
COURT OF APPEALS OF NEW YORK

New York *ex rel.* Harkavy v. Consilvio¹
(decided June 5, 2007)

*New York ex rel. Harkavy v. Consilvio*² gave the New York Court of Appeals its first opportunity to decide the constitutionality of Mental Hygiene Law article X.³ The Deputy Director of the New York State Mental Hygiene Law Services began a habeas corpus proceeding on behalf of ten sexual offenders, facing civil commitment, at the close of their prison terms.⁴ The New York State Legislature enacted Mental Hygiene Law article X (“article X”) to protect the constitutional rights of inmates situated similarly to those in *Consilvio*.⁵ However, the ten petitioners were initially committed pursuant to Mental Hygiene Law article IX (“article IX”).⁶ Article IX is New York’s involuntary civil commitment statute and does not make provisions for individuals serving a prison sentence.⁷

The petitioners in *Consilvio* were involuntarily committed pursuant to article IX.⁸ However, the petitioners argued section 402

¹ 870 N.E.2d 128 (N.Y. 2007).

² *Consilvio*, 870 N.E.2d at 129.

³ N.Y. MENTAL HYG. LAW art. X (McKinney 2007) (governing the civil commitment of sex offenders).

⁴ *Consilvio*, 870 N.E.2d at 130.

⁵ *Id.* at 131.

⁶ *Id.* at 129.

⁷ N.Y. MENTAL HYG. LAW § 9.27 (McKinney 2007) (governing the civil commitment of the mentally ill and those in need of involuntary care).

⁸ *Consilvio*, 870 N.E.2d at 129.

of the Correction Law⁹ should have governed their commitment proceedings.¹⁰ Furthermore, the petitioners objected to their confinement in a secure facility,¹¹ contending an adequate basis did not exist to challenge their confinement.¹² In response, the Office of Mental Health argued that initial treatment of sexual offenders should take place in secure facilities.¹³ Therefore, the Office of Mental Health concluded the petitioners were properly placed in a secure mental health facility because they were sexual offenders who posed a threat to themselves and others.¹⁴

The New York State Court of Appeals held the petitioners were improperly committed under article IX.¹⁵ In addition, the court ordered the petitioners' hearings, on remand, to be conducted pursuant to article X.¹⁶

Article X mandates a multistage process to be used to determine whether a sexual offender should be involuntarily committed.¹⁷ Pursuant to article X, an Office of Mental Health physician must screen an inmate approaching the end of a prison term.¹⁸ If the inmate is deemed to suffer from a mental illness, the determination may

⁹ N.Y. CORRECT. LAW § 402 (McKinney 2007) (governing the commitment of mentally ill prisoners).

¹⁰ *Consilvio*, 870 N.E.2d at 130. Correction Law section 402 was enacted to provide a statutory framework for the civil commitment of prisoners. *See* N.Y. CORRECT. LAW § 402 (McKinney 2007).

¹¹ *Consilvio*, 870 N.E.2d at 130.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 129.

¹⁶ *Consilvio*, 870 N.E.2d at 129.

¹⁷ *Id.* at 131.

¹⁸ *Id.* (citing N.Y. MENTAL HYG. LAW § 10.05).

lead to a review by the state Attorney General.¹⁹ If such a review is conducted upon the recommendation of the Office of Mental Health physician, a sex offender civil management petition must be filed.²⁰ Then, the inmate is entitled to a hearing and a jury trial to ascertain whether the inmate is mentally ill.²¹ If the inmate is found mentally ill, the court must decide whether the inmate requires confinement or intensive supervision.²² Dangerous sex offenders must be confined.²³

Though article X was enacted after the inmates were transferred to an Office of Mental Health hospital, the petitioners in *Consilvio* were still part of the class of inmates contemplated by the New York Legislature when article X was enacted.²⁴ Lastly, the court addressed the petitioners' confinement to a secure facility.²⁵ If, upon remand, the petitioners are determined to be dangerous sex offenders, then the statute mandates placement in secure mental health facilities.²⁶ Therefore, the court opined that an analysis into the petitioners' confinement was purely academic, because the legislature intended all dangerous sex offenders to be confined in secure facilities.²⁷

As a result, in New York, due process is not offended if a

¹⁹ *Id.* It is within the discretion of the Office of the Attorney General to review the Office of Mental Health Determination. *Id.*

²⁰ *Id.* (citing N.Y. MENTAL HYG. LAW § 10.06(b)).

