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Mental Illness: A Sexually Violent Predator is Punished Twice for One Crime

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"MENTAL ILLNESS": A SEXUALLY VIOLENT PREDATOR IS PUNISHED TWICE FOR ONE CRIME

Kansas v. Hendricks, 117 S. Ct. 2072 (1997)

I. INTRODUCTION

In *Kansas v. Hendricks*,[1] the Supreme Court addressed the constitutionality of detaining an individual pursuant to the Kansas Sexually Violent Predator Act (Act).[2] The Court held that the Act's civil commitment procedure meets constitutional requirements.[3] Supreme Court precedent[4] has established that civil confinement, to comport with constitutional due process requirements, requires a showing of both mental illness and dangerousness.[5] The Court held that the Act's requirement of a "mental abnormality or personality disorder" satisfies the "mental illness" standard.[6] The Court also held that under the Act, Kansas may detain an individual against his will without violating the Constitution's prohibitions on double jeopardy and ex post facto laws, despite the fact that the defendant was already serving a prison sentence when the law was enacted.[7] The Court found that the Act is a civil, nonpunitive law,[8] and therefore renders irrelevant the Constitution's Double Jeopardy[9] and Ex Post Facto Clauses,[10] which are only implicated by criminal statutes.[11]

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[1] 117 S. Ct. 2072 (1997).

[2] KAN. STAT. ANN. §§ 59-29a01 to 59-29a17 (1994 & Supp. 1996).

[3] *Hendricks*, 117 S. Ct. at 2086.

[4] Key cases include *Addington v. Texas*, 441 U.S. 418 (1979) (holding that the state has the power to confine people who are dangerous and mentally ill) and *Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding that due process requires that a civil confinee be proven both mentally ill and dangerous).

[5] *See, e.g., Foucha*, 504 U.S. at 75-76.

[6] *Hendricks*, 117 S. Ct. at 2080.

[7] *Id.* at 2085.

[8] *Id.* at 2082.

[9] "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[10] "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9.

[11] *Hendricks*, 117 S. Ct. at 2085.

This Note argues that the Court erred in upholding the constitutionality of the Act. First, this Note observes that Kansas' stated reason for enacting the law was to enable the state to confine people who are not mentally ill.[12] Therefore, this Note concludes, the Court was wrong to decide that the Act requires a showing of mental illness.[13] Second, this Note argues that the language of the Act, its legislative history, and the implementation of the Act show that punishment is a primary goal of the statute. Confining an individual who was already serving time in prison at the time the Act was passed thus violates the Double Jeopardy and Ex Post Facto Clauses of the Constitution.[14]

II. BACKGROUND

A. THE KANSAS SEXUALLY VIOLENT PREDATOR ACT

In July, 1993, a Kansas college student named Stephanie Schmidt was brutally raped and murdered by a co-worker.[15] Her attacker recently had been paroled from a rape sentence.[16] Schmidt's death sparked the formation of an Ad Hoc Sexual Offender Task Force (Schmidt Task Force),[17] which lobbied for legislation to prevent similar crimes by repeat sexual offenders.[18]

The Schmidt Task Force proposed the Kansas Sexually Violent Predator Act to the Kansas legislature,[19] which enacted it in 1994.[20] The Act creates a civil procedure by which persons found to be sexually violent predators may be committed against their will for an indefinite period of time.[21]

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[12] KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996).

[13] *See infra* section V.A.

[14] *See infra* section V.B.

[15] Petitioner's Brief at 3, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-1649); Cross-Petitioner's Brief at 4, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

[16] Cross-Petitioner's Brief at 4, *Hendricks* (Nos. 95-1649, 95-9075).

[17] Petitioner's Brief at 3, *Hendricks* (No. 95-1649); Cross-Petitioner's Brief at 4, *Hendricks* (Nos. 95-1649, 95-9075). The task force included legislators, law enforcement personnel, parole board members, probation officers, and concerned citizens, but did not include any mental health professionals. Cross-Petitioner's Brief at 4, *Hendricks* (Nos. 95-1649, 95-9075).

[18] Cross-Petitioner's Brief at 4, *Hendricks* (Nos. 95-1649, 95-9075).

[19] *Id.*

[20] KAN. STAT. ANN. §§ 59-29a01 to 59-29a15 (1994).

[21] KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996). In this preamble, the Act states:

A person found to be a sexually violent predator must have a mental abnormality or personality disorder, must be likely to engage in future sexually violent acts, and must have committed, or at least been charged with committing, a sexually violent offense.[22] "Mental abnormality" under the Act is a predisposition to commit sexually violent offenses.[23] However, the Act fails to define "personality disorder." The Act lists four categories of persons who "may meet the criteria of a sexually violent predator," and who thus would be subject to the provisions of the Act.[24] The categories are: (1) a person who has been convicted of a sexually violent offense; (2) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial; (3) a person who has been found not guilty by reason of insanity of a sexually violent offense; and (4) a person who has been found not guilty of a sexually violent

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The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

Id.

[22] A "sexually violent predator" is defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." *Id.* § 59-29a02.

[23] *Id.* A "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.*

[24] *Id.* § 59-29a03.

offense and for whom the jury answers in the affirmative to the question of whether the person has a mental disease or defect.[25]

The Act requires the custodial agency to notify the local prosecutor sixty days prior to the expected release of a prisoner who might meet the Act's criteria.[26] The prosecutor then has forty-five days to file a petition in state court seeking the prisoner's involuntary commitment.[27] In the event such a petition is filed, the state district court must decide whether there is probable cause to believe that the person named in the petition is a sexually violent predator.[28] If the court finds probable cause, the prisoner is transferred to a secure facility to undergo a professional psychiatric examination.[29] If the examiner determines that the subject is a sexually violent predator, a trial is held for the purpose of confirming such a finding beyond a reasonable doubt.[30] A person found to be a sexually violent predator is committed indefinitely, until the mental abnormality or personality disorder has ceased to cause the person to be dangerous.[31]

The Act includes a number of procedural safeguards: any person tried subject to the Act is guaranteed the assistance of counsel; he has the right to be examined by a qualified expert; he has the option of requesting a trial by jury.[32] Furthermore, the status of a person committed under the Act is reviewed annually by a qualified professional, and then by the court, to de-

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[25] *Id.*

[26] KAN. STAT. ANN. § 59-29a03 (1994). The notification period has since been changed to 90 days, and the agency is now required to notify the attorney general. KAN. STAT. ANN. § 59-29a03 (1994 & Supp. 1996).

[27] KAN. STAT. ANN. § 59-29a04 (1994). The Act now calls for the attorney general to file a petition within 75 days. KAN. STAT. ANN. § 59-29a04 (1994 & Supp. 1996).

[28] *Id.* § 59-29a05. At the probable cause hearing, the charged person has the right to be represented by counsel; to present evidence; to cross-examine witnesses; and to view and copy all petitions and reports in the court file. *Id.*

[29] *Id.* The Act provides "for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination." *Id.*

[30] *Id.* § 59-29a07. The Act states, "[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. . . . If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release." *Id.*

[31] *Id.* The Act provides that "the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." *Id.*

[32] *Id.* § 59-29a06.

termine whether continued detention is warranted.[33] A review also may occur upon petition by the secretary of social and rehabilitation services[34] or by the committed person.[35]

B. CONSTITUTIONAL PRINCIPLES REGARDING PUNISHMENT AND THE LINE BETWEEN CIVIL AND CRIMINAL PROCEDURES

A state has the ability to administer punishment by means of civil, as well as criminal, sanctions.[36] When and how a statute is determined to be punitive in nature has been addressed by the Supreme Court, as has the related issue of the dividing line between civil and criminal procedures.

