

chiatrist seeking such a court order to be prepared to speak about the question of stability, in accordance with *Marquardt* and *Medina*.

The court's opinion in *Marquardt*, though relevant to a limited jurisdiction, presents several areas of potential impact on practice. On the one hand, it could serve to deter pursuit of more aggressive treatment for a patient by providers, as it imposes a potentially significant obstacle to obtaining a court order should there be sufficient concern that the patient might be found "stable" by the court. Alternatively, the holding in *Marquardt* may incentivize psychiatrists to take a more aggressive stance toward medication titration within the bounds of safety and tolerability, to prevent a situation wherein a significantly impaired but "stable" individual exhibits a plateau in response to treatment but refuses further titration of antipsychotic medication. This case highlights the importance of ongoing discussion among clinicians about providing the best possible psychiatric care in forensic settings where judicial decision-making about criteria for psychiatric dosing must be taken into account.

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Defendant's Competence to Participate in a Sexually Violent Offender Commitment Hearing

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Kansas Supreme Court Rules That Due Process Does Not Require a Defendant to be Competent in a Sexually Violent Predator Hearing Because It Is a Civil Proceeding

In 2007, Paul Sykes neared completion of his sentence for burglary and aggravated sexual battery when the state petitioned to adjudicate and commit

him as a sexually violent predator (SVP) under Kan. Stat. Ann. § 59-29a01 *et seq.* (2006). Several evaluators opined that Mr. Sykes was incompetent to proceed, presumably because of deficits related to schizophrenia. Despite his incompetency, Mr. Sykes was ultimately adjudicated an SVP and civilly committed. In *In re Sykes*, 367 P.3d 1244 (Kan. 2016), the Kansas Supreme Court affirmed the decisions of the district court and the court of appeals in ruling that due process did not require that Mr. Sykes be competent during an SVP proceeding, since SVP hearings are civil, not criminal.

Facts of the Case

In 1987, Mr. Sykes was convicted of burglary and aggravated sexual battery for breaking into a home and striking two females with his pants unzipped and penis exposed. Before the expiration of his sentence in 2007, the state of Kansas petitioned to adjudicate him an SVP.

The district court ordered an evaluation at Larned State Hospital, in which the examiners determined Mr. Sykes to be incompetent to stand trial and ordered involuntary civil commitment proceedings, as he was unlikely to become competent in the foreseeable future. In 2011, after further evaluations of his competence to stand trial, the county district court found Mr. Sykes incompetent to stand trial in a criminal proceeding. As a matter of first impression, the court determined that incompetence to answer criminal charges is legally distinct from answering a civil complaint. Thus, Mr. Sykes was ordered to proceed to trial to address his commitment as an SVP.

Mr. Sykes filed a motion for interlocutory appeal, arguing that his due process rights would be violated if he were to proceed to trial while incompetent. This appeal was granted by the district court but the court of appeals declined to authorize it. Against the advice of his attorney, Mr. Sykes requested a jury trial. He then requested a bench trial at the urging of his attorney. The court asked Mr. Sykes if he understood what he was doing, to which he responded that he did not.

Testimony from multiple witnesses was introduced at trial, including that of the 1987 sexual battery victims and of multiple psychological experts. Psychologists testified that Mr. Sykes met criteria for schizophrenia, antisocial personality disorder, narcissistic personality disorder, substance abuse, and borderline intellectual functioning. Additional testimony highlighted that he had committed lewd acts while confined, was not forthcoming about his

crime, did not comply with his medications, did not finish his sexual abuse treatment program, had a poor understanding of at-risk situations, and had a high risk of recidivism. One psychologist recommended that Mr. Sykes enter the Larned Hospital SVP program, a program that no one had ever successfully completed. A psychologist who had previously evaluated Mr. Sykes for the defense concluded that Mr. Sykes met the definition of an SVP, however, that he did not meet criteria for antisocial personality disorder and that treatment at Larned would be ineffective.

At trial, Mr. Sykes appeared as a witness and was tangential, disorganized, and meandering in his responses. This district court ultimately adjudicated Mr. Sykes as an SVP and committed him until he was determined to be safe for release into the community.

Mr. Sykes appealed the decision of the district court. The Kansas Court of Appeals affirmed the lower court's decision. Mr. Sykes then appealed to the Kansas Supreme Court. He argued that due process requires a defendant to be both competent to understand the nature of an SVP proceeding and to be able to assist counsel.

Ruling and Reasoning

In Kansas, an individual can be civilly committed, either as an SVP under Kan. Stat. Ann. § 59-29a01, *et seq.*, or involuntarily because of a treatable mental illness, an inability to make medical decisions, or the possibility of danger to self or others.

Factors in adjudicating someone an SVP include conviction for a sexually violent crime, presence of a mental or a personality disorder, or a high risk of engaging in repeated acts of sexual violence. SVP proceedings require certain due process protections, including a probable cause hearing, the right to counsel, appointment of qualified experts, a jury trial with a requirement for a unanimous decision, the right to appeal, judgment according to the standard of proof beyond a reasonable doubt, and an annual review.

