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Cross-Appeal

Mark and Tammy, who were given leave to intervene in the juvenile proceedings as Meridian's maternal grandparents, have filed a cross-appeal in which they contend that the juvenile court erred in not placing Meridian with Jeffrey and Karen. However, any interest or right which Mark and Tammy may have had by virtue of their biological relationship to Meridian ceased to exist when the parental rights of their daughter, Tiffani, were terminated.[35] Accordingly, they lack standing to cross-appeal.

CONCLUSION

For the foregoing reasons, we conclude that the intervenors-appellants and cross-appellants lack standing, and we therefore dismiss the appeal and the cross-appeal.

Appeal dismissed.

Wright, J., not participating.

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[35] See, *In re Interest of Destiny S., supra* note 12; *In re Interest of Kayle C. & Kylee C., supra* note 12; *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982).

In re Interest of A.M., Jr., alleged to be a dangerous sex offender.
A.M., Jr., appellant, v. Mental Health Board of the 11th Judicial District, appellee.

797 N.W.2d 233

Filed May 13, 2011. No. S-10-320.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. **Judgments: Appeal and Error.** In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional presents a question of law, which the Nebraska Supreme Court resolves independently of the lower court's determination.
4. **Due Process.** Due process requires a neutral, or unbiased, adjudicatory decisionmaker.

5. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
6. **Administrative Law: Recusal: Presumptions: Proof.** A party seeking to disqualify an adjudicator because of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.
7. **Administrative Law.** Factors that may indicate partiality or bias of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.
8. **Administrative Law: Recusal: Presumptions.** An adjudicator should not hear a case when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
9. **Administrative Law: Due Process.** Although due process requires disqualification when the administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue.
10. **Statutes: Legislature: Intent.** In construing a statute, a court determines and gives effect to the legislative intent behind the enactment.
11. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
12. **Constitutional Law: Equal Protection.** The Nebraska and federal Equal Protection Clauses grant the same level of protection. Both require the State to treat similarly situated people alike.
13. **Constitutional Law: Statutes.** The 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.
14. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
15. **Statutes: Special Legislation.** A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
16. **Constitutional Law: Statutes: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
17. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.
18. **Constitutional Law: Special Legislation.** The general test of constitutionality for prohibitions against special legislation is reasonableness of classification and uniformity of operation.
19. ____: ____. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears

some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.

20. **Constitutional Law.** Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.
21. ____. The separation of powers clause prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.
22. **Administrative Law.** Administrative agencies are capable of exercising quasi-judicial functions.
23. **Criminal Law: Statutes: Legislature.** The prohibition against bills of attainder prohibits trials by the Legislature, and it forbids the imposition of punishment by the Legislature on specific persons.
24. **Criminal Law: Statutes: Words and Phrases.** A bill of attainder is a legislative act that applies to named individuals or to easily ascertained members of a group in a way that inflicts punishment on them without a judicial trial.
25. **Criminal Law: Statutes.** To constitute a bill of attainder, the law must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.
26. **Constitutional Law: Statutes: Proof.** Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder.
27. **Constitutional Law.** The protection against ex post facto laws is the same under the Nebraska and federal Constitutions.
28. **Constitutional Law: Criminal Law: Statutes.** Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.
29. **Constitutional Law: Criminal Law: Other Acts: Time.** It is only criminal punishment that the Ex Post Facto Clause prohibits. The retroactive application of civil disabilities and sanctions is permitted.
30. **Sentences: Statutes: Intent.** To determine whether a statute imposes criminal punishment or civil sanctions, a court applies the two-pronged intent-effects test.
31. **Convicted Sex Offender: Legislature: Intent.** The Legislature enacted the Sex Offender Registration Act to establish a civil regulatory scheme to protect the public from sex offenders.
32. **Convicted Sex Offender: Statutes: Sentences.** The Sex Offender Commitment Act does not constitute ex post facto legislation because it is not punitive in nature.
33. **Constitutional Law: Double Jeopardy.** The protections of the Double Jeopardy Clauses of the state and federal Constitutions are coextensive.
34. **Statutes: Double Jeopardy.** If a statute is not punitive, it does not violate the Double Jeopardy Clause.
35. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

36. **Ordinances: Appeal and Error.** When evaluating an ordinance for vagueness, an appellate court does not seek mathematical certainty, but, rather, flexibility and reasonable breadth.
37. **Statutes.** A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.
38. **Constitutional Law: Statutes.** The void-for-vagueness doctrine applies to civil as well as criminal statutes.
39. **Sentences: Prior Convictions.** A court cannot use a void conviction to enhance punishment for a later offense.
40. **Convicted Sex Offender: Sentences.** Commitment under Nebraska's Sex Offender Commitment Act is a civil restraint that does not enhance punishment.
41. **Prior Convictions: Collateral Attack.** A defendant cannot collaterally attack his or her conviction in a separate proceeding for errors stemming from *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).
42. **Due Process: Trial: Confessions.** It is a violation of the Due Process Clause to use a defendant's involuntary statement against him or her at a criminal trial.
43. **Constitutional Law: Miranda Rights.** The Fifth Amendment precludes the use of compelled testimony and goes further by requiring *Miranda* warnings for some custodial interrogations.
44. **Convicted Sex Offender: Mental Health: Evidence.** Under Neb. Rev. Stat. § 71-955 (Reissue 2009), a mental health board in a proceeding under the Sex Offender Commitment Act cannot consider any evidence that would be inadmissible in a criminal proceeding.
45. **Criminal Law: Trial: Confessions: Expert Witnesses.** In a criminal trial, the prosecution cannot use for *any* purpose a defendant's involuntary statements or any evidence that is directly or indirectly derived from them. This includes an expert's opinion based on them.
46. **Criminal Law: Prior Convictions: Confessions: Evidence.** Even after conviction, if a person in prison or on probation is compelled to make incriminating statements, those statements are inadmissible in a later criminal proceeding for any crime other than the crime for which the person has been convicted.
47. **Self-Incrimination: Time.** In most contexts, the privilege against self-incrimination is not self-executing. A person must timely invoke it, or it will be lost.
48. **Presentence Reports.** Routine presentence interviews, even if the defendant is in custody, are not normally considered coercive interrogations.
49. **Constitutional Law: Self-Incrimination: Probation and Parole.** The State cannot constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege.
50. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
51. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
52. **Rules of Evidence: Mental Health.** Mental health boards must apply the rules of evidence.

