

## Substantive Due Process for Sexually Dangerous Individual Classification

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**Individuals May Not Be Classified as Sexually Dangerous Individuals and Kept in Civil Commitment Without Adequate Proof of a Serious Difficulty in Controlling Behavior**

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**Key words:** sexually dangerous individual; civil commitment; due process; behavioral control

In *In re R.A.S.*, 930 N.W.2d 162 (N.D. 2019), the Supreme Court of North Dakota ruled that the district court erred in determining that R.A.S. was a sexually dangerous individual. The Supreme Court of North Dakota found that the state failed to meet substantive due process requirements establishing that R.A.S. demonstrated a serious difficulty controlling his behavior.

### **Facts of the Case**

In 1991, R.A.S. received an eight-year prison sentence after conviction for gross sexual imposition. In 2001, R.A.S. was convicted for possession of stolen property, and in 2002, he was convicted for assaulting a corrections officer. The state committed R.A.S. as a sexually dangerous individual prior to his scheduled release in 2004. In 2007, R.A.S. requested a review of his commitment, and the district court found that he continued to be a sexually dangerous individual. R.A.S. appealed the district court's decision, and the Supreme Court of North Dakota remanded because there were insufficient findings of fact and the district court made a conclusory

statement that the state had met its burden. After the district court made specific findings in relation to the criteria for his classification as a sexually dangerous individual, the Supreme Court of North Dakota affirmed. The district court subsequently denied R.A.S.'s petitions for release in 2010, 2012, and 2016, and these decisions were not appealed by R.A.S.

On May 2, 2018, R.A.S. requested a discharge hearing under North Dakota Criminal Code § 25-03.3-18 (2019), and the hearing was held on January 11, 2019. At the hearing, a psychologist testified that R.A.S. was likely to engage in further sexually predatory conduct based on testing and review of his past conduct. Review of R.A.S.'s records indicated that a North Dakota state hospital lowered R.A.S.'s olanzapine medication dosage at R.A.S.'s request. The hospital revoked some of his privileges to determine if the new dosage met his behavioral needs. In response to the loss of privileges, R.A.S. declined two doses of the medication. R.A.S. later agreed to return to the higher medication dosage in exchange for his previous privileges. The psychologist testified that R.A.S.'s declination of two medication doses demonstrated his difficulty in controlling his behavior. The district court found convincing that the missed medication doses indicated his difficulty controlling his behavior and denied his application for discharge. R.A.S. appealed.

### **Ruling and Reasoning**

The Supreme Court of North Dakota reversed the district court's decision and released R.A.S. from civil commitment. The court ruled that the state failed to meet the substantive due-process requirements under *Kansas v. Crane*, 534 U.S. 407 (2002). Per North Dakota Criminal Code § 25-03.3-18(4) (2019), the state must prove at a discharge hearing, by clear and convincing evidence, that a petitioner remains a sexually dangerous individual. The court cited North Dakota Criminal Code § 25-03.3-01(8) (2019) to define a sexually dangerous individual as an individual who engaged in sexually predatory conduct who has a congenital or acquired condition that may be manifested by a sexual disorder, personality disorder, or another mental disorder or dysfunction that makes the individual likely to engage in further predatory conduct that would be a danger to the physical or mental health or safety of others. R.A.S. conceded that the state established the first two prongs of North Dakota's definition of a sexually

dangerous individual by the presence of past sexual predatory conduct and diagnoses of bipolar I disorder and specified paraphilic, exhibitionistic, and specified personality disorders with antisocial and schizotypal features. The lower court accepted actuarial test scores and dynamic risk factors as evidence of meeting the third prong of the state's sexually dangerous individual definition.

The court examined the substantive due process requirements articulated in *Interest of Tanner*, 897 W.2d 901 (N.D. 2017) to prove serious difficulty in controlling one's behavior. The court cited *Interest of Carter*, 924 N.W.2d 112 (N.D. 2019), as consistent with *Kansas v. Crane* and indicated that a nexus must exist between the requisite disorder and dangerousness to include proof that the disorder involves serious difficulty controlling behavior, thus distinguishing a dangerous sexual offender whose disorder subjects him to civil commitment from other dangerous but typical recidivists in ordinary criminal cases. Additionally, the court cited *Matter of Wolff*, 796 N.W.2d 644 (N.D. 2011), as consistent with *Kansas v. Crane* and noted that the evidence of serious difficulty in controlling behavior does not necessarily need to be sexual in nature. Further, the court stated that, per *Matter of J.M.*, 927 N.W.2d 422 (N.D. 2019), an individual having a mental disorder or condition alone does not satisfy the requirement of clear and convincing evidence that the individual is likely to engage in future sexually predatory conduct.

The court stated that the district court erred in using R.A.S.'s declination of two medication dosages in 2018 as the sole evidence for demonstrating an active inability to control his actions. The court, citing *Interest of J.M.*, 713 N.W.2d 518 (N.D. 2006), noted that although the district court may rely on non-sexual conduct, substantive due process requires that the evidence must show clearly a serious difficulty in controlling sexual predatory behaviors; without more evidence than twice refusing medication, the state did not establish that R.A.S. had serious difficulty controlling his behavior. The court ordered R.A.S.'s release from civil commitment.

### Discussion

In this case, the Supreme Court of North Dakota reiterated the need for substantive due process in the classification and civil commitment of sexually dangerous individuals. The decision highlights that substantive due process requires sufficient evidence of

serious difficulty controlling behavior and that a nexus exists between the requisite disorder and dangerousness. These requirements are necessary to distinguish sexually dangerous individuals as defined by the law from individuals who are convicted of sexual offenses but do not have a requisite disorder and are not subject to civil commitment. Although the two instances of medication refusal did not represent a serious difficulty controlling behavior in this case, the court gave no clear standard for meeting that standard. This position is consistent with *Kansas v. Crane*, when the U.S. Supreme Court stated, ". . . in cases where lack of control is in question, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior" (*Crane*, p 413).

## Diagnostic Standards for Sex Offender Civil Commitment

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**The Fourth Circuit Court of Appeals Considers Whether a Paraphilic Disorder Diagnosis Is Necessary for Civil Commitment Under the Adam Walsh Child Protection and Safety Act**

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In *United States v. Charboneau*, 914 F.3d 906 (4th Cir. 2019), the Fourth Circuit Court of Appeals considered an appellant's claim that a federal district court had erred in finding him a sexually dangerous person under the Adam Walsh Child Safety and Protection Act of 2006 (18 U.S.C. 4247(a)(5) (2006)) even though he had not been diagnosed with a paraphilic disorder. The appellant also challenged