

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KANSAS, Petitioner v. LEROY HENDRICKS; and
LEROY HENDRICKS, Petitioner v. KANSAS

CASE NO: No. 95-1649,95-9075

PLACE: Washington, D.C.

DATE: Tuesday, December 10, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS, :
Petitioner :
v. : No. 95-1649
LEROY HENDRICKS; :
and :
LEROY HENDRICKS, :
Petitioner :
v. : No. 95-9075
KANSAS :
- - - - -X

Washington, D.C.
Tuesday, December 10, 1996

The above-entitled matters came on for oral
argument before the Supreme Court of the United States at
10:07 a.m.

APPEARANCES:
CARLA J. STOVALL, ESQ., Attorney General of Kansas,
Topeka, Kansas; on behalf of Kansas.
THOMAS J. WEILERT, ESQ., Wichita, Kansas; on behalf of
Hendricks.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-1649, Kansas v. Leroy Hendricks, and 95-
5 9075, Leroy Hendricks v. Kansas.

6 General Stovall.

7 ORAL ARGUMENT OF CARLA J. STOVALL

8 ON BEHALF OF KANSAS

9 GENERAL STOVALL: Mr. Chief Justice, and may it
10 please the Court:

11 Throughout the decades, the States have
12 developed three basic ways to deal with persons who commit
13 sex crimes: criminal punishment, treatment in lieu of
14 sentencing, and the law that you have before you today,
15 Kansas's Sexually Violent Predator law, which is a hybrid
16 of both. Leroy Hendricks has experienced all three during
17 his 40-year history of sexually molesting children.

18 It was the goal of the Kansas legislature by
19 providing for treatment subsequent to punishment that we
20 could succeed where the other procedures have failed,
21 enabling Kansas to reduce the risk that Leroy Hendricks
22 poses to our children.

23 The civil commitment of sex offenders who suffer
24 from a mental condition linked to their sex crimes has
25 been approved by this Court on two prior occasions, by

1 Pearson in 1940 and Allen in 1986.

2 The Court's guidance in what is the
3 constitutional minimal for an acceptable level of mental
4 condition for commitment is found in the Addington
5 decision, wherein the Court proscribed confinement for
6 merely idiosyncratic behavior, or conduct that is not
7 within the generally acceptable bounds of conduct. Surely
8 no one would argue that Leroy Hendricks was engaging in
9 merely idiosyncratic behavior.

10 QUESTION: General Stovall, may I ask you
11 whether -- how you fit this kind of a law into any
12 situation with which we have previously dealt? It seems
13 to be kind of a new category of --

14 GENERAL STOVALL: Only insofar as that we
15 have --

16 QUESTION: -- confinement.

17 GENERAL STOVALL: -- treated subsequent to
18 punishment, Your Honor, instead of treatment in lieu of
19 sentencing.

20 QUESTION: How would this be cabined in the
21 future, do you think, if we uphold it? Could a State lock
22 up any kind of violent offender who's diagnosed as having
23 a mental abnormality of some kind, not mentally ill, and
24 at the same time be likely to commit more crimes in the
25 future?

1 GENERAL STOVALL: I think, Justice O'Connor, as
2 long as the State could show that there's a medical
3 justification for a diagnosis and that we can show
4 dangerousness --

5 QUESTION: Not of mental illness, but of some
6 kind of mental aberration or personality disorder.

7 GENERAL STOVALL: Well, the term mental illness
8 is one that this Court has certainly used in its decisions
9 but never defined and, in fact, in Addington, where the
10 language of mental illness was used, the Court also used
11 mental disorder, mental disease, emotional disorder,
12 emotional disturbance, almost synonymously and
13 interchangeably, and so I would submit the mental
14 abnormality that Kansas has in our statute is not
15 different from those things that you have previously
16 approved.

17 QUESTION: Well, General Stovall, don't you
18 think in using those terms in our opinions we are
19 certainly lay people from a medical point of view, and
20 they probably are not used in any strict medical sense.

21 GENERAL STOVALL: And I'm a lay person in that
22 regard, too, Your Honor, but when you look, Mr. Chief
23 Justice, at the DSM, where we -- where the psychiatric
24 profession describes particular kinds of condition, the
25 things that the medical community tends to understand

1 would fit within this definition would be two paraphilias,
2 which are pedophilia and sexual sadism, which are terms
3 that have been recognized by the community and still would
4 fit within this definition.

5 QUESTION: General Stovall, can I clarify that
6 you are not trying to -- you're not suggesting that this
7 Court ought to establish some kind of national standard
8 for what is mental illness or mental abnormality. Haven't
9 those definitions been left to the States?

10 GENERAL STOVALL: Justice Ginsburg, that's
11 exactly right, and that's what the State of Kansas would
12 ask us -- ask you to do, so long as we still have a mental
13 justification, a medical justification for commitment and
14 we show dangerousness.

15 QUESTION: Well, I take it that even the DSM
16 says that these categories have no real operational
17 consistency, and that you look to the diagnosis or the
18 prognosis on a case-by-case basis after clinical
19 evaluation.

20 GENERAL STOVALL: That's true, Justice Kennedy,
21 and in fact the DSM in the beginning of the introduction
22 part says that this was not created for legal use or for
23 forensic meaning, but it's to aid the psychiatric
24 profession in making some diagnosis that they then can
25 apply to this definition in the Kansas statute of mental

1 abnormality.

2 QUESTION: You begin by saying, and this was
3 part of Justice O'Connor's line of questioning, too, that
4 this is a hybrid between a criminal statute and a civil
5 statute. I should think, and correct me if I'm wrong,
6 that --

7 GENERAL STOVALL: It's a hybrid -- I'm sorry.
8 It's a hybrid between criminal sentencing and treatment in
9 lieu of punishment, but it's clearly a civil commitment.

10 QUESTION: Yes, and I was going to say it seems
11 to me that your argument in your brief at least is one in
12 which you can justify this statute strictly as a civil
13 commitment.

14 If your statutory scheme were changed somewhat
15 and you had an adequate prognosis of dangerous sexual
16 behavior, civil commitment could follow under your
17 argument, I take it.

18 GENERAL STOVALL: Yes. In fact, this Court has
19 specifically approved in Baxstrom in 1966 being able to
20 civilly commit mentally ill inmates at the conclusion of
21 their prison sentence, and so this is no different than
22 what you have approved previously, except that we have
23 crafted out a very specific mental commitment statute for
24 this particular group of offenders.

25 QUESTION: And also that there's no difference

1 in this man than there was the day he went into prison.
2 That's what's unusual about this, isn't it? If he is in
3 this category of having a mental abnormality, he's no more
4 or less abnormal at the time he finishes his criminal
5 sentence than he was the day he began to serve it.

6 GENERAL STOVALL: Justice Ginsburg, that would
7 be true for Leroy Hendricks, who certainly is the
8 respondent here, but Kansas in our prison system has the
9 ability and, in fact, requires inmates that are convicted
10 of sex offenses to go through treatment, so they do have
11 the ability while receiving treatment in prison to shed
12 themselves not of the diagnosis of pedophilia, for
13 example, but of the later part of the definition, which is
14 being likely to continue to engage in predatory acts of
15 sexual violence, because they've gone through treatment.

