IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. **SC02-2277**
JAMES C. WHITE,	:	
Respondent.	:	

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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

826 So. 2d 1043 (Fla. 1st DCA 2002)

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent was the respondent in the Civil Division of the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County, Florida, and the appellant in the District Court of Appeal, First District. Petitioner was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this court.

References to the record on appeal shall be by the letter "R" followed by the page number. References to the trial transcripts shall be by the letter "T" followed by the page number. References to the supplemental record shall be by the letters "SR" followed by the page number

The symbol "PB" will denote Petitioner's Brief.

STATEMENT OF THE CASE

On November 3, 1999, an amended petition for commitment as a sexually violent predator was filed against Respondent. (SR 689-719).

The case proceeded to a jury trial. At the charge conference, Respondent requested that the jury be instructed that before they could commit Respondent they must find in addition to the three elements contained within the standard jury instruction that Respondent is unable to control his dangerous behavior. Respondent's requested jury instruction was denied. (R 218-219, T 461-465).

The jury unanimously found that Respondent was a sexually violent predator. (T 684). On September 18, 2000, the trial court entered the final judgment, adjudication and order of commitment of Respondent. (R 222).

In White v. State, 826 So. 2d 1043 (Fla. 1st DCA 2002), the First District Court of Appeal reversed Respondent's final Order of commitment in holding that Respondent was entitled to a jury instruction as to an essential element of proof that he had serious difficulty in controlling his behavior in light of the United States Supreme Court's decision in Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867 (2002).

Petitioner filed a Notice to Invoke this Court's Discretionary Jurisdiction. On November 17, 2002, this Court accepted jurisdiction of this case and ordered briefs on the merits. This brief follows.

STATEMENT OF THE FACTS

Dr. Robison, a clinical psychologist licensed since December, 1999, testified that he was working under the supervision of Dr. Benoit in June of 1999. (T 124, 128). Dr. Robison evaluated Respondent on June 28, 1999 at the request of the Department of Children and Families with Dr. Benoit. After reviewing a number of Department of Corrections' records including a sex offender screening at the Department of Corrections it appeared that Respondent enjoyed or gained pleasure from sex with a nonconsenting partner, i.e. rape. According to his records, Respondent requested treatment at the Department of Corrections but he refused because of fear of other inmates. (T 135-138, 149-150). His first offense involved a 1993 aggravated assault case against Ms. Mears by putting a knife to her throat. She complained of being raped and they went to counseling together. Both of Respondent's victims including the victim from the 1995 sexual battery and false imprisonment case were physically handicapped. Although Respondent was remorseful about what happened with Ms. Mears, the relationship ended because she cheated on him. In Dr. Robison's view, Respondent has an impulse control disorder. (T 151-154).

In Dr. Robison's view, Respondent's juvenile history was insignificant. When they discussed the rape of Ms. Stokes, Respondent because nauseous and fell to the floor and became incapacitated during the interview. Respondent indicated to Dr. Robison that he realized what he was doing was wrong, tried to stop, but could not. (T 154, 161, 164).

In Dr. Robison's opinion, Respondent has a severe personality disorder. Although there is a lack of enough evidence to put him in a particular slot, Respondent suffers from a severe personality disorder NOS. There is insufficient evidence to conclude firmly that Respondent has paraphilia. Dr. Robison's opinion of Respondent's risk for reoffense is such that he presents a menace. According to Robison, both Ms. Stokes and Ms. Mears indicated that Respondent was aroused by their fear. Respondent could satisfy the criteria of a sexual sadist. (T 167-169, 172-173). Dr. Robison opined that Respondent suffers from sexual sadism. (T 176). Dr. Robison also testified that he used actuarial instruments in this case. The first instrument used was the RRASOR. Respondent scored a 1 on this test which translates into an 11% chance of recidivism in ten years. Respondent also scored a seven on the MnSOST-R test. This score translates into a 63% chance that Respondent will recidivate. Dr. Robison is of the opinion that Respondent

suffers from a very severe personality disorder as well as sexual sadism. The likelihood for reoffense is great based on the severity of Respondent's illness. (T 186-187, 198, 200-201).