In *Kennedy v. Mendoza-Martinez*,[37] the Court held that two federal statutes which stripped American citizenship from individuals evading military service were punitive in nature.[38] Having made that determination, the Court held that both laws were unconstitutional because they administered punishment without providing constitutional rights guaranteed by the Fifth[39]

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[33] *Id.* § 59-29a08. The state does not shed the burden of proof after the original commitment:

> The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.

Id. The state's failure to meet this standard results in the release of the person from confinement. *Id.*

[34] *Id.* § 59-29a10.

[35] *Id.* § 59-29a11.

[36] *See* United States v. Halper, 490 U.S. 435, 448 (1989) (holding that the Double Jeopardy Clause prevents an already-punished defendant from being subjected to a civil monetary sanction whose purpose is punishment).

[37] 372 U.S. 144 (1963).

[38] *Id.* at 165-66. The statutes in question were the Nationality Act of 1940 and its successor, the Immigration and Nationality Act of 1952, both of which provided for the removal of citizenship of a United States citizen who stays outside the country during a war "for the purpose of evading or avoiding training and service in the [military]." *Id.* at 146 n.1.

[39] *Id.* at 165-66. The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

and Sixth[40] Amendments. Writing for the majority, Justice Goldberg set out a seven-part test to aid in evaluating whether a statute is punitive or regulatory.[41] While the Court has never deemed this test decisive, it has employed these factors to inform its analysis of whether a statute is "punitive."[42]

Three years later, in *Baxstrom v. Herold*,[43] the Court made clear that civil and criminal statutes have different purposes, and that, so long as the civil statute is nonpunitive, there is no constitutional conflict in applying both to the same individual. The Court held unanimously that Johnnie Baxstrom was denied equal protection when he was civilly committed at the end of his criminal prison sentence.[44] New York law provided jury review and a judicial determination of mental illness for anyone civilly committed, except those persons, such as Baxstrom, already serving out a criminal punishment.[45] The Supreme Court disallowed Baxstrom's civil detention due to his failure to receive a

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[40] The Sixth Amendment provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. at amend. VI.

[41] *Kennedy*, 372 U.S. at 168-69. The relevant inquiries in Justice Goldberg's seven factor test are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id.

[42] *See, e.g.*, Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997); United States v. Halper, 490 U.S. 435, 448 (1989); United States v. Salerno, 481 U.S. 739, 747 (1987) (holding that pretrial detention based on prediction of dangerousness was not impermissible punishment).

[43] 383 U.S. 107 (1966).

[44] Baxstrom had served most of a two-and-a-half to three-year sentence for second degree assault when he was found to be mentally ill. *Id.* at 108-09. He was transferred from the New York Department of Correction to the Department of Mental Hygiene, and held in a mental hospital for more than four additional years by the time his case was decided by the Supreme Court. *Id.*

[45] *Id.* at 110.

judicial hearing.[46] In so holding, however, the Court implicitly allowed the state, if proper procedures are followed, to commit in a civil proceeding a mentally ill and dangerous person who already had served a criminal sentence.[47] *Baxstrom* thus established the power of the state to punish a mentally ill criminal and thereafter to commit him in a civil proceeding.[48]

In *Allen v. Illinois*,[49] the Court ruled on the constitutionality of Illinois' approach to the civil commitment of sexually violent offenders. The Court held that proceedings under the Illinois Sexually Dangerous Persons Act[50] are not "criminal," and therefore the Fifth Amendment's privilege against self-incrimination[51] does not apply.[52]

In so holding, the Court considered the fact that the statute is included in Illinois' civil code.[53] The majority opinion stated that while labeling a law "civil" is not dispositive, it can be ignored only if the statute is shown to be "'so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil . . . ."[54] The *Allen* Court did not ignore the label in this case because it did not find that the goals of the Il-

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[46] *Id.*

[47] *Id.* at 114-15.

[48] One commentator has characterized the relevance of the case this way: "Based on this broad, albeit accepted, reading of the *Baxstrom* holding, the Court essentially paved the way for the commitment of sexually violent predators both in lieu of and subsequent to completion of a criminal sentence." Deborah L. Morris, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 601 (1997).

[49] 478 U.S. 364 (1986).

[50] 725 ILL. COMP. STAT. 205/1.01 (West 1996). The Illinois Act applies to "[a]ll persons suffering from a mental disorder . . . coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children. . . ." *Id.* Treatment in a psychiatric hospital is provided, until the committed person meets the burden of showing he is no longer dangerous. *Id.* at 205/8, 205/9.

[51] The Self-Incrimination Clause of the Fifth Amendment was applicable in this state proceeding through the Fourteenth Amendment's Due Process Clause. U.S. CONST. amend. XIV, § 1.

[52] *Allen*, 478 U.S. at 375. In a trial under the Illinois Act, at which Allen was found to be a sexually dangerous person, the testimony of two psychiatrists with whom Terry Allen had met was admitted as evidence. *Id.* at 366. Allen claimed that the use of the psychiatric testimony violated his Fifth Amendment right against self-incrimination. *Id.* at 370.

[53] *Id.* at 368.

[54] *Id.* at 369 (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).

linois Act are the punishment goals of retribution and/or deterrence.[55]

The Court also dismissed Allen's alternative argument that, notwithstanding the nonpunitive nature of the Illinois Act, it should be considered criminal under Fifth Amendment analysis because of its use of language and methods associated with criminal law.[56] According to the Court, simply because the Illinois Act provides criminal trial safeguards does not compel the conclusion that a trial held pursuant to the Act is a criminal proceeding.[57] Nor is the Illinois Act rendered criminal because involuntary detainment may be a result of proceedings under that Act.[58] The Court held that Illinois has a legitimate interest in "supplement[ing] its *parens patriae* concerns with measures to protect the welfare and safety of other citizens."[59] Keeping dangerous individuals out of the general population is a legitimate exercise of that interest.[60]

The dissent argued that the statute was criminal in substance because of the potential loss of liberty involved;[61] the stigma associated with confinement;[62] and the criminal law nature of the proceedings.[63] The dissent recognized the state's interest in protecting the public, but argued that such a concern is not license to disregard protections provided by the Constitution.[64]

In *United States v. Salerno*,[65] the Court carved out another narrow exception to the general rule that confinement is a punitive measure. The Court held that statutorily authorized pre-

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[55] *Id.* at 370 (finding that the aim of the Illinois Act is treatment, not punishment).

[56] *Id* at 371. The Illinois Act provides for safeguards such as the right to counsel, right to a jury trial, right to confront and cross-examine witnesses, and the requirement of proof beyond a reasonable doubt. 725 ILL. COMP. STAT. 205/3.01, 205/5 (West 1996).

[57] *Allen*, 478 U.S. at 372.

[58] *Id.*

[59] *Id.* at 373.

[60] *Id.*

[61] *Id.* at 377.

[62] *Id.*

[63] *Id.* at 378.

