IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-957

KANSAS, *Petitioner*

v.

MICHAEL T. CRANE, *Respondent.*

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated in numerous cases involving mental-health issues in this Court, including *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), *Kansas v. Hendricks*, 521 U.S. 346 (1997), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), and *Addington v. Texas*, 441 U.S. 418 (1979). The APA and its members have a strong interest in ensuring that psychiatric hospitalization be reserved for proper care and treatment of patients, not as a means of preventive detention that simply substitutes for the criminal justice system.

STATEMENT

This case involves the Kansas statute that was at issue in *Kansas v. Hendricks*, 521 U.S. 346 (1997) – the Sexually Violent Predator Act, enacted in 1994. This case, like *Hendricks*, also involves an application of that statute based on acts committed prior to the statute's enactment. Pet. App. 13a. The facts of the two cases, however, are significantly different, requiring the State of Kansas, in the state courts and in this Court, to make a much more sweeping claim of state power to confine individuals for preventive purposes than this Court approved in *Hendricks*.

In 1993, respondent Crane, roughly 31 years old at the time (JA 68), exposed himself at a tanning salon and, half an hour later, committed an attack on a video-store clerk, trying to force her to perform oral sex and stating that he would rape her (then suddenly leaving). Pet. App. 2a-3a; *see State v. Crane*, 918 P.2d 1256, 1258-59 (Kan. 1996) (describing evidence). For the first incident, he was convicted of the misdemeanor of lewd and lascivious behavior (Kan. Stat. § 21-3508(b)(1)). Pet. App. 2a; JA 12. For the second incident, he was convicted of several felonies, and sentenced to 35 years to life, but those convictions were overturned on appeal in 1996 as jurisdictionally defective based on the State's failure to charge the necessary elements. *State v. Crane*, 918 P.2d at 1258, 1265-69.

With the State, through its charging failure, having lost its ability to pursue the original serious charges, the State entered into a plea agreement with Crane in August 1997. Under the agreement, Crane pled guilty to the lesser offense of aggravated sexual battery. He received a very short sentence, with a conditional release date set for only a

few months later, in January 1998, because he had already "served nearly as much time as could be imposed for his conduct." Pet. App. 2a-3a, 15a.

The month before Crane's January 1998 release, the State filed a petition to confine him as a sexually violent predator under the Kansas Act. J.A. 1; Pet.. App. 19a. As required by the Act, the trial court, after finding probable cause to believe that Crane qualified as a sexual predator, ordered him sent to the Larned State Security Hospital for evaluation. Pet. App. 22a; Pet. Br. 3. In late February, while the evaluation was under way, the trial court rejected Crane's motion for summary judgment and ruled that the State need not "prove the existence of a mental disorder that so impairs the volitional control of [Crane] as to render him unable to control his dangerous behavior," but "must only prove the existence of a mental disoder that makes [him] likely to reoffend." Pet. App. 23a; *id.* (noting Crane's summary-judgment contention that "the State has no evidence he committed any sexual act while his volitional control was imparied by any mental disorder to the degree he was unable to control his dangerous behavior" and that "the facts stated in [Crane's] motion are uncontroverted").

On March 2, 1998, two state employees at Larned – Dr. Leonardo Mabugat, a psychiatrist, and Mr. Kenneth Eaves, a psychologist – produced a written evaluation. That evaluation appears in the Joint Appendix (JA 11-20), and was referred to during the subsequent trial (*e.g.*, JA 78), but does not seem to have been admitted into evidence (Pet.

Br. 3-4).[1] The authors, however, along with two other mental-health professionals (Robert Heurter and Douglas Hippe, both psychologists), testified for the State at the subsequent trial.

The testimony relied on the standard diagnostic catalog – the current edition of which is the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revision* (2000) ("*DSM-IV-TR*") – which was described at trial as a tool used to promote uniformity in communicating about "personality, medical problems, social problems, and the like" (JA 105). The State's witnesses asserted that Crane came within two *DSM* categories, exhibitionism and antisocial personality disorder. *See* JA 46-49, 71, 89, 110-16; *DSM-IV-TR* at 569 (exhibitionism: exposure to strangers), 701-06 (antisocial personality disorder: "pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood").[2] Exhibitionism alone would not render

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[1]That evaluation, as Kansas observes (Pet. Br. 3-4), identified a collection of prior criminal arrests, charges, and convictions (one 1986 conviction, by plea, was for a sexual offense, *see* JA 12-16); noted Crane's participation in group therapy in prison but not in sex offender treatment (JA 17); stated a diagnosis of exhibitionism and antisocial personality disorder (JA 19); and opined that the antisocial personality disorder "would account for [Crane's] aggression toward women" (JA 19), which "has been sexual in that it has proceeded progressively from his exhibitionistic behavior" (JA 20), and that Crane would be a sexually violent predator under the statute if the list of arrests, charges, and convictions were accurate but would not be if the 1993 video-store attack were considered by itself (JA 20).