Dr. Parker, the clinical director of the Department of Children and Families Sexual Violent Predator program, testified that she went over Respondent's Department of Corrections' files after receiving the reports from Drs. Benoit and Robison on July 26, 1999. Of concern to her about Respondent was his supervision failure and the sadistic features. Also, both women were disabled. In Dr. Parker's opinion, Respondent is likely to recommit. He suffers from paraphilia NOS in that he exhibits a deviant sexual behavior. In Dr. Paker's view, Respondent would benefit from treatment. He is someone who said, "I am doing something wrong and I can't control it." (T 233, 245-249, 251).

Pamela Barr testified that prior to becoming a legal expense broker she worked as a crisis intervention counselor with the Salvation Army domestic Violence Rape Crisis program. (T 295-296). Ms. Barr testified that on January 7, 1993, Respondent came into her office with Allison Mears, who at the time was Respondent's fiancé. They had a small daughter together. Ms. Mears stated that Respondent was raping her and wanted to work it out. Respondent admitted this and seemed to enjoy it. Ms.

Barr recalls Respondent telling her about his fantasies of Allison being raped by ten black men. Also, Respondent liked putting things in her. One time in a motel, he tied her up and raped her with an axe handle. (T 301-303-304). Respondent knew he was wrong but he could not control himself. (T 316).

Jack Howell, of the Life Management Center of Northwest Florida, testified that in 1995 he was a forensic specialist and counseled inmates at the jail. Mr. Howell testified that Respondent told him he tried to get help at Rivendell because he felt that something was wrong with him. (T 321, 325).

Paul Vicker, an investigator with the Bay County Sheriff's Office, testified that he took a statement from Respondent in 1993. (T 327, 329, 332-339). Respondent was seeking help for domestic violence. Respondent had placed a knife to the neck of Allison Mears and threatened Alisha White, their 18-month old baby. Respondent threatened to kill Ms. Mears and the baby. Respondent also stated that he had raped Ms. Mears and wanted help. (T 333-337, 339).

Julia Patterson, a licensed mental health counselor at the Life Management Center, testified that she met Respondent on October 25, 1994. (T 349-351, 352). At that time, Respondent told her that he felt that he had overcome his problems: "patient is able to recognize his behavior being outside social

norms, but feels he has changed." (T 355, 356).

Daniel Kitzerow, a marriage and family therapist, testified that he came in contact with the Respondent on September 13, 1993. He was self referred for counseling services. The last time Kitzerow saw Respondent was on May 18, 1994. In total, he saw Respondent 11 times. (T 358, 361, 364). While Respondent was on probation, he wanted to find out what happened between him and Allison in order to prevent it from happening again. (T 371). Kitzerow testified that on May 18, 1994, Respondent reported that he had fondled his 20-month old daughter. Respondent was uncertain whether he could avoid this in the future without intervention. Respondent also indicated that he enjoyed it a little when his wife acts afraid of him. Respondent indicated that he had sexually molested his daughter and he believed he had done this in an effort to hurt his ex-wife. (T 372, 374, 376).

Commander Hall, of the Panama City Police Department, testified that he took a statement from Respondent on May 27, 1995. (T 384-386). The girl was tied to the bed and gagged. Eventually, Respondent untied her and asked her to take him to Rivendell. Respondent had thought he had raped her. (T 398-400). Respondent's judgment and sentence for sexual battery and false imprisonment were introduced into evidence. (T 413).

Reverend Greg testified that in 1995, he was a mental health counselor at Life Management. He met Respondent in May 1995. Rev. Greg described the incident between Respondent and Susan Stokes as described to him by Respondent. (T 418-420, 423-425).

Susan Stokes testified that she had an aneurysm approximately 17 years ago. It affects her ability to walk and speak. (T 427-428). Between February 1995 and May 1995, she saw appellant approximately four times at Scooters and three times at her house. On February 26, 1995, Respondent came over her house and asked if she wanted to go to a movie. Respondent said he needed to change clothes at his house. After he changed, she was walking by the door and Respondent came up and put a rag in her mouth. He grabbed her from behind. He then carried her into the bedroom. He took her clothes off and tied her up. Her right arm is in a fixed position. Respondent then raped her over and over. Eventually, she got him to untie her and they talked. It was between 4 a.m. and 5 a.m. that Respondent wanted to go to Rivendell for help. At Rivendell, they sent him to Life Management. She went to the hospital later that day. Ms. Stokes also testified that Respondent was sexually aroused by her fear. (T 431-437, 442-444). Ms. Stokes made an in court identification of Respondent. (T 446).

