In the Iowa Supreme Court

No. 25–1237

Submitted September 9, 2026—Filed October 9, 2026

In re detention of **Joshua Andrew Harlow.**

Joshua Andrew Harlow,

Appellant.

Appeal from the Iowa District Court for Polk County, Lawrence P. McLellan, judge.

The respondent appeals his commitment as a sexually violent predator under Iowa Code § 229A. **District court judgment affirmed.**

Christensen, C.J., delivered the opinion of the court, in which all justices joined.

Michael H. Adams (argued), Chief Public Defender, Special Defense Unit, for appellant.

Brenna Bird, Attorney General, and Thomas E. Bakke (argued) and Joshua A. Duden, Assistant Attorneys General, for appellee.

Christensen, Chief Justice.

We must decide what the state is required to prove when it petitions to commit an individual as a sexually violent predator (SVP) under Iowa Code § 229A.4(1) (2024). Joshua Harlow was convicted of sexual abuse in the third degree and incarcerated for parole revocation as part of his special sentence under § 903B when the State filed its petition to civilly commit him as an SVP. The State filed its petition under Iowa Code § 229A.4(1), which required it to allege that a "presently confined" person is an SVP and to provide sufficient facts to support that allegation.

Harlow moved to dismiss at trial. In doing so, he acknowledged that the legislature amended Iowa Code § 229A.2(10) in 2019 to add a definition of "presently confined," which specifically includes special sentence revocations like the one he received in 2023. *See* 2019 Iowa Acts ch. 17, § 1 (originally codified at Iowa Code § 229A.2(8) (2020), now codified at Iowa Code § 229A.2(10) (2024)). Nevertheless, he maintains this definition violates state and federal due process because it does not require the State to prove that he committed a recent overt act tending to show a risk of future violence. The district court denied Harlow's motion and granted the State's petition to confine him as an SVP. We retained Harlow's timely appeal in which he again argues that he was not presently confined and that the State was required to prove a recent overt act. We disagree and affirm the judgment of the district court.

I. Background Facts and Proceedings.

In March 2017, Harlow broke into his ex-wife's house. She arrived home to find him uninvited, unwelcome, and completely naked. Her mom, whom she was already on the phone with, called the police. At that point, Harlow, in his own words, decided "if I'm going to jail, then I'm going to get some." Despite her

multiple objections, he forced her to have sexual intercourse. Consequently, Harlow pleaded guilty to sexual abuse in the third degree. He was sentenced to a prison term not to exceed ten years and a lifetime special sentence under Iowa Code § 903B.1 (2017).

This was not Harlow's first experience with the criminal justice system, and it would not be his last. Between the age of fourteen and his 2017 conviction at the age of thirty-two, he was accused of or charged with more than ten criminal offenses. And while in prison, Harlow was found guilty of approximately sixty-five behavioral violations. At least nine of those violations involved sexual misconduct. For example, Harlow admitted to masturbating in front of others on multiple occasions; indecently exposing himself to two female correctional officers; and frequently making inappropriate, sexual, and vulgar comments to female officers. He also admitted to fixating on female officers, stalking them, and committing sexually motivated acts against them. And in 2018, Harlow was convicted of assault on a female correctional officer after grabbing her buttocks.

In 2022, the board of parole released Harlow to work release, subject to the terms of his § 903B special sentence. But just one day later, he was arrested for failing to report to his parole officer. Frustrated by his arrest, Harlow broke the window of his holding cell by repeatedly striking it with his belly chain. As a result, his parole was revoked, and he returned to prison.

In August of 2024, approximately two weeks before his anticipated discharge date, the State filed a petition to civilly commit Harlow as an SVP under Iowa Code chapter 229A (2024). Iowa Code § 229A.2(15) defines "sexually violent predator" as "a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses,

if not confined in a secure facility." "Sexually violent offense" includes all violations of Iowa Code chapter 709 and other qualifying offenses under Iowa Code § 229A.2(14). If the state believes a person is an SVP, it may file a petition for civil commitment if the person (1) is presently confined or (2) has committed a recent overt act of sexual violence. *Id.* § 229A.4. The State's petition to commit Harlow alleged that he was presently confined at the time of the petition's filing and did not allege a recent overt act.

