No. 95-1649

In the
Supreme Court of the United States

October Term, 1996

State of Kansas, Petitioner,

v.

Leroy Hendricks, Respondent.

On Writ of *Certiorari to the Supreme Court of the State of Kansas*

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF KANSAS AND WESTERN MISSOURI, THE ACLU OF WASHINGTON, THE MINNESOTA CIVIL LIBERTIES UNION, THE ACLU OF WISCONSIN AND THE ACLU OF NORTHERN CALIFORNIA AS *AMICUS CURIAE IN SUPPORT OF RESPONDENT*

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU), is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Bill of Rights. The ACLU of Kansas and Western Missouri, the ACLU of Washington, the Minnesota CLU, the ACLU of Wisconsin and the ACLU of Northern California are state affiliates of the ACLU. Statutes similar to the Kansas Act at issue in this case have been enacted in the states in which these affiliates are located.

The ACLU and each of its affiliates maintains a strong and abiding interest in defending citizens' fundamental civil liberties from unconstitutional and unwarranted governmental intrusion. This case raises constitutional issues that are of central importance to the ACLU and its affiliates. In furtherance of its organizational views on these matters, the ACLU has often appeared before this Court, both as direct counsel and as *amicus curiae. See, e.g., Foucha v. Louisiana, 504 U.S. 71 (1992); United States v. Salerno, 481 U.S. 739 (1987); O'Connor v. Donaldson, 422 U.S. 563 (1975).*

On August 8, 1996, pursuant to Rule 37(3)(a), both Petitioner and Respondent consented to the filing of *amicus curie briefs by any interested groups or organizations. To avoid duplication, the ACLU and its affiliates address the substantive due process issue only. Other amici in support of Respondent will address the other constitutional issues raised by the Kansas Act.*

STATEMENT OF THE CASE[1]

Just prior to Mr. Hendricks' release from a 10-year prison sentence imposed pursuant to a plea agreement on charges of taking indecent liberties with children, the District Attorney filed a petition seeking to commit him involuntarily under the Kansas Sexually Violent Predators Act ("the Act" or "the Kansas Act"). The Act establishes a procedure by which the State may involuntarily commit sex offenders, ostensibly for long-term care and treatment. 1994 Kan. Laws ch. 316 (codified at Kan. Stat. Ann. § 59-29a01 - 29a17).[2] To confine an individual under the Act, the State of Kansas need establish only that the individual has been convicted of, or in certain cases merely charged with, a single qualifying sex crime at any time in the past and "suffers from a *mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Kan. Stat. Ann. § 59-29a02(a) & (e) (emphasis added).*

Even though Mr. Hendricks is not mentally ill, a jury found him to be a "sexually violent predator." Based on the jury's findings, the court ordered Mr. Hendricks involuntarily committed and confined at the Kansas Department of Corrections' Larned Correctional Mental Health Facility. Mr. Hendricks appealed the commitment order to the Kansas State Supreme Court on the grounds that the Act violates several constitutional provisions, including the prohibition against double jeopardy and *ex post facto laws, the equal protection clause and substantive due process.*

The Kansas State Supreme Court ruled that the Kansas Sexually Violent Predators Act violates substantive due process. *In re the Care and Treatment of Hendricks, 259 Kan. 246, 261, 912 P.2d 129 (1996). The Kansas State Supreme Court concluded that the Act does not require a finding of mental illness as a predicate to indefinite, involuntary civil commitment.*[3] *Hendricks, 259 Kan. at 259. The court also concluded that treatment was at best incidental and all but nonexistent for those individuals intended to be committed under the Act: "It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Id. at 258.*

SUMMARY OF ARGUMENT

Initially, the Petitions in this case raised potentially broad and fundamental issues concerning the scope of a state's constitutional authority to commit an individual involuntarily to a psychiatric hospital. In its opening Brief, the State of Kansas has substantially narrowed the issues presented to this Court.

There no longer appears to be any dispute about two fundamental issues. First, the State concedes that the Act is a civil, not criminal, statute and that substantive due process imposes specific limits on the State's power of civil commitment in three specific ways: The individual committed must be mentally ill; he must be dangerous; and finally, he must receive treatment. Each of the State's concessions are compelled by this Court's prior decisions. Second, the State concedes its interest in protecting society could have been met within its existing laws. The State could have sentenced Respondent Leroy Hendricks to a total of 45 to 180 years under sentencing laws in existence at the time he was sentenced. Furthermore, the State could have sought commitment of Mr. Hendricks to a mental health facility for treatment under applicable laws while he was serving his prison sentence. If found to be mentally ill, Mr. Hendricks could have received treatment. The State took neither of these actions.

