Criminal Law: *Kansas v. Hendricks*–Warehousing Sex Offenders

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NOTES

Criminal Law: *Kansas v. Hendricks — Warehousing Sex Offenders*

*Prologue — A Hypothetical*

Suppose you are a parent. You and your family have lived in your neighborhood for fifteen years. Your child is ten and attends the fifth grade at a local elementary school.

Nothing much ever happens in your neighborhood. The most excitement occurs when a newcomer settles in the community. Nonetheless, you have taught your child not to talk to strangers, never to tell anyone he is home alone, and never to wander off.

Recently a new neighbor moved in next door. In an effort to be neighborly, you and your family welcome him to the neighborhood. It is not long before he is accepted as part of the community. In fact, he volunteers for community projects. You attend the same church and even invite him to occasional barbecues.

What you do not know about your new neighbor is that he has been repeatedly convicted for child molestation. Your child may be his next victim. In an effort to protect the community's children, the legislature enacted a Sex Offender Registration Act. This Act requires your neighbor to register with local law enforcement. The file on the community's newest member includes his name and aliases, a photograph and fingerprints, a list of offenses for which he has been convicted, where the offenses were committed, where he resides, and how long he intends to remain. The Act allows for discretionary notification, upon your request, of the information in the sex offender registry.

Like most repeat sex offenders, your neighbor has been diagnosed with an antisocial personality disorder. Someone in the medical community determined that he is safe to be at large. However, his multiple convictions tell a different story. As a parent armed with limited information, you are left with a sexual predator living nearby. Residents in the community cry out "Not in our backyard!" The Oklahoma legislature responds with an involuntary civil commitment statute targeting sex offenders.

*Introduction*

Among the many guarantees provided for in the Constitution are the rights to be free from double jeopardy and the reach of ex post facto laws. 📖 "[W]here so

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1. See U.S. Const. amend. V.
2. See U.S. Const. art. I, § 9, cl. 3.

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significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line. This line cannot be crossed even to protect society from some of its most heinous members — sex offenders. Horrific stories revealing the continuing victimization of our nation's children by sex offenders have spurred the enactment in numerous states of civil commitment statutes.

According to the most conservative studies, recidivism rates are chronic among sex offenders. One study reported a forty percent recidivism rate during the first three years after release from prison. Despite high rates of recidivism, many offenders avoid serving long prison sentences. One study showed that eighty-five percent of a sample of child molesters plea bargain to a lesser sentence. For those offenders that received prison terms, the average sentence was only nine years. However, of the 142 offenders studied, only eight-and-one-half percent were diagnosed as pedophiles. A higher percent were diagnosed as having antisocial personality disorders.

Although sex offenders have alarming recidivism rates, there is no empirical evidence suggesting which sex offenders present risks of reoffending. This explains the medical profession's reluctance to diagnose sex offenders as pedophiles and to classify pedophilia as a mental illness. However, the lack of empirical


8. See id. at 398.

9. See id. at 397.

10. See id. at 397-98.

11. See id. at 392-93.

evidence has neither calmed the public's fury nor delayed the legislative crackdown on sex offenders. New Jersey took the initiative in 1994 when it passed a sex offender notification act, commonly known as "Megan's Law." Currently, all fifty states have adopted sex offender registration and notification acts.

Because registration and notification acts only address the community's need for information, sex offender commitment statutes are being enacted to continue the assault on sex offenders. Meanwhile, convicted sex offenders have mounted their own assault against legislative initiatives by alleging that civil commitment statutes are unconstitutional. However, in Kansas v. Hendricks, a 5-4 decision, the United States Supreme Court upheld the Kansas civil commitment statute for sexually violent predators, despite Hendricks' constitutional challenges.

This note discusses the validity of the Kansas Sexually Violent Predator Commitment Statute as a civil proceeding. Part I examines the constitutional limitations historically placed on civil confinement. Part II recounts the facts and holdings of Hendricks and examines the Supreme Court's decision in light of the medical profession's reluctance to conclude that sexual predators are mentally ill. Part III exposes the reality that while warehousing sex offenders in state institutions might be publicly desirable, it must be done without dismantling bedrock principles protected by the Constitution. Finally, because Oklahoma has proposed a civil commitment statute tailored for sex offenders, this note warns against enacting such a statute.

I. Historical Background

The Due Process Clause of the Fourteenth Amendment requires that no person be deprived of "life, liberty, or property without due process of law;" however, no single source dictates the limits of this doctrine. The essence of federalism ensures that states are free to develop solutions to problems and not be "forced into a common uniform, mold." However, states must still adhere to court constructed guidelines to ensure that statutory law fits within a constitutionally permissible framework.

While the burden of proof required for states to commit an individual civilly is lower than the burden necessary to incarcerate an individual, the guidelines used by courts are becoming unclear. Prior decisions by the United States Supreme Court support the use of general civil commitment statutes to confine mentally ill persons involuntarily due to their behavior. Narrowly tailored civil commitment statutes,

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17. See Hendricks, 117 S. Ct. at 2086.
targeted to reach sexual predators, require the state to prove an existing mental illness as well as dangerousness. More recently, the Court indirectly eased the burden on states by permitting the confinement of sex offenders based on an unpredictable determination of future dangerousness.

A. Burden of Proof

The function of a standard of proof is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."20 In a case involving individual liberty the burden of proof reflects the value society places on the particular liberty.21 Courts have repeatedly recognized that civil commitment for any purpose results in a deprivation of liberty that requires due process protection.22

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. . . . Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.23

In Addington v. Texas,24 the United States Supreme Court defined the burden placed on a state to commit an individual involuntarily. The Court determined that the individual's rights and the interests of the state were best balanced by employing the standard of clear and convincing evidence.25 The Court declined to employ the beyond a reasonable doubt standard for two reasons. First, the lack of certainty and fallibility of psychiatric diagnosis places an impossible burden on a state to prove dangerousness or that an individual suffers from a mental illness.26 Second, the medical community employs the standard of a reasonable medical certainty.27

If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror — or indeed even a trained judge — who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. Such "freedom" for a mentally ill person would be purchased at a high price.28

23. Addington, 441 U.S. at 426.
25. See id. at 431-33.
26. See id. at 429.
27. See id. at 430.
28. Id. (citation omitted).
The "moral force of the criminal law"\textsuperscript{29} concedes that some who are guilty will go free. This is the cost to society to protect the innocent. It cannot be said that it is better for a mentally ill person to go free than for a mentally normal person to be committed.\textsuperscript{30}

