IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JAMES CHRISTOPHER WHITE,

Respondent.

CASE NO. SC02-2277

PETITIONER'S INITIAL BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

THOMAS H. DUFFY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 470325

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT. 4595
(850) 922-6674 (FAX)

RICHARD L. POLIN
MIAMI BUREAU CHIEF, CRIMINAL APPEALS
Florida Bar No. 0230987

OFFICE OF THE ATTORNEY GENERAL
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (FAX)

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 14

ARGUMENT 15

ISSUE I

THE LOWER COURT ERRED IN HOLDING THAT THE JURY, IN A SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT TRIAL, MUST BE INSTRUCTED THAT THE RESPONDENT "HAS 'SERIOUS DIFFICULTY' CONTROLLING HIS OR HER BEHAVIOR." 15

CONCLUSION 34

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE 35

CERTIFICATE OF COMPLIANCE 36

TABLE OF CITATIONS

CASES PAGE(S)

In re Detention of Barnes, 658 N.W.2d 98 (Iowa 2003) . . . 27

Breedlove v. State, 655 So. 2d 74, 76 (Fla. 1995) . . 33-34

In re Detention of Brooks, 973 P.2d 486 (Wash. App. 1999) 20

Carribean Conservation Corp., Inc. v. Florida Fish and Wildlife Commission, 838 So. 2d 492 (Fla. 2003) 16

In the Matter of the Care and Treatment of Coffman, 92 S.W. 3d 245, 251-252 (Mo. App. 2002) 29

In the Matter of Crane, 7 P. 3d 285 (Kan. 2000) . . . 18, 19

Fla. Power & Light Co. v. McCollum, 140 So. 2d 569 (Fla. 1962) 32

In re Detention of Gordon, 10 P. 3d 500 (Wash. App. 2000) 20

Gray v. State, 854 So. 2d 287 (Fla. 4th DCA 2003) . 22, 23

Hale v. State, 834 So. 2d 254 (Fla. 2d DCA 2002) . . . 22, 23

ITT-Nesbitt, Inc. v. Valle's Steak House, 395 So. 2d 217 (Fla. 4th DCA 1981) 32

In re the Detention of Isbell, 777 N.E.2d 994 (Ill. App. 2002) 26

J.A. Cantor Associates, Inc. v. Brenner, 363 So. 2d 204 (Fla. 3d DCA 1978) 29

Jennings v. State, 782 So. 2d 853, 862-863 (Fla. 2001) . . 32

Kansas v. Crane, 534 U.S. 407 (2002) . . . . . *passim*

Kansas v. Hendricks, 521 U.S. 346 (1997) . . . . . *passim*

Kranosky v. Robbins, 120 So. 2d 184 (Fla. 1960) 29

Krawczuk v. State, 634 So. 2d 1070, 1073 (Fla. 1994) . . . 33

In re the Commitment of Laxton, 647 N.W.2d 784 (Wis. 2002) 25, 29

Lee v. State, 854 So. 2d 709 (Fla. 2d DCA 2003) . . . 22, 23

Lee v. State, 2002 WL 1530946 (Wash. App. 2001) (unpublished) 20

In the Matter of Leon G., 59 P. 3d 779, 788 (Ariz. 2002) . 28

In re the Matter of Leon G., 18 P. 3d 169 (Ariz. App. 2001) 20

In re the Matter of Leon G., 26 P. 3d 481 (Ariz. 2001) . . 20

In the Matter of the Treatment and Care of Luckabaugh, 568 S.E.2d 338 (S.C. 2002) 26

McQueen v. State, 848 So. 2d 1220 (Fla. 1st DCA 2003) . . 22

People v. Grant, 2002 WL 54684 (Cal. App. 2002) . . 20, 29

People v. Kohler, 2002 WL 12280 (Cal. App. 2002) 18

People v. Munoz, 2001 WL 1397287 (Cal. App. Nov. 8, 2001) 18

People v. Williams, 3 Cal. Rptr.3d 684 (Cal. 2003) 23, 24, 29

In re Detention of Springett, 2001 WL 913858 (Iowa App. 2001) 20

In re Strauss, 20 P. 3d 1022 (Wash. App. 2001) 20

In re Detention of Thorell, 72 P.3d 708 (Wash. 2003) 25, 26, 29

In re Detention of Tittlebach, 754 N.E.2d 484 (Ill. App. 2001) 19

In the Matter of the Care and Treatment of Thomas, 74 S.W. 3d 789 (Mo. 2002) 27

In re Detention of Trevino, 740 N.E.2d 810 (Ill. App. 2000) 19

In re Detention of Varner, 759 N.E.2d 560 (Ill. 2001) . . 19

Westerheide v. State, 831 So. 2d 93 (Fla. 2002) 18, 22, 23, 29

White v. State, 826 So. 2d 1043 (Fla. 1st DCA 2002) . . . 37

FLORIDA STATUTES

Section 394.912(4) 17

Section 394.912(5) 16

Section 394.912(10) 16

Section 924.051 30

OTHER

American Heritage Dictionary of the English Language, New College Edition (1980 ed.) 17

Kan. Stat. § 59-29a02 18

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appelllee in the First District Court of Appeal and the Petitioner in the trial court, will be referenced in this brief as Petitioner, or the State. Respondent, James Christopher White, the Appellant in the First District Court of Appeal and the respondent in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of six volumes, one main volume of record and five volumes of transcript which are not separately numbered by volume, but are sequentially numbered by page. They which will be abbreviated “Tr.” with the volume number in parentheses and the page number(s) following.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State filed a petition to commit Respondent as a sexually violent predator (SVP) pursuant to the Jimmy Ryce Act (Part V, Chapter 394, Florida Statutes) on July 29, 1999. I, 52-53.