[2]The diagnostic criteria – aside from requiring that the person be 18 and have shown comparable misconduct before 15 and not engage in the misconduct only because of schizophrenia or a manic episode – are stated in *DSM-IV-TR* (at 706) as follows (punctuation added). "There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing

Crane dangerous (JA 94-95, 98, 117), but the antisocial personal disorder diagnosis evidenced by Crane's criminal record – a condition based on "enduring traits . . . that cause enduring trouble, enduring difficulties either with the law or psychologically, personally, or in the community in some way" (JA 111), and "extremely difficult to treat, very intractable, not likely to change" (JA 118) – made a critical difference in qualifying Crane as a sexual predator under the Kansas statute (JA 52, 118).[3] *See* Pet. App. 3a. The likelihood of predatory acts was variously estimated at just barely 50% (JA 67) and 85-90% (JA 121). The State's professional witnesses, without difficulty understanding the concept, testified that, though antisocial personality disorder may affect the ability to control behavior, does not generally and did not in Crane's case mean an inability to control behavior. JA 56-57, 70, 99.[4] Indeed, Mr. Hippe reported that (in direct contrast to the testimony of Hendricks in the *Hendricks* case) Crane told him that he *could* control

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acts that are grounds for arrest; (2) deceitfulness, as indicated by repated lying, use of aliases, or conning others for personal profit or pleasure; (3) impusivity or failure to plan ahead; (4) irritability and agressiveness, as indicated by repeated physical fights or assaults; (5) reckless disrgard for safety of self or others; (6) consistent irresponsbility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another."

[3]With respect to the observation in *DSM-IV-TR* (at 704) that antisocial personality disorder "may" be less in evidence as an individual ages into the fourth decade and beyond, one witness stated that it was not likely to diminish in Crane's case because the condition was evident in his 30s (JA 76), and another witness noted the "may" in the *DSM-IV-TR* observation and stated that a limited literature merely suggested such mellowing in the 45-55 age range but was not substantiated (JA 135-136).

[4]Although Dr. Mabugat, when initially asked by the State if Crane "can't control" or "won't control" his behavior, asserted that "it's a combination" (JA 51) – as the Kansas Supreme Court observed (Pet. App. 10a) – he later made clear his agreement that Crane's "disorders do not affect his volitional control to the degree that he cannot control his behavior." JA 70; *see* JA 71-73.

his urges. JA 117. *See also* Pet. App. 24a (denying summary judgment to Crane "even though the State's expert witnesses might agree that [Crane's] mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior").

In the conference about the proposed jury instructions, the State acknowledged that this case was different from the *Hendricks* case. It stated (with overbreadth) that "pedophilia is something that affects a person's volitional control to the point where they cannot control it. This is a completely different situation . . . ." JA 141. Accordingly, the State argued that this Court's *Hendricks* decision was not limited to the particular facts of the case; rather, "the statute, as a whole, is what the Supreme Court addressed in the *Hendricks* case." JA 140.

The instructions given to the jury recited the threshold element of a conviction of a sexually violent offense – which was met, as a matter of law, by the aggravated sexual battery conviction entered against Crane under the plea agreement. JA 156. The instructions then permitted an adverse finding if the jury found that Crane had either a "mental abnormality" or a "personality disorder" that makes him "likely to engage in future predatory acts of sexual violence" if not securely confined, *i.e.*, such acts were "more probable to occur than not to occur." JA 156, 157. The only real question for the jury was this likelihood question, because the jury was told that the required "personality disorder" was satisfied by any "personality disorder" recognized in *DSM-IV*, such as "antisocial personality disorder" (JA 157) – which Crane had, according to the uniform testimony. Though essentially a moot point, the jury was also allowed, but not required,

to find a "mental abnormality" – any condition "affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," with "volition" meaning "act of willing or exercise of the will." JA 156, 157. The instructions, in short, did not impose as a condition of an adverse finding any requirement whatever of impaired ability to control one's behavior.

On appeal, the Kansas Supreme Court reversed the adverse finding, concluding that the statute could not constitutionally be applied "absent a finding that defendant suffers from a volitional impairment," and remanded for a new trial. Pet. App. 2a, 2a-20a. The court noted that this Court's *Hendricks* decision, involving a man who "admitted . . . that he was unable to control the urge" to abuse children sexually (Pet. App. 6a, citing *Hendricks*, 521 U.S. at 355, 360), "is replete with references to the commitment of persons who cannot control their own behavior" both in discussing due process (Pet. App. 6a (citing *Hendricks*, 521 U.S. at 357, 358, 360, 362, 364); *id.* at 6a-8a) and in discussing the non-criminal character of the statute to reject the ex post facto and double jeopardy challenges (Pet. App. 12a-13a (citing *Hendricks*, 521 U.S. at 362-63, 364, . The court observed that this Court's "opinion in *Hendricks* does not seem to include consideration of willful behavior." Pet. App. 11a. The court concluded that the Constitution requires "a finding that the defendant cannot control his dangerous behavior," a finding of "inability to control his behavior." Pet. App. 11a, 12a. The failure to demand such a finding in the jury instructions required reversal and a new trial.

Pet. App. 12a, 20a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Individuals who commit sex offenses commonly are criminals who should be held criminally responsible for their willful acts. The State, through its legislature and its prosecutors, should bring to bear its criminal-justice system, with its constitutional limits (*e.g.*, against ex post facto punishment and double jeopardy), to impose appropriately severe punishment on such individuals. What the State should not be permitted to do under the Constitution is to evade the criminal-justice system, when dissatisfied with decisions it has made, by setting up an alternative regime broadly authorizing the indefinite locking up of individuals based on risk of future offenses – outside the *parens-patriae*-based tradition of medically justified civil commitment for those suffering severe mental illnesses and in disregard of the tight limits on permitted preventive detention. The State in the present case asks for this Court's approval of just such a broad regime, thereby breaching fundamental limits protecting liberty in our society.