The remaining disputed issues, while less sweeping and fundamental, are nevertheless important ones. First, the State expends considerable effort to suggest the applicability of a rational relationship test rather than a strict scrutiny test, claiming that involuntary civil commitment does not implicate a fundamental liberty interest. To the contrary, this Court has long recognized that indefinite, involuntary civil commitment in a psychiatric hospital implicates the most basic and essential fundamental liberty interest. Under substantive due process analysis, this Court has required that involuntary civil commitment statutes be carefully limited and narrowly tailored to preclude commitment of those individuals to whom the states' legitimate and compelling purposes of commitment are inapplicable. Involuntary civil commitment is designed to treat those individuals who are mentally ill and protect society from those who are dangerous. Thus, in prior substantive due process cases involving involuntary civil commitment, the Court has applied a heightened due process scrutiny standard of review to measure the purposes of commitment.

Second, the State of Kansas in its Brief proposes to replace the Act's constitutionally defective definition with a new definition of "mental abnormality." The State's proposed definition, however, also suffers from a number of significant defects. In rewriting the statute so that it only reaches individuals with psychiatric diagnoses, the State ignores the language of the statute, its legislative history and the authoritative interpretation of the Act by the State's highest court. The State's newly proposed definition cannot satisfy the constitutional mental illness requirement that would permit commitment. Finally, the real purpose in adopting this Act was to extend incarceration for sex offenders who already have been sentenced, and not to provide *bona fide treatment for persons who are mentally ill. The structure of the statute and its legislative history demonstrate that treatment is simply a pretext for what really is continuing punishment for sex offenders beyond the time they lawfully may be confined.*

ARGUMENT

I. DEPRIVATION OF A FUNDAMENTAL LIBERTY INTEREST WARRANTS A HEIGHTENED SCRUTINY STANDARD OF REVIEW

The State of Kansas misleadingly contends that this Court has never applied strict scrutiny, an equal protection standard of review, to a substantive due process claim in an involuntary civil commitment case. State's Brief at 21. The Court, however, has applied a heightened scrutiny standard of review when fundamental liberty interests are implicated, such as freedom from indefinite, involuntary civil commitment in a psychiatric hospital. *See Foucha, 504 U.S. at 80-81. In an effort to avoid application of the heightened scrutiny standard in this case, the State erroneously argues that no fundamental right is implicated by the Kansas Act. State's Brief at 25. This argument is based on a misreading of this Court's opinion in Foucha.*

A. Freedom from Indefinite, Involuntary Civil Commitment in a Psychiatric Hospital Is a Fundamental Liberty Interest

It is hard to imagine a more fundamental liberty interest than freedom from indefinite incarceration. Freedom from unwarranted and unjustified governmental confinement is at the heart of the Bill of Rights. This Court repeatedly has recognized that potentially indefinite, involuntary civil commitment in a psychiatric hospital is a "significant deprivation" and "massive curtailment" of liberty. *Foucha, 504 U.S. at 80; Jones v. United States, 463 U.S. 354, 361 (1983); Addington v. Texas, 441 U.S. 418, 425 (1979); Humphrey v. Cady, 405 U.S. 504, 509 (1972). The right to be free from such confinement is the very essence and the core of the liberty protected by the Due Process Clause. Foucha, 504 U.S. at 80; Youngberg v. Romeo, 457 U.S. 307, 316 (1982).*

As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.

Foucha, 504 U.S. at 90 (Kennedy, J., dissenting). "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1987). The Court has "always been careful not to minimize the importance and fundamental nature of the individual's right to liberty." Id. at 750.

The Court has defined the physical liberty interest implicated by involuntary civil commitment statutes in two ways: First, as the freedom from bodily restraint; *Foucha, 504 U.S. at 80; see also Reno v. Flores, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring) ("Freedom from bodily restraint means more than freedom from handcuffs, straitjackets or detention cells."); and second, as freedom from indefinite involuntary confinement in a psychiatric hospital; Foucha, 504 U.S. at 82; Addington, 441 U.S. at 425; Zinermon v. Burch, 494 U.S. 113, 131 (1990). The loss of liberty produced by indefinite, involuntary civil commitment is more than just a loss of freedom from confinement, but engenders significant adverse stigmatizing consequences and unjustified intrusions on personal security, such as compelled treatment. Vitek v. Jones, 445 U.S. 480, 492 (1980). There simply is no doubt that the liberty interest implicated by the Kansas Act, whatever way it is defined, is a fundamental right.*

B. The Heightened Due Process Scrutiny Standard of Review Applies When A Fundamental Liberty Interest Is Implicated

The State is simply wrong in arguing that only a reasonableness test should apply. Under substantive due process analysis, the Court consistently has applied a rigorous standard of review whenever a State attempts to infringe on a fundamental liberty interest through incarceration, involuntary civil commitment or preventive detention. In describing the standard in *Reno v. Flores, 507 U.S. 292 (1993), Justice Scalia, writing for the majority, articulated when heightened scrutiny applies to a substantive due process claim:*

[T]he Fifth and Fourteenth Amendments' guarantee of "due process of law" . . . include[s] a substantive component, which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

Id. at 301-02.