Bobby Nowell testified that in July 1993, he was working as

an investigator with the HRS Child Protection Team. At that time, he interviewed Respondent. (T 472, 474-475). Mr. Nowell testified that Respondent admitted to having a problem and wanted counseling. According to Mr. Nowell, Respondent was sexually abused as a child and this was causing him problems with Allison. Mr. Nowell believes that Respondent got counseling. According to Mr. Nowell's notes, Respondent had no ideations of sexual behaviors towards his daughter. (T 476-479).

For the defense, Dr. Hodges, a licensed psychologist, testified that he entered into a contract with the Department of Children & Families. The contract required the use of actuarial instruments. In Dr. Hodges' view, actuarials provide a moderate degree of accuracy and are better than clinical judgment. Prior to his evaluation of Respondent, he received a packet of records from the Department of Children & Families. On July 16, 1999, he conducted an evaluation of Respondent at the Century Correctional Institution and prepared a report. (T 482, 488-490, 492). Dr. Hodges used two actuarial instruments in this case; the RRASOR and the MnSOST. On the RRASOR, the Respondent scored a one. This translates into a 7.6% chance of recidivism within 5 years and an 11.2% chance of recidivism in 10 years. On the MnSOST, Respondent scored between a 4 and 7 which is the

moderate range. This translates into a 45% recidivism rate of which 35% are likely to reoffend. (T 501, 505-508). Dr. Hodges also scored Respondent on the Static 99 actuarial instrument. Respondent scored a 4 which placed him in the medium to high category with a 36% chance that he would reoffend within the next fifteen years. (T 510).

Dr. Hodges diagnosed Respondent as having intermittent explosive disorder and post-traumatic stress disorder related to his abuse. Dr. Hodges did not diagnose Respondent which sexual sadism. He concluded that Respondent did not meet the criteria for involuntary civil commitment and that he did not see him as likely to reoffend. According to Dr. Hodges, there is nothing to show a correlation between intermittent explosive personality disorder or post-traumatic stress disorder and the likelihood of reoffending. (T 510-513, 515).

Respondent testified that he did not tell Kitzerow that he molested his daughter. Respondent also denied holding a knife to Ms. Mears and his daughter. He did, however, threaten them. According to Respondent, he and Ms. Mears would be adventurous. They would watch porno and try it which included tying her up. It was consensual. She would tie him up too. His purpose was not to make her afraid nor did he intend to cause her physical pain or humiliate her. Respondent pled to aggravated assault

and was placed on probation for four years. While on probation, he met Ms. Stokes while working at Scooters. (T 563-571).

Respondent testified that Ms. Mears would say that he raped her out of the blue. He became convinced that he was doing this. Respondent denied inserting a foreign object into her body. (T 573-575).

Respondent did admit that he raped Ms. Stokes. There was no excuse for it. He was charged with sexual battery and false imprisonment and sentenced to 6 years and 10 months, followed by 8 years of probation. While in prison, he got his GED. If released into society, he is not going to commit another sexual offense. Respondent also testified that he was raped while in the Department of Corrections and he knows what he put the victim through. (T 575-578).

On cross-examination, Respondent testified that he did not consent to treatment while at the Martin Treatment Center because he did not want the State Attorney's Office to have access to his records. Respondent did not participate in sex offender treatment while in the Department of Corrections because of fear of other inmates. (T 581-582). Respondent acknowledged that he told Barr, Vecker, Nowell and Kitzerow that he raped Mears. (T 586-587). Respondent denied ever pulling out a photo of his daughter the night he raped Ms. Stokes. (T

589). After raping her, she then agreed to consensual sex. He now considers that rape as well. In short, Respondent knew what he was doing was wrong but could not stop himself. If he did not get help it would happen again. Respondent agrees he needs counseling to include psychological counseling and anger and stress management. Since the time he was with Ms. Mears, he has had no sexual offender counseling. (T 586-587, 589, 591, 593, 595).

In rebuttal, Dr. Benoit, a clinical psychologist, testified that he conducted an evaluation of Respondent with Dr. Robison. According to Benoit, on the MnSOST he scored Respondent a 7, which translates into a 63% chance of recidivism in Florida. With a score of 7, there is a 45% chance of recidivism under Minnesota law. In Dr. Benoit's view, Respondent is a severely, disturbed young man with a personality disorder that is an enduring pattern and will manifest itself in the future if not treated. Dr. Benoit recommends inpatient treatment in this case. (T 598, 605, 607-611).