The request should be rejected. The Court has made clear that "'the concept of ordered liberty'" severely limits the circumstances in which a State may deprive people of their physical freedom by imprisoning them – principally as punishment upon a proper criminal conviction. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see Zadvydas v. Davis*, 121 S. Ct. 2491, 2498-99 (2001). Kansas, not able to justify Crane's confinement as criminal, must bring it within some other principle defining one of the narrow circumstances justifying civil confinement. Kansas, however, has not presented any

justification that would not equally justify further preventive detention of a large share of the millions of United States prisoners after they have served their sentences, thus substantially displacing the criminal-justice system.

Mere dangerousness, in the sense of likely recidivism, has never been enough, as Kansas does not dispute. Psychiatric prediction of re-offending is far more uncertain than, for example, prediction of imminent danger from a contagious disease. Likely recidivism, the best that can be done in circumstances like the present, would not meaningfully limit the class of individuals subject to preventive confinement.

Nor is such limitation supplied by mere applicability of *some* recognized diagnostic category in *DSM* as the source of likely recidivism. The Court in *Hendricks* rejected the notion that constitutional justifications follow either labels ("mental illness" versus, say, "mental abnormality") or *DSM* diagnostic categories, which are designed for purposes other than justifying confinement. Of particular importance here, permitting confinement of all dangerous individuals with "antisocial personality disorder" (a *DSM* category) not only has effectively been rejected by this Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992), but would, as a factual matter, not meaningfully circumscribe the reach of preventive detention. The constitutionally valid tradition of civil commitment for "harm-threatening mental illness" (*Zadvydas*, 121 S. Ct at 2499) must incorporate a substantive standard for the mental-illness component (by whatever name), beyond mere listing in *DSM*.

One such principle, which reflects the distinctive characteristic of the tradition of

civil commitment of the mentally ill (as urged by the APA in *Hendricks*), is that the confinement be a medically justifiable one for the good of the individual, hence an exercise of the State's *parens patriae* power. Except for those "insane" in the classic sense, *i.e.*, those whose cognitive functioning is severely impaired, this must mean confinement only for the purpose of providing available treatment sufficiently effective to hold a realistic promise of release (followed by further treatment in less restrictive settings). Kansas does not rely on any such standard, but instead invokes "treatment" simply in the sense of something a doctor or other professional can do to a person in the hope of changing him – there being no known reliably effective methods of "treating" in the sense relevant here, *i.e.*, so reducing recidivism risk as to lead to a determination of safety for release. Such invocation of "treatment," like mere invocation of any *DSM* category, neither furnishes a *parens patriae* medical justification for confinement nor meaningfully limits the class of confinable offenders, for the evidence of available "treatment" is not meaningfully different for offenders generally.

This Court, in *Hendricks*, pointedly relied on another substantive limiting principle, seizing on the highly unusual fact that Hendricks was dangerous because of a deviant sexual condition, pedophilia, that he confessed made him unable to control his criminal conduct. That fact both made imminent danger highly certain and made Hendricks an extreme case of inability to control the behavior causing harm – in both respects making Hendricks analogous to a person with a highly contagious disease who present an imminent danger not traceable to voluntary human action. While volitional

impairment in general has not been subject to measurement or calibration across the spectrum of human behavior, *Hendricks* itself establishes both the coherence of the concept and its usefulness in extreme cases. In this case, with neither this limiting principle nor any other having been used as the basis for confinement, the commitment of Crane was properly set aside by the Kansas Supreme Court.

ARGUMENT

THE KANSAS SUPREME COURT'S INVALIDATION OF CRANE'S COMMITMENT SHOULD BE AFFIRMED

This Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), frames the analysis in this case. That decision pervasively, and pointedly, focuses on a distinctive aspect of the case to bring the confinement of Hendricks within the narrow circumstances in which the constitutionally protected tradition of ordered liberty permits civil confinement in a secure institution. Kansas, in confining Crane, has repudiated both the *Hendricks* basis for limiting such confinement and any other meaningful limiting principle. For that reason, the Kansas Supreme Court was correct in setting aside the commitment of respondent Crane under the Kansas Sexually Violent Predator Act.

A. *Kansas v. Hendricks* Relied Centrally On Hendricks' Confessed Inability To Control His Harmful Conduct

The most striking evidence in *Hendricks* was Hendricks's own testimony that he could not control his urge to engage in sexual abuse of children. *See* 521 U.S. at 355. Kansas, in defending its confinement of Hendricks under its statute, emphasized that testimony in its statement of facts. Pet. Br. 9, 10, 10, 11 in *Hendricks*. Nevertheless, the

State did not rely on Hendricks's inability to control his conduct as an express limiting principle in its argument defending the statute in its briefs as petitioner (on the due process issue) or as cross-respondent (on ex post facto and double jeopardy). *See* Pet. Br. 20-50 in *Hendricks*; Cross-Resp. Br. 3-39 in *Hendricks*; *see id.* at 39-49 (equal protection); *cf.* Pet. Br. in *Hendricks* at 22 (quoting the "utter lack of power to control" and "uncontrollable" language defining the reach of the statute upheld in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)). In its reply brief on the due process question, however, when offering a crucial explanation for why the class of sex offenders covered by its statute was narrow enough to escape the reasoning of *Foucha v. Louisiana*, 504 U.S. 71 (1992), the State deemed it "important" that the Kansas statute's limitation to "sexual predation" reasonably targeted "a disturbed mental condition which, if it persists, is likely to lead to irrational *and irresistible* urges to harm additional victims." Reply Br. 9 in *Hendricks* (emphasis added).

