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IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS, :
Petitioner :
v. : No. 00-957
MICHAEL T. CRANE. :

- - - - -X
Courtroom 20
333 Constitution Avenue, N.W.
Washington, D.C.
Tuesday, October 30, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:59 a.m.

APPEARANCES:

CARLA J. STOVALL, ESQ., Kansas Attorney General; Topeka,
Kansas; on behalf of the Petitioner.

JOHN C. DONHAM, ESQ., Olathe, Kansas; on behalf of the
Respondent.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-957, Kansas v. Michael Crane. General Stovall.

ORAL ARGUMENT OF CARLA J. STOVALL
ON BEHALF OF THE PETITIONER

MS. STOVALL: Mr. Chief Justice, thank you, and may it please the Court:

The Kansas Supreme Court has erroneously read this Court's decision in Kansas v. Hendricks as requiring a showing that a potentially sexually violent predator cannot control his behavior and that such a requirement has supplemented the two requisites for civil commitment that this Court has approved in and since the Addington case. Those two requirements, as you know, are mental illness and dangerousness.

The volitional impairment that the Kansas Supreme Court has ruled was constitutionally required for civil commitment ignores the fact that psychological disorders, such as antisocial personality, can impair an individual in behavior, cognitive, perceptual, emotional, and even intellectual capacities.

This Court has never indicated that there's anything constitutionally significant about a volitional

1 impairment.

2 QUESTION: There was a good deal of reference in
3 our Hendricks opinion to the -- to the apparent fact that
4 the person there had what was volitionally impaired.
5 You're saying that was descriptive rather than essential
6 to the holding?

7 MS. STOVALL: I'm saying it was descriptive.
8 Mr. Hendricks had apparently, and according to himself
9 only, an inability to control his own behavior. So, when
10 the majority wrote about Mr. Hendricks, they used that
11 kind of a description.

12 QUESTION: Well, but we also relied on prior
13 authority that made some reference to lack of control. I
14 don't think that what was done by the court below was
15 totally off the wall in light of what was said in our
16 prior cases. What if there is some element but perhaps
17 not to that extent? How would you draw the line?

18 MS. STOVALL: Well, if this Court says that
19 there needs to be some volitional impairment displayed, we
20 would suggest that it just be merely some impairment. To
21 have a total impairment is something that the
22 psychiatrists will even tell us is an impossible standard
23 to show.

24 QUESTION: You think that's the standard adopted
25 in the court below that we're reviewing?

1 MS. STOVALL: I do.

2 QUESTION: Total impairment?

3 MS. STOVALL: I do.

4 QUESTION: Do you acknowledge that lack of
5 ability to control one's unlawful conduct and volitional
6 impairment are one and the same thing?

7 MS. STOVALL: No, I do not.

8 QUESTION: Suppose I'm delusional and -- and I
9 think that -- that people I see are Satan. I'm fully able
10 to control myself and -- and do not attack people who are
11 not Satan, but I think that some people are Satan.

12 MS. STOVALL: Your Honor, that's --

13 QUESTION: Do you call that a lack of volitional
14 control or delusion?

15 MS. STOVALL: I would consider that delusional
16 and not a -- a lack of volitional control. And the
17 problem with the Kansas Supreme Court's decision is that
18 it says the only thing that we consider is volitional
19 impairment, but there are many kinds of impairments
20 individuals have that are the result of their mental
21 disorder, and so the Kansas court is necessarily limiting
22 the psychiatric diagnosis to say only volitional
23 impairment --

24 QUESTION: What is there -- I thought there
25 could be cognitive impairments. I think Justice Scalia

1 has described one. There could be emotional impairments.

2 MS. STOVALL: Yes, sir.

3 QUESTION: And there could be volitional
4 impairments. Now, is there any other category?

5 MS. STOVALL: Perceptual, intellectual. There
6 -- there are many kinds that are talked about within the
7 psychiatric material.

8 QUESTION: But are these --

9 QUESTION: Is there any kind relevant here other
10 than volition?

11 MS. STOVALL: Yes. I think they all are, all of
12 those that we mentioned, and perhaps even those --

13 QUESTION: Are relevant in this case?

14 MS. STOVALL: Not -- yes.

15 QUESTION: I'm saying is there any one relevant
16 to the particular individual at issue here other than
17 volition.

18 MS. STOVALL: I don't believe psychiatrists can
19 tell us what it is that -- what kind of impairment Mr.
20 Crane has. They're not -- the -- the literature will say
21 that psychiatrists can't tell whether or not Justice
22 Scalia was acting because he's hallucinating or because
23 it's some other volitional impairment, if it's an
24 irresistible impulse, if you will, whether it's emotional,
25 perceptual, intellectual. They can't tell. They can't

1 get in somebody's mind. And what they have to do then is
2 simply rely on what the individual says.

3 Mr. Crane told this -- the court below -- he
4 told the experts below, rather. He didn't testify. He
5 told the experts below that he could control his behavior.
6 Mr. Hendricks had testimony that you refer to in the
7 Hendricks decision that said he couldn't control his
8 behavior. So, because the psychiatrist can't make a
9 determination objectively, we're left with a potential
10 predator telling us who applies -- who's eligible for this
11 law and who isn't.

12 The other point I would make to this Court is
13 that Mr. Hendricks said I can't control my urge to molest
14 children. But he could. He never molested little
15 children in front of their parents, never in front of his
16 wife, never in front of law enforcement --

17 QUESTION: Well, but that's not the premise that
18 Hendricks proceeded upon. Now you're -- now you're saying
19 that Hendricks rested on an insecure factual assumption.

20 MS. STOVALL: I'm sorry, Your Honor. I don't
21 understand.

22 QUESTION: Well, you're -- are you trying to say
23 that what we said in Hendricks was -- was dictum or --

24 MS. STOVALL: I --

25 QUESTION: -- just was -- was wrong in the -- in

1 the context of that case?

2 MS. STOVALL: I'm certainly not saying you were
3 wrong, Your Honor. I'm saying that you did not create a
4 third constitutional standard, that the impairments that
5 I --

6 QUESTION: Well, was the Court under some
7 misimpression as -- as to Hendricks' ability to control
8 himself?

9 MS. STOVALL: There wasn't evidence before this
10 Court that would say whether or not Hendricks suffered
11 from a volitional impairment or not. All we have is what
12 he himself said.

13 QUESTION: But then, it seems to me, that we're
14 back to square one. I -- one reading of Hendricks -- and
15 tell me if this is wrong -- is that we want to find some
16 measure of determining how dangerous this person is to
17 society because that's in the statute. And because many
18 criminals are -- have personality disorders and are
19 dangerous to society, we want to narrow it somewhat. So,
20 we -- so the Court added this volitional control aspect.

21 Is that a fair reading of Hendricks?

22 MS. STOVALL: Your Honor, I don't believe it is
23 because Mr. Hendricks, in particular, didn't suffer from a
24 personality disorder. He had what is classified under the
25 Kansas statute as an abnormality mentally and that was

1 being pedophilia. The Kansas statute specifically says
2 there are two kinds of impairment that we could look at.
3 They're emotional as well as volitional.