Consistent with this standard, the Court in *United States v. Salerno, 481 U.S. 739 (1987), upheld a federal statute permitting pretrial detention of individuals charged with serious crimes and considered dangerous only because the State's interest was "both legitimate and compelling" and because the statute was "carefully limited" as to the circumstances under which such detention was permitted and "narrowly focused" on a particularly acute problem in which the government interests were overwhelming. Id. at 749-50. In Foucha, by contrast, the Court struck down on substantive due process grounds a Louisiana statute that permitted continued indefinite detention in a state psychiatric institution of criminal defendants acquitted by reason of insanity. Foucha, 504 U.S. at 83. The statute allowed such detention, even though the insanity acquitees had regained their sanity, until they could prove that they were no longer dangerous. Id. In comparing the Louisiana act in Foucha to the federal pretrial detention act in Salerno, the Court stated that "[u]nlike the sharply focused scheme at issue in Salerno, the Louisiana scheme of confinement is not carefully limited." Foucha, 504 U.S. at 81.*

In *Foucha, all members of the Court acknowledged that a heightened due process scrutiny standard applied when the State seeks to deprive an individual of his fundamental liberty interests. Id. at 93 (Kennedy, J., dissenting) ("We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a judgment is rendered under this standard."); id. at 115 (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny,' and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring.") Thus, citing to both Salerno and Foucha, Justice O'Connor in her concurrence in Reno agreed that this heightened scrutiny standard applied in*

substantive due process analysis. Reno, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.").

The cases relied upon by the State for its assertion that mere reasonableness review applies can be distinguished on their facts. In several of the cases discussed in the State's Brief, the individual facing a restraint of liberty was already validly confined by the state. The issue confronted by the Court in those cases was simply how and where the individual would be confined, not whether the individual's initial loss of liberty was appropriate. *See, e.g., Youngberg, 457 U.S. at 316 (concerning whether state had adequately protected liberty interests in personal security, freedom of movement and from bodily restraints, and adequate care and treatment while confined); Jones, 463 U.S. at 356 (issue was whether person, who was indisputably mentally ill and dangerous, nonetheless was entitled to release because he had been hospitalized for period longer than he might have served in prison). By contrast, Mr. Hendricks has fully served his criminal sentence and should have been released into society. Were it not for the Kansas Act, Mr. Hendricks would be free.*[4]

The State's Brief attempts to minimize the importance and fundamental nature of an individual's freedom from indefinite, involuntary civil commitment in a psychiatric hospital, contrary to this Court's precedent. Not only has this Court long recognized the fundamental nature of this liberty interest, but the Court has used a heightened due process scrutiny standard to examine statutes that seek to infringe on it.

II. THE ACT VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT SEEKS INDEFINITE INCARCERATION FOR INDIVIDUALS WHO ARE NOT MENTALLY ILL

Whatever substantive due process standard the Court applies, the Kansas Sexually Violent Predators Act is unconstitutional. Because involuntary civil commitment to a psychiatric hospital results in a deprivation of one's fundamental liberty interests, even more severe than that resulting from a criminal conviction, the Constitution limits the circumstances when the State may commit an individual involuntarily. Involuntary civil commitment is constitutionally permissible only for treatment of individuals who are mentally ill and to protect society from individuals who are dangerous. *Foucha, 504 U.S. at 77; Jones, 463 U.S. at 368; O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). People who are mentally ill, but not dangerous,O'Connor, 422 U.S. at 575, or people who are not mentally ill but are considered dangerous, Foucha, 504 U.S. at 77, cannot be confined because they do not fit the strict purposes of confinement. The Kansas Act, labeled civil commitment, in reality is intended to extend indefinitely the confinement of sex offenders considered dangerous, but who are not mentally ill, even though they have completed their judicially imposed incarceration and are legally entitled to be released.*

A. The Act Fails To Satisfy the Constitutional Mental Illness Requirement As a Predicate For Indefinite, Involuntary Civil Commitment

The absence of any mental illness requirement is apparent in both the statutory language and legislative history. The Kansas Legislature acknowledged that, in contrast to persons appropriate for civil commitment under the State's involuntary treatment statute for the mentally ill, individuals subject to indefinite, involuntary civil commitment as sexually violent predators "do not have a mental disease or defect" that is amenable "to existing mental illness treatment." Kan. Stat. Ann. § 59-29a01.[5] The Act itself does not characterize these persons as mentally ill in any clinically meaningful sense, but rather targets individuals who "generally have antisocial personality features." *Id. Moreover, the terms "mentally ill" or "mentally disordered" appear nowhere in the Act, reinforcing the Legislature's recognition that these sex offenders are neither mentally ill nor appropriate for involuntary civil commitment in a psychiatric hospital. The legislative history further establishes that the Act was intended to incapacitate individuals who presently are not mentally ill, and thus could not be subject to civil commitment. Those testifying for and against this Act agreed that individuals subject to confinement under the Act are not mentally ill.*

1. Neither the Statutory Definition Nor the State's Proposed Definition of "Mental Abnormality" Satisfy the Constitutional Requirement For Mental Illness

