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 REPLY BRIEF

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: 386/252-3367

COUNSEL FOR PETITIONER

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SUMMARY OF ARGUMENT

The instructions given in the trial court did not make clear to the jury that it must find, in order to vote for commitment, that Petitioner has extraordinary difficulty controlling his impulses. Nor does the record support a ruling by this court that Petitioner has severe impulse control problems. The Supreme Court's decision in Kansas v. Crane[1] accordingly mandates reversal for a new trial.

The State does not object to this court's addressing, in addition to the Crane issue, whether the Ryce Act satisfies the Florida constitution in any case. The petitioner requests this court to do so on the authority of State v. Dye, 346 So. 2d 538 (Fla. 1977).

[1] No. 00-957 (U.S. January 22, 2002).

ARGUMENT

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

The State seeks to dissuade this court from applying Kansas v. Crane[2] at all in this case, because the argument now made based on that new decision is not precisely the same as any of the arguments made in the trial court. The State relies on cases in which this court has declined, on non-preservation grounds, to apply the Supreme Court's capital-sentencing decision in Espinosa v. Florida, 505 U.S. 1079 (1992). Petitioner submits that those cases should not control here. The defense argument that finally succeeded in Espinosa - that the statutory "heinous, atrocious and cruel" aggravator was void for vagueness - was well known to the criminal bench and bar for many years, and that vagueness argument was reasonably deemed waived where it was never made on the record. See Jackson v. State, 648 So. 2d 85, 88 (Fla. 1994); cf. Smalley v. State, 546 So. 2d 720 (Fla. 1989). In this case, counsel for Petitioner did challenge in the trial court the use of "mental abnormality," a highly general criterion for civil commitment, rather than "specific criteria... which would assist a court or jury [in avoiding] arbitrary and capricious [decisions.]" (R 344-46) On this record, it is not reasonable to

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[2] Case no. 00-957 (U.S. January 22, 2002).

hold that Petitioner waived the argument that his jury should have had a substantially more specific question to decide.

On the merits, the State asserts that two aspects of the instructions given below *must* have conveyed to the jury that it had to decide whether Mr. Westerheide has extraordinary difficulty controlling his actions.[3] (State's supplemental brief at 10-13) The State relies first on the instruction that in order to commit, the jury must find that a mental abnormality or personality disorder "makes the person likely to engage in acts of sexual violence." The State argues that based on that language there is "clearly a substantial causative effect which the mental condition must have on the person's dangerous behavior." (State's supplemental brief at 10) However, as at least one group of commentators has pointed out, language like the quoted language from the instructions can be read as referring to *either* a correlative or a causative relationship between a mental condition and violent acts. Schopp et al., Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks, 5 Psychology, Public Policy and Law 120, 129-30 at nn. 45 et al. (1999). This is true in common parlance: one might well say that being of African-American heritage makes a person more likely to have sickle-cell

[3]The relevant instructions are set out in Petitioner's initial supplemental brief at page 6.

anemia, just as one might well say that smoking makes a person more likely to have lung cancer, although in the first example the relationship is one of correlation rather than causation. Altogether more careful language is generally, and properly, used in the law to convey that a jury must necessarily find a causative relationship. See Fla. Std. Jury Instr. (Civ.) 5.1(a) ("[n]egligence is a legal cause of loss, injury or damage if it directly and in a natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred") and Standard Jury Instructions in Criminal Cases (97-2), 723 So.2d 123, 146-48 (Fla.1998) (defendant must be shown to have "caused or contributed to the cause of the death" in DUI manslaughter cases.) This court should hold that the language quoted above from the instructions given in this case did not clearly put the jury on notice that it had to consider the issue of extraordinary problems with impulse control.

The State also relies on language in the instructions given below which defined "mental abnormality" as a condition "affecting a person's emotional or volitional capacity which predisposes the person" to reoffend. As noted in an earlier brief, the jury was instructed to vote for commitment if it believed that *either* a mental abnormality *or* a personality disorder makes Petitioner

likely to engage in acts of sexual violence. Since the jury may have directly considered only Petitioner's alleged antisocial personality disorder, the "mental abnormality" definition - even if it did clearly get across a need for a finding of extraordinary difficulty controlling behavior, which it does not - would not save the verdict. "When...jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." Delgado v. State, 776 So. 2d 233, 241 (Fla. 2000), citing Griffin v. United States, 502 U.S. 46, 59-60 (1991).

The California cases relied on by the State do not support its position. The California Supreme Court anticipated Kansas v. Crane by holding in 1999, in the context of sexually violent predator civil commitment trials, that "due process *requires* an inability to control dangerous conduct." Hubbart v. Superior Court, 19 Cal. 4th 1138, 1158 (Cal. 1999) (emphasis in original). California's standard jury instructions do not clearly express that requirement, but those instructions have been approved by that state's intermediate courts. See CALJIC 4.19; see People v. Grant, 2002 WL 343165, **8-9 (Cal. App. March 5, 2002). The California instructions do improve on Florida's in that they expressly require that all - rather than some - mental disorders that could support a verdict must be those which "affec[t] the

emotional or volitional capacity [and] predispos[e] the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." This court should either distinguish on that ground, or disagree with, the intermediate California cases, and hold that the Florida instructions fail to adequately explain that jurors must find a direct causative relationship between a proven mental condition and probable violent behavior.[4] The other out-of-state cases relied on by the State predate Kansas v. Crane, and fail to anticipate the current state of the law, i.e., that fact-finders must clearly find that a mental state exists which causes extraordinary inability to control dangerousness in the sexual context.

