IN THE SUPREME COURT OF FLORIDA

MITCHELL WESTERHEIDE,

Petitioner,

vs. CASE NO. SC00-2124

STATE OF FLORIDA,

Respondent.
_____)

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE

On January 1, 1999, the Jimmy Ryce Act went into effect. See Chapter 98-64, Section 24, Laws of Florida. On the same day the State Attorney for the Seventh Judicial Circuit filed a petition under the Act seeking Mitchell Westerheide's commitment. (R 166-84) The Ryce Act, which then appeared at Sections 916.30-916.43, Florida Statutes (1998 supp.) and now appears at Sections 394.910 -394.930, Florida Statutes (2000), permits the State Attorneys to file petitions in the Circuit Courts seeking open-ended civil commitment of persons who are in prison, or the juvenile equivalent of prison. §§394.914, 394.917(2), 394.913(1), Fla. Stat. (2000). The Act requires the court which receives such a petition to enter a civil commitment order if the State shows by clear and convincing evidence that the person (a) was convicted of an enumerated sexually violent offense and (b) suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. Sections 394.917(1), 394.912(10), Florida Statutes (2000).

Through appointed counsel Mr. Westerheide asserted in his answer to the petition, and by motion to dismiss, that the Ryce Act on its face violates the rights protected by the due process, double jeopardy and ex post facto provisions of the state and federal Constitutions. (R 214-18, 255-58, 324-48) He further

argued in a pretrial motion to dismiss that the petition was filed in an arbitrary and capricious manner because "no rules or criteria have been established by the State...to determine which individuals" will be proceeded against under the Act. (R 216) The trial judge, the Honorable David Monaco, Circuit Judge, denied the motions. (R 246-49, 378-88)

A jury trial was held on March 1-3, 1999. (T 1-511) Before and during trial Mr. Westerheide objected to the State's proposed testimony on the issue whether he was likely to engage in sexually violent acts in the future. He objected (a) specifically, that the two psychologists the State proposed to call as experts had used methods in this case that are not generally accepted in the field of psychology, and (b) generally, that the State had failed to show its proposed expert testimony was reliable enough to present to a jury.(R 60, 121-22; T 128-29, 271, 287; R 64-82, 124-25; T 132-34, 148, 273-74, 280-81, 287) Judge Monaco overruled the objections, ruling that both doctors were qualified to testify at trial as experts in forensic psychology and that counsel for Mr. Westerheide could address his concerns during closing argument. (R 61, 122; T 129, 271) Psychologists Dr. Harry McClaren and Dr. Jack Merwin accordingly testified at trial that in their opinion, Mr. Westerheide would commit sexually violent offenses if not confined. Dr. Ted Shaw testified to the contrary for the defense. The details of their testimony are discussed in

the District Court's opinion and are summarized below in the Statement of Facts. See Westerheide v. State, 767 So. 2d 637, 641-43 (Fla. 5th DCA September 29, 2000).

Before trial, on February 15, 1999, proposed standard jury instructions for use in Ryce Act cases were published in the Florida Bar News. Those proposed instructions stated that "'likely to engage in acts of sexual violence' means a person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." Mr. Westerheide filed a timely written request for a jury instruction which would have replaced that definition of "likely" with the following:

> 1. In order for you to find that the Respondent is "likely to engage in acts of sexual violence" if he is not confined in a secure facility, you must find that the State has shown, by clear and convincing evidence, that the Respondent *more likely than not* will engage in such acts if not confined.
>
> 2. (In the alternative) "Likely" means "*more likely to happen than not*."
>
> 3. (In the alternative) "Likely" means "*having a better chance of existing or occurring than not*."

(R 418) (emphasis added) The parties' exchange with the court on the subject at trial was as follows:

> THE COURT: What's your viewpoint on putting a definition of 'likely' in there?
>
> THE STATE: Your Honor, 'likely' is a very

> common term, doesn't need any definition or legalese....
>
> THE COURT: ...I don't think 'likely' is a term of art, I think it's a pretty commonly understood word.
>
> DEFENSE COUNSEL: ...There is a definition of 'likely' in the definitions in the instructions, and we didn't want that definition of 'likely' to be used.... We would like 'likely' defined as more likely to happen than not...and the other language about posing a menace to the health and safety of others to be removed.
>
> THE COURT: I think the language is clear enough and I think it's an accurate statement of the laws that exist right now. I'll deny that request.

(T 439-40) The court instructed the jury, and issued it a verdict form, in accordance with the proposed standard instructions. (R 464-75; T 494-501)

The jury found unanimously that Mr. Westerheide was likely to reoffend, and Circuit Court entered its order on March 4, 1999, committing him to the custody of the Department of Children and Family Services. (T 5030-5; R 476-48) Notice of appeal was timely filed from the commitment order. (R 484)

Mr. Westerheide argued to the Fifth District Court of Appeal, in its case no. 5D99-785, that the Ryce Act violates the federal and Florida constitutional provisions that guarantee due process of law, equal protection of the laws, and freedom from double jeopardy and ex post facto laws. He also argued that it was error to deny his proposed special jury instruction defining

"likely," and that it was error to allow the State's expert witnesses to testify. The District Court, in its decision and opinion issued September 29, 2000, affirmed the commitment order and certified the following questions as being of great public importance:

> 1) DOES THE JIMMY RYCE ACT VIOLATE THE EX POST FACTO CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS?
>
> 2) DOES THE JIMMY RYCE ACT VIOLATE THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS?
>
> 3) DOES THE JIMMY RYCE ACT VIOLATE THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS?
>
> 4) DOES THE JIMMY RYCE ACT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS?

Westerheide v. State, supra, 767 So. 2d at 659.

The petitioner filed timely notice invoking this court's jurisdiction on October 5, 2000. This court, by its order dated January 23, 2001, denied the petitioner's motion to relinquish jurisdiction through which he sought to make a factual record of the conditions of the petitioner's confinement.

