

## CASE NOTE:

# *KANSAS V. CRANE: ITS EFFECTS ON STATE V. EHRlich AND ARIZONA'S SEXUALLY VIOLENT PERSONS STATUTE*

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### I. INTRODUCTION

Since 1992, several states have enacted legislation that allows for the involuntary civil commitment of sex offenders.<sup>1</sup> These sexually violent persons statutes have been held to be constitutional by the United States Supreme Court so long as a jury finds beyond a reasonable doubt that: (1) the individual previously convicted of a sexual offense suffers from a mental disability or personality disorder, and (2) the mental disability or personality disorder makes it likely that the individual will commit sexually violent acts in the future.<sup>2</sup>

However, until recently, courts have grappled with the issue of whether the Constitution requires a finding that the sexually violent person's mental disorder renders him dangerous beyond his control. In *State v. Ehrlich*,<sup>3</sup> the Arizona Supreme Court addressed this issue of involuntariness. The Arizona

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1. See, e.g., ARIZ. REV. STAT. §§ 36-3701 to 36-3707 (Supp. 2000); CAL. WELF. & INST. CODE §§ 6600-6609.3 (Supp. 1999); COLO. REV. STAT. §§ 16-13-201 to -216 (Supp. 2000); KAN. STAT. ANN. §§ 59-29a01 to -29a15 (1999); MASS. GEN. LAWS ch. 123A, §§ 1-8 (Supp. 2001); MINN. STAT. § 253B.02 (West 1998); MO. REV. STAT. §§ 632.480-513 (2000); NEB. REV. STAT. §§ 29-2922 to -2936 (1995); N.J. STAT. ANN. §§ 2C:47-1 to -10 (West Supp. 2000); OR. REV. STAT. §§ 426.521-680 (1999); TENN. CODE ANN. §§ 33-6-301 to -306 (Vernon Supp. 1999); UTAH CODE ANN. §§ 77-16-1 to -5 (Supp. 1999); VA. CODE ANN. §§ 19.2-300 to -311 (Michie 2000); WASH. REV. CODE § 71.09.020 (2000); WIS. STAT. §§ 980.01-.06 (1999).

2. See *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997).

3. 26 P.3d 481 (Ariz. 2001), *rev'g In re Leon G.*, 18 P.3d 169 (Ariz. Ct. App. 2001).

Supreme Court's holding adopted the majority view<sup>4</sup> that the Constitution does not require a finding of involuntariness. The subsequent holding of the United States Supreme Court in *Kansas v. Crane*<sup>5</sup> articulates a new constitutional requirement for sexually violent persons statutes and indirectly calls into question the holding rendered by the Arizona Supreme Court in *State v. Ehrlich*.

## II. ARIZONA COURTS ADDRESS THE INVOLUNTARINESS ISSUE

### A. Arizona's Sexually Violent Persons Act

The Arizona legislature passed the Sexually Violent Predator Act in 1995.<sup>6</sup> This act was originally found in title 13 of Arizona Revised Statutes, the criminal code;<sup>7</sup> it was amended during the 1998 legislative session, renamed the Sexually Violent Persons Act, and transferred to title 36, chapter 37, article 1, which deals with mental health.<sup>8</sup> The Sexually Violent Persons Act allows the State, through involuntary civil commitment, to confine persons who have been found guilty of violent sexual acts, or who have been charged with such crimes but were deemed incompetent to stand trial for them, if those individuals suffer from a "mental disorder" that makes them "likely to engage in acts of sexual violence" in the future.<sup>9</sup>

Before a potential sexually violent person (SVP) is released from incarceration, the attorney general or county attorney may petition the court for a determination that probable cause exists to believe that the person is an SVP.<sup>10</sup> If a court issues such an order, the SVP is detained in a secure facility.<sup>11</sup> The SVP may request a hearing on the probable cause determination and, if that determination is affirmed, may request a jury trial.<sup>12</sup> Although the Arizona Rules of Civil Procedure and Evidence apply to the proceedings,<sup>13</sup> the Act provides procedural safeguards

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4. See, e.g., *People v. Grant*, No. A092910, 2002 Cal. App. LEXIS 431 (Cal. Ct. App. Jan. 15, 2002); *People v. Varner*, 759 N.E.2d 560 (Ill. 2001); *In re W. T.*, 773 A.2d 97 (N.J. Super. 2001).