B. Baxtrom v. Herold: Authority to Civilly Confine Criminals Subsequent to the Expiration of Their Criminal Sentence

The case of Baxtrom v. Herold\textsuperscript{31} articulated the Supreme Court's position regarding the civil commitment of individuals subsequent to their completion of a criminal sentence. In Baxtrom, Johnnie K. Baxtrom was certified as insane by a prison physician while serving a prison term for assault.\textsuperscript{32} Under the custody of the New York Department of Corrections, Baxtrom was transferred from prison to an institution used to confine and care for male prisoners declared mentally ill.\textsuperscript{33} The director of the institution petitioned the court requesting that Baxtrom be civilly committed.\textsuperscript{34} The State submitted medical certificates certifying that Baxtrom was mentally ill.\textsuperscript{35} At a proceeding in chambers, Baxtrom was given a brief opportunity to ask questions.\textsuperscript{36} When Baxtrom's sentence expired, the Department of Mental Hygiene took custody of Baxtrom but determined he was not suitable for civil confinement. Thus, Baxtrom was remanded to the Department of Corrections for confinement.\textsuperscript{37}

After several habeas corpus petitions were denied, the Supreme Court granted certiorari and held that any person dissatisfied with an order certifying him as mentally ill has a right to demand full review by a jury.\textsuperscript{38} The Court found that equal protection requires that mentally ill convicts be released at the termination of their penal terms unless they are civilly committed like other involuntarily confined mentally ill persons.\textsuperscript{39} The Court concluded that Baxtrom was denied equal protection of the law because he was denied a judicial determination that he is dangerous and mentally ill.\textsuperscript{40} The Court found no conceivable basis for differentiating between procedures for a person who is completing a criminal sentence and all other civil commitments.\textsuperscript{41} Read broadly, Baxtrom authorized the civil commitment of criminals who have completed their required prison sentences. This broad

\textsuperscript{29} In re Winship, 397 U.S. at 364.
\textsuperscript{30} See Addington, 441 U.S. at 429.
\textsuperscript{31} 383 U.S. 107 (1966).
\textsuperscript{32} See id. at 108.
\textsuperscript{33} See id.
\textsuperscript{34} See id.
\textsuperscript{35} See id.
\textsuperscript{36} See id. at 108-09.
\textsuperscript{37} See id. at 109.
\textsuperscript{38} See id. at 111.
\textsuperscript{39} See id. at 110.
\textsuperscript{40} See id.
\textsuperscript{41} See id. at 111-12.
interpretation of Baxstrom paved the way for the civil commitment of sex offenders following completion of their criminal sentences.

C. Allen v. Illinois: Support for Finding That Sex Offender Commitment Statutes Are Civil in Nature

Although the Supreme Court generally authorized the civil commitment of criminals who have completed their criminal sentences, modern statutes narrowly tailored to reach sexually violent predators must be civil in nature to survive constitutional attacks. In Allen v. Illinois, the Supreme Court examined the nature of the Illinois Sexually Dangerous Person Act (the Act) in light of the Fifth Amendment privilege against self-incrimination. In Allen, the defendant was charged with unlawful restraint and deviant sexual assault. The State petitioned to have him declared a sexually dangerous person and to have him civilly committed. He was ordered to submit to two psychiatric evaluations. The defendant later alleged that the information elicited from him violated his privilege against self-incrimination. Despite the defendant's constitutional claim, the Court held that the privilege against self-incrimination is not applicable in civil commitment proceedings, and the Court found him to be a sexually dangerous person within the meaning of the Act.

The Supreme Court concluded that the Illinois Act is civil in nature based upon three factors. First, the Court looked to the Act's statutory construction. The Act expressly declared that the Act "shall be civil in nature." Second, the Court recognized that "[t]he State has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable . . . to care for themselves; the state also has authority under its police powers to protect the community from the dangerous tendencies of some who are mentally ill." A state's exercise of its protective powers does not ipso facto make the proceeding criminal. Finally, the Court found that the statute's purpose was not to punish, but to treat sexually dangerous persons. Treatment of sexually dangerous persons is the cornerstone of modern statutory schemes that provide for civil confinement of sex offenders.

42. 478 U.S. 364 (1986).
43. See id. at 365.
44. See id.
45. See id. at 366.
46. See id.
47. See id.
48. See id. at 367.
49. See id. at 375.
50. See id. at 368.
51. Id. (quoting 725 ILL. COMP. STAT. 205/3.01 (West 1992)).
52. Id. at 373 (quoting Addington, 441 U.S. at 426).
53. See id. at 370.
D. Foucha v. Louisiana: Mentally Ill and Dangerousness Requirements

In Foucha v. Louisiana, the Supreme Court examined a Louisiana statute allowing the state to commit persons acquitted of crimes by reason of insanity to mental institutions until they demonstrate they are not dangerous. Terry Foucha was charged with aggravated burglary and illegal discharge of a firearm. The trial court found Foucha not guilty by reason of insanity and committed him to an institution. Four years later, Foucha was conditionally released based on a report that he was "in remission from mental illness." The report recognized that Foucha was in "good shape" mentally but still suffered from an untreatable antisocial personality disorder. The doctor testified he would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people."

The Court, in a plurality opinion, struck down the Louisiana statute. The Court held that when the basis for an insane convict's original confinement no longer exists, a state is required to establish insanity and dangerousness by clear and convincing evidence in order to confine the convict beyond the original sentence. The opinion rejected the rationale underlying the Louisiana statute which would have allowed the State to detain indefinitely insanity acquittees who have personality disorders that may lead to dangerous conduct. The true danger is that this rationale could be applied to any criminal subsequent to the completion of his sentence. "It would also be only a step away from substituting confinements based on 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 a reasonable doubt to have violated a criminal law."

The Court conceded that in narrowly defined circumstances, a finding of dangerousness, without more, is sufficient justification for civil confinement. The Foucha case, however, is distinguishable from those circumstances for two reasons. First, a finding of dangerousness in the context of pre-trial detention is justified by the compelling interest in preventing crime. Second, the Louisiana statute failed

55. See id. at 73.
56. See id.
57. See id. at 74.
58. Id.
59. See id. at 75.
60. Id.
61. See id. at 86.
62. See id.
63. See id. at 82.
64. See id. at 82-83.
65. Id.
66. See id. at 80. The Court is referring to the decision in United States v. Salerno, 481 U.S. 739 (1987).
67. See id. at 81 (citing Salerno, 481 U.S. at 749).
to provide detainees an adversarial hearing.\textsuperscript{68} The fundamental problem is that Louisiana shifts the burden of proof from the State to the detainee.\textsuperscript{69} The State should carry the burden of proving by clear and convincing evidence that the detainee presents an "identified and articulable threat to an individual or the community."\textsuperscript{70}

\textbf{II. Kansas v. Hendricks}

\textbf{A. Facts}

During testimony, Leroy Hendricks revealed his chilling history of sexual molestation. In 1955, Hendricks pled guilty to indecent exposure after exposing his genitals to two young girls. Two years later, a court convicted Hendricks of lewdness involving another young girl. In 1960, he molested two young boys while working for a carnival. Hendricks served two years in prison for that offense and was paroled only to be rearrested for molesting a young girl. After attempts to treat Hendricks for his sexual deviance, he was released in 1965 from a state psychiatric hospital and determined safe to be discharged into the community.