16 And so we have seen that happen, that if they
17 complete treatment, they might not have the abnormality on
18 the inside, whereas your question was, are they going to
19 come in with it. They're not going to develop one while
20 they're in, so if they come in with one, then they will
21 have that before they enter the prison --

22 QUESTION: Well, I --

23 QUESTION: Do you have some studies that we
24 could refer to to support that?

25 My impression was that the psychiatrists cannot

1 really, or clinicians, certify the patient as being
2 unlikely to repeat unless they observe him in a normal
3 environment, and he's not in a normal environment when
4 he's in prison, so it's just somewhat circular.

5 GENERAL STOVALL: There are many studies that
6 were cited in our brief, Justice Kennedy. Two that come
7 to mind talk about the efficacy of treatment of a
8 cognitive behavioral-based treatment which is what we
9 provide, and that is certainly the state of the art now in
10 the psychiatric community for sex offenders.

11 One study would show that people that went
12 through treatment had an 8-percent rate of recidivism,
13 whereas people that didn't go through had a 20-percent
14 rate, and that was coming out of a State hospital in
15 California, so it was a confined environment. I --

16 QUESTION: Is 8 percent high enough? I mean,
17 what if the State says, you know, 8 percent is still too
18 high a risk? At what percentage of unlikelihood to commit
19 more of these offenses does the State release these
20 individuals?

21 GENERAL STOVALL: Justice Scalia, that would be
22 a question for the judge and jury to decide. A
23 psychiatric professional would have to make the
24 determination.

25 QUESTION: Well, what do you tell the jury, you

1 know? Is there no chance that this individual will commit
2 acts of these -- of this sort again if he's released, or
3 is there an 8-percent chance, or a -- what do you tell the
4 jury?

5 GENERAL STOVALL: The jury instructions in
6 Kansas just simply ask them to find whether or not he is
7 likely to continue to engage in predatory acts of sexual
8 violence. The testimony at the trial --

9 QUESTION: Likely. What was that, 49 percent
10 would not do it?

11 GENERAL STOVALL: I would be willing to assert
12 that it's 51 percent, Justice Scalia, and the testimony at
13 the trial --

14 QUESTION: That's pretty generous. If it's, you
15 know, 51-49 that he'll continue to do this you let him
16 lose.

17 GENERAL STOVALL: There has been no
18 determination as to what percent that is, and we don't
19 give that guidance to the jury in Kansas, but Dr. Befort,
20 who testified at the sex predator trial, testified in his
21 view that -- he was saying that Mr. Hendricks would
22 reoffend within a 51-percent chance.

23 QUESTION: Well, you don't define reasonable
24 doubt in criminal cases in terms of 15 percent, or 12
25 percent. We've never required that sort of precision.

1 GENERAL STOVALL: That's true, Mr. Chief
2 Justice, and we don't give any more of that decision
3 within our statute as well, but --

4 QUESTION: And what if it's clear that treatment
5 will not be effective? What if the convicted defendant
6 puts on psychiatric testimony that says, you know, you can
7 talk about treating this all you like, but there's no
8 effective treatment?

9 GENERAL STOVALL: What Kansas has done is to
10 provide for treatment, and I think that's all that we have
11 to do, and not show that Mr. Hendricks, for example --

12 QUESTION: Even when treatment is ineffective.
13 You generously provide for treatment when there's no
14 reason to think the treatment's going to do any good.

15 GENERAL STOVALL: Let me clarify, Justice
16 Scalia. Do you mean for the particular person being --

17 QUESTION: For the particular person. Suppose
18 the evidence is clear that, yes, he will do it again if
19 he's released, but treatment is not going to help that at
20 all.

21 GENERAL STOVALL: I think in that case we still
22 have the ability to commit an individual, because we're
23 providing for the treatment. We're doing everything that
24 we can --

25 QUESTION: Well, the Court --

1 QUESTION: Because you're providing for a
2 treatment that is not going to do any good?

3 GENERAL STOVALL: But we don't -- I don't know
4 that we --

5 QUESTION: I mean, I can understand your
6 position we can commit him, treatment or not, just because
7 he's dangerous, you know, and we can commit him and not
8 even provide any treatment. I can understand that. But I
9 can't understand the position that we can only commit him
10 if we provide treatment, even though it's entirely clear
11 that treatment will do entirely no good.

12 GENERAL STOVALL: The Court has never required,
13 in my understanding, for a State to be able to show that a
14 cure is guaranteed for somebody or that they will
15 necessarily benefit from it, and so --

16 QUESTION: But that's not necessarily this case,
17 I take it, because you're at least claiming that this man
18 is treatable to some degree. I don't know how much, but
19 you're claiming that there is some treatability in his
20 condition, isn't that correct?

21 GENERAL STOVALL: Absolutely, Justice Souter.

22 QUESTION: Now -- so that in the challenge that
23 we've got before us we would not, in order to hold your
24 way, have to go beyond saying, I suppose, that this was
25 mental illness within the meaning of the term as we used

1 it in Foucha, because of two things.

2 Number 1, it fell into at least a recognized
3 psychiatric category, which gets us away from a purely
4 idiosyncratic judgment about one individual's
5 dangerousness, and it is a treatable condition, and that's
6 all you would need to win. Am I correct?

7 GENERAL STOVALL: As long as we show
8 dangerousness as well.

9 QUESTION: So far as the mental illness
10 category -- yes. Yes. Yes.

11 GENERAL STOVALL: I mean, I think we have that
12 obligation as well.

13 QUESTION: So we could -- if we ruled your way
14 we could leave for another day the question of what to do
15 under, we'll say, the Foucha rule, in a case in which
16 there was a recognized psychiatric category of abnormality
17 but one that was totally untreatable, one that was
18 permanent. Nothing could be done about it.

19 GENERAL STOVALL: I would agree with that.

20 QUESTION: So you don't have to have as broad a
21 rule as you were speaking --

22 QUESTION: May I clarify one thing? The court
23 below indicated that Kansas contemplated in the future
24 some kind of treatment, but wasn't providing any. Has
25 that changed?

1 GENERAL STOVALL: Justice O'Connor, what the
2 Kansas supreme court did was look at one prior district
3 court ruling in the -- a motion for a new trial which
4 found that there was treatment. A subsequent habeas
5 corpus proceeding at the trial level found there was
6 treatment in Kansas. The supreme court seemed to not
7 question that there was some level of treatment in Kansas
8 but questioned the efficacy of treatment in the community
9 in general.

10 QUESTION: Well, could you just answer the
11 question?

12 GENERAL STOVALL: I'm sorry.

13 QUESTION: Is Kansas providing any treatment for
14 these people?

15 GENERAL STOVALL: Absolutely, Justice O'Connor.
16 They --

17 QUESTION: And what kind of treatment, other
18 than locking them up in a special ward?

19 GENERAL STOVALL: Cognitive behavioral-based
20 treatment.

21 QUESTION: What is that? It doesn't mean
22 anything to me.

23 GENERAL STOVALL: It didn't to me in the
24 beginning of this case either, Justice O'Connor. It is
25 a -- it's a method of looking at the cognitive distortion

1 somebody has, the maladaptive thinking patterns that lead
2 them to commit maladaptive behavior. Within this context
3 it's sexual behavior.

4 In addition to that --

5 QUESTION: What kind of treatment is that? I
6 just don't understand. Are you trying to train people to
7 think differently, or what is the treatment?

8 GENERAL STOVALL: Part of it does have to do
9 with stopping those thinking patterns, helping them
10 identify, for one thing, what their thinking patterns are
11 that are maladaptive and not like the rest of us, and then
12 how to stop the behavior, how to stop the thinking
13 patterns from leading directly into that behavior, and
14 there is certainly some level of behavior modification in
15 the program.