53. **Rules of Evidence: Expert Witnesses.** Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2008), permits experts to base their opinions on facts that are not admissible into evidence if experts in their field reasonably rely on such facts.
54. **Convicted Sex Offender: Due Process.** Because a hearing under the Sex Offender Commitment Act may result in a serious deprivation of the defendant's interest in liberty, the State's evidence must be sufficiently reliable to comply with due process.
55. **Convicted Sex Offender: Due Process: Hearsay: Presentence Reports.** Because hearsay can permeate the evidence used to commit a sex offender, a victim's hearsay statements in police reports or presentence reports must have special indicia of reliability to satisfy due process.
56. **Constitutional Law: Convicted Sex Offender: Trial: Witnesses.** Neb. Rev. Stat. § 71-954 (Reissue 2009) gives defendants subject to the Sex Offender Commitment Act the same right to confront and cross-examine witnesses as the state and federal Constitutions.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Reversed and remanded for further proceedings.

Derek L. Mitchell, Dawson County Public Defender, for appellant.

Jon Bruning, Attorney General, and Stephanie Zeeb Caldwell for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In the early 1990's, a jury found A.M. guilty of first degree sexual assault and the court sentenced him to prison. In 2008, shortly before his expected release, the State filed a petition under the Sex Offender Commitment Act (SOCA)[1] to have him declared a dangerous sex offender and committed to inpatient care. The Mental Health Board of the 11th Judicial District (Board) found by clear and convincing evidence that A.M. was a dangerous sex offender. It further found that neither voluntary hospitalization nor other treatment alternatives would prevent A.M. from reoffending. A.M. appealed to the district

[1] Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009).

court, asserting a litany of constitutional and evidentiary errors. The district court rejected A.M.'s claims and found that there was clear and convincing evidence to have A.M. committed. A.M. appeals.

I. BACKGROUND

A.M. was convicted of first degree sexual assault in late 1993 or early 1994. The jury found that A.M. was over the age of 19 and had sex with a 15-year-old girl, violating Neb. Rev. Stat. § 28-319 (Reissue 1989). The court sentenced him to 10 to 30 years' imprisonment.

Shortly before A.M.'s release date of September 10, 2008, the State filed a petition with the Board. The State sought a hearing to determine whether A.M. was a dangerous sex offender and whether he should be placed in the custody of the Department of Health and Human Services (DHHS).

1. Preliminary Motions

The parties filed several prehearing procedural motions. The State sought access to the inmate file that the Department of Correctional Services kept on A.M. It claimed that the file was necessary because one of the State's experts, a private psychologist, would need it to form an opinion regarding A.M. The court granted the motion. A.M. objected to the motion and moved for rehearing. After rehearing, the court affirmed its order granting the motion. It concluded that the file "may contain the only recorded evidence of [A.M.'s] recent conduct, which evidence is germane to a determination of whether the subject is a dangerous sex offender."

Before the hearings began, A.M. moved in limine to exclude evidence. A.M. sought to exclude any "statements, depositions, or any other documents, evidence etc." coming from a 1992 conviction that was later vacated. The Board overruled this motion.

A.M. also objected to the makeup of the Board. A.M. moved to have the Board members recuse themselves for various reasons. A.M. moved to have one Board member, Mark Jones, M.D., recuse himself because Jones was a member of a medical practice group that had previously treated A.M. A.M. was unhappy with his treatment and was considering a lawsuit

against Jones. Jones recused himself. The Board assigned an alternate member to complete the panel.

2. The Evidence at the Board's Hearing

The State's experts performed a psychological evaluation to determine if A.M. was a dangerous sex offender. A.M. refused to participate or be interviewed for the evaluation, so the psychologists based their findings on records of A.M.'s conviction and behavior in prison. The psychologists' report states that this is an accepted practice among mental health professionals.

The report noted that while A.M. did initially accept some general mental health treatment while in prison, he refused to participate in a program designed specifically for sex offenders. The report also stated, however, that A.M. had received some sex offender treatment ordered as a condition of probation for an earlier sexual assault that A.M. had committed before the one that sent him to prison. A.M. was dismissed from that program in April 1993 for noncompliance with treatment goals, dishonesty, and failure to complete assignments.

In addition to his 1993 conviction for first degree sexual assault, A.M. apparently also had a 1992 conviction for third degree sexual assault, although a court later vacated this conviction. This vacated conviction is a flashpoint in this appeal. Despite irregularities in the plea process, the county court sentenced A.M. to probation. During court-ordered treatment, A.M. allegedly admitted to sex offenses for which he was never charged. During the sex offender treatment, A.M. repeatedly minimized his actions. A polygraph also indicated that A.M. was likely not complying with the terms of his probation. The State's psychologists relied on these facts from the vacated conviction in forming their opinions regarding A.M., which they memorialized in their report and testified to at the commitment hearing. A.M. objected to the State's experts' reliance on these facts in their report and testimony. The Board admitted the report into evidence and allowed the experts to base their opinions on these facts.

The State called three experts to testify at the hearing. The first was Alan Levinson, Psy.D. He stated that he had based his opinion on facts that he had gathered from witnesses'

statements and the presentence investigation. He stated that these were documents that mental health professionals would consult in forming their opinions. He went further, however, and mentioned facts contained in these sources, such as the number of victims and their gender. Levinson apparently assigned importance to these facts: While he stated that A.M. met the statutory criteria for a dangerous sex offender, he conceded that if the underlying facts were not true, A.M. "cannot be diagnosed with pedophilia."

Mark Weilage, Ph.D., another of the State's experts, testified that he relied on mental health records, institutional records, and the presentence investigation. He testified that mental health experts normally rely on such documents in forming their opinions. Weilage testified that it was his opinion that A.M. was a dangerous sex offender.

The State's third expert was Mary Paine, Ph.D. Paine testified that in forming her opinion, she reviewed A.M.'s prison files, offense reports, mental health records, and the presentence investigation. Paine testified in detail about the earlier incidents and treatment, including facts from the vacated conviction. At places, it appears as if Paine was reading directly from her sources. Paine opined that A.M. met the criteria to be a dangerous sex offender and that inpatient treatment would be necessary. But she conceded that her opinion was contingent on the underlying facts being true.

A.M. made countless objections to the admission of the underlying facts. The State argued that it was not offering the statements for substantive purposes, but, rather, so that the Board could see how the experts arrived at their opinions. The Board allowed the testimony.

The State's psychologists ultimately concluded that A.M. met the statutory definition of a dangerous sex offender. The psychologists stated that A.M. had a "mental health diagnosis of Pedophilia, Sexually attracted to females, nonexclusive type." This diagnosis, the psychologists claimed, would increase his likelihood of engaging in repeat acts of sexual violence. Also factoring into the psychologists' opinions were that A.M. repeatedly minimized his actions, lacked empathy for his victims, and refused to take responsibility for his actions. The

psychologists concluded that A.M. would be unlikely to benefit from attending any type of sex offender treatment.

