

Analysis and Commentary

Kansas v. Hendricks

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The U.S. Supreme Court considered an appeal by the State of Kansas that arose from the Kansas Supreme Court's invalidation of the Kansas Sexually Violent Predator Act. The Act establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or "personality disorder," are likely to engage in "predatory acts of sexual violence." The Supreme Court held that the Act's definition of "mental abnormality" satisfies substantive due process requirements. The Court further held that since the Act does not establish criminal proceedings, it does not violate the Constitution's double jeopardy prohibitions or its ban on *ex post facto* lawmaking. The Court's holding and its implications are discussed.

The U.S. Supreme Court on June 23, 1997, issued its opinion in the case of *Kansas v. Hendricks*.¹ The five to four decision upheld the Kansas law, which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence."

The decision, authored by Justice Clarence Thomas, held that the Kansas Sexually Violent Predator Act comports with substantive due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post facto* lawmaking. It thereby overturned the invalidation of the statute by the Kansas Supreme Court on

due process grounds. While there has been much speculation regarding the long range implications of the decision, it is important to address the actual language of the holding and reflect on methods of providing for public safety concerns while maintaining the integrity of the mental health profession within the confines of the holding.

Case Background

In 1994, the Kansas legislature enacted the law to help deal with the problem of managing repeat sexual offenders. The legislature determined that the existing civil commitment procedures were inadequate to address the risk posed by "sexually violent predators." In the Act's preamble, the legislature found that 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

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under the [general involuntary civil commitment statute].”²

This appeal arose when the State sought to use the Act for the first time to commit Leroy Hendricks, an inmate with a long history of convictions for sexually molesting children. Hendricks was scheduled to be released to a halfway house after having served nearly 10 years of his sentence for a conviction of taking “indecent liberties” with two 13-year-old boys. The Act had become law shortly before his release, and the State filed a petition seeking his civil commitment as a sexually violent predator.

At the hearing on the petition, Hendricks through counsel moved to dismiss the petition on various federal constitutional grounds. The court reserved ruling but found probable cause to support a finding that he met the statutory requirements and ordered an evaluation at Larned State Hospital. He subsequently requested and was granted a jury trial. Hendricks testified to a long history of repeated child sexual molestation and abuse. He explained that when he “get[s] stressed out,” he “cannot control the urge” to molest children. The jury also heard from Hendricks’ stepdaughter and stepson who recounted their repeated sexual abuse at his hands. The State presented expert testimony from a licensed clinical social worker who testified that Hendricks had a diagnosis of personality trait disturbance, passive-aggressive personality, and pedophilia. The State also presented the chief psychologist from Larned State Hospital who testified that Hendricks suffered from pedophilia and that he would likely commit sexual of-

fenses against children in the future if not confined. He further opined that pedophilia qualifies as a “mental abnormality” within the Act’s definition of that term. Hendricks offered testimony from a forensic psychiatrist who stated that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender.

The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. The court subsequently determined as a matter of state law that pedophilia qualifies as a “mental abnormality” as defined by the Act, and ordered Hendricks committed to the custody of the Kansas Secretary of Social and Rehabilitation Services.

Hendricks appealed to the Kansas Supreme Court. He complained that his commitment under the Act violated the due process rights afforded to him under the United States Constitution. He claimed that the criteria used to commit him as a sexually violent predator (i.e., mental abnormality), was qualitatively different from the State’s general commitment criteria of “mental illness.” In addition, the use of the term “mental abnormality” as a condition for commitment was arbitrary, intended for indefinite confinement, and therefore invalid regardless of the validity of the procedural mechanism employed to commit him under the Act. Hendricks asserted that the difference between the two terms amounted to a violation of his substantive due process rights, and as a result, invalidated his commitment.

Hendricks further asserted that his commitment under the new Act was tan-

tamount to double jeopardy. He argued that his being detained amounted to a second conviction and sentence for his 1984 offense. The final basis for his appeal was that his commitment under the new Act was inconsistent with the *ex post facto* clause established in the United States Constitution. He claimed that his involuntary commitment was in fact a conviction and sentence under a law that had not been established in 1984 when he committed his offense.

The Kansas Supreme Court accepted the due process claim. The court held that to commit a person involuntarily in a civil proceeding, a state is required by substantive due process to prove by clear and convincing evidence that the person is both mentally ill and a danger to himself or to others.³ The court then determined that the Act's definition of "mental abnormality" did not satisfy what it perceived to be the U.S. Supreme Court's "mental illness" requirement in the civil commitment context. The court held that "the Act violates Hendricks' substantive due process rights"⁴ The majority decision did not address Hendricks' *ex post facto* or double jeopardy claims. The State of Kansas petitioned for *certiorari*. Hendricks filed a cross-petition reasserting his federal double jeopardy and *ex post facto* claims. The Court granted *certiorari* on both petitions.