The district court found probable cause and ordered a trial. At trial, it heard testimony from Harlow, an expert retained by Harlow, and an expert retained by the State. At the close of the State's evidence, Harlow moved to dismiss, alleging he was not presently confined when the State filed its petition, and the State was required to prove a recent overt act to comply with due process. After trial, the parties submitted proposed findings, and the court denied Harlow's motion to dismiss. It determined that the State was not required to prove a recent overt act under Iowa Code § 229A.4(1) because Harlow was presently confined when the State filed its petition.

The court also found that Harlow was an SVP because the State had proven each of the required elements beyond a reasonable doubt: (1) Harlow had been convicted of at least two qualifying sexually violent offenses—forcing his ex-wife into sexual intercourse in 2017 and grabbing a female correctional officer's buttocks in 2018; and (2) Harlow suffers from a mental abnormality, which makes him likely to engage in predatory acts constituting sexually violent offenses if not confined to a secure facility. It based this conclusion on testimony from both the State's and Harlow's experts, who agreed that Harlow suffers from antisocial personality disorder. This diagnosis and Harlow's history of behavior, the court reasoned, cause Harlow to lack emotional and volitional control that

makes it likely he will engage in predatory acts of sexual violence if not confined to a secure facility. Thus, the court ordered his commitment and transport. We retained Harlow's appeal.

II. Analysis.

Iowa Code chapter 229A provides two bases for the civil commitment of a person who has been convicted of or charged with a sexually violent offense as an SVP. *In re Det. of Shaffer*, 769 N.W.2d 169, 173 (Iowa 2009). The state can seek commitment if the person is "presently confined." Iowa Code § 229A.4(1). Alternatively, it can seek commitment if the person has committed a "recent overt act." *Id.* § 229A.4(2). Section 229A.4(1) does not require a recent overt act, while § 229A.4(2) does not require present confinement.

Here, the State petitioned to commit Harlow under § 229A.4(1), alleging that Harlow was presently confined at the Iowa State Penitentiary when it filed its petition. The district court concluded that Harlow qualified as an SVP and was presently confined. Harlow does not challenge the court's determination that he was an SVP. Rather, he argues that because he had been released from prison after serving his sentence for a sexually violent offense and only reimprisoned for a nonsexual violation of his special sentence, he was not presently confined as required by § 229A.4(1). He also argues that civil commitment without proof of a recent overt act violates his constitutional due process rights. We review the district court's ruling on Harlow's motion to dismiss and its construction of Iowa Code chapter 229A for errors at law. *In re Det. of Tripp*, 915 N.W.2d 867, 873 (Iowa 2018). We review Harlow's constitutional challenges de novo. *Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 15 (Iowa 2019).

A. Harlow's Presently Confined Challenge. Harlow first argues that the State is required to prove a recent overt act under Iowa Code § 229A.4(2) because

he was not presently confined for a sexually violent offense at the time of the State's petition. To determine whether Harlow's incarceration for breach of his § 903B special sentence constitutes present confinement, we look to the rules of statutory interpretation.

When interpreting a statute, our first step is to determine if the statute is ambiguous. *Janssen v. Sec. Nat'l Bank of Sioux City* (*In re Est. of Janssen*), 7 N.W.3d 516, 523 (Iowa 2024). If the legislature chose to define a statute's terms, we must apply those definitions. *Jorgensen v. Smith*, 2 N.W.3d 868, 873 (Iowa 2024). And if the definitions are unambiguous, "we do not search for meaning beyond the statute's express terms," *State v. Lopez*, 907 N.W.2d 112, 117 (Iowa 2018), or "extend, enlarge, or otherwise change the meaning of [the] statute under the guise of construction," *Doe v. Iowa Dep't of Hum. Servs.*, 786 N.W.2d 853, 858 (Iowa 2010). The legislature—not the courts—writes statutes. *Randolph v. Aidan, LLC*, 6 N.W.3d 304, 308 (Iowa 2024). We "look at what the legislature said, rather than what it should or might have said." *Branson v. Mun. Fire & Police Ret. Sys. of Iowa*, 591 N.W.2d 193, 197 (Iowa 1999).

Here, the legislature provided a clear definition of presently confined. *See* Iowa Code § 229A.2(10). In 2019, the legislature amended chapter 229A to define presently confined as

> incarceration or detention in a correctional facility, a rehabilitation camp, a residential facility, a county jail, a halfway house, or any other comparable facility, including but not limited to placement at such a facility as a condition of probation, parole, or *special sentence* following conviction for a sexually violent offense.

2019 Iowa Acts ch. 17, § 1 (originally codified at Iowa Code § 229A.2(8) (2020), now codified at Iowa Code § 229A.2(10) (2024)) (emphasis added).