Unlike the State's experts, A.M.'s expert, Bruce D. Gutnik, M.D., a registered psychiatrist, interviewed A.M. Gutnik stated that if the information on which the psychologists based their opinions were indeed true, then A.M. would meet the definition of a dangerous sex offender. If, however, A.M. was truthful in his statements to Gutnik, there would be no clinical diagnosis of pedophilia. Ultimately, Gutnik was ambivalent. He stated, "I must leave it to the court to determine which historical information is accurate and therefore, whether or not [A.M.] meets the criteria of [§] 83-174.01 as a dangerous sex offender."

3. The Board's Decision

The Board found that the State proved by clear and convincing evidence that A.M. is a dangerous sex offender within the meaning of Neb. Rev. Stat. § 83-174.01(1)(a) (Reissue 2008). Namely, the Board found that A.M. suffered from a mental illness, pedophilia, that makes him likely to engage in repeat acts of sexual violence and unable to control his criminal behavior. The Board found that inpatient treatment was necessary. The Board ordered that A.M. be committed to the custody of DHHS.

4. District Court's Decision

A.M. appealed to the district court. The court affirmed the Board's decision. The court rejected A.M.'s claims that the following statutes are unconstitutional because they are bills of attainder and ex post facto laws: Neb. Rev. Stat. §§ 29-4014 (Reissue 2008), 71-916 (Reissue 2009), 71-1202 (Reissue 2009), and 83-174 (Reissue 2008). The court also found that the laws did not violate the special legislation or the equal protection clauses. Finally, the court found that the laws did not violate the separation of powers doctrine.

(a) Disposition of Procedural Issues

The district court ruled on several procedural issues. It found that the release of the inmate file was not improper. The court

found A.M.'s claim that the Board is biased because its members are trained by DHHS "is rank speculation" and without merit. The court rejected an argument that because Sherry Warner, the Dawson County District Court clerk, sat on the Board, the Board was partial and biased. Further, the court found that Warner was a "layperson" within the meaning of the statute because she was not a member of one of the listed professions in Neb. Rev. Stat. § 71-915 (Reissue 2009). The court also found that the chairperson of the Board had the authority to name an alternate member to replace Jones, who had been recused because he had previously treated A.M.

(b) Disposition of Evidentiary Issues

The court concluded that none of A.M.'s evidentiary assignments of error were meritorious. It also found that no law required the exclusion of statements that A.M. made during his probation, even if the probation was ordered as punishment for a conviction that was later vacated. The court ruled that experts could rely on the statements and other evidence uncovered during A.M.'s probation, even if the evidence would not be otherwise admissible. The court noted that Nebraska evidence law allows experts to rely on evidence that is otherwise inadmissible in forming their opinions. It stated that all that is required is that the evidence be of a type that experts typically rely on when forming opinions. The court concluded that this requirement was satisfied. Finally, the court found that the evidence was clear and convincing that A.M. was a dangerous sex offender and that involuntary commitment was the only means available that would suffice to prevent further harm to the public.

II. ASSIGNMENTS OF ERROR

A.M. assigns, restated and renumbered, that the district court erred in failing to determine the following:

(1) The makeup of the Board was improper, which deprived A.M. of an impartial adjudicator and thus violated due process.

(2) Sections 29-4014 and 71-1202 violate the Equal Protection Clauses of the state and federal Constitutions.

(3) Sections 29-4014 and 71-1202 violate the prohibition against special laws in article III, § 18, of the state Constitution.

(4) Sections 29-4014 and 71-1202 violate the separation of powers doctrine of the state Constitution.

(5) Sections 29-4014 and 71-1202 violate the prohibitions against ex post facto laws, bills of attainder, and double jeopardy found in the state and federal Constitutions.

(6) Section 83-174.01 is unconstitutionally vague.

(7) The Board's determination that A.M. was a dangerous sex offender was unsupported by clear and convincing evidence because the determination was based upon inadmissible evidence.

(8) The State's argument that A.M. is an untreated sex offender unconstitutionally shifted the burden of proof from the State to A.M.

(9) A.M. was denied his First Amendment and due process rights when a psychologist was allowed to testify regarding A.M.'s inmate file.

III. STANDARD OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record.[2] In reviewing a district court's judgment, we will affirm unless we find, as a matter of law, that clear and convincing evidence does not support the judgment.[3]

[3] Whether a statute is constitutional presents a question of law, which we resolve independently of the lower court's determination.[4]

IV. ANALYSIS

1. Due Process

A.M. first argues that the Board was improperly constituted. We have grouped these arguments under the umbrella of due process. A.M. focuses on three points. First, he argues that

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[2] *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009).

[3] *Id.*

[4] See *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009).

§ 71-916 deprives him of due process because it provides that mental health boards will be trained by DHHS, which is the agency that maintains custody of sex offenders. Second, A.M. attacks the participation of Warner, the district court clerk. A.M. claims that she is not a "layperson" within the meaning of § 71-915. He also claims that she is biased because, as district court clerk, she may have come across documents in A.M.'s earlier cases and thus had prior knowledge of the circumstances. Finally, A.M. argues that the Board was not constituted in accordance with the statutes.

(a) Alleged Bias of the Board

A.M. argues that because the Board acted in a quasi-judicial fashion, the judiciary, and not DHHS, should train board members. He contends that DHHS' training of board members renders them biased against defendants. Section 71-916 provides that DHHS "shall provide appropriate training to members and alternate members of each mental health board and shall consult with consumer and family advocacy groups in the development and presentation of such training." DHHS is also required to provide the boards with blank forms for warrants, certificates, and other documents that the boards need to carry out their duties.[5]

[4-8] We have stated that due process requires a neutral, or unbiased, adjudicatory decisionmaker.[6] Such decisionmakers serve with a presumption of honesty and integrity.[7] A party seeking to disqualify an adjudicator because of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.[8] Factors that may indicate partiality or bias of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect

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[5] § 71-916.

[6] See *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010).

[7] See, *id.*; *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

[8] See *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

relationship.[9] An adjudicator should not hear a case when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.[10]

A.M. does not allege, much less prove, any facts that show bias. He does not allege that any Board member had a pecuniary interest in the outcome. Nor does he allege that any board member who heard the matter had a familial or adversarial relationship. And finally, he points to no specific training procedure that is prejudicial to his right to an impartial adjudicator.

It is A.M.'s burden to show bias. His baseless speculation as to collusion between DHHS and the Board members because DHHS trains the Board members fails to satisfy this burden. A.M. has failed to show that § 71-916 deprived him of his right to an unbiased adjudicator.

(b) Warner's Participation

A.M. also argues that Board member Warner, the district court clerk, is biased because she handled documents relating to A.M.'s convictions. He also claims that she is not a lay-person within the meaning of § 71-915(2).