²¹ *Consilvio*, 870 N.E.2d at 131 (citing N.Y. MENTAL HYG. LAW §§ 10.06(g), 10.07).

²² *Id.* (citing N.Y. MENTAL HYG. LAW § 10.07(f)).

²³ *Id.*

²⁴ *Id.* at 132 (stating “these petitioners . . . were transferred directly from correctional facilities to [a mental health facility] in November and December 2005 fall within the purview of the statutory scheme.”).

²⁵ *Consilvio*, 870 N.E.2d at 132.

²⁶ *Id.*

²⁷ *Id.*

prisoner, while serving a term of imprisonment, is involuntarily committed to a mental health facility, so long as the commitment proceedings are carried out pursuant to article X.

While many cases dealing with involuntary commitment of inmates are deeply rooted in state law, the United States Supreme Court has had, on occasion, the opportunity to determine the constitutionality of such state statutes. In *Kansas v. Hendricks*,²⁸ the Supreme Court directly examined the due process implications of an inmate's involuntary commitment. Leroy Hendricks, the petitioner, had a history of sexually molesting children.²⁹ Shortly before Hendricks was to be released from prison, Kansas enacted the Sexually Violent Predator Act,³⁰ designed to alleviate the risks violent sexual predators pose to society.³¹ The act defines a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in [the predatory] acts of sexual violence."³² The statute defined a mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such a person a menace to the health and safety of others."³³

²⁸ 521 U.S. 346 (1997). See also *Addington v. Texas*, 441 U.S. 418, 425 ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

²⁹ *Hendricks*, 521 U.S. at 350.

³⁰ KAN. STAT. ANN. §59-29a01 (1994).

³¹ *Id.*

³² *Id.* § 59-29a02(a).

³³ *Id.* § 59-29a02(b).

In light of the statute and Hendricks's long history and self-admitted propensity to molest children, Kansas moved to commit Hendricks as a sexual offender.³⁴ At his hearing, a jury found Hendricks to be a sexually violent predator.³⁵ Hendricks then appealed, arguing that the Kansas statute's application to him violated his due process rights under the Federal Constitution. Alternatively stated, Hendricks initiated an as-applied challenge to the law.³⁶ The Kansas Supreme Court held the statute violated Hendricks' due process rights because it defined mental abnormality without accord to the definition used by the United States Supreme Court.³⁷ In addition, the burden is upon the State to demonstrate that the inmate suffers from a mental abnormality and is a threat to his own safety or the safety of others.³⁸

The United States Supreme Court held that the Kansas statute did not violate Hendricks' substantive due process rights.³⁹ The Court began its analysis by stating, "The liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times . . . wholly free from restraint. There are . . . restraints to which every person is necessarily subject for the common good."⁴⁰ The Supreme Court has upheld involuntary commitment statutes so long as the confinement is "pursuant to proper

³⁴ *Hendricks*, 521 U.S. at 353-54.

³⁵ *Id.* at 355.

³⁶ *Id.* at 356. Hendricks argued that the Kansas statute violated federal constitutional clauses of Due Process, Double Jeopardy, and Ex Post Facto. However, the Supreme Court determined only his federal Due Process claim. *Id.*

³⁷ *Id.*

³⁸ *Id.* (explaining that the state must prove its burden by clear and convincing evidence).

³⁹ *Hendricks*, 521 U.S. at 350.