STATEMENT OF FACTS

The petition for commitment filed in this case alleged that Mr. Westerheide had "previously been convicted of a sexually violent offense as defined by Section 916.32, Florida Statute (1988 supp.), to wit: Lewd or Lascivious Assault Upon a Child in violation of Section 800.04(3), Florida Statutes."(R 166) A copy of the judgment issued in that criminal case was attached to the petition filed in this case; it shows that Mr. Westerheide did in fact plead guilty to one count filed under Section 800.04(3), Florida Statutes (1993), which proscribes the offense commonly known as statutory rape. See, e.g., Garcia v. State, 633 So. 2d 518 (Fla. 4th DCA 1994). He pleaded guilty, in addition, in that case to one count each of promoting a sexual performance by a child and aggravated assault. (R 168) The opinion issued by the District Court in this case incorrectly states that the alleged victim was 15 years old and the petitioner 22 at the time they had their sexual relationship. Westerheide v. State, 767 So. 2d 637, 642 (Fla. 5th DCA 2000). The record shows that he was 19, then 20, years old at the time and that she was 15, then 16 during that eight-month relationship. (T 373) (R 301, 303; T 120-21, 168-69, 373)

At a pretrial hearing Dr. Harry McClaren testified that he had worked for many years evaluating sex offenders as an employee of the states of Florida, Virginia, and Alabama, and that as part

of that experience, as to defendants who had been found not guilty by reason of insanity and who were seeking release, he had evaluated future dangerousness, a practice he referred to as "risk assessment." (R 52-54, 56-58) McClaren also testified that during the two years preceding the hearing in this case he had attended several presentations about new actuarial tools used by some members of his profession in an effort to predict redicivism among sexual offenders; he did not use those tools when he evaluated the petitioner for the Department of Children and Families in this case. (R 58-60) McClaren testified he did not believe he had sufficient personal experience, knowledge or training to use those tools, and testified that within his field there is disagreement as to their use, with some practitioners taking the view that the tools should be used alone without interpretation, some taking the view that they should form part of a responsible clinician's preparation for giving an opinion on future dangerousness, and some taking the view that the tools should not be used at all. (R 78-79) Dr. McClaren testified for the State at trial that he believes the passage of time has more effect than does therapeutic intervention on ameliorating the symptoms of the personality disorder he diagnosed in this case. (T 286)

Dr. Jack Merwin, the State's other expert, testified at the hearing below that he had specialized as a practicing psycholo-

gist in sexual deviancy since the 1970's, that he has experience in risk assessment, that he has had no specific training in recognizing signs of recidivism, and that he was not aware that any tools have been developed for predicting violent behavior. (R 118-22) He admitted at trial, where he testified that his area of expertise is "victimization," that predicting dangerousness is always difficult to do with any sort of certainty, and admitted that he had never attended a seminar which dealt specifically with predicting redicivism. (T 125-29)

At trial, the petitioner's diary and letters were introduced as evidence. Both the letters and the diary recount violent fantasies and reflect the petitioner's preoccupations with fish hooks and with his motto "learn pain, teach pain." (T 102, 104-5, 135-36, 180, 205, 242-55, 451, 454, 456) The letters have been made part of the record on appeal, and the diary and letters are quoted in the trial transcript and in the District Court's opinion. Westerheide v. State, 767 So. 2d at 642.(R 453; T 102, 104-5, 135-36, 242-55, 451, 454, 456)

Drs. Merwin and McClaren both testified at trial that they learned through interviews and through documents provided to them by the State that Adelle Tubbs, the alleged victim in the criminal case, had a consensual sexual relationship with Mr. Westerheide in 1993 which featured the deliberate infliction of pain on her, involving the use of fish hooks, knives, razor

blades, whips, chains, and a mask with a zipper over the mouth. (R 429-30, 352-53; T 156-59, 283-85, 303-04, 314, 318-21) Various of those implements were seized from Mr. Westerheide's home at the time of his arrest in 1993 and were introduced as evidence below. (T 113-21) The State called the petitioner as a witness, and he acknowledged owning the items and writing the letters and diary. (T 226-55) Dr. Merwin noted that among the documents he reviewed while preparing for trial were psychological evaluations prepared for Adelle Tubbs on her admission to Halifax Hospital and her treatment at Inner Harbor Hospital 'subsequent to the alleged events.' (T 131)

Drs. McClaren and Merwin both testified at trial that they diagnosed the petitioner as a sexual sadist with an antisocial personality disorder, and that they believe with 'reasonable psychological certainty' that he is a sexually violent predator as defined by the Florida Statutes. (T 134-35, 148, 280-81, 286-87) Both doctors testified that the petitioner had admitted to them that he used some of the implements seized from his home during sexual contact with Adelle Tubbs. (T 184, 285) Dr. Merwin testified that sexual sadism consists of deriving sexual pleasure from the pain of one's sexual partner, and testified that it is a 'chronic and lasting and progressive' condition. (T 139) Merwin also testified that antisocial personality disorder is characterized by a reckless disregard for others' safety and by absence of

remorse. (T 142-43) He referred to the combination of the two disorders as 'potentially lethal.' (T 184-95)

Dr. Ted Shaw testified for the petitioner. (T 346-429) Dr. Shaw had at the time of trial been hired by the Department of Children and Families to evaluate 22 potential candidates for Ryce Act commitment, and he had concluded that 13 of those 22 needed to be committed. (T 377-78) Dr. Shaw testified that he did not recommend commitment for Mr. Westerheide, since he believes that he or another competent psychologist, with the aid of polygraph tests, could design and implement an effective treatment plan for him. (T 370, 379, 381, 383) He testified that he considers it likely Mr. Westerheide is a sexual sadist, but that he has mixed feelings about the other doctors' additional diagnosis of antisocial personality disorder, although he 'might very well,' given facts he learned at trial along with facts he learned while preparing for trial, diagnose the petitioner with antisocial personality disorder. (T 357-59, 370-76, 396-413) Dr. Shaw also testified that he applied four actuarial tests in the petitioner's case, each of them designed to predict the likelihood of recidivism by violent criminals, sexual offenders or both. The scores obtained on two of those tests Shaw described as indicating a low risk of reoffending, and the scores obtained on the other two predicted the likelihood of Petitioner's reoffending to be between 11.2 percent and 48 percent. (T 351-64)

During his testimony Dr. Shaw noted that sadistic and masochistic sexual adventures are not illegal between consenting adults, as part of his explanation why he did not believe the petitioner was at high risk of committing further sexual crimes if not incarcerated; he drew a comparison to pedophilia, which by definition cannot be practiced legally. (T 374-75, 425) Shaw testified that he saw no evidence the petitioner was a pedophile, and Dr. McClaren admitted that he believed the petitioner suffers no mental disorders other than the two he diagnosed. (T 375, 279)

SUMMARY OF ARGUMENT

Point one. The Ryce Act is punitive in its intent and its effect, and this court should hold that it violates the federal and Florida constitutional protections against double jeopardy and ex post facto laws. The Ryce Act is more punitive than the Kansas statutory scheme that was at issue in Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); Florida's legislature has precluded the trial courts from considering any means less restrictive than post-prison institutionalization for controlling convicted sex offenders' behavior, a few short years after it abolished its previously-enacted program for treating mentally disordered sex offenders while they are still in prison. Even if this court does not agree that the United States Supreme Court would distinguish the Ryce Act from the Kansas sex offender commitment act, this court has held that Florida's Declaration of Rights provides more protections to its citizens than does the federal Bill of Rights.