The legislature's clear definition of presently confined must guide our analysis. *See Jorgensen*, 2 N.W.3d at 873. And under that definition, Harlow is

presently confined. He was convicted and sentenced for a sexually violent offense. His sentence included a § 903B special sentence. He was released from prison subject to the special sentence then rearrested and reincarcerated for violating the terms of the special sentence. Thus, he is "incarcerat[ed] . . . as a condition of . . . [a] special sentence following conviction for a sexually violent offense." Iowa Code § 229A.2(10). Excluding special sentences like Harlow's would change the meaning of § 229A.2(10) and exceed our role as interpreters. *See Randolph*, 6 N.W. 3d at 308; *State v. Zacarias*, 958 N.W.2d 573, 582 (Iowa 2021). Therefore, we hold that Harlow was presently confined under Iowa Code § 229A.2(10).

B. Harlow's Due Process Challenge. Harlow next argues that the district court's application of Iowa Code § 229A.4(1) violated his constitutional due process rights.[1] He argues that because at the time of the State's petition, he was confined under a § 903B special sentence, due process required the State to prove a recent overt act.

To address Harlow's due process claim, we begin with the principle that "[s]tatutes are cloaked with a strong presumption of constitutionality." *In re Det. of Morrow*, 616 N.W.2d 544, 547 (Iowa 2000) (en banc). A party may make a facial or an as-applied challenge to the constitutionality of a statute. *State v. Schadl*, 37 N.W.3d 337, 341 (Iowa 2026). In an as-applied challenge, the challenger argues that the statute is unconstitutional as applied to his or her specific set of facts. *Id.* at 341–42. Conversely, in a facial challenge, the challenger argues "that there's no set of facts under which the law could be

[1]In his brief, Harlow does not specify whether he is making a federal or state due process claim. At oral argument, he clarified that if we hold that the district court's application of the statute was constitutional under the U.S. Constitution, we should hold that the Iowa Constiution's due process clause demands more.

validly enforced." *Id.* at 341. A facial challenge is "the most difficult challenge a [party] can mount" because "[i]f there is any set of facts where the statute could be held constitutional, [the court] will reject the facial challenge." *State v. Amble*, 22 N.W.3d 265, 272 (Iowa 2025) (quoting *Summit Carbon Sols., LLC v. Kasischke*, 14 N.W.3d 119, 126 (Iowa 2024)). In both challenges, the challenger bears the heavy burden of proving "the unconstitutionality beyond a reasonable doubt." *State v. Hess*, 983 N.W.2d 279, 284 (Iowa 2022) (quoting *State v. Aschbrenner*, 926 N.W.2d 240, 246 (Iowa 2019)).

Here, Harlow makes a facial due process challenge.[2] However, we evaluate the statute as applied to his facts because "[i]f a statute is constitutional as applied to a defendant, the defendant cannot make a facial challenge unless a recognized exception to the standing requirement applies."[3] *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 346 (Iowa 2015) (alteration in original) (quoting *State v. Robinson*, 618 N.W.2d 306, 311 n.1 (Iowa 2000) (en banc)); *see also Singer v. City of Orange City*, 15 N.W.3d 70, 76 (Iowa 2024) (noting that a facial challenge "requires the challenger to show [that] the statute . . . is unconstitutional *in all its applications*" (alteration in original) (quoting *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 766 (Iowa 2019))). Harlow does not argue that an exception applies, so to prevail, he must successfully argue that Iowa Code § 229A.4(1) is unconstitutional as the district court applied it to his facts.

[2]Harlow does not specify in his brief whether he is making a facial or as-applied challenge but clarified at oral argument that his challenge is facial.

[3]In considering facial challenges, we have also held "that facts are irrelevant in a facial challenge." *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 766 (Iowa 2019). But because the challenger in a facial challenge must show that the statute is "incapable of *any valid application*," Harlow would not win a facial challenge if the statute can be constitutionally applied to his facts. *Id.* (quoting *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001)).