On cross-examination, Dr. Benoit acknowledged that Respondent's actuarial scores tell him that there is some risk with people that have his background, but it does not tell him that Respondent is in the group that is going to be at risk versus the group that is not going to be at risk with the same

score. (T 613).

SUMMARY OF ARGUMENT

ISSUE I:

It is not constitutionally permissible to commit a person as a sexually violent predator, as was done in the instant case, absent a showing and determination that the offender has serious difficulty controlling his behavior. The failure of the trial court, in the instant case, to advise the jury of such requirement as was requested by Respondent was a denial of substantive due process.

ARGUMENT

ISSUE I

THE FIRST DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT RESPONDENT WAS ENTITLED TO A JURY INSTRUCTION AS TO AN ESSENTIAL ELEMENT OF PROOF THAT HE HAD SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR.

As Petitioner correctly points out, because the issue presented in this appeal is strictly a legal one, the standard of review is de novo.

In the instant case, Respondent requested that the trial court instruct the jury that before they could commit Respondent they must find that Respondent was unable to control his behavior. The trial court denied Respondent's proposed jury instruction. (R 218-219, R 461-465). The First District reversed and correctly held Respondent was entitled to a jury instruction as to an essential element of proof that he had serious difficulty in controlling his behavior. White v. State, 826 So. 2d 1043 (Fla. 1st DCA 2002).

In Kansas v. Hendricks, 521 U.S. 346 (1997), the U.S. Supreme Court held that to commit a person as a sexually violent predator, the State must prove the existence of a mental disorder that so impairs the volitional control of a Respondent as to render him unable to control his dangerous behavior. The State must not only prove that the mental disorder exists, but

also that it is the mental disorder that makes a Respondent unable to control his behavior.

The Florida statute under which the State sought to commit Respondent is nearly identical in operative part to the Kansas statute considered in Hendricks. The Florida statute provides:

> "Sexually violent predator" means any person who:
>
> (a) Has been convicted of a sexually violent offense; and
>
> (b) Suffers from a mental abnormality or personality disorder that 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.

§ 394.912(10), Fla. Stat. (1999).

> "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses.

§ 394.912(5), Fla. Stat. (1999).

"Personality Disorder" is not defined in the relevant Florida statutes.

> "Likely to engage in acts of sexual violence" means 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), Fla. Stat. (1999).

In Standard Jury Instructions - Criminal Cases (99-2), 25 Fla. L. Weekly S476 (Fla. June 15, 2000), this Court issued certain standard jury instructions for use in cases brought

pursuant to §§ 394.910-394.931, Fla. Stat. (1999). Instruction number 2.02, Statement of Case, provides as follows:

> This is a civil case filed by the petitioner, the State of Florida, against the respondent. The State alleges the respondent is a sexually violent predator and should be confined in a secure facility for long-term control, care, and treatment. To prove the respondent is a sexually violent predator, the State must prove each of the following three elements by clear and convincing evidence:
>
> > a. (Respondent) has been convicted of a sexually violent offense; and,
> >
> > b. (Respondent) suffers from a mental abnormality or personality disorder; and
> >
> > c. The mental abnormality or personality disorder makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.
> >
> > A sexually violent offense is: [as defined in § 394.912(9), Fla. Stat. (1999)] . . .
> >
> > "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses.
> >
> > "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.

The majority opinion in Hendricks, states in clear and unambiguous language that the constitutionality of the commitment procedure created by the Act depends on its application being limited to persons who cannot control their

dangerous behavior. Hendricks admitted that he had repeatedly sexually abused children and that he was unable to control the urge to do so. 521 U.S. at 355, 360. On appeal from his commitment proceeding, the Supreme Court of Kansas invalidated the Kansas statute on the ground that it did not predicate commitment on a finding of mental illness, which the Kansas court held to be a requirement of substantive due process. In re: Care & Treatment of Hendricks, 259 Kan. 246, 912 P.2d 129 (1996). The U.S. Supreme Court granted certiorari on the State's petition to consider the due process issue as well as on Hendricks's cross-petition to consider his federal ex post facto and double jeopardy claims. 521 U.S. at 350.