This Court, upon deciding the case, seized on that precise feature, based on the stark admission by Hendricks himself, and relied on it pervasively in upholding Hendricks' confinement against constitutional challenge. Having described the crucial testimony (521 U.S. at 355), the Court incorporated the inability-to-control principle into the very first paragraph defining why the Kansas statute, as applied to Hendricks, was consistent with the Nation's "understanding of ordered liberty" protected as a matter of substantive due process. *Id.* at 357. Quoting *Foucha* for its affirmation that "freedom from physical restraint 'has always been at the core of the liberty protected by the Due

Process Clause'" (*id.* at 356), and the recognition of *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), that the freedom is not absolute, the Court stated the principle that validated the Hendricks confinement: "States have in certain narrow circumstances provided for the forcible civil detainment of people *who are unable to control their behavior* and who thereby post a danger to the public health and safety," thus reaching only "a limited subclass of dangerous persons." *Id.* at 357 (emphasis added).

The Court stressed the same critical fact, as its understanding of the Kansas statute, over and over in rejecting the due-process challenge. The Court observed that Kansas's requirements "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous *beyond their control*." *Id.* at 358 (emphasis added). The Court described the statute as a requiring a condition that "makes it difficult, if not impossible, for the person to control his dangerous behavior,"and then the Court stated its understanding that this requirement "narrows the class of persons eligible for confinement to those *who are unable to control* their dangerousness." *Id.* (emphasis added). The Court rejected Hendricks's demand that legal definitions and standards "mirror those advanced by the medical profession." *Id.* at 359.[5] Rather, labels

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[5]The APA explained in its *amicus* brief in *Hendricks* (at 22-23 (footnote omitted)): "Just as state legislative dictates cannot control the standard of 'mental illness' justifying involuntary confinement, so, too, the standard be controlled by the categories set forth in [*DSM-IV* (1994) or other classification systems]. Such catalogues include a vast range of disorders that vary widely in severity and type of impairment (*e.g.*, cognitive, mood, sexual, eating, learning, sleep, adjustment, etc.). The classification schemes are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals. *DSM-IV* at xv-xxv. These schemes are

aside, what was critical was that the Kansas statute contained substantive criteria like those in earlier laws "relating to an individual's inability to control his dangerousness" (*id.* at 360), that Hendricks himself suffered from the well-recognized "serious mental disorder" of pedophilia (*id.*), and that "Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control his urge' to molest children." *Id.* It was precisely "this admitted *lack of volitional control*" that, together with dangerousness, "adequately distinguishe[d] Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.*

The Court relied on the same critical factor in rejecting the ex post facto and double jeopardy challenges. The Court concluded that the Kansas legislature did not intend its statute "to function as a deterrent" (a criminal-law objective) because it targets

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designed to identify the full range of mental disorders, each (according to the inevitably imprecise definition)

> a clinically significant behavior or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

[*DSM-IV* at xxi.]

"Such comprehensive classification schemes are not restricted to identifying those persons who warrant involuntary treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the authors of *DSM-IV* caution that '[i]n most sistuations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect."' *DSM-IV* at xxiii. The authors further caution that 'a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder.' *Id.* Not all individuals who come with a *DSM-IV* category suffer an impairment that diminishes their autonomy, much less one justifying involuntary confinement for the individual's

only persons with a condition "that prevents them from exercising *adequate control over their behavior*," persons who are "unlikely to be deterrred by the threat of confinement." *Id.* at 362-63 (emphasis added). More indirectly, the Court concluded that incapacitation alone *can* be a justified civil objective, invoking an analogy – one involving harm other than through voluntary human action – to quarantining "persons afflicted with an untreatable, highly contagious disease." *Id.* at 366 (citing *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. Of Health*, 186 U.S. 380 (1902)). The nonpunitive character of the law established on those bases, the ex post facto and double jeopardy challenges failed.

Justice Kennedy, who supplied the fifth vote for the majority opinion, wrote a concurrence. 521 U.S. at 371-73. He indicated that the Court's analysis "concerns Hendricks alone" (*id.* at 371)[6] and warned against such laws' being used to displace the criminal system (*id.* at 372-73), thus echoing the majority's emphasis of the characteristic distinguishing Hendricks from "other dangerous persons who are perhaps more properly dealth with exclusively through criminal proceedings" (*id.* at 360). Justice Breyer's dissent stressed the wide area of agreement with the majority, notably the distinctive characteristic of Hendricks' "specific, serious, and highly unusual inability to control his actions" (*id.* at 375), his "classic case of irresistible impulse" (*id.* at 376).

In sum, the Court's analysis of the three constitutional provisions at issue focused,

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own good."

[6]*Hendricks* did not, because it could not, rule on the application of the challenged law to

in common, on the circumstances bringing Hendricks' case within a narrow category of nonpunitive civil confinement. Specifically, in its analysis of all three constitutional issues, the Court relied on Hendricks's highly unusual, confessed inability to stop himself from re-offending in highly likely circumstances, thus necessarily and without significant uncertainty presenting a near-term threat. It was on that basis that the Court concluded that the State's interests were nonpunitive and sufficiently akin to traditionally justified civil confinement to pass muster against due process, ex post facto, and double jeopardy challenges.

B. Crane Was Commited Under Standards Lacking Any Meaningful Limiting Principle To Distinguish General Preventive Detention Of Offenders

1. This Court has made clear the fundamental, essentially defining character of freedom from confinement in our system of "ordered liberty." *Hendricks*, 521 U.S. at 357; *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 746. Based on that recognition, the Court has likewise made clear that the circumstances in which an individual may be subjected to physical restraint in the form of confinement, outside the context of punishment upon criminal conviction, are "narrow":

> Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and "narrow" non-punitive "circumstances," *Foucha*, *supra*, at 80, where a special justification, such

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circumstances not presented. Neither a facial validating of a law nor a rejection of a challenge to its application in one circumstances determines the validity of the law in different applications.