1. *U.S. Supreme Court precedent does not require proof of a recent overt act.* The U.S. Supreme Court has provided a general floor for what an SVP statute must include to satisfy due process. In *Kansas v. Hendricks*, the Supreme Court upheld Kansas's SVP statute against a due process challenge. 521 U.S. 346, 360 (1997). The Kansas statute allowed civil commitment upon a finding that the respondent "has been convicted of or charged with a sexually violent offense," and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." *Id.* at 357 (quoting Kan. Stat. Ann. § 59–29a02(a) (1994)). The respondent alleged that the statute violated his substantive due process rights because it allowed civil commitment without proof that he was "mentally ill." *Id.* at 356. In upholding the statute, the Court noted that the statutory requirements satisfied due process by requiring "evidence of past sexually violent behavior" paired with "a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." *Id.* at 357. The Court emphasized the "past sexually violent behavior" requirement but did not state that the past behavior or likelihood of future danger must be proven by a recent overt act. *See id.*

A few years later, the Court reaffirmed *Hendricks* by stating that to satisfy due process, the state must (1) follow proper procedures and evidentiary standards; (2) make a finding of "dangerousness either to [the respondent's] self or to others"; and (3) prove an additional factor, "such as a 'mental illness' or 'mental abnormality.' " *Kansas v. Crane*, 534 U.S. 407, 409–10 (2002) (quoting *Hendricks*, 521 U.S. at 357–58). In *Kansas v. Crane*, the Court also clarified that the state must prove that the mental abnormality causes the respondent "serious difficulty in controlling behavior." *Id.* at 413. Like in *Hendricks*, the *Crane* Court did not explicitly address the statute's lack of a recent overt act requirement. *See*

id. But the Court did hold that Kansas's statute—when interpreted to require proof of serious difficulty in controlling behavior—satisfies due process. *See id.*

We have previously held that chapter 229A complies with the *Hendricks* requirements. *See In re Det. of Garren*, 620 N.W.2d 275, 284–85 (Iowa 2000) (en banc) (describing chapter 229A as "identical to the Kansas statute in all significant respects, using the same definitions and the same standards"). And since its enactment in 1998, we have repeatedly upheld it against due process challenges. *See, e.g.*, *In re Det. of Betsworth*, 711 N.W.2d 280, 289 (Iowa 2006) (holding that chapter 229A commitment of a respondent with an untreatable condition did not violate substantive due process because the commitment was reasonably related to the state's interest); *Iowa v. Cubbage* (*In re Det. of Cubbage*), 671 N.W.2d 442, 447 (Iowa 2003) (holding that denying the respondent's request for a pretrial competency hearing did not violate the respondent's due process rights because a trial under chapter 229A is a civil, not criminal, matter); *Garren*, 620 N.W.2d at 284–85 (holding that chapter 229A did not violate the respondent's substantive due process right by failing to offer the respondent the "least restrictive placement" because the respondent did not have a fundamental right to the least restrictive placement).

Harlow does not argue that the State failed to comply with proper procedures and evidentiary standards. Nor does he argue that he does not suffer from a mental illness or abnormality. Rather, he argues that without proof of a recent overt act, the court cannot sufficiently prove future dangerousness.

The Kansas SVP statute considered by the *Hendricks* and *Crane* Courts did not require proof of a recent overt act to establish dangerousness. But the Court's choice not to address the lack of a recent overt act requirement does not necessarily imply that a recent overt act is not needed to prove dangerousness.

See Crane, 534 U.S. at 414 ("[W]e have sought to provide constitutional guidance in [SVP cases] by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives *as specific circumstances require*.") (emphasis added). The Court may have chosen not to address the lack of a recent overt act requirement because the circumstances in *Hendricks* and *Crane* did not require it. Thus, although Supreme Court precedent suggests that due process does not require proof of a recent overt act, it does not definitively resolve whether Iowa Code § 229A.2(10)'s definition of presently confined satisfies due process.

2. *Iowa due process does not require proof of a recent overt act if the respondent was presently confined.* Because "[w]e have 'traditionally considered the federal and state due process provisions to be equal in scope, import, and purpose,' " we generally apply the same analysis to federal and state due process claims. *In re Det. of Schuman*, 2 N.W.3d 33, 49–50 (Iowa 2024) (quoting *In re Det. of Matlock*, 860 N.W.2d 898, 903 (Iowa 2015)). However, Harlow argues that if we hold that federal due process does not require a recent overt act, we should interpret Iowa due process to provide more protection. We acknowledge that "[w]e jealously guard our right to construe a provision of our state constitution differently than its federal counterpart," *State v. Burns*, 988 N.W.2d 352, 360 (Iowa 2023) (quoting *State v. Brown*, 930 N.W.2d 840, 847 (Iowa 2019)), and are free to "apply a more protective standard than is applied under the United States Constitution," *Lopez*, 907 N.W.2d at 122 (citing *State v. Jackson*, 878 N.W.2d 422, 442 (Iowa 2016)). But we are unpersuaded that Iowa due process always demands proof of a recent overt act for civil commitment under chapter 229A.