As the Kansas State Supreme Court found in *Hendricks, "mental abnormality" is not a psychiatric or medical term. Hendricks, 259 Kan. at 260. "Mental abnormality" has no clinically significant meaning or recognized diagnostic use among treatment professionals. Id.; see also Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 597, 601-02 (1992) (definition of "sexually violent predator" in similar Washington Act fails to coincide with clinical or empirical knowledge regarding sex offenders). Dr. Charles Befort, the State's chief psychologist at Kansas's Larned Correctional Mental Health Facility, testified that the term mental abnormality "is a phrase used by clinicians to discuss abnormality or deviance, but that it is not itself a diagnosis." J.A. 229-33; see also Hendricks, 259 Kan. at 260. Under the Act, mental health professionals must evaluate whether an individual suffers from a*

"mental abnormality" without reference to any clinically meaningful definition. The Kansas Legislature's decision to use a term unrecognized by mental health professionals confirms that the State sought to commit persons who are not mentally ill.

Under the Act's definition, the basis for finding that the individual suffers from a "mental abnormality" is derived solely from that person's past criminal sexual behavior, which in turn is used to establish that person's predisposition to future dangerous sexual behavior.[6] Kan. Stat. Ann. § 59-29a01. As Dr. Befort admitted, this definition is simply a tautology that past criminal behavior is used to predict an individual's potential for future criminal behavior. *See Hendricks, 259 Kan. at 260 (definition of mental abnormality is circular); Rideout, So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act, 15 U. Puget Sound L. Rev. 781, 793 (1992) (discussing the tautology that sexually violent predators have features that lead to sexually violent behavior). The definition is simply a description of the causes for any behavior. Morse, Symposium: Blame and Danger: An Essay on Preventive Detention, 76 B.U.L. Rev. 113, 137 (1996) (a "congenital or acquired condition" includes all possible biological and environmental causes).*

Recognizing that the Act does not require a mental illness as a predicate to indefinite, involuntary civil commitment, the State in its Brief attempts to invent a new definition of "mental abnormality." Contrary to the plain language of the statute, its legislative history and the Kansas State Supreme Court's interpretation of the Act, the State's Brief redefines "mental abnormality" to mean any identifiable mental disorder that any mental health professional determines may make a person dangerous. State's Brief at 40-42. The State admits that, on its face, the statutory definition of "mental abnormality" is unconstitutionally imprecise. The State argues, nevertheless, that mental health professionals will give the definition content when they identify specific mental disorders that satisfy the definition. *Id. at 40. This novel revision does not satisfy the constitutional mental illness requirement.*

Under the revised definition offered in the State's Brief, any identifiable mental disorder that makes the person dangerous may serve as a basis for indefinite, involuntary civil commitment. State's Brief at 42. Not all mental disorders, however, are mental illnesses. Nor do all mental disorders included in the DSM-IV constitute mental illnesses.[7] In *Foucha, this Court rejected the argument that simply because a disorder is listed in the DSM it is a mental illness sufficient for involuntary civil commitment. Foucha, 504 U.S. at 78. For example, the DSM-IV lists as mental disorders "Caffeine-Induced Disorder," "Nicotine-Induced Disorder" and "Male Erectile Disorder," among others. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 212, 244 & 502 (4th ed. 1994) (DSM-IV). The State of Kansas cannot dispute that these mental disorders do not warrant involuntary civil commitment.[8] At the same time, not all recognized or identifiable mental disorders are included in the DSM-IV. The State never defines what is required to be a recognized identifiable mental disorder. Thus, under the State's definition, a person could be indefinitely, involuntarily committed based on any mental health professional's opinion that the person suffers from a recognized identifiable mental disorder, whether or not that "disorder" is found in the standard diagnostic text upon which all mental health professionals rely.*

2. The Act's Attempt to Define Mental Illness Is Directly Contrary to this Court's Holding in *Foucha*

Although the Act employed two bases for civilly committing a sex offender — mental abnormality and personality disorder — the State's Brief focuses only on mental abnormality. The term "personality disorder" is not defined in the Act, nor does the State attempt to define it for this Court[9] The State's Brief offers no explanation for what causes a "personality disorder" nor does it describe the mental processes or functions that are impaired by such a disorder. Even more troubling, the definition of "mental abnormality" in the State's Brief obviously encompasses "personality disorders." Under the revised definition offered by the State, personality disorders are now a subset of mental abnormalities. This proposed definition is so broad that it is unconstitutional under this Court's holding in *Foucha.*

Moreover, both the Act's and the State's definitions merge the two constitutional requirements for civil commitment — mental illness and dangerousness. Under these definitions, whether a qualifying mental abnormality exists depends upon whether the individual is considered dangerous. Under the Act, for example, the determination of a mental abnormality is based on a person's propensity to commit a violent crime. Kan. Stat. Ann. § 59-29a01. Under the revised definition in the State's Brief, a person who suffers from a mental abnormality has an identifiable mental disorder that makes them particularly dangerous. State's Brief at 42. Thus, the Act is unconstitutional because it really requires only a showing of dangerousness, contrary to *Foucha.*

