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SCOTUS to mull accepting sex offender lawsuit

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A case began in December 2011 as a pro se proceeding by patients in the Minnesota Sex Offender Program disputing the conditions including room searches, restrictive telephone and mail policies and bad food, among other things — that's how the defendant state of Minnesota characterized it, anyway.

When the petitioners got an attorney, it got re-characterized as a matter of substantive due process.

It's now pending at the United States Supreme Court, where the justices will consider the patients' petition for certiorari. The briefs are all in now — one from the state, two from petitioners and four from amicus curiae supporting the petitioners. (See sidebar on amicus briefs.)

The constitutional issue presented to the Supreme Court is the standard of review that should apply to substantive due process claims brought by the patients. Strict scrutiny, the highest standard, as employed by Judge Donovan Frank? Or simply a reasonable relation standard, as used by the 8th U.S. Circuit Court of Appeals? And must one's conscience be shocked by the actions of the respondents, and if so, at what stage of the review?

As the petitioners' attorney, Dan Gustafson, sees it, the nub of the problem is that once a person is committed, he or she is labeled dangerous and loses the fundamental right to liberty effectively forever under the state system. The state has failed to enact a procedure to make sure that people are able to be released, Gustafson said.

The state does have a statutory reduction in custody scheme in place, but it shifts the burden of proof to the patient and it has never resulted in a release until this lawsuit was filed. "We've demonstrated that it hasn't worked for the last 25 years," Gustafson said.

The case is Karsjens, et al. v. Emily Johnson Pipe, et al. Solicitor General Alan Gilbert could not be reached for comment.

Rational relationship

Last January, the appellate court reversed the judgment issued by Frank after a six-week trial on the petitioners' facial and as-applied challenge to Minnesota's Civil Commitment and Treatment Act and the Minnesota Sex Offender Program. Frank found the program unconstitutional under a strict scrutiny standard because the plaintiffs' fundamental rights to liberty were curtailed.

Essentially, the MSOP does not evaluate patients to determine whether they have an ongoing need for confinement and does not provide treatments, Frank said. Until this lawsuit, no patient had ever been released.

But strict scrutiny was the wrong standard for a facial challenge, the appellate panel said. Strict scrutiny is the standard by which to examine fundamental rights, which are those deeply rooted in the country's history and implicit in the concept of ordered liberty. Persons who pose a significant danger to themselves or others do not have a fundamental liberty interest in physical freedom, according to Supreme Court jurisprudence, the 8th Circuit said. The state only needed to prove a rational relationship to a legitimate government purpose for a facial challenge, it continued.

And as for an as-applied challenge, the court continued, the petitioners needed to prove a violation of a fundamental right but, before getting to that question, needed to show that the state's actions were shocking to the conscience.

In his petition Gustafson told the court that the 8th Circuit's ruling conflicts with fundamental rights jurisprudence and bedrock principles of constitutional law. "Only by first diminishing the basic constitutional rights held by the Petitioners could the circuit court apply a lesser standard of review and uphold the statute," Gustafson wrote. The 8th Circuit should have framed the question as the right of all persons to be free from physical restraint, not the rights only of persons labeled dangerous.

Furthermore, Gustafson continued, the "shock-the-conscience standard" was misapplied because it is intended for individual executive branch actions and not a legislative scheme, according to County of Sacramento v. Lewis, upon which the 8th Circuit relied, and it is not a prerequisite to the question of whether a fundamental right is impaired by legislation.

"Petitioners could not locate another federal appellate court or state court of last resort that interprets Lewis to apply to substantive due process challenges to systemic and persistent implementation of legislative scheme," Gustafson wrote.

The case differs from Minnesota Supreme Court caselaw and other state and federal decisions, Gustafson said. In 1994 in In Re Blodgett, the Minnesota Supreme Court said that the civil commitment statute implicates fundamental rights. In 1996 it reached the same conclusion in In re Linehan.

The petitioners also argue that their case is an ideal vehicle for this important constitutional question given the nature of the liberty right, the magnitude of the violation and the number of people harmed by the violation.

"A clear standard of review needs to be announced now before the issues presented here arise again," petitioners continue, noting that there are two cases pending in the 8th Circuit alone.

Ordered liberty

The state, represented by Solicitor General Alan Gilbert, responds that there is no conflict among circuit courts of appeals or state supreme courts that warrants review of the issue and that there is no need for the court to revisit it in light of well-established case law.

The Supreme Court has never applied strict scrutiny to substantive due process claims challenging civil commitment statutes, the state argues. To the contrary, it has applied a "reasonable relation" test four times, most recently in 2001.

The state also says the 8th Circuit was correct because the Supreme Court has said that substantive due process only protects fundamental rights, defined as those deeply rooted in the nation's history and implicit in the concept of ordered liberty. It relies on Kansas v. Hendricks, a 1997 case where the court said involuntary civil confinement of a "limited subclass" of dangerous persons is not contrary to the concept of ordered liberty. The Hendricks court said that "the liberty interest is not absolute" and some restraints are necessary for the common good. The state points out that the "limited subclass of committed dangerous persons" consists of only 4 percent of all the registered sex offenders in Minnesota.

"Petitioners' erroneous concept of liberty improperly results in a court imposing its own 'policy preferences' and usurping 'public debate and legislative action,' [cite omitted] regarding Minnesota's commitment law, which is precisely what occurred at the district court in this case," respondents continue.

The state also argues that the petitioners' argument that the shock-the-conscience standard is inapplicable is simply groundless. The 8th Circuit properly treated the as-applied claim to be a challenge to executive action that is subject to the shocks-the-conscience standard under Lewis, the state argued.

Continuing, the state points out that the Minnesota Supreme Court has ruled that the sex offender statute is not punitive and that substantial deference is due to a state's determination

Furthermore, the Supreme Court has recognized that it is for the state to decide whether commitment proceedings are sufficient and appropriate, the state continues.

It also provides the Supreme Court with a detailed explanation of the reduction in custody petition process, arguing that it provides the necessary periodic review and reevaluation of the need for continued confinement.

MSOP unconstitutional, say amicus curiae

Four amicus curiae briefs from a spectrum of philosophical points of view have been submitted by friends of the court in Karsjens, et al. v. Emily Johnson Piper, et al. But they all want the Supreme Court to reverse the 8th Circuit, which didn't have a problem with the program, which had been found unconstitutional by Judge Donovan Frank

A group of 26 professors of law or related subjects has submitted a brief written by Mitchell Hamline Professor Eric Janus and Minneapolis attorney Richard D. Snyder. The fatal flaw in the MSOP program is that no one gets out, Janus said.

“The core of the case is that the state set up what it said was going to be a civil commitment program. And the core definition of that is people get out, and that’s exactly what is missing in the Minnesota program. It’s not just missing here or there, it’s systemically missing,” Janus wrote.

The Cato Institute, known as a libertarian think tank and an advocate for limited government, is another friend of the court. Its brief argues, “Sex-offender laws have bored a hole in the nation’s constitutional fabric. As state and federal governments expand that hole — threatening to swallow other rights and other’s rights — this Court should intervene.”

Also weighing in are criminology scholars and the Fair Punishment Project of Harvard Law School, as well as the Association for the Treatment of Sexual Abusers.

The Fair Punishment Project writes that the commitment statute is a punitive scheme that has responded excessively to “moral panic.”

The Association for the Treatment of Sexual Abusers promotes sex offender research and treatment. It argues that granting review is necessary to take account of important advances in the empirical study of rates of recidivism among sexual offenders; effective assessment treatment, and management of sexual offenders; and factors that influence the effectiveness of treatment interventions.