Point two. The Ryce Act violates substantive due process in that the sole sanction it provides for exceeds in this case, as it will in many foreseeable cases, a reasonable relationship to the State's goal of protecting the public. The statute's term "likely to reoffend" is, in addition, unenforceably vague. This court should at a minimum construe "likely to reoffend" as requiring the State to show a high probability of reoffending,

and also construe "likely to reoffend" as requiring the State to show the person proceeded against is unable to control his conduct.

Point three. Judge Sharp, in the separate opinion she wrote below, correctly stated that there is no scientific consensus on whether it is possible to predict, in the long term, which sexual offenders will reoffend. This court either should hold on the basis of the scientific literature that such predictions are not supported in the relevant scientific community, or should remand this case to the trial court for findings of fact on whether a consensus exists on long-term predictability of redicivism and on who makes up the relevant scientific community.

Point four. This court should strictly scrutinize the Ryce Act in order to determine whether the Legislature has narrowly tailored the Act to meet a compelling State goal. The Petitioner submits that the Act is not sufficiently narrowly tailored in that it precludes the trial courts from considering sanctions less restrictive than total confinement.

ARGUMENT

POINT ONE

THIS COURT SHOULD ANSWER THE FIRST AND SECOND CERTIFIED QUESTIONS IN THE AFFIRMATIVE (THE RYCE ACT, ON ITS FACE AND AS APPLIED IN THIS CASE, VIOLATES CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY AND EX POST FACTO LAWS.)

The statute's provisions.

The Ryce Act requires prison and juvenile detention authorities, when they have in their custody a person they suspect may qualify for commitment under the Act, to notify law enforcement when that person's scheduled release becomes imminent. §394.913 (1), Florida Statutes (2000). A person qualifies for commitment if he has been convicted or adjudicated delinquent of an enumerated sexual offense, and if he is deemed likely to engage in sexually violent offenses in the future. §394.912(10), Florida Statutes (2000). "Likely" is defined as meaning "of such a degree as to pose a menace to the health and safety of others." §394.912 (4). Once law enforcement authorities have been notified of the impending release, the person may then be evaluated by psychologists or psychiatrists appointed for the purpose by the Department of Children and Families. §394.913(3). If those evaluators, or the State Attorney in the circuit where the person was convicted, consider the person likely to commit violent sex offenses in the future, the State may file a petition for commitment under the Act. §394.914. If committed after a jury trial the person is

remanded to the custody of the Department of Children and Families ("the Department") for "control, care and treatment" until the person shows probable cause to believe he is no longer dangerous. §§394.917(2), 394.918(1)-(3), 394.920.

Standard of review.

A decision on the constitutionality of a statute is reviewed by the de novo standard, because it presents a pure issue of law. Lowe v. Broward County, 766 So. 2d 1199 (Fla. 4th DCA 2000).

Argument.

The Ryce Act on its face violates the rights, protected by the federal and Florida constitutions, to be free from double jeopardy and from ex post facto laws. When a state applies punitive sanctions to a person who has already received criminal sanctions for the same conduct, the state violates that person's right to be free from double jeopardy, and when punitive sanctions are created after the date a criminal offense takes place, applying them as punishment for that offense violates the constitutional prohibition against ex post facto laws. State v. Knowles, 625 So. 2d 88 (Fla. 5th DCA 1993) (double jeopardy); Art. I, §9, Fla. Const. (double jeopardy); State v. Hootman, 709 So. 2d 1357, 1358-59 (Fla. 1998) (ex post facto laws); Art. I, §10, Fla. Const. (ex post facto laws); U.S. Const., Amend. V (double jeopardy); U.S. Const., Art. I, §10 (ex post facto laws.)

The Ryce Act is punitive both in its intent and its effect.

Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), does not control this case because the Florida statutory scheme here at issue is more clearly punitive than the Kansas scheme at issue in Hendricks. In any event, this court accords the people of this state greater rights under Florida's Declaration of Rights than does the United States Supreme Court under the federal constitution.

Seven years before it passed the Ryce Act, in 1991, Florida's Legislature abolished its program for treating mentally disordered sexual offenders in prison. Ch. 91-225, §25, Laws of Florida, repealing Chapter 917, Florida Statutes; see §917.012, Florida Statutes (1989). Declining to treat sex offenders for their mental problems in prison, then detaining them further--until an indefinite date--so as to *begin* treating them, "seems clearly to be punishment." State v. Brewer, 767 So. 2d 1249, 1253 (Fla. 5th DCA 2000) (Harris, J., concurring); Kansas v. Hendricks, supra, 117 S. Ct. 2072, 2083-94 (1997) (Breyer, J., dissenting). "Treatment for sexual offending that begins many years after the underlying sex offense is relatively more difficult than that which occurs soon thereafter.... Few, if any, correctional institutions are designed to function as therapeutic environments, much less actually do so. That [a] committed predator has already spent much of his life in such an environment likely reduces his ability to benefit from treatment."

Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 597, 617 (1992)(cited by Justice Breyer in Hendricks). See also Kavanaugh, Massachusetts's Sexually Dangerous Persons Legislation: Can Juries Make a Bad Law Better?, 35 Harv. Civil Rights-Civil Liberties L. Rev. 509, 522 (2000) (noting that Massachusetts repealed a law that mandated civil commitment *instead of* prison for sex offenders, then passed a law analogous to Florida's; "the shift highlights the primary purpose of the new law--to warehouse sex offenders, rather than to treat them.") Professor Steven Friedland of Nova Law School agrees that delayed treatment "indicat[es] a less than wholehearted concern by the legislature for 'healing' these 'sick' individuals," noting that the American Psychiatric Association recommends that treatment for sex offenders begin during incarceration. Friedland, On Treatment, Punishment, and the Civil Commitment of Sex Offenders, 70 U. Colo. L. Rev. 73, 109-10 and (1999). See id. at 148, nn. 404-05. Accord Becker & Murphy, What We Do and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychology, Public Policy & Law 116, 133 (1998)(commending, "as professionals in the field," Justice Breyer's criticism of delaying treatment), and Comment, Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators: Replacing Criminal Justice with Civil Commitment, 26 Fla. St. U.L. Rev. 487, 500 at n.89 (1997).