4 QUESTION: Well, is the test -- are there
5 different requirements if you proceed based on a
6 personality disorder than if you proceed from a mental
7 abnormality?

8 MS. STOVALL: Well, the Kansas court seems to
9 think there is because there is no definition in the
10 statute of a personality disorder. It wasn't defined --

11 QUESTION: Well, I was -- I was suggesting that
12 you thought there was based on the answer you gave to me.

13 MS. STOVALL: No, Your Honor. What --

14 QUESTION: You think they're both one and the
15 same. You have no different requirements for mental
16 abnormality or personality disorder. In -- in either
17 case, the test for civil commitment is the same.

18 MS. STOVALL: Based on the Kansas Supreme Court
19 decision or based on the --

20 QUESTION: Based on what you think the law ought
21 to be and what the -- and how the statute is properly
22 interpreted.

23 MS. STOVALL: We believe there is no
24 distinction. There should be no distinction between
25 mental abnormality and personality disorder, that as long

1 as we -- we show that mental condition and the
2 dangerousness, that there should not be a distinction.

3 QUESTION: So, anybody with a personality
4 disorder that's a danger to himself or others can be --
5 can be civilly committed regardless of volitional control.
6 That's -- that's your position.

7 MS. STOVALL: Right. They have to have some
8 sort of impairment in order to have the diagnosis of a
9 personality disorder. That's part and parcel of a
10 diagnosis of the DSM. But it would be our position it's
11 not limited to volitional control, but could be that
12 laundry list of emotional capacity -- emotional
13 impairment, which is even what the Kansas statute
14 contemplates for mental --

15 QUESTION: -- the DSM that you're mentioning, if
16 you look at the definition of personality disorder and
17 they say pick three out of a list of seven, you could pick
18 out habitually doesn't work, doesn't pay debts, is
19 reckless, irritable. That's something -- I mean, it's
20 considerably less than what is defined as an abnormality
21 like pedophilia. There are a lot of ordinary people who
22 would fit that description.

23 MS. STOVALL: What -- what I want to be able to
24 do today, Your Honors, is to convince you that actually
25 that's not true, that an antisocial personality disorder

1 is a severe mental pathology that really does give us
2 sociopaths and psychopaths that cannot conform to our
3 rules. There are a lot of individuals in this country and
4 certainly in our prisons that break the law, and they may
5 suffer from antisocial personality traits, but that's
6 entirely separate and distinct from having a full-blown
7 diagnosis of an antisocial personality disorder.

8 QUESTION: Well, your statute itself, when
9 you're talking about a sexually violent predator, you say
10 mental abnormality or personality disorder, which makes
11 the person likely to engage in repeat acts of sexual
12 violence. So, that certainly qualifies the personality
13 disorder. It's not any personality disorder that would do
14 that.

15 MS. STOVALL: That's exactly right, Your Honor.
16 The point is that it's a severe diagnosis, for one thing,
17 and then secondly, it has to tie directly to the kind of
18 dangerous behavior that we believe these individuals will
19 commit if they don't have the treatment.

20 QUESTION: And I take it what your -- what your
21 statute is trying to get at is -- is something more than
22 mere repetitive conduct, mere recidivism. Is that fair to
23 say?

24 MS. STOVALL: Absolutely.

25 QUESTION: And -- and is the element that

1 distinguishes this kind of behavior from mere
2 repetitiveness some element of lack of control, not
3 necessarily volitional control, but some element of lack
4 of control, perhaps lack of control resulting from
5 delusion, perceptual difficulties and so on, but -- but
6 some -- some aspect of the personality that -- that gives
7 that individual a -- a lesser chance of controlling
8 behavior in -- in a way that avoids committing crimes. Is
9 that fair to say?

10 MS. STOVALL: With a slight exception. It's the
11 dangerousness, the risk of recidivism tied to a mental
12 disorder. To get the diagnosis of a mental disorder,
13 there will be an impairment that's part and parcel of
14 that.

15 QUESTION: Right.

16 MS. STOVALL: But I want to be clear that we
17 don't think there needs to be a -- a third separate, very
18 distinguishable constitutional element --

19 QUESTION: I guess what I'm -- I guess what I'm
20 getting at is it -- it seems sensible to call somebody who
21 is just an habitual offender at some dangerous crime or
22 serious crime dangerous. And I take it that what the
23 Kansas statute and other statutes like it is trying to get
24 at, by speaking of mental disorder or personality
25 disorder, is some extra element beyond the mere

1 probability of doing an act which society has called
2 dangerous. And I think -- I think --

3 MS. STOVALL: That's 100 percent accurate.
4 That's exactly where we are, Your Honor. And we think
5 that having that mental abnormality or mental disorder
6 gets us away from just predicting who's going to be
7 dangerous.

8 QUESTION: But what is that -- what is that?
9 That's exactly the issue. What is it that you -- how --
10 what form of words will you use to define what counts as a
11 mental disorder that will distinguish the people whom you
12 want to civilly commit from your mine-run recidivist
13 criminal?

14 MS. STOVALL: That they have to have a mental --

15 QUESTION: Yes, but what -- that's the problem
16 in the case. The problem is what counts as a mental
17 disorder. And the Kansas court thought what counts as a
18 mental disorder is a total inability to control behavior.

19 MS. STOVALL: That's correct.

20 QUESTION: You say that's not the right
21 definition. Very well. What is?

22 MS. STOVALL: What is in the statute, a severe
23 mental --

24 QUESTION: No, no. What is the definition of
25 the word, mental disorder, that appears in the statute?

1 If a person were to say every person who commits a crime,
2 15 times running, is a sociopath and thereby falls within
3 DSM-IV, you're not going to permit that. You want to
4 distinguish that sociopath from a person who is really
5 mentally disordered and he isn't your mine-run criminal.
6 All right. Give me the form of words that will do it.

7 MS. STOVALL: I believe they are there now,
8 that --

9 QUESTION: All that's there now is mental
10 disorder.

11 MS. STOVALL: Well, actually it's mental
12 abnormality and personality disorder. You and this Court
13 in the Hendricks decision said that pedophilia certainly
14 qualifies as a --

15 QUESTION: Well, and here we have -- we have
16 here an antisocial personality disorder. That -- that was
17 the diagnosis.

18 MS. STOVALL: That's right. Along with
19 exhibitionism.

20 QUESTION: And the State's own expert said in
21 Mr. Crane's trial that approximately 75 percent of the
22 prison population has antisocial personality disorder.

23 Now, this is an unusual statute where after the
24 person serves a sentence for the crime, the State can then
25 proceed again and get them locked up for a very long time

1 because of his dangerousness.

2 MS. STOVALL: And the mental disorder.

3 QUESTION: We're trying -- okay. But most of
4 them -- 75 percent of them was the testimony -- suffer
5 from antisocial personality disorder. So, is the State
6 going to be able to proceed again against 75 percent of
7 the prison population? What is the added element beyond
8 an antisocial personality disorder?