To argue that we should interpret Iowa constitutional due process to require a recent overt act—even if an act is not required under *Hendricks* and

Crane—Harlow points to fifty years of precedent recognizing the importance of a recent overt act. *See In re Det. of Wygle*, 910 N.W.2d 599, 612–13 (Iowa 2018) (describing Iowa caselaw on the importance of the overt act requirement). First, in *Stamus v. Leonhardt*, the U.S. District Court for the Southern District of Iowa considered the constitutionality of Iowa Code chapter 229, Iowa's involuntary hospitalization of mentally ill persons statute. 414 F. Supp. 439, 441 (S.D. Iowa 1976). There, the court held that to comply with substantive due process, a chapter 229 involuntary hospitalization requires showing that the patient "pose[d] a serious threat to themselves or others, as evidenced by a recent overt act, attempt or threat." *Id.* at 451. The state cannot constitutionally confine a patient who is "dangerous to no one" and "capable of surviving safely in freedom," and under chapter 229, an overt act, attempt, or threat is necessary to show sufficient danger. *Id.* at 450. We agreed with the *Stamus* court in *In re Mohr*, noting that chapter 229 involuntary hospitalizations require dangerousness to the patient's self or others to be shown by a recent overt act, attempt, or threat. 383 N.W.2d 539, 541–42 (Iowa 1986). Then, in *In re Foster*, we upheld the overt act, attempt, or threat requirement. 426 N.W.2d 374, 377 (Iowa 1988).

But *Stamus*, *Mohr*, and *Foster* are not dispositive of the due process requirements of a chapter 229A civil commitment. Chapter 229 and chapter 229A serve similar, but not identical, purposes. The legislature enacted chapter 229A because it found "that the existing involuntary commitment procedure under chapter 229 [was] inadequate to address the risk . . . sexually violent predators pose to society." Iowa Code § 229A.1(2). It intended chapter 229A to apply to persons who would not qualify for treatment under chapter 229. *Id.* § 229A.1(1) ("[S]exually violent predators . . . do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant

to . . . chapter 229 . . . ."). As a result, the requirements for civil commitment under chapter 229A cannot mirror the requirements under chapter 229.

And in challenges to Iowa Code § 229A.4(1)'s provision for civil commitment without proof of an overt act, we have held that if the respondent was presently confined, commitment without proof of a recent overt act does not violate due process. *In re Det. of Willis*, 691 N.W.2d 726, 729–30 (Iowa 2005). In *State v. Gonzales* (*In re Detention of Gonzales*), while considering whether present confinement under § 224A.4(1) had to be for a sexually violent act, we noted that civil commitment "without any showing of a recent overt act . . . would raise serious constitutional issues." 658 N.W.2d 102, 105 (Iowa 2003). But by interpreting " 'confinement' . . . to mean confinement for a sexually violent offense, the 'recent overt act' requirement . . . is satisfied." *Id.* Likewise, in *In re Detention of Willis*, when a respondent alleged that his commitment was unconstitutional because it was not supported by proof of a recent overt act, we restated that "the act for which a person is presently confined, if a sexually violent act, may be deemed to be the recent overt act that due process requires." 691 N.W.2d at 729; *see also In re Det. of Stenzel*, 827 N.W.2d 690, 698 (Iowa 2013) (adding that the state may constitutionally bring an SVP petition against a respondent who is "confined on a term of imprisonment that includes a sentence for a sexually violent offense" without proving a recent overt act) (emphasis omitted).

Harlow acknowledges that due process allows "serving a sentence for a sexually violent offense[] [to] serve[] as a substitute or proxy for a recent overt act." However, he argues that he was not serving a sentence for a sexually violent offense when the State filed its petition. Specifically, he argues that incarceration under a § 903B special sentence is not incarceration for a sexually violent offense

because the legislature did not amend chapter 903B to operate in harmony with chapter 229A when it amended chapter 229A to define presently confined. Special sentences under chapter 903B "commence upon completion of the sentence imposed . . . for the underlying criminal offense." Iowa Code § 903B.1. According to Harlow, if the special sentence does not commence until after the original sentence was discharged, confinement under the special sentence cannot be confinement for the sexually violent offense.

