IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2124

MITCHELL WESTERHEIDE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The Petitioner's claim, that a jury instruction should have been given, setting forth the criteria enunciated in Kansas v. Crane, is unpreserved for appellate review, as no such claim was presented in either the trial court or the district court of appeal.

If this Court does address the merits of the claim, it must be concluded that there was no error in failing to give such an instruction. The instructions which were given were clearly sufficient, as the Crane criteria are subsumed within the given jury instructions. The Crane standard of "serious difficulty in controlling behavior," necessarily exists when a person, as instructed, has a mental condition which predisposes him to commit sexually violent offenses, and which mental condition makes it likely - i.e., probable - that such offenses will be committed as a result of the mental condition.

Lastly, given the evidence adduced by the State, and the defense expert's clear concurrence that the Petitioner has behavioral control problems, any error in failing to give such an instruction must be deemed harmless error.

ARGUMENT

THE DECISION OF THE UNITED STATES SUPREME COURT IN KANSAS V. CRANE, DOES NOT MANDATE THE GIVING OF ANY SPECIAL JURY INSTRUCTIONS, AND DOES NOT OTHERWISE HAVE ANY IMPACT ON FLORIDA'S SEXUALLY VIOLENT PREDATORS INVOLUNTARY CIVIL COMMITMENT ACT.

As detailed in the State's prior brief herein, in Kansas v. Hendricks, 521 U.S. 346 (1997), the Supreme Court, in rejecting constitutional challenges to the Kansas sexually violent predators commitment act, held that the phrase "mental abnormality," as used in the Kansas act, in terminology which is indistinguishable from that in the Florida act, was consistent with the requirements of substantive due process. In so ruling, the Court further found that there was a sufficient connection between the concept of "mental abnormality" and the likelihood of sexually violent recidivism, as the act required more than a mere predisposition to violence: "rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." 521 U.S. at 357.

In the aftermath of Hendricks, the Kansas Supreme Court, in In the Matter of Crane, 7 P. 3d 285 (Kan. 2000), interpreted Hendricks as requiring, as a matter of substantive due process, proof that the defendant in the commitment case suffered from a total impairment of volitional control, as a prerequisite to commitment. The Kansas court based this conclusion on various statements in the

Hendricks opinion, where the Court described the nature of Hendricks' mental condition. As a corollary to this holding, the Kansas court further concluded that such an inability to control behavior required a jury finding, and "the failure to so instruct the jury was error and requires that we reverse and remand for a new trial." 7 P. 3d at 290.

While review of Crane was being pursued in the United States Supreme Court, many other state appellate courts considered the same issue, and routinely rejected the Crane analysis, finding that Hendricks did not require proof of a total inability to control behavior, and further finding that even if it did, standard instructions, based on the statutory elements of the cause of action, would, in any event, be sufficient.

For example, in People v. Munoz, 2001 WL 1397287 (Cal. App. Nov. 8, 2001), the court rejected the Kansas Supreme Court analysis and held that "[p]roof of total lack of volitional control is not a necessary prerequisite to a finding of sexually violent predator status." Id. at *4. This was based on statutory elements comparable to those of both Kansas and Florida. Furthermore, based on those statutory elements, of which the jury was instructed, the court concluded that "[n]otwithstanding our understanding of *Hendricks*, we believe that, in order to make a finding Munoz's mental disorder renders him dangerous because he is likely to engage in sexually violent behavior, the jury was necessarily

required to conclude he lacked the requisite degree of control over his behavior." Id. at *5. See also People v. Grant, 2002 WL 54684 (Cal. App. 2002) (rejecting requirement of total impairment of volitional control and concluding that the standard instructions, which tracked the statutory elements, "adequately conveyed to the jury the requirement that Grant must have an impaired ability to control his behavior."); People v. Kohler, 2002 WL 12280 (Cal. App. 2002).