9 MS. STOVALL: I would suggest to you that there
10 doesn't need to be an additional element. While I
11 acknowledge the expert said 75 percent suffers from that
12 in the deposition, he wasn't -- he certainly didn't quote
13 empirical studies to demonstrate that. I would suggest
14 that probably 90-95 percent of the prison population
15 suffer from antisocial personality traits, but that's
16 different than a disorder.

17 The antisocial personality disorder, psychopaths
18 and sexual -- psychopaths and sociopaths with actual
19 diagnosis -- and Ted Bundy is the best example of that.
20 These are really serious individuals not 75 percent of the
21 population.

22 QUESTION: What is it -- what is it about them
23 that we can isolate that shows that they are really
24 serious beyond the mere repetition of their crime?

25 In other words, let me put the question this

1 way. Under -- under the rule you want us to adopt in
2 which, as you put it, there is no third element, why
3 aren't you free to go after, let's say, every second
4 offender of a sexual crime at the time of release and say,
5 this person is dangerous within -- sufficiently dangerous
6 within the meaning of the statute to -- to commit here?

7 Now, you're not claiming you can do that, but I
8 want to know what it is that you have to prove that stands
9 in the way of your being able to do that.

10 MS. STOVALL: We have to show a mental illness.

11 QUESTION: And -- and --

12 MS. STOVALL: And that's a psychiatrically
13 approved condition that --

14 QUESTION: No, but --

15 MS. STOVALL: -- you can get an expert --

16 QUESTION: -- anything in the DSM.

17 MS. STOVALL: Right.

18 QUESTION: Then you're --

19 MS. STOVALL: I'm sorry. Not anything in the
20 DSM.

21 QUESTION: Then you're back to Justice
22 Ginsburg's question, which -- which is very much like
23 Justice O'Connor's. If all you've got to do is satisfy
24 one criterion in the DSM, you're going to pick up, in
25 Justice O'Connor's reference to the experts, 75 percent

1 probably of your prison population and -- and based on the
2 -- the categorization Justice Ginsburg described, it would
3 seem to me you would pickup a substantial part of the
4 population outside of prison.

5 Now, I know you don't want to do that, but on
6 your theory that there is -- there is no third element
7 beyond this categorization, what stands in the way of your
8 doing that?

9 MS. STOVALL: The actual diagnosis that those
10 folks actually have those diagnosis and are sexually
11 violent. Being sexually violent absolutely limits that.
12 What I would --

13 QUESTION: All right. Are you saying then that
14 in the example Justice Ginsburg gave you -- what was it --
15 four out of seven in the list?

16 MS. STOVALL: Three of seven.

17 QUESTION: That -- that as -- as long as -- as
18 the -- the expert witness says, yes, this person is
19 subject to four out of those seven personality traits,
20 that that person, if a sexual offender, could be locked up
21 under the statute?

22 MS. STOVALL: They could be committed for
23 treatment under this -- this statute, yes, Your Honor.

24 QUESTION: Wow.

25 MS. STOVALL: And Mr. Crane -- what -- what I

1 would want you to know, though, is that it is not a --
2 just because these individuals have committed crimes
3 doesn't mean they have an antisocial personality disorder.
4 Of the seven criteria that are listed, that can certainly
5 be supplemented by independent judgment of psychiatrists,
6 of the --

7 QUESTION: But it would be very -- it -- it
8 would be -- on Justice Ginsburg's example, it would be
9 very easy to prove.

10 MS. STOVALL: It could be if they actually have
11 that diagnosis and have those personality traits and have
12 done that behavior.

13 If I -- although it is not in the record, what I
14 would like this Court to know is that out of 5,000
15 individuals that have been screened in this process in
16 Kansas, a mere 1 -- less than 1 and a half percent have
17 actually been civilly committed. And we have --

18 QUESTION: -- the prosecutor then, but I mean,
19 that's not something that -- that we would generally do.
20 I mean, if we thought of all prosecutors as being wise and
21 kind and good, then there would be a whole lot of rights
22 that we wouldn't have to worry about.

23 MS. STOVALL: I understand.

24 QUESTION: But Justice Kennedy brought up in --
25 in Hendricks a concern, and this case seems to fit that.

1 That is, this man entered a plea bargain.

2 MS. STOVALL: I'm sorry?

3 QUESTION: He entered a plea bargain. Right?

4 And he got a relatively short time. And then, through
5 this civil process, without beyond a reasonable doubt as
6 the standard, just a preponderance --

7 QUESTION: No. There is a reasonable -- beyond
8 a reasonable doubt, yes.

9 MS. STOVALL: It is beyond a --

10 QUESTION: But it is a civil proceeding.

11 MS. STOVALL: It is but we have that higher
12 standard.

13 QUESTION: May I --

14 QUESTION: Still, you could -- you could get to
15 where you were or even beyond. You could get to the full
16 amount of time that the person could have been sentenced
17 if there had been no plea bargain, and if you -- the
18 maximum penalty because this is indefinite. Right?

19 MS. STOVALL: It's indefinite with annual
20 reviews, and they are allowed to be released when they
21 have been determined safe to be at large. And while it is
22 not part of the record, I would want you to know that Mr.
23 Crane is in transitional release now, after about 3 years
24 in this treatment program.

25 QUESTION: What do the annual reviews -- what do

1 they deal with? Is it possible at -- at the end of an
2 annual review for the person to be released?

3 MS. STOVALL: Yes. Could go to the transitional
4 release phase and then the conditional release phase and
5 then ultimately to final discharge. The annual release
6 ensures -- the annual review, rather, ensures that they're
7 not warehoused, that they have an opportunity to come to
8 the court on an annual basis.

9 QUESTION: What does the court have to find in
10 order to release them? It is no longer beyond a
11 reasonable doubt that --

12 MS. STOVALL: Then it's -- the State has to show
13 -- I'm sorry. The -- the respondent has to show probable
14 cause that they have changed. The State, as a matter of
15 policy, never objects when there are psychiatrists say
16 they're safe to be in the next phase of the program or the
17 next. We've never objected to that. We have six that are
18 actually out of the facility now and in either
19 transitional and/or conditional release.

20 QUESTION: And isn't it a frequent case, though,
21 that the psychiatrists say, well, we can't tell until we
22 clinically re-observe him and we can't clinically observe
23 him until he's in a normal environment? I mean, can
24 psychiatrists --

25 MS. STOVALL: It hasn't happened in the six so

1 far that -- that have -- have been released.

2 QUESTION: The American Psychiatric Association
3 says in their brief that the, quote, antisocial
4 personality disorder, end quote, which is DSM-IV at 701-
5 706, applies to 40 to 60 percent among the male-sentenced
6 population. So, are you saying that 40 to 60 percent of
7 the male-sentenced population could be committed for life
8 civilly? Are you saying that DSM-IV is not the standard,
9 or are you saying that the American Psychiatric
10 Association is wrong when it tells us 40 percent to 60
11 percent fit within the DSM-IV definition?