U.S. Supreme Court Upholds Kansas Sexual Predator Commitment Act

The majority of the U.S. Supreme Court accepted the State's argument that the Act's definition of "mental abnormal-

ity"—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 others⁵—satisfies substantive due process requirements. Citing *Foucha v. Louisiana*,⁶ the Court said that, "Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute." Even in a civil context, the individual's constitutionally protected interest in avoiding physical restraint may be overridden. There is no "absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."⁷

The Court explained that in certain narrow circumstances, states have provided for forcible civil detainment of people who are unable to control their behavior and thereby pose a danger to public health and safety. The Court pointed to the allowance of involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.⁸ The involuntary civil confinement of a limited subclass of dangerous persons is not, therefore, contrary to the Court's understanding of ordered liberty.⁹

The Court noted that the Act requires a finding of dangerousness to one's self or to others as a prerequisite to involuntary

confinement. The Act also requires proof of more than a mere predisposition to violence. It requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. Citing *Heller v. Doe*,¹⁰ the Court noted that "previous instances of violent behavior are an important indicator of future violent tendencies."¹¹ Thus, from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct.¹²

A finding of dangerousness, without anything further, has ordinarily been insufficient grounds upon which to justify involuntary commitment. The Court noted that some additional factor, such as mental illness, must be coupled with dangerousness. Justice Thomas explained that over the years, the Court has upheld numerous commitment statutes in which dangerousness was combined with other factors to support the loss of liberty. In the *Heller* case,¹³ for example, Kentucky permitted commitment of "mentally ill" or "mentally retarded" and dangerous individuals. The Court also upheld a commitment process for dangerous individuals with "psychopathic personality."¹⁴ The term "mental illness" does not according to the Court carry "talismatic significance."¹⁵

The Court then listed a variety of expressions used in its decisions to describe the mental condition of those properly subject to civil confinement, including "emotionally disturbed" and "mentally ill;"¹⁶ "incompetency" and "insanity;"¹⁷ and Justice O'Connor's concurring opinion in *Foucha*,¹⁸ which acknowledged a "State's authority to commit a person

when there is 'some medical justification for doing so.'" The Court also noted, that it had previously found that "psychiatrists disagree widely and frequently on what constitutes mental illness."¹⁹

According to Justice Thomas, the definition of terms of a medical nature that have legal significance has, according to the Court, traditionally been left to legislators. (See for example Massachusetts General Laws, Chapter 123, Section 2, which requires the Department of Mental Health to define "mental illness" by regulations "adaptable to changing conditions and to advances in methods of treatment of the mentally ill."). As a result, specialized terms that define mental health concepts have developed. These definitions do not always fit precisely with definitions employed by the medical community. The Court noted that in this case, Hendricks' diagnosis of pedophilia is considered a serious mental disorder by many in the psychiatric profession (see also *Osborn v. Psychiatric Security Review Board*,²⁰ discussed in the *Legal Digest* section of this issue of the Journal).

The Court also addressed the argument that Hendricks would be better served by being dealt with exclusively in the criminal justice arena. The Kansas Supreme Court found that he was "not amenable to treatment" under the Kansas civil commitment statute and considered this an important element when it invalidated the statute. This led the U.S. Supreme Court to observe that, "It would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise

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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."²¹ The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner.²² The Court observed that, "it remains a stubborn fact that there are many forms of mental illness which are not understood, some of which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low."²³

The Court found it unnecessary to consider Hendricks' double jeopardy and *ex post facto* grounds for appeal, since it found, based on the above outlined rationale, that the Kansas statute was not establishing a criminal proceeding. The Court found that commitment under the Act did not implicate the two primary objectives of criminal punishment: retribution and deterrence.

In fact, the Act does not make a criminal conviction a prerequisite for commitment. Persons found incompetent to stand trial after having been charged with sexually violent crimes and those found not guilty by reason of insanity of such crimes may also be committed.

Commentary

This decision changes little about the way that commitment laws in the United States operate. The legislature, because it is uniquely responsive to the public will, is the appropriate forum for addressing whether classes of people need protection and the manner in which this protection

may be implemented. The court should remain an avenue of last resort, necessary to protect those not capable of receiving protection from the democratic process. If the Kansas statute creates a new class of persons eligible for commitment, who are not appropriate for commitment and treatment by the mental health profession, then the appeal should be addressed to the legislature to correct the statute.

Those individuals deemed too dangerous to be returned safely to society have under a variety of guises been subject to some form of commitment for a long time. In some cases,²⁴ the sanction has been pursuant to the process of the criminal law, when "... in lieu of sentence" individuals found to be sexually dangerous (i.e., lacking the power to control their sexual impulses as evidenced by repetitive or compulsive behavior) could be committed for an indeterminate period of time "... for purposes of treatment and rehabilitation."²⁵ (It should be noted that Massachusetts is no longer committing persons pursuant to this chapter of the law.) In other cases, the definition of "mental illness" has been interpreted broadly enough so as to include persons diagnosed with pedophilia.²⁶

The implications of this decision may, however, have consequences far beyond the process of commitment. Defense counsel representing individuals in Kansas will be well served to advise their clients that sentences imposed as the result of plea bargains may no longer have any lasting validity, since the defendant may at the end of his sentence now be deemed a proper subject for commitment as a "sexually dangerous person."

The Court relied on the concept of a volitional prong to support the commitment in this case. Thus, it may also be time once again to revisit the distinctions between an irresistible impulse and an impulse not resisted, to determine whether we are in twilight or dusk.²⁷

References

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6. 504 U.S. 71 (1992)
7. *Hendricks*, 117 S. Ct. at 2079 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905))
8. See *Foucha*, 504 U.S. at 80
9. *Addington v. Texas*, 441 U.S. 418, at 426 (1979)
10. 509 U.S. 312, at 323 (1993)
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