[64] *Id.* at 382. The dissent summarized, "[P]ermitting a State to create a shadow criminal law without the fundamental protection of the Fifth Amendment conflicts with the respect for liberty and individual dignity that has long characterized, and that continues to characterize, our free society." *Id.* at 384 (Stevens, J., dissenting).

[65] 481 U.S. 739 (1987).

trial detention based on a prediction of dangerousness is not punishment and does not violate the Due Process Clause.[66] The respondents in the case were detained prior to trial, following the guidelines of the Bail Reform Act,[67] after "the Government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community . . . ."[68] The detainees contended that confinement based on the likelihood of future criminal conduct violates the Fifth Amendment's guarantee of due process.[69]

The Court regarded the Bail Reform Act's legislative history and the Act's procedural safeguards as evidence of the Act's regulatory, rather than punitive, nature.[70] Accordingly, the Court disagreed that the Bail Reform Act authorizes unconstitutional pre-trial punishment.[71] The Court also rejected the argument that the Bail Reform Act, even if not punitive, fails to provide due process of law.[72] In doing so, the Court employed a balancing test, weighing individual liberty interests against the governmental regulatory interest in community safety.[73] While recognizing the strength of the individual's right to liberty, the Court allowed that "this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."[74]

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[66] *Id.* at 755.

[67] 18 U.S.C. § 3141 (1994). Under the Bail Reform Act, a judicial officer decides whether an arrestee is to be detained until trial. *Id.* Congress stipulated certain factors to be used in making that determination: the nature of the charges; the amount of evidence against the arrestee; the arrestee's background; and the potential danger posed by the arrestee's release. *Id.* § 3142. Applicable procedural safeguards include a detention hearing; the right to counsel at that hearing; the right to testify and present witnesses; and the requirement that the judicial officer support his finding with clear and convincing evidence. *Id.*

[68] *Salerno*, 481 U.S. at 743-44.

[69] *Id.* at 744-46.

[70] *Id.* at 747-48. According to the Court, "[t]he legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. . . . Congress instead perceived pretrial detention as a potential solution to a pressing societal problem." *Id.* at 747.

[71] *Id.* at 747-48.

[72] *Id.* at 748.

[73] *Id.*

[74] *Id.* at 750-51. The Court went on to set the following standard: "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751.

In his dissenting opinion, Justice Marshall argued that the majority's distinction between regulatory and punitive legislation was simplistic and false, and would allow for the evasion of the Due Process Clause merely by labeling punishment as "regulation."[75]

In *United States v. Halper*,[76] a unanimous Supreme Court held that a civil sanction may constitute "punishment," and that the imposition of such punishment following application of a criminal sanction resulting from the same behavior violates the Double Jeopardy Clause.[77] Irwin Halper submitted sixty-five false medical benefits claims to Blue Cross, cheating the federal government out of $585.[78] He was convicted on sixty-five counts of violating the criminal false claims statute, sentenced to two years in prison, and fined $5000.[79] The Government then brought a civil action pursuant to the False Claims Act,[80] under which Halper was liable for a penalty of more than $130,000.[81] He claimed that such a penalty would constitute double jeopardy.[82]

The Court stated that in certain circumstances a civil penalty can amount to punishment.[83] Such a determination should be made not merely by examining the language of the statute and its history, but "by assessing the character of the actual sanctions imposed on the individual by the machinery of the state."[84] Retribution and deterrence are legitimate governmental goals,

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[75] *Id.* at 760 (Marshall, J., dissenting).

[76] 490 U.S. 435 (1989).

[77] *Id.* at 448-49.

[78] *Id.* at 437.

[79] *Id.*

[80] *Id.* at 438. The False Claims Act provided that a person who:

> knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved . . . is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action.

31 U.S.C. § 3729 (1982).

[81] *Halper*, 490 U.S. at 438.

[82] *Id.*

[83] *Id.* at 442 (characterizing the civil penalty in this case as "so extreme and so divorced from the Government's damages and expenses as to constitute punishment").

[84] *Id.* at 447.

concluded the Court, only when pursued through the mechanisms of the criminal justice system.[85]

C. CONSTITUTIONAL PRINCIPLES REGARDING CIVIL COMMITMENT: THE "MENTALLY ILL" AND "DANGEROUS" REQUIREMENTS

In order to satisfy constitutional requirements in the civil commitment of an individual, the state must prove that the person to be detained is both mentally ill and dangerous.[86] Neither factor, standing alone, will suffice.[87]

In *O'Connor v. Donaldson*,[88] a unanimous Court held that it is a violation of the constitutional right to liberty to confine a mentally ill but nondangerous individual.[89] Kenneth Donaldson was civilly committed and kept against his will in the Florida State Hospital for more than fourteen years.[90] He alleged that the hospital staff unconstitutionally deprived him of his freedom.[91] There was no testimony that Donaldson had ever posed any threat of danger.[92] The Court held that there is "no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one . . . ."[93]

Four years later, in *Addington v. Texas*,[94] the Court clearly established that the police power of the state provides the constitutional authority for the civil confinement of individuals who

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[85] *Id.* at 448. Applying its analysis to the prohibition against double jeopardy, the Court stated, "We therefore hold that under the Double Jeopardy clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49.

[86] Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992). *See* discussion of *Foucha infra* at text accompanying notes 115-23.

[87] *Foucha*, 504 U.S. at 75-76.

[88] 422 U.S. 563 (1975).

[89] *Id.* at 576.

[90] *Id.* at 564.

[91] *Id.* at 565.

[92] *Id.* at 568.

[93] *Id.* at 575. The Court also said:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely . . . . One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Id.

[94] 441 U.S. 418 (1979).

are both dangerous and mentally ill.[95] At issue in *Addington* was the standard of proof required in a civil commitment proceeding.[96] After a jury found him mentally ill and requiring hospitalization,[97] Addington appealed, objecting to the jury instruction regarding the standard of proof.[98] A unanimous Court held that a criminal standard of proof need not be met,[99] but that an individual's liberty interest is powerful enough that proof by a preponderance of the evidence would not satisfy due process.[100] The Court settled on a middle level of proof, adopting a "clear and convincing" standard.[101] The issue decided in *Addington* was one of procedural due process. Nevertheless, the case is often cited[102] for its substantive proposition that a showing of dangerousness and mental illness is required to commit someone in a civil proceeding.[103]

In *Jones v. United States*,[104] the Court held that a criminal defendant who is found, by a preponderance of evidence, not guilty by reason of insanity, may be detained in a mental institution until he regains his sanity or ceases to be dangerous.[105] Michael Jones was charged with attempted petit larceny, but was

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[95] *Id.* at 426. The Court said:

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Id.

[96] *Id.* at 419-20.

[97] *Id.* at 421.

[98] *Id.* at 421-22. The instructions to the jury read: "1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill? 2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?" *Id.* at 421. Addington argued that substantive due process required that he be committed only if the state could meet the criminal standard of proof beyond a reasonable doubt. *Id.* at 421-22.

[99] *Id.* at 431.

[100] *Id.* at 427.

[101] *Id.* at 433.

[102] *See, e.g.*, Kansas v. Hendricks, 117 S. Ct. 2072, 2087 (1997) (Kennedy, J., concurring); Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992); Jones v. United States, 463 U.S. 354, 362 (1983) (holding that a finding of not guilty by reason of insanity establishes the existence of mental illness).

[103] *Addington*, 441 U.S. at 426.

