

OP. NO. 03-089

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS (CRIMINAL PROSECUTIONS).

Entry on Child Abuse and Neglect Central Registry of name of individual acquitted of criminal charges related to child abuse and neglect does not constitute double jeopardy violation.

The Honorable Mark L. Cole
Member, House of Delegates
December 1, 2003

Issue Presented

You ask whether local departments of social services may enter on the Child Abuse and Neglect Central Registry the name of an individual acquitted of criminal charges related to child abuse and neglect.

Response

It is my opinion that entry on the Child Abuse and Neglect Central Registry of the name of an individual acquitted of criminal charges related to child abuse and neglect does not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

Background

You have been advised that local departments of social services are entering on the Child Abuse and Neglect Central Registry the names of individuals who have been acquitted of criminal charges related to child abuse and neglect. You question whether placing the names of such individuals in the Central Registry violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Applicable Law

The Fifth Amendment to the Constitution of the United States provides that "[no] person shall be subject for the same offense to be twice put in jeopardy of life or limb."¹ The Constitution of Virginia states that a person in a criminal prosecution "shall not ... be put twice in jeopardy for the same offense."²

The Double Jeopardy Clause guarantees protection against a second prosecution for the same offense after acquittal or conviction and protection against multiple punishments for the same offense.³ "Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors."⁴ "It is well established that the Double Jeopardy

Clause prevents the retrial of a *criminal* defendant who has been acquitted of the crime charged.⁵ The Clause protects only against the imposition of multiple *criminal* punishments for the same offense.⁶ Thus, the Double Jeopardy Clause guards against dual punishment for the same crime.

Chapter 15 of Title 63.2, §§ 63.2-1500 through 63.2-1529, comprises Virginia's child abuse and neglect laws. Section 63.2-1514(B) requires the State Department of Social Services to "maintain a child abuse and neglect information system that includes a central registry of founded complaints [of child abuse and neglect]." Section 63.2-1515 mandates that the central registry contain such information as is prescribed by regulation of the State Board of Social Services. The Board has regulated information entered on the central registry.⁷ The regulations define "central registry" as

a subset of the child abuse and neglect information system and is the name index with identifying information^[8] of individuals named as an abuser and/or neglector in founded child abuse and/or neglect complaints or reports not currently under administrative appeal, maintained by the department.^[9]

"*Founded*" means that a review of all the facts shows by a preponderance of the evidence that child abuse or neglect has occurred."¹⁰ Names of individuals appearing in founded reports of child abuse and neglect are maintained in the central registry for three or more years, depending on the severity of the complaint.¹¹ Based on a review of Virginia's child abuse and neglect laws and regulations of the State Board of Social Services, it is clear that a determination whether a complaint of abuse or neglect is founded does not constitute a criminal proceeding. The evidence required^{3/4} a preponderance of the evidence^{3/4} is a civil evidentiary requirement. A founded complaint does not result in jail time, probation, or fines, and does not require proof beyond a reasonable doubt; rather, it is a civil administrative act.¹²

While founded complaints are placed in the central registry pursuant to § 63.2-1515, unfounded complaints are maintained separately by the Department of Social Services and are only accessible to the Department and local departments for child-protective services.¹³ "The purpose of retaining these complaints or reports is to provide local departments with information regarding prior complaints or reports."¹⁴ Unfounded reports are purged from the Department's records after one year, provided that no additional reports of abuse are received regarding the subject of the complaint¹⁵ or the child.¹⁶

The Supreme Court of the United States has considered "whether and under what circumstances a civil penalty may constitute 'punishment' for purposes of double jeopardy analysis."¹⁷ "In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties."¹⁸ The threshold question is whether the legislature intended the particular successive punishment to be civil or criminal in nature.¹⁹ Second, we must evaluate the "statute on its face"²⁰ to determine whether it provides for a criminal sanction.²¹

"[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction."²² First, one must determine whether the legislature, in establishing the penalizing mechanism, indicates either expressly or impliedly a preference for one label or the other.²³ Second, where the

legislature has indicated an intention to establish a civil penalty, one must address "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."²⁴

It is clear that entering a name on the central registry is not intended as a deterrent or retribution, but is intended to be wholly civil. First, various statutes in Title 18.2 address crimes and offenses against children.²⁵ Moreover, the General Assembly has made it clear that the goal of Title 63.2 is protection of children, not punishment of their abusers. Section 63.2-1500 states:

The General Assembly declares that it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.^[26]

Similarly, Virginia courts have noted that "the purpose of the [Child Abuse and Neglect] Act is not one of punishment and correction of the alleged abuser. Rather, under this statute, the policy of protecting abused children and preventing further abuse of those children is key."²⁷

There is no evidence to suggest that the General Assembly intends the entry of a name on the central registry to be criminal. Entering a name on the central registry is a civil administrative act.

Next, we must address "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."²⁸ As noted, there is nothing to indicate that entry of a name on the central registry is punitive. A founded report of child abuse and neglect does not result in prison, probation, community service, or fines. Indeed, a long line of cases has declared that child abuse registries are not punitive.²⁹ The entry of a name on the central registry is a civil action designed to protect the children of the Commonwealth, rather than to punish abusers.

Conclusion

Therefore, it is my opinion that entry on the Child Abuse and Neglect Central Registry of the name of an individual acquitted of criminal charges related to child abuse and neglect does not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

¹U.S. Const. amend. V.

²Va. Const. art. I, § 8.

³*Brown v. Ohio*, 432 U.S. 161, 165 (1977), *cited in* *Tench v. Commonwealth*, 21 Va. App. 200, 203, 462 S.E.2d 922, 923 (1995).