> as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).
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> [W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. *Compare Hendricks*, *supra*, at 368 (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" and provides "strict procedural safeguards") and *Salerno*, *supra*, at 747, 750-752 (in upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards), with *Foucha*, *supra*, at 81-83 (striking down insanity-related detention system that placed burden on detainee to prove nondangerousness). In cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. *See Hendricks*, *supra*, at 358, 368.

Zadvydas, 121 S. Ct. at 2498-99. A State's basis for civil confinement must be deemed insufficiently limiting when it would substantially displace the criminal-justice system by applying to a large share of offenders, confining them indefinitely based on their offenses, even after completion of their sentences – or as a substitute for criminal sentencing altogether (if the offense is merely evidentiary). *See Foucha*, 504 U.S. at 76 n.4, 82-83; *cf. Hendricks*, 521 U.S. at 360 (distinguishing Hendricks from "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings"); *id.* at 372-73 (Kennedy, J., concurring).[7]

2. The State of Kansas does not defend its confinement of Crane based on the risk

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[7]In the present case, the confinement scheme was used precisely as a means of making up for the State's failure in successfully pressing sufficiently serious criminal charges for the video-store attack. *See* Pet. App. 4a.

of his re-offending, *i.e.*, his dangerousness, alone. It may be assumed that, in some circumstances, a State may confine individuals simply for dangerousness – when the period is very limited (*Salerno, supra*), for example, or perhaps when the prediction is of a highly certain imminent danger, as with an infectious disease (*see Jacobson, supra*). The confinement regime at issue here, however, is indefinite in theory and (for want of known curative treatments) perhaps in practice. *See* pages __, *supra*. And psychiatric prediction that Crane (or almost any particular individual) will re-offend is inherently uncertain – nothing like, say, a medical prediction of passing an infectious disease to others. *See, e.g., Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Addington v. Texas*, 441 U.S. 418, 429 (1979); APA *Amicus* Br. in *Hendricks* at 18.

Equally important, a standard of generally (but imprecisely) predictable recidivism does nothing to distinguish the class of sex predators covered by the Kansas statute from offenders generally. A very substantial number of offenders can be predicted to re-offend. For example, a large-scale 1989 study by the United States Department of Justice Bureau of Justice Statistics reported that, in a sample of more than 108,000 persons released from prisons in 1983, "an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail," and "22.7% of all prisoners were rearrested for a violent offense within 3 years of their release." U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* at 1 (April 1989); *see also id.* at 10 (rates especially high for prisoners who are younger when released). Dangerousness alone, in the sense of likely

reoffense relevant here, furnishes no meaningful limiting principle, as Kansas seems to concede.

3. Nor is a meaningful limiting principle provided by adding the mere fact that the dangerousness flows from *any* diagnosis found in the *DSM* catalog. The Court concluded in *Hendricks*, constitutional justification cannot simply follow the *DSM*. As the APA there explained (*see* note 5, *supra*; *DSM-IV-TR* at xxxii-xxxiii; *id.* at xxxvii ("Cautionary Statement")), the *DSM* manual is designed for quite different purposes, and it disclaims any intent to conform its diagnostic categories to legally relevant standards, much less to the circumstances of justified confinement.

More specifically, the presence of "antisocial personality disorder" as the condition causing the danger (*see DSM-IV-TR* at 701-706) provides no meaningful limiting principle. A very substantial number of offenders are diagnosable with antisocial personality disorder – its "prevalence rates as high as 40-60% among the male sentenced population." Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 Soc. Psychiatry & Psychiatr. Epidemiol. 231, 234 (1999); *id.* at 235-36 (high prevalence of antisocial personality disorder abmong substance abusers); JA 147 (noting deposition evidence from State's witness suggesting that 75% of prisoners have antisocial personality disorders). Under Kansas's theory, indefinite confinement for this "chronic condition" (Moran, *supra*, at 234; *see DSM-IV-TR* at 701-06) – definitionally characterized by repeated disregard for the rights of others, including often by commission of offenses, and not subject to known effective treatment – would be

available for a large share of the prison population.

This Court recognized and effectively rejected this result in *Foucha v. Louisiana*, 504 U.S. 71 (1992), which was relied on in *Hendricks* and, more recently, in *Seling v. Young*, 121 S. Ct. 727, 736 (2001), and in *Zadvydas*, 121 S. Ct. at 2498-99. In *Foucha*, the Court took as a given that the petitioner, at the time of the requested release, had been diagnosed by a doctor as having "an antisocial personality," a "disorder for which there is no effective treatment" (504 U.S. at 75, 82) but which has long been recognized as a psychiatric diagnosis (*see DSM-IV-TR* at 701-06; *DSM-III-R* (1987), at 342-46; *DSM-III* (1980) at 317-21; *DSM-II* (1968) at 43). Against that background, the Court made clear that it was a matter of constitutional principle that an individual may be held based on mental condition "as long as he is *both* mentally ill and dangerous, but no longer." 504 U.S. at 77 (emphasis added). Reiterating the insufficiency of dangerousness alone, the Court pointedly rejected, to the extent it understood Justice Kennedy in dissent to be advancing, "the proposition that a defendant convicted of a crime and sentenced to a term of years, may nevertheless be held indefinitely because of the likelihood that he will commit other crimes." *Id.* at 76 n.4.

