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court file."[11] But in this case, no such reason was contained in our record.

Therefore, on remand, we encourage the district court to also review the deductions on worksheet 1 of the child support guidelines to determine whether a deviation for Martinez-Ibarra's cash medical support payment would be appropriate.

CONCLUSION

The decision of the district court is reversed, and the cause remanded for a redetermination of cash medical support and child support.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

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[11] *Id.*

IN RE INTEREST OF D.H., ALLEGED TO BE A DANGEROUS SEX OFFENDER. D.H., APPELLANT, V. LANCASTER COUNTY MENTAL HEALTH BOARD, APPELLEE.

797 N.W.2d 263

Filed May 20, 2011. No. S-10-617.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. **Mental Health: Judgments: Appeal and Error.** In reviewing a district court's judgment upon review of a mental health board determination, an appellate court will affirm the judgment unless it finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. ____: ____. The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
5. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

6. **Res Judicata: Appeal and Error.** The applicability of the doctrine of res judicata is a question of law, as to which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
7. **Criminal Law: Mental Health.** The key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Todd Molvar, and Andrew J. Conroy, Senior Certified Law Student, for appellant.

Bruce J. Prenda and Maureen Hannon Lamski, Deputy Lancaster County Attorneys, and Meagan Deichert, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

The Lancaster County Mental Health Board (the Board) determined that D.H. is a "dangerous sex offender" within the meaning of the Sex Offender Commitment Act (SOCA)[1] and should be committed for inpatient treatment. The determination was affirmed on appeal to the district court for Lancaster County. D.H. appeals to this court, contending that the district court erred in affirming the order of the Board for several reasons. We find no error and affirm.

I. FACTS AND PROCEDURAL BACKGROUND

D.H. was convicted of first degree sexual assault on November 26, 1991, and was sentenced to a term of 16 to 35 years in prison. The sexual assault occurred when D.H. entered a woman's apartment after seeing her sunbathing on her apartment balcony.

[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009).

Prior to D.H.'s scheduled release from prison, the Nebraska Department of Correctional Services (DCS) ordered an evaluation pursuant to Neb. Rev. Stat. § 83-174.02 (Reissue 2008) in order to determine whether D.H. was a dangerous sex offender. The evaluation was performed by Stephanie Bruhn, Ph.D., a licensed psychologist employed by DCS. Bruhn prepared a written report of her evaluation dated March 13, 2009.

On April 10, 2009, the Lancaster County Attorney filed a petition pursuant to SOCA alleging that D.H. was a dangerous sex offender who had a mental illness which made him likely to engage in repeat acts of sexual violence. A copy of Bruhn's report was attached to the petition along with Bruhn's affidavit stating her opinion that D.H. was a dangerous sex offender as defined in Neb. Rev. Stat. § 83-174.01 (Reissue 2008). The petition alleged that D.H. was "substantially unable to control his criminal behavior" and that neither voluntary hospitalization nor other less restrictive treatment alternatives were available or would suffice to prevent the harm described in § 83-174.01.

D.H. filed a motion to dismiss the petition on the ground that DCS had failed to order the evaluation within the timeframe stated in § 83-174.02(2). The Board overruled the motion. D.H. then filed a motion to dismiss the petition on constitutional grounds and a motion to dismiss the petition on principles of res judicata. These motions were overruled by the Board.

The Board then conducted a hearing on the petition. The hearing was continued several times at the request of D.H. Bruhn testified that to a reasonable degree of psychological certainty, she diagnosed D.H. with (1) "paraphilia, not otherwise specified, non-consent," and (2) antisocial personality disorder. She testified that in her opinion, D.H. was a dangerous sex offender. Another psychologist, Mary Paine, Ph.D., also testified that she had evaluated D.H. and, to a reasonable degree of psychological certainty, diagnosed him with (1) paraphilia not otherwise specified, nonconsent; (2) alcohol abuse by history, in remission in a controlled setting; and (3) antisocial personality disorder. Both Bruhn and Paine testified that D.H. was at high risk to reoffend upon release and that he

needed further sex offender treatment. Paine testified that in her opinion, inpatient treatment was the least restrictive environment in which such treatment could be safely provided. Two of D.H.'s relatives testified that if he were released, he could live with them and they would assist him with transportation and employment. The evidentiary record will be discussed in more detail below.