(i) Exposure to A.M.'s Records Does Not Disqualify Warner as an Adjudicator

[9] A.M. argues that Warner had personal knowledge of the facts because she worked as the district court clerk when A.M. was the defendant in two criminal cases and that thus, she is not impartial. The same bias principles discussed above govern whether the Board was so biased as to deprive A.M. of due process, and we need not repeat them. However, more on point, we stated in *Central Platte NRD v. State of Wyoming*,[11] "Although due process requires disqualification when the

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[9] See *Murray, supra* note 6.

[10] See *Urwiller, supra* note 8.

[11] *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 466, 513 N.W.2d 847, 865 (1994).

administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue."

These criminal cases occurred in the early 1990's. Obviously, court clerks deal with hundreds if not thousands of cases a year. To claim that Warner would remember the details of any case almost 20 years later seems farfetched. But even if she did, under *Central Platte NRD*, it does not matter. Unless A.M. can show that Warner had actually prejudged the issues—a claim he does not make—her mere exposure to the facts of the case does not disqualify her as an impartial decisionmaker.

(ii) Warner Qualified as a Layperson

A.M. also argues that Warner, as the district court clerk, was not a "layperson" within the meaning of § 71-915(2). Section 71-915(2) states in part:

> Each mental health board shall consist of an attorney licensed to practice law in this state and any two of the following but not more than one from each category: A physician, a psychologist, a psychiatric social worker, a psychiatric nurse, a clinical social worker, or a layperson with a demonstrated interest in mental health and substance dependency issues.

[10,11] In construing a statute, we determine and give effect to the legislative intent behind the enactment.[12] And absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[13]

Webster's dictionary defines "layman" as "one of the laity; one who is not a clergyman or who is not a member of a specified profession, as of law, medicine, etc."[14] The professions specified by § 71-915(2) are a lawyer, a physician, a psychologist, a psychiatric social worker, a psychiatric nurse, and a clinical social worker. A.M. has not argued that Warner

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[12] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[13] *Id.*

[14] Webster's Encyclopedic Unabridged Dictionary of the English Language 813 (1994).

falls into one of these categories. Because a "layman" is one "who is not a member of a specified profession," it follows that Warner is a layperson.

(c) The Board Has Authority to Appoint an Alternate Member

A.M.'s final due process argument is that the Board chairperson lacked the authority to assign an alternate to sit on the Board after Jones was recused. A.M. argues that the statute, § 71-915(1), requires the presiding district court judge to appoint a replacement board member.

Section 71-915(1) states that the "presiding judge in each district court judicial district shall create at least one . . . mental health board[] in such district and shall appoint sufficient members and alternate members to such boards."

Section 71-915(3) states that a board "shall have the power to issue subpoenas, to administer oaths, and to do any act necessary and proper for the board to carry out its duties. No mental health board hearing shall be conducted unless three members or alternate members are present and able to vote."

Here, Jones recused himself because he had previously treated A.M. for a cardiac condition and A.M. apparently was considering a lawsuit against Jones. Although the replacement member was not originally assigned to this Board, she had previously been appointed as an alternate.

The Board has the power "to do any act necessary and proper for the board to carry out its duties." Further, the Board must have three members.[15] Assigning a previously appointed alternate member to serve so that the Board has the required three members is certainly an act "necessary and proper" for the Board to carry out its duties.

In sum, A.M.'s due process arguments have no merit.

2. Equal Protection

[12] A.M. next challenges §§ 29-4014 and 71-1202 under the Equal Protection Clauses of the state and federal Constitutions. The Nebraska and federal Equal Protection Clauses grant the

[15] § 71-915.

same level of protection. Both require the State to treat similarly situated people alike.[16]

Section 29-4014 is a statute under the Sex Offender Registration Act (SORA).[17] It requires that certain inmates undergo sex offender counseling while incarcerated. The inmates may refuse without being punished, but if they do refuse, they must undergo an evaluation before their release.

Section 71-1202 states the purpose of SOCA. Under SOCA, if a person is determined to be a dangerous sex offender, he or she may be involuntarily committed.

[13] The two statutes in question were enacted in 2006. A.M.'s argument is that the two statutes treat people differently based upon whether they were released from prison before or after the effective date of the statute. The U.S. Supreme Court, however, has said that "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."[18] A.M.'s equal protection argument has no merit.

3. Special Legislation

A.M. also argues that §§ 29-4014 and 71-1202 constitute "special laws" that violate Neb. Const. art. III, § 18. A.M.'s special legislation argument is the same as his equal protection argument: Treating people who are still incarcerated on the effective date of the statute differently than those who were previously released is unconstitutional. We disagree.

[14,15] "The burden of establishing the unconstitutionality of a statute is on the one attacking its validity."[19] "'The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors"

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[16] See *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[17] See Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2008 & Cum. Supp. 2010).

[18] *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505, 31 S. Ct. 490, 55 L. Ed. 561 (1911).

[19] *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 850, 620 N.W.2d 339, 344 (2000).

to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.'"[20]

[16-19] When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.[21] The analysis of a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a "substantial difference of circumstances" to suggest the expediency of diverse legislation.[22] The general test of constitutionality for prohibitions against special legislation is reasonableness of classification and uniformity of operation.[23] And classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.[24] The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.[25]

The fact that § 29-4014 operates only on inmates still incarcerated on the operative date of the statute does not render it unconstitutional under the special legislation clause. The purpose of § 29-4014 and the rest of SORA is to protect the public from sex offenders.[26] Section § 29-4014 advances this

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[20] *Yant v. City of Grand Island*, 279 Neb. 935, 940, 784 N.W.2d 101, 106 (2010), quoting *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008). See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

[21] *Hug, supra note* 20.

[22] *Id*. at 826, 749 N.W.2d at 890.

[23] See *Bergan Mercy Health Sys., supra* note 19.

[24] *Id.*

[25] *Id.*

[26] *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

purpose by requiring incarcerated sex offenders to undergo counseling. Those who were already released from custody before the operative date would be difficult, if not impossible, to treat. After release, such inmates could have left Nebraska. Such inmates would no longer be subject to Nebraska law. Those who were still in custody, however, can be ordered to treatment. Thus, there is a "substantial difference of circumstances" between those who are still in prison and those who are not. Finally, A.M. does not argue that this statute creates a closed class.

A.M.'s challenge to § 71-1202 also fails because SOCA does not limit its application to those who are still imprisoned on its effective date; SOCA applies to anyone alleged to be a dangerous sex offender, regardless of whether they are still incarcerated. In other words, the statute does not make the classification that A.M. claims it does. Nor does the statute create a closed class. His argument that § 71-1202 violates the special legislation clause of the Nebraska Constitution fails.