The State further argues that any error in instructing the jury in this case was harmless. Inexplicably its brief states that "Petitioner does not dispute that the State adduced considerable evidence regarding Westerheide's difficulty in controlling his dangerous behavior." (State's supplemental brief ("SSB") at 14) The petitioner *does* dispute that the State made any such showing; there was no evidence introduced at trial which tended to show that the Petitioner sought to, but could not, prevent himself from committing the acts that resulted in his entering a

[4]Grant in any event is distinguishable from this case because the State's showing against Grant supported a harmless error argument. See infra.

plea in his criminal case.

The State also asserts, incorrectly, that a diagnosis of antisocial personality disorder "entails a finding that the individual has impulse control problems." (SSB at 14) As its experts testified below, a diagnosis of antisocial personality disorder depends on a finding of a pervasive pattern of disregard for, and violation of, the rights of others as indicated by *three or more of the following criteria*:

- failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;

- deceitfulness as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

- impulsivity or failure to plan ahead;

- irritability and aggressiveness as indicated by repeated physical fights or assaults;

- reckless disregard for the safety of self or others;

- consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;

- lack of remorse. (Vol. IV, T 140-43; see Vol. V, T 277)

Accord Diagnostic and Statistical Manual of Mental Disorders, (Fourth Edition, Text Revision) ("DSM-IV-TR") at 706 (American Psychiatric Association 2000). As another expert has summarized

the foregoing criteria, they consist of "a life-long history of making bad choices which were conscious and volitional." Elledge v. State, 706 So. 2d 1340, 1346-47 (Fla. 1997). The Kansas v. Crane opinion suggests that the Supreme Court agrees with the expert quoted in Elledge: the opinion emphasizes "the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings," immediately citing a study that notes that the majority of the male prison population may be diagnosable with antisocial personality disorder. Kansas v. Crane, slip op. at 4-5.

The *only* testimony that State expert Dr. Merwin gave in this case that would support a finding of impulse control problems referred to a trip Petitioner took to Chicago one summer which involved his staying with family and friends and supplying himself only with about $200 for expenses. (Vol. IV, T 142) The only testimony the State's other expert, Dr. McClaren, gave on the subject was "I thought that he duly showed impulsivity or failure to plan ahead. In his own words he told me there was no planning ahead before prison." (Vol. V, T 277) Cf. People v. Grant, supra, 2002 WL 343165 (Cal. App. March 5, 2002) (experts testified that respondent "does not have the tools necessary to control his sexually deviate behavior" and that he "lacked the

ability to control his behavior prior to incarceration;") People v. Hicks, 2002 WL 139718 (Cal. App. January 29, 2002) (experts testified that respondent could not control behavior.) Cf. also Crook v. State, No. SC-94782, slip op. at 6, 8 (Fla. March 7, 2002) (capital case; experts testified that defendant "suffered from impulsivity from a very early age," "was prone to impulsive and aggressive behavior including rage," and "had difficulty in controlling his behavior;" that his "brain damage would cause him to become excited easily [and] overreact;" and that "in certain situations [he] would be unable to control himself to a degree that a person with an intact brain would be able to"); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (similar capital case; record "replete" with testimony attesting to lack of impulse control).

The State asserts in its brief that its experts "opined that Westerheide had problems conforming his conduct to the norms of society." (SSB at 14) Dr. Merwin testified that he found Mr. Westerheide *did not* conform to social norms, but notably did not testify that he *could not* do so. (Vol. IV, T 140) Dr. McClaren's testimony was that he believed Mr. Westerheide from an early age "had little regard for social mores, had a lot of trouble conforming to the expectations of society, lawful behavior, and probably has significant problems with authority." (Vol. V, T 280) Again, that testimony does not establish impulse control

problems, as distinct from "a life-long history of making bad choices which were conscious and volitional." See Elledge v. State, supra, 706 So. 2d at 1346-47.

The State further argues, incorrectly, that excerpts from letters introduced into evidence at trial show that Petitioner has exhibited lack of reasonable control by effectively stalking Adelle Tubbs, the prosecutrix of the criminal case that gave rise to this civil proceeding, by writing her letters that detail sexual fantasies throughout his prison term. The letters in Exhibit 10 were in fact written to an Aleta Orlandoni, whom the letters show became Petitioner's fiancee while he was awaiting sentencing, and maintained that relationship with him long into his prison term. A further factual misstatement in the State's brief is that one of the letters contains an admission by him that he had a relationship with a second underaged girl; it is clear from the context of that letter (pages 4 and 5 of the appendix to the State's supplemental brief) that he is quoting the content of a psychological evaluation prepared for his sentencing.

Mr. Westerheide's criminal career was notably brief, and notably featured no allegations, admissions or proof of impulsively committed acts. This court should reject the State's invitation to rule that no jury could reasonably have reached a different decision in this case if it had had to find a clear and

convincing showing of extraordinary difficulty controlling behavior.

The State does not object in its supplemental brief to this court's addressing, in addition to the Crane issue, whether the Ryce Act satisfies the Florida constitution in any case. The petitioner again requests this court to do so pursuant to the authority of State v. Dye, 346 So. 2d 538 (Fla. 1977).

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,

JAMES B. GIBSON
PUBLIC DEFENDER

____
NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 386/252-3367

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 11th day of March, 2002.

____
NANCY RYAN
FLORIDA BAR NO. 765910

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 Courier New 12-point font.

____
NANCY RYAN
FLORIDA BAR NO. 765910