Following the hearing, the Board entered an order in which it found clear and convincing evidence that the allegations in the petition were true. The Board specifically found that D.H. suffers from paraphilia not otherwise specified, an "Axis I" mental illness, and that as a result of that mental illness, he is substantially unable to control his criminal behavior and poses a high risk to sexually reoffend. The Board also found that inpatient treatment was the least restrictive alternative which would meet D.H.'s needs and protect the community. The Board ordered D.H. committed to the Nebraska Department of Health and Human Services for inpatient sex offender treatment pursuant to an individualized treatment plan.

D.H. appealed the Board's order to the district court, which affirmed the Board's decision. The court found no merit to D.H.'s claims that SOCA is unconstitutional, that the Board's order was barred by res judicata, or that the proceeding should have been dismissed on the ground that the initial psychological evaluation was not ordered within the time periods specified in § 83-174.02(2). The court found clear and convincing evidence to support both the Board's finding that D.H. is a dangerous sex offender within the meaning of SOCA and its finding that inpatient involuntary treatment is the least restrictive treatment alternative. D.H. perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

D.H. assigns (1) that the Board erred in overruling his motion to dismiss based on DCS' failure to comply with § 83-174.02(2); (2) that the Board erred in overruling his motion to dismiss based on res judicata; (3) that there was insufficient evidence to support the decision of the Board to deem D.H. a dangerous sex offender and commit him to inpatient, sex-offender-specific treatment with the Department of

Health and Human Services; and (4) that SOCA violates the Ex Post Facto and Double Jeopardy Clauses of the state and federal Constitutions.

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 upon review of a mental health board determination, an appellate court will affirm the judgment unless it finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.[3]

IV. ANALYSIS

1. Jurisdiction

Following the submission of appellate briefs but prior to oral argument, D.H. filed a motion to dismiss the appeal for lack of jurisdiction. He contends that the Board, the district court, and this court lack jurisdiction over the cause because his conviction occurred prior to January 1, 1997, and that he therefore does not meet SOCA's definition of a dangerous sex offender.

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[5]

Section 71-1203(1) of SOCA incorporates the definition of "[d]angerous sex offender" found in § 83-174.01(1), which includes a requirement that the person "has been convicted of one or more sex offenses." "Sex offense" is defined in § 83-174.01(5) as "any of the offenses listed in [Neb. Rev. Stat. §] 29-4003 for which registration as a sex offender is required." Section 29-4003 is part of the Sex Offender Registration

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[2] *In re Interest of G.H.*, 279 Neb. 708, 781 N.W.2d 438 (2010).

[3] *Id.*

[4] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[5] *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

Act (SORA),[6] under which persons convicted of certain sex offenses must register with local law enforcement agencies.[7] Section 29-4003(1) provides that SORA applies to "any person who on or after January 1, 1997: (a) [p]leads guilty to or is found guilty of" any of 14 enumerated sex offenses, which include first degree sexual assault.[8] D.H. argues that because his offense and conviction occurred before January 1, 1997, he is not required to register under SORA, and that therefore, the crime for which he was convicted and sentenced in 1991 is not a "sex offense" under § 83-174.01(5) and he is not a "dangerous sex offender" under § 83-174.01(1).