The case proceeded to trial on September 11, 14-15, 2000 in Bay County. At that trial the following testimony was taken.

Chris Palmer Robison, a psychologist, testified that he had conducted an examination of Respondent on June 28, 1999, while Respondent was incarcerated at Century Correctional Institution. Tr. (2), 135. He was accompanied by Dr. Jeffrey Benoit. Tr. (2), 135.

Dr. Robison testified as follows:

Prior to the interview, he and Dr. Benoit reviewed records compiled by the Department of Corrections concerning Respondent, which included mental health evaluations, his offense history, his incarceration history, any disciplinary reports he had received while incarcerated, a victim statement, emergency room reports concerning a sexual battery Respondent had committed on the victim, statement from a mental health experts and an arrest report. Tr. (2), 135-137.

Respondent reported to him and Dr. Benoit that he had been sexually abused by his uncle from age 4 and by his father from approximately the same time, and that this abuse continued for 12 years. Tr. (2), 142. He also reported physical abuse by his older brothers, and that his father was an alcoholic who abused his mother physically, and who gave Respondent alcohol and marijuana “to subdue him for his sexual activities.” Tr. (2), 143. Respondent had been on suicide watch while in the Bay County Jail in 1993, and had referred himself to the Life Management Center in 1994. Tr. (2) 146. He was diagnosed by DOC with impulse control disorder, which “describes an individual who behaves impulsively without forethought and then is real sorry about it and keeps doing it again and again, just has deficient impulse control.” Tr. (2), 146-147. DOC records “said basically he enjoyed or gained pleasure from sex with a nonconsenting partner, essentially rape, he enjoyed rape.” Tr. (2), 149.

Respondent told Drs. Robison and Benoit “that when he realized what he was doing at what ever point that he knew it was wrong and tried to stop and couldn’t do it.” Tr. (2) 164. “[T]here was that indication of poor behavioral control or that he was out of control and needed help.” Tr. (2), 164.

Respondent “seems to have coupled in his mind sex and aggression, first of all. When he thinks of sex it is associated with aggression.” Tr. (2), 164. Respondent’s personalty showed “a severe neurotic pattern,” and he appeared “self oriented, selfish and kind of narcistic [sic]. He acts impulsively and shows poor judgment and has a low tolerance for frustration.” Tr. (2), 166. Respondent has “a severe personality disorder.” Tr. (2) 167.

Based on the interview and the information available to the doctors at that time, Respondent was diagnosed as having a severe personality disorder (“one of those that significantly deviates from social expectations”), not otherwise specified. Tr. (2) 167-168. He could not find evidence of a “childhood conduct disorder” and therefore could not diagnose Respondent with antisocial personality disorder. Tr. (2), 168. He could not, at the time of the interview, diagnose a “paraphilia,” or “sexual deviance.” Tr. (2), 168. He said his impression at the time of the interview was that Respondent’s “risk for reoffense was such that he presented a menace . . . to the health and welfare of the community, safety and welfare of the community.” Tr. (2) 169-170. He elaborated:

> [I]n that assessment of likelihood for reoffense we looked very strongly at how severely ill this man seems to be. The literature tells us that that is a strong contributing factor. Severe pathology, severe sexual deviance is a strong factor for consideration of likelihood for reoffense. If someone, to give you an example, maybe two different people commit the same crime but one of them is more of an antisocial person that has sort of a disregard for the law, he's about to go out and do anything he wants he thinks he can get away with. He gets slapped hard, thrown in jail and realizes if he does it again he is not likely to see day light [sic] any time soon. His likelihood for going out doing that again is not the same as someone who is doing it from a point of mental illness through which he is compelled, almost, to do that to satisfy his needs.

Tr. (2), 171.

After the interview, Dr. Robison received other information, primarily in the form of interviews with Alison Mears and Susan Stokes, both of whom had been victimized by Respondent. Tr. (2), 172. From their descriptions, Dr. Robison was able to diagnose Respondent as suffering from sexual sadism. Tr. (2), 173, 175. He also reviewed some mental health notes and other statements Respondent had made in which he described raping Ms. Mears and having "fantasies of getting ten black men to rape her." Tr. (2), 178. He also reported penetrating her with an axe handle. Tr. (2), 178.

Dr. Robison used some "actuarial instruments" to help inform his diagnosis, the RRASOR and the MnSOST, and, based on those results and his clinical judgment Respondent had a mental abnormality or personality disorder and the paraphilia of sexual

sadism and that "the likelihood for reoffense is great." Tr. (2), 199-200. Dr. Karen Parker, clinical director for Florida's Sexually Violent Predator Program, was called as the next State witness. Tr. (3), 233. She testified as follows:

She reviewed the evaluation reports, Department of Correction reports, files and other information regarding Respondent, which included reports by Dr. Benoit and Dr. Hodges, and determined that there was "a discrepancy" between Dr. Benoit's report and that of Dr. Hodges. Tr. (3), 245-246. Thus, she reviewed the files on Respondent in order to determine if a recommendation for commitment should be made. Tr. (3), 239-240; 246.

She noted that Respondent had been a "supervision failure," in that he had relapsed after receiving outpatient treatment. Tr. (3), 247. She also noted "sadistic features and sadism." Tr. (3) 247. She continued:

> [O]ne of the things we know about sadism, unlike others, say, exhibitionism, sadism tends to escalate. It doesn't tend to stay the same. And when I looked at this particular case I even saw an example of that because the first incident was with an intimate person, somebody he had lived with and he tried to stop and he actually signed a contract but was unable to, and, of course, she left the relationship. What concerned me for the second target or second victim was that, again, it was a disabled woman and it was somebody who was an acquaintance, this was not somebody that you were married to, lived with, had children with. This was somebody you met on a very casual basis and that, in our business, it can actually say that the victim pool is becoming wider and that's always a concern to us.