In 1967, however, Hendricks was imprisoned for performing oral sex on an eight-year-old girl and fondling an eleven-year-old boy. Despite Hendricks' refusal to participate in the sex offender treatment program, he was paroled in 1972. For approximately the next four years Hendricks abused his two stepchildren. In 1984, Hendricks was again convicted of taking indecent liberties with two teenage boys. After serving ten years of his sentence, Hendricks was slated for release to a halfway house. In 1994, the State of Kansas petitioned the state court to civilly confine Hendricks, pursuant to Kansas' Sexually Violent Predator Act (the Act),\textsuperscript{71} and to end Hendricks' rampant victimization of young children.

Hendricks challenged the constitutionality of Kansas' Act and moved to dismiss the petition. The court reserved ruling on the Act's constitutionality and required Hendricks to undergo mental evaluation at the Larned State Security Hospital. After Hendricks' request for a jury trial, the jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. The trial court also concluded that pedophilia qualifies as a "mental abnormality" as defined in the Act.

Hendricks appealed the trial court's findings, alleging that the Act violated his right to substantive due process, his right to be free from double jeopardy, and his right to be free from ex post facto laws. The Kansas Supreme Court held that the Act violated Hendricks' right to substantive due process; however, the majority did not address the double jeopardy or ex post facto claims.\textsuperscript{72} The United States Supreme Court stayed the Kansas Supreme Court's ruling pending its decision.\textsuperscript{73}

\textsuperscript{68} See id. (citing Salerno, 481 U.S. at 751).
\textsuperscript{69} See id.
\textsuperscript{70} Id. (quoting Salerno, 481 U.S. at 751).
\textsuperscript{72} See In re Hendricks, 912 P.2d 129, 138 (Kans. 1996).
\textsuperscript{73} See Kansas v. Hendricks, 116 S. Ct. 1540 (1996).
States Supreme Court eventually reversed the Kansas Supreme Court by upholding the constitutionality of the Kansas Sexually Violent Predator Act.\textsuperscript{74}

\textbf{B. Kansas Sexually Violent Predator Act}

In 1994, Kansas enacted the Sexually Violent Predator Act, which provided procedures for civilly confining persons who, due to a mental abnormality or personality disorder, are likely to commit predatory acts of violence.\textsuperscript{75} The Act was enacted for two reasons: (1) to provide a long term treatment program for the sexually violent predator; and (2) because general involuntary civil commitment statutes inappropriately address the unamenable characteristics of sexually violent predators.\textsuperscript{76}

The Act defines a sexually violent predator as "any person convicted of or charged with a sexually violent offense\textsuperscript{77} and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."\textsuperscript{78} Likewise, the Act defines a mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses."\textsuperscript{79}

The Act sets forth a specific series of procedures which must be followed in order to obtain a civil commitment. First, the custodial agency notifies the local prosecutor prior to the anticipated release of the sex offender.\textsuperscript{80} The prosecutor determines whether to file a petition seeking the offender's involuntary civil commitment.\textsuperscript{81} Once the petition is filed, the court conducts a hearing to determine whether probable cause exists to find that the detainee is a sexually violent predator within the meaning of the Act.\textsuperscript{82} If probable cause has been established, the detainee is professionally evaluated.\textsuperscript{83}

Subsequent to the evaluation, the offender receives a trial in which the State must demonstrate beyond a reasonable doubt that the offender is in fact a sexually violent predator.\textsuperscript{84} Finally, if the State meets its burden, the sexually violent predator is civilly committed until the offender's mental abnormality is treated and it is determined that it is safe for the offender to be at large.\textsuperscript{85} The Act further requires

\textsuperscript{74} See Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997).
\textsuperscript{76} See id. § 59-29a01.
\textsuperscript{77} Id. § 59-29a02. Sexually violent offenses include rape, indecent liberties with a child, criminal sodomy, indecent solicitation of a child, sexual exploitation of a child, and aggravated sexual battery. The Act provides a catch-all clause including any felony offense comparable to a sexually violent offense. See id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See id. § 59-29a03.
\textsuperscript{81} See id. § 59-29a04.
\textsuperscript{82} See id. § 59-29a05.
\textsuperscript{83} See id.
\textsuperscript{84} See id. § 59-29a07.
\textsuperscript{85} See id.
that the commitment conform to the constitutional requirements for treatment and that the offender be granted avenues for review.\(^{86}\)

\textit{C. Majority Opinion}

The Court examined whether the involuntary civil commitment of a subclass of dangerous persons conflicts with the Constitution's doctrine of ordered liberty. In a 5-4 decision, the Court upheld the Kansas Sexually Violent Predator Act.\(^{87}\) The majority examined the Act in light of three constitutional dimensions: substantive due process, double jeopardy, and ex post facto laws.\(^{88}\)

\textit{1. Substantive Due Process}

While freedom from physical restraint is at the core of the Due Process Clause, that freedom is not absolute.\(^{89}\) Society cannot exist without providing safety for its members.\(^{90}\) The Court recognized that civil commitment statutes have historically been upheld when the individual poses a danger to public safety.\(^{91}\) The Kansas Statute "requires proof of more than a mere predisposition to violence; rather 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."\(^{92}\)