5. No. 00-957, 2002 U.S. LEXIS 493 (Jan. 22, 2002).

6. See ARIZ. REV. STAT. §§ 13-4501 to -4509 (Supp. 1995).

7. See *id.*

8. See Sexually Violent Persons Act, ch. 136, secs. 4, 5, § 36-3701, 1998 Ariz. Sess. Laws §14.

9. ARIZ. REV. STAT. § 36-3701(7)(b) (Supp. 2000). See also *Martin v. Reinstein*, 987 P.2d 779, 785 (Ariz. Ct. App. 1999).

10. See ARIZ. REV. STAT. §§ 36-3704 to -3705 (Supp. 2000).

11. See *id.* § 36-3705(B).

12. See *id.* §§ 36-3705(B)-(C), -3706.

13. See *id.* § 36-3707.

closely paralleling those that apply in criminal cases.<sup>14</sup> The State must prove its case beyond a reasonable doubt.<sup>15</sup>

If the accused is determined to be an SVP, the court may either (1) commit the SVP to the custody of the Department of Health Services<sup>16</sup> or (2) “[o]rder that the person be released to a less restrictive alternative.”<sup>17</sup> SVPs under the care of the Department of Health Services must receive treatment for their mental disorders.<sup>18</sup> They must be examined at least annually to determine whether their mental disorder has sufficiently improved to the point that they no longer pose a danger to the public, and SVPs may petition annually for a change of status.<sup>19</sup> At each review, the State bears the burden of showing, beyond a reasonable doubt, that continued commitment is necessary.<sup>20</sup>

### B. Leon G.

In 1982, Leon G. pled guilty to five counts of child molestation and one count of sexual abuse.<sup>21</sup> He was sentenced to twelve years for each of the molestation counts and two years for the sexual abuse count.<sup>22</sup> The first three sentences for child molestation and the sexual abuse charge were to be served concurrently.<sup>23</sup> The other two sentences for child molestation were also to be served concurrently but consecutive to the first three counts of child molestation.<sup>24</sup>

Prior to his release, the State screened Leon G. to determine if he was an SVP.<sup>25</sup> The psychologist found that he suffered from paraphilia,<sup>26</sup> which made it likely that he would engage in acts of sexual violence in the future.<sup>27</sup> The Yuma County Attorney petitioned the court to detain Leon G. as an SVP.<sup>28</sup> The court found probable cause, detained him, and appointed counsel.<sup>29</sup> A jury found beyond

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14. For example, an accused SVP is entitled to appropriate notices and hearings, a probable cause determination, appointed counsel, and a jury trial. *See id.* §§ 36-3704 to -3707.

15. *See id.* § 36-3707(A).

16. *See id.* § 36-3707(B)(1).

17. *Id.* § 36-3707(B)(2).

18. *See id.* § 36-3708.

19. *See id.* §§ 36-3709(B), -3714(B).

20. *See id.* § 36-3714(C).

21. *See In re Leon G.*, 18 P.3d 169, 171 (Ariz. Ct. App. 2001), *rev'd sub nom.* State v. Ehrlich, 26 P.3d 481 (Ariz. 2001).

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. Paraphilia is generally defined as “perverted sexual behavior.” MERRIAN WEBSTER’S MEDICAL DESK DICTIONARY (2001), available at LEXIS, Reference, Medical File.

27. *See In re Leon G.*, 18 P.3d at 171.