[104] 463 U.S. 354 (1983).

[105] *Id.* at 370.

found not guilty by reason of insanity.[106] After spending more than a year in a mental hospital, he demanded to be released or recommitted pursuant to normal civil commitment standards.[107] He argued that his civil commitment failed to satisfy due process requirements since the judgment of not guilty by reason of insanity is not equivalent to a finding of mental illness, and was proven only by a preponderance of the evidence.[108] He claimed that *Addington*[109] stands for the proposition that civil commitment requires clear and convincing evidence that the individual is mentally ill and dangerous.[110]

The Court disagreed, stating that the finding of insanity established that Jones was mentally ill.[111] The Court also distinguished *Addington* as to the burden of proof issue.[112] The Court said the *Addington* ruling was based in part on concerns about an individual being detained for acceptable but unusual behavior.[113] Such concerns are diminished in the case of an individual who has committed a crime, which is clearly unacceptable behavior.[114]

Most recently, in *Foucha v. Louisiana*,[115] the Court confirmed the relevance of the *Addington* test, holding that a Louisiana statute[116] violated due process by allowing civil confinement without requiring a finding of mental illness.[117] Citing *Addington*,[118] the Court noted that to detain someone in a civil proceeding, the State must show that the person is both dangerous and mentally ill.[119] The Court also discussed *United States v. Salerno*,[120]

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[106] *Id.* at 359-60.

[107] *Id.* at 360. The civil commitment standards Jones argued should apply in his case included a jury trial and proof by clear and convincing evidence that he was mentally ill and dangerous. *Id.*

[108] *Id.* at 362.

[109] Addington v. Texas, 441 U.S. 418 (1979).

[110] *Jones*, 463 U.S. at 362.

[111] *Id.* at 363.

[112] *Id.* at 367.

[113] *Id.*

[114] *Id.*

[115] 504 U.S. 71 (1992).

[116] LA. REV. STAT. ANN. § 28:59 (West 1986).

[117] *Foucha*, 504 U.S. at 78. After Terry Foucha was found not guilty by reason of insanity of a burglary charge, he was committed to a psychiatric hospital to be held until he could prove to supervising doctors that he was not dangerous. *Id.* at 73-74.

[118] 441 U.S. 418 (1979).

[119] *Foucha*, 504 U.S. at 75-76. Stated the Court, "Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for

on which the state relied for the proposition that dangerous persons who are not mentally ill may nevertheless be confined in limited circumstances.[121] Unlike the statute at issue in *Salerno*, however, the statute in *Foucha* was neither sharply focused nor strictly limited in duration.[122] Thus, the state could not hold Foucha unless it satisfied both prongs of the *Addington* test.[123]

III. FACTS AND PROCEDURAL HISTORY

A. LEROY HENDRICKS

Leroy Hendricks has a lengthy and troubling history of sexually abusing children. In 1955, Hendricks exposed his genitals to two young girls, whom he invited to play with his penis.[124] He pleaded guilty to indecent exposure.[125] Two years later, he played strip poker with a fourteen-year-old girl and subsequently was convicted of lewdness.[126] In 1960, he fondled the penises of two boys, ages seven and eight, for which he was convicted and spent nearly three years in prison.[127] Soon after his release in 1962, he was arrested for touching a seven-year-old girl's genitalia.[128] During his subsequent incarceration, he was treated for his sexual deviance in a Washington State psychiatric hospital, until his discharge in 1965.[129] After his release, however, Hendricks returned to his sexually deviant ways, performing oral sex on an eight-year-old girl and fondling an eleven-year-old boy.[130] As a result, in 1967 he was imprisoned again.[131] Following his

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holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." *Id.* at 78.

[120] 481 U.S. 739 (1987). *See* discussion of *Salerno supra* at text accompanying notes 65-75.

[121] *Foucha*, 504 U.S. at 80.

[122] *Id.* at 81-82. The Court stated that to allow the Louisiana law to stand would "be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 83.

[123] *Id.*

[124] Petitioner's Brief at 9, *Hendricks* (No. 95-1649).

[125] Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

[126] Petitioner's Brief at 9, *Hendricks* (No. 95-1649).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

parole in 1972, Hendricks participated in an outpatient treatment program, but ceased attending after a few months.[132]

Between 1973 and 1978, Hendricks repeatedly and forcibly sexually molested his stepdaughter and stepson, when they both were between the ages of nine and fourteen.[133] Then, in 1984, he was charged with fondling three thirteen-year-old boys in the electronics store where he worked, and was convicted of two counts of taking indecent liberties with a child.[134]

Hendricks has acknowledged that he causes harm to children.[135] He testified, however, that when he feels stressed, he cannot control his urge to engage a child in sexual activity.[136] He also discounted treatment as "bullshit" and stated that only his death would guarantee that he would stop molesting children.[137]

B. THE KANSAS SEXUALLY VIOLENT PREDATOR ACT AND LEROY HENDRICKS

After serving ten years in prison as a result of his latest conviction, Hendricks was scheduled to be released to a halfway house in September of 1994.[138] Instead of releasing him, however, the State sought Hendricks' civil commitment as a sexually violent predator under the Kansas Sexually Violent Predator Act.[139] As a person currently incarcerated for having committed a sexually violent offense, Hendricks fit into one of the four categories of persons to whom the Act applies.[140] Hendricks moved to dismiss the state's petition to confine him.[141] He argued that the Act, as applied to him, violated the Constitution's Due Process,[142] Double Jeopardy,[143] and Ex Post Facto Clauses.[144]

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[132] *Id.*

[133] *Id.* at 10.

[134] Cross-Petitioner's Brief at 3, *Hendricks* (Nos. 95-1649, 95-9075).

[135] Petitioner's Brief at 10, *Hendricks* (No. 95-1649).

[136] *Id.*

[137] *Id.* at 11.

[138] Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

[139] *Id.*

[140] KAN. STAT. ANN. § 59-29a03 (1994 & Supp. 1996). *See* discussion of the Act *supra* at text accompanying notes 15-35.

[141] *Hendricks*, 117 S. Ct. at 2078.

[142] The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

The state district court reserved ruling on the constitutional issues, but found probable cause to support a finding that Hendricks is a sexually violent predator under the Act and should be evaluated professionally.[145]

Pursuant to the Act and Hendricks' request, Hendricks was tried by a jury, which, after hearing evidence about Hendricks' history, found beyond a reasonable doubt that he was a sexually violent predator.[146] The trial court subsequently determined "that pedophilia qualifies as a 'mental abnormality' as defined by the Act," and had Hendricks committed to the custody of the State's Secretary of Social and Rehabilitation Services.[147] Hendricks appealed directly to the Kansas Supreme Court, reiterating his claim that in applying the Act to him, the State was violating numerous constitutional provisions.[148]

The Kansas Supreme Court reached only Hendricks' substantive due process challenge.[149] The court held that the Act itself violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[150] Both Hen-

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[143] *See supra* note 9 for the text of the Double Jeopardy Clause. The Double Jeopardy and Ex Post Facto Clauses both apply in this case of state law through the Fourteenth Amendment's Due Process Clause. U.S. CONST. amend. XIV, § 1.

[144] *Hendricks*, 117 S. Ct. at 2079. *See supra* note 10 for the text of the Ex Post Facto Clause.

