

18-7375

No. 18-2030

ORIGINAL

In the Supreme Court of the United States

Court, U.S.
FILED

SPRING TERM 2019

OCT 13 2019

Wayne Carl Nicolaison,

Petitioner,

v.

Hennepin County

Respondent.

*On Petition for Writ of Certiorari to the
United States Supreme Court*

PETITION FOR WRIT OF CERTIORARI

Wayne Carl Nicolaison
Petitioner/ *Pro se*
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QUESTION PRESENTED

Petitioner Wayne Nicolaison filed a 42 U.S.C. § 1983 civil rights complaint in the Federal District Court of Minnesota. On Dec. 11, 2017 the Magistrate recommended dismissal without prejudice citing *Heck v Humphrey*, 512 U.S. 477 (1994). “Because judgment in Nicolaison’s favor would necessarily imply the invalidity of his commitment, *Heck* applies to bar his claim. [Doc. C] Nicolaison v Hennepin County; #17-4769 (JRT/DTS); On Jan. 29, 2018 the District Court upheld the Magistrate’s Recommendation [Doc. B] [And] the Eighth Circuit Court of Appeals in Nicolaison v Hennepin County 18-2030 dated Sept. 17, arbitrarily refused to review this case stating: “It is so ordered by the court that the judgment of district court is *summarily affirmed*.” [Doc. A]

Furthermore, in adding salt to the wound; the Appellate Court remanded the case back to the District Court to reverse its’ Order of *In Forma Pauperis* and to assess payment of \$505 to Petitioner for bringing the Appeal. Id.

The question presented: Is the “Petitioner” entitled to [a] defense of [the] “presumption of innocence” upon a State’s assertion of “future dangerous behavior” by purely mere “speculation” a violation of the 5th and 14th Amendment[s] of Due Process, and the standard of “clear and convincing evidence”, to maintain an “indefinite civil commitment”, fundamentally violate this Court’s opinion developed under Foucha v Louisiana 504 US 71 (1992)?

PARTIES TO THE PROCEEDING

Petitioner Wayne Nicolaison was Plaintiff in the District Court and Appellant in the Eighth Circuit Court of Appeals.

Respondent was the Defendant County of Hennepin of the State of Minnesota, a District of the Federal Court and did not file a reply in the Eighth Circuit. The Order was summarily entered against Petitioner by the Appellate Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wayne Carl Nicolaison respectfully petition for a writ of certiorari to the United States Court of Appeal for the Eighth Circuit in *Wayne Carl Nicolaison v Hennepin County* No. 18-2030 .

DECISIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is unreported. The filing Number is 18-2030; summarily denied review September 17, 2018. [Appendix A] The District Court of Minnesota summary dismissals. [Appendix B and C]

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeal for the Eighth Circuit was entered on September 17, 2018. [Pet. App. A] This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10 (c) because the lower courts decisions conflicts with this court's *Foucha v Louisiana* 504 US 71 (1992) ;as well as, the Minnesota State Court Decision[s] of *Jarvis v Levine* 418 N.W.2d 139 (Minn. 1988); *Johnson v Noot, et. al.* 323 N.W.2d 724 (Minn. 1982); *Lidberg v Steffen* 492 N.W.2d 560 (Minn. App. 1992), *Reome v Levine* 350 N.W.2d 428 (Minn. App. 1984).

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The 5th and 14th Amendment Due Process Clauses; and Equal Protection in statutory rights as mentally ill and dangerous Minn. Stat[s]. 526.10 and 253B.02 subd.

17 (1990). [See: Footnotes 1-3].

United States Constitution 5th Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution 14th Amendment Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This case involves the scope and strength of bedrock constitutional principle that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause[.]” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (stating that “[a] statute permitting indefinite detention” raises serious constitutional problems, because “[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects.”) (citation omitted).

The construction is supported upon bedrock Constitutional expectations that one is “innocent until proven guilty” beyond a reasonable doubt, or the lesser “clear and convincing evidence” standards. In the instance, Respondent Hennepin County has removed indefinitely Petitioner’s liberty upon pure speculation of some “unconsummated future crime” , not for current or a past criminal conviction.