16 They receive 31-1/2 hours of treatment per week.
17 Part of it is this cognitive-based theory as well as the
18 general issues of social skills, self-esteem, anger
19 management, rebuilding relationships, family issues, value
20 clarifications, the gamut of treatment --

21 QUESTION: General Stovall --

22 QUESTION: I thought -- maybe I'm wrong. I
23 thought the whole point of the DSM was that this is not a
24 cognitive disorder.

25 GENERAL STOVALL: But the --

1 QUESTION: I mean -- you know, correct me if
2 that's wrong.

3 GENERAL STOVALL: The definition of mental
4 abnormality in our Kansas statute is that it is a
5 congenital or an acquired condition, and that --

6 QUESTION: But that's not cognitive.

7 GENERAL STOVALL: You're correct, Justice O --
8 Justice Kennedy. The treatment is a combination of both
9 cognitive restructuring as well as behavior modification,
10 and so they need to initially be able to identify the
11 cognitive -- the thinking distortions that occur instead
12 of just -- like, 30 years ago all we would have done is
13 sort of the 12-step addiction model, try to deal with the
14 behavior and not the thought processes that preceded that
15 behavior.

16 QUESTION: May I ask you a question about this
17 statute and what the State's position is?

18 The statute defines a sexually violent predator
19 as a person who has been convicted or charged with a
20 sexually violent offense and who suffers from a mental
21 abnormality or personality disorder which makes the person
22 likely to engage in predatory acts of sexual violence.

23 Would this statute be constitutional, in your
24 view, if it left out the requirement that there be a prior
25 conviction, if it were like the Illinois statute on which

1 you rely? Just, they come in with an indictment of this
2 and say, in addition we think he's likely to do it in the
3 future. Would that be constitutional?

4 GENERAL STOVALL: I think so, Justice Stevens.
5 what Kansas has chosen to do, though --

6 QUESTION: So really the prior convictions are
7 merely the evidentiary support under the statute for the
8 finding that it's more likely than not that this person
9 will be violent.

10 GENERAL STOVALL: It's somewhat evidence of
11 that, as well as it's a limiting of Kansas' decision who
12 to commit. We can't just pick somebody off the street --

13 QUESTION: But why not? That's what puzzles me.

14 GENERAL STOVALL: Oh, constitutionally I think
15 that we could, but the legislature chose to very narrowly
16 define --

17 QUESTION: Only those who have previously been
18 punished, or ones who would be --

19 GENERAL STOVALL: Because the idea is that we're
20 trying to identify those that pose the greatest risk to
21 the community.

22 QUESTION: But I don't understand why a person
23 who's indicted on very strong evidence, probable cause,
24 shouldn't be subjected to exactly the same treatment.

25 GENERAL STOVALL: There are certainly those that

1 would argue, Justice Stevens, that we should have more
2 expanded the law --

3 QUESTION: Yes.

4 GENERAL STOVALL: -- to include more people in
5 it, but that's not what the legislature chose to do,
6 though.

7 QUESTION: You agree that it is a preponderance
8 standard that's determinative here. It has to be more
9 likely than not that the person will engage in this kind
10 of conduct in the future.

11 GENERAL STOVALL: More likely than not about the
12 dangerousness, but the State has a beyond a reasonable
13 doubt --

14 QUESTION: Oh, beyond a reasonable doubt of
15 proving that he's likely to do it.

16 GENERAL STOVALL: Exactly.

17 QUESTION: Which boils down to a preponderance
18 standard, of course.

19 QUESTION: Do you agree that, at least under the
20 law as it exists this morning, if you were providing no
21 treatment at all, and that could be shown, that an
22 individual would be entitled to release on habeas?

23 GENERAL STOVALL: I think this Court has -- as I
24 read decisions of the Court has never been extremely clear
25 as to whether or not treatment is absolutely required.

1 I'm fortunate that we don't have that issue in
2 Kansas because we do provide for treatment.

3 QUESTION: Well, it's --

4 GENERAL STOVALL: I think it's --

5 QUESTION: I'm sorry. At least for purposes of
6 the case that you've brought to us it would be sufficient
7 to decide the case, I suppose, on the mental illness
8 ground to say that this was a treatable condition and
9 therefore qualified as mental illness within the meaning
10 of the term in Foucha, and that implies treatability, I
11 presume.

12 And I suppose the treatability in a way is kind
13 of a quid pro quo for the capacity of the State to lock
14 somebody up, so that if we went no further than the Foucha
15 rule and no further than the rule that would cover the
16 case that you've brought to us this morning, I would
17 suppose that a failure or a refusal to treat would be
18 grounds for release. Would you agree with that?

19 GENERAL STOVALL: And Mr. Hendricks' certainly
20 would have the ability to file a habeas action in either
21 State or Federal court challenging that if he were not
22 getting any sort of treatment at all, or if he was unable
23 to be released without -- for that reason.

24 QUESTION: Yes.

25 QUESTION: Well, I suppose the quid pro quo for

1 locking him up, or the reason for locking him up is that
2 he's a danger to others, and that treatability bears on
3 the fairness of the conditions of his confinement. That
4 is to say, it is thought that it is unfair to confine him
5 without treatment if there's any likelihood of success.
6 Is that the underlying rationale?

7 GENERAL STOVALL: Well, it is for us. It's an
8 easy call to make for us, Justice Kennedy, because we do
9 provide for treatment. Whether or not --

10 QUESTION: I'm talking about the general rule.

11 GENERAL STOVALL: I think that that's correct,
12 that that's -- the decisions have indicated by some
13 justices that there need to be some level of treatment and
14 others have sort of left the door open, but from Kansas'
15 standpoint it's an easier call because we clearly do
16 provide treatment.

17 QUESTION: General Stovall, will you be devoting
18 some of your oral argument to a response to the cross-
19 petitioner's claims?

20 GENERAL STOVALL: If I have the opportunity to
21 do that, Mr. Chief Justice.

22 QUESTION: Yes. Let's hope you do.

23 QUESTION: And perhaps you could also respond to
24 how far does this spread? Could you apply the same theory
25 to, say, arsonists? It is something new in the

1 preventative detention line, isn't it?

2 GENERAL STOVALL: It is somewhat, although for
3 the last 60 years States have been dealing with a way to
4 be able to civilly detain sex offenders in particular.
5 They've not looked to do that for arsonists or others, but
6 in the -- in 1940 this Court approved the Pearson decision
7 that did allow for commitment of someone with a sex
8 offense.

9 But I think Justice O'Connor in the beginning
10 asked the question that I think relates to this, and that
11 is, I think as long as a State can demonstrate that there
12 is a medically justified condition and that there is a
13 manifestation of a threat to be the dangerousness element,
14 that a State probably could do that if there was some
15 level of harm that they were trying to prevent and
16 identify.

17 QUESTION: When you say --

18 QUESTION: May I just ask, then why isn't this
19 case covered by Addington v. Texas, where you require
20 clear and convincing evidence, and you only require more
21 likely than not?

22 GENERAL STOVALL: I think clear and convincing
23 would be sufficient from a constitutional perspective.

24 QUESTION: But, see, you don't provide that.
25 You just say it has to be likely that it'll do this. It's

1 beyond a reasonable doubt that it'll be likely, but it's
2 really a preponderance standard, which is not -- doesn't
3 comply with Addington.