[145] *Hendricks*, 117 S. Ct. at 2078.

[146] *Id.* at 2079.

[147] *Id.*

[148] *In re* Hendricks, 912 P.2d 129, 133 (Kan. 1996). Relying on *Foucha v. Louisiana*, 504 U.S. 71 (1992), Hendricks claimed that his substantive due process rights were violated by confining him absent a finding that he was "mentally ill" (as opposed to merely "mentally abnormal"). *Id.* He also argued that civil confinement constitutes additional punishment for a crime for which he had already served the prescribed sentence, and that such punishment violates the Constitution's prohibition against double jeopardy and ex post facto laws. *Id.*

[149] *Id.* Because the court decided the due process issue in Hendricks' favor, it did not consider the alternative arguments raised in Hendricks' appeal. *Id.* at 138.

[150] *Id.* The Kansas Supreme Court interpreted United States Supreme Court precedent to require clear and convincing proof that a person is "mentally ill" if he is to be committed to a mental institution in a civil proceeding in a manner consistent with due process. *Id.*

The court decided that the Act lacked a required finding of mental illness. *Id.* at 137. In fact, as the court pointed out, the preamble to the Act specifically states that sexually violent predators do not have a mental illness which "renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. §59-2901 et seq." KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996). *See supra* note 21 for the full preamble text. Thus, the court held that "the record in this case will not support a finding that the statutory requirement of a mental

dricks and the State of Kansas petitioned the Supreme Court for certiorari; both requests were granted and the cases were consolidated.[151] The Court examined the due process grounds on which the Kansas Supreme Court overturned the Act, as well as Hendricks' double jeopardy and ex post facto claims that were not addressed by the Kansas Supreme Court.[152]

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

The Court voted 5-4 to reverse the judgment of the Kansas Supreme Court, holding that the Kansas Sexually Violent Predator Act meets substantive due process requirements, and violates neither the Double Jeopardy nor the Ex Post Facto Clause.[153]

1. The Due Process Claim

Justice Thomas, delivering the opinion of the Court,[154] first addressed the issue of whether the Act is consistent with substantive due process rights.[155] Recognizing that in certain noncriminal circumstances it is constitutionally permissible to restrain an individual against his will, Justice Thomas held that the Act does not violate due process requirements.[156] States are permitted to impose forced civil confinement upon persons "who are unable to control their behavior and who thereby pose a danger to the public health and safety."[157]

Justice Thomas pointed out that involuntary civil commitment statutes had been upheld consistently by the Court so long as the commitment comported with proper procedures and standards.[158] He also surveyed several prior cases in which the Court upheld state civil commitment statutes requiring that the

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abnormality or a personality disorder is equivalent to the constitutional standard of mental illness." *Hendricks*, 117 S. Ct. at 137.

[151] Kansas v. Hendricks, 116 S. Ct. 2522 (1996).

[152] Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

[153] *Id.* at 2086.

[154] Justice Thomas was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy.

[155] *Hendricks*, 117 S. Ct. at 2079.

[156] *Id.* at 2081.

[157] *Id.* at 2079.

[158] *Id.* at 2080 (citing Foucha v. Louisiana, 504 U.S. 71 (1991); Addington v. Texas, 441 U.S. 418 (1979)).

person committed be proven both mentally ill and dangerous.[159] According to the Court, the Kansas Act is plainly similar to these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior.[160]

Justice Thomas raised and then dismissed Hendricks' argument that the Kansas legislature's term "mental abnormality" fails to satisfy the constitutional requirement of "mental illness."[161] Members of the psychiatric community disagree about the meaning of mental illness,[162] Justice Thomas reasoned, and the Court itself has "used a variety of expressions to describe the mental condition of those properly subject to civil confinement."[163]

Ultimately, the Court rejected Hendricks' contention that the Act is unconstitutional because of its failure to require a finding of "mental illness."[164] "Contrary to Hendricks' assertion," Justice Thomas stated, "the term 'mental illness' is devoid of any talismanic significance."[165]

2. *The Double Jeopardy and Ex Post Facto Claims*

Justice Thomas next responded to Hendricks' argument that the Act establishes criminal proceedings, and therefore his confinement under the Act violates the Double Jeopardy and Ex Post Facto Clauses.[166] Justice Thomas wrote that identifying the intent of the legislature is the first step in determining whether a particular statute is civil or criminal.[167] In this case, Kansas' in-

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[159] *Id.* (citing Heller v. Doe, 509 U.S. 312 (1993) ("mentally retarded" or "mentally ill" and dangerous); Allen v. Illinois, 478 U.S. 364 (1986) ("mentally ill" and dangerous); Minnesota *ex rel.* Pearson v. Probate Court of Ramsey Cty., 309 U.S. 270 (1940) ("psychopathic personality" and dangerous)).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 2080-81 (citing *Foucha*, 504 U.S. at 88 ("some medical justification for doing so"); *Addington*, 441 U.S. at 425-26 ("emotionally disturbed" and "mentally ill"); Jackson v. Indiana, 406 U.S. 715, 732, 737 (1972) ("incompetency" and "insanity")).

[164] *Id.* at 2081.

[165] *Id.* at 2080.

[166] *Id.* at 2081.

[167] *Id.* at 2082.

tentions are evidenced by the placement of the Act in the state probate code, rather than in the criminal code, and by the reference within the Act itself to its being a "civil commitment procedure."[168]

Though the legislature's intent is not dispositive, it will be rejected only if the challenging party "provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[169] Only if such proof is offered will the Court consider the statute as having created criminal proceedings.[170] Justice Thomas concluded that Hendricks failed to meet this burden.[171]

There are two primary objectives of criminal punishment: retribution and deterrence.[172] According to Justice Thomas, neither is implicated by commitment under the Act.[173] The Act's purpose is not retributive because prior criminal conduct "is used solely for evidentiary purposes;" because a criminal conviction is not a prerequisite for commitment; and because commitment, unlike a criminal statute, requires no finding of scienter.[174] Nor is the Act deterrent, because those confined under the Act suffer from a "mental abnormality."[175] Since, by definition, they lack control over their actions, they probably would not be deterred by the threat of confinement.[176]

While acknowledging that the Act institutes involuntary confinement, Justice Thomas deemed this insufficient to support a conclusion that such restraint constitutes punishment.[177] Protecting the public, said Justice Thomas, is a legitimate governmental objective, and detaining people who are both dangerous and mentally ill is a "classic example of nonpunitive detention."[178] He pointed out, "If detention for the purpose of protecting the community from harm *necessarily* constituted

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[168] *Id.* (quoting KAN. STAT. ANN. § 59-29a01 (1994)).
[169] *Id.* (citing United States v. Ward, 448 U.S. 242 (1980)).
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 2083.
[178] *Id.*

punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held."[179]

Justice Thomas next rejected Hendricks' contention that the State's intent to punish him is evidenced by the indeterminate duration of his confinement.[180] The duration of detention, Justice Thomas reasoned, is clearly connected to the stated purpose of the Act—i.e., to hold the individual until he ceases to pose a danger to the public.[181] The detained person may be freed as soon as he is judged "safe to be at large."[182]

Hendricks' next claim, also dismissed by Justice Thomas, was "that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil."[183] The employment of such devices is not sufficient to render the proceeding criminal in nature.[184] According to Justice Thomas, these standards are evidence only that the state has been extremely careful in its application of this civil procedure.[185]

Finally, Justice Thomas responded to Hendricks' argument that because no treatment is offered, confinement pursuant to the Act is merely punishment under a different name.[186] Justice Thomas rejected this argument because it assumes the existence of available treatment which Kansas chooses not to provide.[187] Although the Kansas Supreme Court found that treatment under the Act "is incidental, at best,"[188] Justice Thomas proposed two scenarios in which the failure to provide treatment would not lead to the conclusion that Hendricks' confinement is punitive.[189] On the one hand, if no effective treatment is available for sexually violent predators, then there is no constitutional

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[179] *Id.* (emphasis in original).