STATEMENT OF THE CASE

Petitioner Wayne Nicolaison was civilly committed as an alleged Psychopathic Personality (Minn. Stat. 526.09 (1990)¹ in Order dated January 1992. [See: Appendix D E]; “Initial Commitment Order; (2) Final Commitment Order of June 9, 1992] by virtue of Minnesota Statutes(s) §526.10 (1990)² and §253B.02 subd. 17 (1990)³.

As subject to the terms of Petitioner commitment, he is entitled to all the rights and procedures as those applied to the ‘Mentally Ill and Dangerous’. Minn. Stat, 253B.18 (1990).

¹ **526.09 PSYCHOPATHIC PERSONALITY.**

The term “psychopathic personality”, as used in sections 526.09 to 526.11, means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any such conditions, as to render such person irresponsible for personal conduct with respect to sexual matter and thereby dangerous to other persons.

² **526.10 (1990) LAWS RELATING TO MENTALLY ILL PERSONS DANGEROUS TO THE PUBLIC TO APPLY TO PSYCHOPATHIC PERSONALITIES; TRANSFER TO CORRECTIONS.**

Subdivision 1. **Procedure.** Except as otherwise provided in this section or in chapter 253B, the provisions of chapter 253B, pertaining to persons having a psychopathic personality, to persons alleged to have such personality, and to persons found to have such personality, respectively. Before such proceedings are instituted, the facts shall first be submitted to the county attorney, who, if, satisfied that good cause exists therefor, shall prepare the petition to be executed by a person having knowledge of the facts and file the same with the judge of the probate court of the county in which the “patient,” as defined in such statutes, has a settlement or is present. The judge of probate shall thereupon follow the same procedures set forth in chapter 253B, for judicial commitment. The judge may exclude the general public from attendance at such hearing. If, upon completion of the hearing and consideration of the record, the court finds the proposed patient has a psychopathic personality, the court shall commit such person to a public hospital, or a private hospital consenting to receive the persons, subject to a mandatory review by the head of the hospital within 60 days from the date of the order as provided for in chapter 253B for persons found to be mentally ill and dangerous to the public. **The patient shall thereupon be entitled to all of the rights provided for in chapter 253B, for persons found to be mentally ill and dangerous to the public shall apply to such patient except as otherwise provided in subdivision 2.**

³ **253B.02 Subd. 17 (1990) Person mentally ill and dangerous to the public.** “Person mentally ill and dangerous to the public” is a person (a) who is mentally ill; and (b) who as a result of that mental illness presents a clear danger to the safety of others as demonstrated by the facts that (i) the person has engaged in an overt act causing or attempting to cause serious physical harm to another and (ii) there is a substantial likelihood that the person will engage in acts capable of inflicting serious physical harm on another. **A person committed as a psychopathic personality as defined in section 526.09 is subject to the provisions of this chapter that apply to persons mentally ill and dangerous to the public.**

Petitioner Nicolaison's record indicates he was convicted of (2) sexual crimes, which occurred in 1980 and 1984. He was duly convicted by guilty plea[s] and sentenced to 50 and 120, months of respective imprisonment[s].

At the time Petitioner Nicolaison was entitled to his liberty for the 1984 conviction in 1991; Respondent Hennepin County petitioned in Hennepin County Probate Court in August 1991 for further confinement as an alleged 'Psychopathic Personality' (ftnt 1-3). [Later amended in November 1991 and the Initial commitment Hearing was held on Dec. 14, 1991.]

The commitment is premised 'narrowly' upon [the] mere speculation of some unpredictable "future crime" which summarily supported by the opinions of the Minnesota Supreme Court, Justices' WAHL; KEITH; TOMLJANOVICH in their dissent . [See: In re Blodgett 510 N.W.2d 910, 918 (1994)⁴]. The dissenting opinions supports Petitioner's cause of action for relief, thereby stating a claim. The lower courts' summary dismissals demonstrates they totally ignored Petitioner's factual claim for relief.

The Petitioner having raised [as Justice Kavanaugh argued during his confirmation hearings] [that] he is entitled to the *presumption of innocence* for allegation[s] of alleged future sexual misconduct, the sole foundation of taking his liberty indefinitely since 1991. .

