Mitchell Westerheide vs State of Florida

MR. CHIEF JUSTICE: THE FINAL CASE ON THE COURT'S CALENDAR THIS MORNING IS WESTERHEIDE VERSUS STATE. MS. RYAN.

GOOD MORNING, JUDGES. MR. POLIN. MAY IT PLEASE THE COURT. I AM NANCY RYAN WITH THE SEVENTH CIRCUIT PUBLIC DEFENDERS REPRESENTING THE PETITIONER. AS THE COURT KNOWS, THIS WAS A DIRECT APPEAL FROM A SKMITMENT ORDER ENTERED UNDER THE RISE ACT. THE FIFTH DCA -- UNDER THE RYCE ACT. THE FIFTH DCA AFFIRMED AND THE CONSTITUTIONALITY IS CERTIFIED TO THIS COURT. THE STATE CANNOT SHOW THAT THE ACT IS REASONABLY TAILORED TO ADMIT ITS VALID PURPOSE, AND THIRDLY, PUBLISHED MATERIALS WHICH WE HAVE PROVIDED TO THE COURT AND CITED IN THIS BRIEF, ESTABLISH THAT THE ACT IS, IN FACT, PUNITIVE AND THEREFORE IT SHOULD BE DECLARED VOID, IN VIOLATION OF THE FEDERAL AND FLORIDA DOUBLE JEOPARDY AND EXPOSE FACTOR CLAUSES.

NOW, YOU HAVE SOME PRETTY BIG HURDLES TO OVERCOME, WITH REFERENCE TO YOUR FEDERAL CONSTITUTIONAL ARGUMENTS, DO YOU NOT, AND CERTAINLY THEY RELATE TO THE STATE CONSTITUTIONAL ARGUMENTS, TOO. HOW CAN YOU DISTINGUISH THIS STATUTORY SCHEME FROM THE SCHEMES THAT THE U.S. SUPREME COURT HAS APPROVED?

THE FLORIDA STATUTE OTHER SCHEME IS ALL BUT IN DISTINGUISHABLE FROM THE KANSAS SCHEME, AS FAR AS THE DEFINITION OF MENTAL ABNORMALITY, THE DEFINITION OF SEX PREDATOR, AND THE DEFINITION OF "LIKELY TO REOFFEND" ARE CONCERNED. HOWEVER, THE CANDOR VERSUS HENDRICKS CASE DID NOT ADDRESS THE DUE PROCESS ISSUES WHICH ARE BEFORE THIS COURT. AS THE COURT PROBABLY REMEMBERS FROM READING THE HENDRICKS OPINION, LEROY HENDRICKS WENT TO HIS HEARING AND TESTIFIED THAT HE COULD NOT CONTROL HIS SEXUAL PEDOPHILIA URGES, THAT HE WOULD HAVE TO DIE TO STOP OFFENDING AGAINST CHILDREN AND THE STATE HAS TO SHOW HOW LIKELY IT IS THAT A PERSON WILL REOFFEND. THAT IS A BRAND NEW ISSUE FOR THIS COURT. THAT IS IN HENDRICKS, THE STATE DID NOT ESTABLISH TOTAL CONFINEMENT AS THE SINGLE ANSWER FOR ALL SEXUAL OFFENDERS, AGAIN, DUE TO MR. HENDRICKS'S POSITION.

IN THE HENDRICKS, THERE IS NO REQUIREMENT FOR CONVICTION, IS THERE?

NO, IN KANSAS IT IS IN LIEU OF CRIMINAL PROSECUTION.

AND FLORIDA REQUIRES THAT A CONVICTION BE HAD BEFORE THIS ACT GOES INTO EFFECT.

A CONVICTION OR FINDING OR FINDING OFING IN BY REASON OF INSANITY.

DOES THAT MAKE A DIFFERENCE?

ARGUABLY IT COULD. JUDGE, I WOULD LIKE TO POINT OUT THAT, WITH REGARD TO THE QUESTION WHETHER THIS WAS CRIMINAL OR WHETHER THIS WAS CIVIL, WHICH I THINK IS WHERE YOU ARE GOING, I SUBMIT TAKE THIS COURT GOT THE WHOLE GENERAL IDEA RIGHT IN THE FDLE VERSUS REAL PROPERTY CASE, WHERE THE STATE CAME IN AND FORFEITURE IS CIVIL. THIS COURT SAID DON'T ARGUE EW CIVIL OR QUASI-CRIMINAL OR CIVIL TO US. WE CAN SEE THIS IS HARSH, AND WE WILL DECIDE WHAT PROCESS IS DUE. I SUBMIT THAT THE SANCTIONS AT ISSUE IN THIS CASE ARE OBVIOUSLY EXTREMELY VASTLY MORE HARSH THAT THAN A FORFEITURE OF

PROPERTY, THAT DUE PROCESS DUE A CLIENT UNDER THIS ACT SHOULD BE EQUAL TO THE CONSTITUTIONAL PROTECTIONS AFFORDED TO ALL CRIMINAL DEFENDANTS AND I AM SORRY, JUDGE, I CAN TELL FROM YOUR EXPRESSION I DIDN'T ANSWER EW QUESTION.

I WAS JUST WONDERING DOES IT MAKE A DIFFERENCE THAT THE KANSAS ACT REQUIRES, DOES NOT REQUIRE CONVICTION AND FLORIDA ACT DOES? DOES THAT MAKE A DIFFERENCE?

IT MAKES IT ALL THE MORE CLEAR THAT THIS ACT IS PUNITIVE. JUDGE, YOU HAVE GOT AMPLE EVIDENCE OF PUNITIVE INTENT. THE DISTINCTION THAT, BETWEEN THE STATUTE AND THE KANSAS STATUTE THAT IS BROUGHT OUT, IN ADDITION, THE FACT THAT THE FLORIDA STATUTE DOES NOT PERMIT THE TRIAL COURTS TO CONSIDER ANY SANCTION LESS PUNITIVE, LESS RESTRICTIVE THAN TOTAL CONFINEMENT. THAT IS UNIQUE. KANSAS DOESN'T HAVE THAT. ABOUT HALF OF THE STATUTES, THE SEXUAL VIOLENT PREDATOR STATUTES NATIONWIDE, REQUIRE THE TRIAL COURTS TO CONSIDER LESS RESTRICTIVE ALTERNATIVES. THE WASHINGTON SUPREME COURT HAS HELD THAT, AS A MATTER OF CONSTITUTIONAL LAW, THE TRIAL COURTS MUST CONSIDER LESS RESTRICTIVE ALTERNATIVES. THE OTHER HALF OF THE STATES EXCLUDING FLORIDA, ARE SILENT. THEY DO NOT PRECLUDE THE TRIAL COURTS FROM CONSIDERING ANYTHING LESS RESTRICTIVE THAN TOTAL CONFINEMENT. EVIDENCE OF PUNITIVE INTENT AND A FACTOR THAT DISTINGUISHINGS -- THAT DISTINGUISHS THE FLORIDA SCHEME FROM THE KANSAS SCHEME IS THE FACT THAT THE LEGISLATURE HAS EXPRESSLY STATED IN THE STATUTE NO LESS RESTRICTIVE ALTERNATIVES CAN BE CONSIDERED. THERE IS OTHER EVIDENCE OF PUNITIVE INTENT. YOU HAVE GOT THE FACT THAT THERE IS NO TRANSITIONAL RELEASE UNDER THE FLORIDA ACT. THE KANSAS ACT DOES ALLOW TRANSITIONAL RELEASE. THE TREATING PROFESSIONALS, WHOSE ARTICLES ARE CITED AND QUOTED IN PETITIONER'S BRIEF, STATE THAT THERE CAN BE NO REALISTIC POSSIBILITY OF TREATING A SEX OFFENDER, WITHOUT TOTALLY IN AN INSTITUTIONAL SETTING, WITHOUT GIVING HIM A CHANCE TO WORK HIS WAY BACK INTO THE COMMUNITY. WE HAVE GOT THE FACT THAT TREATMENT IS DELAYED, FROM THE TIME DEFENDANTS ARE SENTENCED, UNTIL THEY REACH THE END OF THEIR SENTENCES. THAT IS ANOTHER DISTINCTION, NOT ON THE FACE OF THE STATUTE, BUT IT IS A DISTINCTION IN THE PROGRAMS. IN KANSAS, WE KNOW FROM KANSAS VERSUS HENDRICKS, FROM JUSTICE BREYER'S DISSENT, THAT THE KANSAS DEPARTMENT OF CORRECTIONS OFFERS SOMETHING CALLED WORD MILEU THERAPY TO INDIVIDUALS WHO ARE INCARCERATED IN PRISON IN KANSAS. WE KNOW FROM THE ATTACHMENTS, WHICH THE STATE PROVIDED THIS COURT IN THE APPENDIX TO ITS MERITS BRIEF THAT, THE DEPARTMENT OF CORRECTIONS, IN FLORIDA, ONLY, IN FACT, OFFERS 20 HOURS OF TREATMENT TOWARD THE END OF A CRIMINAL DEFENDANT'S SENTENCE.