Tr. (3), 248. Respondent is likely to commit an act of sexual violence, in her opinion, and the next victim would be "[s]omebody he met casually, a woman." Tr. (3), 249.

The fact that both Respondent's victims were handicapped also was relevant, in her opinion, "because domination is a key element in that." Tr. (3), 249.

In her opinion, Respondent suffers from paraphilia, not otherwise specified, which is "a category of diagnoses for somebody who has deviant sexual behaviors, attitudes or fantasies, but they include different elements of the other diagnoses." Tr. (3), 251. In her opinion he is likely to commit an act of sexual violence if he is not given in-patient care, control and treatment,

> especially since he did have outpatient intervention and in all the materials that I've read there was a real desire to get help. This is not somebody who says I'm not doing anything wrong, this is somebody who said I'm doing something wrong and I can't control it.

Tr. (3), 252.

Pam Barr testified that she had met Appellee in 1993 when he and his fiancé, Ms. Mears, came to her at the Domestic Violence Counseling Office. Tr. (3), 301. She further testified:

> I remember him very well. I remember him coming into the office saying that he wanted help. I remember him coming in with Alison Mears who at that time was his fiancé and their small daughter who may have been about 8 or 9 months old. They had come in and she said that her fiancé had been raping her and that she cared a lot about him and she wanted to stay with him and that they wanted to work this out and he wanted to come in with her so he did.

Tr. (3) 302-303. She said she asked Respondent if he had been raping Ms. Mears and he said he "absolutely had been raping her and he seemed to enjoy it very much." Tr. (3) 303. Respondent also told her "he had fantasies of having Allison raped by ten black men," and that "he liked putting things inside her and talked about the time he was at the motel and tied Allison up to the bed and raped her with an ax handle." Tr. (3), 304. Her notes were introduced into evidence, and she read them aloud, including the following sentences. "He's now raping his fiancé. He knows it's wrong. . . . He's having difficulty controlling his anger and aggressions." Tr. (3), 315.

Jack Howell, Jr. testified that he is a master level counsel for the Life Management Center of Northwestern Florida, and in 1995, as a forensic specialist, he spoke several times with Respondent, who was in the Bay County Jail at the time. Tr. (3), 317-319. Respondent told him that he had tried to get admitted to Rivendell, a psychiatric hospital, "because he felt like he was out of control and needed help." Tr. (3), 321.

Paul Vecker, an investigator with the Bay County Sheriff's Office, said that he took a taped statement from Respondent in 1993, which statement was played for the jury. Tr. (3), 327-332. In the statement Respondent admitted having told Ms. Mears that he would kill her and their baby "if [she] didn't do what I said" and that he had raped her. Tr. (3), 337. Asked why he raped her, he replied: "It's like I said, there is times when, like, I'm not myself and the times that I'm not myself is when

it happens." Vecker asked: "But you know what you're doing?" and Respondent answered "Not until after it happens or it's already happening," and elaborated: "[I]t's not, not like I grab ahold of her and throw her down and when I get to that point I know what I'm doing, it's like when I'm almost done I know what I'm doing and it's like I'm ashamed of what I do because I love her and that's not supposed to happen when you love somebody . . . ." Tr. (3), 338-339.

Julia Patterson, an emergency services screener at Life Management Center in Panama City, said she evaluated Respondent for in-patient treatment in 1994, at which time he acknowledged that before the end of his relationship with his ex-girlfriend (Ms. Mears) "he was raping her regularly" and that "he was able to recognize his behavior being outside social norms but feels he has changed." Tr. (4), 349-355.

Daniel Kitzerow, a licensed marriage and family therapist and certified sex therapist, testified that he had treated Respondent on eleven occasions between September 13, 1993, and May 18, 1994, and that Respondent canceled or broke appointments 14 times during that period. Tr. (4), 358-365. He testified that Respondent told him that he had molested his daughter, 20 months in age at the time, believing he may have done it to hurt his "ex-wife" (Ms. Mears). Tr. (4) 372, 376. He also said Respondent told him "he is concerned because he enjoys it a little when his wife acts afraid of him." Tr. (4), 374.

The State next called Panama City Police Department Commander Joe Hall, who, as a detective, had investigated Respondent's 1995 sexual battery of Susan Stokes. Tr. (4), 382-392. Reading from a transcript of a recorded statement he had taken from Respondent, he testified that Respondent stated that the sexual encounter between himself and Ms. Stokes had been consensual, but consent to the first episode of intercourse had been tacit, rather than explicit. Tr. (4), 393-398. Realizing, after the second episode, that he had not received express consent, he "started panicking" and "tied her to the bed so I could have a few minutes to calm down." Tr. (4), 398. He said she wasn't screaming because "I had her gagged." Tr. (4), 399. He kept her tied for about 30 minutes, after which he untied her and "[w]e sat there and talked for a good long while, I told her, you know, I told her that I was going to go down to Rivendell because I thought that I had raped her and I needed help getting straight." Tr. (4), 399.

Hall identified Plaintiff's exhibit 13 as consisting of judgments and sentences against Respondent for two counts of aggravated assault by threat in 1999 and for sexual battery and false imprisonment in 1995. Tr. (4), 409-410.

Next, the State called the Rev. Steven Patrick Gregg, a Methodist minister who worked as a mental health counselor for Life Management Center in 1995. Tr. (4) 414-415. He testified that he interviewed Respondent at the center after the sexual battery on Susan Stokes had been committed, and that Respondent

told him he was “euphoric” on some sort of medication and did not know he was sexually assaulting Ms. Stokes until he already had begun having intercourse with her, that the second episode of intercourse was consensual, and that afterwards he “hog-tied and gagged her” (his words). Tr. (4), 419-425.