Courts of Illinois, also critical of the Kansas Supreme Court's extreme interpretation of Hendricks, similarly found that jury instructions which tracked the statutory elements of the commitment act were sufficient to enable the jury to make a determination that the mental condition affected the individual's ability to control his conduct. See In re Detention of Varner, 759 N.E. 2d 560, 564 (Ill. 2001) ("What is significant is that, as with the Kansas law, the mental condition required in Illinois must be one which affects an individual's ability to control his conduct. . . . As noted earlier in this disposition, the jury here received instructions that tracked the language of the Act. Under those instructions, the jury's conclusion that Varner was a sexually violent person necessarily required a determination that he suffered from a mental disorder. . . . Accordingly, there was no need for the jury to make any additional findings in this case regarding Varner's ability to control his sexually violent

conduct."); In re Detention of Tittlebach, 754 N.E. 2d 484 (Ill. App. 2001) ("Unlike in Crane, however, we believed that, in order to make such a finding [that the person suffers from a mental disorder that made it substantially probable that he would engage in acts of sexual abuse], the jury is necessarily required to conclude that the respondent lacked volitional control over his mental disorder."); In re Detention of Trevino, 740 N.E. 2d 810 (Ill. App. 2000) (same).

In an extensive analysis of the issue, a New Jersey appellate court, in In the Matter of the Commitment of W.Z., 773 A. 2d 97, 108 (N.J. App. 2001), likewise rejected the extreme Kansas conclusion that proof of a total impairment of volitional control was required, while concluding, as had Minnesota courts, that there had to be some level of inability to control behavior. The issue of jury instructions did not arise, since the trial was before the judge.

The only appellate court to concur with the Kansas analysis in Crane, was an intermediate Arizona appellate court, in In re the Matter of Leon G., 18 P. 3d 169 (Ariz. App. 2001). That court's decision, however, was promptly overturned. In re the Matter of Leon G., 26 P. 3d 481 (Ariz. 2001). That court found that there was no requirement of a specific finding of volitional impairment, as mental conditions could be based on impairments which are other than volitional.

Courts of Washington and Iowa likewise concluded that there was no requirement of a specific finding of volitional impairment rendering the person dangerous beyond his control. Lee v. State, 2002 WL 1530946 (Wash. App. 2001) (unpublished); In re Strauss, 20 P. 3d 1022 (Wash. App. 2001); In re Detention of Gordon, 10 P. 3d 500 (Wash. App. 2000); In re Detention of Brooks, 973 P. 2d 486 (Wash. App. 1999); In re Detention of Springett, 2001 WL 913858 (Iowa App. 2001).

With the foregoing history of virtually unanimous rejection of the Kansas position, the Crane case was reviewed by the United States Supreme Court, which issued its opinion on January 22, 2002. Kansas v. Crane, 122 S.Ct. 867 (2002). The Court rejected the Kansas Supreme Court's conclusion, agreeing "that *Hendricks* set forth no requirement of *total* or *complete* lack of control." Id. at 870. However, although such total lack of control was not required, "serious difficulty in controlling behavior" would have to be established:

> In recognizing that fact, we did not give to the phrase "lack of control" a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental

> illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Id. at 870. The Court recognized that this was a non-specific guideline, which could not be reduced to a bright-line rule, and which would enable the States to "retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment." Id. at 871. The Court also avoided any opinion on what would be required in the context of emotional impairments, as opposed to volitional impairments. Id. at 871-72.

In reaching these conclusions, the Court did not invalidate the Kansas statute, and the Court did not assert that any particular jury instruction had to be utilized to convey the essence of the "serious difficulty" standard.

In one opinion which was rendered subsequent to the Supreme Court's Crane opinion, a California appellate court simply treated Crane as relating to the sufficiency of evidence. People v. Hicks, 2002 WL 139718 (Cal. App. 2002). There was no discussion of the need for any specific jury instructions regarding "serious difficulty," and, as noted in the prior California cases, the standard California instructions are like Florida's, tracking the statutory language and not referring to "serious difficulty" in controlling behavior.