I UNDERSTAND THAT, UNTIL 1991 FLORIDA HAD A MENTALLY MENTALLY-DISORDERERRED SEX OFFENDER PROGRAM.

CORRECT, JUDGE.

WITH THE LEGISLATURE ABOLISHED IN '91.

CORRECT, JUDGE.

HAVE ANY SIGNIFICANCE IN THAT? -- IS THERE ANY SIGNIFICANCE IN THAT?

I BELIEVE SO, JUDGE.

AS TO WHETHER THE RY KRE. ACT IS, IN FACT, CIVIL OR CRIMINAL.

IT IS A STRONG LEGISLATIVE PUNITIVE INTENT. UP TO 1981, PRISONERS COULD BE TAKEN OUT OF THE PRISONER, UNDER THE PROGRAM, AND PUT INTO A MENTAL INSTITUTION AND TREATED. NOW THEY WILL ARE ONLY GIVEN A 20-HOUR TALKING COURSE TOWARDS THE END OF THEIR SENTENCES, WHERE THE MATERIALS ATTACHED TO THE APPENDIX BY THE STATE, CONVINCING

THAT THEY MUST GET TREATMENT WHEN THEY GET OUT. THE D.O.C CONCEDES, IN THOSE MATERIALS, THAT THERE IS NOT A GREAT DEAL THEY CAN REALLY DO TO TREAT SEX OFFENDERS IN PRISON. THE LEGISLATORS, IN THE PREAMBLE TO THE RYCE ACT, FINDS THE SAME THING. THE PROGNOSIS OF REHABILITATING SEXUALLY VIOLENT PREDATORS IN A PRISON SETTING IS POOR. THEY EXPRESSLY CONCEDED THAT. THE FACT THAT THE LEGISLATURE SAID LET'S NOT TRY TREATING THESE PEOPLE ANYMORE. WE ARE JUST GOING TO PUN IRTHEM. THEN THEY COME ALONG, EIGHT YEARS LATER, AND SAY WE COULD KEEP THEM IN A LITTLE LONGER, IF WE STARTED TREETH THEM AFTER THEIR SENTENCES WERE OVER. I SUBMIT JUDGE HAIRS OF THE FIFTH DCA GOT IT EXACTLY RIGHT, IN THE CONSENTING OPINION IN BREWER, THIS STARTS TO LOOK LIKE PUNISHMENT, WHEN THE STATE CAN DELAY TO THAT EXTENT.

UNDER THE PRIOR, HOW LONG DID THAT TREATMENT LAST, UNTIL CURED OR HOW DID THAT ACT?

JUDGE, THAT IS BEFORE MY TIME. I AM NOT SURE WHETHER -- FLORIDA HAS NOT HAD INDETERMINATE SENTENCES. I DO NOT KNOW WHETHER THEY WERE RELEASED BACK INTO GENERAL POPULATION, WHEN THE NORTH FLORIDA REGIONAL HOSPITAL WAS SATISFIED. I CANNOT ANSWER THAT FOR YOU, JUDGE. I WILL TRY TO FIND YOU SOME SUPPLEMENTAL AUTHORITY FOR YOU ON THAT.

COULD YOU ADDRESS, I KNOW YOU HAVE A LOT TO COVER, AND I AM JUST TRYING TO SORT OUT EVERYTHING, BUT ONE THING THAT YOU SAID WAS THAT YOUR CONCERN IN THIS CASE, AND THIS ACT, ABOUT THE LIKELIHOOD OF REOFFENDING, THAT IN THE KANSAS ACT, THAT, OR THE KANSAS CASE, IT WASN'T AN ISSUE, BECAUSE YOU SAID THAT THE DEFENDANT HAD ACTUALLY ADMITTED THAT HE WOULD PROBABLY, IF HE WAS UNDER SEVERE STRESS, HE WOULD COMMIT AGAIN. WHAT IS THE -- IS IT THAT LIKELY IS, BY NOT BEING DEFINED, YOU ARE SAYING IT IS UNCONSTITUTIONALLY VAGUE. IS THAT YOUR ARGUMENT?

YES, JUDGE, IT IS. THAT IS ONE OF OUR ARGUMENTS. THE DEFINITION IN THE STATUTE IS CIRCULAR. IT SAYS THAT A PERSON WHO IS LIKELY TO REOFFEND IS SOMEONE WHO IS SO LININGLY TO REOFFEND -- SO LIKE TO REOFFEND THAT HE POSES A MENACE TO SOCIETY.

HOW, IN THIS CASE, WAS IT INTERPRETED? WAS IT A MORE LIKELY THAN NOT? MORE THAN 50 PERCENT?

JUDGE, WE ASKED FOR A JURY INSTRUCTION TO THAT EFFECT SPECIFICALLY. WE ASKED FOR A JURY INSTRUCTION THAT SAID THE JURY HAS TO FIND MR. WESTERHEIDE IS MORE LIKELY THAN NOT TO REOFFEND. THAT WAS DENIED. WE ARGUED IN THE DCA THAT THE DENIAL OF THAT JURY INSTRUCTION WAS ERROR, AND IT AMOUNTED TO A DENIAL OF DUE PROCESS.

HOW IS THE TERM LIKELY BEING INTERPRETED? I KNOW WE APPROVED JURY INSTRUCTIONS. IS "LIKELY" DEFINED IN THE JURY INSTRUCTIONS?

THE LANGUAGE IN THE PROVISIONAL JURY INSTRUCTIONS DIRECTLY TRATHS TRACKS THE STATUTE AND SAYS OF SUCH A DEGREE THAT IT POSES A MENACE TO THE PUBLIC. THAT IS NOT TO KEEP JURIES FROM CONSULTING THEIR PERSONAL PREDILECTIONS ABOUT WHO IS LIKE. THAT IS JUST BECAUSE THE CLAUSE REQUIRES.

IS THE LEGISLATURE ABLE TO, IF THERE IS SOME PERCENTAGE CHANCE THAT IT IS GOING TO HAPPEN, I MEAN, IN OTHER WORDS, WHAT IS YOUR ARGUMENT ON THERE? "LIKELY", LIEN MOOPING THAT YOU HAVE TO GIVE PERCENTAGES, TO SAY IT IS MORE THAN 50 PERCENT, BEFORE YOU CAN COMMIT SOMEBODY INDEFINITELY?