Susan Stokes testified next. She said she was partly paralyzed on her right side due to a brain aneurism that she suffered 17 years prior, when she was 22 years old; the aneurism affected her speech and gait, and her right arm is in a nearly fixed position. Tr. (4) 426-428, 431.

She said she knew Respondent casually; he worked at a restaurant she sometimes patronized, and that she had known him for about four months prior to the attack in 1995. Tr. (4) 429-430. They had never been intimate. Tr. (4), 430-431. On the night in question, May 26, 1995, Respondent came to her house and asked if she wanted to go to a movie or to shoot pool. Tr. (4) 432. She wanted to go to a movie, but beforehand they went to his house because he said he had to change clothes. Tr. (4), 432-433. After he changed, and they were about to leave, Respondent grabbed her from behind, placed a rag over her mouth, took her into his bedroom, took her clothes off, tied her up, and raped her, vaginally and anally “over and over and over.” Tr. (4), 433-437, 441. She said Respondent held her neck and turned it and threatened to keep turning it until it popped and killed her. Tr. (4), 438.

Respondent allowed her to put her clothes back on, but tied her up again and left the house for a period of time; when he came back they talked and he eventually untied her after about four to five hours. Tr. (4), 441-442, 444. She then drove him to the Rivendell mental health facility, where he went inside while she remained in the car; while she waited, someone from that facility came out to the car and she said she had been raped. Tr. (4), 442-443. She was taken to the hospital and Respondent was sent to Life Management. Tr. (4), 443. Ms. Stokes testified that Respondent was sexually aroused by her fear, and that he showed her a picture of his daughter, saying that when she was older, he would molest her. Tr. (4), 444-445.

The State rested; Respondent moved for a directed verdict, which was denied. Tr. (4), 456-460.

The court then took up respondent's proposed jury instruction, which Respondent's counsel argued should add an "extra element" to the standard instruction that "he's unable to control his dangerous behavior . . . ." Tr. (4), 463. The trial court denied the motion. Tr. (4), 465.

Dr. John Hodges was the first witness in Respondent's case in chief. He testified that he also reviewed Respondent's court, prison and treatment records, completed two actuarial instruments based on Respondent's history, and conducted an interview with him while he was imprisoned. Tr. (5), 490-492. He reached a diagnosis of intermittent explosive disorder, post traumatic stress disorder and sexual abuse of an adult (i.e.,

the sexual battery convictions in the Susan Stokes case). Tr. (5), 510-511. His opinion was that Respondent did not meet the criteria for civil commitment. Tr. (5), 513. On cross-examination, Dr. Hodges said his diagnoses would not qualify as mental abnormalities under the definition in Florida Statutes. Tr. (5).

Respondent took the stand next. He denied ever having told Mr. Kitzerow that he had molested his daughter, admitted threatening Ms. Mears and his daughter, and he denied ever raping Ms. Mears, though he said that at one time he thought that their consensual sexual activity was rape; he denied ever inserting any foreign object into her. Tr. (5) 564, 568-570, 572-575. He acknowledged raping Susan Stokes, an act for which he said he had "no justification." Tr. (5), 575.

On cross-examination Respondent testified that he had refused treatment after being detained pursuant to this case because the state attorney would have access to any treatment records and because the treatment did not guarantee that he would be re-integrated into society. Tr. (5), 580-581, 583. He denied ever showing a photograph of his daughter to Susan Stokes on the night he raped her, or saying that he would molest her. Tr. (5), 588-589. He said he did not know why he raped Susan Stokes and acknowledged raping her anally. Tr. (5), 590. He said that after the first episode of rape he propositioned Ms. Stokes, who consented, but he now considers that "a second rape." Tr. (5), 591.

After the respondent's case closed, the State called Dr. Benoit as a rebuttal witness. He testified that:

> James White is a severely disturbed young man. He has a severe personality disorder that is an enduring pattern of chronic pattern [sic] and that that personality disorder will manifest itself in another sexual reoffense. I think he is an extreme danger to the community and very likely to reoffend, not more likely than not, I mean, extremely likely.

Tr. (5), 609-610.

Respondent renewed his motions for directed verdict, which again were denied. Tr. (5), 617. After closing arguments, the jury was instructed, in part, as follows.

> To prove the Respondent, James Christopher White, is a sexually violent predator the state must prove each of the following three elements by clear and convincing evidence.
>
> Number one, James Christopher White has been convicted of a sexually violent offense. And number two, James Christopher White suffers from a mental abnormality or personality disorder. And number three, the mental abnormality or personality disorder makes the person likely to engage in acts of sexual violence if not confined in a secured facility for long term control, care and treatment.

Tr. (5), 675.

The jury retired to deliberate at 6:50 p.m. and returned at 7:28 p.m. with a unanimous verdict that Respondent is a sexually violent predator for civil commitment. Tr. (5), 683-684.

SUMMARY OF ARGUMENT

The lower court misread the United States Supreme Court's opinion in Kansas v. Crane, 534 U.S. 407 (2002). Crane and its predecessor case Kansas v. Hendricks, 521 U.S. 346 (1997), establish that the concept of "serious difficulty controlling sexually violent behavior" is already encompassed within the statutory elements of the sexually violent predators act. Thus, the standard jury instructions read in this case, which track the statutory elements, are sufficient without adding any additional language, as the lower court would do.

The statutory elements have a built-in causal connection between the sort of mental condition necessary for commitment and the future acts of sexual violence, as the mental condition must make the person likely to commit recidivist acts of sexual violence. The statutory terms in the act, taken together, require proof of serious difficulty controlling sexually violent behavior, even if that precise phrase is not used.