This Court in *Foucha held that a person could not be involuntarily committed as mentally ill merely because he suffers from an "antisocial personality disorder" or "personality disorder" that purportedly makes him dangerous to himself or others.*

[T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for 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 reasonable doubt to have violated a criminal law.*

Foucha, 504 U.S. at 82-83 (emphasis added). The Court described exactly what has become the Kansas Act, as interpreted in the State's Brief and by the Kansas State Supreme Court. It seeks to confine individuals who are not mentally ill, and whose past criminal conduct was not caused by mental illness, simply because they are perceived as dangerous. See Comment, Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice, 14 U. Puget Sound L. Rev. 105, 122 (1990). InFoucha, all members of the Court agreed that civil commitment requires a finding of mental illness and that neither "antisocial personality" nor "personality disorder" constitute mental illness. Foucha, 504 U.S. at 97 (Kennedy, J., dissenting) ("[p]resent sanity would have relevance if petitioner had been committed as a consequence of civil proceedings"); id. at 113-14 (Thomas, J., dissenting) ("Louisiana cannot possibly extend Foucha's incarceration by adding the procedures afforded to civil committees, since it is impossible to civilly commit someone who is not presently mentally ill."). Just as Louisiana could not involuntarily commit Foucha to a psychiatric hospital based on an "antisocial personality disorder," Kansas cannot commit sex offenders to a psychiatric hospital based on a personality disorder.

3. The State's Definition of the Mental Condition Sufficient for Commitment under the Act Is Unconstitutional Because it Does Not Require Any Impairment of Reasoning Ability

Because the State's Brief defines the mental illness requirement of the Act so broadly that it encompasses behavior that this Court found in *Foucha is not mental illness, it is not necessary for the Court to address the question initially presented by this case — namely, the substantive due process limitation on the ability of a state to define a behavior or condition as a mental illness, and thereby subject an individual to involuntary civil commitment. Understandably, this Court has not rushed to define with specificity the precise contours of this due process limitation. The concept of mental illness, its etiology, diagnosis and treatment have and will change over time as science achieves increased understanding of mental processes. Attempting to specify the exact parameters of the concept would be premature and unwise at this time. Several principles, nevertheless, can be stated with relative certainty.*

The definition of mental illness is a legal question, not purely a medical one. Given that, and given the changing concept of mental illness, there must be some latitude for state legislatures in attempting to provide a precise definition. The state legislatures are not free, however, to define any condition or behavior as mental illness as a predicate for involuntary civil commitment. Thus, in *Foucha, the Court found that "personality disorder," although recognized by the psychiatric profession as an identifiable mental disorder, was not a condition that could be considered a mental illness for purposes of involuntary civil commitment. Foucha, 504 U.S. at 82-83. Homosexuality was once considered by the psychiatric community as a mental illness, but no one could seriously contend that the due process clause would permit civil commitment of an individual because of his sexual preference. A variety of other examples from recognized psychiatric diagnoses could be identified that would be insufficient, as a matter of due process, to justify commitment. The essential function of the due process limitation on what the State can denominate as "mental illness" is to prevent pretexts designed to justify incarceration by evading other constitutional limitations.*

The common denominator of all the legal definitions of mental illness (incompetence to stand trial, insanity and civil commitment) that could justify depriving a person of physical liberty is that the individual involved suffers from a significant impairment in his or her ability to reason, to understand that a problem in reasoning exists and to plan for a method of solving that problem. Morse, *Symposium, 76 B.U.L. Rev. at 135-36 ("nonresponsibility is usually a necessary condition of justifiable involuntary civil commitment under the standard account of civil and criminal confinements"). At a minimum, due process prohibits commitment of someone who does not suffer this significant impairment of reasoning ability.*

By contrast, the Respondent and others who have committed similar sex offenses have no such impairment. Typically, they have planned, executed and often attempted to cover their behavior with conscious clarity. Their goals and behavior are incomprehensible to most people and morally unacceptable to virtually all, but the means by which they carried out those purposes typically are logical and rational. This behavior is clearly within the power of the State to sanction and punish severely as criminal conduct, but it does not involve significant impairment of understanding or reasoning ability, unless the individual also has a recognized mental illness. Therefore, it cannot, consistent with the due process clause, serve as the basis for civil commitment.

B. The Act's Real Objective Is Indefinite Incarceration and Not *Bona Fide Treatment*

The State has a legitimate and compelling interest under its *parens patriae powers in providing care and treatment to its citizens who are unable to care for themselves. Addington, 441 U.S. at 426. When an individual is not mentally ill, involuntary civil commitment in a psychiatric hospital for any length of time offends substantive due process because it is not medically justified. Foucha, 504 U.S. at 82-83; id. at 88 (O'Connor, J., concurring) (individual can not be confined as mental patient absent some medical justification for doing so); id. at 113-114 (Thomas, J. dissenting) ("[I]t is impossible to civilly commit someone who is not mentally ill."). The Kansas State Supreme Court has concluded that the Act does not provide the constitutionally required treatment:*

It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent.