Under a substantive due process analysis, the Supreme Court read a volitional impairment requirement into the Kansas statute as a condition of its constitutionality. The particular facts of Hendricks' case, including his conceding that he could not control his urge to sexually molest children, was at the core of the Supreme Court's opinion. The Court held that to be constitutional, a civil commitment must limit involuntary confinement to those "who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. The court held that the Kansas statute set forth criteria to make such a finding by linking future dangerousness to a

"mental abnormality" or "personality disorder" that "makes it difficult, if not impossible," to control such behavior. 521 U.S. at 358. Hendricks met that criteria by being diagnosed as a person who could not control his urge to molest children.

The Supreme Court rejected the Kansas Supreme Court's requirement of a finding of mental illness in order to override an individual's constitutionally protected liberty interest. 521 U.S. at 356-360. The Court catalogued constitutionally permissible instances in which "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." [Emphasis added.] 521 U.S. at 357. The Court noted the typical state statute's linking of a finding of dangerousness with an additional factor, such as mental illness, in the Court's analysis of the Kansas Act's conformance to the pattern:

> These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior. Kan. Stat. Ann. § 59-29a02(b) (1994). The precommitment requirement of a "mental abnormality" or "personality disorder" is consistent with the requirements of these other statutes that we have upheld in that it narrows the

> class of persons eligible for confinement to those who are unable to control their dangerousness. [Emphasis added.]

521 U.S. at 358. The Supreme Court concluded:

> To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria. . . . Hendricks even conceded that, when he becomes "stressed out," 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. [Emphasis added.]

521 U.S. at 360.

The Supreme Court clearly held that it is not constitutionally permissible to commit a person as a violent sexual predator absent a showing that he is unable to control his dangerous behavior. The Court required a "lack of volitional control" to distinguish Hendricks from "other dangerous persons." 521 U.S. at 360. Thus the Court read a requirement of inability to control behavior into the Kansas statute in order to find it constitutional. The Court's opinion does not allow mere willful behavior or mental illness, without more, to be sufficient predicate for civil commitment.

In Kansas v. Crane, 122 S.Ct. 867 (2002), the Supreme Court has now ruled that the Constitution requires that there be a

separate finding of inability to control behavior or serious difficulty in controlling behavior. In other words, there must be some lack of control determination before one can be civilly committed. See, also, Hudson v. State, 825 So.2d 460 (Fla. 1st DCA 2002). So without showing lack of volitional control, the proof of mental abnormality or personality disorder is constitutionally inadequate regardless of the danger.

In Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 870 (2002), the United States Supreme Court considered 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. The court held that there must be proof of serious difficulty in controlling behavior. The proof, when viewed in light of such features of the case such 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. The Court clearly intended that trial courts

give a jury instruction encompassing that principle.[1] Thomas v. Missouri, 72 SW 3d 789 (Mo. 2002); In re Detention of Barnes, 658 N.W. 2d 98 (Iowa 2003).

In Westerheide v. State, 27 Fla. L. Weekly, S866 (Fla. October 17, 2002), this Court considered how, in light of Crane,

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[1]Counsel for Respondent suggests this Court adopt and issue the following jury instruction to be used by the trial court in these post sentence civil commitment cases:

This is a civil case filed by the petitioner, the State of Florida, against the Respondent. The State alleges the Respondent is a sexually violent predator and should be confined in a secure facility for long-term control, care, and treatment.

To prove the Respondent is a sexually violent predator, the State must prove each of the following four elements by clear and convincing evidence:

a. Respondent has been convicted of a sexually violent offense; and

b. Respondent suffers from a mental abnormality or personality disorder; and

c. The mental abnormality of personality disorder causes Respondent to have serious difficulty in controlling his behavior, and when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormalities itself, the mental abnormality or personality disorder must be sufficient to distinguish him from the dangerous recidivists convicted in the ordinary criminal cases, and

d. The mental abnormality or personality disorder makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

a trial court must instruct a jury in this type of civil commitment case. Three justices held that they did not find that Crane required a specific jury instruction, but rather; that there must be proof of serious difficulty in controlling behavior in order to civilly commit an individual as a sexually violent predator. Three justices strongly disagreed and held, in accordance with Crane, that the jury instructions must contain clear guidance so that the jurors understand that they are deciding that the respondent is a dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment rather than a dangerous but typical recidivist convicted in an ordinary criminal case. Justice Quince concurring only in the result with

Justices Harding, Wells and Lewis simply found that the state did demonstrate that Westerheide had serious difficulty in controlling his behavior but she did not address the propriety of the jury instructions at all. Thus, in Westerheide, this Court was equally divided in opinion as to the requirement of the jury instruction addressing proof of serious difficulty in controlling behavior. Therefore, the majority opinion in Westerheide cannot be understood to resolve that issue.