The failure to give the instruction requested by Respondent in the trial court was not error because that instruction did not comport with the law, as established by Crane. The failure to give an instruction that uses the words "serious difficulty" is not constitutionally required, and therefore is not fundamental error. In any event, if it were error, it would be harmless here in light of the overwhelming evidence of Respondent's inability to control his behavior.

ARGUMENT

ISSUE I

THE LOWER COURT ERRED IN HOLDING THAT THE JURY, IN A SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT TRIAL, MUST BE INSTRUCTED THAT THE RESPONDENT "HAS 'SERIOUS DIFFICULTY' CONTROLLING HIS OR HER BEHAVIOR."

In the aftermath of Kansas v. Crane, 534 U.S. 407 (2002), the lower court reversed a judgment of civil commitment, based upon the court's conclusion that it was reversible error not to instruct the jury that the respondent had "serious difficulty controlling sexually violent behavior." The lower court construed Crane as creating an additional fourth element of proof to commit an individual as a sexually violent predator and that that element of proof required the above instruction.

The lower court's reading of Crane, however, is erroneous. Crane did not address the need for any specific language in jury instructions in sexually violent predator civil commitment proceedings. Moreover, when Crane is considered in the context of the prior Supreme Court decision in Kansas v. Hendricks, 521 U.S. 346 (1997), it must be concluded that the concept of "serious difficulty controlling sexually violent behavior" is already encompassed within the statutory elements of the sexually violent predators act, as written. Thus, the standard jury instructions, which track the statutory elements, are sufficient without adding any additional language regarding serious difficulty controlling sexually violent behavior. The

concept of serious difficulty controlling sexually violent behavior is therefore subsumed within the existing statutory language of Florida's commitment act and within the standard instructions given in the instant case. The issue before this Court is a pure legal question, and the lower court's holding is therefore subject to *de novo* review in this Court. See, Carribean Conservation Corp., Inc. v. Florida Fish and Wildlife Comm'n, 838 So. 2d 492, 500 (Fla. 2003).

The statutory elements of the sexually violent predators civil commitment act are that the person (1) "has been convicted of a sexually violent offense"; (2) "suffers from a mental abnormality or personality disorder"; and (3) which 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." §394.912(10), Fla. Stat. Those statutory elements have a built-in causal connection between the mental condition and the future acts of sexual violence, as the mental condition must make the person likely to commit such recidivist acts.

That causal connection between the mental condition and the future acts of sexual violence is further highlighted by the statutory definitions of the phrases "mental abnormality" and "likely to engage in acts of sexual violence." "Mental abnormality" is defined in the act as meaning "a mental condition affecting a person's emotional or volitional capacity which **predisposes** the person to commit sexually violent

offense." §394.912(5), Fla. Stat. Thus, the mental abnormality, by predisposing the person to commit sexually violent offenses, encompasses a cause-and-effect relationship between the mental condition and the acts of sexual violence.

Similarly, the phrase "likely to engage in acts of sexual violence," is defined to mean that "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. "Propensity" connotes a natural or innate inclination or tendency. See, *American Heritage Dictionary of the English Language, New College Edition*, (Houghton Mifflin) (1980 ed.) at 1048. An "innate" condition further connotes something which is firmly rooted in one's constitution. See, id. at 677 (synonyms).

The relevant statutory terms therefore coalesce to require proof of serious difficulty controlling sexually violent behavior, even though the phrase "serious difficulty" is not, in and of itself, used. Since the statutory language clearly encompasses proof of serious difficulty controlling sexually violent behavior, and since the standard instructions, which were utilized in the instant case, track the statutory language, those instructions did, in fact, require proof of serious difficulty controlling sexually violent behavior, without using that precise terminology.

The concept of "mental abnormality" as the basis for sexually violent predator civil commitments was carefully explored in Kansas v. Hendricks, where the Supreme Court rejected a

substantive due process challenge to the use of a "mental abnormality" as the basis for commitment. The Court rejected the claim that only a "mental illness," as opposed to a "mental abnormality," could provide the basis for civil commitment. 521 U.S. at 358-60. The definition of terms of a medical nature that have legal significance is a matter for which the Supreme Court grants great deference to state legislatures. Id.

The statutory elements and definitions of the Kansas Act, that were at issue in Hendricks, are virtually identical to those in the Florida Act. See, Westerheide v. State, 831 So. 2d 93, 99 at n. 6 (Fla. 2002) ("Florida's Ryce Act is similar to the Kansas Sexually Violent Predator Act in many respects.")[1] The most significant point about Hendricks is that the concept of mental abnormality, as drafted in the Kansas statute, was deemed to satisfy the requirements of substantive due process.

The Supreme Court revisited the Kansas Act and the concept of mental abnormality five years later, in Kansas v. Crane. In the

[1] The Kansas Act defined "sexually violent predator" in the same manner as Florida: "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Kan. Stat. § 59-29a02(a). "Mental abnormality," in turn, was defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Kan. Stat. § 59-29a02(b). Thus, both Florida's and Kansas's statutes incorporate the concept of the mental condition, making it likely that there will be recidivist conduct, and the concepts of volitional impairment and predisposition.