The Court likened the Kansas Act to previously upheld civil commitment statutes.\(^{93}\) Hendricks asserted that earlier decisions required a finding of mental illness before civil commitment can be imposed.\(^{94}\) He argued that a mental abnormality is not the equivalent of a mental illness.\(^{95}\) The Court gave little weight to Hendricks' assertions because the term mental illness lacks "talismanic sig-

\begin{itemize}
  \item \textit{86. See id.} §§ 59-29a08 to -29a11 (1994 & Supp. 1997). Confined offenders were granted three avenues for review. First, the offender receives an annual review to determine whether continued confinement is necessary. Second, the secretary of Social Rehabilitation Services may determine, at any time, whether the offender's mental abnormality has so changed that he should be released. Finally, the confined offender may, at any time, file a release petition. \textit{See id.}
  \item \textit{87. See Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997).}
  \item \textit{88. See id.}
  \item \textit{89. See Foucha v. Louisiana, 504 U.S. 71, 80 (1992).}
  \item \textit{90. See Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).}
  \item \textit{91. See 1788 N.Y. Laws ch. 31 (permitting confinement of the "furiously mad"); ALBERT DEUTSH, THE MENTALLY ILL IN AMERICA (1949) (tracing history of civil confinement in the 18th and 19th centuries); GERALD CROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 (1973) (discussing colonial and early American civil commitment statutes).}
  \item \textit{92. Hendricks, 117 S. Ct. at 2080.}
  \item \textit{93. See id.} The Supreme Court has upheld civil commitment statutes when the statute requires proof of dangerousness as well as mental abnormality. \textit{See} Heller v. Doe, 509 U.S. 312, 334 (1993) (sustaining a Kentucky statute allowing for commitment of mentally retarded or dangerous individual); Allen v. Illinois, 478 U.S. 364, 375 (1986) (upholding Illinois statute permitting commitment of mentally ill and dangerous person); Minnesota \textit{ex rel.} Pearson v. Probate Court, 309 U.S. 270, 277 (1940) (permitting commitment of dangerous individual with psychopathic personality under Minnesota statute).
  \item \textit{94. See Hendrick}, 117 S. Ct. at 2080.
  \item \textit{95. See id.}
\end{itemize}
nificance." Both the psychiatric discipline and the Court use a variety of expressions to describe mental illnesses. Legal definitions, however, which must take into account such issues as individual responsibility and competency need not mirror those advanced by the medical profession.

Hendricks undoubtedly satisfied the criteria because of his inability to control his actions. In fact, Hendricks admitted that when he becomes "stressed out" he cannot "control the urge" to abuse children sexually. Not surprisingly, Hendricks was diagnosed as having pedophilia, which is characterized by the medical profession as a mental disorder. The Court concluded that Hendricks' diagnosis as a pedophile, which clearly falls within the Act's definition of a mental abnormality, suffices for due process purposes.

2. Double Jeopardy

Hendricks argued that the Kansas Act establishes a criminal proceeding resulting in punishment. Furthermore, Hendricks reasoned that the punishment was based upon past conduct for which he had already been convicted, and therefore violated the Double Jeopardy Clause. Unpersuaded, the Court held that Hendricks was not placed in double jeopardy because the proceedings established by the Kansas Act are civil in nature. The Court reached the conclusion that civil commitment cannot ipso facto be a criminal proceeding merely because the individual has already been convicted. The Court's rationale is threefold.

First, all proceedings are characterized by looking at the statutory construction. The Court normally defers to the legislature's intent. The legislative intent is rejected only upon presentation of the clearest proof by the challenging party that the statute is so punitive in purpose or effect as to negate the legislature's intent. The Court reasoned that the Kansas legislature clearly intended to create a civil proceeding. In reaching this decision, the Court relied upon the fact that the Act was placed within the state's probate code rather than the criminal code. Furthermore, the legislature describes the Act as a "civil commitment procedure."

96. Id.
97. See id. (citing to Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).
98. Id. at 2081 (citing to DSM-IV, supra note 12, at xxiii, xxvii).
99. Id. at 2081.
100. See id.
101. See id.
102. See id.
103. See id.
104. See id. at 2085.
105. See id.
106. See id. at 2081.
107. See id. at 2082.
108. See id.
109. See id.
110. See id.
111. Id.
A second factor examined by the Court was the Act's purpose. The Court identified two objectives of criminal punishment: retribution and deterrence. The majority reasoned that neither of those objectives motivate the enactment of the Kansas Act. Because the prior criminal conduct of Hendricks was used merely for evidentiary purposes to demonstrate that he had a mental abnormality and was dangerous, the Act is not retributive. Furthermore, conviction of a criminal offense is not a prerequisite for commitment under the Kansas Act. Under the Act, an individual absolved of criminal responsibility may nonetheless be subject to commitment. The legislature likewise did not intend the Act to serve as a deterrent. Because sexual predators committed under the Act are by definition mentally abnormal, they are unable to exercise control over their behavior. Therefore, the threat of confinement will not alter the behavior of a sexual predator. "Thus the fact that the Act may be 'tied to criminal activity' is 'insufficient to render the statute punitive.'" If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment.

Finally, the Court refused to conclude that the Act is punitive in purpose and effect merely because the procedural safeguards enumerated in the Act are the same as those found in criminal proceedings. Rather, the carefully established procedure evidences great care by the State of Kansas to tailor the statute narrowly to a dangerous subclass of sex offenders. Certainly, incapacitation is a legitimate end of both criminal and civil law. The Court used an analogy to drive home its decision: "A state could hardly be seen as furthering a 'punitive' purpose by involuntarily confining a person afflicted with an untreatable, highly contagious disease." Therefore, Hendricks' confinement does not violate the Double Jeopardy Clause. The Court's decision merely reaffirms the principle established some thirty years ago in Baxtrom. There is no basis for distinguishing the commitment of a convicted offender, subsequent to his penal term, from all other civil commitments.

112. See id.
113. See id.
114. See id.
115. See id.
116. See id.
117. See id.
118. See id.
119. See id.
120. Id. (citing United States v. Ursery, 116 S. Ct. 2135, 2149 (1996)).
121. Id. at 2083.
122. See id.
123. See id.
124. Id. at 2084. (citing Accord Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases)).
125. See id. at 2086.
3. Ex Post Facto Claim

Because the Ex Post Facto Clause applies only to penal statutes, the Court rejected Hendricks' ex post facto claim.128 The Act cannot be considered a penal statute for two reasons. First, it does not impose punishment because it establishes a civil proceeding.129 Second, the Act does not apply retroactively.130 Civil confinement is based upon a finding that the offender currently suffers a mental abnormality and is currently dangerous.131 Further, the Act did not criminalize conduct before its enactment nor deprive Hendricks of available defenses.132 Therefore, the Court found that the Kansas Sexually Violent Predator Act is not an ex post facto law.133

D. Dissenting Opinion

Relying on different reasoning, Justice Breyer, writing for the dissenting justices, agreed with the majority's conclusion that the Act's definition of mental abnormality satisfies substantive due process requirements.134 Hendricks' diagnosis as a pedophile brings him under the Act's definition of a person suffering from a mental abnormality.135 Recognizing that the psychiatric profession debates whether pedophilia is a mental illness, Justice Breyer concluded that pedophilia is a serious mental disorder.136 Justice Breyer believes that the psychiatric debate defines boundaries of reasonableness rather than providing a definitive answer. Thus, States must only remain within the boundaries of reasonableness when drafting the law.137