12 MS. STOVALL: In terms of the antisocial
13 personality disorder alone, I don't know. What I would
14 say is that certainly 40 to 60 percent --

15 QUESTION: All right.

16 QUESTION: Did they say how they know? I -- I
17 -- you know, I could --

18 QUESTION: I -- I don't know if they know or
19 not.

20 QUESTION: If -- if they stated --

21 QUESTION: But I know they know better than I
22 do.

23 QUESTION: Did they say that 40 to 60 percent
24 are beyond a reasonable doubt suffering from an antisocial
25 personality disorder?

1 MS. STOVALL: I doubt that, and I doubt that --
2 that it applies to --

3 QUESTION: The reason -- the point of my
4 question is, is DSM-IV the standard and if DSM-IV is not
5 the standard, what is? That's what I think all of us, or
6 several of us anyway, are trying to get to. And it may be
7 you -- you cannot address that further, but if you could.

8 MS. STOVALL: The DSM-IV absolutely is the
9 standard in the psychiatric profession, but it is not the
10 Bible and is not the only thing psychiatrists use. They
11 very much can supplement that with their own judgment, and
12 in fact, that's part of the prefatory language in the DSM.

13 QUESTION: May I ask you this question? And I'm
14 concerned about whether the instructions were adequate and
15 whether you think the instructions were adequate. And one
16 of the reasons I have the question is they do not seem, on
17 their face, to require any finding of volitional
18 impairment. And it seems to me we might look at
19 volitional impairment in three different ways, one that
20 has to be total inability to comply, some inability to
21 comply, or that it's totally irrelevant to the issue.
22 Which of those three positions is yours?

23 MS. STOVALL: The last, that it's irrelevant to
24 a diagnosis.

25 QUESTION: There's no need to show any

1 volitional impairment in order to obtain a commitment
2 under this statute, so the instruction is correct.

3 MS. STOVALL: That -- that is absolutely the
4 State's position.

5 QUESTION: And I think it's also unnecessary to
6 show any other kind of impairment in addition to the two
7 elements that you're describing.

8 MS. STOVALL: In order to get a -- in terms of
9 the instructions, that's true because to get a diagnosis,
10 you have to have an impairment. You can't be diagnosed
11 with anything under DSM without having an impairment. So,
12 it's part and parcel.

13 QUESTION: -- the actual difficulty in
14 controlling, not -- not utter inability to control
15 conduct, but difficulty in controlling conduct. Don't you
16 have to show that?

17 QUESTION: She said -- she didn't say that.

18 MS. STOVALL: I don't believe we have to show
19 that.

20 QUESTION: How could the person be dangerous --

21 MS. STOVALL: Because they have this --

22 QUESTION: -- by reason of the personality
23 disorder if the personality disorder does not produce a
24 difficulty in -- in controlling conduct?

25 MS. STOVALL: In order to link together the --

1 QUESTION: I must say, I thought -- I thought
2 you conceded that you have to show difficulty in
3 controlling conduct, and if you don't, this is a quite
4 different case from what I thought.

5 MS. STOVALL: And I misspoke, Your Honor. The
6 -- within the definition of the mental abnormality itself,
7 we don't have to show lack of control, but the statutory
8 language then leads us into that you have this mental
9 abnormality or disorder that makes you likely or that
10 predisposes you. So, there is the connection that we have
11 to show.

12 QUESTION: Well, no --

13 QUESTION: In other words --

14 QUESTION: It predisposes you to do things you
15 want to do.

16 QUESTION: Yes.

17 QUESTION: So that, it seems to me, doesn't
18 answer the question.

19 MS. STOVALL: Our --

20 QUESTION: Where is it in the statutory language
21 that talks about volitional control? It doesn't.

22 MS. STOVALL: The mental abnormality is defined
23 in the statute and it does mention both volitional and
24 emotional capacity --

25 QUESTION: A personality disorder does not.

1 MS. STOVALL: It is not defined and I think
2 that's because it's such a common term, the legislature
3 didn't define it. Mental abnormality was a very unique
4 term. So, I think they chose to define it, but they
5 include emotional as well as volitional impairments there.
6 And if the Kansas Supreme Court is right, then you must
7 strike out emotional because we could prove it under the
8 statute by an emotional impairment that they say is not
9 valid. Only a volitional impairment is allowed. And --
10 and so --

11 QUESTION: But you say emotional is, and -- and
12 I guess emotional impairment I suppose would describe
13 every sociopath in the country. I mean, I thought a
14 sociopath by definition was somebody who just didn't care
15 about society's standards.

16 MS. STOVALL: That is absolutely one part --

17 QUESTION: That would satisfy as an emotional
18 impairment, wouldn't it?

19 MS. STOVALL: It is an emotional impairment,
20 yes, Your Honor. That's true.

21 QUESTION: So --

22 MS. STOVALL: But the Kansas court would say
23 that --

24 QUESTION: -- in fact, we -- I think we get back
25 to the point that on your theory any sociopath who has

1 committed a -- a sexual offense can be committed under
2 this statute upon release.

3 MS. STOVALL: But it takes more than having the
4 likelihood of committing more sex crimes and/or not having
5 any empathy before you could be diagnosed with an
6 antisocial personality disorder. And so, there --

7 QUESTION: It would take -- it would take four
8 out of seven on Justice Ginsburg's list.

9 MS. STOVALL: It takes three, actually three of
10 seven. But it does make a significant diagnosis. It is a
11 mental pathology. It isn't something that --

12 QUESTION: Beyond a reasonable doubt.

13 MS. STOVALL: Again, Your Honor, you're exactly
14 right. Beyond a reasonable doubt we have to be able to --

15 QUESTION: If we take just those three things
16 beyond a reasonable doubt, that definition doesn't say
17 trait. It says antisocial personality disorder, and
18 you're familiar with this list. You could be a liar. You
19 could be a malingerer and you could not pay your debts,
20 and you'd make those three.

21 MS. STOVALL: I would suggest to you that's part
22 of the evaluative process of a psychologist then in saying
23 this is someone who is likely to continue to be sexually
24 violent. If that's all they've done --

25 QUESTION: The prosecutor says, DCM, this

1 category fits, antisocial personality disorder, any three
2 of -- and I just gave you three from the list.

3 MS. STOVALL: Right, but that doesn't mean that
4 one of the experts would say that makes them fit under
5 this law to be sexually violent predators. They may have
6 an antisocial personality disorder, but not that it makes
7 them likely to re-offend, not that the -- the
8 psychiatrists at Larned would suggest they need to be
9 civilly committed.

10 QUESTION: General Stovall, you have read
11 Hendricks, as all of us have. And -- and the part that's
12 on substantive due process is not long. It's four pages,
13 and in those four pages, there are six references to
14 people -- not Hendricks, but people who are unable to
15 control their behavior, confinement for those who are
16 unable to control their dangerousness. Are you -- you're
17 essentially saying we should just read out that language.
18 It was incautious. Is that what you're telling us?

