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 REPLY 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

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Point one. The Ryce Act is more punitive than the Kansas scheme at issue in Kansas v. Hendricks; even if it were not, this court should hold as a matter of state law that the Act violates double jeopardy and ex post facto protections.

Point two. This court should depart from In re Beverly, 342 So. 2d 481 (Fla. 1977),and hold that the beyond a reasonable doubt standard applies in Ryce Act trials. The State's proposed definition of "likely to reoffend" as meaning "unable to control one's conduct" should be accepted and made mandatory on the trial courts.

Point three. The State failed to show that long-term predictions of how non-psychotic individuals will act are reliable or that they are regularly made outside the forensic context. If they are not made outside the forensic context the fact that they are based on "pure opinion" does not justify their admissibility.

Point four. The fact that alleged sexually violent predators are allegedly highly dangerous justifies differences in their treatment once hospitalized, but does not justify differences in the courts' procedure in deciding whether to institutionalize them. Failure to consider less restrictive alternatives in Baker Act cases but not Ryce Act cases violates equal protection.

ARGUMENT

POINT ONE

IN REPLY: 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 State urges this court to follow Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), suggesting that Hendricks had a predecessor in Baxstrom v. Herald, 383 U.S. 107 (1966), "where the Court had expressly recognized that 'civil commitment could follow the expiration of a prison term without offending double jeopardy principles.'" (State's brief (SB) at 14-15) Baxstrom in fact deals only with an equal protection issue; it holds only that New York violated the right to equal protection when it transferred a criminal defendant, at the end of his sentence, to civil commitment without providing him with procedural protections that New York provided all other civil committees.

The Court held in Hendricks that the Kansas post-sentence commitment scheme does not violate either double jeopardy or ex post facto protections because it is not so punitive that it should be deemed an extension of the original prosecution. Petitioner's position is that Florida's prosecuting authorities patently are using civil commitment merely as a means toward the end of extending sex offenders' incarceration. The respondents in

Tanguay v. State, 2001 WL 127740 (Fla. 2d DCA Feb. 16, 2001), Kinder v. State, 2000 WL 1800574 (Fla. 2d DCA Dec. 8, 2000), rev. granted no. SC01-37 (Fla. 2001), and State v. Brewer, 767 So. 2d 1249, n.1 (Fla. 5th DCA 2000), were all held past the end of their prison sentences, in violation of the Ryce Act's terms, so that they could be evaluated to determine whether they have a mental problem that qualifies them for commitment. A diagnosis of "antisocial personality disorder" has been used in this case and in State v. Jones, 25 Fla. L. Weekly D1227 (Fla. 1st DCA 2000), to hold the respondents in custody long past the end of their prison sentences; that "disorder," as noted in Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 1782, 118 L. Ed. 2d 437 (1992), and in People v. Hubbart, 81 Cal. Rptr. 2d 492, 519-20 (Cal. 1999) (Werdegar, J., concurring), and as acknowledged by Dr. McClaren in his testimony in this case, is not treatable.[1] Judge Blue of the Second DCA was disturbed by the facts of Watrous v. State, 2001 WL 219982 (Fla. 2d DCA March 7, 2001):

> the fact that the State [after a successful post-conviction motion] offered Mr. Watrous a sentence that was one-third of

[1] Accord Friedland, On Treatment, Punishment and the Civil Commitment of Sex Offenders, 70 U. Colo. L. Rev. 73, 109 at n.220, 112 at n.235, 117 at nn. 254-56 (1999); Schopp, Expert Testimony and Professional Judgment:Psychological Expertise and Commitment as a Sexual Predator after Hendricks, 5 Psychology, Public Policy & Law 120, 140 at n.113, 1560 at nn. 157-59 (1999); Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predators Statute,15 U. Puget Sound L. Rev. 597, n.60 and accompanying text (1992).

> the sentence he received after trial ... coupled with the fact that the same state attorney's office filed a commitment petition against him only twenty-five days later, give the appearance that the State is using the Act to extend Mr. Watrous' punishment after agreeing to an inappropriately lenient sentence.