4. Separation of Powers

A.M. argues that §§ 29-4014 and 71-1202 violate the separation of powers principle found in the state Constitution by "encroaching upon powers belonging to the judicial branch of government."[27] Although his argument is difficult to follow, A.M. seems to argue that the statutes impose judicial functions on the executive branch.

[20,21] Nebraska's separation of powers clause[28] prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[29] Additionally, it prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.[30]

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[27] Brief for appellant at 18.

[28] Neb. Const. art. II, § 1.

[29] *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 738 N.W.2d 850 (2007); *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

[30] *In re Petition of Nebraska Community Corr. Council, supra* note 29.

[22] We have, however, long held that administrative agencies are capable of exercising quasi-judicial functions.[31] We previously addressed a challenge that an act of the Legislature unconstitutionally delegated judicial power to the tax commissioner.[32] In rejecting that challenge, we stated that the conferral of quasi-judicial duties upon state agencies does not conflict with the constitutional provisions relating to the judiciary. We noted that this is "particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts."[33] In *Hadden v. Aitken*,[34] we reached a similar result and used almost identical language. Further, the Legislature bases the Administrative Procedure Act upon this very notion. A.M.'s argument that administrative agencies cannot exercise quasi-judicial powers has no merit.

5. Bills of Attainder

A.M. next argues that the challenged statutes are impermissible bills of attainder.

[23-26] The prohibition against bills of attainder "prohibits trials by a legislature, and it forbids the imposition of punishment by the legislature on specific persons."[35] A bill of attainder is a legislative act that applies to named individuals or to easily ascertained members of a group in a way that inflicts punishment on them without a judicial trial.[36] It is "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by

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[31] See, *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967); *Hadden v. Aitken*, 156 Neb. 215, 55 N.W.2d 620 (1952), *overruled on other grounds, Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972).

[32] *Anderson, supra* note 31.

[33] *Id.* at 403, 155 N.W.2d at 329.

[34] *Hadden, supra* note 31.

[35] *State v. Palmer*, 257 Neb. 702, 717, 600 N.W.2d 756, 770 (1999).

[36] See, *id.* See, also, *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

legislature."[37] The prohibition on bills of attainder proscribes legislation that singles out disfavored persons and carries out summary punishment for past conduct.[38] To constitute a bill of attainder, the law must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.[39] Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder.[40]

Neither of the challenged statutes constitutes a bill of attainder because the Legislature has not determined guilt, it has merely imposed burdens on those whom the judicial branch has already found guilty.[41] Section 29-4014 limits its application to "[a]ny person convicted of a crime requiring registration as a sex offender," and § 71-1202 states that SOCA's purpose "is to provide for the court-ordered treatment of sex offenders *who have completed their sentences*." Obviously, for sex offenders to have been sentenced, it is necessary for them to have first been convicted by a court. In sum, because the Legislature is not the branch determining guilt, these statutes do not constitute bills of attainder.

6. Ex Post Facto

[27] A.M. next challenges §§ 29-4014 and 71-1202 under the Ex Post Facto Clauses of the state and federal Constitutions. But like many other constitutional provisions, the protections offered by each are ordinarily the same.[42] Thus, only one analysis is necessary.[43] Further, we note that

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[37] *United States v. Brown*, 381 U.S. 437, 442, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

[38] *Brown, supra* note 37.

[39] See, *id.*; *Galindo, supra* note 36.

[40] *Galindo, supra* note 36.

[41] See, *Wright v. Iowa Dept. of Corrections*, 747 N.W.2d 213 (Iowa 2008); *State v. Williams*, 88 Ohio St. 3d 513, 728 N.E.2d 342 (2000); *Com. v. Mountain*, 711 A.2d 473 (Pa. Super. 1998); *State v. Larson*, No. A05-40, 2006 WL 618857 (Minn. App. Mar. 14, 2006) (unpublished decision); *Montgomery v. Leffler*, No. H-08-011, 2008 WL 5147935 (Ohio App. Dec. 5, 2008) (unpublished decision).

[42] *Galindo, supra* note 36; *In re Interest of J.R., supra* note 4.

[43] See *Slansky, supra* note 26.

we have recently considered ex post facto challenges to our sex offender laws.[44]

[28] Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.[45]

[29] It is only criminal punishment, however, that the Ex Post Facto Clause prohibits. The retroactive application of civil disabilities and sanctions is permitted.[46] Thus, we must determine whether the statutes impose either civil disabilities or criminal punishment.

[30] To do so, we apply the two-pronged intent-effects test.[47] We must first "'ascertain whether the legislature meant the statute to establish "civil" proceedings.'"[48] This is a question of statutory construction.[49]

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[50]

Because we ordinarily defer to the Legislature's stated intent, only the clearest proof will suffice to override legislative intent

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[44] See, e.g., *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010); *In re Interest of J.R., supra* note 4; *Slansky, supra* note 26; *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[45] *Galindo, supra* note 36.

[46] See *In re Interest of J.R., supra* note 4.

[47] See *id.*

[48] *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), quoting *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

[49] *Hendricks, supra* note 48.

[50] *Smith, supra* note 48, 538 U.S. at 92, quoting *Hendricks, supra* note 48.

and transform what has been denominated a civil remedy into a criminal penalty.[51]

In determining whether the statutory scheme is so punitive that it transforms the statute from a civil statute to a criminal statute, we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*.[52] The factors are neither "'exhaustive nor dispositive.'"[53] They are "'useful guideposts.'"[54] The following seven factors serve as our guideposts:

> "'(1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."'"[55]

(a) § 29-4014

[31] We previously determined in *State v. Worm*[56] that the Legislature enacted SORA to establish a civil regulatory scheme to protect the public from sex offenders. We reaffirmed this legislative intent in *Slansky v. Nebraska State Patrol*.[57] In those cases, we analyzed SORA's notification and registration requirements. But § 29-4014 presents a different situation. It

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[51] See, *Smith, supra* note 48; *Hendricks, supra* note 48.

[52] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

[53] *Smith, supra* note 48, 538 U.S. at 97, quoting *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2635, 65 L. Ed. 2d 742 (1980).

[54] *Id.*, 538 U.S. at 97, quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

[55] *Worm, supra* note 44, 268 Neb. at 85, 680 N.W.2d at 161, quoting *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

[56] *Worm, supra* note 44.