⁴⁰ *Id.* at 356-57 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

procedures and evidentiary standards.”⁴¹

Addressing the Kansas statute on its face, the Court found the statute clearly called for a finding of dangerousness to self or others.⁴² In addition, commitment proceedings could only be commenced if a person was found guilty of committing a violent sexual act.⁴³ Further, the person must “ ‘suffer[] from a mental abnormality or personality disorder which makes the person’ ” prone to commit acts of sexual violence.⁴⁴ The Court reasoned that the statute called for “more than a mere predisposition to violence.”⁴⁵ As a whole, the statute “require[d] evidence of past sexually violent behavior” and a mental condition that would make it extremely likely for such conduct to continue.⁴⁶

Furthermore, the Supreme Court went on to discuss Hendricks’s other key argument that mental abnormality is not the same as mental illness.⁴⁷ However, the Court has left the definitions to be used in statutes to the province of the states.⁴⁸ In addition, psychiatrists who evaluated Hendricks diagnosed him with pedophilia, a condition that has been classified “as a serious mental disorder.”⁴⁹

A finding of a propensity for violence alone does not justify

⁴¹ *Id.* at 357.

⁴² *Id.*

⁴³ *Id.* (quoting KAN. STAT. ANN. § 59-29a02(a)).

⁴⁴ *Hendricks*, 521 U.S. at 357 (quoting KAN. STAT. ANN. § 59-29a02(a)).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 358-59.

⁴⁸ *Id.* at 359.

⁴⁹ *Hendricks*, 521 U.S. at 360 (quoting 1 AMERICAN PSYCHIATRIC ASSOCIATION, TREATMENTS OF PSYCHIATRIC DISORDERS 617-33 (1989)).

an involuntary commitment.⁵⁰ The Supreme Court has upheld involuntary commitment statutes when the statute couples proof of dangerousness with a proof of a mental abnormality or mental illness.⁵¹ The Court has stated that such statutory limitations serve to encompass “those who suffer from a volitional impairment.”⁵² The statute therefore encompasses people who cannot control their own violent propensities. The Kansas statute adheres to the precepts set forth by the Supreme Court because the statute requires “a finding of future dangerousness” supported by a finding of a lack of volitional control.⁵³ Therefore, the Court held the Kansas statute did not violate Hendricks’s substantive due process rights because it coupled his inability to control his behavior and likelihood of future dangerousness.⁵⁴

However, it is important to consider whether statutes such as the one enacted by Kansas violate the Ex Post Facto provision of the United States Constitution.⁵⁵ A statute violates the Ex Post Facto Clause if it imposes more punishment on a person than his crime originally did.⁵⁶ The majority held the Kansas statute was not puni-

⁵⁰ *Id.* at 358.

⁵¹ *Id.* See also *O’Connor v. Donaldson*, 422 U.S. 563, 573-76 (1975) (“[A] State cannot constitutionally confine . . . a nondangerous [sic] individual who is capable of surviving safely in freedom by himself . . .”)

⁵² *Hendricks*, 521 U.S. at 358.

⁵³ *Id.* (citing KAN STAT. ANN. § 59-29a02(b)).

⁵⁴ *Id.* at 360. See also *Kansas v. Crane*, 534 U.S. 407, 411-12 (2002) (dealing again with Kansas’ Sexually Violent Predator Act and holding “*Hendricks* set forth no requirement of *total* or *complete* lack of control [M]ost severely ill people—even those commonly termed ‘psychopaths’—retain some ability to control their behavior.”).

⁵⁵ U.S. CONST. art. I, § 9, cl. 3 states: “No Bill of Attainder or ex post facto Law shall be passed.”