I BELIEVE MR. POLIN WILL CONCEDE, AS HE DID IN ORAL ARGUMENT IN THE DCA, THAT WE ARE ENTITLED TO A JURY INSTRUCTION THAT DOES SPEAK IN TERMS OF 51 PERCENT OR MORE LIKELY

THAN NOT. WE SUBMIT THAT OUR CLIENTS ARE NOT ONLY ENTITLED TO THAT INSTRUCTION BUT THAT THEY ARE ENTITLED TO AN INSTRUCTION WHICH THE RESPONDENT MUST BE SHOWN, BY THE STATE, TO BE UNABLE TO CONTROL HIS CONDUCT AND HERE I AM RELYING ON CASES FROM THE MINNESOTA AND KANSAS SUPREME COURTS AND CASES FROM AN ARIZONA APPELLATE COURT, WHICH CONSTRUED INTERPRETED THE HENDRICKS CASE. I SUBMIT THAT IS A THOROUGHLY AND COMPLETELY VALID INTERPRETATION OF HENDRICKS. THAT ISSUE IS PENDING IN THE UNITED STATES SUPREME COURT. THEY ACCEPTED THE KANSAS, IN DECIDING WHETHER TO LIMIT THEIR APPROVAL OF THESE ACTS, ONLY TO PEOPLE WHO CANNOT CONTROL THEIR CONDUCT. ONE APPROPRIATE RESOLUTION OF THIS CASE WOULD BE TO REACH THE SAME DECISION THAT THE MINNESOTA COURT HAD REACHED IN LINAHAN, THAT THE KANSAS COURT REACHED, THAT THE ARIZONA COURT REACHED IN LEON GEE. IF YOU BASE THAT INTERPRETATION ON HENDRICKS, THIS CASE WILL GO UP WITH CRANE. YOU COULD, IN THE ALTERNATIVE, ACCEPT A SUGGESTION, WHICH I BELIEVE THE STATE MADE IN A FOOTNOTE IN ITS ANSWER BRIEF. I TOOK THE STATE TO SAY THAT THE FLORIDA LEGISLATURE DID, IN FACT INTEND TO INCLUDE A VOLITIONAL CONTROL ELEMENT IN THE STATUTE, WHEN IT SAID THAT, REFERRED IN THE STATUTE TO THE FACT THAT THERE HAS GOT TO BE AN EMOTIONAL OR VOLITION ALIM PARENT, SPECIFICALLY, DEFINITION OF MENTAL ABNORMALITY IS MEANTAL CONDITION AFFECTING AN AMERICAN PERSON'S EMOTIONAL OR VOLITIONAL CAPACITY WHICH PREDISPOSES A PERSON TO REOFFEND. THE STATE, I BELIEVE SAID THAT, AND I SUGGESTED IN THE BRIEF THAT THE LEGISLATURE DID, INTEND TO INCLUDE A VOLITION ALIM PARENT. IF THAT IS TRUE, THEN MR. WESTERHEIDE WOULD BE ENTITLED TO A NEW TRIAL, BECAUSE OUR EXPERT WITNESS TESTIFIED THAT HE IS, IN FACT, ABLE TO CONTROL HIS CONDUCT. THE STATE'S WITNESSES DOES NOT TESTIFY EITHER WAY ON THAT. NEITHER THE CRANE OR LEE AND GEE CASE HAD BEEN DECIDED AT THAT TIME. THE STATE DID NOT TREAT VOLITION ALIM PARENT AT THE TRIAL IN THIS CASE. WE ANTICIPATED LINAHAN AND ASKED THE EXPERT IS THIS PERSON ABLE TO CONTROL HIS CONDUCT? THE WITNESS REPLIED MR. WESTERHEIDE, I BELIEVE, CANNOT CONFORM HIS CONDUCT TO THE LAW.

WITH THAT INSTRUCTION IN EFFECT, WOULD THE ACT BE CONSTITUTIONAL?

WOULD AN INSTRUCTION TO THAT EFFECT, THE DUE PROCESS QUESTION WOULD BE RESOLVED. I SUBMIT THIS COURT NEEDS TO GO FURTHER AND FIND, IN VIEW OF ALL OF THE EVIDENCE OF PUNITIVE INTENT, THAT THE STATE VIOLATES THE EXPOS FACT-AND DOUBLE JEOPARDY. IN ONE OF THE SUPPLEMENTAL AUTHORITIES FILED BY PETITIONER, WE HAVE GOT THE SPONSOR OF THE RYCE ACT, REPRESENTATIVE JOHN VILLALOBOS QUOTED, IN THE PUBLIC FORUM, IN THE NEWSPAPERS IN BOTH 1999 AND IN 2001, TO THE EFFECT THAT ALL WE EVER WANTED TO DO WITH THE RYCE ACT WAS KEEP THESE PEOPLE IN CARS RATED. THAT IS NOT THE PRECISE QUOTE. THE PRECISE QUOTES DO APPEAR IN THE SUPPLEMENTAL AUTHORITY WHICH I FILED WITH THIS COURT.

THE ISSUE, THE CONSTITUTIONALLY-VAGUE PROBLEM, YOU ARE SAYING, COULD BE RESOLVED WITH JURY INSTRUCTIONS, AS TO WHAT LIKELY MEANS, AND A VOLITIONAL COMPOINT. CORRECT?

I BELIEVE THAT THOSE TWO COMPONENTS IN THE ACT WOULD GO A VERY LONG WAY IN INSTALLING DUE PROCESS.

I AM NOT SURE I UNDERSTAND, THE U.S. SUPREME COURT HAS UPHELD AN ACT, AND YOU SAID THE KANSAS ACT. YOU FIRST SAID IT WAS VIRTUALLY IN DISTINGUISHABLE. WE DON'T HAVE EVIDENCE IN THIS RECORD ABOUT THE TREATMENT ISSUE SO WE REALLY DON'T, ON ITS FACE, SAY ANYTHING ABOUT THE TREATMENT. WHAT IS IT THAT, THEN, DISTINGUISHS THIS FROM KANSAS, THAT WOULD MAKE IT ACT, UNDER THE FEDERAL CONSTITUTION, PUNITIVE AND THEREFORE VIOLATING DOUBLE JEOPARDY AND EX POST FACTO?

JGE, I MISSPOKE WHEN I SAID THE ACT WAS IN DISTINGUISHABLE. I MEANT WHAT IS LIKELY TO REOFFEND, WHAT IS A SEXUAL PREDATOR. THOSE ARE IN DISTINGUISHABLE. YOU HAVE GOT OF THE FLORIDA LEGISLATURE SAYING THE COURTS CANNOT CONSIDER ANYTHING LESS PUNITIVE THAN TOTAL CONFINEMENT. YOU HAVE GOT THE FLORIDA LEGISLATURE SAYING, NOT PROVIDING FOR TRANSITIONAL RELEASE. YOU HAVE GOT THE SPONSOR 6 THE ACT -- OF THE ACT SAYING ALL WE HAVE WANTED TO DO WAS LOCK HIM UP.

THAT WAS THE TRANSITIONAL AMENDMENT, TRANSITIONAL RELEASE, AFTER THE KANSAS.

I BELIEVE SO, JUDGE.

WE HAVE GOT THE U.S. SUPREME COURT DECISION, SO IF TRANSITIONAL RELEASE WASN'T PART OF THE KANSAS ACT THAT WENT UP AND THEY UPHELD IT, THEN THE ONLY OTHER PART THAT YOU ARE TALKING ABOUT IS THE LEAST RESTRICTIVE ALTERNATIVE, AND I ARE AS I UNDERSTAND WHAT THE FIFTH DISTRICT SAID IS THEY SAID THAT THAT IS REALLY PART OF WHAT THE JURY HAS TO FIND, THAT IS THAT THERE ISN'T A LEAST RESTRICTIVE ALTERNATIVE, IN ORDER FOR THEM TO BE FOUND TO BE A SEXUAL VIOLENT PREDATOR, AND THEREFORE THAT IS PART AND PARCEL OF THE REQUIREMENT. NOW, WHAT DO YOU SAY TO THAT ARGUMENT?