It is true that D.H.'s crime occurred, and he was convicted, in 1991, and therefore, § 29-4003(1)(a) does not apply to him. But § 29-4003(1)(c) does. That portion of § 29-4003 states that SORA applies to any person who on or after January 1, 1997,

> [i]s incarcerated in a jail, a penal or correctional facility, or any other public or private institution or is under probation or parole as a result of pleading guilty to or being found guilty of a registrable offense under subdivision (1)(a) or (b) of this section prior to January 1, 1997[.][9]

On and after January 1, 1997, D.H. was incarcerated in a correctional facility as a result of his conviction for an offense registrable under SORA. Accordingly, he committed a "sex offense" as defined by § 83-174.01(5) and incorporated in SOCA. We find no merit to D.H.'s jurisdictional argument and overrule his motion to dismiss the appeal.

2. Timeliness of Mental Health Evaluation

D.H. argues that the district court erred in affirming the Board's decision to overrule his motion to dismiss based on the failure of DCS to comply with § 83-174.02. That statute directs DCS to order a mental health evaluation of certain sex offenders, including those convicted of sexual assault in the

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[6] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008).

[7] See § 29-4002.

[8] § 29-4003(1)(a)(iii).

[9] § 29-4003(1)(c).

first degree, in order to determine whether the individual is a dangerous sex offender.[10] D.H. focuses on that part of the statute which provides:

> The evaluation required by this section shall be ordered at least one hundred eighty days before the scheduled release of the individual. Upon completion of the evaluation, and not later than one hundred fifty days prior to the scheduled release of the individual, [DCS] shall send written notice to the Attorney General, the county attorney of the county where the offender is incarcerated, and the prosecuting county attorney. The notice shall contain an affidavit of the mental health professional describing his or her findings with respect to whether or not the individual is a dangerous sex offender.[11]

The psychological evaluation relied upon by the State in this case was dated March 13, 2009. D.H. was released from incarceration on April 14, 2009. Due to the filing of the petition alleging him to be a dangerous sex offender, he was then taken into emergency protective custody during the pendency of the proceedings before the Board.[12] He argues that he was forced to serve additional prison time as a result of the delay in the evaluation and that his due process rights were violated because he was not given proper notice of the evaluation and was denied time to obtain voluntary treatment and an independent evaluation. He also alleges that the State's failure to comply with the statute divested the Board of jurisdiction under SOCA.

The issues raised involve statutory interpretation, a question of law which we resolve independently of the lower court.[13] Section 83-174.02 is not a part of SOCA. It makes no reference to mental health boards or their statutory powers. Although a county attorney may elect to file a petition under SOCA based upon the results of the evaluation required by § 83-174.02, the

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[10] § 83-174.02(1)(a).

[11] § 83-174.02(2).

[12] See § 71-1206.

[13] See, *State v. State Code Agencies Teachers Assn., supra* note 5; *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

statute does not place any time limitation on such filing. We find no language in § 83-174.02 which would be jurisdictional with respect to a proceeding under SOCA.

The time periods mentioned in § 83-174.02(2) designate when DCS shall provide information to prosecutors, but the statute does not prescribe any type of notice to the offender. We conclude that § 83-174.02 provides a mechanism for identifying potentially dangerous sex offenders prior to their release from incarceration and for notifying prosecuting authorities so that they will have adequate time to determine whether to file a petition under SOCA before the offender's release date. But the statute does not create any substantive or procedural rights in the offender who is the subject of the mental health evaluation. We note that contrary to his argument, D.H. served no additional prison time based on the timing of the filing of the petition. The district court did not err in affirming the Board's overruling of the motion to dismiss based upon an alleged failure to comply with § 83-174.02(2).

3. Res Judicata

When he was sentenced in 1991, D.H. was found not to be a mentally disordered sexual offender (MDSO). He contends that this 1991 determination is a bar to the 2010 proceedings, in which he was found to be a dangerous sex offender under SOCA, based upon res judicata.