⁵⁶ See, e.g., *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“[T]o fall within the *ex post facto* prohibition, two critical elements must be present: first, the law must be retrospective . . .

tive in nature and did not violate the Ex Post Facto provision of the United States Constitution.⁵⁷ Nonetheless, Justice Stephen Breyer dissented, arguing a civil commitment carried out in a secure setting is tantamount to being imprisoned and thus violates the Ex Post Facto provision of the United States Constitution.⁵⁸ Furthermore, the statute only applies to individuals who have committed sexual offenses in the past.⁵⁹ However, these similarities do not elevate the statute to one that is punitive in nature.⁶⁰

Justice Breyer articulated five important reasons why the statute in Kansas was punitive in nature.⁶¹ First, treatment of the sexual offender was not a primary objective of the Kansas statute.⁶² Second, the Kansas statute applies to sexual offenders who have almost completed their prison sentence.⁶³ Third, the statute did not provide for less restrictive methods of treatment.⁶⁴ Fourth, many states that have enacted similar statutes dealing with sexual offenders do not postpone the treatment until after the prisoner has been released.⁶⁵ In addition, the few states that do wait until the end of the prisoner's term provide less restrictive methods for treatment, such as halfway house programs and non-confinement supervision programs.⁶⁶ Finally, Kansas argued its statute met the constitutional requirements set forth

and second, it must disadvantage the offender affected by it.") (internal quotations omitted).

⁵⁷ *Hendricks*, 521 U.S. at 361.

⁵⁸ *Id.* at 379 (Breyer, J., dissenting).

⁵⁹ *Id.* at 380.

⁶⁰ *Id.*

⁶¹ *Id.* at 383 (Breyer, J., dissenting).

⁶² *Hendricks*, 521 U.S. at 383 (Breyer, J., dissenting).

⁶³ *Id.* at 385.

⁶⁴ *Id.* at 387.

⁶⁵ *Id.* at 388.

⁶⁶ *Id.* at 388-89.

in *United States v. Salerno*.⁶⁷ However, Justice Breyer distinguished the principles set forth in *Salerno* as inapplicable, by design, to the issues related to the Ex Post Facto Clause.⁶⁸

Despite these concerns, it seems that the United States Supreme Court is not quick to strike down statutes such as the one enacted by Kansas. Five years after its decision in *Hendricks*, the Supreme Court qualified its holding. In *Kansas v. Crane*,⁶⁹ the Court held that in civil commitment of sexual offenders, the constitution requires courts make a lack-of-control determination to comport with requirements of substantive due process.⁷⁰

Petitioner Michael Crane was facing civil commitment pursuant to Kansas' Sexually Violent Predator Act.⁷¹ Crane was previously convicted of sex crimes and deemed to suffer from exhibitionism and antisocial personality disorder.⁷² Crane was committed after a jury trial but the Kansas Supreme Court overturned his commitment.⁷³ Relying on *Hendricks*, the Kansas Supreme Court stated that the United States Constitution required a "finding that the defendant must not be able to 'control his dangerous behavior' even if problems of 'emotional capacity' and not 'volitional capacity' prove the

⁶⁷ *Hendricks*, 521 U.S. at 394; *United States v. Salerno*, 481 U.S. 739, 741 (1987) (holding that detention of a dangerous person for the purposes of preventing future harm is constitutional).

⁶⁸ *Hendricks*, 521 U.S. at 394 (Breyer, J., dissenting).

⁶⁹ 534 U.S. 407 (2002).

⁷⁰ *Crane*, 534 U.S. at 412 (disagreeing with Kansas' position that commitment of "dangerous sexual offender[s] considered in *Hendricks* without any lack-of-control determination" is nevertheless constitutional).

⁷¹ *Id.* at 410-11.

⁷² *Id.* at 411.

