

## Are Special Sex Offender Sentencing-Alternative Evaluations Exempt From Public Disclosure Because They Contain “Health Care Information?”

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### Ruling Hinges On Distinction Between Forensic Evaluations And Health Care

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In *Doe G v. Dep’t of Corr.*, 410 P.3d 1156 (Wash. 2018), the *pro se* petitioner Donna Zink and the Washington Department of Corrections (DOC) sought the reversal of a published court of appeals decision that affirmed the trial court ruling in favor of the respondents, John Does G, I, and J (John Does). The Supreme Court of Washington considered whether special sex offender sentencing-alternative (SSOSA) evaluations contain health care information and should therefore be exempt from disclosure under the state’s Public Records Act (PRA) (Wash. Rev. Code § 42.56.360(2) (2014)).

The Supreme Court of Washington held that the SSOSA evaluations were improperly enjoined from public disclosure because they did not contain “health care information” within the meaning of Wash. Rev. Code § 42.56.360(2) and because they were forensic examinations done for the purpose of aiding the court in sentencing of sex offenders and did not directly relate to health care.

#### Facts of the Case

Sex offenders who are eligible and request a SSOSA must undergo an evaluation to aid the court

in determining whether the offender is amenable to treatment and to assess the offender’s relative risk to the community. In July 2014, Donna Zink sent a PRA request to the DOC for all SSOSA evaluations since 1990. The respondents (collectively John Does), comprising two former level I sex offenders who had been relieved from the duty to register and one compliant level I sex offender, sued to prevent the DOC from disclosing their evaluations. The offenders also sought class certification to represent all compliant level I sex offenders who had been evaluated for a sentencing alternative since 1990. The trial court granted a temporary restraining order preventing the DOC from releasing any SSOSA evaluations of level I sex offenders. On November 6, 2015, the trial court entered summary judgment in favor of the plaintiffs, ruling that the SSOSA evaluations of level I sex offenders were exempt from disclosure and prevented the DOC from releasing the SSOSA evaluations of level I sex offenders. The DOC and Ms. Zink both appealed the trial court’s summary judgment ruling.

The court of appeals affirmed the trial court order enjoining the disclosure of level I sex offender SSOSA evaluations. The court explained that the SSOSA evaluations contain confidential health care information because they include a diagnosis of the offender’s mental conditions, results of physical and psychological tests, and assessments of amenability to treatment, and that, if not redacted, they are exempt from PRA disclosure under Wash. Rev. Code § 42.56.360(2). The Washington DOC and Ms. Zink sought reversal of the court of appeals decisions and inspired the Supreme Court of Washington to review all agency actions taken or challenged under the PRA *de novo*.

#### Ruling and Reasoning

The primary question in this case is whether SSOSA evaluations are exempt from public disclosure under the PRA because they contain “health care information.” The Supreme Court of Washington reversed the court of appeals orders and held that SSOSA evaluations are not exempt under the PRA because they do not contain “health care information.”

The court reasoned that, pursuant to the PRA, courts are to recognize that free and open examination of public records is in the public interest, even if it might cause inconvenience or embarrassment to

public officials or others. A “public record” is virtually any record related to the government’s conduct or performance. The court clarified that the legislature enacted the PRA to ensure broad disclosure of public records unless the records fall within a specific statutory exemption, such as “health care information” under the Wash. Rev. Code § 70.02, the Uniform Health Care Information Act.

One pertinent inquiry was whether a SSOSA evaluation “directly relates to a patient’s health care” within the meaning of Wash. Rev. Code § 70.02.010(16) (2014), which defines “health care information” as information that identifies or can readily be associated with the identity of a patient and directly relates to the patient’s health care. “Directly” means purposefully or decidedly and straight to the mark, which indicates that the legislature chose to narrow its definition of health care information to only include information for the direct purpose of health care. The court reasoned that a SSOSA evaluation is not directly related to health care because its purpose is to assist the court in determining whether the offender should be granted an alternative sentence instead of jail time and is a forensic examination, not a medical one. Unlike typical health care evaluations, forensic evaluations do not focus on the individual’s health and are not for the purpose of treatment; therefore, they are not subject to the same privacies and privileges as medical evaluations. SSOSA evaluations are made for the purpose of publishing the results to the court, to aid the court in deciding whether the offender is amenable to treatment, and whether a SSOSA will serve public safety interests and the goal of offender rehabilitation. Unlike typical health care evaluations that enjoy the doctor–patient privilege and focus on the best interest of the patient, SSOSA evaluations are made with the understanding that they will be shared with others and focus on the best interest of the court, the community, the victim, and the offender. Because the SSOSA is a sentencing alternative, the public’s involvement plays a significant role. The court emphasized that the public must be able to scrutinize the sentences given to offenders to ensure the court is following the sentencing statutes and is not granting or denying SSOSA sentences inappropriately.