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 analysis of the Kansas Supreme Court, 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.[2] Other state appellate courts, prior to the

[2] See, e.g., People v. Munoz, 2001 WL 1397287 (Cal. App. Nov. 8, 2001); People v. Grant, 2002 WL 54684 (Cal. App. 2002); People v. Kohler, 2002 WL 12280 (Cal. App. 2002); In re Detention of Varner, 759 N.E. 2d 560, 564 (Ill. 2001); In re Detention of Tittlebach, 754 N.E. 2d 484 (Ill. App. 2001); In re Detention of Trevino, 740 N.E. 2d 810 (Ill. App. 2000). In what was probably the only state appellate court decision to concur with the Kansas Supreme Court's ruling in Crane, prior to the United States Supreme Court's disposition of the case, an

disposition of Crane in the United States Supreme Court, had further concluded that there was no requirement of a specific finding of volitional impairment rendering the person dangerous beyond his control.[3]

The United States Supreme Court then rejected the Kansas Supreme Court's conclusion, agreeing "that *Hendricks* set forth no requirement of *total* or *complete* lack of control." 534 U.S. at 412-13 (emphasis in original). 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

---

intermediate Arizona appellate court, in In re the Matter of Leon G., 18 P. 3d 169 (Ariz. App. 2001), promptly had its decision overturned. In re the Matter of Leon G., 26 P. 3d 481 (Ariz. 2001), where the state supreme 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.

[3] See, e.g., 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).

> the dangerous but typical recidivist convicted in an ordinary criminal case.

534 U.S. at 413. 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 413. The Court also avoided any opinion on what would be required in the context of emotional impairments, as opposed to volitional impairments. Id. at 415.

The Supreme Court did not address the question of whether a jury instruction specifying "serious difficulty" controlling behavior was required. The most significant point to be derived from the Court's opinion is that the Court did not invalidate the Kansas statute. Thus, Hendricks' conclusion, that the mental abnormality component of the commitment act comported with the requirements of substantive due process, remained valid.[4] If so, the only explanation must be that the statutory definitions of the mental component of the commitment act were sufficient to encompass the requirement of proof of serious difficulty controlling sexually violent behavior. And, if the statutory provisions are sufficient to satisfy substantive due process in that regard, it necessarily means that the statutory language,

---

[4] As Crane note, Hendricks held that the statutory criterion for confinement **embodied in the statute's terms** 'mental abnormality or personality disorder' satisfied'"substantive" due process requirements.'" 534 U.S. at 410.

when serving as the basis for a jury instruction, inherently encompasses the requirement of proof of serious difficulty controlling behavior.

Subsequent to the Supreme Court's opinion in Crane, appellate courts from across the country, in jurisdictions with similar commitment statutes, have been addressing the question of whether Crane creates the need for a special jury instruction as to "serious difficulty controlling sexually violent behavior." While these decisions have been divided, the above analysis compels the conclusion that a special jury instruction is not required, as instructions which track the existing statutory language incorporate the concept of serious difficulty controlling sexually violent behavior.

This Court itself, in Westerheide v. State, 831 So. 2d 93, 107-09 (Fla. 2002), addressed the Crane jury instruction issue. The opinion of the Court[5] stated: "Contrary to Westerheide's

[5] Some subsequent opinions from Florida's District Courts of Appeal have questioned whether the opinion in Westerheide, authored by Justice Harding, constitutes an opinion of the Court on the issue of jury instructions under Crane. See, Lee v. State, 854 So. 2d 709, 715-16 (Fla. 2d DCA 2003); McQueen v. State, 848 So. 2d 1220, 1221 (Fla. 1st DCA 2003) (Browning, J., concurring in part and dissenting in part). This question has been raised because the Westerheide opinion, authored by Justice Harding, was joined by two other Justices, with Justice Quince concurring in result only. The question has thus been raised as to whether Justice Quince concurred with the conclusion, in Justice Harding's opinion, that the instructions were sufficient without reference to serious difficulty controlling behavior. Hale v. State, 834 So. 2d 254 (Fla. 2d DCA 2002), review pending, SC03-166; Gray v. State, 854 So. 2d 287 (Fla. 4th DCA 2003), and Lee have treated the Westerheide opinion as a

arguments, we do not find that *Crane* requires 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." 831 So. 2d at 107. For the reasons detailed in footnote 5, although some have questioned whether this portion of the Westerheide opinion is the opinion of the Court, as opposed to an opinion of three Justices, the only plausible construction of Justice Quince's concurring opinion is that it is in agreement with the foregoing and thus renders this a majority opinion for the Court. Subsequent District Court of Appeal decisions have consistently been treating Westerheide as dispositive on this issue. Hale v. State, 834 So. 2d 254 (Fla. 2d DCA 2002), review pending, SC03-166; Gray v. State, 854 So. 2d 287 (Fla. 4th DCA 2003); Lee v. State, 854 So. 2d 709 (Fla. 2d DCA 2003).

The most thorough analysis of this issue, and one which concurs with Westerheide, comes from the California Supreme Court's recent opinion in People v. Williams, 3 Cal. Rptr. 3d 684 (Cal. 2003). The fundamental premise of the analysis in Williams is that the United States Supreme Court's opinions in Hendricks and Crane found that the statutory language, in and of itself, was sufficient to comport with due process requirements regarding the mental condition, and that the statutory language,

---

majority on the jury instruction issue.

as written, necessarily embodied the requirement that there be proof of serious difficulty controlling sexually violent behavior.

Williams starts by analyzing the significance of Hendricks:

> Neither *Hendricks* . . . nor *Hubbart, supra, 19 Cal. 4th 1138*, suggested that *new* elements or requirements, absent from the literal statutory language, were being read into these schemes as a condition of their constitutionality. . . . On the contrary, the core holding of each of these cases was that (1) when drafting involuntary civil commitment laws, states have considerable leeway in describing and defining the necessary link between a control-impairing disorder and a prediction of future dangerousness, and (2) the particular language chosen for inclusion in the statutes under consideration - Kansas's in the case of *Hendricks*, and California's in the case of *Hubbart* - satisfied this basic due process requirement.
>
> **In other words, these decisions emphasized, the *words* used by the Kansas and California laws themselves *inherently and adequately convey* the crucial class-restricting elements of future dangerousness linked to a disorder-related inability to control behavior. It necessarily follows that, if supported by substantial evidence, any finding of eligibility for commitment under these statutes, when made pursuant to *the statutory language itself,* also meets constitutional standards.**
>
> The recent, narrow decision in *Kansas v. Crane* ... dictates no different result.

