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 SUPPLEMENTAL BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF SUPPLEMENTAL ARGUMENT

Kansas v. Crane[1] should be applied in this case because this court generally applies the law in effect at the time it decides a case; because omission from the jury instructions in this case of the narrowing construction announced in Crane amounts to fundamental error; and because once this court has jurisdiction of a case, it may, in its discretion, consider any issue affecting the case.

The expert testimony adduced by Petitioner might well have resulted in a different verdict by the jurors, had they been told pursuant to Crane that they must be convinced Mr. Westerheide either *finds it difficult, if not impossible, to control* his behavior, or *has a special and serious lack of ability to control* his behavior. This court should require the State, as the beneficiary of the instructional error, to establish beyond a reasonable doubt that the deliberations were not affected by it.

Petitioner asks this court to address, as well as the Crane issue, the facial constitutionality of the Ryce Act. Crane does not moot the other constitutional questions raised in the briefs filed in this case.

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[1] No. 00-957 (U.S. January 22, 2002) (attached as an appendix to this brief).

SUPPLEMENTAL ARGUMENT

THE UNITED STATES SUPREME COURT'S DECISION IN KANSAS V. CRANE MANDATES REVERSAL OF THE COMMITMENT ORDER ENTERED IN THIS CASE.

The State, in a pleading that it filed opposing supplemental briefing on this point, has argued that this court should disregard Kansas v. Crane[2] in deciding this case because the degree to which Mr. Westerheide can control his conduct was not litigated in the trial court or in the District Court of Appeal. This court should apply Crane in this case for three reasons:

First, this court generally applies the law in effect at the time it decides a case. Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986); Florida East Coast Ry. Co. v. Rouse, 194 So. 2d 260, 261-62 (Fla. 1966). The State urges this court to depart from that practice because Crane was foreseeable, citing a 1994 Minnesota decision, In re Blodgett, 510 N.W. 2d 910 (Minn. 1994). Petitioner submits that if the Crane narrowing construction of the Kansas sexually violent predator statute was in fact foreseeable to reasonably astute counsel in March, 1999, when this case was tried, it was incumbent as an ethical matter on the State's attorneys to advise the trial court of the probable constitutional limits on Florida's Ryce Act and to

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[2] Case no. 00-957 (U.S. January 22, 2002) (attached as an appendix to this brief).

propose a burden of proof and a jury instruction that would have complied with the inevitably forthcoming Crane decision.

Kansas v. Crane narrows the field of offenders who can constitutionally be detained after their sentences end to those whose "mental abnormalities" cause them "serious difficulty in controlling behavior...sufficient to distinguish [them] from the dangerous but typical recidivist convicted in an ordinary criminal case." Slip op. at 5. Petitioner acknowledges that his counsel did not at the time of trial anticipate the precise direction the Supreme Court would take, if any, in narrowing what appeared to be a very broad decision in Kansas v. Hendricks, 521 U.S. 346 (1997). However, Petitioner has argued throughout these proceedings that the Act's definition of "mental abnormality" is unconstitutionally vague and circular; the State has opposed that argument, and affirmatively argued at trial that the proposed standard jury instructions, which track the Ryce Act's definition of "mental abnormality" and which do not prefigure Crane, are constitutionally sufficient. See Westerheide v. State, 767 So. 2d 637, 653 (Fla. 5th DCA 2000); cf. id. at 660 (Sharp, J., concurring specially); Petitioner's brief on the merits at 3-4, 34-40; Respondent's brief on the merits at 33. Since issues closely related to the ultimate Crane holding have been argued by the parties throughout this case, the State has not shown that this court should depart from the usual practice announced

in Cantor v. Davis and in Florida East Coast Ry. Co..

This court should apply the new rule of Crane, secondly, because omission from the jury instructions in this case of the narrowing construction announced in Crane amounts to fundamental error. In criminal cases, it is the duty of the court to define to the jury the elements of the offense with which the accused is charged, and such definition must be at least not misleading. Croft v. State, 158 So. 454, 455 (Fla. 1935); Bagley v. State, 119 So. 2d 400, 403 (Fla. 1st DCA 1960). Similarly, an omission from the jury's instructions that "goes to the essence and entirety of the defense" is cognizable on appeal even where no objection is made in the trial court. Motley v. State, 20 So. 2d 798, 800 (Fla. 1945); Bagley, 119 So. 2d at 403. Here, where the Petitioner's liberty interest is no less at stake than in a criminal case, the same rule should apply.

Thirdly, once this court has jurisdiction of a case, it may, in its discretion, consider any issue affecting the case, Cantor v. Davis, supra, 489 So. 2d at 20, and may decide the case on a ground entirely separate from the constitutional questions which led it to take jurisdiction. Anoll v. Pomerance, 363 So. 2d 329, 330 (Fla. 1978). This court should exercise its discretion to apply the Crane narrowing construction, since that construction was necessary, in the view of the United States Supreme Court, to preserve the constitutionality of a sexually violent

predator civil commitment scheme similar to Florida's. There is no principled reason why this court should delay recognition of constitutional limits that apply in Florida, as well as in Kansas.