In analyzing Mr. Sykes' case, the Kansas Supreme Court referenced *In re Morgan*, 330 P.3d 774 (Wash. 2014), a decision of the Washington Supreme Court. Although *Morgan* was not binding, the majority found the ruling persuasive, in that it applied the balancing test found in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Kansas Supreme Court balanced the risk of erroneous deprivation of liberty with the government's interest in treatment and in

protecting society from SVPs. The court additionally noted that the government must avoid the risk of a less secure setting that would threaten the "well-being of society at large" (*Sykes*, p 1248).

The Kansas Supreme Court affirmed the court of appeals in holding that Mr. Sykes received due process. The majority decided that incompetence is not a defense in civil actions, that Kansas's SVP act includes sufficient due process protections, and that mental competence is not necessary to ensure a defendant can assist in his own defense in civil adjudication of an SVP.

In a concurring opinion, Justice Johnson reluctantly agreed with the holding of the court while pointing out that there is a substantial difference between involuntary civil commitment and SVP commitment, suggesting that each should have distinct procedures. Justice Johnson highlighted the dissent in *Morgan*, which observed that procedural safeguards such as the right to counsel, the right to present evidence, and the right to cross-examination are diluted significantly if a defendant is incompetent. Justice Johnson cautioned that allowing an incompetent defendant to be adjudicated an SVP reduces him to a mere "spectator, with no power to have an effect on the outcome" and possibly costs him his liberty, which "stretches due process near, if not past, the breaking point" (*Sykes*, p 1252).

Discussion

Mr. Sykes's case highlights the fundamental tension between an individual's substantive and procedural due process rights and the state's interest in protecting the community from potentially dangerous individuals. The Kansas SVP Act was passed in 1994 and precipitated the landmark case of *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks*, the Court ruled that the SVP Act was constitutional; the Court held that the Act was civil, not criminal, and thus did not violate an individual's due process rights. In addition, the Court acknowledged that treatment was not guaranteed under the Act, but the absence of treatment did not make the statute punitive. In *In re Hay*, 953 P.2d 666 (Kan. 1998), the Kansas Supreme Court further held that the specific protections provided under the Act satisfy necessary due process requirements.

The majority in *Sykes* referenced these cases, as well as case law from other jurisdictions in reaching the decision that it was not a constitutional require-

ment that Mr. Sykes be competent throughout an SVP adjudication. However, the concurring opinion in *Sykes* validly asserted that purported due process protections, such as the right to counsel, notice, and opportunity to be heard, were effectively diluted if a defendant was incompetent. Although the majority emphasized the civil nature of the SVP hearing as a crucial factor in their decision, SVP proceedings are arguably distinct from other, traditional civil commitment schemes, in that a more compelling liberty interest is at stake. Individuals adjudicated as SVPs face a low likelihood of eventual release or even the ability to complete an SVP program. In addition, if there is minimal emphasis on treatment of co-occurring mental disorders (such as schizophrenia) during an SVP commitment, the probability that an individual will successfully complete an SVP program is even lower. Although the majority in *Sykes* followed the lead of at least seven other jurisdictions in reaching its conclusion, the points delineated in the concurring opinion remain compelling. As referenced in *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992), “[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.” It appears in this case that the reasonable relation is a tenuous one, given that Mr. Sykes’s severe psychiatric illness may not be treated while he is in the SVP program, where he may be held for life, an outcome that Mr. Sykes may not have had the capacity or ability to influence or appreciate throughout his trial.

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Habeas Corpus Petitions and the Antiterrorism and Effective Death Penalty Act of 1996

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Tenth Circuit Court Affirms District Court Denial of a Petition for Habeas Relief of Incompetent Petitioner Based on the Standard Laid Out by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

In *Ryder v. Warrior*, 810 F.3d 724 (10th Cir. 2016), an Oklahoma man found guilty of two murders and sentenced to death filed a federal *habeas* petition, arguing that he was not competent to stand trial or to waive his right to present mitigating evidence at trial. He had untreated mental illness, which the Tenth Circuit Court acknowledged. Nonetheless, the court held that, under the narrow review permitted by the Antiterrorism and Effective Death Penalty Act of 1996, it had to affirm the denial of *habeas* relief.

Facts of the Case

On April 8, 1999, James Chandler Ryder killed an elderly woman, Daisy Hallum, and her son, Sam Hallum, in a dispute over Mr. Ryder’s belongings. Mr. Ryder had been collecting supplies with the intention of moving to the Yukon Territory, Canada, before January 1, 2000; the day he believed that the apocalypse would occur. Mr. Ryder believed that the Yukon would be the only place that he could survive this event. His ongoing dispute with the Hallums culminated with Mr. Ryder’s beating Ms. Hallum to death and then shooting and killing her son.

The facts pertaining to the murders and the arrest of Mr. Ryder were essentially undisputed. Mr. Ryder was convicted of two counts of first degree murder and sentenced to death for the murder of Ms. Hallum. Before the trial, a favorable plea agreement had been rejected by Mr. Ryder who had stated that he had preferred death to a life sentence. After his conviction in 2000, but before sentencing, his defense attorney raised questions about a competency evaluation that had been completed before the trial finding Mr. Ryder incompetent to assist his attorney. The defense had decided not to raise this question before the trial, based on the belief that defense’s interaction with the defendant did not create a “good faith doubt” as to his competency. The trial court held a hearing during which Mr. Ryder waived his right to present mitigating evidence. The trial judge ruled, after an extensive hearing, that Mr. Ryder was competent, and knowingly and voluntarily had waived his right to present mitigation at the sentencing phase.