Hendricks, 259 Kan. at 258.

1. The Kansas Legislature Acknowledged That Treatment Is Not Possible for Those Committed Under the Act

The Kansas Legislature's purpose in seeking to commit these individuals involuntarily to a psychiatric hospital was simply to extend their incarceration, not to provide any *bona fide treatment. Indeed, the Legislature recognized that no realistic prospect for treatment or release exists:*

[T]he prognosis for rehabilitating sexually violent offenders 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 [under the State's involuntary treatment statute].

Kan. Stat. Ann. § 59-29a01 ("[S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities"). In light of these findings and as a pretext to what really is indefinite incarceration of persons who are not mentally ill, the Kansas Legislature nevertheless added a provision that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment." Kan. Stat. Ann. § 59-29a09. The Kansas Legislature offered the "promise of treatment . . . only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." *Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969).*

2. The Act Deliberately Defers Evaluation, Diagnosis and Treatment of Those It Considers Mentally Ill

The Act itself demonstrates that the Legislature's inclusion of treatment was disingenuous and illusory. Unlike other involuntary civil commitment statutes, the Kansas Sexually Violent Predators Act deliberately defers evaluation, diagnosis and treatment of convicted sex offenders until they have served their full criminal sentence. Kan. Stat. Ann. § 59-29a03(a) (notice is given 90 days prior to anticipated release from total confinement of person meeting statutory criteria). Only after he has been found fully responsible for his conduct and punished for the offense that will be used as the basis to involuntarily commit him does the State recognize the onset of a "mental abnormality" or "personality disorder" that requires treatment.

Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed.

Young v. Weston, 898 F. Supp. 744, 753 (W.D. Wash. 1995).

By contrast, any rational and *bona fide involuntary treatment scheme would seek to diagnose the illness and provide treatment as soon as the symptoms of the purported disorder manifest themselves rather than requiring the person to wait years before providing any treatment. Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predators Act, 15 U. Puget Sound L. Rev. 597, 617 (1992). Any diagnosis based on criminal conduct occurring years before is likely to be highly inaccurate and any treatment based on such diagnosis is likely to be inappropriate and ineffective. Id. The Act's deliberate deferral of even the pretense of evaluation, diagnosis and treatment confirms that the real purpose of the Act is not to provide mental health treatment to mentally ill individuals, but rather to extend indefinitely the incarceration of sex offenders.*

3. Kansas Intends to Punish Those it Seeks to Commit under the Act Contrary to *Allen*

This Court in *Allen v. Illinois, 478 U.S. 364 (1986), reiterated the long standing constitutional principal that if the statutory scheme is so punitive, either in purpose or effect, as to negate the State's therapeutic intention, it cannot be considered a civil statute; but rather it is a criminal statute. Id. at 369. Allen involved the constitutionality of the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. ch. 38, § 105-3, which permitted indeterminate commitment of persons for treatment in lieu of conviction and punishment. Allen, 478 U.S. at 373. Central to the Illinois statutory scheme was the requirement that the State elect either punishment or treatment, but not both, at the time the offender is charged. Id. at 369-70. In holding that proceedings under the Illinois statute were civil rather than criminal, the Court in Allen found that "the State has disavowed any interest in punishment, has provided for the treatment of those it commits, and has established a system under which committed persons may be released after the briefest time in confinement." Id. at 370.*

Thus, to pass constitutional muster, an involuntary civil commitment scheme requires the State to disavow any interest in punishment and to provide care designed to treat the individual for the condition for which he is confined. *Accord Jones, 463 U.S. at 369; Addington, 441 U.S. at 428. The Kansas Sexually Violent Predators Act, of course, does not disavow punishment, but instead explicitly requires the State to first extract a full measure of punishment before declaring the individual subject to indefinite, involuntarily commitment in a psychiatric hospital ostensibly for treatment. Such a statutory structure belies the State's professed intention to provide treatment.*

4. In Reality the Kansas Legislature Sought Indefinite Preventive Detention Contrary to *Salerno*

The Kansas State Supreme Court found that the "primary objective of the Act is to continue incarceration and not to provide treatment." *Hendricks, 259 Kan. at 258. Only under carefully limited and narrowly focused circumstances has the Court permitted the State to detain or incarcerate an individual for non-punitive reasons pending judicial proceedings. Salerno, 481 U.S. at 747-51; Schall v. Martin, 467 U.S. 253, 269-70 (1984).*[10] *Examination of the Act and its legislative history inexorably leads to the conclusion that its purpose is to confine indefinitely an individual solely because he is considered dangerous and at risk of reoffending.*

The Kansas Act was part of a larger set of laws intended to deal with sex offenders. 1994 Kan. Laws ch. 252 (codified at various sections of Kan. Stat. Ann. titles 21 & 22). Concluding that criminal sentences for sex offenders were too lenient, the Kansas Legislature passed a number of measures that increased the penalties for certain sex offenses and permitted further enhanced sentences for defendants designated "predatory sex offenders." Kan. Stat. Ann. § 21-4176(a)(G)(i)(b),(ii). While these provisions permitted extended incarceration of individuals who might commit crimes in the future, standing alone they could not address the public's concern over individuals already incarcerated for sex offenses who would someday be released. The Kansas Sexually Violent Predators Act was devised as a way to extend the periods of incarceration for individuals considered dangerous beyond their lawful terms of criminal confinement and potentially for the rest of their lives.