4 GENERAL STOVALL: But only one of the elements,
5 though, of the definition would be likely to --

6 QUESTION: Well, the fact that likely do the --
7 commit the harm to the -- to children.

8 GENERAL STOVALL: Right, and the other is the
9 mental abnormality, and taken in totality we have beyond a
10 reasonable doubt to show that.

11 QUESTION: But a key element doesn't require
12 beyond a reasonable doubt. The key element of the
13 definition just requires that they be likely to do it.
14 That's a preponderance standard.

15 GENERAL STOVALL: Well, I still think overall
16 the State has to be able to sustain that burden of proof
17 beyond a reasonable doubt.

18 QUESTION: It has to prove that it's likely
19 beyond a reasonable doubt, but that's -- you can't -- you
20 know --

21 GENERAL STOVALL: I think even if you --

22 QUESTION: That's still 51 percent.

23 QUESTION: When you speak of a -- I think you
24 spoke of a medically -- you didn't use the word medically
25 recognized category. What was the term you used?

1 GENERAL STOVALL: Medically justified.

2 QUESTION: Medically justified. Do you mean by
3 that a category which is recognized in some standard
4 medical literature like the DSM manual?

5 GENERAL STOVALL: I don't think we are limited,
6 Justice Souter, just to the DSM, but I think certainly the
7 psychiatric community has to believe that this is a
8 condition that they can identify and diagnose, but it
9 would not --

10 QUESTION: You don't take the position that
11 the -- or maybe you do, that the legislature of any State
12 could say, we recognize a category of mental abnormality
13 or mental illness. It hasn't been recognized in any
14 medical or psychiatric literature, but we're recognizing
15 it now, and that satisfies the rule that requires some
16 mental illness element. You wouldn't say that a State
17 could do that.

18 GENERAL STOVALL: That would not be the argument
19 the State would make. We're very comfortable with the
20 fact that what we're describing is medically justified.

21 QUESTION: What is the function of this medical
22 recognition as you understand it under Foucha? Why do we
23 have this element? Why do we -- why would you say -- why
24 do you say that in order to satisfy the mental illness
25 element under Foucha there has got to be a medically

1 recognized category within which the particular individual
2 falls?

3 GENERAL STOVALL: I think so that the Court
4 doesn't worry that we confine merely for dangerousness or
5 merely for a class of people that we don't want to be
6 around. We need to -- to be able to civilly commit and
7 provide treatment for them it has to be a medically
8 recognized condition, I --

9 QUESTION: It's less likely to be abused if
10 there's a categorical approach rather than a purely
11 individual approach.

12 GENERAL STOVALL: That would be correct.

13 QUESTION: Do you know of any medically
14 recognized condition that has been medically determined to
15 be nontreatable? Is there any such thing as a medically
16 recognized condition which the medical profession is
17 willing to say is nontreatable?

18 GENERAL STOVALL: Not that I'm aware of. They
19 would say that they're not curable, but not necessarily
20 not treatable.

21 Perhaps I should try to take the discussion to
22 the criminal side of things and address the issues that
23 you accepted the cross-petition on of Mr. Hendricks.

24 The State maintains that this is not a criminal
25 sanction as Leroy Hendricks indicates. A prior -- the

1 Allen v. Illinois case in 1986 is the one that we would
2 ask you to turn the attention to, because it is so
3 similar. While it did provide for commitment instead of
4 punishment, admittedly, there's no reason from a
5 constitutional perspective that that should be
6 significant.

7 When you looked at the Allen decision, the
8 similarities between the Illinois statute and Kansas
9 statutes are so great, and you found that to be a civil
10 statute. Even though it was triggered by the commission
11 of a crime, you found that that only limited the group of
12 people that it applied to. It didn't make it criminal.

13 Even though the State in that case had beyond a
14 reasonable doubt for a burden, even though Illinois
15 extended to the potential sexually dangerous person the
16 same criminal protections in terms of being able to call
17 their own witnesses, having an attorney, a jury trial and
18 the like, you still found that that wasn't criminal, and
19 even putting the individual in the custody of the
20 Secretary of Corrections and putting them in a maximum
21 secured facility for treatment was not held to be
22 criminal.

23 Those are all the same kinds of things that we
24 do in the State of Kansas.

25 QUESTION: Hadn't a similar situation applied to

1 Hendricks at one stage? I mean, you said everything that
2 happened to him. He'd been put in prison. He'd been put
3 in a mental institution. What was -- was the other
4 incarceration like the one in Allen?

5 GENERAL STOVALL: Justice O'Connor -- I'm sorry.
6 Justice Ginsburg, it was in 1964 in the State of
7 Washington, and he was sent there under a psychopathic
8 personality statute.

9 QUESTION: But that was a civil commitment?

10 GENERAL STOVALL: Yes, Your Honor.

11 QUESTION: But not under this current statute
12 that was under some --

13 GENERAL STOVALL: In Washington now, you mean?
14 It was in 1964 and it was a different kind of commitment.
15 Washington just has their sexually violent predator
16 statute like we have since 1990, so this would have been a
17 much earlier forerunner of what the current version is.

18 QUESTION: Could you address the cross-petition
19 question?

20 GENERAL STOVALL: Thank you for the opportunity,
21 Justice Kennedy.

22 The -- we think that if you use the Ursery test,
23 which Mr. Hendricks' counsel supported as well, you look
24 to see what the legislative intent was. Was it civil or
25 criminal?

1 The language in our preamble and throughout the
2 statute talks about civil, so if it's established it's
3 criminal on the face, then Mr. Hendricks has the burden to
4 show by the clearest proof that the application is so
5 punitive that it becomes criminal.

6 But in looking at the Kennedy factors, there is
7 only one of those that you can answer yes to, and that is
8 that indeed we have a disability, an affirmative restraint
9 of his liberty. We don't find it to be a fundamental
10 restraint, but admittedly it's a restraint.

11 But the rest of the categories, in terms of
12 whether this commitment process has ever been historically
13 viewed as punishment, we would answer no. We've never
14 looked at civil commitment as punishment. It does not
15 come into play only on the criminal conviction. We have
16 to have more than that. We have to have the mental
17 abnormality and there has to be the likelihood of
18 predatory act.

19 It doesn't serve the traditional aims of
20 punishment or retribution or deterrence, but it serves the
21 aim on the civil side of incapacitation and treatment so
22 we can change this behavior.

23 There are -- when you run through the seven
24 other factors there, they are distinct differences as to
25 why it's not found to be criminal.

1 The Allen v. Illinois statute is again extremely
2 important in being able to make those distinctions between
3 civil and criminal, and we would ask that those be the
4 kinds of issues that you look at in making this decision.

5 When you look at the rights that are afforded to
6 the mentally ill inmates and the sexually violent
7 predators that are in Kansas custody they are very
8 similar. In fact, the sexually violent predators are
9 extended the same bill of rights that the mentally ill
10 patients have.

11 That's not the case, though, when you look at
12 Department of Correction inmates and the way that they are
13 treated versus our sexually violent predators. There is
14 distinct differences in their clothing, their personal
15 property, their telephone and visitation privileges and
16 the like, and so there's a tremendous difference there as
17 well.

18 QUESTION: If you have a minute, could you go
19 back to Justice Stevens' question?

20 In Addington, I take it the Court held that you
21 must have -- you must say, based on clear and convincing
22 evidence, does Frank Addington require hospitalization in
23 a mental hospital for the protection of others?