⁷³ *Id.*

‘source of bad behavior’ warranting commitment.”⁷⁴ The State of Kansas, in its argument to the United States Supreme Court, stated the Supreme Court of Kansas interpreted the decision in *Hendricks* very narrowly.⁷⁵

The United States Supreme Court agreed with the State of Kansas that *Hendricks* did not create a requirement for absolute lack of control.⁷⁶ Rather, the standard to be taken from that case was the standard of “*difficult*, if not impossible.”⁷⁷ However, the Supreme Court quickly moved to assert that the Constitution does not allow for the commitment of sexual offenders “without any lack-of-control determination.”⁷⁸ In other words, the Constitution prohibits civil commitment based solely on an emotional abnormality. The Court acknowledged that ascertaining a lack-of-control could not be done with exact precision.⁷⁹ However, the Court requires that there is proof of extreme difficulty in restraining behavior.⁸⁰ In addition, the Court also recognized that *Hendricks* would now provide “a less precise constitutional standard” than would be provided by a bright line rule.⁸¹ However, the Court eloquently stated “the Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules.”⁸² The Court reasoned it was best to allow the states latitude to determine

⁷⁴ *Id.* (quoting *In re Crane*, 7 P.3d 285, 290 (Kan. 2000)).

⁷⁵ *Crane*, 534 U.S. at 411.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 412.

⁷⁹ *Id.* at 413.

⁸⁰ *Crane*, 534 U.S. at 413.

⁸¹ *Id.*

⁸² *Id.*

which mental illnesses would make an individual eligible for commitment.⁸³ Furthermore, psychiatry is an advancing science that informs the decisions of the court.⁸⁴ The Court's stated goal was "to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach."⁸⁵

Similarly, the promulgation of article X and its subsequent approval by the New York Court of Appeals now provides an intricate statutory framework designed to protect the procedural and substantive due process rights of prisoners facing commitment prior to their release. However, prior to the enactment of article X, New York courts did not have clear guidance when facing an issue similar to that in *Consilvio*. The Court of Appeals dealt with the issue of involuntary commitments as related to inmates in another case, *New York ex rel. Harkavy v. Consilvio*⁸⁶ ("*Consilvio II*") which induced the legislature to take action.

In *Consilvio II*, twelve petitioners challenged their involuntary commitment pursuant to Mental Hygiene Law section 9.27 as uncon-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Crane*, 534 U.S. at 414.

Hendricks must be read in context. The Court did not draw a clear distinction between the purely "emotional" sexually related mental abnormality and the "volitional." Here, as in other areas of psychiatry, there may be "considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control behavior."

Id. at 415 (quoting AMERICAN PSYCHIATRIC ASSOC. STATEMENT ON INSANITY DEFENSE, (140 AM. J. PSYCHIATRY 681, 685 (1983))).

⁸⁶ *New York ex rel. Harkavy v. Consilvio (Consilvio II)*, 859 N.E.2d 508 (N.Y. 2006).

stitutional.⁸⁷ Specifically, the petitioners argued that their rights under the due process clause of the New York State Constitution were violated.⁸⁸ The Court of Appeals held that “in the absence of specific statutory authority governing the release of felony offenders from prison to a psychiatric hospital . . . the procedures set forth in Correction Law § 402, rather than Mental Hygiene Law article 9, better suit[s] this situation.”⁸⁹ The court reasoned that, at the time all the necessary examinations and paperwork were completed, the defendants were still inmates, despite only a “few hours or days” remaining in the completion of the petitioners’ sentences.⁹⁰ Therefore, the correction law was the appropriate statutory framework to be used.

The twelve petitioners in *Consilvio II* were nearing the completion of their prison terms for felony sex offenses.⁹¹ During this time, two physicians from the Office of Mental Health examined them for consideration of involuntary commitment.⁹² The physicians concluded that if the petitioners did not receive appropriate psychiatric care they would likely repeat sexual offenses.⁹³ Subsequently, pursuant to Mental Hygiene Law section 9.27,⁹⁴ petitioners’ applications for involuntary commitment were completed and, at the expiration of each petitioner’s prison term, they were transferred to the

⁸⁷ *Id.* at 509.

⁸⁸ N.Y. CONST. art. I, § 6 (stating that “[n]o person shall be deprived of life, liberty or property without due process of law.”).

⁸⁹ *Consilvio II*, 859 N.E.2d at 509 (referencing N.Y. CORRECT. LAW § 402 (McKinney 2007) (governing the commitment of mentally ill prisoners to psychiatric facilities)).