⁴ Dissent by: WAHL; KEITH; TOMLJANOVICH WAHL, Justice (dissenting). I respectfully dissent. The Minnesota Psychopathic Personality Statutes, Minn. Stat. 526.09-.10, under which a person, **who may in the future commit acts of sexual misconduct** dangerous to others, may be involuntarily committed, without the requirement of a finding that the person suffers from a medically diagnosable and treatable mental illness, to a confinement of indefinite duration until the person proves he is no longer dangerous to the public and no longer in need of inpatient treatment, in my view, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Furthermore, the rigor and methodical efficiency with which the Psychopathic Personality Statute is presently being enforced is creating a system of wholesale preventive detention, a concept foreign to our jurisprudence.

The Petitioner argued for relief In the lower courts, that he is entitled to the defense of [a] “presumption of innocence” for alleged “future dangerous behavior ” supported only upon pure speculation for an indefinite civil commitment/imprisonment. In support See: Foucha v Louisiana 504 US 71 (1992)⁵ . [Also see: Jarvis v Levine 418 N.W.2d 139 (Minn. 1988); Johnson v Noot, et. al. 323 N.W.2d 724 (Minn. 1982),); Lidberg v Steffen 492 N.W.2d 560 (Minn. App. 1992).]

The Petitioner sought relief by 42 U.S.C. 1983 civil right complaint seeking declaratory judgment as his cause of action. The district and appellate court[s] in summary dismissal erred [citing an unbelievable allegation] that Petitioner’s Complaint included violations of the Double Jeopardy and Ex Post Facto Clause(s). Issues not raised nor complained by the Petitioner.

The evidence supports that [neither] of the lower Courts’ addressed Petitioner’s claim regarding ‘presumption of innocence’, but instead, alleged falsely, Petitioner was barred by *res judicata* because of an earlier habeas corpus which was dismissed without prejudice. “Nicolaison brought a Habeas petition that he **voluntarily dismissed** after the Magistrate Judge recommended dismissing it as an improper successive petition.” (See District Court Order. July 11, 2017, Civil No. 16-2777, Docket No. 20; R § R., June 21, 2017, (Civil No. 16-2777, Docket No. 17))

A Dismissal without prejudice allows Petitioner to file anew, contrary to the federal district court’s claim for dismissal of *res judicata*.

Since both, the State and Federal Courts’ refused to rule for Habeas Corpus relief earlier regarding Petitioner’s claim for the “presumption of innocence”, for

⁵ See: 29 Am J2d Ev 225, 226. “A presumption which applies, not only in criminal cases, but in civil cases where the commission of a crime is in issue.” In the instant case, [the] “alleged future crime is in issue.” There also is a presumption, one is not mentally ill and dangerous.”

confinement/commitment based strictly upon unconsummated acts of “future criminal conduct”, Petitioner filed the current 42 USCA 1983 civil right complaint seeking an Order of Declaratory Judgment to create a basis for future habeas relief. The Federal District Court and Eighth Circuit Appeals Court summary denials’ grants the Right to this Petition for Certiorari. As stated in the Appellate Court’s dismissal, Petitioner was granted in forma pauperis, which indicating he had stated a claim for relief in the Complaint and supports renewed motion to proceed in forma pauperis on this petition. [See: 8th Cir. Order]. It is time for this Court to settle this Constitutional conundrum.

BASIS FOR FEDERAL JURISDICTION

This case raises important questions of interpretation of Due Process secured by the 5th and 14th Amendments’ of the United States Constitution, involving the ‘Right to [the] presumption of innocence’ for an indefinite civil commitment, constructed solely upon non-behavioral allegations of “future criminal misconduct” for confinement, is a violation of this Court’s opinion stated in Foucha v. Louisiana 504 US 71 (1992). The district court further had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. § 1331.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. PETITIONER'S CIVIL COMMITMENT CONFLICTS WITH THIS COURT'S OPINION OF *FOUCHA V LOUISIANA* 504 US 71 (1992) AND MINNESOTA SUPREME AND APPELLATE COURT'S OPINION OF *JARVIS V LEVINE* 418 N.W.2D 139 (MINN. 1988); *JOHNSON V NOOT, ET. AL.* 323 N.W.2D 724 (MINN. 1982) AND *REOME V LEVINE* 350 N.W.2d 428 (MINN. APP. 1984).