⁴*Brown*, 432 U.S. at 165 (citation omitted).

⁵United States v. 1808 Diamond Springs Rd., 816 F. Supp. 1077, 1081 (E.D. Va. 1993); see also United States v. DiFrancesco, 449 U.S. 117, 129 (1980).

⁶See *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

⁷22 Va. Admin. Code 40-700-10 to 40-700-30 (West 2003).

⁸"Identifying information" includes "the name, race, sex, and date of birth of the subject." 22 Va. Admin. Code 40-700-10.

⁹*Id.*

¹⁰*Id.*

¹¹See 22 Va. Admin. Code 40-700-30 (providing for maintenance of identifying information in central registry for eighteen, seven, or three years, depending on level of founded case); see also *id.* 40-700-20 (setting forth three levels of founded cases).

¹²Section 63.2-1526(A) permits the subject of a founded complaint to petition the local department of social services to amend its determination. If the local department upholds the founded complaint, the subject is entitled to an informal conference. Va. Code Ann. § 63.2-1526(A) (LexisNexis Repl. Vol. 2003). At the informal conference, the subject may be represented by counsel and may present the testimony of witnesses, documents, and other submissions of proof. *Id.* Lastly, the Commissioner of the Department of Social Services must grant the subject of the complaint an administrative hearing, which may be appealed in accordance with the Administrative Process Act. Section 63.2-1526(A), (B).

¹³Va. Code Ann. § 63.2-1514(B) (LexisNexis Supp. 2003).

¹⁴*Id.*

¹⁵"The subject of the complaint or report is the person who is alleged to have committed abuse or neglect." *Id.*

¹⁶*Id.*

¹⁷United States v. Halper, 490 U.S. 435, 436 (1989).

¹⁸*Id.* at 447.

¹⁹See, e.g., United States v. Ward, 448 U.S. 242, 248-49 (1980) (distinguishing between civil and criminal penalties).

²⁰Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963).

²¹*Kennedy*, 372 U.S. at 168-69 (setting forth factors to consider in determining whether statutory sanction is penal).

²²*Ward*, 448 U.S. at 248; see also *Helvering*, 303 U.S. at 399 (noting that question whether I.R.C. § 293(b) imposes criminal sanction is one of statutory

construction); see, e. g., *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-37 (1972) (examining legislative history of relevant federal laws to determine whether Congress intended sanctions to be penal).

²³ See *One Lot Emerald Cut Stones*, 409 U.S. at 236-37.

²⁴ *Ward*, 448 U.S. at 248-49, see also *Flemming v. Nestor*, 363 U.S. 603 (1960) (upholding constitutionality of § 202(n) of Social Security Act, which provides for termination of benefits payable to alien deported because of subversive activity, explaining that Congress did not intend social security benefits to be used to support those deported for communist associations; sanction in § 202(n), therefore, is not punitive, but is mere denial of noncontractual governmental benefit).

²⁵ See, e.g., Va. Code Ann. § 18.2-314 (Michie Repl. Vol. 1996) (failing to secure medical attention for injured child); § 18.2-361 (Michie Repl. Vol. 1996) (crimes against nature); § 18.2-370 (Michie Repl. Vol. 1996) (taking indecent liberties with children); § 18.2-370.1 (LexisNexis Supp. 2003) (taking indecent liberties with child by person in custodial or supervisory relationship); § 18.2-371 (LexisNexis Supp. 2003) (causing or encouraging acts rendering children delinquent, abused, etc.); § 18.2-371.1 (LexisNexis Supp. 2003) (abuse and neglect of children); § 18.2-374.3 (LexisNexis Supp. 2003) (use of communications systems to facilitate certain offenses involving children); § 18.2-48 (LexisNexis Supp. 2003) (abduction with intent to extort money or for immoral purpose); § 18.2-56.2 (Michie Repl. Vol. 1996) (allowing access to firearms by children); § 18.2-61(A) (LexisNexis Supp. 2003) (rape); § 18.2-63 (Michie Repl. Vol. 1996) (carnal knowledge of child between thirteen and fifteen years of age).

²⁶ 2002 Va. Acts ch. 747, at 1108, 1197.

²⁷ *J.P. v. Carter*, 24 Va. App. 707, 726, 485 S.E.2d 162, 172 (1997).

²⁸ *Ward*, 448 U.S. at 248-49.

²⁹ See *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (registration provision of Tennessee Sex Offender Registration and Monitoring Act is not intended to be punitive); *Montalvo v. Snyder*, 207 F. Supp. 2d 581 (E.D. Ky. 2002) (classification of prisoner as sexual offender and notification of release to local authorities is remedial and not punitive or excessive); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996) (sexual offender registration is unlikely to be considered punitive as applied to juveniles); *Young v. State*, 806 A.2d 233 (Md. 2002) (registration requirement is not intended as punishment but is regulatory requirement available for protection of public); *Meinders v. Weber*, 604 N.W.2d 248 (S.D. 2000) (registration is not punitive in effect but is intended to aid law enforcement in preventing future crimes); *Commonwealth v. Gaffney*, 733 A.2d 616, 619 (Pa. 1999) (registration is designed to further nonpunitive goal of public safety); *Kellar v. Fayetteville Police Dep't*, 5 S.W.3d 402 (Ark. 1999) (Sex and Child Offender Registration Act is regulatory, civil, and nonpunitive in nature); *State v. Burr*, 598 N.W.2d 147 (N.D. 1999) (registration requirement is regulatory, not punitive, and is designed to aid law enforcement agencies); *Opinion of the Justices to the Senate*, 668 N.E.2d 738 (Mass. 1996) (registration is not designed to punish, but to regulate).