[5,6] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[14] The applicability of the doctrine of res judicata is a question of law, as to which we are obligated to reach a conclusion independent of the determination reached by the court below.[15]

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[14] *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

[15] See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

Prior to 1992, Nebraska defined a "mentally disordered sex offender" as "any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others."[16] If an offender met this definition at the time of sentencing and it was determined that the disorder was treatable, the offender was immediately committed to a regional center for treatment before serving a sentence of incarceration.[17] After receiving the maximum benefit of treatment, the offender was returned for further disposition by the sentencing court, with credit given for time spent in treatment.[18]

In rejecting D.H.'s claim that the 1991 MDSO determination operated as a bar to the 2010 SOCA proceeding, the district court reasoned that the issue before the Board was D.H.'s current mental health diagnosis and its effect upon his ability to control his criminal behavior in 2010, which is a different issue from that which was decided in 1991. The court found persuasive the reasoning of *People v. Carmony*,[19] in which a California appellate court held that a 1982 determination that a convicted defendant was not an MDSO did not operate as a bar to a proceeding initiated approximately 20 years later, shortly before the defendant's release on parole, to determine if he was a "sexually violent predator" who posed a danger to others and should be civilly committed for treatment. Under California's formulation of the doctrine of collateral estoppel, "an issue tried and determined in one proceeding is given conclusive effect in subsequent litigation between the same parties or their privies."[20] The California court determined that the doctrine did

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[16] Neb. Rev. Stat. § 29-2911(2) (Reissue 1989) (repealed by 1992 Neb. Laws, L.B. 523, § 18).

[17] Neb. Rev. Stat. § 29-2915 (Reissue 1989) (repealed by 1992 Neb. Laws, L.B. 523, § 18).

[18] Neb. Rev. Stat. § 29-2919 (Reissue 1989) (repealed by 1992 Neb. Laws, L.B. 523, § 18).

[19] *People v. Carmony*, 99 Cal. App. 4th 317, 325, 120 Cal. Rptr. 2d 896, 901 (2002).

[20] *Id.* at 322, 120 Cal. Rptr. 2d at 899.

not bar the subsequent proceedings because they involved the individual's mental health at the time of parole, not at the time of conviction. The court reasoned:

> Some issues are not static, that is, they are not fixed and permanent in their nature. When a fact, condition, status, right, or title is not fixed and permanent in nature, then an adjudication is conclusive as to the issue at the time of its rendition, but is not conclusive as to that issue at some later time.[21]

The court concluded that collateral estoppel did not apply in "light of the changeable nature of a person's mental health and dangerousness."[22]

D.H. argues that we should not follow the reasoning in *Carmony* because there has been no material change in the facts between the time of his 1991 MDSO determination and the current SOCA proceeding. The *Carmony* court cited a 1931 California case for the proposition that claim preclusion did not apply where "'the facts have materially changed or new facts have occurred'" in the interval between the two proceedings.[23] Nebraska law is similar.[24]

We do not read *Carmony* to focus on changes in factual circumstances. Rather, the court's focus was on the differing purposes of the two statutes in question and the changeable *nature* of an individual's mental health. The mental health determination under California's MDSO statute occurred before the criminal sentence was served, as was true under Nebraska's former MDSO statutes. But the mental health determination under California's subsequent statute focused on the offender's mental health and dangerousness immediately prior to his or her release from incarceration, and it was intended by the California Legislature as a means of protecting the public from those sex offenders who are determined to be at high risk to

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[21] *Id.*

[22] *Id.* at 323, 120 Cal. Rptr. 2d at 900.

[23] *Id.* at 322, 120 Cal. Rptr. 2d at 900, quoting *Hurd v. Albert*, 214 Cal. 15, 3 P.2d 545 (1931).