In each of the above cases, the courts' clearly opined an individual cannot be civilly committed, nor continued to be committed, solely upon the basis of future criminal misconduct. Petitioner is diagnosed with antisocial personality, which is not a mental illness and for which no treatment effectuates. *Foucha v Louisiana* 504 U.S. 71; *Reome v Levine* 350 N.W.2d 428 (Minn. App. 1984). "That appellant is apt to be involved in criminal-type behavior in the future, but is not deemed dangerous as a result of mental illness." Id.

B. IMPORTANCE OF THE QUESTION PRESENTED.

This case presents an important fundamental question to the interpretation of this Court's decision[s] of *Foucha v Louisiana* 504 U.S. 71 (1992); *Kansas v Hendricks* 521 US 346 (1997) and *Kansas v Crane* 534 U.S. 407 (2001).

The question presented is of great public importance, because it affects the civil commitment of individual[s] who have fully served their prison sentences. Who are thereafter indefinitely confined under civil commitment, "not for their past behavior— but for alleged future behavior."

Governmental conduct, that subsequently denies *Them*, due process and equal protection of the United States Constitution as the 'presumption of innocence'. This standard has created a lower bar in removing one's liberty from guilt of 'beyond a reasonable doubt' to guilty without proof of any wrong doing as claimed to be for alleged future behavior that has not yet transpired. Science fiction's *Minority Report* has now become reality.

REASONS FOR GRANTING THE PETITION

I. The District Court and the Eighth Circuit's Ruling Conflicts With This Court's Fundamental Rights Jurisprudence And Bedrock Principles of Constitutional Law.

D. The Decision Below Undervalues The Right To Be Free From Massive Deprivations of Physical Liberty.

"[A]s a matter of due process," civil confinement is only permissible [if a rational basis for the commitment exists..." *Foucha*, 504 U.S. at 77 (citing *O'Connor v. Donaldson*, 422 U.S. 563,575 (1975))]. It is at this stage; the Petitioner's commitment fails to meet the Court's precedence's or due process standards of *Foucha*.

The reason is because Petitioner is confined, not for what he has done, but for some alleged future conduct that has not occurred. This is governmental conduct that is practiced in third world or dictatorial regimes. Proceedings that are corrupt and constructed upon fraud., where the individual is denied truth. There is no scientific basis that anyone can predict the future with such accuracy, such sureness, to meet the standard of "clear and convincing evidence", let alone, "beyond a reasonable doubt." Why??? Because there has been no prosecutable behavior to base the commitment upon.

The confinement is based upon 'mere' hypotheticals of claimed future conduct, that simply has not occurred. That is the foundation of this Court's *Foucha* decision. [That] the state may not convict and imprison, when there is no evidence of a current dangerous sexual crime necessities a mental diagnosis. The fact that Petitioner was found rational in sentences of imprisonment for his past crimes, concludes that he was not mental ill at the time the crime was committed.

No, the State to get around due process, claimed at the time Petitioner was entitled to his liberty, continued confinement for future criminal conduct that has simply not occurred.

E. The District Court and the Eighth Circuit erred in judgment.

The Magistrate recommended a summary dismissal of Petitioner's 42 U.S.C § 1983 civil right complaint because: "Nicolaison alleges that his continuing detention at the MSOP is unlawful because it is premised on his threat of future dangerousness and therefore violates his due-process right to the presumption of innocence." citing *Heck v Humphrey*, 512 U.S. 477 (1994) and upheld by the District Court.

Unfortunately, *Heck* involved a Habeas Corpus action, not a civil complaint. Furthermore, the District and Eighth Circuit Court in *Karsjen, et al. v Jesson, et al.* D.C. file no. 11-3659 (DWF/JJK) and Eighth Cir. No. 15-3485.

HECK V HUMPHREY IS NOT ABSOLUTE.

The lower courts' dismissal rests upon this Court's *Heck* decision. Petitioner argues *Heck* is not controlling.