[180] *Id.*

[181] *Id.*

[182] KAN. STAT. ANN. § 59-29a07 (1994 & Supp. 1996).

[183] *Hendricks*, 117 S. Ct. at 2083. Procedural safeguards guaranteed by the Act include the right to counsel, the right to be examined by an expert, and the right to a trial by jury. KAN. STAT. ANN. § 59-29a06 (1994 & Supp. 1996). *See also* discussion of the Act *supra* at text accompanying notes 15-35.

[184] *Hendricks*, 117 S. Ct. at 2083.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* (citing *In re* Hendricks, 912 P.2d 129, 136 (1996)).

[189] *Id.* at 2084.

violation in confining such predators merely for the purpose of protecting others.[190] As long as proper procedures are followed, argued Justice Thomas, civil detainment is a constitutionally permissible method for protecting the public from a potentially dangerous person.[191] He noted: "To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions."[192]

On the other hand, wrote Justice Thomas, if Hendricks' condition is treatable, but treatment is merely a secondary goal of the Act, then it cannot be claimed that punishment is the state's sole intention in applying the Act.[193] States are given broad authority regarding implementation of treatment programs.[194]

Justice Thomas concluded by pointing out that the characterization of the Act as civil, rather than criminal, destroyed Hendricks' double jeopardy and ex post facto claims.[195] The Double Jeopardy Clause protects individuals from being twice prosecuted or twice punished for a single offense, but the civil proceedings under the Act qualify as neither prosecution nor as punishment.[196] The Ex Post Facto Clause likewise applies only to punitive measures, and thus is not implicated by the nonpunitive confinement to which Hendricks was subjected.[197]

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy, who also joined the majority opinion, cautioned against the possibility that civil confinement could be used improperly for the purpose of deterrence and/or retribution.[198] He stated that the furtherance of such goals is reserved for the criminal justice system.[199]

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[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 2085 n.4.
[195] *Id.* at 2085.
[196] *Id.* at 2086.
[197] *Id.*
[198] *Id.* at 2087 (Kennedy, J., concurring).
[199] *Id.* (Kennedy, J., concurring).

C. JUSTICE BREYER'S DISSENT

Writing for the dissent,[200] Justice Breyer agreed with the majority that the Act satisfies due process requirements, but argued that in applying the Act to Hendricks, Kansas intended to punish Hendricks.[201] Because Hendricks committed his crimes prior to the statute's enactment, such application would make the Act an unconstitutional ex post facto law.[202]

1. The Due Process Claim

Justice Breyer agreed that the Due Process Clause does not prevent Kansas from confining Hendricks under the civil procedure established by the Act.[203] In support of this conclusion, he listed three factors: (1) much of the professional psychiatric community classifies Hendricks' problem as a serious mental disorder;[204] (2) Hendricks is unable to control his own actions;[205] and (3) Hendricks poses a serious danger to others.[206]

Justice Breyer believed the Kansas Supreme Court's conclusion that due process is a bar to the Act was largely based on the fact that Hendricks does not qualify for civil commitment under Kansas' own civil commitment statute.[207] According to Justice Breyer, however, the Kansas general civil commitment statute's failure to include Hendricks indicates only a statutory organizational decision made by the Kansas legislature.[208] Such a choice does not necessarily mean that any civil confinement outside of the general statute is unconstitutional.[209]

2. The Double Jeopardy and Ex Post Facto Claims

Justice Breyer then discussed whether the Act is punitive and therefore an unconstitutional ex post facto law as applied to

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[200] Joining Justice Breyer's opinion were Justices Stevens and Souter. Justice Ginsburg joined in respect to the sections on punishment and ex post facto laws, but not the section on due process.

[201] *Hendricks*, 117 S. Ct. at 2088 (Breyer, J., dissenting).

[202] *Id.* (Breyer, J., dissenting).

[203] *Id.* (Breyer, J., dissenting).

[204] *Id.* (Breyer, J., dissenting).

[205] *Id.* at 2088-89 (Breyer, J., dissenting).

[206] *Id.* at 2089 (Breyer, J., dissenting).

[207] *Id.* (Breyer, J., dissenting) (citing the Treatment Act For Mentally Ill Persons, KAN. STAT. ANN. §§ 59-2901 to 59-2941, 59-2943, 59-2944 (1994) (repealed 1996)).

[208] *Id.* (Breyer, J., dissenting).

[209] *Id.* (Breyer, J., dissenting).

Hendricks.[210] In concluding that the Act is punitive, Justice Breyer pointed out some obvious ways in which civil commitment pursuant to the Act resembles traditional criminal punishment: people are confined against their will;[211] one of the Act's goals is to prevent harm to others;[212] and it uses people, procedures, and standards traditionally associated with criminal law.[213] Although such similarities by themselves do not make the statute criminal, neither, according to Justice Breyer, is the "civil" label dispositive.[214]

Justice Breyer then looked to the Act's provision for treatment as an important guide in discerning whether the Act's objective is punitive or nonpunitive.[215] Justice Breyer asserted, "[A] statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose."[216] As such, the Kansas legislature's primary goal in creating the Act, he concluded, was punitive, and not civil.[217]

There were a number of reasons for Justice Breyer's conclusion. First, the Kansas Supreme Court already had found that the legislative history and early implementation of the Act indicated that treatment is not a significant purpose of the Act.[218] Second, Justice Breyer noted the delay in applying the Act to a previously convicted offender until the end of his prison sentence.[219] Such a delay makes treatment more difficult, but punishment more severe.[220] Third, the statute does not allow for less restrictive methods.[221] Justice Breyer stated, "This Court has said that a failure to consider, or to use, 'alternative and less harsh methods' to achieve a nonpunitive objective can help to show

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[210] *Id.* at 2090 (Breyer, J., dissenting).

[211] *Id.* (Breyer, J., dissenting).

[212] *Id.* at 2091 (Breyer, J., dissenting).

[213] *Id.* (Breyer, J., dissenting).

[214] *Id.* (Breyer, J., dissenting).

[215] *Id.* at 2092 (Breyer, J., dissenting).

[216] *Id.* (Breyer, J., dissenting).

[217] *Id.* (Breyer, J., dissenting).

[218] *In re* Hendricks, 912 P.2d 129, 136 (1996). Such lower court evaluations of legislative intent are usually given great weight by the Supreme Court. *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting).

[219] *Hendricks*, 117 S. Ct. at 2094 (Breyer, J., dissenting).

[220] *Id.* (Breyer, J., dissenting).