[24] See, *Ichtertz v. Orthopaedic Specialists of Neb., supra* note 15; *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996).

reoffend.[25] Similarly, the purpose of SOCA "is to provide for the court-ordered treatment of sex offenders who have completed their sentences but continue to pose a threat of harm to others."[26]

Nor are we persuaded by D.H.'s argument that we should follow the reasoning of the Kansas Supreme Court in *In re Care and Treatment of Sporn*,[27] which held that a proceeding initiated under Kansas' Sexually Violent Predator Act in 2007 was barred by a 2006 finding in a proceeding under the same statute where the State had failed to prove that the offender's mental status and risk assessment had changed in the interim. Unlike *In re Care and Treatment of Sporn*, the case at bar involves mental health adjudications under different statutes and separated by a period of years.

We agree with the district court that the reasoning of *Carmony* is applicable to this case. Nebraska's former MDSO statutes and its current SOCA statutes provide for assessment of an offender's mental health and risk of recidivism at different times and for different purposes. While the MDSO determination may be relevant to the subsequent SOCA issue, it is not conclusive. In addition to the information available to the sentencing court at the time of the 1991 MDSO determination, the Board in this SOCA proceeding had evidence of D.H.'s sexual misconduct while in prison, discussed in more detail below. While D.H. would minimize the significance of this evidence, it is not our role to reweigh the evidence. We conclude that the issue presented in this SOCA proceeding was not and could not have been litigated at the time of the MDSO determination in 1991 and that the doctrine of res judicata is therefore inapplicable.

4. Sufficiency of Evidence

We turn to the argument made by D.H. that the evidence before the Board was insufficient to support its finding that he is a dangerous sex offender who should be committed for

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[25] *People v. Carmony, supra* note 19.

[26] § 71-1202.

[27] *In re Care and Treatment of Sporn*, 289 Kan. 681, 215 P.3d 615 (2009).

inpatient treatment. In its de novo review, the district court found the evidence to be sufficient to support the findings and actions of the Board under SOCA. Our standard of review requires that we affirm unless we can conclude, as a matter of law, that the judgment is not supported by clear and convincing evidence.[28]

In order for an individual to be considered a dangerous sex offender, the State has the burden to prove by clear and convincing evidence that (1) the subject is a dangerous sex offender and (2) neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the Board are available or would suffice to prevent the harm described in § 83-174.01(1).[29]

(a) Dangerous Sex Offender

As used in SOCA, the phrase "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.[30]

(i) Mental Illness or Personality Disorder

Bruhn diagnosed D.H. as having both paraphilia not otherwise specified, nonconsent, and antisocial personality disorder. The former is an Axis I mental illness under the "DSM-IV." Paine also diagnosed D.H. as having (1) paraphilia not otherwise specified, nonconsent; (2) alcohol abuse by history, in remission in a controlled setting; and (3) antisocial personality

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[28] *In re Interest of G.H., supra* note 2.

[29] § 71-1209(1).

[30] § 83-174.01(1).

disorder. There was no expert testimony to the contrary. The expert testimony of Bruhn and Paine supports the finding that D.H. has a mental illness.

(ii) Likely to Engage in Repeat Acts of Sexual Violence

The phrase "likely to engage in repeat acts of sexual violence" in § 83-174.01(2) means that a "'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.'"[31]

The record shows that D.H. was given 68 misconduct reports while incarcerated. Four of them involved his sexual activities of making sexual comments to a female correctional officer, exposing himself to a female staff member, and masturbating in view of female staff members. D.H. was in segregation from 2004 until his discharge for various reasons, including threatening staff members, sexual activities, misconduct reports, and assault on a staff member.

In addition, Bruhn and Paine administered several assessment instruments to D.H. On the "Psychopathy Checklist Revised, 2nd Edition" instrument, which is designed to assess personality traits and behaviors characteristic of psychopathy, D.H. scored a 28. Individuals with scores between 25 and 29 are considered possibly psychopathic. On the "Static-99" instrument, which is designed to estimate the risk of sexual recidivism among sex offenders, D.H. scored in the high risk category, relative to other adult male sex offenders, for committing a future sex offense. Of those with the same Static-99 score as D.H., 27.7 percent sexually reoffended within 5 years and 37.3 percent sexually reoffended within 10 years.

