washington to operate such transitional housing to prevent sanction by the federal district court, the current impetus is for establishing the halfway house adjacent to the SCC on McNeil Island.[10]

As for the future of the SVP program in Washington, the legislature has only begun to realize that the SVP program is not a guarantee of indefinite confinement and is currently in the process of drafting legislation designed to incapacitate the SVP through the criminal justice system and not the mental health system. In addition, progress toward implementing the transitional housing has been hampered by a new development. One of the few SVPs to have been placed on conditional release status to live with his family in the community has surfaced in the local news. This SVP has been returned to the SCC to await further disposition of his case as a result of allegedly violating the terms of his conditional release by having an extramarital affair.[11]

Seling v. Young clearly indicated the U.S. Supreme Court's extreme reluctance to be the decision maker about what constitutes a civil or criminal scheme for a particular SVP statute and reserved that decision for the State. In addition, *Seling v. Young* was a reaffirmation of *Kansas v. Hendricks*. Nonetheless, the U.S. Supreme Court appears uneasy in its two prior SVP decisions and in April 2000 agreed to place a third SVP case on the next term's docket.[12,13] Like

the fictional serial slasher who cannot be vanquished and reappears in subsequent films, the SVP debate has several more sequels to *Kansas v. Hendricks* waiting on the legal horizon.

References

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