Having thus stressed the necessity for mental illness, the Court rejected the State's reliance on Foucha's "antisocial personality," coupled with dangerousness, as sufficient to perpetuate his confinement, apparently indefinitely. The most extensively explained reason was a matter of substantive due process: there was insufficient justification to overcome the basic principle that "[f]reedom from bodily restraint has always been at the

core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 80. Foucha, though concededly having a "disorder" (*id.* at 82), was not "mentally ill" within the meaning of, and so could not be held pursuant to, the tradition justifying commitment of the mentally ill. *Id.* at 80. Accordingly, Foucha could be held only if he fit within the "narrow circumstances," reflected in *United States v. Salerno*, 481 U.S. 789 (1987), where "limited confinement" is permitted *simply* to avert "a danger to others or to the community." 504 U.S. at 80; *see id.* at 83 ("'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'" quoting *Salerno*, 481 U.S. at 755). But, aside from failing to require affirmative proof of dangerousness, Louisiana's statute failed to come within *Salerno* for more fundamental reasons (504 U.S. at 82-83):

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

4. a. A limiting principle underlies the tradition of civil commitment based on serious mental impairments – though it is not one Kansas has invoked here. That tradition historically rests on the *parens patriae* power of the State, over and above the pure police power to protect the public, to act *in the interest of the individual* by

displacing his own judgments about hospitalization in certain circumstances. As Kansas notes in describing *Addington v. Texas*, 441 U.S. 418 (1979), involuntary commitment traditionally turns on a determination that the individual "requires hospitalization *for his own welfare* and protection of others." Pet. Br. 17 n.4. Given the fundamental respect for adult autonomy as the core of liberty, those circumstances are limited by the requirement of a sound basis for denying the fundamental and general right of adults to make their own decisions about confinement: mental illness. What makes mental-illness a *distinctive* basis for detention of adults in our tradition of liberty are (a) that "[o]ne who is suffering from a debilitating mental illness" is not "wholly at liberty" (*Addington*, 441 U.S. at 429) and (b) that the State is acting not "for the destruction of liberty" but for a "beneficient function" (*Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 59 (1890)) when it furthers its "*parens patriae* interest in preserving and promoting the welfare of the [individual]" (*Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (*parens patraie* power regarding children)).

The APA has urged, at least as a policy matter, that involuntary confinement requires a finding of the individual's incapacity to make a rational decision balancing the probability of living freely without relapse (with treatment) versus commitment for the period likely in the individual's case – which might be indefinite in the case of a condition not known to be amenable to reliable treatment that would realistically lead to release. At a minimum, though, the historical tradition of mental-illness civil commitment has always required, over and above any finding of dangerousness, a very

clear basis for concluding, making the same comparison, that the confinement in a secure facility is better *for the individual* than the alternative. That comparison might more readily justify confinement in the first instance if the standards for release thereafter did not demand the kind of guarantee of "safe[ty]" Kansas seemingly demands (Kan Stat. Ann. §59-29a07), but were flexible and based on medical judgments about the appropriateness of continuing treatment outside confinement, in the outpatient settings in which the individual must learn to live without reoffending. *See* APA Task Force Report at 62, 65, 68, 69, 73, 75 (importance of therapeutically monitored adjustment to real-world settings). Putting aside individuals with severe cognitive impairments that might strip them of meaningful autonomy without hope of effective cure, the essential precondition of a *parens patriae* confinement, one justified as in the individual's interest after making the comparison of alternatives, is the actual availability of treatment holding realistic promise of release in a reasonable time. Any lesser standard for locking someone up unjustifiably overrides self-determination as the essential and defining premise of a free society. *See* APA *Amicus* Brief in *Hendricks* at 20-30; American Psychiatric Association, *Dangerous Sex Offenders*: A Task Force Report at 171-175 (1999) ["APA Task Force Report"].[8]

Abandonment of a good-of-the-patient requirement in favor of a simple protection-of-the-public standard would not only transform commitment into general and

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[8]The Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), involved an individual who was severely "mentally ill" in the usual civil-commitment sense (*id.* at 366), requiring

open-ended preventive detention in circumstances where prediction is uncertain. It also would threaten the beneficial tradition of civil commitment itself. The ability of civil commitment to perform its function depends vitally on doctors making judgments *as doctors* for the benefit of the patients, with corresponding flexibility in making medical judgments about conditions and length of confinement and treatment. Turning doctors into jailers changes their role, undermining the therapeutic alliance with their patients that is basic to medicine generally and psychiatry in particular. *See* APA Task Force Report at 173 ("[B]y bending civil commitment to serve essentially nonmedical purposes, sexual predator commitment statutes threaten to undermine the legitimacy of the medical model of commitment.").

b. Kansas, relying on information presented in the brief of *amicus* Association for the Treatment of Sexual Abusers (ATSA), suggests (without quite arguing) the much broader view that the mere fact that some "treatment" is available for some sex offenders may justify confinement. *See* Pet. Br. 28-30. ATSA (at 9-10) describes the several types of treatment that may be provided to *some* individuals with sexual disorders – not all sex offenders, like rapists, have recognized disorders, let alone sex-related disorders[9] – including "cognitive-behavioral" therapies and pharmaceutical therapies. *See* APA

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treatment for a psychosis, *i.e.*, schizophrenia. *See* APA *Amicus* Br. in *Hendricks* at 16 & n.12.