2001 WL 219982 *5 (Blue, J., concurring [with the court's decision to allow the plea to be withdrawn as involuntary.]) Respondents awaiting their Ryce Act trials, if they do not consent to treatment pending trial, are housed within the perimeters of South Bay Correctional Institution. State v. Jackson, 2001 WL 256280 (Fla. 2d DCA March 16, 2001); Amador v. State, 766 So. 2d 1061, n.1 (Fla. 4th DCA 2000). The Department of Children and Families (DCF) has not enacted any administrative procedures for those respondents to challenge whether that placement is an "appropriate secure facility" as required by the Act, although the Legislature has directed DCF to do so. Jackson. The prosecutor in Pedroza v. State, 773 So. 2d 639 (Fla. 5th DCA 2000), urged jurors to find Mr. Pedroza "likely" to reoffend although a State witness had pegged the probability at 12%, because they would feel "pretty scar[ed]" and likely to die if they were told a cancer gave them a 12% probability of doing so. 773 So. 2d at 640, n.3. Judge Harris of the Fifth DCA has noted that

> [a]nother indication that the procedure is punitive is that the statute does not permit a less restrictive alternative to total confinement. "Not all sex predators

> present the same level of danger, nor do they require identical treatment conditions."

State v. Brewer, 767 So. 2d 1249, 1253 (Fla. 5th DCA 2000) (Harris, J., concurring specially, quoting In re Young, 857 P. 2d 989 (Wash. 1993).)

The State argues, and the District Court held, that due process is satisfied because under the Ryce Act juries must find that "control, care and treatment" is necessary before voting for commitment. As a practical matter counsel cannot argue to juries in these cases that some combination of community controls more onerous than probation but less onerous than incarceration – e.g., electronic monitoring, intensive outpatient treatment, daily home checks - is appropriate, *because the Act does not permit the courts to impose any such combination of lesser controls*. The fact that defense counsel can point to the fact his client is on probation or, in some cases, conditional release,[2] does not cure the punitive intent and effect of precluding the Circuit Courts, and juries, from considering anything but an all-or-nothing disposition in these cases.

---

[2]Conditional release will apply to few individuals who are subject to the Ryce Act. DOC does not award basic gain time to sex batterers convicted after 1992, and does not award incentive gain time to sex offenders convicted after 1996. See McArthur v. State, 730 So. 2d 333 (Fla. 5th DCA 1999); Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996). Conditional release applies only to offenders convicted after 1988 and entails mandatory sex offender counseling only for offenders convicted after 1995. Section 947.1405(2)(a), (7)(a), Florida Statutes.

The State relies on a bulletin issued by the Department of Corrections (DOC) to establish that sex offenders receive treatment in Florida prisons. (Appendix to SB at 19-25) According to that document prisoners are placed on a waiting list until the end of their sentence approaches (p. 20, para. IIC), they are then treated for about 20 hours (p. 22, para. IIID), and since prisoners "can only learn so much from behind bars about how to live responsibly within the community," DOC emphasizes the need for more treatment after release. (P. 21-22, para. A) That modest program neither replaces the Mentally Disordered Sex Offender program abolished by the Legislature in 1991 nor undercuts Judge Harris's insight that

> [t]o delay the process by which treatment is provided to one whom the State believes is in need of specialized treatment before he can be returned to society *until shortly before he is scheduled to be released from incarceration* so that continued confinement will be necessary in order to receive treatment seems clearly to be punishment. If retribution is not the reason, why is the prisoner not evaluated and, if found appropriate, transferred to a proper hospital setting and enrolled in a treatment program immediately upon his conviction so that he may well be ready for release back into the community, no longer a threat to the public, as soon as he has "paid his debt to society?"

Brewer, supra, 773 So. 2d at 1253 (Harris, J., concurring). Accord In re Samuelson, 727 N.E. 2d 228, 238-39 (Ill. 2000) (Heiple, J., dissenting); State v. Post, 541 N.W. 2d 115, 140-41

(Wis. 1995) (Abrahamson, J., dissenting); In re Young, 857 P. 2d 989, 1024-25 (Wash. 1993)(Johnson, Utter, and Smith, JJ., dissenting).