The Petitioner's primary contention in the Supplemental Brief

is that Crane necessitates the giving of a further jury instruction regarding "serious difficulty" in controlling behavior. Initially, the State would note that this issue has not been preserved for appellate review. At no time did Westerheide ever request that the jury be instructed that the mental condition must cause him serious difficult in controlling behavior. Such an issue must be preserved for purposes of appellate review. Walls v. State, 641 So. 2d 381 (Fla. 1994) (to preserve error on jury instruction, it is necessary to make specific objection or request alternate instruction at trial and raise issue on appeal). While the Petitioner is correct in noting that Florida appellate courts apply the law in effect at the time of an appeal, and that new appellate court decisions apply to pipeline cases, that principle does not excuse the need for proper preservation in the trial court or lower appellate court.

A similar situation has arisen in the context of capital cases, where the United States Supreme Court has concluded that the manner in which Florida instructions defined certain aggravating circumstances rendered those factors unconstitutionally vague.[1] In the aftermath of those rulings, capital defendants, on appeal, have sought the benefit of the new United States Supreme Court pronouncements. This Court has routinely held that the capital

[1] By contrast, in the instant case, the Supreme Court's holding regarding "serious difficulty" did not state that the statutory elements of the cause of action were in any capacity vague.

defendants could derive such benefit only if they had properly preserved the issue in the trial court through proper requests for jury instructions.

For example, in Espinosa v. Florida, 505 U.S. 1079 (1992), the Court held that the jury instruction given on the heinous, atrocious, or cruel aggravating factor was defective. When such a claim was raised in a direct appeal in Thompson v. State, 619 So. 2d 261, 266-67 (Fla. 1993), this Court stated: "Further, we note that Thompson's trial counsel did not object to the instruction read to the jury and thus failed to preserve the issue for appeal. See Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed. 2d 326 (1992). We find that this claim is procedurally barred. . . ." The Court came to the same conclusion in Ragsdale v. State, 609 So. 2d 10, 14 (Fla. 1992) ("We find that, although this instruction [HAC] was given to the jury, this issue was neither preserved at trial nor raised in this appeal.").

The Petitioner suggests that the failure to give such an instruction somehow constitutes "fundamental error," since it goes to the definition of an element of the cause of action, or to the essence of the defense. Fundamental error "is error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). In the context of instructions regarding either elements of actions or defenses, the fundamental error doctrine has been implicated only

when there has been a total failure to instruct on such an element or defense, or when the given instruction has wrongfully negated a valid defense. See, Dawson v. State, 597 So. 2d 924 (Fla. 1st DCA 1992) (total failure to instruct on element of self-defense instruction); Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985) (self-defense instruction incorrectly set forth duty to retreat and thus negated asserted defense).

In the instant case, the trial court did instruct on the necessary link between the mental condition and the likely recidivism. Thus, the court instructed the jury that the mental abnormality or personality disorder had to make Westerheide likely to engage in acts of sexual violence. The court further instructed the jury that the mental abnormality had to affect Westerheide's emotional or volitional capacity, by predisposing him to commit sexually violent offenses. (R. Vol. 6, 495-96). Although this instruction did not use the phrase "serious difficulty," its essence is clearly the same. A defendant can be found to be a sexually violent predator only if his mental condition makes him likely to engage in further acts of sexual violence if not committed. That is clearly a substantial causative effect which the mental condition must have on the person's dangerous behavior. If the mental condition makes such conduct "likely," it is only because the mental condition interferes with the ability to control behavior. Further, since "likely" means "probable," or "more

likely than not," as the Fifth District, below, concluded, 767 So.2d at 652-53, this causative effect of the mental condition must obviously be substantial. Furthermore, this was combined with the instruction regarding the mental abnormality predisposing the person to commit sexually violent offenses. Once again, if the mental condition "predisposes" him, the condition is interfering with the ability to control behavior, and it is doing so to a substantial degree, since the predisposition must make the recidivism "likely" - "probable"; "more likely than not."