28. *See id.*

29. *See id.*

a reasonable doubt that Leon G. was an SVP.<sup>30</sup> The court ordered his civil commitment to the Arizona State Hospital.<sup>31</sup> Leon G. appealed.<sup>32</sup>

*C. The Arizona Court of Appeals Holds that a Finding of Involuntariness is Constitutionally Required*

The Court of Appeals of Arizona, Division One, appointed counsel for Leon G.<sup>33</sup> Appointed appellate counsel filed an *Anders* brief<sup>34</sup> stating that after a search of the record he found no grounds for an appeal.<sup>35</sup> The court of appeals, although noting that *Anders* only applied to criminal cases, stated that it would follow “*Anders*-like” procedures in the handling of Leon G.’s appeal because his civil commitment implicated the fundamental right to be free from physical restraint and because the court traditionally reviewed involuntary mental commitments.<sup>36</sup>

Although Leon G.’s appellate brief did not raise the issue, the court of appeals examined the constitutionality of Arizona’s SVP statute.<sup>37</sup> The court held that the statute was unconstitutional.<sup>38</sup> In so holding, the court of appeals reversed *Martin v. Reinstein*,<sup>39</sup> which held that the SVP statute was constitutional. In *Martin*, the court grounded its decision in the United States Supreme Court case *Kansas v. Hendricks*,<sup>40</sup> which upheld the constitutionality of Kansas’ SVP statute.<sup>41</sup> However, a subsequent Kansas Supreme Court case, *In re Crane*,<sup>42</sup>

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. In *Anders*, the United States Supreme Court addressed the duty of a court-appointed counsel to prosecute a first appeal when the attorney has conscientiously determined that there is not merit to the indigent’s appeal. *See Anders v. California*, 386 U.S. 738 (1967). The Court held that if counsel concludes that the case is wholly without merit, counsel may request permission to withdraw. *See id.* at 743–44. However, that request must be accompanied by a brief referring to anything in the record that might be argued in support of the appeal, and a copy of the brief should be furnished to the indigent defendant to permit him or her to raise any points he or she chooses. *See id.* The court is then required to make a full examination of the proceedings to determine whether the case is wholly frivolous. *See id.* If the court finds the case is not frivolous, the court must provide the indigent with counsel to argue the appeal. *See id.* at 744.

35. *See In re Leon G.*, 18 P.3d at 171–72.

36. *See id.* Other jurisdictions also follow an *Anders*-like procedure in civil commitment cases. *See, e.g., Pullen v. State*, No. SC00-1482, 2001 WL 1044808 (Fla. Sept. 13, 2001); *In re McQueen*, 495 N.E.2d 128 (Ill. App. Ct. 1986); *In re E.M.*, No. 03-96-00703-CV, 1997 WL 217186 (Tex. App. May 1, 1997); *Jeffrey M. v. Milwaukee County*, 520 N.W.2d 112 (Wis. Ct. App. 1994).

37. *See State v. Ehrlich*, 26 P.3d 481, 484 (Ariz. 2001), *rev’g In re Leon G.*, 18 P.3d 169 (Ariz. Ct. App. 2001).

38. *See In re Leon G.*, 18 P.3d at 175.

39. 987 P.2d 779 (Ariz. Ct. App. 1999).

40. 521 U.S. 346 (1997).

41. *See id.*

interpreted *Hendricks* to hold that a finding of volitional impairment is required to civilly commit an individual under a sexual predator law.<sup>43</sup> The court of appeals then reasoned that the Kansas Supreme Court's interpretation of *Hendricks* was correct and that Arizona's SVP statute was unconstitutional because it did not require that a person committed under the SVP law be suffering from a volitional impairment.<sup>44</sup>

The court of appeals and the Kansas Supreme Court supported their position with the language of the *Hendricks* decision. In *Hendricks*, the United States Supreme Court noted that states have in certain narrow circumstances provided for the forcible civil detainment of people who are "unable to control their behavior" and who thereby pose a danger to the public health and safety.<sup>45</sup> The Court then stated that it had upheld civil commitment statutes that limited civil confinement to those "who suffer from a volitional impairment rendering them dangerous beyond their control."<sup>46</sup> The Court held that the Kansas SVP statute was similar to this and hence constitutional because it required a finding of future dangerousness caused by the existence of a mental abnormality or personality disorder that "makes it difficult, if not impossible, for that person to control his dangerous behavior."<sup>47</sup> Indeed, the *Hendricks* decision references voluntariness in a number of locations.<sup>48</sup>

#### *D. Arizona Supreme Court Reverses the Court of Appeals*

The Arizona Supreme Court reversed the court of appeals' decision.<sup>49</sup> The court first held that an *Anders*-type review was inappropriate in this case because an *Anders* review arises through the Sixth Amendment right to counsel in criminal cases, and because this case was a civil commitment, *Anders* procedures did not apply.<sup>50</sup> The court then noted that it could decline to address the constitutionality of the SVP statute because Leon G.'s appeal did not raise the issue.<sup>51</sup> However, the court stated that there was an exception that allowed the court to resolve issues not properly before it if the issue involved a question of

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42. 7 P.3d 285 (Kan. 2000).

