

Preserving Constitutional Issues: Three States, Three Cases, One Hard Lesson

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Late last year, three states illustrated an important point about preserving constitutional law issues for appeal: *always* be on the lookout for constitutional law issues at the *beginning* of the case. We begin in California in *Coastal Hills Rural Preservation v. Cty. of Sonoma*, 2 Cal. App. 5th 1234 (Ca. Ct. App. Aug. 31, 2016).

There, a citizens' group challenged a county's issuance of permits to a religion-based organization without an environmental impact report. On appeal, the group argued for the first time that the county had violated the state and federal establishment clauses. The court of appeals first cited the general rule that constitutional issues not raised in earlier civil proceedings are waived on appeal. But, it also noted that if the issue presents a matter of public interest, involves purely a legal question, on an uncontroverted record, and requires no factual determinations, an appellate court may consider the new theory. Finding that this high bar had not been met, the court declined to consider the constitutional issue. The Supreme Court of California subsequently granted review and transferred back to the appellate court for reconsideration in light of another case unrelated to preservation issues. On the other side of the country, the Vermont Supreme Court was more forgiving. In *In re LaBerge NOV*, 2016 WL 4582182 (Vt. Sept. 2, 2016), a family was issued a noise violation as a result of a motocross track on their property. On appeal, they argued the noise ordinance was so vague that it violated their constitutional right to due process and equal protection. The family had not submitted the constitutional issue to the trial court as part of a statement of questions, however, a requirement to preserve the issue for appeal. The supreme court found that while the technical requirements for preservation were not met, the purpose of the preservation rule was, as the issue was raised on summary judgment and the original forum was given an opportunity to and did rule on the issue prior to the supreme court's review. Texas showed no such mercy in *In re Commitment of Clemons*, 09-15-00488-CV, 2016 WL 7323298, at *1 (Tex. App. Dec. 15, 2016), *review denied* (Feb. 10, 2017). There, a man was civilly committed as a sexually violent predator (SVP) pursuant to a statute amended mere months before his trial. After the man's trial and motion for new trial but before the appeal, another trial court found the SVP statute as amended unconstitutionally

punitive. The man argued that he should be allowed to raise the constitutional issue on appeal for the first time based on Texas' rule that "a person may always obtain relief from an indictment or a conviction based on a penal statute that has been previously declared unconstitutional." The appellate court disagreed, noting that the SVP was a civil, not penal statute. **Preservation Issue:**

- Constitutional law issues are not exempt from the risk of waiver.

Tip: Don't risk waiving potentially winning constitutional issues for appeal. To avoid that, don't just assume a statute or regulation must be challenged only on its merits – it may also be vulnerable to a challenge under the state or federal constitution. Be sure to look for and raise such issues at the earliest stages of your case.

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