⁹⁰ *Consilvio II*, 859 N.E.2d at 511.

⁹¹ *Id.* at 509.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ N.Y. MENTAL HYG. LAW § 9.27 (governing the civil commitment of the mentally ill and those in need of involuntary care).

Manhattan Psychiatric Center.⁹⁵ Upon arrival at the Manhattan Psychiatric Center, a physician evaluated each petitioner and deemed involuntary commitment to be necessary.⁹⁶

Thereafter, the Mental Hygiene Legal Service commenced a habeas corpus proceeding for the immediate release of the defendants.⁹⁷ The petitioners were still serving the remainder of their prison sentences when the process of their involuntary commitment was commenced.⁹⁸ Therefore, the petitioners argued that their involuntary commitment should have been conducted pursuant to Correction Law section 402, which outlines the procedures for committing mentally ill prisoners to psychiatric facilities.⁹⁹ In addition, the petitioners contended, a prison superintendent cannot commence an involuntary commitment proceeding.¹⁰⁰

In contrast, the State of New York argued that, due to each petitioners' impending release, they were not actually serving a prison sentence.¹⁰¹ Therefore, the petitioners were no longer within the purview of the Corrections Law.

The court began its analysis by asserting the petitioners were imprisoned at the time of their involuntary commitment.¹⁰² Therefore, the procedures set forth in Correction Law section 402 were

⁹⁵ *Consilvio II*, 859 N.E.2d at 509.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Consilvio II*, 859 N.E.2d at 509.

¹⁰¹ *Id.*

¹⁰² *Id.* at 511.

controlling.¹⁰³ The court relied on the legislative intent behind Correction Law section 402 to support its assertion.¹⁰⁴ The New York State Legislature has provided that Correction Law section 402 applies to inmates “undergoing a sentence of imprisonment.”¹⁰⁵ The legislature intended that prisoners, despite a possible impending release, be committed pursuant to Correction Law section 402.¹⁰⁶

Furthermore, the procedures outlined in both Mental Hygiene Law section 9.27 and Correction Law section 402 are markedly different. The procedures in Mental Hygiene Law section 9.27 do not require inmates’ psychiatric evaluation to be performed by court-appointed physicians; it does not “provide for pre-transfer notice to the inmate and others,” nor “[an] opportunity for a pre-transfer hearing.”¹⁰⁷ Therefore, the Court held, in order to protect the substantive due process rights of inmates, all future determinations of involuntary commitment have to be made pursuant to Correction Law section 402.¹⁰⁸

When compared to the United States Supreme Court’s statutory interpretations in *Hendricks* and *Crane*, for the reasons discussed below, article X may be able to withstand a constitutional challenge. According to *Hendricks*, due process requires the person facing an involuntary commitment be a threat to himself or to others.¹⁰⁹ New

¹⁰³ *Id.* (“Because all the preliminary paperwork and examinations were completed during the sentence the Correction Law should have been followed.”).

¹⁰⁴ *Id.*

¹⁰⁵ *Consilvio II*, 859 N.E.2d at 511.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Hendricks*, 521 U.S. at 357.

York State Mental Hygiene Law section 10.03(e) defines a “dangerous sex offender” as one who is likely to be a danger to others.¹¹⁰ Further, *Hendricks* requires a person must suffer from a mental abnormality or personality disorder that makes the person prone to committing acts of sexual violence.¹¹¹ In the same section of the Mental Hygiene Law, section 10.03(e), a “dangerous sex offender” is a person who is “suffering from a mental abnormality involving such a strong predisposition to commit sex offenses.”¹¹²

These two statutory provisions appear to pass the *Hendricks* test—dangerousness with proof of a mental abnormality or mental illness.¹¹³ Moving to *Crane* and taking the *Hendricks* decision one step further; the person in question must suffer some form of volitional impairment.¹¹⁴ Because of the Mental Hygiene Law definition of dangerous sex offenders, the statutory provisions outlined in Mental Hygiene Law section 10.03 appear to satisfy the substantive due process requirements established by the Supreme Court in cases dealing with the involuntary commitment of inmates.