43. *See id.* "Volitional impairment" was defined by the Kansas Supreme Court as an inability to control ones behavior. *See In re Crane*, 7 P.3d at 289-90 (citing *Hendricks*, 521 U.S. at 357-58).

44. *See In re Leon G.*, 18 P.3d 169, 173-74 (Ariz. Ct. App. 2001), *rev'd sub nom.* *State v. Ehrlich*, 26 P.3d 481 (Ariz. 2001).

45. *Hendricks*, 521 U.S. at 357.

46. *Id.* at 356.

47. *Id.*

48. *See, e.g., id.* at 357, 358, 360, 362, 364.

49. *See State v. Ehrlich*, 26 P.3d 481, 490 (Ariz. 2001), *rev'g In re Leon G.*, 18 P.3d 169 (Ariz. Ct. App. 2001).

50. *See id.* at 483.

51. *See id.* at 484.

great public importance or if it might recur. This case fell within this exception.<sup>52</sup> The court held that the court of appeals had misread *Hendricks* and that the Arizona SVP statute did satisfy the demands of substantive due process.<sup>53</sup> The court found that *Hendricks* required: (1) the confinement to take place pursuant to proper procedures and evidentiary standards; (2) the commitment to be restricted to a limited subclass of dangerous persons; and (3) the dangerousness finding must be coupled with a finding of an additional factor such as mental illness or mental abnormality.<sup>54</sup> The court stated that substantive due process and the United States Supreme Court decision in *Hendricks* did not require a finding of volitional impairment.<sup>55</sup>

The court reasoned that understanding *Hendricks* in such a manner allowed it to read that decision consistent with several of the United States Supreme Court's earlier decisions.<sup>56</sup> Moreover, if *Hendricks* were to require a finding of voluntariness, then most other states' SVP statutes would be unconstitutional.<sup>57</sup> The court noted that *Hendricks* itself states that the Constitution does not require any specific language.<sup>58</sup> Additionally, limiting the class of persons who could be committed under the SVP statute to only those who were not in control of their actions would not enable the State to commit certain classes of dangerous persons.<sup>59</sup> For example, a person who suffers from hallucinations, and therefore believes that others are trying to harm him, may react in a sexually violent way to that belief. That person could choose another, less dangerous, response to his perceived reality.<sup>60</sup> He is rendered dangerous, not by an impairment of will, but by a mental disorder that renders him unable to perceive accurately the reality to which he willfully responds.<sup>61</sup>

The court then held that Arizona's SVP statute does comply with substantive due process because it only applies to persons who have been "convicted of or found guilty but insane of a sexually violent offense or...charged with a sexually violent offense and...determined incompetent to stand trial" and who have "a mental disorder<sup>62</sup> that makes it highly probable that the person will engage in acts of sexual violence."<sup>63</sup>

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52. See *id.* (citing *Schwab v. Matley*, 793 P.2d 1088, 1089 n.2 (Ariz. 1990); *Fraternal Order of Police Lodge 2 v. Phoenix Employee Relations Bd.*, 650 P.2d 428, 429 (Ariz. 1982)).

53. See *id.* at 484.

54. See *id.* at 484-485.

55. See *id.*

56. See *id.* at 485.

57. See *id.*

58. See *id.*

59. See *id.* at 487.

60. See *id.*

61. See *id.*

62. A mental disorder is defined as "a paraphilia, personality disorder or conduct disorder or any combination [of those] that predisposes a person to commit sexual acts to

Vice-Chief Justice Jones and Justices Feldman<sup>64</sup> and Martone concurred with the decision of the court.<sup>65</sup> Justice Zlaket dissented.<sup>66</sup>