THE FIFTH DCA BOUGHT THAT ARGUMENT. I SUBMIT IT IS A HOLLOW ARGUMENT BECAUSE AS A PRACTICAL MATTER, RESPONDENT'S COUNSEL CAN'T GO TO THE JURY AND SAY WOULDN'T SOME COMBINATION OF OUTPATIENT TREATMENT FOR A SHORT TIME, THEN INTENSIVE, INPATIENT TREATMENT FOR A SHORT TIME THEN INTENSIVE OUTPATIENT TREATMENT, ELECTRONIC MONITORING, HOME CHECKS, WOULDN'T SOME COMBINATION OF THESE BE SUFFICIENT TO PROTECT THE PUBLIC? HOW CAN WE ARGUE THAT? THE JUDGE DOESN'T HAVE ANY AUTHORITY TO ORDER IT THE. THE JUDGE IS EXPRESSLY PRECLUDED IN EVERY CASE, FROM ORDERING THAT, EVEN THOUGH IN THIS CASE, WE HAD OUR EXPERT, DR. TED SHAW, TESTIFY THAT HE BELIEVED THAT SUCH A SCHEME COULD BE PUT TOGETHER. AND I LOST MY TRAIN OF THOUGHT. THAT THERE WAS JUST NO WAY THAT WE COULD ARGUE TO THE JURY THAT SOME OTHER COMBINATION OF SANCTIONS IS APPROPRIATE. I SUBMIT THAT, IN NO OTHER CASE, IN NO OTHER STATE, DO YOU HAVE THE LEGISLATURE SAYING THIS OR NOTHING.

ARE YOU SAYING IN EVERY OTHER STATUTE WHICH HAS BEEN UPHELD, THAT THE TRIAL JUDGE HAS THE ABILITY AND THE JURY HAS THE ABILITY TO CONSIDER OTHER FORMS OF CONFINEMENT, OTHER THAN INCARCERATION?

YES, JUDGE. HALF THE STATUTES ARE SILENT. AS A MATTER OF STATE CONSTITUTIONAL LAW, THE RESPONDENT IS FREE TO ARGUE TO THE COURTS THAT A LESS RESTRICTIVE MEANS ARE APPROPRIATE AND SUFFICIENT. AND IN THE OTHER HALF OF THE STATES, THE LEGISLATURES HAVE EXPRESSLY STATED THAT RESPONDENTS ARE ENTITLED TO A CONSIDERATION OF LESS RESTRICTIVE ALTERNATIVES, BEFORE THEY ARE CONFINED. IN FLORIDA, DEFENDANTS, CRIMINAL DEFENDANTS WHO ARING IN BY REASON -- WHO ARE NOT GUILTY BY REASON OF INSANITY AND INCOMPETENT AND DEFENDANTS WHO ARE BAKER-ACTED, ARE ALL ENTITLED BY THE JUDGE, BEFORE THAT JUDGE ORDERS CONFINEMENT, TO CONSIDER WHETHER LESS RESTRICTIVE ALTERNATIVE MEANS ARE SUFFICIENT, AND, AGAIN, THE WASHINGTON SUPREME COURT FOUND, AS A MATTER OF CONSTITUTIONAL LAW, AS THIS COURT SHOULD, THAT IT IS NECESSARY, UNDER THE DUE PROCESS CLAUSE, TO CONSIDER LESS RESTRICTIVE MEANS. IT IS THE STATE'S BURDEN TO SHOW UNDER THE STRICT SCRUTINY STANDARD WHICH APPLIES HERE, THAT IT HAS NARROWLY TAILORED ITS STATUTE TO MEET ITS ADMITTEDLY APPROPRIATE GOAL.

ARE YOU SAYING THAT WE COULD INTERPRET THE STATUTE TO REQUIRE TO READ THAT IN, OR BECAUSE THAT IS NOT IN, THERE IS NO CHOICE BUT TO FIND IT PUNITIVE ON ITS FACE?

I DON'T THINK YOU CAN READ IT IN, BECAUSE THE LEGISLATURE, IN THE 1999 AMENDMENT TO THE ACT, EXPRESSLY STATED THAT NO LESS RESTRICTIVE ALTERNATIVE CAN BE CONSIDERED. I

THINK YOU WOULD HAVE TO FIND AT LEAST THAT PORTION OF THE ACT UNCONSTITUTIONAL, AND IF I MAY, I AM IN MY REBUTTAL TIME AND I WILL RESERVE.

THANK YOU, MS. RYAN. MR. POLIN.

MAY IT PLEASE THE COURT. THIS CASE COMES BEFORE THE COURT NOT JUST IN THE POSTURE OF THE UNITED STATES SUPREME COURT, FINDING THAT A VIRTUALLY IDENTICAL STATUTE WAS CONSTITUTIONAL IN MOST OF THE RESPECTS, WHICH THE APPELLANT IS CONTESTING TODAY, BUT THERE ARE SIMILAR STATUTES IN ABOUT 15 OR 17 OVER STATES RIGHT NOW, AND MOST OF THOSE HAVE WORKED THEIR WAY UP TO THE STATE SUPREME COURT, AND VIRTUALLY EVERY ONE OF THESE ARGUMENTS HAS UNIFORMLY BEEN REJECTED IN STATE AFTER STATE AFTER STATE. MANY OF THEM, UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS. SINCE THE KANSAS ACT IS THE ONE WHICH HAS BEEN SCRUTINIZED THE MOST AND AT THE HIGHEST LEVEL, AND THE QUESTION HAS COME UP, TODAY, FROM SEVERAL JUSTICES, AS TO WHETHER THERE ARE ANY SIGNIFICANT DISTINCTIONS, I WOULD, FIRST, SAY, WITH RESPECT TO THE PRIMARY DISTINCTION WHICH IS BEING ASSERTED TODAY, BY THE APPELLANT, WHETHER YOU CAN HAVE LESS RESTRICTIVE ALTERNATIVES, THE KANSAS STATUTE, WHICH WAS AT ISSUE IN HENDRICKS, AND WHICH WAS DECIDED IN THAT PARTICULAR CASE, DID NOT PROVIDE FOR ANY LESS RESTRICTIVE ALTERNATIVES TO BE UTILIZED AS A REMEDY. THE DISSENT TOOK NOTE OF IT, WHILE IT MATTERED TO SOME IN THE DISSENT, THE MAJORITY CLEARLY WAS NOT INFLUENCED BY THAT. THE STATE OF KANSAS DID.

BUT DID THEY ACTUALLY, YOU SAID IT DIDN'T HAVE IT WRITTEN IN THERE, BUT OUR STATUTE APPARENTLY, SPECIFICALLY DOES NOT EVEN PERMIT IT. IN HENDRICKS, THE GUY ADMITTED THAT HE COULDN'T --

THERE STILL WERE NO LESS RESTRICTIVE ALTERNATIVES AUTHORIZED IN THE KANSAS STATUTE FOR UTILIZATION AS A REMEDY. THE STATUTE DID NOT PROVIDE JUDGES WITH THE AUTHORITY TO SAY GO TO A HALFWAY HOUSE, GO TO OUTPATIENT TREATMENT.

BUT WAS THAT AN ISSUE? I KNOW THAT THE DISSENT MADE SOME REFERENCE TO IT. WAS THAT AN ISSUE IN HENDRICKS?

I THINK IT WAS AN ISSUE, IN THE SENSE THAT HENDRICKS WAS ARGUING THAT THAT WAS ONE OF THE FACTORS THAT MAKES THE STATUTE PUNITIVE, AND THE DISSENT WOULD HAVE AGREED WITH THAT, BUT THE MAJORITY DIDN'T, SO, YES, I DO THINK IT WAS AT ISSUE, AND LET'S GO BACK TO THIS CONCEPT OF LESS RESTRICTIVE ALTERNATIVES. YOU CANNOT HAVE A LESS RESTRICTIVE ALTERNATIVE AS A REMEDY, BECAUSE THE ELEMENT OF THE CASE IS UTTERLY INCONSISTENT WITH IT. THE DEFINITION OF A SEXUALLY-VIOLENT PREDATOR INCLUDES PROOF THAT THE PERSON SUFFERS FROM A MENTAL ABNORMALITY OR PERSONALITY DISORDER THAT MAKES THE PERSON LIKELY TO ENGAGE IN ACTS OF SEXUAL VIOLENCE, IF NOT CONFINED IN A SECURE FACILITY FOR LONG-TERM CONTROL, CARE AND TREATMENT, SO THE STATE HAS TO PROVE THE NEED FOR THAT SECURE CONFINEMENT. IF THE STATE PROVES AND CONVINCES THE JURY OR JUDGE THAT SECURE CONFINEMENT IS NEEDED, HOW COULD ANY JUDGE, THEN, TURN AROUND AND SAY GO TO A HALFWAY HOUSE. GO TO OUTPATIENT TREATMENT. IT HAS BEEN RULED OUT.