More basically, the relevant scientific literature does not support the assumption that those sex offenders targeted by the Act can profit from treatment *at all*. The Legislature, in the Act's preamble, expressly acknowledges that members of the targeted population "do not have a mental disease or defect that renders them appropriate for involuntary treatment under the Baker Act," and that "sexually violent predators have antisocial personality features which are unamenable to existing mental illness treatment modalities." The preamble also, inconsistently, states that "the treatment needs of this population are very long term." §394.910, Florida Statutes. The mental health treatment community agrees with the Legislature that most sex offenders behave in an anti-social manner but do not manifest serious emotional or thought disorders. Schopp, Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks, 5 Psychology, Public Policy & Law 120, 132 (1999); Friedland, supra, 70 U. Colo. L. Rev. 73, 109 at nn. 220-21, 113 at n. 235 (1999); Kavanaugh, supra, 35 Harv. Civil Rights-Civil Liberties L. Rev. 509, 527 at n.27 (2000). The mental health treatment community also agrees with the Legislature that "anti-social personality disorder" is not a condition that can be effectively treated. Schopp, supra, 5 Psych., Pub. Pol. & Law 120, 140 at n. 113, 150 at nn. 157-59 (1999); Friedland, supra, 70 U. Colo. L. Rev. 73, 109 at n. 220,

112 at n.235, 117 at nn. 254-56 (1999); Wettstein, supra, A Psychiatric Perspective..., 15 U. Puget Sound L. Rev. 597, n. 60 and accompanying text (1992). Dr. McClaren, one of the State's experts, admitted in the trial of this case that the passage of time has more effect than does treatment on ameliorating the symptoms of anti-social personality disorder. (T 286)

The Ryce Act not only delays initial efforts to treat sexual offenders and acknowledges that in a majority of cases it may be holding the untreatable for treatment; further, the Act throws up greatly significant barriers to that whatever potential effectiveness the offered treatment has. The Act provides that "the psychotherapist-patient privilege...does not exist or apply...in proceedings to involuntarily commit a person under this part." §394.9155(3), Florida Statutes (2000). A person proceeded against under the Act must "fully cooperate with...any state mental health expert" on penalty of losing his opportunity to introduce expert testimony himself; and once committed, a person seeking release must submit to an examination and supply the trial court with a waiver of rights. §§394.9155(7); 394.918(1),(2); 394.920, Florida Statutes (2000). In short, all confidentiality is stripped from the treatment process from the time it begins. "Confidentiality has traditionally been considered the sine qua non of effective mental health treatment.... Regrettably... [t]herapists in... institutional programs...are often pressured

to share information about their offender patients with others responsible for, or involved in, release decisionmaking." Wettstein, supra, A Psychiatric Perspective..., 15 U. Puget Sound L. Rev. at 619-20.

The delayed and non-confidential treatment offered under the Act further provides for no community aftercare. Treatment begins after the offender's prison sentence and terminates on his release, if he obtains it, from civil commitment. "Sexual predator programs that exist without adequate after-care programs and without adequate parole supervision are destined to failure.... [S]uch programs are going to be needed if society is serious about reducing risk." Becker and Murphy, What We Do and Do Not Know About Assessing and Treating Sex Offenders, supra, 4 Psychology, Public Policy & Law at 133 (1998). Also critical of the failure to provide aftercare are Wettstein, supra, A Psychiatric Perspective..., 15 U. Puget Sound L. Rev. at 622 and Comment, supra, Jimmy Ryce...Replacing Criminal Justice with Civil Commitment, 26 Fla. St. U.L. Rev. at 499-50.

Notwithstanding such concerns, the Legislature has mandated that courts considering Ryce commitment cases *must not* consider *any* alternative disposition less restrictive than total confinement. §394.911, Florida Statutes (2000). This is unusual: in Hendricks Justice Breyer noted that several of the states which allow civil commitment of sexual offenders first *require* consid-

eration of less restrictive alternatives. 117 S. Ct. 2072 at 2095. Arizona, Illinois, Minnesota, North Dakota and Wisconsin all have such a requirement. §36-3707, Ariz. Rev. Stat. Ann. (1999); Ill. Ann. Stat. ch. 725, paras. 207/40(2)-(4) (Smith-Hurd 1999), as amended by 2000 Ill. Legis. Serv. P.A. 91-875 (West); Minn. Stat. s. 253B.185(1) (1999 supp.); N.D. Cent. Code ss. 25-03.3-13 (1999); §980.06(2), Wis. Stat. (1999). "[T]reatment in the least restrictive environment ...has become a tenet of mental health policy." Becker & Murphy, supra, 4 Psychology, Public Policy & Law at 133. Again, "control" rather than "care" or "treatment" appears to have been the Florida Legislature's chief purpose.

The Florida Act is more clearly punitive than the similar Kansas scheme the United States Supreme Court weighed in Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The Kansas Legislature at the time had not expressed a view whether the courts should be permitted to consider alternatives less restrictive than forced confinement, see 117 S. Ct. at 2094-95 (Breyer, J., dissenting); Kansas has since provided the option of "transitional release" from commitment. Kan. Stat. Ann. §59-29a08(b)-(f). Kansas further provides its sex-offender prison inmates, before the commitment process begins, with "ward milieu" therapy as well as group therapy. Hendricks, 117 S. Ct. at 2094 (Breyer, J., dissenting). Petitioner submits that even by the

Hendricks Court's standards, and certainly by this court's standards, the Ryce Act merely extends punishment for sex offenders' crimes and thus should be held to violate the federal and Florida constitional protections against double jeopardy and against ex post facto laws (Mr. Westerheide's offenses against Ms. Tubbs took place during 1993; the Ryce Act dates to 1998.)

The District Court of Appeal in this case, like the Court in Hendricks, focused on whether indefinite commitment of sexually violent predators should be deemed civil or criminal. Westerheide, 767 So. 2d 637, 644-646. This court, however, when it considered a constitutional challenge to Florida's Contraband Forfeiture Act, sensibly disregarded arguments which depended on an initial ruling whether forfeiture is 'criminal,' 'quasi-criminal,' or 'civil,' holding that:

> We reject the overly simplistic notion that a label should be dispositive in deciding constitutional cases. Disputes over rights guaranteed by the Florida Constitution must be decided by evaluating, and if necessary, balancing the interests as appropriate under the circumstances.

Department of Law Enforcement v. Real Property, 588 So. 2d 957, n.15 (Fla. 1991). This court should continue to disregard the "civil" designation, and should also decline to apply the multi-factor test applied by the District Court in this case to determine whether the Act, despite its label, is truly "civil" or "criminal." 767 So.2d at 645-46. The authors of the majority and

dissenting opinions in Hendricks also applied that test, which originated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); they reached precisely opposite results. Compare Hendricks, 117 S. Ct. at 2082-83, with id. at 2098 (Breyer, J., dissenting). The Mendoza factors have been justly criticized as "beg[ging] the question" whether confinement under a particular "predator" statute is so punitive that constitutional considerations arise. Comment, Jimmy Ryce... Replacing Criminal Justice with Civil Commitment, 26 Fla. St. U.L. Rev. 487, 501 at nn.95-96; see also Klein, Redrawing the Civil-Criminal Boundary, 2 Buff. Crim. Law Rev. 683 (1999). In the event this court disagrees on this point and adopts the Mendoza analysis, Petitioner submits that Justice Breyer's conclusions in Hendricks apply here: the Ryce Act "involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment) and is excessive in relation to any alternative purpose assigned." 117 S. Ct. at 2098.