Chapters 229A and 903B share a common purpose: protecting society from sex offenders. *See Schuman*, 2 N.W.3d at 50 (stating that the purpose of chapter 229A is to "protect[] society from persons who have been determined to be likely to reoffend if not placed in a secure facility" (quoting *Garren*, 620 N.W.2d at 285)); *Hess*, 983 N.W.2d at 289–90 ("[T]he purpose of the special sentence in section 903B.1 is to protect the public from sex offenders."). When interpreting statutes, we apply "the general rule that when more than one statute bears on an issue, courts must attempt to harmonize the relevant statutes and not interpret or construe them to render one or more of the statutes inoperative." *State v. Laub*, 2 N.W.3d 821, 833 (Iowa 2024).

The legislature's definition of presently confined in Iowa Code § 229A.2(10) allows the chapters to operate in harmony. Under Iowa Code § 903B.1, a special sentence commences at the end of any other sentence imposed because of the underlying criminal offense. Under Iowa Code § 229A.2(10), a respondent confined under a special sentence is still presently confined. Although the special sentence occurs after the underlying sentence, they both occur due to the sexually violent offense. *See Hess*, 983 N.W.2d at 287 ("[O]ur state's precedent refers to the chapter 903B special sentences as part of the defendant's

sentence."). Thus, a person confined under a § 903B special sentence is confined due to a sexually violent offense.

Therefore, Harlow was presently confined due to a sexually violent offense while serving his initial prison sentence and while incarcerated under his special sentence. This interpretation allows the chapters to work together to achieve their shared goal of protecting the public from persons who have committed sexually violent offenses. Any other interpretation would make parts of the legislature's § 229A.2(10) definition inoperative.

3. *When Harlow was released and then confined under a § 903B special sentence, due process did not require proof of a recent overt act under the facts of this case.* Harlow also argues that even if he was confined due to a sexually violent offense under the terms of Iowa Code § 229A.2(10), due process requires the State to prove a recent overt act because he was not continuously confined. We hold that this is more than due process requires.

Harlow argues that because he was released from prison after serving his sentence for a sexually violent offense and then rearrested for a nonsexually violent violation of his § 903B special sentence, due process requires the State to prove a recent overt act. He points to our precedent in *Gonzales* and *In re Detention of Wygle*. In *Gonzales*, we interpreted presently confined under chapter 229A to mean confined for a sexually violent offense. 658 N.W.2d at 104–05. And in *Wygle*, we interpreted presently confined to exclude respondents serving a § 903B special sentence. 910 N.W.2d at 619. Harlow asserts that *Gonzales* and *Wygle* together establish that due process requires proof of a recent overt act when the respondent was incarcerated under a § 903B special sentence. But *Gonzales* and *Wygle* were cases of statutory interpretation, so they do not establish the due process requirements in Harlow's case. *See Gonzales*, 658

N.W.2d at 103 ("We do not address the constitutional questions . . . ."); *Wygle*, 910 N.W.2d at 601 ("This case involves a question of statutory interpretation.").

Additionally, our due process discussion in *Wygle* supports Harlow's chapter 229A commitment without proof of a recent overt act. The general due process requirement of an overt act springs from the need to support current "dangerousness" with "some concrete, individualized evidentiary showing." *Wygle*, 910 N.W.2d at 602. If a respondent recently committed a sexually violent act, the court can infer that they are presently dangerous. *See Willis*, 691 N.W.2d at 729 ("The significance of a recent overt act in predicting future conduct is . . . the inference against a particular propensity that arises from the absence of an overt act."). But "[t]he absence of sexually predatory acts in a setting of secure confinement does not paint the same picture as the absence of such acts in a normal life situation." *Id.* So, if the respondent has spent the past several years in some form of confinement, "the absurdity or impossibility of committing *recent* overt acts when incarcerated" causes the court to waive the overt act requirement. *Wygle*, 910 N.W.2d at 616.

Except for a single day in 2022, Harlow has been incarcerated since 2017. Thus, his behavior while incarcerated "does not paint the same picture" as it would if he had been living freely in the community, and requiring the State to find evidence of a recent overt act during that period of incarceration would be absurd. *Willis*, 691 N.W.2d at 729.