Thus, the reality of the given instructions is that they were the functional equivalent of the Supreme Court's concept of "serious difficulty in controlling behavior," but they used different terminology to effect the same result. Indeed, it should be noted that several appellate courts across the country, prior to the recent Crane decision, had held that even if the Kansas Supreme Court's standard of "total impairment of volitional control" were correct, the standard jury instructions, which tracked the statutory elements, as did Florida's instructions, would suffice to incorporate even that higher standard of total impairment. See, Munoz, supra; Grant, supra; Varner, supra. Such courts would obviously have to concur that the standard instructions based on the tracking of the statutory elements similarly subsumed what can only be described as a lower constitutional standard - i.e., serious difficulty in controlling behavior.

In view of the foregoing, not only does fundamental error not exist, but, it is equally clear that no error exists, as the instructions as given were clearly sufficient to encompass the "serious difficulty" standard enunciated by the Supreme Court in Crane. As detailed above, a mental condition which makes a person "likely" to commit further offenses is one which, of necessity, causes the person to have serious difficulty controlling behavior; otherwise, the likelihood of recidivism caused by the mental condition would not exist. Similarly, a mental condition which "predisposes" the person to commit further sex offenses is one which must evince serious difficulty in controlling the dangerous behavior; otherwise, the predisposition would not exist. Moreover, when the predisposition and likelihood are combined, the predisposition is elevated to a higher level, and the difficulty controlling behavior which inheres in the predisposition must obviously be that much greater. Thus, this is simply a case of the Supreme Court utilizing different terminology to describe what is already set forth in both the Florida statute and jury instructions.

The foregoing point is reemphasized by the Supreme Court's reiteration that "the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment." 122 S.Ct. at 871. It is also highlighted by the Supreme Court's insistence that the "serious

difficulty" is something which will be inferred from the totality of the circumstances, including the nature of the psychiatric diagnosis and the severity of the mental condition. Id. at 870. As the Kansas statute, utilizing the same terminology as Florida's statute, was sufficient to encompass the "serious difficulty" standard, the Supreme Court did not find that the statute itself was unconstitutional. As the constitutionality of the statute had already been upheld in Hendricks, and as that conclusion was not altered in Crane, the inevitable conclusion is that the statutory elements, in Kansas (and Florida), as written, suffice to set forth a standard which includes within it the "serious difficulty" criteria of Crane.

The State would next note that Westerheide's arguments in the instant supplemental brief go solely to the effect of Crane on jury instructions. There is no suggestion that the evidence adduced by the State is in any way insufficient as to the "serious difficulty" standard. As will be detailed in the ensuing paragraphs, not only is any error herein with respect to a jury instruction harmless, but, the evidence is clearly sufficient as to "serious difficulty in controlling behavior."

Any error in failing to give an instruction regarding "serious difficulty in controlling behavior" would have to be deemed

harmless error.[2] The Petitioner does not dispute that the State adduced considerable evidence regarding Westerheide's difficulty in controlling his dangerous behavior. Both of the State's expert witnesses included a diagnosis of antisocial personality disorder, which diagnosis entails a finding that the individual has impulse control problems. (R. Vol. 4, 142, 170; Vol. 5, 277, 323). Indeed, even the defense expert, Dr. Shaw, found that Westerheide suffered from all of the antisocial personality disorder features except for one - evidence of onset of the disorder prior to age 15. (R. Vol. 6, 401). Furthermore, this disorder, in conjunction with the second diagnosis, sexual sadism, rendered Westerheide extremely dangerous. (R. Vol. 5, 323).