Justice Breyer further characterized Hendricks' abnormality as a "specific, serious, and highly unusual inability to control his actions" rather than mere antisocial behavior.138 This type of abnormality has traditionally been found similar to insanity for purposes of commitment.139 Furthermore, the notion of an "irresistible impulse" is at the heart of the insanity defense.140 Hendricks admitted that his irresistible impulse to molest children makes him dangerous.141 Although Hendricks falls outside

128. See id.
129. See id.
130. See id.
131. See id.
132. See id.
133. See id.
134. See id. at 2088 (Breyer, J., dissenting).
135. See id.
136. See id.
137. See id.
138. Id. at 2088-89.
139. See id. at 2089 (citing Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 274 (1940) (upholding, over a due process challenge, the civil commitment of dangerous person where the danger followed from an "utter lack of power to control sexual impulses" (quoting State ex rel. Pearson v. Probate Court, 287 N.W. 97, 302 (1939)))).
140. See id.; see also AMERICAN LAW INST. MODEL PENAL CODE § 4.01 (stating that insanity defense, in part, rests on inability "to conform . . . conduct to the requirements of the law").
141. See Hendricks, 117 S. Ct. at 2089.
the scope of a general civil commitment statute, Kansas has the authority to draft a commitment statute, narrowly tailored, to reach sexually violent predators like Hendricks. 142

However, the dissent found that the Kansas Act's application to Hendricks was prohibited by the Ex Post Facto Clause. 143 Justice Breyer reached the conclusion that the Kansas Act is punitive by comparing the Act to criminal punishments. First, Justice Breyer identified incapacitation as a primary objective of the Kansas Sexually Violent Predator Act. 144 The Act provides for secure confinement in the psychiatric wing of a prison hospital where Hendricks will be treated like an ordinary prisoner. 145 Second, like criminal punishment, the Act confines only individuals who have committed criminal offenses. 146 Moreover, the Act imposes confinement "through the use of persons (county prosecutors), procedural guarantees (trial by jury, assistance of counsel, psychiatric evaluations), and standards (beyond a reasonable doubt) traditionally associated with the criminal law." 147 However, these characteristics alone are not enough to make the Kansas Act punitive. 148 Likewise, Kansas' designation of the Act as civil is not dispositive. 149 The deciding factor is treatment. 150

"[W]hen a State believes that treatment does exist, and then couples the admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive." 151 Because Hendricks was convicted, incapacitated, then confined and offered no treatment, Justice Breyer concluded that the Act deliberately postpones treatment to justify further confinement. 152 If treatment was a primary objective, then Kansas would require treatment of sex offenders soon after they begin their penal terms. 153 Finally, Justice Breyer concluded that the Act should require a consideration of less restrictive alternatives prior to committing, as many other states do. 154 This failure is yet another indicator that the Act is punitive. 155

Justice Breyer finished by utilizing seven factors listed in Kennedy v. Mendoza-Martínez 156 to determine that the Act's primary objective is punishment.

142. See id.
143. See id. at 2088.
144. See id. at 2090.
145. See id. (citing to Testimony of Terry Davis, SRS Director of Quality Assurance, App. 52-54, 78-81).
146. See id. at 2091.
147. Id.
148. See id.
149. See id.
150. See id.
151. Id. at 2091-92.
152. See id. at 2093.
153. See id. at 2094.
154. See id.
155. See id. at 2095.
156. 372 U.S. 144, 169 (1963). The factors listed by the Court are: (1) whether a sanction involved an affirmative restraint, (2) how history has regarded it, (3) whether it applies to behavior already a
I believe the Act before us involved an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint namely confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment) and is excessive in relation to any alternative purpose assigned.157

III. Analysis of Hendricks

A. Nature of the Kansas Sexually Violent Predator Act

I. A Punitive Statute

"One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."158 While the Kansas Act civilly confines sexual predators to prevent future harm, the civil label does not mean the confinement is any the less punishment. The majority in Hendricks relied on the Court's prior decision in Allen for support that sex offender commitment statutes are civil. However, Allen did not create a bright line rule and is distinguishable from the Kansas statute used to confine Hendricks. The cornerstone of the Allen decision was that the State provided treatment for those committed under the Illinois statute.159

In Allen, the Illinois court concluded that "treatment, not punishment, was the primary objective of the statute."160 In contrast, the Kansas Supreme Court found that treatment was incidental at best under the Act.161 The primary purpose of the Act is "segregation of sexually violent offenders."162 This distinction is important because the Court normally defers to the findings of state courts regarding the purpose or intent of a statute.163 Moreover, the record demonstrates that at the time of Hendricks' commitment, treatment was not available and the State had few people on staff to carry out a treatment program.164 In fact, those who testified regarding the Kansas Sexually Violent Predator Treatment Program believed that effective treatment was not available and that the Kansas Act creates an opportunity to impose a lifetime of confinement on sex offenders.165 Not surprisingly the response by many has in

crime, (4) the need for a finding of scienter, (5) its relationship to a traditional aim of punishment, (6) the presence of a nonpunitive alternative purpose, and (7) whether it is excessive in relation to that purpose. See id.

159. See id. at 370.
160. Id. at 367 (quoting People v. Allen, 481 N.E.2d 690, 694-95 (Ill. 1985)).
162. Id.
164. See Testimony of John House, SRS Attorney, App. 255 (acknowledging that no one is hired to operate the SVP program or to serve as a psychiatrist).
165. See Testimony of Jim Blaufass, App. 503.
effect been, "So be it!" Responsible lawmaking does not, however, mean that a legislature may enact any socially desirable law no matter how unconscionable the effects on an individual's constitutional rights.

The only consideration given to treatment of sexually violent predators in the Kansas Act is the recognition that long term treatment is necessary and shall conform to constitutional requirements for treatment. On its face, this recognition sounds promising but it is in reality a disingenuous look at how much and what kind of treatment sexually violent offenders should receive. The fundamental problem lies in defining the constitutional requirements for treatment of confined sex offenders. This is not a task the Court was willing to undertake. During oral arguments the Court asked:

\[\textit{So we could — if we ruled your way [the State] we could leave for another day the question of what to do under, well say, the Foucha rule, in a case in which there was a recognized psychiatric category of abnormality but one that was totally untreatable, one that was permanent. Nothing could be done about it.}\]

It is unclear whether the Court would still have held for the State of Kansas had the Court been forced to look more closely at the issue of treatment. Based on the underlying purpose of the statute the Kansas Sexually Violent Predator Act is punitive. Labeling the Act a civil statute does not change the Act's purpose, intent, or effect.