But according to Harlow, since he was released from prison for a single day, requiring a recent overt act would no longer be absurd. To support this, he points to the Washington Supreme Court's decision in *In re Detention of Albrecht*. 51 P.3d 73, 74 (Wash. 2002) (en banc). There, the respondent had been released to serve a community placement and arrested thirty days later for violating the

terms of his placement. *Id.* at 75. The court held that since the respondent had been released from prison into a community placement, requiring the state to prove a recent overt act was no longer absurd. *Id.* at 78. Thus, the court held that due process required the state to prove a recent overt act. *Id.*

However, in a subsequent Washington case, *In re Detention of Lewis*, the court held that the state did not need to prove a recent overt act when a respondent was released from prison, escorted to a community corrections office, and then immediately rearrested. 177 P.3d 708, 714 (Wash. 2008) (en banc). Because the respondent had not actually spent any time in the community, requiring the state to prove a recent overt act was still an "impossible" standard. *Id.* (quoting *Henrickson v. State*, 2 P.3d 473, 478 (Wash. 2000) (en banc)). As a result, in Washington, if a respondent has been released into the community for any amount of time—however short—the state must prove a recent overt act. *See Albrecht*, 51 P.3d at 74. But if the respondent has not been released into the community, the state need not prove a recent overt act. *See Lewis*, 177 P.3d at 714.

We believe the *Albrecht–Lewis* standard creates an illogical bright-line rule. *See Crane*, 534 U.S. at 413 ("[T]he Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules."). In Washington, if a respondent was never released from confinement, the state is relieved of its burden of proving a recent overt act. But if the respondent was released for any amount of time, the burden "is no longer an impossible burden," so due process requires the state to reassume it. *Albrecht*, 51 P.3d at 78. By making the state's burden more difficult to meet based on how quickly the respondent was rearrested, the standard essentially rewards respondents for being rearrested immediately after being released into

the community. This is illogical, so we decline to adopt it as a bright-line rule. We agree with the court in *Lewis* that if a respondent has not actually spent any time in the community, the task of proving a recent overt act remains impossible. *See* 177 P.3d at 714. But if a respondent spent only a single day in the community, the task remains nearly as impossible, so due process does not require proof of a recent overt act.

Harlow also points to our concern in *Wygle* that civil commitment of respondents serving § 903B special sentences without proof of a recent overt act would violate due process because a special sentence can last a lifetime. 910 N.W.2d at 619. There, we acknowledged that subjecting a person who was released into the community to serve a special sentence "to an SVP proceeding many years or even decades later without a recent overt act *merely* because of the existence of a special sentence would plainly stretch the statute beyond the boundaries of due process." *Id.* (emphasis added).

But that is not what happened to Harlow. The State did not initiate the proceeding "many years or even decades" after Harlow was released into the community. *Id.* Harlow was released on parole and ordered to report to a residential treatment center for work release and was then arrested for violating the terms of his special sentence the very next day when he failed to so report. The State commenced the SVP proceeding against Harlow because of his mental abnormality and his likelihood of committing future sexually violent offenses premised on his underlying conviction and the numerous events of sexual misconduct committed while Harlow was incarcerated, both during his incarceration for the underlying conviction and his incarceration for violating the terms of his special sentence, not "merely because of the existence of a special sentence." *Id.* The district court found beyond a reasonable doubt—and Harlow

does not contest for purposes of this appeal—that Harlow has a mental abnormality, and the mental abnormality makes him more likely than not to commit a sexually violent offense if not confined to a secure facility.

Therefore, our concerns in *Wygle* do not apply to Harlow's situation and do not stretch chapter 229A beyond the bounds of due process.[4]

Harlow cannot prevail in his due process challenge by showing that the statute might someday be applied against some future respondent in a potentially unconstitutional way. To prevail on an as-applied challenge, Harlow must show that the statute is unconstitutional as applied to his specific facts. *Schadl*, 37 N.W.3d at 341–42. To prevail on a facial challenge, Harlow must show that the statute would be constitutional under no set of facts. *Id.* at 341. Speculation that the statute could someday be applied unconstitutionally satisfies neither standard, and we hold that the district court's application of chapter 229A was constitutional.

4. *Other courts would hold that Harlow's commitment does not violate due process.* Other courts' analyses support our conclusion that the district court's application of chapter 229A was constitutional. *Cf. Wygle*, 910 N.W.2d at 615 ("Because SVP statutes in other jurisdictions often use different nomenclature . . . , cases from other state appellate courts have limited applicability in the interpretation of Iowa Code chapter 229A. [But their] reasoning . . . may inform our analysis . . . .").