24 How does the Kansas statute meet that
25 requirement in respect to requiring hospitalization for

1 the protection of others?

2 GENERAL STOVALL: Because one of the
3 requirements in our definition is that the individual go
4 to a secure facility, a securely confined facility, so
5 that would be similar to the hospitalization.

6 QUESTION: No, I'm not worried about the part.

7 GENERAL STOVALL: Excuse me, Your Honor.

8 QUESTION: I'm worried about how, by clear and
9 convincing evidence, to show that he is dangerous to
10 others, because what I thought you said is in Kansas you
11 don't have to show this by clear and convincing evidence.
12 You have to show it by a preponderance of the evidence.

13 GENERAL STOVALL: It is one of the elements,
14 Justice Breyer, that we have to show, but again I think
15 the overall burden of proof of being beyond a reasonable
16 doubt --

17 QUESTION: Suppose we disagree with you.
18 Suppose we think that the burden of proof that you impose
19 is the preponderance of the evidence. Then don't you lose
20 the case under our previous precedents?

21 GENERAL STOVALL: The Addington decision clearly
22 talked about, for civil commitment you had to show it by
23 clear and convincing. You're right but it was more than
24 just simply the dangerousness element. It also was that
25 you had to show the mental illness, as I understand it,

1 that standard itself.

2 QUESTION: Both. It looks like both.

3 QUESTION: Yes.

4 GENERAL STOVALL: Right, and we clearly do that
5 in terms of the mental abnormality, and I understand
6 that's where the issue is for the Court, but you still
7 have to show the likelihood of committing that harm is
8 beyond a reasonable doubt, and so it's showing a 51-
9 percent burden by an 80-percent burden --

10 QUESTION: What did we mean by dangerousness in
11 that case? Might not we have meant by dangerousness
12 simply the same thing that's the test here, that he's
13 likely to harm somebody --

14 GENERAL STOVALL: Yes.

15 QUESTION: -- which would have converted that
16 into a preponderance standard as well, if you follow that
17 reasoning.

18 GENERAL STOVALL: That would be exactly right,
19 Justice Scalia.

20 QUESTION: That's not what the opinion says, if
21 you read it carefully.

22 (Laughter.)

23 QUESTION: But the Kansas -- your State courts
24 have not construed the standard to be a beyond-a-
25 reasonable-doubt standard in the classic sense, has it?

1 In other words, we could say -- the Court could say, look,
2 proving likelihood beyond a reasonable doubt really means
3 prove it beyond a reasonable doubt that he will do thus
4 and so, but that isn't what your courts have said, is it?

5 GENERAL STOVALL: There has only been one court
6 in Kansas that would have looked at this issue, and that
7 was the -- the Kansas supreme court --

8 QUESTION: Yes.

9 GENERAL STOVALL: -- made that final
10 determination, and that's not part of their decision.

11 QUESTION: That's not in their opinion.

12 GENERAL STOVALL: They relied just on --

13 QUESTION: Could I ask you another question,
14 assuming this is not an obstacle. Imagine an armed robber
15 who has committed many armed robberies, and a psychologist
16 who says he has a sociopathic personality.

17 Now, under those circumstances, do you believe
18 it would be constitutional, since he may -- lots of
19 testimony -- commit many more armed robberies, and you
20 have some psychologists who say he has sociopathic
21 personality, would it be constitutional for a State to
22 keep him under the correct standard -- clear and
23 convincing, review every year, we're going to look at this
24 over and over -- confined in a mental hospital, and how do
25 you distinguish that case from this one?

1 GENERAL STOVALL: One of the distinctions is the
2 level of personality disorder that is there.

3 QUESTION: Go ahead and answer the question.

4 GENERAL STOVALL: The indication in the Foucha
5 decision, for example, was that simply a personality
6 disorder might not be enough for commitment, and that's
7 clearly not what the State has in this condition. We have
8 a pedophile, a recognized mental disorder that is subject
9 to the commitment, and so the mental condition, the
10 medically justified condition is so much greater than in
11 your example.

12 QUESTION: Thank you, General Stovall.

13 Mr. Weilert.

14 ORAL ARGUMENT OF THOMAS J. WEILERT

15 ON BEHALF OF HENDRICKS

16 MR. WEILERT: Mr. Chief Justice, and may it
17 please the Court:

18 The State of Kansas is extending the
19 incarceration of Mr. Hendricks beyond the term of sentence
20 imposed in the plea agreement he reached with the State of
21 Kansas in 1984.

22 The State should not be allowed to circumvent
23 the constitutional prohibitions against ex post facto and
24 double jeopardy by calling for an effectively permanent
25 incapacitation that's imposed, based upon the commission

1 of criminal acts, a civil commitment for treatment.

2 Neither should the strict limits of preventive
3 detention outside of the criminal law be broadened to
4 allow such a confinement to prevent the possibility of the
5 commission of a criminal offense at some unspecified point
6 in the future. To do so would fundamentally undermine a
7 constitutionally guaranteed right of liberty.

8 We suggest that the Sexually Violent Predator
9 Act is, in fact, a criminal enactment, even though the
10 legislature labeled it a civil proceeding.

11 QUESTION: Well, didn't the Court in Baxstrom
12 uphold essentially the notion that the State could commit
13 people after they were released from prison in a civil
14 commitment proceeding?

15 MR. WEILERT: I believe the Court upheld that
16 they could commit after a -- pardon me. After a criminal
17 sentence if they were mentally ill, yes, Your Honor.

18 QUESTION: Yes, and we have left largely to the
19 States to define what constitutes a mental illness within
20 that framework.

21 MR. WEILERT: That is correct, and whether --

22 QUESTION: And so maybe this boils down to
23 whether this particular condition of pedophilia, or
24 however you pronounce it, qualifies.

25 MR. WEILERT: Your Honor, I don't believe that

1 the constitutional standard for mental illness can be the
2 equivalent of any diagnosis that might come out of the
3 DSM, and that is essentially what the State, I believe, is
4 trying to argue.

5 QUESTION: Well, let's talk about this specific
6 condition of pedophilia and whether that is open to the
7 State to include within the broad concept of some kind of
8 mental illness.

9 MR. WEILERT: Pedophilia, as I understand it, is
10 diagnosed based upon prior commission of criminal acts.
11 If pedophilia was sufficient to form the basis for a civil
12 commitment, then any other act such as Justice Breyer was
13 speaking of -- armed robbery, or any number of other
14 criminal acts which would be the diagnostic basis for an
15 antisocial personality disorder -- would also be
16 sufficient to --

17 QUESTION: This Court has suggested that may not
18 be so, but is this a different kind of category of mental
19 aberration?

20 MR. WEILERT: Pedophilia as opposed to any other
21 of the DSM --

22 QUESTION: As opposed to a tendency to have an
23 antisocial personality.

24 MR. WEILERT: I don't believe there's anything
25 that I have read which would indicate that it is any

1 different than an antisocial personality.

2 QUESTION: Well, suppose you had a paranoid
3 schizophrenia acute type, and the diagnosis was that the
4 person was dangerous to himself and to others, could you
5 commit there?

6 MR. WEILERT: That would be acceptable under the
7 normal civil commitment statute, Your Honor, where the
8 commitment is based upon the inability of the person to
9 take care of themselves and make rational decisions about
10 their treatment, and then because the commitment is for
11 the person's own good, he can be civilly committed.

