

## **CIVIL COMMITMENT OF SEXUALLY DANGEROUS INDIVIDUALS - *KANSAS V. HENDRICKS***

### **NORTH DAKOTA LAW**

The 1997 Legislative Assembly enacted House Bill No. 1047, which created a procedure for the civil commitment of sexually dangerous individuals. House Bill No. 1047 defines a sexually dangerous individual as an individual who has:

[S]hown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.

Sexually predatory conduct is conduct that is similar to the conduct required for the crime of gross sexual imposition.

The burden of proof for commitment is clear and convincing evidence, and the person to be committed has the right to counsel, to be present, to testify, and to present and cross-examine witnesses. If a person is found to be a sexually dangerous individual, the court commits that person to the care, custody, and control of the executive director of the Department of Human Services. The executive director has the duty to place the sexually dangerous individual at an appropriate facility or program at which treatment is available. Unless the sexually dangerous individual is already in the custody of the Department of Corrections and Rehabilitation, the executive director may not place the individual at the State Penitentiary or affiliated penal facilities.

The court must release the individual once the individual is no longer sexually dangerous. Each committed individual must have an examination of that individual's mental condition at least once a year. In addition, the executive director must give written notice of the right to petition for discharge to the committed individual once a year. If the committed individual files a petition for discharge and has not had a hearing during the preceding 12 months, the committed individual will receive a hearing.

### **UNITED STATES SUPREME COURT OPINION**

On June 23, 1997, the United States Supreme Court issued an opinion in *Kansas v. Hendricks*, U.S.

Sup. Ct; Nos. 95-1649 and 95-9075. In *Hendricks*, the Court held in a 5-4 decision that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible ex post facto lawmaking.

### **Substantive Due Process Issue**

Substantive due process requires that a decision is principled. The Kansas Supreme Court invalidated the Act and held that the precommitment condition of a "mental abnormality" did not satisfy substantive due process because involuntary civil commitment must be made on a finding of "mental illness." The Act defined a "sexually violent predator" as:

[A]ny 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.

The Act defined a "mental abnormality" as a:

[C]ongenital or acquired condition effecting 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.

The Court reasoned that involuntary civil commitment requires a finding of dangerousness either to oneself or to others and an additional factor, such as mental illness or mental abnormality. The determination of the additional factor is within the purview of the state legislature. However, the additional factor must serve to limit involuntary civil commitment to those who suffer from a volitional impairment deeming them dangerous beyond their control. The Court held that the Kansas Act satisfied these requirements.

Although the Kansas Act imposed a higher burden of proof upon the state--beyond reasonable doubt--and provided an additional avenue for review and provided for a jury trial, all of which are different from House Bill No. 1047, this state's law seems constitutional under the same substantive due process analysis used in *Hendricks*.

House Bill No. 1047 requires a sexually dangerous individual to have engaged in and be "likely to engage in further acts of sexually predatory conduct" which would constitute "a danger to the physical or mental

health or safety of others.” These words appear to satisfy the dangerousness element required by the Court for involuntary civil commitment. The future dangerousness must be a result of a sexual, personality, or mental disorder or dysfunction. This appears to satisfy the future dangerousness beyond the individual’s control element.

### **Double Jeopardy and Ex Post Facto Issues**

For the Kansas Act to violate the constitution’s double jeopardy prohibition or its ban on ex post facto lawmaking, the Act must create a punishment. The Court held that the Act cannot be characterized as punitive. The Court reasoned that the legislature’s stated intent was to have a civil label applied. The Court said that the Act does not implicate either of the two primary objectives of punishment--retribution or deterrence. For example, the Act does not have an element of scienter, which is customarily an important element in distinguishing criminal from civil statutes.

Hendricks argued, among other things, that the potentially indefinite duration of confinement was evidence of a punitive intent. The Court stated that the confinement’s duration is linked to the committed individual’s abnormality. When the committed individual is no longer a danger to that individual’s self or others, that individual must be released.

Hendricks also argued that the Act is punitive because it fails to offer legitimate treatment. The Court stated:

A State could hardly be seen as furthering a “punitive” purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Similarly, 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 would obligate a state to release certain confined individuals who are both mentally ill and

dangerous simply because they could not be successfully treated for their afflictions.

The Court reasoned that, at minimum, the ancillary purpose of the Act was to provide treatment. However, Justice Kennedy held in his concurring opinion that if the object of the Act had been to provide treatment, but the treatment provisions were adopted as a sham, there would have been an indication of the forbidden purpose to punish.

The Court found that the sexually dangerous individual was committed to the social service agency of the state of Kansas, which has an obligation to provide treatment to individuals. Although the Court found that Hendricks was offered somewhat meager treatment, the Court placed great weight on placement with the social service agency as evidence of a nonpunitive intent. The Court concluded:

Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

House Bill No. 1047 appears to meet all of the same conditions as the Kansas Act. This state would have to make a good-faith effort to offer treatment upon the commitment of an individual. Otherwise, the other factors seem to have already been met. Of great significance, the North Dakota law physically and procedurally separates involuntary civil commitment from the criminal process. There is ample evidence that House Bill No. 1047 is civil or remedial and not punitive.