As noted in Petitioner's brief on the merits, Dr. Ted Shaw testified for Petitioner at trial that he believes that he or another competent psychologist could design and implement an effective outpatient treatment plan for him. 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. Shaw testified that he saw no evidence that Petitioner is a pedophile, and that he "is not stupid and he's not crazy." (T 422) That testimony might well have resulted in a different verdict by the jurors, had they been told they must be convinced Mr. Westerheide either *finds it difficult, if not impossible, to control* his behavior, or *has a special and serious lack of ability to control* his behavior. See Crane, slip op. at 4, 5.

A new trial is the appropriate remedy for omission of the jury instruction required by Crane. The State may argue that the instructions given below satisfy the rule of Crane because they refer to "volitional capacity." This court should

reject that argument. The jury was instructed as follows:

> To prove the Respondent, Mitchell Westerheide, is a sexually violent predator, the State must prove each of the following three elements by clear and convincing evidence:
>
> 1. Mitchell Westerheide has been convicted of a sexually violent offense; and
>
> 2. Mitchell Westerheide suffers from a mental abnormality or personality disorder; and
>
> 3. The mental abnormality or personality disorder makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.
>
> ...With respect to the second element, the term "mental abnormality" means mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses. The term "volitional" means "the act of will or choosing" or "the act of deciding" or "the exercise of the will."[3]

(R 464-65) "Mental condition affecting a person's emotional or volitional capacity," according to those instructions, is an aspect only of "mental abnormality," not of "personality disorder." The expert witnesses at trial disagreed as to whether Petitioner has an "anti-social personality disorder" in addition to the "mental abnormality" of sexual sadism, and one of the State's experts testified that he

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[3] The last sentence was added at the request of Mr. Westerheide's counsel. (R 420)

believes the combination of the two is a significant factor in this case. (See Petitioner's brief on the merits at 9-10) The State in its opening statement and closing argument emphasized the testimony about antisocial personality disorder. (T 102, 105, 452, 453, 454) On this record, it is not clear that the jury must necessarily even have reached the question whether a "mental condition affecting emotional or volitional capacity" was present. Nor can the State establish that if the jurors reached the question, they understood the "emotional or volitional" language to mean they must be convinced Mr. Westerheide finds it difficult, if not impossible, to control his behavior to an extent that sets him apart from other recidivists.

This court should require the State, as the beneficiary of the instructional error, to establish beyond a reasonable doubt that the deliberations were not affected by it. That burden and that standard are applied in criminal cases, see Goodwin v. State, 751 So. 2d 537 (Fla. 1999), and Chapman v. California, 386 U.S. 18 (1967), and this court should apply that rule in this case since Petitioner's liberty interest is at issue. In any event, the standard applied in civil cases calls for reversal on this record, since an error cannot be deemed harmless where, as here, there is a reasonable probability that but for the error a result more favorable to the appellant might have been reached. Chrysler v. Department of Professional Regulation, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993); Tracton v. City of Miami

Beach, 616 So. 2d 457, 458 (Fla. 3rd DCA 1992).

For the foregoing reasons Petitioner is entitled, at a constitutional minimum, to a new trial where the parties can argue and the jury can consider whether he has a mental problem which causes him special and serious difficulty controlling his behavior. Petitioner asks this court to address, as well as the Crane issue, the facial constitutionality of the Ryce Act. While ordinarily this court does not reach constitutional issues if a case can be effectively disposed of on narrower grounds, it has made an exception where further litigation is inevitable, in order to guide the lower courts. State v. Dye, 346 So. 2d 538, 541 (Fla. 1977). Because further litigation in this case is highly likely, and because this court's decision on the fundamental constitutional questions raised by the Ryce Act has been long awaited, Petitioner submits that this court should again make the exception in this case that it made in Dye.

Crane does not moot the other constitutional questions raised in the briefs filed in this case. The Ryce Act is still especially punitive in that Florida does not provide its sex-offender prisoners with inpatient treatment for their mental conditions until their sentences end. The Act is still especially punitive, and violates equal protection of the laws, in that it does not permit the courts to consider alternatives to civil commitment. Finally, this court, of course, still has the power

and duty to consider the questions resolved in Hendricks under the Florida Constitution.

CONCLUSION

The petitioner requests this court to quash the decision and opinion issued by the District Court, and to remand with directions for his immediate release on the bases argued in the briefs on the merits filed in this case.

If that relief is not granted, the petitioner requests this court 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 the Supreme Court's decision in Kansas v. Crane.

Respectfully submitted,

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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 14th day of February, 2002.

_____
NANCY RYAN
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, in that is set in Times New Roman 14-point font.

_____
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