Other indicia of an inability to control dangerous behavior were adduced as well. The experts opined that Westerheide had problems conforming his conduct to the norms of society. (R. Vol. 4, 140; Vol. 5, 280). Perhaps the most significant source of such

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[2] Contrary to the Petitioner's argument, the instant case is a civil proceeding, as detailed in the State's prior brief herein. As such, the harmless error standard is "whether, but for the error, a different result would have been reached." Pascale v. Federal Express Corp., 656 So. 2d 1351, 1353 (Fla. 4th DCA 1995); National Union Fire Ins. v.Blackmon, 754 So. 2d 840,843 (Fla. 1st DCA 2000). The burden of demonstrating reversible, harmful error lies with an appellant. E & I, Inc. v. Excavators, Inc., 697 So. 2d 545 (Fla. 4th DCA 1997). Furthermore, when an instruction is denied, a complaining appellant must demonstrate that such an instruction was requested, that it was accurate, that the facts of the case supported it, and that it was necessary for the jury to properly resolve issues in the case. Giordano v. Ramirez, 503 So. 2d 947 (Fla. 3d DCA 1987); Reyka v. Halifax Hospital District, 657 So. 2d 967 (Fla. 5th DCA 1995).

evidence is State's Composite Exhibit 10 (R. Vol. 3, 453), which consists of several years of correspondence from Westerheide to his former girlfriend, the victim of the primary incidents. Westerheide continued sending her detailed, graphic letters, years after she had made it clear that she was no longer involved with him. The mere fact that Westerheide continued the correspondence obviously reflects a lack of self-control and an inability to accept reality.

The State of Minnesota has a psychopathic personality statute which, by its statutory terms, requires proof of an utter inability to control behavior. While that inability to control behavior is not required as a matter of constitutional law, as evidenced by Crane, the factors which Minnesota courts consider in determining whether proof of that inability exists would obviously be relevant to the lesser determination of "serious difficulty" in controlling behavior. Thus, the Minnesota courts consider: the nature and frequency of the sexual assaults, the degree of violence, the relationship between the offender and victims, the offender's attitude and mood, the offender's medical and family history, the results of psychological and psychiatric testing and evaluation, and other factors that bear on the impulse and lack of power to control it. In re Blodgett, 510 N.W. 2d 910, 915 (Minn. 1994). In the context of the instant case, Westerheide had a long-term sexual relationship with his underage girlfriend. Additionally,

Westerheide noted, in one of his numerous letters in State's Composite Exhibit 10, that he had had a sexual relationship with one other underage girl.[3] As Westerheide was diagnosed as being a sexual sadist, and as evidenced by the graphic details of his relationship, a high level of violence was involved in the acts which he perpetrated. As to his attitude and mood, his extensive correspondence while incarcerated reflected an intent to pick up where he left off.

In addition to such extensive evidence bearing on difficulty in controlling behavior, it is further significant that the defense expert, Dr. Shaw, did not have any serious disagreement with the underlying diagnoses (except for what he perceived to be a lack of evidence of onset of the antisocial personality disorder prior to age 15). (R. Vol. 6, 400-402). Dr. Shaw simply concluded that Westerheide's problems could be dealt with through outpatient treatment. He, too, however, acknowledged that Westerheide had difficulty controlling behavior, as he accepted all aspects of the antisocial personality disorder other than the onset of the disorder prior to age 15.

Under such circumstances, any further instruction regarding

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[3] In the letter, a copy of which is included in the Appendix to this Brief, Westerheide stated: "Another diary entry points out that I had sex with another underage girl." (App. 4). He reiterates this later on in the same letter. (App. 5). Yet another letter highlights Westerheide's control problems: "When I discover your mistakes, I fill with a rage of betrayal and hatred. . . . Unfortunately this is uncontrollable." (App. 11).

"serious difficulty in controlling behavior" would, if error, be harmless error.

CONCLUSION

Based on the foregoing, the decision of the lower court should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Supplemental Brief on the Merits was mailed this ___ day of February, 2002, to NANCY RYAN, Assistant Public Defender, Office of the Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

I HEREBY CERTIFY that the foregoing Supplemental Brief of Respondent on the Merits was typed in Courier New, 12-point type.

_____
RICHARD L. POLIN