In his concurring opinion in Hendricks, Justice Kennedy wrote that

> [i]f the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indi-

> cation of the forbidden purpose to punish.... My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process.... If the civil system is used simply to impose punishment after the state makes an improvident plea bargain on the criminal side, then it is not performing its proper function.... On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence...our precedents would not suffice to validate it.

117 S. Ct. at 2087. In this case, as Justice Kennedy warned, the civil system is being used, now that the prison sentence the State bargained for has expired, to augment the appellant's criminal sentence. This court should distinguish Hendricks based on the factors set out above, and should hold that the Ryce Act violates both federal and Florida protections against double jeopardy and ex post facto laws.

Even if this court determines that the United States Supreme Court would probably not distinguish the Ryce Act from the act at issue in Hendricks, this court has still the power and duty to address whether the act violates Florida's protections against double jeopardy and ex post facto laws. This court has, of course, held on numerous occasions in recent years that Florida's Declaration of Rights provides greater individual protections than does the federal constitution. State v. Hoggins, 718 So. 2d 761 (Fla. 1998); Allred v. State, 622 So. 2d 984 (Fla. 1993); State v. Guess, 613 So. 2d 406 (Fla. 1992); Traylor v. State, 596

So. 2d 957 (Fla. 1992); Voltaire v. State, 697 So. 2d 1002 (Fla. 4th DCA 1997), rev. dism. 709 So. 2d 1382 (Fla. 1998); see In re Forfeiture of 8,849.00, 603 So. 2d 96 (Fla. 2d DCA 1992), citing Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). Regarding double jeopardy, this court has expressed the view that

> Although federal law provides some guidance for interpreting the meaning of Florida's double jeopardy clause...Article I, Section 9 of the Florida Constitution... has historically focused upon the protection of the individual, and thus provides *at the very least* the same protection of individual rights as the federal constitution.

Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991) (emphasis added; citation and punctuation omitted.) "Having a fixed punishment is a hallmark of legitimate governance; a system that would permit the government to seek a second punishment merely because it was dissatisfied with the initial sentence imposed would be tyrannical." Comment, Jimmy Ryce... Replacing Criminal Justice with Civil Commitment, 26 Fla. St. U.L. Rev. at 504. Ex post facto protections not only protect individual rights but limit government abuse. Id. By passing the Ryce Act the Legislature has allowed the State to indefinitely augment the sentence already imposed any case where a jury can be convinced that a past sex offender is "likely...to pose a menace to the health or safety of others." §394.912(4). This court should answer the first two

questions certified by the District Court in the affirmative.

POINT TWO

THIS COURT SHOULD ANSWER THE THIRD CERTIFIED QUESTION IN THE AFFIRMATIVE (THE RYCE ACT, ON ITS FACE AND AS APPLIED IN THIS CASE, VIOLATES DUE PROCESS.)

The statute's provisions.

As noted above, a person must be committed for an indefinite period by the Circuit Court if he has been convicted or adjudicated delinquent of an enumerated sexual offense, and if a jury finds that he suffers from a "mental abnormality" that makes him likely to engage in sexually violent offenses in the future. §§394.912(10), 394.917(1),(2), 394.918-20, Florida Statutes (2000). "Mental abnormality" is defined as "a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses." §394.912(5), Florida Statutes (2000)."Likely to engage in acts of sexual violence" is defined in the statute to mean "of such a degree as to pose a menace to the health and safety of others." §394.912(4). The State's standard of proof at trial is "by clear and convincing evidence." §394.917 (1). Persons proceeded against are entitled to appointed counsel. §394.916(3). The Florida Rules of Civil Procedure apply throughout the proceedings. §394.9155 (1). All hearsay is admissible at trial unless the trial court finds it unreliable; hearsay may not be the sole basis for commitment. §394.9155(5).

Standard of review.

A decision on the constitutionality of a statute is reviewed by the de novo standard, because it presents a pure issue of law. Lowe v. Broward County, supra.

Argument.

Involuntary commitment to a mental hospital is a "massive curtailment of liberty" which the State cannot undertake without providing the committed person with due process of law. Shuman v. State, 358 So. 2d 1333, 1335 (Fla. 1978). The Ryce Act, on its face and as applied in this case, does not provide persons subject to the Act with the due process of law that is guaranteed by the federal and Florida Constitutions; the sole sanction provided for in the Act exceeds in this case, as it will in many foreseeable cases, a reasonable and substantial relationship to the object sought to be attained. The statute, in addition, is unenforceably vague.

A. Substantive due process.

The doctrine of substantive due process protects the full panoply of individual rights from unwarranted encroachment by the government. Department of Law Enforcement v. Real Property ("FDLE"), supra, 588 So. 2d at 960. The state's "police power," which derives from the state's sovereign right to enact laws for the protection of its citizens, is not boundless and is confined to those acts which may be reasonably construed as expedient for

protection of the public health, safety, welfare, or morals. State v. Saiez, 489 So. 2d 1125, 1127. (Fla. 1986). The due process clauses of the federal and state constitutions do not prevent legitimate interference with individual rights under the police power, but do place limits on such interference. Id. In addition to the requirement that a statute's purpose be for the general welfare, the guarantee of due process requires that the means selected shall have a reasonable and substantial relationship to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious. Id. at 1128.

The Ryce Act denies the Respondent substantive due process in that it does not require or even permit the courts to consider post-trial supervision alternatives that are less restrictive than confinement. §394.911, Fla. Stat. (2000). Where the State seeks to curtail individuals' rights, it must do so by the least restrictive means available to it. FDLE, supra, 588 So. 2d at 964; Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565, 571 (Fla. 1991); State v. Leone, 118 So. 2d 781, 784-85 (Fla. 1960). The Act does not allow the Circuit Courts to consider community-based sanctions, which could include any combination of electronic monitoring, outpatient counseling, inpatient counseling for finite terms, residence in halfway houses, furloughs to test detainees' ability to adjust to living outside confinement, and close supervision with frequent report-

ing and frequent home checks. Florida's Baker Act requires the courts to consider less restrictive alternatives before ordering involuntary hospitalization. §§394.459(2)(b), 394.467(1)(b), Fla. Stat. (2000). Similar provisions require the Florida courts to consider less restrictive alternatives before involuntarily committing criminal defendants or juveniles who are incompetent to undergo trial or sentencing, §§916.13(1)(b), Fla. Stat. (2000), 985.223 (3)(b), Fla. Stat. (2000), and before involuntarily admitting mentally retarded persons for residential treatment. §393.11(8) (b)(2), Fla. Stat. (2000). As noted above, at least five states require their courts to consider less restrictive alternatives before civilly committing sexually violent predators. An Arizona appellate court has held that its SVP act is constitutional at least partly based on the fact that it allows consideration of placements less restrictive than total confinement. Martin v. Reinstein, 987 P. 2d 779, 790 (Ariz. App. 1999).