THE STATE, I GUESS, IN THIS STATUTE, IS TAKING THE POSITION THAT A VERY SMALL POPULATION OF SEXUALLY-VIOLENT PREDATORS. ARE WE LOOKING FOR THE MOLEST FORCE THAT ARE PEDOPHILES, THAT MAY BE ABLE TO BE CONTROLLED IN LESS RESTRICTIVE ENVIRONMENTS? WE ARE JUST LETTING THOSE PEOPLE OUT TO MAYBE REOFFEND AGAIN?

I THINK YOUR INITIAL POINT IS CORRECT. THE STATE IS GOING AFTER THE TIP OF THE ICEBERG, THE MOST SERIOUS OF THE MOST SERIOUS, THE ONES WHO POSE THE GREATEST DANGER, AND THE STATE IS NOT REQUIRED TO GO THROUGH AN ALL OR NOTHING, NOT REQUIRED TO GO AFTER

EVERYONE OR NO ONE AT ALL. THE STATE CAN IDENTIFY THE MOST SERIOUS PART OF THE PROBLEM AND GO AFTER THAT, PERHAPS AT A LATER DATE, AFTER THE ACT HAS BEEN IMPLEMENTED AND SEEING HOW IT WORKS THAT PERHAPS IT WILL BE EXPAND TO INCLUDE OTHERS WHO WOULD BENEFIT AT A LOWER LEVEL.

BUT I GUESS MAYBE THIS GOES BACK TO IT. HERE IS THE PERSON, THIS DEFENDANT, WHO GOT A RELATIVELY SHORT PRISON SENTENCE. I MEAN, ISN'T THE QUESTION IN THESE CASES JUST LOOKING AT THE OUTSET OF PEOPLE THAT HAVE COMMITTED SIGNIFICANT CRIMES AND MAKING SURE THAT THE PRISON TERM IS COMMENSURATE WITH THE NATURE OF THEIR CRIME, RATHER THAN A SITUATION HERE IS A GUY THAT GOT HOW MANY YEARS DID HE GETS INITIALLY? UNDER FIVE?

IT WAS SOMEWHERE IN THE BALLPARK OF FIVE YEARS.

AND WHAT WAS HE CONVICTED OF? HAVING SEX WITH A MINOR?

THAT WAS PART OF IT. IT WAS A SEXUAL PERFORMANCE. BUT WHEN YOU GO TO THE FACTS OF THIS PARTICULAR CASE, I THINK YOU CAN READ THE FACTS OF IT AND SEE THAT THIS IS ONE OF THE MOST SADISTIC, SICK, POSSIBLE FACTUAL SETTINGS THAT YOU ARE EVER GOING TO FIND.

WOULDN'T THAT HAVE BEEN SOMETHING TO HAVE GONE INTO THE SENTENCE?

WELL, I THINK THOSE ARE POLICY DETERMINATIONS FOR THE LEGISLATURE.

NOT REALLY, IF WE ARE REALLY DEALING WITH SOMETHING THAT IS ESSENTIALLY SOMEONE IS LOOKING AFTER THE FACT THAT, YOU KNOW, WE DIDN'T PUT THIS GUY AWAY FROM FOR LONG ENOUGH. NOW WE HAVE GOT TO DO SOMETHING AND MAKE SURE HE IS PUT AWAY FOR IN A WAY, IF YOU READ WHAT JUDGE SHARP SAYS, IT LOOKS LIKE THIS IS FOREVER.

IT IS NOT NECESSARILY FOREVER. THERE IS AN ABUNDANCE OF ACADEMIC LITERATURE ON THE NATURE OF TREATMENT, AND THERE ARE MANY MENTAL HEALTH PROFESSIONS, PSYCHOLOGISTS, PSYCHOTHERAPISTS, WHO BELIEVE THAT TREATMENT CAN BE EFFECTIVE AND CAN BE, AND THAT INDIVIDUALS CAN BE TAUGHT TO CONTROL THEIR BEHAVIOR.

NOW, THIS PERSON WASN'T A PEDOPHILE.

NO. HE WASN'T DIAGNOSED WITH PEDOPHILIA.

WHAT WAS THE NATURE? HOW DID THIS ARE A RISE, THIS MENTAL ILLNESS?

THE DIAGNOSIS IN THIS PARTICULAR CASE WERE A COMBINATION OF SEXUAL SADISM AND THE ANTI-PERSONALITY DISORDER, WHICH ONE OF THE EXPERTS TESTIFIED IS ABOUT AS DEADLY A COMBINATION AS YOU CAN GET, EQUATING IT TO MIXING DRUGS AND ALCOHOL. AS TO HOW IT COMES ABOUT, I GUESS THAT IS A LITTLE BIT BEYOND MY OWN KNOWLEDGE OF THE PSYCHOLOGICAL PROFESSIONS.

IN THE RECORD.

BUT IT IS, YOU KNOW, JUST BASICALLY LOOKING AT THE FACTORS FROM THE DSM MANUAL FOR BOTH OF THESE DISORDERS, WHICH ARE --

AN ANTISOCIAL PERSONALITY. WE HAVE GOT --

ANTISOCIAL PERSONALITY DISORDER. I DON'T THINK THERE ARE GOING TO BE VERY MANY CASES WHERE YOU SEE A SOLE DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER, AND IT IS

TYPICALLY GOING TO BE IN CONJUNCTION WITH SOMETHING ELSE, SUCH AS SEXUAL SADISM OR PEDOPHILIA OR ONE OR ANOTHER OF THE PARAFILL YEAHS THAT ARE -- PARAPHILIAS THAT ARE DISORDERS.

DOES PEDOPHILIA MEAN THAT SOMEONE ASK NOT CONTROL THEIR URGES?

I DON'T. I DON'T BELIEVE THE ANALYSIS THAT THE PERSON HAS A TOTAL INABILITY TO CONTROL BEHAVIOR, I DON'T THINK ANYONE WOULD SUGGEST THAT THAT IS THE NATURE OF THE DISORDER. WHICH LEADS INTO ANOTHER ASPECT OF THE APPELLANT'S ARGUMENT, THE CRANE VERSUS KANSAS LITIGATION.

BEFORE YOU GET THERE, JUSTICE SHAW HAD A QUESTION.

IN ORDER FOR THE ACT TO BE CIVIL INNATE, WHICH IT HAS BEEN DETERMINED TO BE, DOES IT HAVE TO BE A TREATMENT PROGRAM? IS THAT, DOES THAT HAVE TO BE THE NATURE OF IT?

I AM NOT GOING TO SAY THAT IT HAS TO, BECAUSE THE UNITED STATES SUPREME COURT GAVE SOME EXAMPLES WHERE IT IS POSSIBLE THAT YOU MIGHT HAVE COMMITMENT OF SOME INDIVIDUALS, EVEN IF THERE WERE NO PLAUSIBLE TREATMENT. IF A PERSON HAS A MENTAL HEALTH DISORDER AND THAT MENTAL HEALTH DISORDER MAKES THE PERSON DANGEROUS, AND THERE IS NO EFFECTIVE TREATMENT, THE UNITED STATES SUPREME COURT SAID YOU ARE NOT GOING TO LET THEM BACK OUT ON THE STREET. SAME THING WITH PEOPLE WHO ARE GUARANTEEND WITH HIGHLY-CONTAGIOUS DISEASE. IF YOU CAN'T --

BUT I THINK YOU MIGHT BE MISSING MY QUESTION. ISN'T THE THING THAT DETERMINES THAT IT IS CIVIL INNATE -- IN NATURE, AS OPPOSED TO BEING CRIMINAL, IS THAT IT IS NOT PUNITIVE THEORETICALLY. IT IS REMEDIAL OR MEDICALLY TREATMENT, IS THAT --

COMBINATION.