[221] *Id.* at 2095 (Breyer, J., dissenting).

that legislature's 'purpose . . . was to punish.'"[222] Fourth, Justice Breyer compared the Kansas statute to the laws of sixteen other states dealing with civil commitment of mentally abnormal, sexually dangerous persons.[223] Besides Kansas, only Iowa both delays civil commitment (and consequent treatment) and fails to explicitly consider less restrictive alternatives.[224] But the Iowa law, unlike that of Kansas, avoids ex post facto problems by applying prospectively only.[225]

Justice Breyer concluded that Hendricks' confinement under the Act constitutes punishment.[226] It therefore violates the Ex Post Facto Clause, since "the 1994 Act changed the legal consequences that attached to Hendricks' earlier crimes, and in a way that significantly 'disadvantage[d] the offender.'"[227]

V. ANALYSIS

The Kansas Sexually Violent Predator Act does not require a finding of mental illness to confine someone in a civil proceeding. That failure means that the Act violates constitutional due process requirements. The *Hendricks* Court should have upheld the decision of the Kansas Supreme Court on this issue, and found the Act unconstitutional. Furthermore, despite the civil label attached to the Kansas statute, Hendricks' confinement is "punishment" for a criminal act, and therefore violates the Double Jeopardy and Ex Post Facto Clauses of the U.S. Constitution.

A. THE ACT FAILS TO REQUIRE A FINDING OF MENTAL ILLNESS

The *Hendricks* Court should have held that because the Act does not require a finding of "mental illness," the law fails to meet one of the constitutional requirements in the two-prong

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[222] *Id.* (Breyer, J., dissenting) (citing Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).

[223] *Id.* (Breyer, J., dissenting). The other sexual offense commitment statutes which Breyer examined were from the states of Arizona, California, Colorado, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Oregon, Tennessee, Utah, Washington, and Wisconsin. *Id.* at 2099 (Breyer, J., dissenting).

[224] *See* IOWA CODE ANN. § 709C (West 1996).

[225] *Hendricks*, 117 S. Ct. at 2095 (Breyer, J., dissenting).

[226] *Id.* at 2098 (Breyer, J., dissenting).

[227] *Id.* (Breyer, J., dissenting) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

test for civil commitment set out in *Addington*.[228] While the Act requires a finding of "mental abnormality or personality disorder,"[229] such language fails the *Addington* test—contrary to Justice Thomas' opinion that it is equivalent to "mental illness."[230] Though the Court has used various language to convey the same meaning as "mental illness,"[231] Justice Thomas failed to address the telling factor that the Kansas legislature itself admitted that persons covered by the Act do not have a mental illness.[232] Granted, the Court has consistently allowed the states flexibility in their choice of statutory language.[233] In this instance, however, the choice of language used in the Violent Sexual Offender Act must be analyzed in conjunction with the Kansas general civil commitment statute, which is specifically applicable to mentally ill individuals.[234] By contrast, the Violent Sexual Offender Act does not require a finding of mental illness. In fact, according to the Kansas legislature, it was enacted specifically to apply to a category of individuals who are not mentally ill.[235]

It may be true that a civil commitment statute could be written in a manner consistent with due process requirements that would allow Kansas to confine violent sexual offenders such as Hendricks. However, this is not the statute which was written and enacted by the Kansas legislature.

Whether Hendricks might be labeled mentally ill by the psychiatric community is equally irrelevant. The test established in *Addington*, and elucidated upon in *Foucha*, mandates that the state require a finding of mental illness in a civil commitment

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[228] 441 U.S. 418 (1979). The *Addington* test for civil commitment requires that an individual be proven both mentally ill and dangerous. *Id.* at 426. *See* discussion of *Addington, supra* at text accompanying notes 94-103.

[229] KAN. STAT. ANN. § 59-29a02 (1994 & Supp. 1996).

[230] *Hendricks*, 117 S. Ct. at 2079.

[231] *See supra* note 159.

[232] The Act's preamble begins, "The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. . . ." KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996).

[233] *See supra* note 159 and accompanying text.

[234] Treatment Act For Mentally Ill Persons, KAN. STAT. ANN. §§ 59-2901 to 59-2941, 59-2943, 59-2944 (1994) (repealed 1996).

[235] KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996). *See supra* note 21 for the text of § 59-29a01.

procedure.[236] Kansas failed to do this. The fatal flaw in the Act lies not in the use of the language "mental abnormality or personality disorder" instead of "mental illness," but in the fact that the law by its own terms is intended to apply to a category of people the state believes does not suffer from mental illness. Regardless of Kansas' interest in confining dangerous sexual offenders, it may not do so in a civil proceeding absent a finding of mental illness.

Justice Breyer, who agreed with the majority on the due process question,[237] addressed the impact of the Kansas general civil commitment statute on the constitutionality of the Act.[238] However, he attributed the creation of the Act to a choice by the Kansas legislature to organize its own state laws in a certain fashion.[239] In doing so, Justice Breyer too easily brushed aside a key point. The Kansas legislature may enact a new statute if it chooses. It would have no reason for doing so, however, unless it determined that no existing law provided for the civil commitment of a category of people whom it wanted to confine indefinitely. The people to whom the Act applies do not suffer from mental illness, and therefore could not be held under the general civil commitment statute.[240]

In interpreting the underlying intent of state statutes, the Court traditionally defers to the lower court decision.[241] In this case, the Kansas Supreme Court, interpreting the laws of its own state, determined that the Act fails to require a finding of mental illness.[242] *Hendricks* is therefore analogous to *Foucha*.[243] In *Foucha*, the Court struck down a Louisiana civil commitment statute that did not require a finding of mental illness.[244] Civil commitment in that case was disallowed because the State ex-

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[236] *See* Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992); Addington v. Texas, 441 U.S. 418, 426 (1979). *See supra* text accompanying notes 94-103, 115-23.

[237] Justice Ginsburg was the sole dissenter on the due process issue. She did not write an opinion.

[238] *Hendricks*, 117 S. Ct. at 2089 (Breyer, J., dissenting). *See supra* section IV.C.1.

[239] *Id.* (Breyer, J., dissenting).

[240] *See* Treatment Act For Mentally Ill Persons, KAN. STAT. ANN. §§ 59-2901 to 59-2941, 59-2943, 59-2944 (1994) (repealed 1996).

[241] *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)).

[242] *In re* Hendricks, 912 P.2d 129, 137 (1996).

[243] Foucha v. Louisiana, 504 U.S. 71 (1992). *See supra* text accompanying notes 115-23.

[244] *Foucha*, 504 U.S. at 71.

plicitly admitted that Foucha was not mentally ill.[245] In *Hendricks*, the admission is implicit rather than explicit. Nevertheless, when the two Kansas civil commitment statutes are viewed in conjunction, Kansas has admitted that Hendricks is not mentally ill, as clearly as Louisiana made the same admission about Foucha. Hendricks, like Foucha, should be freed.

B. HENDRICKS' CIVIL CONFINEMENT VIOLATES THE DOUBLE JEOPARDY AND EX POST FACTO CLAUSES

Notwithstanding the Act's placement in the state's civil code, Kansas punishes Hendricks by subjecting him to the Act's proceedings. In so doing, the state violates the constitutional prohibitions against double jeopardy and ex post facto laws. Hendricks and the State of Kansas agree that the Double Jeopardy and Ex Post Facto Clauses apply only in the case of a criminal sanction, not a civil one.[246] Therefore, the issue is whether, despite the Act's "civil" label, it should be considered "criminal."[247]

The first step of the two-step *Allen* test is to look at the language of the statute itself.[248] While the Act is in the civil code, that is not determinative.[249] The Act's language makes clear that the legislature did not think that those persons subject to incarceration under the Act suffer from a mental illness.[250] Though the Act does provide for treatment,[251] the text of the Act makes plain that such treatment was not the central concern of the legislature.[252] The obvious objective of the Act was the removal

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[245] *Id.* at 80.