[57] *Slansky, supra* note 26.

provides for treatment for inmates who are already imprisoned for certain offenses. Section 29-4014, however, does not impose any discipline for the refusal to participate. Instead, the inmate must merely undergo a civil commitment evaluation before his or her release. Although this statute is of a different flavor than registration and notification requirements, we still believe that the Legislature's intent was to establish a civil regulatory scheme for sex offenders. In other words, in enacting this statute, it was not the Legislature's intent to punish. Having determined that the Legislature did not intend § 29-4014 as punishment, we look to the seven *Kennedy* factors. Again, we note that only the clearest proof will suffice to overcome our view that the Legislature intended § 29-4014 to operate as a civil statute.

Section 29-4014 imposes no affirmative disability or restraint. While it does say that certain inmates shall attend treatment and counseling, it imposes no penalty on those who refuse to participate. Those who refuse only undergo an evaluation. Section 29-4014 itself does not prohibit any inmate or sex offender from doing anything he would otherwise be able to do.

Section 29-4014 does not further the traditional punitive justifications of retribution or deterrence. First, treatment may benefit the offender, thus undercutting any claim of its retributive nature. Second, § 29-4014 only applies to those who are already "committed to the Department of Correctional Services," i.e., in prison. Prison itself is already a significant deterrent. It is unlikely that § 29-4014 adds any additional deterrence.

There are alternative purposes for treatment other than punishment. Namely, the program is designed to treat sex offenders. And the statute is not excessive in the light of this alternative purpose; the statute is well tailored to further this purpose, and its burdens are not onerous.

We recognize that some of the *Kennedy* factors may cut in favor of § 29-4014 as being considered punishment. For example, it does not apply unless there has already been a criminal act. We conclude, however, that most of the factors weigh in favor of § 29-4014 being a civil statute. Certainly, the evidence to the contrary does not rise to the "clearest proof" standard.

We hold that § 29-4014 is not punitive and thus does not violate the Ex Post Facto Clause.

(b) § 71-1202

[32] We recently held that SOCA, in its entirety, does not constitute ex post facto legislation because it is not punitive in nature.[58] Accordingly, A.M.'s argument that § 71-1202, which is a part of SOCA, is ex post facto is without merit.

7. Double Jeopardy

[33,34] A.M. next argues that the challenged statutes violate the Double Jeopardy Clauses of the state and federal Constitutions, whose protections are coextensive.[59] But because we determined in our ex post facto analysis that neither statute is punitive, neither statute can violate the Double Jeopardy Clause.[60]

8. Vagueness of § 83-174.01

A.M. argues that § 83-174.01(1) and (2) are vague and thus unconstitutional. The challenged subsections read in their entirety:

> (1) Dangerous sex offender means (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.
>
> (2) Likely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public.

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[58] *In re Interest of J.R., supra* note 4.

[59] See *id.*

[60] *Slansky, supra note* 26.

Specifically, A.M. alleges that the term "sexual violence" in subsection (1) and the terms "serious harm" and "pose a menace" used in subsection (2) are unconstitutionally vague.

[35-38] "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[61] In brief, a statute must not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.[62] "[W]hen evaluating an ordinance for vagueness, we do not seek mathematical certainty, but, rather, flexibility and reasonable breadth. Moreover, a statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding."[63] The void-for-vagueness doctrine applies to civil as well as criminal statutes.[64]

The first phrase that A.M. argues is vague, "sexual violence," is actually part of a larger phrase that is defined in subsection (2) of the statute. We believe that the definition is adequate. Secondly, A.M. argues that "serious harm" is impermissibly vague. While it would be difficult to state precisely at what point harm becomes "serious," we do not require mathematical certainty in a statute. We require that the statute be specific enough so that it put people of ordinary intelligence on notice of what is forbidden and prohibit arbitrary enforcement. We believe that the phrase "serious harm," when considered within the larger phrase "sex offenses resulting in serious harm to others," does so sufficiently.

Finally, A.M. attacks the phrase "pose a menace." "Menace," in its noun form, means "something that threatens to cause evil,

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[61] *State v. Rung*, 278 Neb. 855, 866, 774 N.W.2d 621, 632 (2009).

[62] *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

[63] *Maxon v. City of Grand Island*, 273 Neb. 647, 654, 731 N.W.2d 882, 888 (2007).

[64] See *Agena, supra* note 62.

harm, injury, etc; a threat."[65] Again, the meaning here is clear. In stating, "to pose a menace to the health and safety of the public," the Legislature is talking about those who threaten the health and safety of the public.

Summing up A.M.'s constitutional arguments, A.M. has thrown a constitutional paintball at an appellate canvas. He missed.

9. Admissibility of Experts' Opinions

A.M. next contends that the district court erred in upholding the Board's conclusion that A.M. is a dangerous sex offender. He argues the State's experts considered evidence that violated his constitutional rights or the Nebraska Evidence Rules. Specifically, he contends that the evidence relied on by the State's experts violated his due process rights, his Fifth Amendment privilege against self-incrimination, and his right to confront witnesses under Neb. Rev. Stat. § 71-954 (Reissue 2009). He argues that the hearing was fundamentally unfair because the experts relied on unsubstantiated and untested hearsay statements made many years earlier. And he argues that the Board should not have considered, as fruit of the poisonous tree, any evidence obtained as a result of his vacated 1992 conviction.

(a) County Court's 1992 Errors Do Not Require Exclusion of A.M.'s Statements or Information Gathered in Presentence Investigation

The issue is whether a mental health board must exclude a defendant's incriminating statements made in a presentence investigation or court-ordered counseling when a court has vacated the defendant's conviction for *Boykin*[66] errors. The parties have not cited, and our research has not uncovered, any cases directly on point. But we believe that the district court reached the correct conclusion.

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[65] Webster's, *supra* note 14 at 894.

[66] *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Here, the record includes a 2003 postconviction order in which the district court vacated A.M.'s 1992 conviction in county court. The district court concluded that while A.M. had agreed with his attorney's statement of the plea agreement, the county court had failed to ensure A.M.'s plea was voluntary.

The record from the 1992 plea hearing was not made part of this record. But the district court found that A.M. had signed the county court judge's journal entry and order that recited A.M.'s plea of no contest and set his conditions for probation. It also stated that A.M. had signed an amended order reciting his conditions for probation. A.M. does not challenge these findings. The district court further determined that the Board's record showed that the State's experts had not relied upon the fact of A.M.'s 1992 conviction or the predicate facts for that conviction. It concluded that the vacation of his conviction did not require the exclusion of A.M.'s statements during treatment on probation or any information gathered during the 1992 presentence investigation. We agree.

[39-41] A court cannot use a void conviction to enhance punishment for a later offense.[67] But commitment under Nebraska's SOCA is a civil restraint that does not enhance punishment.[68] Further, the facts recited by the district court show *Boykin* errors, and we do not permit a defendant to collaterally attack his or her conviction in a separate proceeding for such errors.[69] So we do not believe that the 2003 postconviction order precluded the use of evidence that resulted from A.M.'s 1992 conviction.