CORRECT ?

I WOULD SAY A COMBINATION OF TWO REASONS, CERTAINLY. REMEDIAL FOR THE PROTECTION OF THE PUBLIC, AND TYPICALLY YOU DO HAVE TREATMENT, AS THE OTHER SIDE OF IT, BUT THERE CAN BE OCCASIONS WHERE THE PROTECTION OF THE PUBLIC FROM SOMEONE WHO IS DANGEROUS, AS A RESULT OF A MENTAL HEALTH DISORDER, NEVERTHELESS, CANNOT BE TREATED, AND YOU STILL DON'T RELEASE THE PERSON.

IT COULD BE CRIMINAL PROTECTION OF THE PUBLIC. YOU PUT PEOPLE AWAY.

NO. NO. EVEN IT IS PLAUSIBLE THAT YOU CAN HAVE AWAKER ACT -- A "BAKER" ACT SITUATION, WHERE SOMEONE HAS A MENTAL ILLNESS AND IS DANGEROUS TO EITHER HIMSELF OR OTHERS, AND THEY ARE COMMITTED, AND THEY WILL REMAIN COMMITTED, EVEN IF THERE IS NO EFFECTIVE TREATMENT THAT CAN BE PROVIDED FOR THEM. YOU ARE NOT GOING TO LET THEM BACK OUT ON THE STREET, JUST BECAUSE TREATMENT CANNOT BE GUARANTEED TO BE EFFECTIVE. IN THIS PARTICULAR CASE, AND THIS PARTICULAR STATUTE, THIS LEGISLATURE SPECIFIES THAT TREATMENT SHALL BE PROVIDED AND IN ACCORDANCE WITH ANY CONSTITUTIONAL REQUIREMENTS, AND THERE IS A SUBSTANTIAL MENTAL HEALTH PROGRAM IN PLACE.

WELL, WHAT, I GUESS I ASKED YOU THE SAME QUESTION I ASKED BEFORE. IS IT SIGNIFICANT THAT THE STATE OF FLORIDA DID AWAY WITH THE TREATMENT PROGRAM, IN WHICH WAS GEARED TO TREAT THESE VERY TYPES OF INDIVIDUALS, AND NOW IT COMES BACK WITH ANOTHER PROGRAM THAT IS MORE DRACONIAN THAN THE PROGRAM THAT WAS OUT THERE, AND DESIGNATES IT CIVIL. IS THERE ANY SIGNIFICANCE TO THAT AT ALL?

I DON'T THINK IT IS SIGNIFICANT AT ALL. I THINK THIS STATUTE IS ONE WHICH EXISTS ON ITS OWN, REGARDLESS OF THE PRIOR LEGISLATION. THIS IS NOT, IN ANY WAY, DIRECTLY CONNECTED TO THAT LEGISLATION. THIS WAS NOT ENACTED IMMEDIATELY AS A REPLACEMENT FOR IT, A SUBSTITUTE FOR IT, IN LIEU OF IT OR WHATEVER YOU WANT TO CALL IT. THIS WAS ENACTED ON ITS OWN, AFTER THE STATE OF FLORIDA SAW THAT OTHER STATES ACROSS THE COUNTRY WERE DOING SIMILAR THINGS, AND AFTER THE STATE OF FLORIDA SAW THAT THE STATE OF KANSAS ACT HAD BEEN UPHELD BY THE UNITED STATES SUPREME COURT, SO WE BORROWED HEAVILY, NOT EXCLUSIVELY, BUT HEAVILY FROM THE KANSAS ACT, AND IT STANDS ON ITS OWN.

ONE FINAL QUESTION, I GUESS, FROM ME. EXACTLY WHAT DO YOU SEE AS DISTINGUISHING THIS FROM CRIMINAL, AS OPPOSED TO CIVIL? WHAT IS THE DISTINCTION HERE?

YOU CAN START WITH, GO THROUGH THE FACTORS THAT THE UNITED STATES SUPREME COURT UTILIZED IN HAND RICKS, AND THERE ARE -- THERE WERE SEVERAL OF THEM. THE ONES THAT COME TO MIND ARE, FIRST, YOU HAVE THE LEGISLATIVE INTENT, THE LABEL, AND IT GOES BEYOND JUST BEING A LABEL, THAT THIS IS A CIVIL STATUTE, THAT THIS IS A CIVIL COMMITMENT STATUTE. IT PROVIDES FOR THE TREATMENT AS WELL, AND THERE IS A TREATMENT PROGRAM IN PLACE. IT IS NOT BEING DONE. IT IS NOT BEING DONE FOR RETRIBUTION. IT IS BEING DONE FOR THE PROTECTION OF THE PUBLIC FROM THOSE WHO ARE DANGEROUS AS A RESULT OF MENTAL HEALTH CONDITIONS, AND IT IS NOT GOING TO HAVE A DETERRENT EFFECT, BECAUSE THERE IS A CAUSATIVE RELATIONSHIP BETWEEN THE MENTAL HEALTH CONDITION AND THE CONDUCT SO IT IS NOT ANTICIPATED THAT THIS WOULD HAVE ANY DETERRENT EFFECT ON CRIMINAL CONDUCT. BEYOND THAT, THE TERM IS ONE THAT IS ONLY POTENTIALLY INDEFINITE, AS WAS THE CASE WITH THE KANSAS STATUTE, THAT AS TREATMENT PROGRESSES AND THE DOCTORS CHANGE THEIR OPINIONS AS TO WHETHER THE PERSON NEEDS TO BE CONFINED COMMITTED, THOSE INDIVIDUALS CAN BE RELEASED.

BUT ISN'T ONE OF THE PURPOSES OF THIS ACT TO HAVE A DETERRENT EFFECT UPON THAT TYPE --

I THINK THE EXACT SAME REASONING AS IN THE KANSAS ACT APPLIES. THAT IT IS NOT VIEWED AS HAVING -- IT IS NOT VIEWED AS HAVING A DETERRENT EFFECT, BECAUSE IF IT IS BASED ON THE PREMISE THAT THERE IS A CAUSE AND EFFECT RELATIONSHIP BETWEEN MENTAL HEALTH CONDITIONS AND SUBSEQUENT CONDUCT, THAT IT IS NOT REALLY GOING TO DETER ANYONE, BECAUSE THOSE PEOPLE, AS A RESULT OF THEIR MENTAL HEALTH CONDITIONS, ARE PROBABLY GOING TO ENGAGE IN THAT CONDUCT, REGARDLESS OF WHETHER THIS STATUTE IS IN PLACE OR NO. IT IS NOT GOING TO STOP THEM, JUST BECAUSE IT IS IN PLACE. THEIR MENTAL HEALTH CONDITIONS ARE GOING TO TAKE OVER AND PUSH THEM IN THE DIRECTION THAT THEY WOULD OTHERWISE GO IN, IF NOT TREATED.