The "Stable 2007" instrument is designed to assess change in intermediate-term risk status, assess treatment needs, and help predict recidivism in sexual offenders. D.H. scored 21 out of 26 points, which placed him in the high needs category on that instrument and indicated that he had a high chance of

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[31] *In re Interest of J.R.*, 277 Neb. 362, 386, 762 N.W.2d 305, 324-25 (2009), quoting § 83-174.01(2).

recidivism. A composite score of the Static 99 and Stable 2007 placed D.H. in a very high category for recidivism relative to other sexual offenders.

Bruhn also administered the "Sex Offender Risk Appraisal Guide," which is an instrument intended to estimate the risk of violent recidivism among adult male sex offenders. D.H. scored in the highest category. Individuals with similar scores have a "1.00" probability of violent recidivism within 7 years and a "1.00" probability of violent recidivism within 10 years. Bruhn stated D.H.'s mental illness makes it likely that he will reoffend sexually and likely that he will engage in repeat acts of sexual violence.

Paine also determined that D.H. scored in the highest risk category for sexual reoffense on the Static 99. On the Stable 2007 administered by Paine, D.H. scored 18 out of 24 possible points. Combining the scores on both instruments, Paine said D.H. is at very high risk to sexually reoffend. Among individuals with the same scores, sexual recidivism occurs at a rate of 14.3 percent at 1 year and at a rate of 26 percent at 4 years. In terms of violent recidivism, the rates are 20.4 percent at 1 year and 42 percent at 4 years.

This evidence supports the Board's finding that D.H. is likely to engage in repeat acts of sexual violence.

(iii) Convicted of One or More Sex Offenses

This requirement was met by proof that D.H. was convicted of sexual assault in the first degree in 1991, for which he was incarcerated until 2009.

(iv) Substantially Unable to Control Criminal Behavior

The phrase "substantially unable to control his or her criminal behavior" means that the person has "serious difficulty in controlling or resisting the desire or urge to commit sex offenses."[32]

The assessment tools administered by Bruhn and Paine demonstrated that D.H. is at high risk for committing a future

[32] § 83-174.01(6).

sex offense when compared with other adult male sex offenders. On the Sex Offender Risk Appraisal Guide, he scored in the highest category, representing a high risk of violent reoffense.

Based on the mental illness diagnosis and the record of D.H.'s acting out sexually in a structured environment, Bruhn opined to a reasonable degree of psychological certainty that D.H. is substantially unable to control his criminal behavior. And Paine believed, to a reasonable degree of psychological certainty, that D.H. would pose a substantial risk of harm, specifically to adult females, if he were released.

The evidence was sufficient to support a finding that D.H. is a dangerous sex offender under the definition stated in § 83-174.01. We next consider whether the State demonstrated the level of treatment necessary.

(b) No Less Restrictive Treatment

Under § 71-1209(1)(b), the State must demonstrate that "neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the [Board] are available or would suffice to prevent the harm described" in § 83-174.01(1). For D.H., the Board determined that the least restrictive treatment available to prevent the harm described in § 83-174.01 is inpatient commitment for sex offender treatment.

The evidence showed that D.H. participated in but did not successfully complete sex offender treatment while incarcerated. Specifically, he participated in an inpatient sex offender program for a short period of time and then went to the Lincoln Regional Center for sex offender treatment from December 1997 to September 1998. D.H. never progressed beyond the initial treatment level at the regional center and was given a negative recommendation. D.H. told Bruhn he believed there was bias in the regional center treatment program. D.H. was recommended for participation in another sex offender treatment program in June 2007, but he was never transferred to the program because he was in segregation.

D.H. completed three levels of a generic mental health program and a 10-week anger and stress management program

while incarcerated. D.H. also attended 3 of 10 sessions of a domestic violence group and was described as an active participant of that group, although he had to be given cues not to dominate the group.