The legislative history of the Act confirms that it was designed to address the perceived deficiencies of criminal sentencing of sex offenders currently incarcerated in Kansas and to detain sex offenders about to be released from prison. In describing these perceived deficiencies, Robert Stephan, then Attorney General of the State of Kansas, testified:

Under the provisions of the sentencing and parole system in effect prior to July 1, 1993, a violent sex offender could serve the full sentence and be released without any relevant safeguards for the public. In the same manner under the sentencing guidelines, a violent sex offender will be released at the end of the sentence imposed. With either system, there has been no adequate legal provision to continue incarceration of violent sexual predators past the period of mandatory incarceration.

J.A. 468-69. In his testimony to the Legislature, Attorney General Stephan identified the Act's real objective as "a law that will keep dangerous sex offenders confined past their scheduled prison sentence." *Id. Carla Stovall, then a member of the Kansas Parole Board and currently Kansas' Attorney General, also described the goal of the Act to continue incarceration of sexually violent offenders by keeping them "locked up indefinitely." J.A. 478. Attorney General Stovall stated her view that "We cannot open our prison doors and let these animals back into our communities." J.A. 475-76.*

No Supreme Court decision has ever authorized indefinite, involuntary civil commitment in a psychiatric hospital solely because an individual was considered likely to commit a crime in the future. That is precisely what this Court refused to do in *Foucha. In that case, the State of Louisiana argued that the Court's opinion in Salerno authorized preventive detention for persons who pose a danger to the community. Foucha, 504 U.S. at 81. The Court rejected that argument and distinguished Salerno on grounds that the statue was narrowly focused and carefully limited to stringent time limitations. Foucha, by contrast, had no time limitations and, indeed, was indefinite. Confinement of an individual entitled to his freedom to prevent conjectural crime is the very essence of indefinite, preventive detention condemned by both the majority and dissent in Foucha.*

CONCLUSION

Like the statute in *Foucha, the Kansas Sexually Violent Predators Act is fundamentally flawed. Its scope is broad, covering any crime that may have been sexually motivated. It is based solely on predictions of dangerousness. Its duration is indefinite. Unlike the statutes at issue in Salerno or Schall, the Act produces indefinite incarceration. A state cannot under the guise of civil commitment continue the confinement of individuals who have paid their debt to society and are entitled to their liberty simply because they are considered at risk of reoffending. The Act could not be sustained under Salerno, and is unconstitutional under Foucha. For the reasons set forth above, amici urge this Court to affirm the decision of the Supreme Court of the State of Kansas.*

Respectfully submitted,

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NOTES

1*Amici incorporates by reference the more comprehensive statement of the case provided in Brief of Cross Petitioner.*

2The Kansas Act is modeled after a similar statutory scheme enacted in Washington State in 1990. 1990 Wash. Laws ch. 3, §§ 1001-1013 (codified at Wash. Rev. Code § 71.09.010 - .120, as amended). The Washington Sexually Violent Predators Act has been held unconstitutional on substantive due process grounds by the United States District Court for the Western District of Washington. *Young v. Weston, 898 F. Supp. 744 (W. D. Wash. 1995) appeal withdrawn pending resolution of this case, No. 95-35958 (9th Cir., July 31, 1996). Similar sex offenders involuntary civil commitment schemes have been adopted in Wisconsin (1993 Wisc. Laws, Act 479, § 40 (codified at Wisc. Stat. § 980.01 - .13, as amended)); Minnesota (1994 Minn. Laws, 1st Sp., ch. 1, art. I (codified at Minn. Stat. § 253B.02, as amended)); California (1995 Cal. Stat., ch. 762 & 763 (codified at Cal. Welf. & Inst. Code § 6600 - 6608, as amended)); and Arizona (1995 Ariz. Sess. Laws 1st Sess. ch. 257 (codified at Ariz. Rev. Stat. § 13-4601 - 4609, as amended)).*

3The Kansas State Supreme Court is the final authority on the meaning and purposes of Kansas legislation. *Allen v. Illinois, 478 U.S. 364, 380 (1986). This Court is bound by the Kansas State Supreme Court's construction of a state statute.*

Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute."); R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