2. Comparison to Alternatives

Supreme Court rulings demonstrate that two elements must be present to utilize civil commitment proceedings. An offender must be both mentally ill and dangerous to fall within the reach of a commitment statute. A finding of mental illness alone does not justify confining an individual against his will. Likewise, a belief that an individual poses future harm to others is not sufficient to commit civilly without the presence of a mental illness. Because most sex offenders fall between these two standards, using civil commitment proceedings to incapacitate sex offenders poses significant problems.

The objectives for civilly confining sexually violent predators are twofold: incapacitation and punishment. Nothing is inherently wrong with these objectives. "The point, however, is not how long Hendricks and others like him should serve a criminal sentence. . . . The concern instead is whether it is the criminal system or the civil system which should make the decision in the first place." Kansas could have served these objectives by utilizing punitive alternatives available through the criminal system. First, because Hendricks had at least three felony convictions prior to the

166. See KAN. STAT. ANN. § 59-29a09 (1994).
170. Hendricks, 117 S. Ct. at 2087 (Kennedy, J., concurring).
State's petition for commitment, his penal sentence could have been tripled under the Habitual Criminal Act.\textsuperscript{171} Additionally, the court could have sentenced Hendricks to the maximum sentence instead of the minimum.\textsuperscript{172}

During oral arguments before the Supreme Court, counsel for Hendricks suggested other punitive means of incapacitation. Hendricks' counsel suggested that Kansas could have imposed life imprisonment, a sentence with restrictive parole conditions, or an order requiring Hendricks to stay away from children and any public place where children may be found as alternatives to civil commitment. All of these methods of punishment would have imposed significant restraints on Hendricks' personal liberty. In that respect, the alternatives are not distinguishable from civil commitment. However, the alternatives are distinguishable for other reasons. First, all of the alternatives could have been made part of his original criminal sentence rather than imposed subsequently. Second, enforcing some of the alternatives poses a problem. The key distinction is timing, i.e., when to impose the punishment, not whether punishment should be imposed at all.

Most courts and statutes require a state to show that the care and treatment recommended for an individual subject to civil commitment is the least restrictive alternative.\textsuperscript{173} However, this burden often is shifted to the defendant.\textsuperscript{174} The Kansas Act gives no consideration to less restrictive alternatives.

B. The Problem with Mental Abnormality

The Kansas Act acknowledges that sexually violent predators do not have a mental illness which "renders them appropriate for involuntary treatment" within the general civil commitment statute.\textsuperscript{175} Sexual predators typically have antisocial personality disorders which are unamenable to treatment for the mentally ill.\textsuperscript{176} In fact, Hendricks' diagnosis as a pedophile makes him an exception to the general population of sex offenders.\textsuperscript{177} The Court's holding in Hendricks draws no distinction between a mental illness and a mental abnormality, or sex offenders and sex offenders diagnosed as pedophiles. In fact, the Court uses the terms interchangeably.\textsuperscript{178} The presumption that the terms may be used interchangeably is dangerous because it places no boundaries on the scope of civil commitment statutes.

The conclusion that a mental abnormality is a diagnosis is questionable. Mental abnormality is not defined in the American Psychiatric Association's \textit{Diagnostic and

\textsuperscript{171} See \textit{In re} Hendricks, 912 P.2d 129, 137 (Kan. 1996).
\textsuperscript{172} See id.
\textsuperscript{174} See id.
\textsuperscript{175} KAN. STAT. ANN. § 59-29a01 (1994).
\textsuperscript{176} See id.
\textsuperscript{177} See supra text accompanying note 9.
Statistical Manual of Mental Disorders (DSM). Clearly, many believe that the clinical and legal conceptualizations of mental illness are different. The DSM is a diagnostic tool to assist the psychiatric community in identifying and treating mental illnesses. Additionally, the drafters of the Model Penal Code have declared that personality disorders leading to repeated criminal acts should not be considered mental illnesses under the law. Legal definitions of mental illness encompass issues of safety, fairness, and moral responsibility. Fairness and moral responsibility are compromised when a state is given unfettered discretion to impose restraints on personal liberty. Because of the imprecise definition of "mental abnormality" and the unpredictability of potential dangerousness, sex offender civil commitment statutes are likely to be misused. The Court has reached a conclusion that neither experts in the psychiatric discipline nor legal analysts have been able to reach.

The Court's previous decision in Foucha rejected a statute that could indefinitely detain insanity acquittees who have personality disorders that may lead to dangerous conduct. The Court feared that civil commitment of persons who are dangerous but not mentally ill could be applied to any criminal. The Court's holding in Hendricks completely abandons the concerns raised by Foucha. During oral arguments in Hendricks, the Court posed a hypothetical to the State: "Imagine an armed robber who has committed many armed robberies, and a psychologist who says he has a sociopathic personality. Now, under those circumstances, do you believe it [civil commitment] would be constitutional . . . ?" The State distinguished the hypothetical by alleging that Hendricks suffers from pedophilia, a recognized mental disorder, which is much more severe than the disorder posed in the Court's hypothetical. This reasoning presumes that all sex offenders characterized as mentally abnormal have been diagnosed as pedophiles. However, only a small percentage are actually diagnosed as pedophiles; thus, such a distinction categorically excludes most repeat sex offenders from civil commitment under the Kansas Act. Furthermore, the Court made no attempt to distinguish its contradictory holding in Foucha from the holding in Hendricks. Perhaps the Court reconciles the contradiction because indefinitely confining a violent sexual predator seems less unconscionable than indefinitely confining a burglar who illegally discharged a firearm.

C. Other States' Civil Commitment Statutes for Sexual Predators

At least sixteen states have adopted civil commitment statutes narrowly tailored to reach violent sexual predators. Ten of those statutes, unlike the Kansas Act,
impose treatment of the sex offender soon after the offender's apprehension. 187 Seven statutes, like Kansas', delay civil commitment and treatment until the sex offender has completed his penal sentence. 188 Of these seven, six "require consideration of less restrictive alternatives." 189 Only Iowa delays both civil commitment and treatment and does not require consideration of less restrictive alternatives. 190 However, the Iowa statute differs from the Kansas statute because it applies prospectively, thus avoiding ex post facto concerns. 191 The fundamental differences between the Kansas Act and other states' statutes demonstrate that Kansas' failure to look to alternatives and the timing of the civil commitment proceeding led to an inference that the confinement imposed under the Kansas Act is punitive. 192

D. Application to Oklahoma

Oklahoma does not currently have in effect a civil commitment statute targeting violent sexual predators. However, State Rep. Laura Boyd, Democrat of Norman, introduced a civil commitment statute which is being considered during the Second Session of the 46th Legislative Session. 193 The House Bill is substantially similar to the Kansas Sexually Violent Predator Act. 194 The civil commitment statute grants the care of confined sexual predators to the Department of Mental Health and Substance Abuse Services. 195 Because the Oklahoma statute mimics the punitive nature of the Kansas Act, the problems with the proposed Oklahoma statute are threefold.