Bruhn stated that D.H. presented himself as someone who had worked through his treatment issues. He became defensive when he was given feedback and became loud and verbally aggressive when confronted about current or past behaviors. D.H. avoided taking responsibility for behavioral problems and was told to find less aggressive ways to express his anger and other emotions.

Bruhn expressed concern about D.H.'s ability to comply with treatment because he told her he thought that the mental health system was corrupt and that the evaluation process was a "witch hunt" for sex offenders. He also indicated he did not need treatment. To a reasonable degree of psychological certainty, Bruhn believed D.H. would pose a danger to the community based on his previous offense against an adult female using force, his acting out sexually in a structured setting, and his not successfully completing any sex offender treatment.

Paine testified that D.H. had not yet checked on whether there were any restrictions on where he could live after his release. He believed he could get work with relatives, and he planned to take a correspondence course in paralegal studies. D.H. said his primary means of avoiding relapse would be to remain sober, but he was unable to identify any warning signs that might indicate he was "in trouble." He did not see himself as being at risk to reoffend. Paine said that individuals who do not view themselves to be at risk to reoffend are less likely to take steps to prevent it, are less likely to avoid situations that might create problems, and are likely to fail to recognize the need for advance intervention to prevent reoffending.

D.H. did not identify a need for any type of treatment and said that he would keep himself from reoffending by working out at a gym. Bruhn found this comment of concern because if D.H. encountered an adult woman at a gym, he might be tempted to engage in sexual behavior with her. Paine testified

D.H. had said that Lincoln Regional Center staff played favorites and that he did not make progress in treatment there for racial reasons.

Paine asked D.H. his thoughts about relationships with women when he is released. D.H. said he planned to write to women in magazines to ask them to have sexual relationships. He said he "needs sex," "wants it upfront," and does not want to have to deal with women who "play[] games." Paine said D.H.'s attitudes toward women were cause for concern because they indicated cognitive distortions about women that are common in rapists. Paine opined that D.H. is in need of further sex offender treatment and that the least restrictive environment in which that could safely be provided would be an inpatient program.

This evidence supports the Board's finding that commitment for inpatient sex offender treatment was the least restrictive alternative which would provide D.H. with the treatment he required and which would protect the community.

(c) Summary

[7] "The key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others."[33] The evidence summarized above provided a sufficient factual basis for the Board and the district court to conclude that the State had met its burden of proof under SOCA by clear and convincing evidence.

5. Constitutionality of SOCA

Finally, D.H. asserts that the Board erred in overruling his motion to dismiss the petition because SOCA is unconstitutional. D.H. claims that SOCA is an ex post facto law because it is punitive in nature and retroactive in its application, therefore violating the prohibition against such laws found in U.S. Const. art. I, § 9, and Neb. Const. art. I, § 16. D.H. also argues that SOCA places him twice in jeopardy for the same offense,

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[33] *In re Interest of J.R., supra* note 31, 277 Neb. at 386, 762 N.W.2d at 365.

in violation of the Fifth Amendment to the U.S. Constitution and Neb. Const. art. I, § 12.

In *In re Interest of J.R.*,[34] we held that SOCA does not constitute ex post facto legislation because it is not punitive in nature. We are not persuaded by the argument that we should reconsider this holding. Indeed, we recently reaffirmed it in *In re Interest of A.M.*,[35] where we also held that because SOCA is not punitive in nature, it cannot violate the coextensive protections afforded by the Double Jeopardy clauses of the state and federal Constitutions. Accordingly, we conclude that the district court did not err in overruling D.H.'s motion to dismiss the petition on constitutional grounds.

V. CONCLUSION

For the reasons discussed above, we overrule D.H.'s motion to dismiss the appeal and affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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[34] *Id.*

[35] *In re Interest of A.M., ante* p. 482, 797 N.W.2d 233 (2011).