The SSOSA evaluations must be performed by a certified sex offender treatment provider and must also include the evaluator’s diagnostic impressions and a proposed treatment plan. But the court points

out that the provider who completed the offender’s evaluation is prohibited from providing subsequent treatment to the offender, except in limited circumstances. This indicates that the legislature’s intent was to distinguish the forensic stage (the SSOSA evaluation), which lacks the doctor–patient privilege, from the potentially medical stage (the SSOSA alternative itself), which carries out the proposed treatment plan and may include a doctor–patient privilege. The court said that SSOSA evaluations involve legal determinations, not medical ones, and therefore do not contain “health care information” and are not exempt from public disclosure.

#### Dissent

Two Justices dissented from the majority on several points. Information can still be directly related to a patient’s health care without being for the sole purpose of obtaining treatment. The use of SSOSA evaluations for legal determinations does not exclude them from directly relating to health care. Neither the PRA nor Wash. Rev. Code § 70.02 requires the existence of a doctor–patient privilege to protect health care information from disclosure. The legislature did not intend to separate the “forensic stage” from a “potentially medical stage,” stating “it is the public policy of this state that a patient’s interest in the proper use and disclosure of the patient’s health care information survives even when the information is held by persons other than health care providers” (*Doe*, p 209, citing the legislative history for Wash. Rev. Code § 70.02.005).

#### Discussion

This case highlights potential complications that may arise while evaluating sex offenders for alternative sentencing. The court had to consider the sensitive nature of any health care information obtained from the SSOSA evaluations, as well as the importance of abiding by the PRA, particularly when the matter at hand may significantly affect public safety. The court differentiated the purpose of a SSOSA evaluation (i.e., the forensic stage) from the purpose of a SSOSA sentence (i.e., the potentially medical stage). This distinction became the foundation of the court’s rulings that SSOSA evaluations do not contain “health care information” and do not fall within any specific exemption from PRA disclosure. Ultimately, the majority held that the information in SSOSA evaluations is only incidentally related to

health care, and exempting it would be inconsistent with the PRA's broad disclosure policy.

The dissent disagreed with such a distinction and argued that forensic examinations may necessarily include health care information and should be protected with the same sensitivity despite its primary use. Neither the dissent nor the majority chose to comment on the federal HIPAA laws.

## Due Process Rights in the Sexually Violent Predator Statute

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### The Washington State Supreme Court Ruled That Commitment Based on Sexual Offense Committed as Juvenile Does Not Violate a Defendant's Due Process Rights Under the State's Sexually Violent Predator Statute

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Troy Belcher was civilly committed at the age of 26 as a sexually violent predator. Four years later, the superior court ordered him to be indefinitely committed, basing its decision on sexually violent crimes he perpetrated as a juvenile, a diagnosis of antisocial personality disorder (ASPD), and a finding that he was at high risk to reoffend. Mr. Belcher appealed, arguing that his civil commitment violated due process because a person could be indefinitely confined for an act committed as a juvenile. He also challenged the use of ASPD as the diagnostic basis for his commitment and a court expert's use of an assessment tool. In *In re Det. of Belcher*, 9 P.3d 1179 (Wash. 2017), the Washington State Supreme Court ruled that juvenile offenses can serve as the basis for continued commitment, ASPD constitutes a mental abnormality for purposes of the statute, and actuarial tools (even if not focused on sexual offenses) can be used to assist in assessing the likelihood of reoffense.

### Facts of the Case

In 1998, at the age of 13, Troy Belcher followed a 13-year-old girl from a park to the house in which she was babysitting, forced his way inside, and vaginally raped her. He was found guilty of second-degree rape and sentenced to 65 weeks of juvenile rehabilitation. Two years later, while on parole, Mr. Belcher took a 13-year-old girl through the woods, pulled down her pants, pinned her to the ground, and threatened to harm her. He was found guilty of second-degree attempted rape and sentenced to another 256 weeks. In 2004, at the age of 19 and in correctional custody, Mr. Belcher asked a fellow inmate about having his first victim killed. He was charged with solicitation to commit first-degree murder and intimidating a witness; he pleaded guilty to the latter charge and was sentenced to 27 months in prison.

The state of Washington moved to have Mr. Belcher civilly committed as a sexually violent predator (SVP), and he was formally committed in 2011 following a jury trial. In 2015, Mr. Belcher was retried to determine if he still met the criteria of an SVP pursuant to Wash. Rev. Code § 71.09.090 (2012), which states that an SVP is "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." State expert psychologist Dr. Brian Judd diagnosed Mr. Belcher with ASPD with high levels of psychopathy along with a provisional paraphilia diagnosis using DSM-5 and the Hare Psychopathy Checklist-Revised (PCL-R). Dr. Judd opined that Mr. Belcher's diagnosis was significant enough to qualify as a "mental abnormality" and that his high level of psychopathy could correlate with future offenses encompassing greater violence. Dr. Judd also utilized the Violence Risk Appraisal Guide-Revised (VRAG-R) to determine that Mr. Belcher's risk of reoffense was in the highest risk group.

The trial court found that Mr. Belcher continued to meet the definition of an SVP. Mr. Belcher appealed, arguing that his civil commitment violated due process by using a sexually violent juvenile crime as the predicate offense, by employing an imprecise psychological instrument to assess his risk of reoffense, and by labeling him with ASPD, which he argued was not a sufficient enough diagnosis to justify the SVP statute. The court of appeals affirmed the