First, the proposed Oklahoma statute insufficiently addresses the need for treatment of confined sex offenders. The Oklahoma Supreme Court has held that an involuntarily civilly confined sex offender has an absolute right to treatment. 196 Much like the Kansas Act, the proposed Oklahoma statute summarily dismisses the issue of treatment. The Oklahoma civil commitment statute requires that treatment conform to constitutional requirements. 197 However, the constitutional requirements have not been determined. In fact the United States Supreme Court chose not to develop the requirements in Foucha.

The Oklahoma legislature's findings demonstrate that the prognosis for rehabilitating sexually violent predators is long-term and requires unique treatment modalities. 198 Based on these findings, the proposed statute prohibits the release of confined sexual

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187. See Hendricks, 117 S. Ct. at 2095 (Breyer, J., dissenting).
188. See id.
189. Id.
190. See id.
191. See id. at 2093.
192. See id. at 2094.
193. See H.B. 2212, 46th Leg., 2d Sess. (Okla. 1997). The House Bill has been reprinted in its entirety in the appendix to this note.
194. See id.
198. See id. § 1.
predators until "such time as the person is no longer a threat to the public." At this stage of medical knowledge, although future treatments cannot be predicted, psychiatrists or other professionals engaged in treating pedophilia may be reluctant to find measurable success in treatment even after a long period and may be unable to predict that no serious danger will come from release of the detainee. Given the bleak prognosis for effective treatment, the procedural safeguards in the statute offer little chance of release for a sexual predator once he or she is involuntarily committed under the statute.

As of June 1997, a total of 666 inmates were serving sentences in Oklahoma prisons for making lewd or indecent proposals or committing sexual acts against children. Approximately 1900 sex offenders were listed in a registry maintained by the Department of Corrections. These 1900 offenders were registered due to a comprehensive sexual predator notification law recently passed in the state legislature, in response to the enactment of 'Megan's Law.' Oklahoma's notification law designates sex offenders convicted two or more times as sexual predators. Despite the large number of sex offenders both registered and convicted, the Department of Corrections treatment program houses only 160 inmates. Although the Department of Corrections is not responsible for confining those sex offenders involuntarily committed under the statute, the statute will require complete segregation from other patients supervised by the Department of Mental Health and Substance Abuse Services. Beginning November 1, 1998 sex offenders will be confined in a separate building. Given the current limited space in existing treatment programs, providing effective treatment will prove challenging.

Because it does not provide for adequate treatment, the Oklahoma statute is punitive and results in double jeopardy. If the proposed statute is to apply retroactively then Oklahoma faces the additional problem of developing treatment programs for those offenders whose sentences are nearing an end. Without such treatment the statute is both punitive and an ex post facto law. If the proposed statute is to apply prospectively then the legislature has failed to safeguard against those sex offenders slated for release. Perhaps the better solution is to provide harsher sentences the first time sex offenders are convicted.

Secondly, the proposed Oklahoma statute operates upon a finding of mental abnormality. 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

199. Id. § 7.
203. See id.
204. See id.
206. See id.
and safety of others." By using the broad standard of mental abnormality, the proposed Oklahoma statute fails to distinguish between sex offenders who are mentally ill (pedophiles), sex offenders who are not mentally ill but are suspected to pose a danger of future harm, and those offenders who are both mentally ill and dangerous. Only those offenders in the last category can be civilly committed constitutionally under the holding in Foucha. Relying on a standard as broad as mental abnormality leaves the scope of civil commitment statutes as broad as the legislature's imagination. Such an involuntary commitment statute could be constructed to target almost any group of criminals.

Finally, the proposed Oklahoma civil commitment statute does not provide a procedure to look at less restrictive alternatives. This is a procedure also missing from the Kansas Act. In many instances the time the sex offenders spend civilly confined may be equivalent to or even exceed the time the offender spent incarcerated. The clear purpose of the proposed Oklahoma civil commitment statute is to compensate for the lax sentencing of sex offenders.

Conclusion

Civil commitment statutes like the one in Kansas are being enacted to stop the rampant victimization of our nation's children. While the Supreme Court upheld the constitutionality of the Kansas Sexually Violent Predator Act, the Court disregarded precedent and weakened fundamental constitutional principles. The Court's decision reached conclusions that neither the medical community nor legal analysts have been able to reach with any degree of certainty. The condition of mental abnormality is simply too imprecise to justify such a significant encumbrance on constitutional principles.

Warehousing sexual predators may be publicly desirable and even necessary to prevent sexual predators from reoffending, but because such tactics are punitive in purpose and effect, civil commitment statutes result in double jeopardy. The proposed Oklahoma civil commitment statute goes to great lengths to provide procedural due process. However, acknowledging select constitutional rights and stripping away other rights undermines our legal system. The proposed Oklahoma civil commitment statute is as constitutionally infirm as the Kansas Act. The better answer is to incapacitate sex offenders for a more significant period the first time they are convicted.

Kayci Bair Hughes

207. Id. § 2.
APPENDIX

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-101 of Title 43A, unless there is created a duplication in numbering, reads as follows:

The Legislature finds that a small but extremely dangerous group of sexually violent predators exists who do not have a mental disease or defect that renders them appropriate for involuntary treatment of mentally ill persons defined in Title 43A of the Oklahoma statutes, 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 Title 43A of the Oklahoma Statutes, 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 the likelihood of a sexually violent predator engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure for mentally ill persons pursuant to Title 43A of the Oklahoma Statutes 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 of mentally ill persons pursuant to Title 43A of the Oklahoma Statutes; therefore, a separate civil commitment procedure for the long term care and treatment of the sexually violent predator is found to be necessary by the Legislature.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-102 of Title 43A, unless there is created a duplication in numbering, reads as follows:

As used in this act:
1. 'Sexually violent predator' means any person who has been convicted of two sexually violent offenses and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence;
2. 'Mental abnormality' means 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;
3. 'Predatory' means acts directed towards strangers or individual with who relationships have been established or promoted for the primary purpose of victimization;
4. 'Sexually violent offense' means:
   a. rape pursuant to Section 1114 of Title 21 of the Oklahoma Statutes
   b. rape by instrumentation pursuant to Section 1111.1 of Title 21 of the Oklahoma Statutes,

208. 1997 Okla. House Bill 2212. This is the introduced version as of February 2, 1998.
c. lewd, indecent proposals or acts against a child under sixteen (16), pursuant to Section 1123 of Title 21 of the Oklahoma Statutes,

d. incest pursuant to Section 885 of Title 21 of the Oklahoma Statutes,

e. forcible sodomy pursuant to Section 888 of Title 21 of the Oklahoma Statutes,

f. any conviction for a felony offense in effect at any time prior to the effective date of this act that is comparable to a sexually violent offense as defined in subparagraphs a through e of this paragraph or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this paragraph,

g. an attempt, conspiracy or criminal solicitation to commit a sexually violent offense as defined in this paragraph, or

h. any act which, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated; and

5. 'Agency with jurisdiction' means that agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the Department of Corrections and the Department of Mental Health and Substance Abuse Services.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-103 of Title 43A, unless there is created a duplication in numbering reads as follows:

A. When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the district attorney of the county where that person was charged, sixty (60) days prior to the anticipated release from total confinement of a person who has been convicted of a sexually violent offense.