19 MS. STOVALL: I am because I don't believe that
20 was central or necessary to the holding. What I believe
21 is in the majority opinion, you were using that to
22 describe the mental abnormality, just to talk about --
23 it's a substitute. On -- on page 360 of the --

24 QUESTION: The holding -- the holding was,
25 indeed, described differently. It at one point said -- it

1 did mention volitional impairment, but it said the
2 following. The Kansas act is plainly of a kind -- these
3 other civil commit -- and statutes. It requires a finding
4 of future dangerousness and then links that finding to the
5 existence of a mental abnormality or personality disorder
6 that makes it difficult, if not impossible for the person
7 to control his dangerous behavior. That seems to me --

8 MS. STOVALL: That's -- that's exactly --

9 QUESTION: -- the crux of the holding of the
10 case and that portion does not say anything about
11 volitional impairment, just inability or difficulty in
12 controlling behavior.

13 MS. STOVALL: And what I would suggest to you is
14 on page 360 of -- of the opinion, it becomes very clear
15 the way that that phrase and those phrases were being
16 used. This admitted lack of volitional control, coupled
17 with prediction of future dangerousness adequately
18 distinguish Hendricks from other dangerous people who are
19 perhaps more properly dealt with through the criminal
20 proceedings.

21 The way of saying admitted lack of volitional
22 control is another way of simply talking about the mental
23 impairment. Couple that with dangerousness, and then you
24 get the two historic requirements of mental illness and
25 dangerousness that you've always required.

1 QUESTION: If -- if a jury instruction were
2 couched in the terms that Justice Scalia just quoted, as
3 stating the holding in Hendricks, would you find that jury
4 instruction correct and satisfactory?

5 MS. STOVALL: I would find it longer than it
6 needed to be and more inclusive than it needed to be
7 because --

8 QUESTION: Would it be -- would it be
9 constitutionally erroneous? Would you --

10 MS. STOVALL: Yes. I -- I would say that it --
11 that it would be --

12 QUESTION: So, we --

13 MS. STOVALL: -- because it goes beyond --

14 QUESTION: That's the holding in Hendricks.
15 We've got to pull back from Hendricks then in your view.

16 MS. STOVALL: My view is that what you said in
17 Hendricks was mental illness that makes somebody dangerous
18 in sexually violent ways.

19 QUESTION: Yes. But if Justice Scalia's
20 quotations correctly stated the holding in Hendricks, I
21 think you are telling us we have got to draw back from
22 Hendricks.

23 MS. STOVALL: Again, what I'm saying, the mental
24 illness makes them likely to re-offend in sexually violent
25 ways.

1 QUESTION: -- why you say we have -- you say we
2 have to draw back from that statement. What -- what in
3 that statement is wrong?

4 MS. STOVALL: That -- that we have to -- that we
5 have to show the -- the difficulty of maintaining their
6 behavior, of controlling their behavior.

7 QUESTION: The statement said --

8 MS. STOVALL: I don't have the exact --

9 QUESTION: -- it requires a finding of future
10 dangerousness and links that finding to the existence of a
11 mental abnormality or personality disorder that makes it
12 difficult, if not impossible, for the person to control
13 his dangerous behavior. What is wrong in that, other than
14 leaving out beyond a reasonable doubt, which your statute
15 contains?

16 MS. STOVALL: Right.

17 QUESTION: What is -- what is wrong in it?

18 MS. STOVALL: Only that if -- if we have to
19 require the finding of that makes it difficult, if not
20 impossible, for them to control behavior.

21 QUESTION: You're concerned that the last
22 sentence --

23 QUESTION: -- that finding? How are they future
24 -- wow.

25 MS. STOVALL: It's -- it's because they're --

1 they have a mental abnormality. They've committed the
2 past acts. They're likely to do it in the future. They
3 have this diagnosis. And so, it's part and parcel, and
4 common sense would tell you that there's a link and a
5 bridge, but not that it's a separate statutory term that
6 needs to be shown and certainly not a constitutional one.

7 QUESTION: Thank you, General Stovall.

8 We'll hear from you, Mr. Donham.

9 ORAL ARGUMENT OF JOHN C. DONHAM

10 ON BEHALF OF THE RESPONDENT

11 MR. DONHAM: Mr. Chief Justice, may it please
12 the Court:

13 I think the major disagreement between the State
14 -- the State's view of this and Mr. Crane's view is not
15 how dangerous is an individual, but why are they
16 dangerous.

17 The Kansas Sexual Predator Act was clearly
18 written to limit the application to those who are
19 dangerous on account of their mental illness.

20 QUESTION: You have a nice speaking voice, but
21 could you raise it just a little bit?

22 MR. DONHAM: I'm sorry, Judge. I'm sorry, Your
23 Honor. Excuse me. Is that better? Okay.

24 Mr. Crane sought a jury instruction at his trial
25 that was consistent with this Court's decision in

1 Hendricks. There is or was known to Mr. Crane at that
2 time only three forms of a mental abnormality or a mental
3 illness that historically satisfied involuntary,
4 indefinite civil commitments, and that was the inability
5 to care for oneself, the absolution of criminal
6 responsibility or incompetency, and the inability to
7 exercise self-control.

8 Now, that term, inability to exercise self-
9 control, is defined in the passage of volitional control,
10 the ability to exercise choice and to make a decision
11 concerning your behavior.

12 QUESTION: You say it's defined. Where do we
13 find that definition, Mr. Donham?

14 MR. DONHAM: Your Honor, in the Kansas statute
15 itself. It's 59-29a02. The definitional portion defines
16 what a sexually violent predator is.

17 QUESTION: Can you tell us where we find that in
18 -- in the papers?

19 QUESTION: It's the first page of the appendix
20 to the petitioner's brief I think.

21 MR. DONHAM: Your Honor, joint appendix --
22 excuse me. Joint appendix, page 157. That would have
23 been instruction number 9 that was given to the jury.

24 QUESTION: We're not talking about the
25 instruction. We're talking about the statute. What is

1 the statutory provision that's in question that -- that
2 makes -- that requires -- you say this Kansas statute
3 requires a volitional impairment. Isn't that what you
4 said?

5 MR. DONHAM: No. I'm sorry. The -- it's --
6 it's our opinion that the Kansas Sexually Violent Predator
7 Act must be limited to that narrow subgroup of
8 recidivists, those individuals who cannot control their
9 behavior.

10 QUESTION: So that a recidivist who will be a
11 recidivist because he's delusional and he thinks that
12 every woman he meets is inviting crude sexual behavior --
13 he's fully able to control himself if he doesn't think
14 that the woman is inviting crude sexual behavior, but he
15 happens to think that every woman he meets is inviting
16 him, and he would not be covered because that is not a
17 volitional impairment. He cannot constitutionally be
18 covered.

19 MR. DONHAM: I agree with that, and -- and may I
20 -- may I follow that up with perhaps -- the Kansas Sexual
21 Predator Act has a number of subsections, one of which is
22 directly -- directly focused on the type of individual you
23 just mentioned in your hypothetical.