3 Cal. Rptr. 3d at 693 (bold emphasis added; italics emphasis in original). Continuing with this explanation, the Court observed:

> Nowhere did *Kansas v. Crane* . . . suggest that the Kansas law so recently upheld *as written* in *Hendricks* could be constitutionally applied only with supplemental instructions, in

> language *not* chosen by Kansas's legislators, pinpointing the impairment-of-control issue.

3 Cal. Rptr. 3d at 697 (emphasis in original). Thus, applying those principles to California's act, the Court held:

> California's statute inherently *embraces and conveys* the need for a dangerous mental condition characterized by impairment of behavior control.

Id. (emphasis in original). Thus, "[w]e are persuaded that a jury instructed in the language of California's statute must necessarily understand the need for serious difficulty in controlling behavior." 3 Cal. Rptr. 3d at 698. Furthermore, "a judicially imposed requirement of special instructions *augmenting* the clear language of the SVPA would contravene the premise of both *Hendricks* . . . and *Kansas v. Crane* . . . that, in this nuanced area, the *Legislature* is the primary arbiter of how the necessary mental-disorder component of its civil commitment scheme shall be defined and described." Id. at 698 (emphasis in original).

The Washington Supreme Court has similarly given considerable thought to this issue in In re the Detention of Thorell, 72 P. 3d 708 (Wash. 2003). The ultimate conclusion was "that proof that a person facing commitment under *chapter 71.09 RCW* lacks behavioral control is not a new element of the SVP commitment and a jury need not make a separate finding regarding 'lack of control.'" 72 P. 3d at 718. The instructions given in Thorell were essentially the same as those in the instant case. 72 P. 3d at 719. Those instructions were deemed sufficient in light of

Crane: "Because the standard 'to commit' instruction requires the fact finder to find a link between a mental abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility, the instruction requires a fact finder to determine the person seriously lacks control of sexually violent behavior." Id.

Courts from several other jurisdictions have reached the same conclusion. The Wisconsin Supreme Court, in In re the Commitment of Laxton, 647 N.W. 2d 784, 792-94 (Wis. 2002), agreed with the state's argument that a finding of serious difficulty controlling sexually violent behavior was subsumed within the statutory language of the act itself, even though the act did not use the phrase "serious difficulty controlling behavior." The same reasoning warranted a rejection of Laxton's argument that jury instructions absent that wording were insufficient:

> By concluding that Laxton has a mental disorder and that his mental disorder creates a substantial probability that he will engage in acts of sexual violence, the jury had to conclude that Laxton's mental disorder involved serious difficulty for him in controlling his behavior. This nexus between the mental disorder and the level of dangerousness distinguishes Laxton as a dangers sexual offender who has serious difficulty controlling his behavior, from the dangerous but typical recidivist. We conclude, therefore, that the jury was properly instructed and that the jury instructions did not violate substantive due process.

647 N.W. 2d at 795. See also, In re the Detention of Isbell, 777 N.E. 2d 994, 998 (Ill. App. 2002) ("The jury was instructed that it had to find beyond a reasonable doubt that respondent

suffered from a mental disorder, which by definition was a finding that respondent had a congenital or acquired condition 'affecting his emotional or volitional capacity that predisposes him to engage in acts of sexual violence.' Therefore, there was no need for the jury to make an additional finding that respondent lacked emotional or volitional control over his sexual behavior."); In the Matter of the Treatment and Care of Luckabaugh, 568 S.E. 2d 338, 348-49 (S.C. 2002) ("*Crane* does not mandate a court must separately and specially make a lack of control determination, only that a court must determine the individual lacks control while looking at the totality of the evidence. . . . To read *Crane* as requiring a special finding would be to suggest the United States Supreme Court mandated at least sixteen states to hold new commitment hearing for over 1,200 individuals committed under their state's sexually violent predator acts. . . . We believe the Court's ruling would have been more explicit if it intended such consequences.")

While some other jurisdictions have reached a contrary conclusion on the question of the need for an instruction regarding serious difficulty, none have given the issue the careful analysis that the issue has received from the California Supreme Court in Williams. Thus, the Iowa Supreme Court, in In re Detention of Barnes, 658 N.W. 2d 98 (Iowa 2003), simply concluded that since the state statute had to be construed to require a showing of serious difficulty controlling behavior, there had to be an instruction containing such language. The

Court did not engage in any effort to determine whether the existing language in the statute incorporates that concept. The Court did not consider the significance of the fact that the United States Supreme Court has rejected the constitutional challenge to the Kansas statute. The court did not consider how the Kansas statutory language, in and of itself, could be constitutional without embodying the concept of serious difficulty controlling behavior. The opinion is notable solely for its paucity of reasoning. The same holds true of the Missouri Supreme Court's opinion in In the Matter of the Care and Treatment of Thomas, 74 S.W. 3d 789 (Mo. 2002).

While Arizona's supreme court has directed that a "serious difficulty" instruction be given, that conclusion was based on practical considerations; the court did not construe Crane as requiring such an instruction. In the Matter of Leon G., 59 P. 3d 779, 788 (Ariz. 2002). Prior to requiring that such an instruction be given in future cases,[6] the court stated: "We agree with these courts that due process requirements, as set forth in *Hendricks* and *Crane*, do not mandate a specific jury instruction." 59 P. 3d at 788.