12 QUESTION: Well, rationality is not a part of
13 the civil commitment preconditions.

14 MR. WEILERT: Generally, in --

15 QUESTION: Why is it that you can commit the
16 paranoid schizophrenic and not this person?

17 MR. WEILERT: Because the treat -- pardon me.
18 The commitment of the paranoid schizophrenic is for his
19 own good, to help him to overcome his --

20 QUESTION: But suppose the condition, the
21 condition for his incarceration was he was dangerous to
22 others?

23 MR. WEILERT: I don't believe that a paranoid
24 schizophrenic could be committed unless there was first a
25 finding that the commitment would be for his own good. I

1 believe commitment strictly because of the dangerousness
2 would be unconstitutional.

3 QUESTION: Well, the supreme court of Kansas,
4 Mr. Weilert, in its opinion, which upheld your -- the
5 majority upheld your point of view, said the State could
6 get around -- could handle it by simply imposing a life
7 sentence on these people and there would be no
8 constitutional problem.

9 Does that really solve any problem to say that
10 the State can't do what it does here but it can come back
11 and impose a life sentence on a person for the first
12 pedophilic offense?

13 MR. WEILERT: Your Honor, it is a decision that
14 the State can make under its criminal -- or, criminal
15 powers. If the State would choose to impose a life
16 sentence on a first-timer there's certainly nothing wrong
17 with that, but even in this case there are a number of
18 things the State can do other than commit some person for
19 a second time because of the criminal actions he's
20 committed.

21 They can place very restrictive parole
22 conditions. They can even enact some criminal legislation
23 which would make it illegal for someone with a sex offense
24 to have contact with children in a public place, go around
25 schoolyards, and enforce that criminally.

1 QUESTION: Why is all that okay? I don't
2 understand. I mean, if the principle you're arguing for
3 is correct, why aren't those restrictions just as
4 improper?

5 MR. WEILERT: The restrictions that I spoke of
6 as far as parole or conditional release in this case --

7 QUESTION: It's a restriction of his physical
8 liberty.

9 MR. WEILERT: It's a restriction of his liberty,
10 but it's not a confinement that is a massive curtailment
11 of that liberty, and I believe that's the distinction,
12 Justice Scalia.

13 QUESTION: But life imprisonment certainly would
14 be, and one of the arguments that the State makes is,
15 we're doing something gentler and kinder here, that
16 instead of locking him up in a maximum security prison for
17 the rest of his life, we say there's a criminal sentence
18 and maybe -- there's not much chance of it, but maybe
19 he'll be all right at the end of the term. If he's not at
20 the end of the term we put him in another confinement,
21 form of confinement.

22 Why does the Constitution force the most harsh
23 solution, I suppose is what the State is urging?

24 MR. WEILERT: The Constitution does not force
25 that, the most harsh remedy. The State of Kansas at the

1 time of Mr. Hendricks' commission of these acts in 1984
2 had a procedure, and still does have a procedure where he
3 could be psychologically evaluated and committed for care,
4 if that was in fact necessitated or recommended by that
5 evaluation.

6 The only limitation on that term of care and
7 treatment, if needed, would be the maximum sentence that
8 could have been imposed by the criminal act, or on the
9 criminal acts, which in this case in 1984 was 45 to 180
10 years.

11 QUESTION: Maybe the State has to take the
12 harsher course because the harsher course is the only one
13 that is less manipulable.

14 MR. WEILERT: I believe that --

15 QUESTION: I mean, isn't there some fear
16 about -- you know, totalitarian regimes don't put people
17 in jail for crimes. They commit them for mental
18 treatment. It's a very hard thing to nail down, isn't it,
19 who's mentally ill and who's finally been cured.

20 MR. WEILERT: I believe that is a very astute
21 observation, Justice Scalia.

22 QUESTION: And so mainly to -- perhaps to
23 protect against that, the State, if it wants to protect
24 itself, has to take the harsher course.

25 MR. WEILERT: It is certainly the -- or, pardon

1 me, an avenue open to the State to do it that way. It's
2 not necessarily required, though, because the State could
3 provide for an indeterminate sentence, also, which would
4 be dependent upon the person then proving to the parole
5 authorities that he was safe to be at large.

6 QUESTION: But surely that would be manipulable,
7 too, if that is to be part of the test, if the parole
8 authorities are to have that sort of discretion.

9 MR. WEILERT: Well, certainly the parole
10 authorities would have to have some discretion, but it
11 would be -- it would not be manipulative in the same way
12 that the States could formulate a plan to commit persons
13 based solely upon dangerousness, which we believe this act
14 provides that opportunity.

15 QUESTION: What's the -- your best authority
16 from this Court for the proposition that you can only have
17 a civil commitment for the best interests of the person
18 and not for the safety of society?

19 MR. WEILERT: It is -- in Addington v. Texas the
20 Court basically said the commitment is for those who
21 cannot take care of themselves, and that is where the
22 being in the best interests of the person comes from. The
23 Court --

24 QUESTION: What is the rationale -- if that is
25 the correct reading of Addington, what is the explanation

1 for it, that everyone has a constitutional right to commit
2 a crime once before he can be committed?

3 MR. WEILERT: No, Your Honor, I don't believe
4 anyone has a constitutional right to commit a crime.
5 However --

6 QUESTION: Before he can be committed civilly.

7 MR. WEILERT: It would not require the
8 commission of a crime to be committed civilly, but it
9 would require the finding of a mental disease or mental
10 illness and the finding of dangerousness both by --

11 QUESTION: No, but you say he can only be
12 committed if it's for his own good, if we're talking about
13 civil commitment.

14 MR. WEILERT: I believe that that is the
15 underlying basis for civil commitment.

16 QUESTION: No, I thought Addington said
17 dangerous to others, didn't it, as well as dangerous to
18 himself?

19 MR. WEILERT: It does say that it is dangerous
20 to himself or others, and that is in conjunction with the
21 need that -- or, pardon me, in conjunction with the fact
22 that he is unable to care for himself and needs
23 commitment.

24 QUESTION: But Addington was just talking about
25 the burden of proof when you're going ahead with civil

1 commitment. It didn't purport to categorize every single
2 situation which would justify a civil commitment, if you
3 met the burden of proof.

4 MR. WEILERT: While Addington was a procedural
5 due process case, I believe the concept that a civil
6 commitment has to be based upon dangerousness and mental
7 illness was carried into fruition by this Court in Foucha
8 v. Louisiana.

9 We would suggest that the primary reason for the
10 Kansas statute having been passed was to continue the
11 incarceration of persons who were being released from
12 confinement following their conviction and sentence on
13 sexual offenses. That finding was made by the Kansas
14 supreme court, where it said that the primary objective
15 was to continue incarceration and that treatment was
16 incidental at best. That's further --

17 QUESTION: Mr. Weilert, are you complaining just
18 about timing, and suppose Mr. Hendricks is charged,
19 indicted, found guilty, and then instead of having the
20 ordinary criminal incarceration, at that point we have
21 this SVP proceeding, and so although he has a criminal
22 conviction he's never -- the time that he served has been
23 pursuant to this special proceeding. Would there be
24 anything unconstitutional about that?

25 MR. WEILERT: That's the situation in Colorado

1 v. Specht, or Specht v. Colorado, where the Court approved
2 that type of situation, where instead of a specific term
3 of criminal incarceration it allowed for an indeterminate
4 term and found that it was, in fact, a criminal
5 incarceration even though it was for the purpose of
6 incapacitation rather than retribution.