The Petitioner's expert witness, Dr. Ted Shaw, testified that Petitioner is "neither crazy nor stupid," and is able to control his conduct; that he had no reason to believe that Petitioner is a pedophile; that consensual sado-masochistic activities are entirely legal between consenting adults; and that community supervision, in his experience, was appropriate in this case. On those facts Judge Monaco, had he been permitted to

exercise some discretion in the matter, could rationally have concluded that a sanction less draconian than commitment was called for. The Act violates substantive due process in that the single, inflexible means of protecting the public that it creates exceeds in this case, and in other foreseeable cases, a reasonable relationship to that goal. See Saiez, supra.

This court should not adopt the District Court's holding on this issue. It held that the Act will never inappropriately result in commitment because "whether less restrictive alternatives are appropriate [is an] evidentiary matter the jury may consider in determining whether the person is a sexually violent predator." 767 So. 2d at 649. Defense counsel plainly had no way to argue to the jury in this case that electronic monitoring, residence in a halfway house, or inpatient counseling for a finite term with furloughs were appropriate and sufficient dispositions, since no law authorized the trial court to impose such sanctions in lieu of commitment.

Kansas v. Hendricks does not dispose of this question; as noted above, the 1994 Kansas statute at issue in that case did not speak to whether the courts of that state could or could not consider less restrictive alternatives. This court should hold that allowing the Circuit Courts to consider less restrictive alternatives is part of the process due, under the federal and Florida constitutions, in *all* civil commitment proceedings. FDLE,

supra; Padgett, supra; Leone, supra; Saiez, supra. The Petitioner, at a minimum, is entitled to a new trial where counsel can argue, and the jury must be instructed, that less restrictive alternatives to commitment can be imposed.

The Ryce Act also denies substantive due process in that–as described above on Point One–it acknowledges that it may in most cases be holding the untreatable for "treatment," it delays any effort at treatment until after years of imprisonment are complete, it precludes community care as a transition to rejoining society, and it denies the "patients" confidentiality. See Friedland, On Treatment, Punishment, and the Civil Commitment of Sex Offenders, 70 U. Colo. L. Rev. 73, 114 (1999); Comment, 26 Fla. St. U.L. Rev. 487, 512-13 (1999). Hendricks does not dispose of this issue; as noted above, Kansas provides treatment in prison and now provides for transitional release from confinement. Treatment which is not calculated to improve a patient's condition by definition does not bear a reasonable and substantial relationship to the object sought to be attained. See Saiez, supra. The Act accordingly denies substantive due process and should be declared void.

The Act further denies substantive due process in that it does not require the State to prove its case beyond a reasonable doubt. §394.917(1), Florida Statutes (2000)(setting out "by clear and convincing evidence" as burden of proof.) This court has held

that burdens and standards of proof can implicate substantive due process. FDLE, supra, 588 So. 2d 957, 960. The California Supreme Court has held that a "beyond a reasonable doubt" standard is required in proceedings to civilly commit sex offenders, because "[t]he deprivations with which the individual is threatened in commitment are comparable in magnitude, with respect to both the threatened loss of liberty and the stigmatization, to the potential deprivations in criminal cases." People v. Burnick, 121 Cal. Rptr. 488, 504-05 and n.15 (Cal. 1975); see People v. Ward, 83 Cal. Rptr. 2d 828, 832 (Cal. App. 1999). The Court in Kansas v. Hendricks reached no decision on this issue; the Kansas civil commitment statute at issue in that case required the State to prove its case beyond a reasonable doubt. Hendricks, 117 S. Ct. 2072, 2077. This court should follow the California Supreme Court's reasoning and decision on this point; Petitioner, at a minimum, is entitled to a new trial where the "beyond a reasonable doubt" standard is incorporated into the jury's instructions.

B. Vagueness.

The definition of "mental abnormality" that appears in the Ryce Act is unconstitutionally vague. That definition is not, as a practical matter, severable from the remainder of the Act. The District Court's proposed resolution of this difficulty is not workable, and the Act must for that reason be declared void or

construed in a manner that limits its application.

The Act defines "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses." §394.912(5), Florida Statutes (2000). That definition does not suggest to what degree the person must be predisposed to commit offenses, or to what degree his volitional (or emotional) capacity must be affected. The Act purports to cure that defect by providing that a person cannot be considered a sexually violent predator unless his mental abnormality (or a personality disorder) makes him "likely to engage in acts of sexual violence if not confined." §394.912(10)(b). "Likely to engage in acts of sexual violence" is defined as meaning that "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." §394.912(4). As Judge Sharp correctly noted in her special concurring opinion in this case, those definitions are circular; a person is likely to reoffend if he poses a menace, and a person who poses a menace is a sexually violent predator. Westerheide, 767 So. 2d at 660 (Sharp, J., concurring specially). Numerous commentators agree, unsurprisingly, with Judge Sharp on that point. See Brakel & Cavanaugh, Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States, 30 N.M. L. Rev. 69, 78 (2000); Comment, 26 Fla. St. U.L. Rev. 487, 508-09 (1999);

Wettstein, supra, A Psychiatric Perspective, 15 U. Puget Sound L. Rev. 597, 602 at n.26 (1992).

The statutory definitions of "mental abnormality" and "likely" encourage an emotional and arbitrary response and do not give juries a rational basis for deciding which persons must be confined under the Act. Legislatures must define the terms they use in a manner that does not encourage arbitrary and discriminatory enforcement; where a law fails to provide minimal guidelines to those entrusted with enforcing it, a "standardless sweep" results which "allows... prosecutors and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903, 909 (1983); accord Wyche v. State, 619 So. 2d 231, 237 (Fla. 1993).

The District Court concluded that since "likely" is commonly understood by the public to mean "highly probable or probable and having a better chance of existing or occurring than not," the standard for commitment set out in the Act presents no problem. 767 So. 2d at 652-53. Petitioner submits that "highly probable" means something different from "probable," and that "likely" may mean to the average person either "reasonably foreseeable," "more likely than not," or, as the Fifth District Court suggested, "highly probable." See Garcetti v. Superior Court, 102 Cal. Rptr. 2d 214, 220 n.6 (2000). Without greater clarification than the District Court provided, the Department evaluators, the prosecu-

tors and the jurors involved in these cases will inevitably have to consult their personal predilections when deciding who "likely" "pose[s] a menace."