24 QUESTION: Which one is that? Subsection.

25 MR. DONHAM: Your Honor, in the definition of a

1 -- sorry. I'm sorry. I don't have that. It is the
2 Kansas statute on the sexually violent predator --

3 QUESTION: Well, I have it here with a number.
4 You referred to one subsection. I'm asking you what
5 subsection that is.

6 MR. DONHAM: Your Honor, it's in the statute. I
7 don't believe it's in any of the briefs or in the joint
8 appendix.

9 But the Kansas Sexual Predator Act reaches those
10 who have been absolved of criminal irresponsibility, those
11 found --

12 QUESTION: Well, but you're telling us now what
13 the Kansas Sexual Predator Act does. Cite us to some
14 sections. I don't -- we're not interested in some general
15 summary.

16 MR. DONHAM: Your Honor, I'm sorry. I don't
17 have the statute number at my fingertips.

18 QUESTION: I thought your submission here was
19 not that the act didn't cover your client, but you're --
20 you're supporting the holding of the Kansas Supreme Court
21 that the act does cover your client, but inasmuch as --
22 insofar as it does, it's unconstitutional if it goes
23 beyond volitional impairment. Isn't -- isn't that what
24 this case is about?

25 MR. DONHAM: Your Honor, this -- the facts of

1 the Crane case dealt specifically with Mr. Crane and Mr.
2 Crane alone. Prior to his criminal trial, he sought a
3 defense of insanity, and that was ruled out by the State.
4 That left him with only one feasible mental illness which
5 might qualify him for commitment under the Sexual Predator
6 Act, as understood by Mr. Crane, following your decision
7 in Hendricks. And that was that he was unable to control
8 his dangerous sexual behavior.

9 QUESTION: Does not --

10 QUESTION: Excuse me. Can I just -- I really
11 don't know what we have before us here. I understood the
12 issue before this Court to be the fact that the Kansas
13 Supreme Court held the Sexually Violent Predators Act,
14 which we had just said in Hendricks was constitutional --
15 the Kansas Supreme Court held it unconstitutional, yet
16 again, as applied to someone who, like your client, has
17 only an emotional or personality disorder rather than a
18 volitional disorder. Isn't that what the Kansas Supreme
19 Court opinion said? There has to be a volitional disorder
20 or else it is unconstitutional to apply the Kansas
21 statute.

22 MR. DONHAM: That's what the Kansas Supreme
23 Court said.

24 QUESTION: All right. Now tell us why -- why it
25 is constitutional to commit someone who -- who makes

1 sexual advances to women because of a volitional
2 impairment, but not constitutional to commit someone who
3 is delusional. He is just as dangerous. He is just as
4 mentally impaired, and the only difference is he's
5 delusional rather than cannot control his -- his will.
6 Why is the one unconstitutional and the other
7 constitutional? I don't understand it.

8 MR. DONHAM: Your Honor, if -- if I have to
9 fault the opinion in the -- of the Kansas Supreme Court is
10 -- it is that it expanded its decision that was directly
11 for Mr. Crane under the specific subsection of the Kansas
12 Sexual Predator Act that dealt with individuals who had
13 been found criminally responsible. And it expanded that
14 and its terminology to give effect to all commitments.

15 The -- the Sexual Predator Act is and should be
16 available for individuals such as your hypothetical,
17 individuals who, because of some psychosis or
18 hallucinations, have in effect lost their ability to
19 control their behavior as well, although perhaps through
20 some better recognized form. There is -- there are
21 specific subsections of the Kansas Sexual Predator Act
22 that would pull those people in for a commitment
23 proceeding even though they don't go forward -- forward
24 with a trial or if they've been found not guilty by reason
25 of insanity.

1 Mr. Crane, however, was in that unique section
2 of people who have -- who have been found legally
3 responsible, who are competent to stand trial, who are
4 imprisoned, and upon release this -- this new group of
5 individuals that are now subject to involuntary commitment
6 for some mental disorder this Court found that the
7 appropriate level of -- of mental illness, if you will,
8 for Mr. Hendricks was his professed inability to control
9 his behavior, and that --

10 QUESTION: You say we -- we found that. I
11 realize that the opinion refers to the fact that he was
12 unable to control his behavior. Are you saying that was
13 -- that was the holding of the case?

14 MR. DONHAM: Your Honor, as -- as I read --
15 Hendricks stands for the proposition that the Kansas act
16 is constitutional because, as with Mr. Hendricks, what it
17 determined was that the State was not seeking to
18 involuntarily commit people based on dangerousness alone,
19 which would have been absolutely unconstitutional under
20 Foucha v. Louisiana. It seized upon this additional
21 element which separated and distinguished Mr. Hendricks
22 from the larger class of just garden variety recidivists.
23 It held that given that limiting factor --

24 QUESTION: Which -- which limiting factor was
25 difficulty or impossibility of controlling behavior.

1 Right?

2 MR. DONHAM: The -- I think the exact language
3 of the Kansas statute, or at least of Mr. Hendricks -- I'm
4 sorry. The opinion of Mr. Hendricks was that he admitted
5 that he was unable to control his behavior. The only way
6 he himself could be sure he would never offend again was
7 for him to die.

8 QUESTION: I just read -- I just read the
9 portion of the -- of the opinion that I think the most
10 relevant, and what it says is difficult, if not
11 impossible, to control behavior. To show utter
12 impossibility to control behavior would be very difficult.
13 That's -- that's what it said.

14 Now -- now, you equate that difficulty or if not
15 impossibility to control behavior with volitional
16 impairment. Why do you -- why do you equate that, as I
17 think the Kansas Supreme Court did? They -- they seemed
18 to say that if there's no volitional impairment, there
19 cannot be this difficulty or impossibility of controlling
20 behavior. But that doesn't seem to me to be true.

21 MR. DONHAM: Well, when Mr. Hendricks professed
22 that he could not control his behavior, that's an
23 indication that when confronted with temptation, he was
24 unable to exercise his free will.

25 QUESTION: That's right. In Hendricks it

1 happened to be a volitional impairment. But why do you
2 assert that that is the only reason for which one can say
3 a person is unable to control his behavior? Why isn't
4 delusion a reason why a person can't control his behavior?
5 He doesn't know what he's confronted with.

6 MR. DONHAM: Your Honor, I'm not trying to limit
7 the -- what a psychiatrist or a psychologist might be able
8 to say affects the ability of an individual to conform his
9 behavior to society's requirements. I'm not standing here
10 today as a psychiatrist or a psychologist. It's a murky
11 subject at best, and even those who work in it disagree.

12 The principal distinction that I take from the
13 Hendricks decision is that Mr. Hendricks could not have
14 been constitutionally involuntarily committed absent that
15 additional element that set him apart from others who
16 simply behave out of clear choice because they lack any
17 respect or moral value.

18 QUESTION: Well, I would have thought, really,
19 that that is not what we limited it to in Hendricks, that
20 a delusional lack of control would be entirely sufficient
21 constitutionally as -- as it relates to a lack of control,
22 that it could be volitional or delusional, that the Kansas
23 court went too far in requiring only volitional as a
24 constitutional standard.