[9]"[A]lthough most sex offenders show traits of personality disorders and although there are subgroups representing the seriously mentally ill and developmentally disabled, most sex offenders do not show major psychiatric disorders. . . . Only the paraphilic diagnoses focus directly on psychopathological features of deviant sexual behavior, but these conditions appear to be absent in most offenders. In contrast, a significant number of sex offenders may have substance abuse or personality disorder diagnoses, but these conditions usually have little

Amicus Br. in *Hendricks* at 29 & n.26; APA Task Force Report at 61-75, 103-20; General Accounting Office, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* (1996). On the crucial matter of effectiveness, ATSA, after observing that "currently there is no 'cure' for sexual predation," makes only the carefully qualified summary of the literature: "Although treatment is still a developing field, recent research *suggests* that it *might* be *effective* for *high-risk* offenders." ATSA *Amicus* Br. 8 (emphases added).

Amicus's observations about "treatment" do not separate, among sex offenders, those with mental illness from those without (*e.g.*, there is *no* recognized mental illness of "rapism," *but cf.* Pet. Br. 23 n.10); does not indicate which subgroups have treatments available (while acknowledging that "[s]exual predators are far from a homogenous group," *id.*); does not say what "effective" means, or whether treatments are "effective" when conducted in prison or prison-like settings, or whether any treatments hold significant potential to reduce recidivism risk to a level that would allow release. There is, in fact, no basis for identifying recidivism-reducing treatments or concluding that a State could provide "treatment" holding realistic promise of release. As one of ATSA's principal sources has written, "evaluators have had little success in determining whether sexual offenders have benefited from treatment"; and "[f]ew of the identified risk factors have even the potential for change, and, for those that can change, it is unclear whether reductions in the problem areas actually lead to reductions in recidivism," so that "the

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explanatory connection to the offender's sexual behavior." APA Task Force Report at 7, 9.

available research can be used to justify committing sexual offenders, but it provides little direction as to when they can safely be released." Hanson, *What Do We Know About Sex Offender Risk Assessment*, 4 Psychol., Pub. Policy & L. 50, 68 (1998); *id.* ("In practice, decision makers will be faced with the difficult choice between retaining ever increasing numbers of offenders in commitment units or releasing potentially dangerous offenders on the basis of evaluations with low levels of certainty."); APA Task Force Report at 175 ("to date there is no clear basis for making the claim that treatment of any class of patients with paraphilias will result in lower rates of recidivism"). ATSA does not assert that its members would consider involuntary hospitalization for such "treatment" to be medically (or professionally) justifiable (*see* APA Task Force Report at 175 ("confinement without a reasonable prospect of beneficial treatment of the underlying disorder is nothing more than preventive detention and violates the norms of the medical model")), and Kansas's statute itself declares that normal civil-commitment standards cannot be met. Kan. Stat. Ann. § 59-29a01; *see Hendricks*, 521 U.S. at 351.

Equally important, the evidence on "treatment" does nothing to distinguish "sexual predators" who might qualify under Kansas's statute from offenders generally. A recent Government sponsored summary of the research literature indicates a comparable availability of "treatments" that might be effective in reducing recidivism among offenders, with no special limitation to sex offenders. MacKenzie, "Criminal Justice and Crime Prevention," in U.S. Department of Justice National Institute of Justice, *Preventing Crime: What Works, What Doesn't, What's Promising* ch. 9 (1997), available

at the website of the National Criminal Justice Referral Service.[10] Critically, then, not only does the evidence on "treatment" fail to bring this statute within the paternalistic justification for traditional justifiable civil commitment but also fails to supply a limiting principle that would make upholding the confinement here stop short of generally authorizing preventive detention of offenders.

5. *Hendricks* itself involved a combination of two factors that, at least when present together, form a limiting principle: a highly objective and near-certain prediction of imminent danger; and inability to exercise self-control. Those factors, in *Hendricks*, inhered in a single fact, namely, Hendricks' own testimony of his inability to stop himself from re-offending. By virtue of that fact, Hendricks was analogous to the highly contagious individual – presenting an "imminent danger" according to "high medical authority" and not through voluntary human action – whose quarantine (at least temporarily) might be justified. *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 30 (1905) (upholding mandatory vaccination), relied on in *Hendricks*, 521 U.S. at 357; *see also id.* at 366 (citing *Compagnie Francaise, supra*).

The State, in the trial court, successfully resisted the incorporation of this limiting principle into the standards to be applied to Crane. In this Court, the State denies that *Hendricks* actually relied on such a limiting principle – a denial that, as explained above, cannot easily be squared with the *Hendricks* opinion. Moreover, the State's substantive argument against the *Hendricks* standard should be rejected.

Citing quotations included in the APA's *amicus* brief in *Hendricks*, the State stresses that there may be no scientifically valid way to "'measure'" or "'calibrate'"

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[10]The 1997 report summarized: "Today, while there is still some debate about the effectiveness of rehabilitation (e.g., Lab and Whitehead 1988; Whitehead and Lab 1989) recent literature reviews and metaanalyses demonstrate that rehabilitation programs can effectively change offenders (Andrews and Bonta 1994; Andrews, Bonta, and Hoge 1990; Andrews, Zinger, Hoge, Bonta, Gendreau, and Cullen 1990; Palmer 1975; Gendreau and Ross 1979, 1987). In general, according to Andrews et al. (1990), reviews of the literature show positive evidence of treatment effectiveness. For example, in a series of literature reviews, the proportion of studies reporting positive evidence of treatment effectiveness varied from near 50 percent to 86 percent: 75 percent (Kirby 1954), 59 percent (Bailey 1966), 50 percent (Logan 1972), 48 percent (Palmer's 1975 retabulation of studies reviewed by Martinson in 1974), 86 percent (Gendreau and Ross 1979) and 47 percent (Lab and Whitehead 1988). In reviewing these studies, Andrews et al. (1990) conclude that 'This pattern of results strongly supports exploration of the idea that some service programs are working with at least some offenders under some circumstances.' The important issue is not whether something works but what works for whom."