First, in *State v. Bush* (*In re Commitment of Bush*), the Wisconsin Supreme Court considered whether a respondent was constitutionally committed as an

[4]Additional provisions of chapter 229A protect the due process rights of respondents. For example, Iowa Code § 229A.8 allows respondents to challenge their confinement on an annual basis. During that challenge, respondents are entitled to an examination of their mental abnormality by a qualified expert or professional person and an attorney to represent them in a hearing on their release. *Id.* § 229A.8(2), (5)(*a*).

SVP with no proof of a recent overt act. 699 N.W.2d 80, 83 (Wis. 2005). The respondent served a sentence for a sexually violent offense, was released on parole for twenty-six days, and then was rearrested and reincarcerated for a nonsexually violent violation of his parole. *Id.* at 83–84. The respondent argued that because he had been released on parole, due process required the state to prove a recent overt act to satisfy the present dangerousness requirement. *Id.* at 88. The court disagreed, holding that the respondent's release into the community did not imply that he was no longer dangerous, a bright-line rule requiring proof of a recent overt act would exceed the state's due process requirements, and requiring the state to find proof of a recent overt act while the respondent was released on parole would be illogical. *Id.* at 89–90.

The court's reasoning in *Bush* supports our determination that the State was not required to prove a recent overt act by Harlow. By releasing Harlow pursuant to a special sentence, the court did not convey that Harlow was no longer dangerous. The legislature enacted chapter 903B because it believed that even after serving their initial term of imprisonment, persons who have committed sexually violent crimes may still be dangerous. *See Hess*, 983 N.W.2d at 289–90 ("We are mindful that the purpose of the special sentence in section 903B.1 is to protect the public from sex offenders."). Therefore, the sexually violent offense that caused the respondent's initial term of imprisonment supports the required dangerousness determination, and due process does not demand proof of an additional overt act of sexual violence.

As additional support, in *People v. Felix*, a California appellate court considered whether the state was required to prove a recent overt act by a respondent who was reimprisoned after several parole violations. 87 Cal. Rptr. 3d 482, 484–85 (Ct. App. 2008). While considering Supreme Court and California

precedent, the court noted that "proof of recent overt acts [are not required] as a constitutional minimum." *Id.* at 491. Because the California SVP statute required at least two convictions for sexually violent offenses and evidence of a current mental disorder that makes it likely the respondent will reoffend, due process was satisfied without a recent overt act. *Id.* at 491–92; *see also People v. G.A.*, 311 Cal. Rptr. 3d 525, 533 (Ct. App. 2023) (noting the "substantial" authority holding that due process "does not require proof of a recent overt act to establish dangerousness sufficient to warrant a civil commitment" (quoting *Felix*, 87 Cal. Rprt. 3d at 490–91)).

And still more courts would hold that a recent overt act is not required for a respondent who is confined due to a special sentence similar to Iowa's § 903B. *Cf. Phillips v. State*, 178 So. 3d 468, 471 (Fla. Dist. Ct. App. 2015) (noting that the Florida SVP statute, which does not require proof of a recent overt act, applies to all persons who are currently confined for sexually violent or nonsexually violent offenses); *Beasley v. Molett*, 95 S.W.3d 590, 599 (Tex. App. 2002) (holding that Texas' SVP statute satisfies due process without evidence of a recent overt act because it requires the respondent to "be a repeat sexual offender and have a behavioral abnormality that makes the person a menace to the health and safety of another person").

We agree with these courts that a recent overt act is not the only way to prove dangerousness. At trial, the court must determine that "beyond a reasonable doubt, the respondent is a sexually violent predator." Iowa Code § 229A.7(5)(*a*). And to be an SVP, the respondent must "suffer[] from a mental abnormality which makes the person *likely to engage in predatory acts constituting sexually violent offenses*." *Id.* § 229A.2(15) (emphasis added). This requirement mirrors the dangerousness element that the *Hendricks* Court held

satisfies due process. *See Hendricks*, 521 U.S. at 360; *see also Garren*, 620 N.W.2d at 284–85. Holding that because Harlow was briefly released from incarceration, the State must prove a recent overt act would create an arbitrary, bright-line rule that requires the State to prove the absurd and reward Harlow for being returned to incarceration so quickly. Therefore, we hold that due process did not require the State to prove a recent overt act by Harlow.

III. Conclusion.

For these reasons, we affirm the district court's determination that Harlow is an SVP under Iowa Code chapter 229A.

District court judgment affirmed.