25 MR. DONHAM: Your Honor, I would agree with

1 that.

2 QUESTION: Yes, so if you --

3 QUESTION: You think the court erred.

4 MR. DONHAM: I -- I agree with that and I hope I
5 haven't misled the Court. I -- I've been acting on behalf
6 of Mr. --

7 QUESTION: So, you agree that the Kansas Supreme
8 Court went too far.

9 MR. DONHAM: I agree that they perhaps imposed
10 too strict a limit on these additional elements that have
11 to be found in order to involuntarily commit.

12 QUESTION: But that there has to be some
13 additional elements.

14 MR. DONHAM: Absolutely.

15 QUESTION: And the most appropriate one at hand
16 in this case was volitional. Were there any other
17 additional elements that might have been argued in your
18 case? And if not, what are the additional elements that
19 might -- we might encounter in cases somewhat like this?

20 MR. DONHAM: Your Honor, to the first part of
21 your question, the only available argument that we could
22 have made, the only conceivable jury instruction that
23 would have been consistent with the contradictory evidence
24 at trial and this Court's opinion in Hendricks was a -- a
25 demand for a jury instruction, requiring the jury to find

1 that it was his mental abnormality or his personality
2 disorder that made him be likely to re-offend because it
3 interfered with his ability to control his behavior.

4 QUESTION: So, what are the words that you want
5 there? That is, imagine I'm talking about the set of
6 people who are very dangerous. Imagine I'm talking about
7 the set of people who are very dangerous because of a
8 mental problem. In defining mental problem, we could have
9 one subset that has a cognitive disorder well beyond the
10 normal person, including the normal prisoner. We could
11 have a set of people who have an emotional disorder well
12 beyond what the ordinary prisoner recidivist has, and we
13 could be talking about what the Kansas Supreme Court
14 thought it was talking about in this case, the set of
15 people who arguably have a volitional disorder. In
16 respect to that, it sounded to me, if that's the subject
17 of this case, that the Kansas court used the word cannot
18 control, whereas our Court used the word difficult, if not
19 impossible, to control. The only argument here being if
20 there is some difference between those two, and I would
21 think there is.

22 But how should we put that in your opinion?
23 Would it satisfy you if we said this case is about
24 volitional disorders, and there the Constitution permits
25 us to take a dangerous person and commit him civilly if

1 his ability to control his behavior is significantly, a
2 lot, quite a lot less than the ordinary person, including
3 the ordinary prisoner sentenced in a -- in a penitentiary?
4 How do you want -- in other words, I'm looking for the
5 proper standard. Cannot sounds too tough. Difficult, if
6 not impossible, maybe that's all right. But that's caused
7 confusion. So, what's your standard?

8 MR. DONHAM: Your Honor, I know the State has
9 touted the -- the descriptive adjective adequate control.
10 I'm not sure if I know how to answer that. I would think
11 that if you perform the criminal act, your control was not
12 adequate. And so, it would seem that what the medical
13 personnel are going to have to end up testifying and what
14 eventually will be a question for the jury to decide is
15 whether or not, given the opportunity and the chance for
16 success at committing a criminal act, this individual
17 chose to do that as an exercise of his or her free will or
18 whether or not some overriding mental condition compelled
19 them to act or disabled their capacity to refrain from
20 acting.

21 QUESTION: I don't -- I really don't understand
22 where we are now. You're -- you're objecting, as I
23 understand it now, just to the jury instruction. I mean,
24 we didn't take this case to decide whether the jury
25 instruction was right under the statute or not. You don't

1 challenge the statute. You think the statute is fine.
2 It's just a bad jury instruction that occurred?

3 MR. DONHAM: Your Honor, as -- as I read the --
4 the Kansas statute, the legislative body intended that the
5 mental defect caused the individual to be likely to commit
6 future predatory acts of violence.

7 QUESTION: No. It -- it says exactly that, and
8 you think that's okay.

9 MR. DONHAM: Yes, and this Court --

10 QUESTION: And the Kansas Supreme Court didn't
11 think it was okay.

12 MR. DONHAM: I disagree with that. I -- I think
13 -- and allow me to follow up. This Court in Hendricks
14 reinforced the notion that the Kansas act is
15 constitutional because there did exist, at least with Mr.
16 Hendricks, an additional element that because of that,
17 because of his mental illness, he was likely to offend.

18 The State -- or the Kansas Supreme Court was
19 presented simply the fact pattern in Mr. Crane's case, and
20 -- and that fact pattern was essentially -- or at least
21 the State's position was we don't have to prove any kind
22 of additional element whatsoever.

23 QUESTION: Well, they have to prove the
24 causality. You're saying they don't have to prove
25 causality. I mean, the way the statute reads is: who

1 suffers from a mental abnormality or personality disorder
2 which makes the person likely to engage in repeat acts of
3 sexual violence. It's not just that he's likely to -- to
4 commit future acts of sexual violence, but it also must be
5 shown that the reason he's likely to do it is because that
6 is caused by a mental abnormality or personality disorder.
7 I mean, it seems to me, the statute says exactly what you
8 think it ought to say, and you're just -- you're now
9 complaining about the jury instruction?

10 MR. DONHAM: We did object to the jury
11 instruction because we felt it did not adequately address
12 the theme that the State carried to the jury. What the
13 State presented to the jury, through all four of its
14 expert witnesses, is that Mr. Crane satisfied the
15 definition of a sexually violent predator because of his
16 prior repetitive history of criminal offenses. Their own
17 expert, Dr. Mabugat, even testified on the stand that if
18 -- that in satisfying this definition, if the jurors only
19 take his current mental status, coupled with his instant
20 offense for the aggravated sexual battery, he's not a
21 sexually violent predator.

22 Dr. Mabugat went on to testify --

23 QUESTION: Well, just -- just a minute, Mr.
24 Donham. The question presented by the State is -- in its
25 petition for certiorari is -- is a very general one,

1 whether the Fourteenth Amendment requires the State to
2 prove that -- and I think if you're going to bring up a
3 jury instruction, you're required to cross petition for
4 certiorari and raise that yourself. You didn't do that,
5 did you?

6 MR. DONHAM: Yes, sir, I did. I -- I filed in
7 my response an objection to the --

8 QUESTION: The Kansas Supreme Court held the
9 jury instruction bad, did it not?

10 MR. DONHAM: I'm sorry. I -- I -- on the
11 petition?

12 QUESTION: Just answer Justice Stevens'
13 question.

14 MR. DONHAM: I'm sorry, Your Honor. On the --

15 QUESTION: Is it not correct that the Kansas
16 Supreme Court held that the jury was not properly
17 instructed?

18 MR. DONHAM: That's correct.

19 QUESTION: It was not properly instructed not
20 because it was not instructed in accordance with the
21 Kansas statute, but because if it had been instructed in
22 accordance with the Kansas statute, that would have been
23 unconstitutional. Wasn't that the basis of the holding?
24 And you're saying the Kansas statute is not
25 unconstitutional. I mean, the whole basis for the Kansas

1 Supreme Court thinking that the jury instruction, which
2 followed the statute, was unconstitutional was, of course,
3 that the statute was unconstitutional.