7 QUESTION: But that raised -- that -- correct me
8 if I'm wrong. I thought that case raised a procedural due
9 process question.

10 MR. WEILERT: That was a procedural claim, Your
11 Honor, where there was not a hearing for that second
12 sentencing procedure, but that would be an appropriate
13 type -- Kansas could make the decision at the time of the
14 original conviction to go to a sexual psychopath type law,
15 much as it could have done back in 1984 when Kansas did
16 have such a law in effect.

17 QUESTION: So you're saying that they could have
18 done it on the spot, but they can't do it 5 years later.
19 Is that --

20 QUESTION: It's now 12 years later, Your Honor,
21 and the reason they can't do it now is because first of
22 all it is a continue -- a second incarceration for the
23 same conviction, the same criminal act that he committed
24 back in 1984.

25 Secondly, we are talking about a situation

1 where, if -- even though this act is purported to be
2 civil, it's in fact criminal, because the intent and
3 purpose and effect of the legislation is criminal, and I
4 would suggest that even back in 1984, if the only thing
5 that the State had to prove was a mental abnormality, that
6 there would be some question about whether the commitment
7 could have occurred at that time, rather than proving a
8 mental illness which could be treated.

9 QUESTION: So you're modifying the answer that
10 you first gave. You're not so sure that it could have
11 been done immediately after the conviction.

12 MR. WEILERT: There could have been a civil, or
13 a commitment for treatment done in 1984, yes, if there had
14 been a -- if there had not been a criminal sentence
15 imposed at that time.

16 In the Kansas supreme court's decision, it went
17 on, after saying that the main purpose of the
18 incarceration, or the -- yes, the incarceration was for
19 punishment and not for treatment, it --

20 QUESTION: Well, they didn't use those words,
21 punishment, did they?

22 MR. WEILERT: Pardon me, for incapacitation
23 rather than treatment.

24 QUESTION: Right.

25 MR. WEILERT: And incapacitation has been

1 recognized by the Court as one of the --

2 QUESTION: And do you say that no treatment is
3 being provided now to your client?

4 MR. WEILERT: The record reflects that the
5 Kansas supreme court made that finding based upon the
6 evidence presented both at the trial court and the habeas
7 court, where the head of the treatment facility said that
8 the persons there were receiving essentially no treatment
9 other than --

10 QUESTION: And what about today?

11 MR. WEILERT: Today, it's my understanding there
12 is some group therapy being given. There -- I don't
13 believe there's any indication on the record that such
14 therapy is effective or has any hope of being effective to
15 overcome the condition of pedophilia, primarily because,
16 as the State's expert testified, pedophilia is a diagnosis
17 that, once made, remains with the person forever.

18 QUESTION: Well, there's no question, I gather,
19 that this man is very much likely to commit sexual
20 offenses against children in the future, if released.

21 MR. WEILERT: There is certainly no --

22 QUESTION: Strong evidence to that effect.

23 MR. WEILERT: There's certainly no doubt that
24 Mr. Hendricks presents a risk of committing further crimes
25 if released.

1 QUESTION: To children.

2 MR. WEILERT: To children. That is what his
3 previous crimes have been, yes. But I don't believe that
4 we can incarcerate people solely because they have the
5 possibility of committing a criminal act at some point in
6 the future.

7 QUESTION: So what's the State supposed to do,
8 just wait till he goes out and does it again?

9 MR. WEILERT: No, Chief -- Mr. Chief Justice.
10 The State has other opportunities, or, pardon me, other
11 means available to it.

12 It can, you know, impose very stringent
13 conditions of parole, have him repeat -- pardon me, report
14 very frequently, require him to stay away from children,
15 require him to stay away from schoolyards. It can, for
16 people who have not yet been convicted, of course, do all
17 sorts of things with the sentencing guidelines.

18 QUESTION: Well, we have a person here who's
19 been convicted at least of two offenses most immediately
20 and, I gather, some in the past.

21 MR. WEILERT: I believe a total of five, Your
22 Honor.

23 QUESTION: Yes.

24 MR. WEILERT: That is correct, and -- but the
25 State still has the ability to put restrictions on that

1 person to lesson the risk.

2 QUESTION: Well, I guess we all know as a
3 practical matter that's not very effective, many times.
4 We read about it every day, and I guess we don't have to
5 avoid that kind of general awareness of concern about just
6 saying on a piece of paper, don't go near a schoolyard and
7 don't do this again. It just isn't very effective with
8 someone with this abnormality, is it?

9 MR. WEILERT: Your Honor, the only way to be
10 totally effective would be to lock up anyone who would
11 possibly commit a criminal action in the future.

12 QUESTION: No, no. No, we're talking --

13 QUESTION: Mr. Weilert, I assume that many -- I
14 don't know what the statistics are, but within a certain
15 age group the recidivism rate for anybody released from
16 prison may be as high as 80 percent, so you could say for
17 everybody walking out of prison he's likely to commit the
18 same crime.

19 MR. WEILERT: I believe that is correct.

20 QUESTION: Isn't that the case?

21 QUESTION: I guess we could --

22 QUESTION: And maybe we could preventively
23 detain everybody that's released because he's committed
24 one crime and is likely to commit another one.

25 MR. WEILERT: In order to do that, Your Honor,

1 we would have to be talking about a preventive
2 detention --

3 QUESTION: I'm being facetious, Mr. Weilert.

4 (Laughter.)

5 QUESTION: I'm puzzled about your response to
6 Justice O'Connor. You said that they could put all these
7 other restraints on the individual. On a preponderance of
8 the evidence that somebody's likely to commit a crime, can
9 you put all these restraints on people, they can't go near
10 schoolyards, and so forth, or are you talking about as
11 part of a sentence after being convicted of a crime?

12 MR. WEILERT: That's correct, Justice Stevens.
13 As a part of the parole conditions after being released
14 from incarceration.

15 QUESTION: Yes, but the statute is dealing with
16 the problem presented by someone who's served his sentence
17 entirely, and the criminal punishment, power to punish him
18 criminally has been exhausted. There's still a threat
19 there, and I frankly don't see the difference between that
20 case and one where you just indict somebody who's been
21 caught but never convicted, and the question is, can you
22 do those other things to that person without some kind of
23 proof of a mental abnormality by some standard?

24 I don't think the difference between going to
25 jail and being subjected to a lot of other restraints can

1 just answer this case, because the basic question in the
2 case is what is the threshold showing that must be made to
3 treat such a person, or take him out of society, other
4 than as punishment for a crime?

5 And I think we're all assuming that this is
6 not -- I mean, that the punishment for a crime has already
7 been done, and I don't -- as I say, I don't see why it
8 makes any difference whether the person's been punished or
9 hasn't -- or has just been indicted. Frankly, I don't see
10 the constitutional distinction there.

11 MR. WEILERT: If -- pardon me, Your Honor. The
12 commitment could not occur simply because someone has been
13 indicted, I believe, unless there was a showing that the
14 person was mentally ill. In Allen v. Illinois the Court
15 found that the -- that Mr. Allen was mentally ill. I
16 believe he had schizophrenia.

17 QUESTION: Yes, but what's the magic to the term
18 mentally ill? Why can't they call it having XYZ
19 personality factor, and they can prove it beyond a
20 reasonable doubt that the person with that factor in all
21 probability, beyond a reasonable doubt or beyond clear and
22 convincing evidence, will do bad things, rob banks, hurt
23 children? Why isn't that enough, if the XYZ factor is
24 something to do with the person's character, whether you
25 call it mentally illness or not?