Because, the Heck decision as opined by the lower court[s] indicates [that] " should Plaintiff/Appellant prevail on his claim. " citing Heck v. Humphrey, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383, 394 (1994) (holding that § 1983 suits are not available if the outcome of the suit would imply that a prisoner's conviction or sentence is invalid, unless he proves that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus); concluding Plaintiff cannot challenge constitutional violations using a 1983 civil complaint, before prevailing by habeas corpus.

Here it is firmly apparent Petitioner raised a cause of action for relief, but was denied his Constitutional Right to litigate it.

Regardless this action however, would not necessarily imply the invalidity of the plaintiff's commitment. See Huftlev. Miccio-Fonseca, 410 F.3d 1136, 1140 (9th Cir. 2005) (noting Heck applies to civilly committed persons as well as prisoners). Petitioner does not allege that the initial commitment was invalid. Nor is it alleged that he should be immediately released. Instead, the Petitioner's claim is that he should receive a finding of the Court as to the merits of his cause of action concerning the Due Process "presumption of innocence" under 42 U.S.C. § 1983. It is conceivable that upon receiving a favorable finding, the petitioner may be eligible in the future for release. This case has not reached that point.

Clearly, *speculation* alone is not enough to invoke *Heck* and Petitioner has stated a claim [if true] for declaratory, injunctive, and monetary judgments, that leaves release for another day. "[Confinement] for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves [confinement] for a mere propensity, a desire to commit an offense." *Powell v Texas*, 392 US 514 (1968). *Hypotheticals* simply have no evidentiary or Constitutional values to deprive one's liberty. Plaintiff/Appellant's civil confinement for the past 28 years is repugnant to due process of the United States Constitution.

Minnesota statutes provide (2) separate definitions for Mentally ill persons. See: Minn. Stat. 253B.02 subd. 13 [mentally ill] and 17 (1990) [mentally ill and dangerous, says: "(ii) there is a substantial likelihood that the person will engage in acts capable of inflicting serious physical harm on another.."] The dangerousness is predicated upon future conduct, that occurs as the result of the mental infirmity. That is the understanding codified within civil commitment statutes' and requires the *elimination* of a criminal trial and/or sentence, The apparent fact the constitutional protection by that fact, safeguards an unbroken status "of innocence". The offender civilly committed is found 'innocent' by reason of his mental illness. He may not be punished.

In the instance, Petitioner has completed his prison sentences and has no pending criminal charges and for these reasons is entitled to a presumption of innocence for some *hypothetical future crime*, when on first blush, the Minnesota Security Hospital determined he has no mental illnesses.

The Eighth Circuit Court's recent precedence of *Karsjens*, has breathed new life because Petitioner need not prevail on habeas corpus, before raising a 42 U.S.C. § 1983 complaint for civil right violations, that may result a later challenge for actual liberty. In review of the Complaint, Petitioner has not asked for release and *Heck* has no value at this stage of the suit, and Collins [Id.] supports the district court and appellate court erred in summary dismissal and Appellant is entitled to Declaratory Judgment regarding the presumption of innocence for future crimes, that have not occurred. Furthermore, the Court may Order only injunctive relief requiring Minnesota to seek commitment of its' sex offender either before or in place of, criminal sanctions and would not necessarily imply the invalidity of the sex offender's commitment. Therefore this action is not barred under *Heck or Preiser*. This case may in fact, provide a new rule protecting a class of individuals' from a lifetime loss of liberty based upon a [state] invented future crime.

Furthermore, the Supreme Court opined in *Hohn vs. United States*, 524 US 236 (1998) [when, as here] "[the] claim of appeal [has] a substantial showing for the arbitrary denial of the constitutional right [i.e. "presumption of innocence"] stipulates a trial on the merits." Due Process is [a] Constitutional right that embraces "[a] presumption of innocence to the indefinite incarceration for an accusation, of a *hypothetical future crime*, meets the necessary substantial showing of [a] Constitutional injury under [a] due process clause violation.