The State also argues that sexually violent predator acts (SVP acts) serve no deterrent purpose, and therefore are not punitive, because the people they apply to "suffe[r] from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior [and are therefore] unlikely to be deterred by the threat of confinement." (SB at 17, citing Kansas v. Hendricks, 521 U.S. at 362-63.) That argument is, of course, inconsistent with the State's due-process-related argument that SVP acts do *not* require a showing that respondents cannot control their conduct, and that such a requirement would "impose an impossible burden on the State." (SB at 35-37; see infra.) More importantly, as Judge Harris states,

> Hendricks did not discuss the penal goals of incapacitation and rehabilitation.... The Jimmy Ryce Act is designed to meet civilly the incapacitation and rehabilitation functions of criminal sentencing without providing the constitutional protections which go hand-in-hand with the criminal remedy.
>
> **********
>
> Keeping sexual predators behind bars so they cannot commit additional acts is a popular position. It is a "feel good" position. But we as judges are not in the "feel good" business and there are times when we must throw our bodies against popular positions. Constitutional truths are

> blurred by... extraordinarily evil acts... and constitutional principles are sacrificed to assure that these people are unable to repeat such acts in the future. Do you feel how slippery the slope has become?

Brewer, supra, 773 So. 2d at 1253, 1256 (Harris, J., concurring). Judges Harris and Blue, have correctly concluded that Ryce Act commitment unconstitutionally extends punishment and serves as preventive detention. See Brewer and Watrous, supra, 2001 WL *7. Justice Heiple of the Illinois Supreme Court, Justice Abrahamson of the Wisconsin Supreme Court, and Justices Johnson, Utter, and Smith of the Washington Supreme Court have reached the same conclusion. This court should adopt the conclusions courageously voiced by those judges, and answer the first and second certified questions in the affirmative.

POINT TWO

> IN REPLY: 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.)

A. Substantive due process.

As to the burden of proof, the petitioner acknowledges that this court held in In re Beverly, 342 So. 2d 481, 488 (Fla. 1977), that all civil commitment actions in Florida would be

governed by the clear and convincing standard of proof.[3] Beverly arose in the non-jury Baker Act context; Florida law in 1977 did not contemplate jury trials in civil commitment cases. Assigning a burden of proof both indicates to juries the relative importance attached to their decision, and allocates between the parties the risk of a wrong decision. Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979). The Court in Addington chose the clear and convincing standard as appropriate for civil commitments because "the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." 99 S. Ct. at 1811. In reviews of Ryce Act commitments, the burden is on the committed person to show probable cause to believe he is no longer a danger to the public, and successive petitions for release are presumed meritless. §§394.918, 394.920, Florida Statutes. "Continuous opportunities" for correction of Ryce Act commitment orders can thus not be said to exist. Justice Werdegar of the California Supreme Court has pointed out that SVP actions, to the extent

[3]As to preservation of the burden-of-proof issue, the Ryce Act's failure to require the beyond-a-reasonable-doubt standard was alluded to in the trial court. (R 330) Petitioner acknowledges that he has not actively pursued the burden-of-proof issue before this time. Petitioner submits, however, that the State's non-preservation arguments as to the other issues raised in this case should be disregarded; the arguments now made regarding substantive due process (except for the burden-of-proof point), double jeopardy, ex post facto laws, and equal protection of the laws are closely conceptually related to, if not precisely identical to, arguments which have been made since the trial court level in this case.

they are based on a diagnosis of antisocial personality disorder, allege an abnormality which "only traces, in circular fashion, back to th[e respondent's] conduct." Hubbart v. Superior Court, 81 Cal. Rptr. 2d 492, 519 (Cal. 1999) (Werdegar, J., concurring.) See also Watrous v. State, 2001 WL 219982, *5, n.8 (Fla. 2d DCA March 7, 2001) (Blue, J., concurring) (Ryce evaluations appear to be based on facts of crimes rather than meaningful evaluation of respondent's mental state.) Since SVP actions in many cases may allege primarily factual matters, the beyond a reasonable doubt burden is appropriate. See Addington, supra, 99 S. Ct. at 1811.

B. Vagueness.

The definition of "mental abnormality" that appears in the SVP acts has been criticized as circular not only by Judge Sharp of the Fifth DCA and by the academic authorities cited in the initial brief at 35, but also by dissenting Justices in State v. Post, supra, 541 N.W. 2d 115, 143-45 (Wis. 1995) (Abrahamson, J., dissenting) and in In re Young, supra, 857 P. 2d 989, 1021-22 (Wash. 1993) (Johnson, Utter and Smith, dissenting). This court should adopt the sound logic of those opinions.