The longstanding law in Florida is that when an appellate court is evenly divided, the decision of the lower court stands

affirmed. Powell v. Rodriguez, 200 So. 700 (Fla. 1939); Johnson v. Landefeld, 189 So. 2d 666 (Fla. 1939). However, the Fifth District Court of Appeal in Westerheide did not address the issue of a jury instruction regarding serious difficulty in controlling behavior. The district court did consider the issue of proper jury instructions, but only in the context of the meaning of the word "likely". Thus, even if the Court could do away with a due process requirement imposed by the United States Supreme Court, the court did not do so in Westerheide. The 3-3 split opinion would have affirmed the holding of the district court had the district court ruled on the issue of serious difficulty in controlling behavior. However, the district court did not address that issue. Therefore, one cannot properly draw conclusions from Westerheide as to whether or not a jury instruction is required specifically addressing serious difficulty in controlling behavior.[2]

The decisions of the First District Court of Appeal in Hudson v. State, 825 So. 2d 460 (Fla. 1st DCA 2002), Converse v.

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[2]A number of appellate court judges around the state have expressed the view that the better practice would be to instruct the jury as to the element of serious difficulty in controlling behavior. McQueen v. State, 848 So. 2d 1209 (Fla. 1st DCA 2003), Browning, J. dissenting); Lee v. State, 854 So. 2d 709 (Fla. 2nd DCA 2003), (Casanueva, J. concurring); Gray v. State, 854 So. 2d 709 (Fla. 4th DCA 2003), (Klein, J. concurring).

Dept. of Children and Families, 823 So. 2d 295 (Fla. 1st DCA 2002) and White v. State, 826 So.2d 1043 (Fla. 1st DCA 2002), comport with the due process requirement imposed by the United States Supreme Court. In Hudson, the Court agreed with the district court in Westerheide on the constitutionality of the statute, but held that "in light of the Crane holding, the State's proof was legally insufficient to satisfy the demands of substantive due process because the State presented no evidence regarding Respondent's ability to control his dangerous behavior". Hudson, 825 So. 2d at 471. In Converse, the Court held that the failure of the lower court to instruct the jury of such requirement was a denial of substantive due process which is fundamental error. Converse, 823 So. 2d at 297. In White, the Court specifically held that in Crane the Supreme Court had added a "fourth element of proof" under the Kansas Act; that the person has serious difficulty in controlling his or her behavior. The White court concluded that "as explained in Hudson, this fourth element of proof is likewise essential under the Florida Act. The appellant was therefore entitled to an instruction as to this element, and the trial court erred in refusing to give it."

Florida courts have long held that the failure to instruct the jury on every disputed element of a cause of action

impermissibly takes from the jury part of its essential function. A fair and impartial trial requires that one be accorded the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the cause which must be proven by competent evidence. Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953). Thus, in order to civilly commit a person as a sexually violent predator, a jury must be instructed as required by Crane. Nothing in Westerheide stands contrary to that requirement.

The trial court's denial of Respondent's requested jury instruction was not harmless. Dr. Hodges diagnosed Respondent as having intermittent explosive personality disorder and post traumatic stress disorder related to his abuse. Dr. Hodges did not diagnose Respondent with sexual sadism. He concluded that Respondent did not meet the criteria for involuntary civil commitment and that he did not see him as likely to reoffend. According to Dr. Hodges, there is nothing to show a correlation between intermittent explosive personality disorder or post traumatic stress disorder and the likelihood of reoffending. (T 510-513, 515).

The State failed to present sufficient evidence that Respondent suffered from a mental abnormality of personality disorder that caused him serious difficulty in controlling his

behavior. This material element was in dispute by Respondent and the failure to instruct the jury on this disputed element impermissibly took from the jury part of its essential function.

Accordingly, the opinion of the first District Court of Appeal must be upheld.

CONCLUSION

Based on the foregoing arguments, and the authorities cited therein, Respondent requests this Court to uphold the opinion of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Thomas H. Duffy**, Assistant Attorney General, at The Capitol, PL-01, Tallahassee, Florida 32399-1050, on this _____ day of January, 2004.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

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APPENDIX

NANCY A. DANIELS
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