B. The agency with jurisdiction shall inform the district attorney of the following:

1. The name of the person, identifying factors, anticipated further residence and offense history; and

2. Documentation of institutional adjustment and any treatment received.

C. The agency with jurisdiction, its employees, officials and individuals contacting, appointed or volunteering to perform services hereunder shall be immune from liability for any good faith conduct under this section.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-104 of Title 43A, unless there is created a duplication in numbering, reads as follows:

When it appears that a person presently confined meets the criteria of a sexually violent predator and is about to be released, the district attorney of the county where the person was convicted or the Attorney General, if requested by the district attorney, may file a petition within forty-five (45) days of the date the prosecuting attorney received the written notice by the agency of jurisdiction as provided in Section 3 of this act, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.
SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-105 of Title 43A, unless there is created a duplication in numbering, reads as follows:

Upon filing of a petition under Section 4 of this act, a judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be evaluated for determination 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.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-106 of Title 43A, unless there is created a duplication in numbering, reads as follows:

Within forty-five (45) days after the filing of a petition pursuant to Section 4 of this act, the court shall conduct a hearing to determine whether the person is a sexually violent predator. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist the person. Whenever any person is subjected to an examination under this act, the person may retain experts or professional persons to perform an examination on behalf of the person. When the person wishes to be examined by a qualified expert or professional person chosen by that person, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the request of the person, shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the behalf of the person. The person or the district attorney or Attorney General shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four (4) days prior to trial. The jury shall be composed of six persons having the qualifications of jurors in courts of record. If no demand is made, the trial shall be before the court.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-107 of Title 43A, unless there is created a duplication in numbering, reads as follows:

The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the determination that the person is a sexually violent predator is made by a jury, the determination shall be by unanimous verdict of the jury. The verdict or court decision may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the Department of Mental Health and Substance Abuse Services for control, care and treatment until such time as the person is no longer a threat to the public. such control, care and treatment shall be provided at a facility operated by the Department of Mental Health and Substance Abuse Services. At all times, persons committed for control, care and treatment by the Department of Mental Health and Substance Abuse Services pursuant to this act shall be kept in a secure facility, and such persons shall be segregated at all times from any other patient under the
supervision of the Commissioner of the Department of Mental Health and Substance Abuse Services. Commencing November 1, 1998, such person committed pursuant to this act shall be kept in a facility or building separate from other patients under the supervision of the Commissioner. 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 release of the person.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-108 of Title 43A, unless there is created a duplication in numbering, reads as follows:

Each person committed under this act shall have a current examination of the mental condition of the person made once every year. The person may retain or, if the person is indigent and so requests, the court may appoint a qualified professional person to examine the person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in his act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The Commissioner of the Department of Mental Health and Substance Abuse Services shall provide the committed person with an annual written notice of the right of the person to petition the court for a release over the objection of the Commissioner. The notice shall contain a waiver of rights. The Commissioner shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing, but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person is no longer a threat to the public and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The district attorney or the Attorney General, if requested by the district attorney, shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on behalf of the person, and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the mental abnormality or personality disorder of the committed person remains such that the person is not safe to be at large and, if released, is likely to engage in acts of sexual violence.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-109 of Title 43A, unless there is created a duplication in numbering, reads as follows:

The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.
SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-110 of Title 43A, unless there is created a duplication in numbering, reads as follows:

If the Commissioner of the Department of Mental Health and Substance Abuse Services determines that the mental abnormality or personality disorder of a person has so changed that the person is not likely to commit predatory acts of sexual violence if released, the Commissioner shall authorize the person to petition the court for release. The petition shall be served upon the court and the district attorney. The court, upon receipt of the petition for release, shall order a hearing within thirty (30) days. The district attorney or the Attorney General, if requested by the district attorney, shall represent the state and shall have the right to have the petitioner examined by an expert or professional person chosen by the district attorney or Attorney General. The hearing shall be before a jury if demanded by the petitioner or the district attorney or Attorney General. The burden of proof shall be upon the district attorney or Attorney General to show beyond a reasonable doubt that the mental abnormality or personality disorder of the petitioner remains such that the petitioner is not safe to be at large and, if discharged, is likely to commit predatory acts of sexual violence.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-111 of Title 43A, unless there is created a duplication in numbering, reads as follows:

Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act. However, if a person has previously filed a petition for discharge with the Commissioner of the Department of Mental Health and Substance Abuse Services approval and the court determined, either upon review of the petition or following a hearing, that the petition was frivolous or that the condition of the petitioner had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner so changed that a hearing was warranted. Upon receipt of a first or subsequent petition form committed persons without the approval of the Commissioner, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and, if so, shall deny the petition without a hearing.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-112 of Title 43A, unless there is created a duplication in numbering, reads as follows:

The Commissioner of the Department of Mental Health and Substance Abuse Services shall be responsible for all costs relating to the evaluation and treatment of persons committed to the custody of the Commissioner under any provision of this act. Reimbursement may be obtained by the Commissioner for the cost of care and treatment of persons committed to the custody of the Commissioner.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-113 of Title 43A, unless there is created a duplication in numbering, reads as follows:
In addition to any other information required to be released under this act and prior to the release of a person committed under this act, the Commissioner of the Department of Mental Health and Substance Abuse services shall give written notice of such release to any victim of the activities or crime of the person who is alive and whose address is known to the commissioner or, if the victim is deceased, to the family of the victim, if the address of the family is known to the Commissioner. Failure to notify shall not be a reason for postponement of release. Nothing in this section shall create a cause of action against the state or an employee of the state acting within the scope of employment as a result of the failure to notify pursuant to this action.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 12-114 of Title 43A, unless there is created a duplication in numbering, reads as follows:

This act shall become effective November 1, 1998.