LET ME ASK YOU A QUESTION, AND IN THAT REGARD, IF THE LEGISLATURE MADE A DETERMINATION THAT SOMEONE INVOLVED IN A CRIME BECAUSE OF DRUG USE HAD, COULD THEY PASS A SIMILAR STATUTE, CIVIL INNATE, TO PROVIDE MANDATORY TREATMENT UPON A CERTAIN CRITERIA FOR SOMEONE INVOLVED IN DRUGS OR MAYBE CHREPT MANIA? OR -- CLEPTOMANI A OR PERSISTENT DOMESTIC VIOLENCE ? COULD THIS BE EXTENDED TO ANYTHING BEYOND DANGEROUS SEXUAL --

I THINK THE STANDARDS FOR WHAT A LEGISLATURE CAN DO, WE DON'T EXPECT THE LEGISLATURE TO CONDUCT EVIDENTIARY HEARINGS, WHEN PASSING ITS LEGISLATION, TO DECIDE WHAT THE EVIDENCE SHOWS AS TO WHAT ULTIMATELY CAN OR CANNOT BE DONE, THE LEGISLATURE CANNOT BE HELD TO THAT TYPE OF A STANDARD. CONSTITUTIONALLY, THE LEGISLATURE HAS TO BE ABLE TO FREE SPECULATE AS TO WHETHER SOMETHING IS RATIONAL. I THINK THAT IS THE APPROPRIATE STANDARD, AND FOR DUE PROCESS PURPOSES, AS TO WHETHER THE GOALS, THE PURPOSE IS LEGITIMATE AND WHETHER THERE IS A SUFFICIENT NEXUS TO THE REMEDY. AND PERHAPS WITH SOME TYPES OF OTHER OFFENSES, IT MIGHT BE PLAUSIBLE,

ESPECIALLY THOSE WHICH HAVE A VIOLENT SIDE, WHICH IS DANGEROUS TO THE PUBLIC. IF, IN FACT, THOSE FORMS OF DANGER CAN BE CONNECTED TO MENTAL HEALTH CONDITIONS, MORE SPECIFICALLY ON YOUR EXAMPLE, IT MIGHT BE, I THINK IT MIGHT BE MORE DIFFICULT, YES, AS TO NOT ALL DRUG, CERTAINLY NOT ALL DRUG USERS ARE MENTALLY ILL OR WITH MENTAL ABNORMALITIES, THAT IS FREE, PURELY FREE VOLITIONAL CONDUCT ON THEIR PART, AND THERE MAY NOT BE A MENTAL HEALTH CONDITION, WHICH WOULD CERTAINLY POSE A PROBLEM, BUT FOR THOSE WHO DO HAVE MENTAL OR MEDICAL PROBLEMS THAT COULD COMMITMENT IN GENERAL HAS TWO PRONGS. YOU HAVE TO HAVE THE MENTAL HEALTH COMPONENT AND THE DANGEROUSNESS COMPONENT, SO YOU NEED A MENTAL HEALTH SIDE, AND YOU HAVE THE DANGNESS. ON THE DANGNESS SIDE, PERHAPS IN SOME CASES IF IT IS NARROWLY TAILORED, YOU MIGHT FIND SOME DRUG USERS WHO DO POSE A DANGER TO THE PUBLIC, BUT MOST LIKELY IN GENERAL, THERE ARE AN AWFUL LOT OF DRUG USERS WHO ARE NOT PARTICULARLY DANGEROUS TO OTHERS OR THEMSELVES.

YOU SAY THAT THERE IS A RATIONAL BASIS. WHY WOULD THIS NOT RACHET UP TO STRICT SCRUTINY, BECAUSE OF THE REQUIRED CONFINEMENT?

THE CASE LAW THAT IS OUT THERE SO FAR, ON MENTAL HEALTH ISSUES AND CIVIL COMMITMENT CONTEXT, HAS BEEN SPLIT. THERE ARE SOME COURTS THAT HAVE SAID RATIONAL BASIS. THERE ARE SOME THAT HAVE SAID STRICT SCRUTINY. THE UNITED STATES SUPREME COURT HAS NOT BEEN SPECIFIC, ALTHOUGH IT LEFT INTACT A STRICT SCRUTINY STANDARD THAT WENT UNCHALLENGED IN ONE PARTICULAR CADE, HOWARD VERSUS DEL. BEYOND THAT, -- VERSUS DEL BEYOND THAT I DON'T THINK IT GIVES A SIGNIFICANT DIFFERENCE THERE, BECAUSE THE COURTS ACROSS THE COUNTRY HAVE CONCLUDED THAT IT SATISFIES ANY STANDARD. YOU HAVE GOT VERY STRONG COMPELLING GOVERNMENTAL INTEREST BOTH FROM THE PERSPECTIVE OF THE REMEDIAL NATURE OF THE PROTECTION OF THE PUBLIC, WHICH HAS BEEN RECOGNIZED OVER AND OVER AGAIN, NOT JUST IN COMMITMENT CASES, BUT YOU HAVE IT IN, TO A CERTAIN EXTENT, IN PRETRIAL CRIMINAL CASES, IN BAIL QUESTIONS.

WHAT IS THE LIKELY -- COULD YOU, GOING BACK TO JUST THIS ACT AND THE TWO ASPECTS OF THE CON ARE UNCONSTITUTIONALLY VAGUE -- ---OF THE UNCONSTITUTIONALLY VAGUE CHALLENGE, WHAT IS YOUR TAKE AS TO WHAT THE JURY NEEDS TO FIND, AS FAR AS WHETHER THE PERSON IS LIKELY TO BE A DANGER TO OTHERS?

THERE ARE ABOUT A HALF A DOZEN COURTS THAT HAVE THUS FAR EXPRESSLY CHA CONCLUDED THAT LIKE, IN AND OF ITSELF, IS SUFFICIENT IN OTHER CIVIL COMMITMENT STATUTES. LIKELY MEANS PROBABLY. THAT IS WHAT THEY HAVE DECIDED.

DOES THAT MEAN MORE THAN 50%ENT?

I THINK IT MEANS MORE LIKELY THAN NOT. I THINK JURORS WOULD COMMONLY UNDERSTAND, PROBABLY, TO MEAN GREATER THAN 50 PERCENT.

DON'T WE NEED TO, THEN, BE TOLD A JURY INSTRUCTION TO EXPLAIN?

I DON'T BELIEVE SO. I THINK HALF A DOZEN COURTS HAVE ASSESSED THIS QUESTION, ESPECIALLY IN THE CONTEXT OF THE NEED FOR ADDITIONAL JURY INSTRUCTIONS UNLIKELY -- ON LIKE AND THEY HAVE ALL SAID --

YOU ARE AGREEING ON THE COMMON ACCEPTANCE OF THE TERM "LIKELY".

AND THAT IS WHAT THE JURY WOULD UNDERSTAND AND THAT IS WHAT HALF A DOZEN COURTS HAVE SAID, AND THEY HAVE SAID IT DOESN'T NEED ANY FURTHER INSTRUCTION, BECAUSE IT IS COMMONLY UNDERSTOOD.

SO IF THERE IS A 20 PERCENT CHANCE OR A 10 PERCENT CHANCE THAT A PERSON WILL COMMIT AGAIN, WILL REOFFEND, WITHOUT TREATMENT THAT IS NOT ENOUGH.

IF THAT IS ALL THAT THE TESTIMONY IS GOING TO BE, AND IT IS NOT QUALIFIED IN ANY MANNER, THAT SHOULD NOT BE ENOUGH TO SUSTAIN A COMMITMENT. MOST EXPERTS DO NOT COUCH THEIR OPINIONS SOLELY IN TERMS OF PERCENTAGES. HOWEVER, THEIR TESTIMONY IS OFTEN MORE GENERAL, JUST SAYING THIS IS A VERY DANGEROUS PERSON. THERE IS A HIGH LIKELIHOOD OF REOFFENDING, BASED ON THE MENTAL CONDITION, AND THERE ARE SOME ACTUARIAL RISK ASSESSMENT INSTRUMENTS THAT WERE INVOLVED, AS WERE USED BY THE DEFENSE IN THIS CASE. THE STATE DID NOT USE THEM IN THIS PARTICULAR CASE, BUT THOSE INSTRUMENTS DO CONVERT THEM INTO PERCENTAGES, BUT MOST EXPERTS WOULD CONVERT THEM INTO PERCENTAGES, SAYING THOSE INSTRUMENTS ARE NOT THE END ALL AND BE ALL. THEY WORK IN OPERATION WITH THE CLINICAL OPINIONIONS OF THE DOCTORS.