4 But it seems to me what you're saying here is
5 that the statute is okay. Didn't you say the statute is
6 okay now?

7 MR. DONHAM: What I said, Your Honor, is that
8 the statute requires that an individual susceptible to
9 being involuntarily committed must have a mental illness
10 that makes him or her likely to re-offend.

11 QUESTION: What it says, right?

12 MR. DONHAM: That's correct.

13 What we ask -- our jury instruction was intended
14 to -- to clarify or to put a face to what is intended by
15 this word make. The term make has a lot of definitions,
16 and our -- our version of it was that Crane's antisocial
17 personality disorder had to compel him to behave in a
18 certain way or --

19 QUESTION: The Kansas Supreme Court appeared to
20 hold that a person must be completely unable to control
21 his behavior in order to meet what it thought the
22 constitutional standard is under the Due Process Clause.
23 That's how I read the Kansas opinion, that it thought that
24 there had to be a total, complete lack of control, not
25 just substantial, not just adequate lack, a complete lack

1 in order to meet U.S. constitutional standards.

2 MR. DONHAM: I agree with that. It --

3 QUESTION: Well, I don't think I do. I don't
4 think that's what Hendricks said was the constitutional
5 standard. Some lack of control, but I hadn't thought it
6 had to be 100 percent or complete. I thought the Kansas
7 court got it wrong and went too far. There has to be
8 something there, but probably not complete.

9 MR. DONHAM: Your Honor, I suppose the
10 difference may lie in -- in what is meant by total or
11 absolute lack of control. No doubt an individual who has
12 certain designs to commit an act may exercise at times
13 some degree of control over his or her behavior.

14 The -- the essential element in these
15 involuntary commitment statutes that must be kept in mind
16 is, number one, they're -- they're civil. They're not --
17 they're not criminal. Number two, it's to commit the
18 person to a mental hospital for treatment of the mental
19 disease or defect, and this mental disease or defect must
20 be significant enough to warrant depriving this person of
21 their liberty.

22 QUESTION: Yes. A -- a significant or
23 substantial lack of control, but to try to move toward an
24 irresistible impulse standard would fly in the face of
25 what the American Psychiatric Association thinks is

1 likely. I mean, it just -- it seemed to me the Kansas
2 court went somewhat too far in establishing the -- what it
3 thought the constitutional requirement was.

4 MR. DONHAM: I'm sorry. Was that a question?
5 Excuse me.

6 (Laughter.)

7 QUESTION: You can interpret it as you wish.

8 (Laughter.)

9 QUESTION: You're free to dispute my
10 interpretation of that --

11 MR. DONHAM: Well, some of these terms are --
12 are pretty slippery, and of course, they're all taken in
13 context of what does a psychiatrist mean by them. I'm not
14 a psychiatrist or a psychologist, but I think that this
15 Court can set a -- a benchmark that can be followed by --

16 QUESTION: We're not psychiatrists or
17 psychologists either. That's -- that's part of the
18 problem in --

19 (Laughter.)

20 QUESTION: -- in our setting as precise a
21 benchmark as you would like us to set.

22 QUESTION: Well, what -- did the Kansas Supreme
23 Court quote the very words from Hendricks that Justice
24 Scalia referred to before to make this finding by linking
25 future dangerousness to a mental abnormality, a

1 personality disorder, that makes it difficult, if not
2 impossible, to control such behavior? That's what the
3 Kansas Supreme Court repeated. You seemed to have
4 conceded that it went beyond that.

5 MR. DONHAM: No. I think my concession to the
6 -- to the fact that the Kansas Supreme Court may have
7 expanded its decision for Mr. Crane too far and -- and by
8 doing that, it in essence, if you will, limited the
9 application of the act. By taking the particular fact
10 pattern of Mr. Crane for which the only available and the
11 only reasonable qualifying mental defect would have been
12 the inability to control behavior and saying that it's now
13 required for all persons, what the Kansas Supreme Court
14 did was effectively cut off, I think unfairly, the ability
15 of the State to incapacitate people who have other type of
16 significant mental disorders such as Justice Scalia has
17 pointed out, the hallucinations, the psychoses. Those are
18 a different breed of mental illnesses with different
19 effects.

20 QUESTION: Would -- would your objections and
21 the -- and perhaps the Kansas court's objections have been
22 met if instruction no. 9 at page 156 of the joint appendix
23 said that mental abnormality means a congenital or
24 acquired condition substantially affecting the emotional
25 or volitional capacity?

1 MR. DONHAM: If I were to write the instruction,
2 it would have read it is a acquired or congenital
3 condition that affects the emotional or volitional
4 capacity to the degree that the person is unable to
5 exercise self-control.

6 QUESTION: Just -- what about a person who
7 thinks other people are -- are like rocks? You know? I
8 mean, he can control himself. He just has a totally
9 bizarre emotional -- totally bizarre emotional situation,
10 an autistic kind of person unable to understand emotions
11 at all. What do we do with that person, absolutely mad as
12 a hatter, in common parlance, and also dangerous?

13 MR. DONHAM: Well, if he's dangerous because --

14 QUESTION: Yes. He's dangerous because he's
15 autistic or has no sense whatsoever of what a feeling is.
16 All right? Now, can he control himself? Absolutely. He
17 has no volitional impairment. He just has this bizarre
18 emotional situation. What do we do about that person?
19 And, of course, I'll imagine it as bizarre as you want.

20 (Laughter.)

21 MR. DONHAM: I -- I would say that he's an
22 appropriate for an involuntary commitment under the
23 provision --

24 QUESTION: Right. So, what standard there do we
25 use?

1 MR. DONHAM: That he would be unable --

2 QUESTION: So, they can't do it with control
3 because control has to do with volition.

4 MR. DONHAM: This would be a person susceptible
5 to commitment because he's unable to care for himself, and
6 therefore poses a danger.

7 QUESTION: No. He cares for himself perfectly.
8 He just has this emotional impairment. What do we do?
9 It's a problem.

10 MR. DONHAM: Yes, it is. It's a significant
11 problem because were talking about depriving people of
12 their liberty, and we're -- we're basing it on the
13 testimony of people who don't fully understand their field
14 of expertise at times, which is why this Court should set
15 a high benchmark to preclude the inadvertent commitment of
16 someone who really shouldn't have gone to a mental
17 hospital.

18 I'm particularly distressed over the use of an
19 antisocial personality disorder in that it is -- it is
20 given simply to someone who has a history of offenses.
21 So, that history of offenses provides the basis for the
22 diagnosis, and it provides the basis for the prediction of
23 future dangerousness. In effect, the State seeks to
24 involuntarily commit someone because they have a long
25 prior criminal history.

1 My time is almost up. If there are no more
2 questions.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Donham.

4 The case is submitted.

5 (Whereupon, at 11:59 a.m., the case in the
6 above-entitled matter was submitted.)

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