As to the definition of "likely," the State argues that Hendricks does *not* stand for a rule that SVP acts apply only to persons who are unable to control their conduct (SB at 35-37); that such a rule would "impose an impossible burden on the State, as mental health professionals can not provide opinions as to whether

a person is utterly unable to control impulses;" (SB at 37) and that "[m]ental health professionals have not established, let alone agreed, that deviant sexual urges are irresistible impulses." (SB at n.23) As noted above, that argument is altogether inconsistent with the double jeopardy and ex post facto-related argument that SVP acts are not intended to deter, and therefore clearly not punitive, since the population affected is incapable of weighing the risks of its actions.

The State argues that the petitioner did not preserve for review his position that In re the Matter of Leon G., 2001 WL 125844 (Ariz. App. February 15, 2001), In the Matter of Care and Treatment of Crane, 2000 WL 966703 (Kan. 2000), and In re Linehan, 594 N.W. 2d 867 (Minn. 1999) set out a correct reading of Kansas v. Hendricks. All of those cases post-date the trial in this case but nevertheless are clearly correct in holding that the Hendricks by its terms is limited to those respondents who cannot control their actions. The State suggests that

> Florida's statutory definition of mental abnormality incorporates the concept of volitional impairment: "a mental condition affecting a person's...volitional capacity which predisposes the person...." Fla. Stat. §394.912(5).

SB at 36, n.22. The petitioner accepts that proposed interpretation of the Ryce Act and submits that this court should make it universal, by construing the Act as requiring the State to show in

every case that the respondent lacks the capacity to control his conduct. That construction would mandate a new trial in this case, since the instructions given to the jury did not make that meaning of the Act clear; a new trial is particularly called for in this case since the respondent's expert expressly testified that Mr. Westerheide *is* able to control his conduct. The State's proposed construction, if adopted by this court, would be binding on the federal courts. See Minnesota ex rel. Pearson v. Probate Court of Ramsay County, 309 U.S. 270, 60 S. Ct. 523, 525, 84 L. Ed. 744 (1940). This court should answer the third certified question in the affirmative.

POINT THREE

IN REPLY: 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.

The State correctly notes that use of actuarial instruments to predict recidivism is at issue in other cases brought under the Ryce Act, but not in this case. Any decision this court makes on the issue raised on this point should not preclude respondents in other Ryce Act cases from arguing that actuarial-based predictions of recidivism are based on something akin to a profile which is unsupported by accepted scientific opinion, and that such predictions should not be admitted in court.

In this case the State failed to show that science supports the theory that long-term predictions of dangerousness in a non-psychotic population can be accurately made, whether or not those opinions are based on actuarial instruments. Such predictions should not be swept into court as "pure opinion" where they are not made as part of mainstream psychologic practice; phrenological predictions are presumably based on "pure opinion," but should not become admissible simply because that argument is made on their behalf. Petitioner submits that the issue is one of great statewide importance, and that this court should therefore condition affirmance of the commitment order entered in this case on a showing by the State that there is in fact a non-forensic scientific community which recognizes as valid long-term predictions of non-psychotic individuals' behavior.

POINT FOUR

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

The State takes the position that the Ryce Act meets strict scrutiny because its intention is to "treat and control the most serious of the most serious...the prospect of violent sexual offenses poses a danger of the highest magnitude." (SB at 48, 49) Similar reasoning was rejected by the Supreme Court in Baxstrom v. Herald, supra, where the Court held that

> Classification of mentally ill persons as... dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person [qualifies for treatment under a particular statute] at all.

383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1965). Failure to provide alleged predators, as distinct from all other persons alleged to be in need of commitment, with less onerous alternatives does not meet strict scrutiny, and this court should answer the fourth certified question in the affirmative.

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 trial court's commitment order, and to remand with directions for a new trial 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 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 March, 2001.

_____
NANCY RYAN

CERTIFICATE OF FONT

This brief is set in Courier New 12.

_____
NANCY RYAN