However, the *Hendricks* Court warned that civil commitment statutes that are criminal in nature are unconstitutional.¹¹⁵ Civil statutes that are criminal in nature are those that seek to achieve the ends

¹¹⁰ N.Y. MENTAL HYG. LAW § 10.03(e) states:

“Dangerous sex offender requiring confinement” means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.

¹¹¹ *Hendricks*, 521 U.S. at 357.

¹¹² N.Y. MENTAL HYG. LAW § 10.03(e).

¹¹³ *Hendricks*, 521 U.S. at 358.

¹¹⁴ *Crane*, 534 U.S. at 412.

¹¹⁵ *Hendricks*, 521 U.S. at 361.

of deterrence, rehabilitation, and retribution.¹¹⁶ Notably, article X has its roots in the corrections law.¹¹⁷ Arguably, it can be said that article X is simply civil in name and therefore it may stand on constitutionally shaky ground because it violates the Ex Post Facto provision of the United States Constitution.¹¹⁸

One of the statute's potential pitfalls, because it is specifically designed to deal with sexual offenders and enhance their substantive process protections, is the possibility of a remaining incarcerated population that is not afforded the same protections, thus opening the door to an equal protection challenge.¹¹⁹

Furthermore, the New York State Constitution affords the same protections to its citizens.¹²⁰ Pursuant to Mental Hygiene Law section 9.27, a person can be involuntarily committed without the possibility of notice to the person's friends or close family members,

¹¹⁶ *Id.* at 362.

¹¹⁷ *Consilvio II*, 859 N.E.2d at 508.

¹¹⁸ U.S. CONST. art. I, § 9, cl. 3. In *Hendricks* Justice Breyer articulated five reasons a civil statute may be punitive in nature. See *supra* notes 62-68 and accompanying text. Three of the factors can be applied to article X. First, article X applies only to sexual offenders who have almost completed their sentence. Second, article X does not provide for less restrictive methods of treatment. Third, article X waits until the completion of the prisoner's sentence to begin treatment. Therefore, article X may be viewed as imposing a greater punishment upon individuals convicted of dangerous sexual offenses. In addition, article X applies retroactively and places a potential inmate, convicted of a violent sexual offense, at a disadvantage. As a result, that could subject article X to scrutiny under the Ex Post Facto provision of the United States Constitution. See *Miller*, 482 U.S. at 430.

¹¹⁹ U.S. CONST. amend. XIV states, in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

See also *Foucha v. Louisiana*, 504 U.S. 71, 85-86 (1992). In *Foucha*, a dichotomy existed between the continued confinement of prisoners and insanity acquittees. Under Louisiana law a prisoner's continued confinement could not be justified on dangerousness alone. However, an insanity acquittee could be indefinitely confined if found to be dangerous. The Court held that such a distinction violated the Equal Protection Clause of the United States Constitution. *Id.*

¹²⁰ N.Y. CONST. art. I, § XI states:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

or the Mental Hygiene Legal Services. Furthermore, courts do not have to appoint physicians to review the mental health status of such a person. However, under both New York State Correction Law section 402 and Mental Hygiene Law section 10.01, such persons are afforded the opportunity of court review prior to their commitment to a state facility. Furthermore, those committed pursuant to these statutes are afforded notice prior to their proceedings taking place. In addition, once an inmate's prison term has been completed, he or she can petition for release on an annual basis. However, Mental Hygiene Law section 9.27 makes no provision allowing a person committed pursuant to that statute to petition for release on an annual basis.

Nonetheless, article X is an indication that the legislature and judiciary of the State of New York are serious about protecting the due process rights of sexual offenders. Despite its arguable shortcomings, article X, for the foreseeable future, will withstand a constitutional attack.

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