### III. KANSAS V. CRANE

The United States Supreme Court in *Kansas v. Crane*<sup>67</sup> held that where the individual that the state is seeking to detain civilly as a sexually violent person is suffering from a “volitional impairment,” such as pedophilia, substantive due process requires “proof of serious difficulty in controlling behavior.”<sup>68</sup> The Court stated that the Constitution neither permits commitment of a sexually violent person suffering from a volitional impairment “without *any* lack-of-control determination”<sup>69</sup> nor does it require a finding of a “*total or complete* lack of control.”<sup>70</sup> The Court expressly reserved the issue of what the Constitution requires to civilly confine an individual suffering from an “emotional” impairment.<sup>71</sup>

This decision by the Court expressly rejects the approach used by the Arizona Supreme Court in *Ehrlich*. and imposes an additional requirement upon states seeking to civilly confine sexually violent persons suffering from volitional impairments. Under the Court’s holdings in *Hendricks* and *Crane*, a jury in a SVP commitment case must find beyond a reasonable doubt that: (1) the individual previously convicted of a sexual offense suffers from a mental disability or personality disorder, and (2) the mental disability or personality disorder makes it likely that the individual will commit sexually violent acts in the future,<sup>72</sup> and (3)

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such a degree as to render the person a danger to the health and safety of others.” ARIZ. REV. STAT. § 36-3701 (Supp. 2000).

63. *Id.* § 36-3701.7. *See also Ehrlich*, 26 P.3d at 488–89.

64. Justice Feldman concurred with the court’s analysis and decision with regards to the issue of whether Arizona’s SVP statute violates substantive due process on its face. *See Ehrlich.*, 26 P.3d at 490 (Feldman, J., concurring). However, he may have foreshadowed future constitutional challenges to the SVP statute when he wrote that he believed the United States Constitution would allow an as-applied challenge to an SVP statute if it were supported by sufficient factual findings. *See id.* In the alternative, he stated that he believed that it could be challenged on state constitutional grounds. *See id.* Justice Feldman stated that the legislative history of this statute and Arizona’s poor history of treating the mentally ill raises doubts as to the States’ motive and its ability to treat those found to be sexually violent. *See id.* Moreover, if the State were in fact incarcerating rather than treating the mentally ill, then this statute would violate substantive due process. *See id.*

65. *See id.* at 481.

66. *See id.*

67. No. 00-957, 2002 U.S. LEXIS 493 (Jan. 22, 2002).

68. *Id.* at \*11–\*14.

69. *Id.* at \*9.

70. *Id.* at \*10.

71. *See id.* at \*16.

72. *See Kansas v. Hendricks*, 521 U.S. 346, 357–358 (1997).

if the individual suffers from a volitional impairment, there must be a finding that this individual has serious difficulty controlling his behavior.<sup>73</sup>

Justice Thomas joined Justice Scalia in dissenting from the opinion of the Court.<sup>74</sup> Justice Scalia argues that a judge would have a difficult time articulating to a jury what it means to have a serious inability to control ones behavior.<sup>75</sup> Justice Scalia states that this new standard “gives trial courts, in future cases under the many commitment statutes similar to Kansas’s SVPA, *not a clue* as to how they are to charge a jury!”<sup>76</sup>

The Court expressly left open the question of whether an individual who suffers from an emotional impairment could be civilly confined as a SVP. This was one of the reasons the Arizona Supreme Court used in *Ehrlich* to support its holding that a finding of involuntariness was not constitutionally required.<sup>77</sup> Thus, it remains to be seen whether, and under what circumstances, “[t]he man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances,” can be confined as a sexually violent person.<sup>78</sup>

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73. See *Crane*, 2002 U.S. LEXIS 493, at \*11.

74. See *id.* at \*16; Justice Thomas was the author of the majority opinion in *Kansas v. Hendricks*. See *Hendricks*, 521 U.S. at 346.

75. See *Crane*, 2002 U.S. LEXIS 493, at \*29–\*30.

76. *Id.* at \*29.

77. See *State v. Ehrlich*, 26 P.3d 481, 486–87 (Ariz. 2001), *rev'g In re Leon G.*, 18 P.3d 169 (Ariz. Ct. App. 2001).

78. *Crane*, 2002 U.S. LEXIS 493, at \*28 (Scalia, J., dissenting).