1 I don't quite understand the magic to the term,
2 mentally ill.

3 MR. WEILERT: Your Honor, I don't believe there
4 is any magic to the term mentally ill, but there is a
5 point, I believe, at which the State cannot commit someone
6 simply because they have a history of prior commitment, or
7 criminal act, and based upon those prior commitments is,
8 they're predicted to commit another criminal act in the
9 future.

10 QUESTION: Everyone agrees with that, I think.
11 The issue is, in addition, you have to be mentally ill,
12 and it's like civil commitment, and how do you decide
13 whether for legal purposes a person is sufficiently
14 mentally ill?

15 I suppose there are some people who are very
16 dangerous, whom every psychiatrist would say are crazy
17 beyond a doubt and are going to murder 15 other people
18 unless they're locked up, and I'm assuming that it would
19 be possible to lock up that person, but not lock up
20 somebody who commits a lot of crimes, whom every
21 psychiatrist would say there's nothing wrong with except
22 he's a sociopath, which means he commits a lot of crimes,
23 all right. I take that as an assumption.

24 So what's the definition distinguishing the one
25 from another, and what I'm going to ask you about is the

1 ALI's definition, which had for a different purpose to say
2 that a person was insane if, as a result in part of a
3 mental defect, he lacked substantial capacity, in this
4 case it would be to conform his conduct to the
5 requirements of law, which would suggest a kind of
6 irresistible impulse, a compulsion.

7 And we know that there is in one of the
8 psychiatric associations' brief evidence that some
9 psychiatrists call this a kind of compulsion, so is the
10 ALI test a possible test? If not, what is, and if we have
11 some psychiatrists saying this is somewhat compulsive, and
12 others saying not, what do we do?

13 QUESTION: I think your response is that we
14 tried this test for criminal conviction and it turned out
15 to be a mess. Is there any reason it's likely to be
16 better for psychiatric commitment? It's always possible
17 to get somebody to come in with evidence on one or the
18 other side of that irresistible compulsion rule. The
19 courts adopted that for criminal -- for insanity defenses
20 and it turned out to be chaos.

21 MR. WEILERT: I believe that is correct, Justice
22 Scalia and Justice Breyer. The --

23 QUESTION: So your view, then, is that you could
24 not lock up a person whom every psychiatrist would say has
25 a totally uncontrollable compulsion to murder people, and

1 they want civilly to commit him -- civilly to commit him,
2 as -- or a person who's going to kill herself, or himself,
3 uncontrollable impulse, though the person otherwise seems
4 rational. We could not civilly commit such a person?

5 MR. WEILERT: In that circumstance, Your Honor,
6 I believe that the civil commitment might be appropriate
7 because it would be for the good of the person being
8 committed to prevent him from killing himself and for the
9 protection of society, but it would be based upon the
10 original finding that the civil commitment had to be based
11 upon a mental illness rather than simply the prior
12 commission of a crime.

13 QUESTION: In any event, you agree with General
14 Stovall, don't you, that this matter of what the mental
15 state is, subject to constitutional limitations, is for
16 the State to decide, and the State here has defined
17 something called mental abnormality that's short of mental
18 illness?

19 MR. WEILERT: I believe that the State has
20 latitude in deciding whatever the condition is for civil
21 commitment so long as it is something more than just a
22 condition based upon the prior commission of crime and the
23 risk of commission of crime again in the future.

24 QUESTION: Well, what's the ethical calculus
25 that makes the dangerousness to oneself so much of a

1 higher order of priority than dangerous to 10 other
2 people?

3 MR. WEILERT: I -- if I stated that I did not
4 mean to do so. I believe that danger --

5 QUESTION: Well, I mean, that's the logical
6 consequence of your answer that you must find that it's in
7 the person's own welfare, and I suppose we could say it's
8 in your own welfare to prevent you from committing crimes,
9 but leaving that aside, you seem to say it must be in the
10 patient's own welfare to be committed before there can be
11 a civil commitment.

12 MR. WEILERT: I believe that's correct,
13 because --

14 QUESTION: I'm asking you why that is so. Why
15 is that so?

16 MR. WEILERT: Because the person is unable to
17 care for themselves.

18 QUESTION: But what's the reason for --

19 QUESTION: Why limit it to that?

20 MR. WEILERT: If we do not limit it to that, I
21 believe we then -- there's no logical stopping place where
22 we can say that a commitment for dangerousness alone would
23 not be sufficient, and --

24 QUESTION: Well, what about Justice Breyer's
25 example of someone who's said by every psychiatrist who

1 has seen him, if he's at large he's going to murder
2 people? Now, do you say that person can or cannot be
3 civilly committed?

4 MR. WEILERT: Well, as I understand the ALI
5 definition --

6 QUESTION: Well, no, I'm not talking about the
7 ALI. I'm just asking, all the psychiatrists find a person
8 is going to -- if he's at large he's going to murder
9 people. Now, can that person be civilly committed?

10 MR. WEILERT: Based on that alone? I --

11 QUESTION: Well, and that it's a form of mental
12 illness, as one would hope they would find.

13 MR. WEILERT: Your Honor, I believe we would be
14 treading on very thin ice, because that in effect is
15 allowing for a commitment based upon what someone might do
16 in the future, and it would have to be based upon a
17 finding of mental illness, which we once again come back
18 to that has to be based upon something more than the
19 commission of the crime in the past and the possibility of
20 committing a crime in the future.

21 QUESTION: Well, Allen v. Illinois certainly
22 upheld a civil commitment of persons charged with sexual
23 offenses who are sexually dangerous persons suffering from
24 a mental disorder and having criminal propensities to the
25 commission of sex offenders -- offenses, particularly, in

1 that case, sexual molestation of children.

2 Now, the Court upheld that notion, and referred
3 to a mental disorder. The only difference was that in
4 that case it was offered as an alternative to
5 incarceration for the criminal offense as opposed to here,
6 where it is proposed subsequent to serving the sentence.

7 Now, does that make a big difference if it in
8 fact is a civil commitment?

9 MR. WEILERT: Your Honor, in Allen the
10 commitment there was in lieu of a criminal prosecution.
11 Here, the State has already had a criminal prosecution,
12 and in Allen the justification the Court gave was that it
13 disavowed -- Allen -- or, pardon me, Illinois disavowed
14 any interest in punishment in lieu of the civil
15 commitment.

16 In this case, the same procedure could have
17 perhaps been used, except the --

18 QUESTION: I'm just asking you if that one
19 factor should make a difference.

20 MR. WEILERT: Yes, Your Honor, it should. The
21 commitment in Allen was of a person who was -- had a
22 treatable mental illness, a schizophrenic. In this case
23 there's no --

24 QUESTION: Well, but the statute doesn't refer
25 to that. It speaks in terms of a mental disorder, having

1 criminal propensities to the commission of sex offenses,
2 and it's not at all this situation.

3 MR. WEILERT: But in Allen the -- this -- the
4 distinction was that it disavowed punishment. In this
5 case, the State does not. It was for treatment. In this
6 case there's no treatment, and that would conclude.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Weilert. The case is submitted.

10 (Whereupon, at 11:08 a.m. the case in the above-
11 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

KANSAS, Petitioner v. LEROY HENDRICKS; and LEROY HENDRICKS, Petitioner v. KANSAS

CASE NO. 95-1649,95-9075

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)