This court should accordingly adopt the limiting instruction suggested by Judge Sharp in her concurring opinion in this case. Pointing to the fact that the Legislature used the term "menace" in its definition of "likely," Judge Sharp concluded that "likely" should be construed by the courts as meaning "a high probability, greater than 50%." Westerheide, 767 So. 2d at 661. The Minnesota Supreme Court has reached a similar conclusion. In re the Matter of Linehan, 557 N.W. 2d 171, 179-80 (1996). The "high probability" standard was also alluded to, albeit confusingly, by the majority in Westerheide. 767 So. 2d at 652-53. This court should at a minimum, to limit arbitrary enforcement, incorporate "high probability" into the State's burden of proof. Kolender; Wyche.

The vagueness issue was not raised in Kansas v. Hendricks. The only due process issue raised in that case was the specific question whether "mental abnormality" must be construed to mean "mental illness" within the meaning prior Supreme Court cases had given that phrase. That contention was rejected by the Court. 117 S. Ct. at 2080-2081. The Court, however, approved the Kansas civil commitment act because it concluded that it applied, by its terms, only to "a limited subclass of dangerous persons" "who are

unable to control their dangerousness." Hendricks, 117 S. Ct. at 2080. The Ryce Act on its face cannot reasonably be said to limit enforcement, as far as Department evaluators, prosecutors or jurors are concerned, to cases that involve a "limited subclass" of persons who are "unable to control their dangerousness."

The Kansas and Minnesota Supreme Courts have found a additional solution to the overly flexible element of "likeliness" to reoffend. Those courts have construed the sexual predator civil commitment acts in effect in those states to require a showing that persons proceeded against under such acts have a mental abnormality which makes them unable to control their conduct. In the Matter of Care and Treatment of Crane, 7 P. 3rd 285 (Kan. 2000); In re Linehan, supra, 594 N.W. 867, 871-72 (Minn. 1999). The commitment acts construed in those cases are indistinguishable from Florida's on this point, and this court should adopt the same limiting construction.

As the Linehan court correctly points out, the Supreme Court's holding in Hendricks was that the Kansas commitment act was not punitive because persons to be committed under the act are "by definition *suffering from a mental abnormality or a personality disorder that prevents them from exercising adequate control over their behavior*." Linehan, 594 N.W. 2d 867, 871-72, citing Hendricks, 117 S. Ct. at 2072 (emphasis added); accord Crane, 7 P. 3rd at 290. The Supreme Court in Hendricks summarized

past precedent by saying

> States have in certain narrow circumstances provided for the forcible civil detainment of people *who are unable to control their behavior* and who thereby pose a danger to the public health and safety. We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. It thus cannot be said that the involuntary civil confinement of *a limited subclass of dangerous persons* is contrary to our understanding of ordered liberty.

117 S. Ct. at 2079-80 (emphasis added, citations omitted). The Court applied that precedent to the case before it as follows:

> Hendricks...conceded that...he cannot control the urge to molest children. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.

Id. at 2081. The Court concluded that

> Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality *rendering him unable to control his dangerousness.*

Id. at 2083 (emphasis added). As the court correctly stated in Linehan, "[a]t no point in its analysis did the Supreme Court state that a civil commitment statute could pass substantive due process without a volitional impairment element." 594 N.W. 2d at 873.

The Minnesota Supreme Court rejected Linehan's substantive

due process argument by construing the Minnesota act in accordance with Hendricks and finding, based on the record, that Mr. Linehan is unable to control his conduct. 594 N.W. 2d at 873-76. (Mr. Linehan killed a fourteen-year-old girl while sexually assaulting her, committed two more sexual assaults in the ensuing month, was convicted in the case involving the fourteen-year old, escaped from prison and assaulted another fourteen-year-old, returned to prison then was placed in a video-supervised halfway house, where he was videotaped during a family visit masturbating after playing with his stepdaughter.) 594 N.W. 2d at 869, 876-77. The Kansas Supreme Court granted Crane a new trial based on its holding that the jury should have been instructed that volitional impairment is an element of the State's case. 7 P. 3rd at 290. The California courts also instruct their juries that the State must show that alleged sexually violent predators are unable to control their conduct. See People v. Ward, 83 Cal. Rptr. 2d 828, 833 (Cal. App. 1999).

This court should either adopt the Crane and Linehan courts' careful reading of Hendricks and limit the Ryce Act's application accordingly, and in addition adopt Judge Sharp's suggested "high probability" construction, or else declare the Ryce Act void for vagueness. If this court chooses the former course, the remedy applied in Crane and by the California courts should be applied in Petitioner's case as well, since Petitioner's expert witness

testified that he is able to control his conduct. Petitioner is entitled, at a minimum, to a new trial where the jury is instructed that the State must prove a high probability that he is unable to control his conduct. Crane; Linehan; Ward; Hendricks.

POINT THREE

THE STATE FAILED TO SHOW THAT ITS PROPOSED EXPERT OPINION TESTIMONY WAS OF A KIND GENERALLY RECOGNIZED IN THE RELEVANT SCIENTIFIC COMMUNITY, OR THAT IT MET MINIMUM STANDARDS OF RELIABILITY. ADMITTING EVIDENCE WITHOUT SUCH A SHOWING VIOLATES THE RIGHT TO DUE PROCESS OF LAW.

Standard of review.

This court, once it accepts jurisdiction over a cause in order to resolve a legal issue, has discretionary jurisdiction to consider all issues necessary to a full and final resolution of the cause. Hall v. State, 752 So. 2d 575, 582 n.2, citing Savoie v. State, 422 So.2d 308, 310 (Fla. 1982). Accord Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986).

Whether evidence meets the Frye standard is a question of law which is to be reviewed by a de novo standard. Brim v. State, 695 So. 2d 268 (Fla. 1997), construing Frye v. United States, 293 F. 1013 (D. C. Cir. 1923).

Argument.

The issue raised on this point is necessary to a full resolution of this cause. Judge Sharp correctly stated, in her special concurring opinion in this case, that

> this statute...is not based on sound medical or scientific practices or findings.... The Legislature made a finding, in passing this statute, that there exists a small but very dangerous groups of people called 'sexually violent predators.' However, there is no evidence this group truly exists and is identifiable.

> Even if such a 'syndrome' can be established by legislative fiat, there is also great uncertainty about the accuracy of psychiatric diagnosis and the prediction of future behavior.
>
> *
>
> [T]he experts have no scientific basis to enable them to predict future acts of violence....there is wide-spread agreement among mental health experts that clinical predictions of dangerousness are highly unreliable.

Westerheide v. State, 767 So. 2d 637, 661, 662 (Sharp, J., concurring specially). The absence of scientific consensus is at the core of the substantive due process issue raised at Point Two above and is, accordingly, genuinely necessary to a full resolution of this cause.