4The other cases concerned procedural, not substantive, due process. *See Allen v. Illinois, 478 U.S. 364 (1986); Addington v. Texas, 441 U.S. 418 (1979). In Heller v. Doe, 509 U.S. 312 (1993), the Court did not apply heightened scrutiny because the issue of the appropriate standard of review was not properly before the Court. Respondent had relied on the reasonableness standard in the lower courts and had not argued for a more rigorous standard until his initial brief in the Supreme Court. Id. at 319.*

5Ironically, the Act would apply, *inter alia, to a sex offender who is due to be released from the Kansas mentally ill offender system. Kan. Stat. Ann. § 59- 29a02. In other words, an individual who was once mentally ill and confined, but whom the State now says is no longer mentally ill, nevertheless, is subject to confinement under this Act.*

6As the Court stated in *Heller v. Doe, 509 U.S. 312, 322 (1993):*

> Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness. . . . It is thus no surprise that psychiatric predictions of future violent behavior by the mentally ill are inaccurate.

Id. at 323-24. Past actions that may have evidenced mental illness or dangerousness are not sufficient to support a finding of current mental illness sufficient to deprive an individual of his liberty. Moreover, a criminal act by definition is not "within a range of conduct that is generally acceptable." Jones, 463 U.S. at 366 (citing Marshall v. United States, 414 U.S. 417, 426-427 (1974)). A convicted criminal a priori has engaged in abnormal conduct. It is obvious, however, that the mere fact of prior criminal conduct is not constitutionally sufficient to support a finding that a convict is mentally ill for purposes of involuntary civil commitment. Were that the case, all criminal convicts would be considered mentally ill. Worse, if the prior criminal acts are relied upon to prove future dangerousness, all criminal convicts would be automatically subject to civil commitment. This cannot be the case.

7The fact that a condition like anti-social personality is discussed and identified by psychiatrists as a "personality disorder" does not render it a "mental illness" for legal purposes. The American Psychiatric Association and other mental health professional organizations have acknowledged this limitation. "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as pathological gambling or pedophilia, does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability." DSM-IV at xxvii (Cautionary Statement).

8It is true that commitment requires dangerousness as well as mental illness. It is not difficult to imagine an argument that most of the possible disorders carry with them a component of dangerousness. Thus, for example, nicotine addiction is a psychiatric diagnosis that carries the risk of lung cancer and other disease, but would not justify commitment.

9The Kansas State Supreme Court found that "personality disorder" is not a mental illness. *Hendricks, 259 Kan. at 261. Although the term "personality disorder" has a recognized clinical meaning, there is no personality disorder peculiar to sex offenders. Young v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995). In the descriptive classification system of mental disorders universally recognized by mental health professionals, a personality disorder is characterized by maladaptive behavior, but criminal sexual behavior alone is not a basis for such a diagnosis. DSM-IV at 630. A personality disorder has no underlying biochemical or medical etiology and, as the Legislature acknowledged, is not a condition that is treatable with the tools of a psychiatric hospital. Winick, Ambiguities in the Legal Meaning and Significance of Mental Illness, 3 Psych., Pub. Policy & Law 534 (1995). It neither impairs cognitive processes so as to render the individual incompetent to make hospitalization and treatment decisions, nor does it substantially impair volitional processes so as to prevent the individual from controlling himself. See Schopp & Sturgis, Sexual Predators and Legal Mental Illness for Civil Commitment, 1 Behav. Sci. & Law 437 (1995); Schopp, Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus on Therapeutic Jurisprudence, 1 Psych., Pub. Policy & Law 161 (1995). Like the definition of "mental abnormality," the Act's use of "personality disorder" is circular in that "'the only observed characteristic of the disorder is the predisposition to commit sex crimes.'" Hendricks, 259 Kan. at 261.*

10In *Salerno and Schall, the Court authorized detention for stringently limited periods of time. In Salerno, for example, the Court upheld a federal act authorizing pretrial detention of defendants deemed dangerous. Salerno, 481 U.S. at 755. The purpose for the detention in Salerno was to detain the defendant only until the government could provide the full procedures*

required by the criminal justice system, not to detain them indefinitely without ever having a full criminal trial. The Court noted that preventive detention under the act was "limited by the stringent time limitations of the Speedy Trial Act." Id. at 747. Similarly, in Schall, the Court upheld a state statute authorizing the preventive detention of juveniles accused of crimes who were deemed dangerous. Schall, 476 U.S. at 269-70. In that case, the Court noted that the maximum possible detention under the act was only 17 days. Id. Other preventive detention statutes which the Court has approved likewise have allowed detention only for stringently limited periods. See Reno v. Flores, 507 U.S. 292 (1993) (approving regulatory detention of juvenile aliens pending deportation); Bell v. Wolfish, 441 U.S. 520 (1979) (pre-trial detention permissible when arrestee presents risk of flight); Gerstein v. Pugh, 420 U.S. 103 (1975) (approving post-arrest detention of individual pending probable cause determination by neutral magistrate); Carlson v. Landon, 342 U.S. 524 (1952) (finding no absolute barrier to detention of potentially dangerous resident alien pending deportation).

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