However, we also do not believe that the State could use evidence obtained through official or judicial misconduct to deprive a defendant of his or her liberty at a subsequent trial.[70] This includes a state expert's opinion relying on such

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[67] See, e.g., *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

[68] See *In re Interest of J.R., supra* note 4.

[69] See *State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000).

[70] See, *Harrison v. United States*, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

evidence.[71] But this record fails to show any misconduct that would warrant applying an exclusionary rule. If A.M. had appealed from his 1992 conviction, we would have reversed his conviction for the *Boykin* errors cited by the district court. But the county court's errors did not rise to misconduct that would have tainted A.M.'s subsequent statements made during his presentence investigation or court-ordered treatment. We conclude that the 2003 district court order vacating A.M.'s 1992 conviction did not require the Board to exclude any expert opinion relying on his statements.

(b) The Board Erred in Failing to Determine Whether the State's Experts Relied on A.M.'s Compelled Statements

[42-44] Next, we consider whether the use of A.M.'s statements by the State's experts violated his due process rights or his privilege against self-incrimination under the Fifth Amendment.[72] It is a violation of the Due Process Clause to use a defendant's involuntary statement against him or her at a criminal trial.[73] The Fifth Amendment similarly precludes the use of compelled testimony and goes further by requiring *Miranda* warnings for some custodial interrogations. Thus, both the Fifth Amendment and Due Process Clause prohibit the use of a person's involuntary statements at a later criminal trial.[74] And under Neb. Rev. Stat. § 71-955 (Reissue 2009), a mental health board in a SOCA proceeding cannot

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[71] See *Harrison, supra* note 70. See, also, 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6273 (1997 & Supp. 2010).

[72] See *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

[73] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[74] See, *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), citing *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897). See, also, *New Jersey v. Portash*, 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979); 1 Wayne R. LaFave et al., Criminal Procedure § 2.10(b) (3d ed. 2007).

consider any evidence that would be inadmissible in a criminal proceeding.

[45] In a criminal trial, the prosecution cannot use for *any* purpose a defendant's involuntary statements or any evidence that is directly or indirectly derived from them.[75] This includes an expert's opinion based on them.[76] So we consider whether A.M.'s statements were compelled, which would preclude an expert's opinion based on them in a criminal trial.

[46,47] Even after conviction, if a person in prison or on probation is compelled to make incriminating statements, those statements are inadmissible in a later criminal proceeding for any crime other than the crime for which the person has been convicted.[77] But in most contexts, the privilege against self-incrimination is not self-executing. A person must timely invoke it, or it will be lost.[78] There are, however, limited exceptions. For example, under *Miranda*, custodial police interrogations are an exception because courts consider them inherently coercive.[79] An exception also exists when remaining silent is threatened by punishment or consequences significant enough to compel a person to make incriminating statements.[80]

But we do not believe that A.M. has shown coercive official conduct merely by claiming that he made incriminating statements during a presentence investigation. If a court officer interviewed A.M., such an interview would be closer to the

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[75] See, *Portash, supra* note 74; *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

[76] See, *People v Tyson*, 423 Mich. 357, 377 N.W.2d 738 (1985); *In re Commitment of Mark*, 308 Wis. 2d 191, 747 N.W.2d 727 (2008).

[77] See *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

[78] See, *id.*; *Roberts v. United States*, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980); *Garner v. United States*, 424 U.S. 648, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976); *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975).

[79] See *Murphy, supra* note 77.

[80] See, *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002); *Murphy, supra* note 77.

probation interview that the U.S. Supreme Court considered in *Minnesota v. Murphy*.[81] There, the Court distinguished a mandatory interview with a probation officer from the coercion inherent in a custodial police interrogation. And it held that *Miranda* warnings were not required. Because the defendant "revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations."[82]

The Court also rejected the defendant's argument that he was compelled to make incriminating statements by the penalty of having his probation revoked if he was untruthful. It noted that the statute requiring the defendant to answer a probation officer's questions truthfully did not condition his probation on waiving his Fifth Amendment privilege. Also, "no direct evidence [showed] that [the defendant] confessed because he feared that his probation would be revoked if he remained silent."[83] Because the defendant could not have reasonably believed that invoking the privilege would lead to revocation, his failure to invoke the privilege was not excused and his statements were voluntary.

[48] Here, we assume from the experts' opinions that A.M. made incriminating statements that were included in the presentence investigation. But the record does not contain the report or any evidence that reveals to whom A.M. allegedly made incriminating statements. Routine presentence interviews, even if the defendant is in custody, are not normally considered coercive interrogations.[84] And A.M. does not claim that any state officer threatened him with punishment if he refused to make incriminating statements. Thus, he has failed to show that his statements made in the presentence investigation were compelled.[85]

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[81] *Murphy, supra* note 77.

[82] *Id.*, 465 U.S. at 440.

[83] *Id.*, 465 U.S. at 437.

[84] See, *U.S. v. Jones*, 266 F.3d 804 (8th Cir. 2001); *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982).

[85] See, e.g., *People v. Goodner*, 7 Cal. App. 4th 1324, 9 Cal. Rptr. 2d 543 (1992).

[49] But in *Murphy*, the Court also clarified that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege."[86] A "classic penalty situation" arises "if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation."[87] In that circumstance, a probationer's "failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution."[88]

Under this reasoning, many courts have held that sex offender treatment programs that required a defendant to complete the program as a condition of probation explicitly or implicitly threatened the probationer with punishment—revocation of probation—if the probationer fails to admit to sexual conduct.[89] Thus, the offender's compelled, incriminating statements cannot be used against him in a subsequent criminal trial.[90]

We agree with these courts. If A.M. made incriminating statements under the explicit or implicit threat that the court would revoke his probation if he failed to comply with sex offender treatment, then his failure to invoke his privilege against self-incrimination would be excused. And his statements would be inadmissible against him in a criminal trial. Further, because any use of his statements in a criminal trial would violate his Fifth Amendment privilege, an expert for the State could not base an opinion on them. Section 71-955 applies these rules to a SOCA hearing. But while A.M. raised this issue, the Board failed to consider whether the experts relied on any incriminating statements that A.M. made under

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[86] *Murphy, supra* note 77, 465 U.S. at 438.

[87] *Id.*, 465 U.S. at 435.

[88] *Id.*

[89] See, *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991); *State v. Eccles*, 179 Ariz. 226, 877 P.2d 799 (1994) (en banc); *People v. Elsbach*, 934 P.2d 877 (Colo. App. 1997); *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991); *State v. Kaquatosh*, 600 N.W.2d 153 (Minn. App. 1999); *State v. Fuller*, 276 Mont. 155, 915 P.2d 809 (1996). See, also, *Gyles v. State*, 901 P.2d 1143 (Alaska App. 1995).