In support of this conclusion: 'Unlike the Bail Reform Act', the discharge criteria here permit the indefinite confinement of persons who have never been charged with a

crime. The discharge provision effectively transforms mental hospitals into penal institutions where persons who are not mentally ill are held, not because they committed a crime, but because they might at some future time be involved in criminal behavior. Confinement on this basis bears no rational relation to the purpose for commitment and clearly interferes with rights "implicit in the concept of ordered liberty." Citing: *Palko v. Connecticut*, 302 U.S. 319, 324-25, 82 L. Ed. 288, 58 S. Ct. 149 (1937); *Reome v Levine* 692 F. Supp. 1046 (D.C. Minn 1988)

The Constitutional error is evident, when liberty is removed simply upon a whim, through a verdict of guilty for a fictitious crime is a real injury and a violation of the United States Constitution Due Process Clause as stipulated by the *Hohn* decision. Plaintiff's confinement bears no rational relation to the purpose for commitment and clearly interferes with rights "implicit in the concept of ordered liberty." *Id.* *Palko*

In summary, the facts confirm a confinement constructed upon legal fraud, masquerading as a dangerous mental illness or disorder, is a disservice to the people of the United States, the State of Minnesota and Constitution.

The lower courts' summary dismissals substantiates Petitioner stated a claim for relief of an unconstitutional imprisonment and the Constitution requires this matter be settled.

F. IT WAS THE LOWER COURTS' DUTY TO PROVIDE A LEGITIMATE CONSTITUTIONAL EXCEPTION AS TO WHY THE GOVERNMENT MAY IMPRISON A CITIZEN INDEFINITELY FOR FUTURE CONDUCT THAT HAS NOT YET OCCURRED.

The facts plainly illustrate that Petitioner's confinement by the State of Minnesota is not for his past completed criminal sentences. His confinement now is premised for alleged "future behavior". A finding that is as improbable/illogical as one meeting Santa Claus.

This Court in previous opinions of *Pearson v Ramsey Co.* 309 U.S. 270 (1940); *Foucha v Louisiana* 504 U.S. 71 (1992); *Kansas v Hendricks* 521 US 346 (1997) and *Kansas v Crane* 534 U.S. 407 (2001) was supported upon real mental illnesses or disorders. In the case of *Pearson* his admittance of possessing an “utter lack of power” to control his sexual urges.

THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE URGENT AND IMPORTANT QUESTION PRESENTED.

The foundational nature of the liberty right at stake, the magnitude of the violation, and the number of people harmed by the violation all point towards the urgency of review in this case. The right to be free from indefinite physical restraint. A wrongful restraint because Petitioner is denied the bedrock Right of a ‘presumption of innocence’ provided even a criminal offender. Yet, Respondent fails to recognize the substance of this right in defense of a lifetime incarceration for conduct that has not occurred. This Court in *Hendricks v Kansas* 521 US 346 (1997) opined that *Hendricks had* confessed that he had an uncontrollable compulsive disorder around children. See: also *Pearson v Ramsey Co.* 309 U.S. 270 (1940). This Court in *Kansas v Crane* 534 U.S. 407 (2001) opined “...the Federal Constitution required the state to prove that such offenders had serious difficulty in controlling their behavior.” [That the offender need not have a “complete” lack of control].

This Court still requires the commitment be premised upon the mental illness of a “compulsive disorder.” Actually, more than a compulsive disorder is necessary, it also includes the “uncontrollable or difficult if not impossible to control” element. This court’s definition clearly demands the relevant sexual behavior, must not only be enduring but also currently present. Obviously, if the sexual behavior is not habitual, nor has occurred for a number of years, the individual has control of his conduct. As a

result, his behavior demands prison confinement, not commitment to a mental health facility. The State cannot have it both ways.

For these reasons, it is appropriate the Court grant Certiorari with counsel appointed.

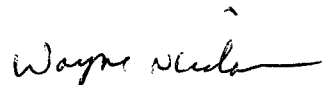
SUMMARY

The lower courts' erred when it failed to both hear and rule on this case. Petitioner has stated a claim for relief, and has provided proof of fraudulent incarcerations based upon erroneous interpretations of this Court's opinions. It is time to correct this Constitutional abuses. As this Court has opined in the past, "it is unconstitutional to confine someone because they might commit a crime in the future."

For this reason Petitioner is entitled to the issuance of Certiorari and send this case back to the District Court for trial on the merits.

Respectfully Submitted,

Dated: 1-2-19



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NICOLAISON APPENDIX