[246] *Hendricks*, 117 S. Ct. at 2081.

[247] *Id.*

[248] Allen v. Illinois, 478 U.S. 364, 368 (1986). The test formulated by the *Allen* Court for determining whether a law should be considered criminal for constitutional purposes involves first looking at the plain language of the statute and then at the statute's underlying intent and effect. *Id.* at 368-69. *See* discussion of *Allen, supra* text accompanying notes 49-64.

[249] *Allen*, 478 U.S. at 369.

[250] KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996). *See* discussion of the Act, *supra* text accompanying notes 15-35.

[251] KAN. STAT. ANN. § 59-29a07 (1994 & Supp. 1996).

[252] KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996) (stating that "[t]he legislature . . . finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society.").

from the community of certain persons who are thought likely to commit a crime.[253]

Also relevant is the fact that the structure of the Act in several ways is similar to a typical criminal law. Like criminal imprisonment, the result of civil commitment is involuntary incarceration,[254] and that incarceration is a basic objective of the Act.[255] The confinement triggered by the Act is imposed only on persons who have committed a crime.[256] Procedures and standards implemented under the Act, including the use of prosecutors and defense attorneys, trial by jury, and a requirement of proof beyond a reasonable doubt, are "traditionally associated with the criminal law."[257]

Applying the second step of the *Allen* test[258] and looking behind the Act's "civil" label bolsters the argument that its intent and/or effect is obviously punishment. First, legislative history sheds light on the legislature's goals. Then-Kansas State Attorney General Robert Stephan made abundantly clear his belief that dangerous sex offenders should never be released.[259] Then-Kansas Special Attorney General, now Kansas Attorney General, Carla Stovall agreed, "We cannot open our prison doors and let these animals back into our communities. If we do—we are accomplices to the atrocities which they will surely commit."[260]

Testimony during hearings on the Act showed the lack of concern about treatment. A representative of the Kansas Psy-

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[253] *Id.*

[254] Kansas v. Hendricks, 117 S. Ct. 2072, 2090 (1997) (Breyer, J., dissenting).

[255] *Id.* (Breyer, J., dissenting).

[256] *Id.* at 2091 (Breyer, J., dissenting) (citing KAN. STAT. ANN. §§ 59-29a02, 59-29a03 (1994)).

[257] *Id.* (Breyer, J., dissenting) (citing KAN. STAT. ANN. §§ 59-29a06, 59-29a07 (1994)).

[258] Allen v. Illinois, 478 U.S. 364, 370 (1986). *See* discussion of *Allen, supra* text accompanying notes 49-64.

[259] Stephan testified in 1994 to the Kansas legislature:

> Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released, I believe, as legislators, you have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders.

Cross-Petitioner's Brief at 5, *Hendricks* (Nos. 95-1649, 95-9075).

[260] *Id.* at 6. The purpose of the Act, according to Stovall, is that it "would allow us to keep the sexually violent offenders locked up indefinitely." *Id.*

chological Association cautioned that permanent incarceration would result from civil commitment.[261] However, the legislature's purpose in enacting the statute was simply to incarcerate persons such as Hendricks.[262] Treatment was not on the agenda.

Further evidence that the intent of the law is punitive is seen in the fact that implementation of the Act is delayed until the "anticipated release" of a prisoner,[263] thereby lessening the effect of any treatment while simultaneously maximizing punishment. In Hendricks' case, the State's lack of interest in providing treatment is starkly shown by the empirical evidence that Hendricks simply did not receive any worthwhile treatment until about a year into his confinement.[264]

The lack of treatment for Hendricks was not due to a determination by the Kansas legislature that there is no effective treatment for violent sexual offenders.[265] Rather, the State has paid lip service to providing treatment, but only as an excuse to indefinitely detain individuals such as Hendricks.

The State's interest in confining Hendricks is admittedly a legitimate one: Kansas is predicting that he will commit a crime in the future.[266] Hendricks might very well agree with such a prediction.[267] Nevertheless, the Constitution does not allow for imprisonment based on a prediction of future criminal conduct.[268] In *Foucha,* the Court unequivocally held that a predic-

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[261] Tom Locke of the Kansas Psychological Association testified, "Lengthy periods of commitment with little likelihood of release are almost inevitable. Perhaps that is the goal of the statute." *Id.* at 7.

[262] Jim Blaufuss, a member of the Schmidt Task Force, stated at legislative hearings, "Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!" Petitioner's Brief at 503aa, *Hendricks* (No. 95-1649).

[263] KAN. STAT. ANN. § 59-29a03 (1994 & Supp. 1996).

[264] Kansas v. Hendricks, 117 S. Ct. 2072, 2097 (1997) (Breyer, J., dissenting). At Hendricks' state hearing, Dr. Charles Befort, the director of the program into which Hendricks was placed, stated that sexually violent predators were receiving "essentially no treatment," that Hendricks "has had no opportunity for meaningful treatment," and that Hendricks has "wasted ten months . . . in terms of treatment." *Id.*

[265] The Act makes specific references to the "treatment needs" and "treatment modalities" of sexually violent predators, and says "a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature." KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1996).

[266] "The legislature . . . finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high." *Id.*

[267] Petitioner's Brief at 11, *Hendricks* (No. 95-1649).

[268] *See* Foucha v. Louisiana, 504 U.S. 71, 83 (1992).

tion of dangerousness, standing alone, is not enough to allow the State to impose civil confinement.[269] Additional proof of the Kansas legislature's primarily punitive goal in creating the Act lies in the fact that the Act does not provide for methods less restrictive than incarceration.[270] The use, or at a minimum the consideration, of less strict methods would be expected if the legislature's goal were truly nonpunitive.[271]

Therefore, even though the statute has a civil label, the Court should have held that punishment is the intent of the Act. To further punish Hendricks, who already had been sentenced to serve time in prison, and who already had served that time, constitutes a violation of the Ex Post Facto and Double Jeopardy Clauses of the Constitution.

VI. CONCLUSION

The Supreme Court erred in *Kansas v. Hendricks* by allowing the civil commitment of Leroy Hendricks under the Kansas Sexually Violent Predator Act. The Court should have held that the Act does not satisfy the *Addington* test for civil commitment. The *Addington* Court established that a finding of "mental illness" is a requisite for civil commitment. The Kansas Sexually Violent Predator Act falls short of requiring such a finding, and therefore should have been struck down as a violation of due process. Furthermore, the clear intent of Kansas in implementing the Act is to punish the perpetrators of sex crimes above and beyond whatever sanctions are applied in the state criminal justice system. A second punishment for a single crime runs afoul of the Constitution's prohibition on double jeopardy. In Hendricks' case, since the statute was passed after the acts for which he is being confined, its application to him also violates the constitutional ban on ex post facto laws.

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[269] *Id.* at 85.

[270] Kansas v. Hendricks, 117 S. Ct. 2072, 2094 (1997) (Breyer, J., dissenting).

[271] *Id.*