degrees of volitional control or even to locate a clear "'line'" on one side of which are precisely those with such control and on the other those without. *See* APA *Amicus* Br. in *Hendricks* at 26 n.22, quoted at Pet. Br. 26, 28; *see also* ATSA *Amicus* Br. 3-7. Those imprecisions, in the APA's view, remain characteristic of the notion of volitional control today. Indeed, the APA (like others) has relied on them to justify a policy choice to abandon the use of the concept altogether for various legal purposes in favor of other standards, as many jurisdictions have done with the insanity defense. As a simple logical matter, however, the inability to make the notion operationally precise across the full range of human behavior does not mean that the idea of volitional control lacks a coherent ordinary meaning or that some version of it cannot reasonably be used in law at all or that there are not clear cases at the ends of the spectrum, any more than that "day" and "night" are meaningless or useless or indistinguishable concepts simply because light fades gradually at twilight and dusk.

The Court's opinion in *Hendricks* itself establishes both the common-sense coherence and the actual use of the notion of volitional control, a concept on which the Court relied numerous times. *See* pages __-__, *supra*. The dissent, too, used the notion. 521 U.S. at 375 ("inability to control his actions"; "irresistible impulse"). The notion of impaired capacity to control conduct, moreover, was incorporated into the once widely accepted formulation of the insanity defense in the 1962 Model Penal Code § 4.01: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he *lacks substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or *to conform his conduct to the requirements of the law*." *See American Psychiatric Association Statement on the Insanity Defense*, 140 Am. J. Psychiatry 681, 682 (1983) (emphasis added). That test, of course, has been altered in many jurisdictions, based in part (but only in part) on the difficulties of plenary use of volitional control.[11] But that policy choice does not imply or prove the incoherence of

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[11]The APA stated in 1982: "Many psychiatrists . . . believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior. The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk. . . . The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding." *Id.* at 685.

The APA statement went on to explain that reliance for an insanity defense on "'personality disorders' such as antisocial personality disorder (sociopathy) does not accord with modern psychiatric knowledge or psychiatric beliefs concerning the extent to which such persons do have *control over their behavior*." *Id.* (emphasis added). The APA, recommending a requirement of serious mental disorder of the severity of a psychosis and exclusive focus on

the concept or its uselessness in any limited version.[12]

On the other hand, the very imprecisions of measuring degrees of volitional control do suggest that the idea cannot be fairly used to attach (profound) legal consequences unless the standard is set near the far end of the spectrum. As Kansas now insists, it is in the wide middle range of nonextreme cases that volitional "impairment" would present substantial practical problems of consistent, workable, objective use of the concept. Kansas does not suggest that a standard infected by such difficulties could constitutionally be used to lock someone up.

This Court in *Hendricks* carefully avoided those problems – without disagreeing with the point made there by the APA about the difficulties of fine-tuning the volitional-control notion for general use, despite citing the page of the APA brief making that point (521 U.S. at 360 (citing APA *Amicus* Br. 26)) – by repeatedly invoking not just some impairment but actual "inability to control," as proved to a high degree of certainty by Hendricks' own admission to that effect. *See* page __, *supra*; *see also* 521 U.S. at 375 (Breyer, J., dissenting) ("highly unusual inability to control his actions") (the portion of the dissent stating the area of agreement with the majority). That formulation reflects a critical precedent relied on in *Hendricks* (521 U.S. at 358), namely, the 1940 *Pearson* case. The law upheld against constitutional challenge there applied only if the person was so severely impaired as to be rendered "'irresponsible for his conduct with respect to sexual matters'" by his mental condition (309 U.S. at 272), and this Court pointedly premised its constitutional ruling on its acceptance of the Minnesota Supreme Court's "construction" of the law as applying only to a category of "'persons who, by an habitual course of misconduct in sexual matters, ha[d] evidenced *an utter lack of power to control* their sexual impulses," causing them to be "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their *uncontrolled and uncontrollable* desire.'" 309 U.S. at 273 (emphasis added); *see id.* at 274 (again stressing these requirements). Thus, *Hendricks* and *Pearson*, together with the need to avoid the difficulties that (as Kansas recognizes) afflict lesser versions of a "volitional impairment" standard, support a limiting principle of such severe impairment as to avoid the large gray area: actual inability to control the conduct, as proved with a high degree of certainty. Crane's

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ability to appreciate the wrongfulness of the conduct, added: "In practice there is considerable overlap between a psychotic person's defective understanding or appreciation and his ability to control his behavior. Most psychotic persons who fail a volitional test for insanity will also fail a cognitive-type test when such a test is applied to their behavior, thus rendering the volitional test superfluous in judging them." *Id.* at 685. *See* Morse, *Culpability and Control*, 142 U. Penn. L. Rev. 1587 (1994) (explaining that a legally and morally relevant notion of volitional impairment generally collapses into the more operationally useful notion of rationality defects).

[12]*Amicus* ATSA (at 7) seems to suggest that its position is that an individual's "desires, thoughts, and feelings" are "inaccessible" in any sense relevant to the law. It is unclear what, under that position, would be left of the narrowed insanity defense, let alone ordinary civil commitment processes (or of "intent" throughout the law).

confinement was not based on this or any other meaningful limiting principle.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted.

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