The majority of the District Court panel reached incorrect conclusions on the Frye issue which this court should correct. See Westerheide, 767 So. 2d at 657-59. The District Court held that Frye analysis does not apply to predictions of dangerousness because such predictions are merely statements of pure informed opinion by psychologists, based on their training and experience. 767 So. 2d at 657. Petitioner submits it is in fact a hotly debated question whether, and to what extent, anyone can make a valid prediction how likely it is that an individual who is not psychotic will recidivate in the long term. See Flores v. Johnson, 210 F. 3rd 456, 462-70 (5th Cir. 2000)(Garza, J., specially concurring) (questioning validity of Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d

1090 (1983)); Rogers, The Uncritical Acceptance of Risk Assessment in Forensic Practice, 24 Law and Human Behavior 595 (2000); Schopp, Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After Hendricks, 5 Psychology, Public Policy & Law 120, 133-44 (1999); Friedland, On Treatment, Punishment, and the Civil Commitment of Sex Offenders, 70 U. Colo. 73, 81-83, 137-38 (1999); Janus & Meehl, Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings, 3 Psychology, Public Policy and Law 33, 35-37 (1997); Wettstein, 15 U. Puget Sound L. Rev. 597, 604-08 (1992). Cf. What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychology, Public Policy and Law 116 (1998).

The petitioner acknowledges that the Frye issue was not presented to the trial court in a useful manner in this case. See Westerheide, 767 So. 2d at 656-57, 661. The petitioner submits first that the discussion in the separate opinions issued below and the literature cited in those separate opinions, in addition to the parties' briefs and argument, provide a sufficient basis for this court to decide the Frye issue: as the authorities cited above indicate, the majority of psychologists and psychologists outweigh the small minority of practitioners who believe that long-term prediction of behavior in non-psychotic individuals is possible. In the alternative, if this court disagrees, the petitioner submits that the remedy fashioned by the Second District Court in Brim v.

State, 25 Fla. L. Weekly D2537 (Fla. 2d DCA October 11, 2000) (Brim III) is appropriate in this case. That court, holding that de novo review of a Frye issue cannot be performed without a factual record on standards in the relevant scientific community, relinquished its jurisdiction to the trial court for it to take testimony on specific aspects of the DNA-related issue which was raised in that case. This court, if it does not invalidate the Ryce Act in this proceeding, should likewise remand this case so that a record can be made not only on the issue whether the relevant scientific community has reached a consensus whether, and to what extent, individual sex offenders' likelihood of reoffending can be predicted, but also on the significant threshold issue of who makes up the relevant scientific community. See Vargas v. State, 640 So.2d 1139, n.10 (Fla. 1st DCA 1994), holding that the relevant scientific community in that DNA-related case was not limited to forensic scientists working in the field, who obviously have already determined that the new science is a valid one, but that the relevant community includes all of those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it. Accord United States v. Porter, 618 A.2d 629, 634 (D.C. App. 1992) (cited in Vargas).

POINT FOUR

THE FOURTH CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE (APPLYING THE RYCE ACT VIOLATES EQUAL PROTECTION OF THE LAWS.)

The District Court of Appeal held that the equal protection issue raised by Mr. Westerheide in that court was properly characterized as a due process issue. 767 So. 2d at 653-54. That argument was that the Legislature has directed the Department to promulgate rules setting out criteria for its evaluators to use when recommending commitment, see §394.930(1) and (2), Florida Statutes (2000), that the Department has failed altogether to create such rules, and that all persons proceeded against under the Act therefore have a claim that the Act is not being applied equally statewide. Petitioner acknowledges the District Court's ruling that this argument represents an aspect of the vagueness claim set out above at Point Two, and asks this court to treat it as such and to grant relief on that ground.

Petitioner further asks this court to consider whether he is not, in fact, being denied the equal protection of the laws in that the Legislature treats alleged sexually violent predators differently from all other potential subjects of civil commitment in that it expressly precludes the trial courts from considering, in their cases, whether less restrictive alternatives exist to total confinement. §394.911, Florida Statutes.

Standard of review.

A decision on the constitutionality of a statute is reviewed by the de novo standard, because it presents a pure issue of law. Lowe v. Broward County, supra.

Argument.

In In re Young, 857 P. 2d 989, 1012 (Wash. 1993), the Washington Supreme Court held that that state's sexually violent predator civil commitment scheme violated equal protection of the laws because it failed to require consideration by the trial courts of less restrictive alternatives to total confinement, while the state's general civil commitment law did require such consideration. The Ryce Act *expressly precludes* the trial courts from considering less restrictive alternatives to total confinement, while this state's general civil commitment statute, the Baker Act, requires such consideration. Cf. §394.911, Florida Statutes (2000) with §394.459(2)(b), Florida Statutes (2000). The Washington legislature complied with the holding in Young and added a least-restrictive-alternative clause to its sexually violent predator civil commitment statute. See Wash. Rev. Code ss. 71.09.020(7); 71.09.070; 71.09.090 et seq. (1999). This court should follow Young and hold that the Ryce Act violates equal protection of the laws.

In resolving this claim this court should apply strict scrutiny to the Act rather than merely deciding whether it bears some rational relationship to a legitimate State goal. In the Matter of

the Care and Treatment of Hay, 953 P. 2d 666, 675 (Kan. 1998); In re the Matter of Linehan, 557 N.W. 2d 171, 181 (Minn. 1996). The former standard is appropriate where, as here, the fundamental right to liberty is at stake. Linehan, 557 N.W. 2d at 181; Friedland, On Treatment, Punishment, and the Civil Commitment of Sex Offenders, 70 U. Colo. L. Rev. 73, 86 at nn. 66-67 (1999). Strict scrutiny places the burden on the State to show that it has narrowly tailored its legislation to serve a compelling interest. Linehan, 557 N.W. at 181; Westerheide, 767 So. 2d at 654-55. Petitioner submits that the Legislature's act of affirmatively precluding the trial courts from considering less restrictive alternatives establishes, *ipso facto*, that the Legislature has not tailored the Ryce Act in an appropriately narrow fashion. The Act should be declared void for that reason, as well as for the related reasons that it fails to establish substantive due process and is punitive in relation to its stated goal.

CONCLUSION

The petitioner requests this court to answer the certified questions in the affirmative, to quash the decision and opinion issued by the District Court, and to remand with directions for his immediate release.

If that relief is not granted, the petitioner requests this court to issue a decision and opinion narrowing the scope of the Ryce Act, to quash the decision and opinion of the District Court, to reverse the commitment order entered by the trial court, and to remand with directions for a new trial consistent with this court's decision and opinion to be held in this case.

The petitioner further requests this court, if it does not invalidate the Act as a whole, to remand the case to the trial court for specific findings on issues relevant to the Frye issue discussed above at Point Three.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

_____
NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served by U.S. Mail on Assistant Attorney General Richard Polin, at 444 Brickell Avenue, Suite 950, Miami, FL 33131, this _____ day of February, 2001.

_____
NANCY RYAN

CERTIFICATE OF FONT

This brief is set in Courier New 12.

_____
NANCY RYAN