OF COURSE THAT IS A WHOLE OTHER ISSUE, AS TO WHETHER EXPERTS REALLY CAN MAKE AN ACCURATE PREDICTION OF FUTURE BEHAVIOR.

THEY DO IT EVERYDAY.

WHAT ABOUT THE VOLITIONAL COMPONENT? DO YOU AGREE, IS THERE, THAT THE JURY NEEDS TO FIND THAT --

NO.

NO?

NO. THIS IS, THAT IS NOT A PROPER READING OF THE HENDRICKS OPINION. IT IS CURRENTLY BEING DECIDED BY THE UNITED STATES SUPREME COURT. IT WAS NOT AT ISSUE WHETHER YOU HAVE TO HAVE TOTAL VOLITION ALIM PARENT. IF YOU REQUIRE TOTAL VOLITION ALIM PARENT, YOU ARE GOING TO OPEN THE DOORS AND THE GATES TO EVERY "BAKER" ACT THAT WE HAVE IN A CIVIL CONTEXT, BECAUSE VERY FEW OF THOSE CASES, IF ANY, ARE GOING TO INVOLVE TOTAL VOLITION ALIM PARENT. WHAT THE UNITED STATES SUPREME COURT HAS SAID IS THAT STATE LEGISLATURES SHOULD HAVE THE ABILITY TO DEFINE APPROPRIATE MENTAL HEALTH CONDITIONS WHICH CAN BE USED AS A PREDICATE FOR COMMITMENT STATUTES. THE UNITED STATES SUPREME COURT WAS NOT LOCKING THE STATES INTO ONE PARTICULAR REQUIREMENT, WHICH A TOTAL VOLITION ALIM PARENT WOULD BE. WHAT -- VOLITIONAL IMPAIRMENT WOULD BE. WHAT IS REQUIRED IS THAT A MENTAL HEALTH CONDITION WHICH PREDISPOSES THE PERSON TOWARDS SEXUALLY VIOLENT CONDUCT. THAT PREDISPOSITION ENTAILS A CERTAIN CAUSE AND EFFECT TYPE RELATIONSHIP, WHICH IS UNDOUBTEDLY GOING TO BE SUBSTANTIAL, BUT IT DOES NOT HAVE TO BE THE TOTAL IMPAIRMENT THAT CRANE WAS DISCUSSING, UNLESS THERE ARE ANY FURTHER QUESTIONS, SINCE I HAVE UTILIZED MY TIME, I WOULD THERE FOR REQUEST THAT THIS COURT UPHOLD THE FIFTH DISTRICT'S CONCLUSIONS. THANK YOU. MR. CHIEF JUSTICE: REBUTTAL?

JUDGE, INTERESTINGLY, THE STATE TAKES THE POSITION THAT, IF THE RYCE ACT IS ONLY INTENDED FOR INCAPACITATION THAT, IT MEETS DUE PROCESS STANDARDS, AND THE UNITED STATES SUPREME COURT DID AGREE WITH THAT POSITION IN HENDRICKS. THIS COURT IS IN NO WAY BOUND BY HENDRICKS. THIS COURT HAS A PROUD TRADITION GOING BACK TO TRAIL OR AND EVEN EARLIER, OF DECIDING -- TO TRAILER AND EVEN EARLIER OF DECIDING POSITIONS OF CONSTITUTIONAL POSITION. AS JUSTICE HARRIS POINTEDED OUT IN HIS COMMENTS ON THE BREWER CASE, ISN'T IT AS MUCH A GOAL OF PUNISHMENT AS OF RETRIBUTION AND DETERRENT? OF COURSE IT IS. OF COURSE IT IS. THIS IS A PREVENTATIVE DETENTION BEING USED TO AUGMENT CRIMINAL SENTENCES. I SUBMIT THAT, UNDER THE FLORIDA DOUBLE JEOPARDY AND EXPOSE FACT FACT-CASES, THAT -- EX POST FACTO CASES, THAT THIS IS NOT AS POINTED OUT. THAT IS TRUE, THAT THIS COULD BE FOREVER, UNDER THIS STATUTE, THE RESPONDENT, THE INDIVIDUAL

WHO IS SENT DOWN TO ARCADIA, HAS TO SHOW PROBABLE CAUSE THAT HE IS NO LONGER DANGEROUS TO GET OUT. THAT IS UNLIKE THE "BAKER" ACT, WHERE THE BURDEN GOES BACK ON THE STATE AFTER SIX MONTHS, VERY MUCH UNLIKE THE "BAKER" ACT.

WHERE DID YOU FIND THE MOST SIGNIFICANT DEPARTURE FROM THE ARGUMENT THAT YOU ARE MAKING, BETWEEN THE APPLICATION OF THE EXPOS FACT-DOUBLE JEOPARDY CONCEPTS, UNDER THE FLORIDA CONSTITUTION, AS COMPARED TO THE U.S. CONSTITUTION? YOU SEEM TO BE SUGGESTING THAT THOSE ARE TOTALLY DIFFERENT CONCEPTS AND THEY ARE FOREIGN. WHERE IS THE MOST SIGNIFICANT THAT YOU SEE THAT APPLIES, HERE, AS WE COULD FOLLOW A FLORIDA CONSTITUTIONAL CONCEPT, AS OPPOSED TO THE US THE ZHU?

I SUGGEST THAT THE EXPERTS IN KANSAS SHUT THEIR EYES TO THAT. I SAY THAT FLORIDA COURTS SHOULD NOT SHOT IT'SS WHICH LEAVES US WITH THE DEFINITION. WHICH LEAVES US WITH MR. POLIN ADMITS IT DOESN'T MATTER WHETHER YOU APPLY STRICT JUT SCRUTINY OR THE RAGSIZATION TEST. I SUGGEST IT DOES MATTER, BECAUSE FLORIDA PUTS THE STRICT SCRUTINY ON THE STATE TO SHOW THAT IT HAS TAILORED ITS REMEDIES TO THE NEEDS TO PROTECT ADMITTEDLY, A VALID STATE GOAL OF PROTECTING THE PUBLIC. I SUGGEST THEY CANNOT MAKE THAT SHOWING, WHERE YOU HAVE GOT PUTTING DEFENDANTS AWAY POTENTIALLY FOREVER. THEY HAVE GOT TO SHOW PROBABLE CAUSE TO THE SAME JUDGE THAT PUT THEM AWAY, TO BELIEVE THAT THEY ARE NO LONGER DANGEROUS. I WOULD RENEW THE RESPONDENT'S MOTION WHICH WE MADE BEFORE ORAL ARGUMENT, TO RELINQUISH JURISDICTION, SO WE CAN MAKE A FINDING OF JUST HOW THIS ACT IS BEING APPLIED. I SUBMIT THIS CASE IS IMPORTANT ENOUGH AND THAT ENOUGH TIME HAS PASSED SINCE THE ACT WAS PASSED. THERE ARE 300 PEOPLE BEING INCARCERATED UNDER THIS ACT. I SUBMIT THAT, ESPECIALLY IN VIEW OF SELLING VERSUS YOUNG, WHERE THE UNITED STATES SUPREME COURT SAID THERE IS NO RIGHT TO DOUBLE JEOPARDY OR EXPOSE FACTOR CHALLENGES. I SUBMIT THAT, IN VIEW OF THAT, IT IS IMPORTANT FOR THIS COURT TO GIVE JURISDICTION IN THIS CASE SO THAT WE CAN SEEIOUS HOW IT IS BEING APPLIED. WE HAVE, IN FACT, SHOWN THAT IT PUNITIVE AND THAT THE PEOPLE OF THE STATE OF FLORIDA SHOULD NOT HAVE THEIR RIGHTS CURTAILED IN THIS FASHION.

THANK YOU, COUNSEL, THANK YOU FOR YOUR ASSISTANCE IN THIS CASE.