[90] See, *Elsbach, supra* note 89; *Fuller, supra* note 89.

the explicit or implicit threat of revocation. We therefore reverse the order of commitment and remand the cause for a determination of this issue.

[50] In addition, because the issues are likely to recur on remand, we address A.M.'s argument that the State's experts' opinions were unreliable and violated his right to confront witnesses. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[91]

(c) Reliability of Experts' Opinions

A.M. contends that the district court erred in upholding the Board's conclusion that he is a dangerous sex offender. He argues that the Board based its conclusion on expert testimony that was unreliable.

[51-53] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.[92] Mental health boards must apply the rules of evidence.[93] Neb. Evid. R. 703[94] permits experts to base their opinions on facts that are not admissible into evidence if experts in their field reasonably rely on such facts. The State's experts all testified that experts in their field generally rely on the presentence investigation, offense reports, and other sources that they consulted.

[54] Rule 703 was designed to promote efficiency.[95] It was intended to reduce the time spent to introduce into evidence a factual basis for the expert's opinion when the expert has relied upon data produced by others.[96] We recognize that other courts have held that experts who testify in mental health and sex offender commitment hearings can rely on police reports and

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[91] *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

[92] *Liberty Dev. Corp. v. Metropolitan Util. Dist. of Omaha*, 276 Neb. 23, 751 N.W.2d 608 (2008).

[93] See § 71-955.

[94] Neb. Rev. Stat. § 27-703 (Reissue 2008).

[95] 29 Wright & Gold, *supra* note 71, § 6272.

[96] *Id.*

sentencing reports.[97] But because a SOCA hearing may result in a serious deprivation of the defendant's interest in liberty, the State's evidence must be sufficiently reliable to comply with due process.[98]

[55] Obviously, an expert's opinion based on inadmissible evidence is only as reliable as the evidence on which it is based. This is because an expert who "relies on an out-of-court statement in reaching an opinion . . . has inferred that the facts asserted in it are true."[99] Further, in sex offender commitment cases, if the underlying facts of an expert's opinion are unreliable, "a significant portion of the foundation of the resulting [dangerousness] finding is suspect."[100] Other courts have concluded that because hearsay can permeate the evidence used to commit a sex offender, a victim's hearsay statements in police reports or presentence reports must have special indicia of reliability to satisfy due process.[101] We agree.

We do not attempt to set out every indicia of reliability for hearsay statements in these reports. But we agree that whether a defendant pleaded guilty or was found guilty of the crime for which the reports were created is a critical consideration for determining the reliability of a victim's unsworn accusations in such reports: "As a result of such a conviction, some portion, if not all, of the alleged conduct will have been already either admitted in a plea or found true by a trier of fact after trial."[102] Courts may also consider trial transcripts and

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[97] See, e.g., *U.S. v. LeClair*, 338 F.3d 882 (8th Cir. 2003); *In re Williams*, 841 So. 2d 531 (Fla. App. 2003), *overruled on other grounds, In re Commitment of Debolt*, 19 So. 3d 335 (Fla. App. 2009); *Com. v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009); *In re Civil Commitment of R.S.*, No. SVP 450-07, 2008 WL 5194450 (N.J. App. Dec. 12, 2008) (unpublished decision).

[98] See, e.g., *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

[99] 29 Wright & Gold, *supra* note 71, § 6273 at 320.

[100] See *People v. Otto*, 26 Cal. 4th 200, 210-11, 26 P.3d 1061, 1068, 109 Cal. Rptr. 2d 327, 335 (2001).

[101] See, *id.*; *Jenkins v. State*, 803 So. 2d 783 (Fla. App. 2001).

[102] See *Otto, supra* note 100, 26 Cal. 4th at 211, 26 P.3d at 1068, 109 Cal. Rptr. 2d at 336.

whether the defendant challenged the use of a victim's hearsay statements.[103]

Because evidence underlying an expert's opinion need not, indeed in some cases should not, be admitted into evidence, the Board's focus should be on the reliability of the out-of-court declarant's hearsay statement and not on the statement's "fit" within any hearsay exception. All that is required is that the underlying facts bear sufficient reliability so that due process is not violated. Thus, if the Board finds that any of A.M.'s hearsay statements were voluntary, they would be reliable as a statement against interest.[104]

(d) Right to Confront Witnesses

[56] Finally, A.M. argues that the Board's admission of these experts' opinions violated his right to confront witnesses. It is true that § 71-954 gives SOCA defendants the same right to confront and cross-examine witnesses as the state and federal Constitutions. But federal courts have held that because the expert is the only witness testifying against the defendant, the defendant's ability to cross-examine the expert satisfies the requirement of the Confrontation Clause so long as the underlying statements are not relayed to the jury.[105]

But when an expert testifies to out-of-court accusations or other testimonial statements, both hearsay and Confrontation Clause issues are presented.[106] So we agree with A.M. that the Board should not have permitted the experts to testify about the underlying statements they relied on.

V. CONCLUSION

We conclude the following:

• A.M.'s arguments as to the bias and composition of the Board fail.

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[103] See *id.*

[104] See *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[105] See, e.g., *U.S. v. Pablo*, 625 F.3d 1285 (10th Cir. 2010); *U.S. v. Lombardozzi*, 491 F.3d 61 (2d Cir. 2007). See, also, 29 Wright & Gold, *supra* note 71, § 6275 n.24.

[106] See, *Jenkins, supra* note 101; *People v. Jensen*, No. 235372, 2004 WL 2533270 (Mich. App. Nov. 9, 2004) (unpublished decision).

• A.M.'s equal protection challenges are meritless.
• The challenged statutes do not violate the special legislation clause.
• A.M.'s separation of powers argument is without merit.
• The challenged statutes are not bills of attainder.
• Because the challenged statutes do not inflict punishment, they do not violate the Ex Post Facto or Double Jeopardy Clauses.
• Section 83-174.01 is not unconstitutionally vague.
• The evidentiary issues present require remand.
• On remand, the Board must determine if A.M. was compelled to make the incriminating statements.
• The Board must also ensure that the facts underlying the experts' opinions are sufficiently reliable.
• And the Board must prohibit the experts from introducing the underlying facts through their testimony because such a practice violates A.M.'s right to confrontation.
• We have considered A.M.'s other assignments of error and conclude that none of those issues warrant discussion.

We reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE VILLAGE OF HALLAM, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. L.G. BARCUS & SONS, INC., A KANSAS CORPORATION, APPELLANT.

798 N.W.2d 109

Filed May 13, 2011. No. S-10-406.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.