In view of the foregoing, it should be concluded that the concept of serious difficulty controlling sexually violent behavior is subsumed within the statutory elements of the sexually violent predators civil commitment act. Instructions

[6] No such instruction had been given in Leon G., but the commitment verdict of the trial court was nevertheless affirmed.

that track those statutory elements are therefore constitutionally sufficient under Crane, and there need not be an additional instruction requiring a specific finding serious difficulty controlling behavior. The instructions in the instant case did track the statutory elements and were therefore sufficient. The lower court therefore erred in finding that Crane created an additional element in the cause of action and in finding that that additional element required an express jury instruction with language different from that in the statute.[7]

---

[7] The State further notes that the instruction the respondent requested in the trial court was a clearly erroneous instruction. The defense had requested an instruction that the respondent was "unable to control his dangerous behavior." Tr. (4), 463. That instruction connoted a total inability to control sexually violent behavior and that is precisely what the United States Supreme Court, in Crane, said was improper. "We agree with Kansas insofar as it argues that *Hendricks* set forth no requirement of *total* or *complete* lack of control. . . . Insistence upon absolute lack of control would risk barring the civil commitment to highly dangerous persons suffering severe mental abnormalities." 534 U.S. at 411-12). Thus, it should be noted that several courts have concluded that a requested instruction such as the instant one failed to preserve the issue for appeal, and, that such a requested instruction was simply erroneous. See, e.g., Laxton; People v. Grant, 2002 WL 54684 (Cal. App. 2002); In the Matter of the Care and Treatment of Coffman, 92 S.W. 3d 245, 251-252 (Mo. App. 2002).

Although this Court, in Westerheide, 831 So. 2d at 107, n. 19, addressed the issue as one of potential fundamental error, not only did the Court fail to find any error, but, as should be clear from the above analysis, this is not a question of a failure to instruct on an element of a cause of action; it is a question of whether the wording of the instruction on the mental condition was correct. As this is not a question of a total failure to instruct on an element of a cause of action, the issue should be one which a party must preserve for appellate review. Furthermore, a request for a clearly erroneous

Lastly, even if this Court concludes that the wording of the instruction as given was erroneous, any such error should be deemed harmless in the instant case.[8] The evidence against White was overwhelming. Indeed, even Respondent himself admitted that he sometimes cannot control his behavior and had sought psychological aid in gaining control over his impulses.

The State established that the Department of Corrections had diagnosed Respondent has having impulse control disorder, which Dr. Robison said "describes an individual who behaves impulsively without forethought and then is real sorry about it and keeps doing it again and again, just has deficient impulse control." Tr. (2), 146-147.

In his interview, Respondent told Drs. Robison and Benoit, in Dr. Robison's words: "that when he realized what he was doing at what ever point that he knew it was wrong and tried to stop and couldn't do it." Tr. (2) 164. Dr. Robison recalled "there was that indication of poor behavioral control or that he was out of control and needed help." Tr. (2), 164. Dr. Robison noted that

---

instruction does not preserve an issue for appellate review. See, e.g., Kranosky v. Robbins, 120 So. 2d 184 (Fla. 1960); J.A. Cantor Associates, Inc. v. Brenner, 363 So. 2d 204, 205 (Fla. 3d DCA 1978).

[8] The California Supreme Court, in Williams, alternatively concluded that the issue was one which was subject to harmless error analysis and found that under the facts of that case, any error was, in fact, harmless. 3 Cal. Rptr. 3d at 701. Additional support can be found in chapter 924, which governs criminal appeals and requires that any error be prejudicial. §§924.051(1)(a), 924.051(3).

from his observations of Respondent that “he acts impulsively.” Tr. (2), 166. Dr. Robison distinguished Respondent from other sex offenders, for whom incarceration may be an impetus to change their behavior, saying Respondent is someone “who is doing it from a point of mental illness through which he is compelled, almost, to do that to satisfy his needs.” Tr. (2), 171.

From an examination of the material in Respondent’s file, Dr. Parker testified that Respondent is “not somebody who says I’m not doing anything wrong,” but, rather, “is somebody who said I’m doing something wrong and can’t control it.” Tr. (3) 252.

Mental health counselors who treated Respondent in 1993 and 1995 testified that he knew he was having difficulty controlling his behavior:

Pam Barr, a therapist who counseled Respondent and Ms. Mears before their relationship broke up, testified that Respondent acknowledged raping Ms. Mears, realized it was wrong, and said he was “having difficulty controlling his anger and aggressions. Tr. (3), 315.

According to the testimony of counselor Jack Howell, Jr., Respondent said he tried to get admitted to the Rivendell psychiatric hospital “because he felt like he was out of control and needed help.” Tr. (3), 321.

Julia Patterson, who evaluated Respondent for in-patient treatment at a mental health facility, noted that Respondent knew his raping Ms. Mears was “outside social norms,” and felt

he had “changed.” Tr. (4), 349-355. By saying he thought he had “changed” Respondent suggests that in his mind the violent sexual urges had ceased, not that he had better control over them.

Sheriff’s Office investigator Paul Vecker played a taped statement for the jury wherein Respondent said the incidents of violence against Ms. Mears “happen[ed]” at “times when I’m not myself.” The use of the word “happens” suggests that the violence was not something Respondent could control. Indeed, he acknowledged that on those occasions when he would “grab ahold of her and throw her down” are “not supposed to happen when you love somebody. Tr. (3), 338-339. Police investigator Joe Hall read from a statement that Respondent had given him wherein Respondent said he sought treatment at the Rivendell facility after raping Susan Stokes because “I needed help getting straight.” Tr. (4), 339.

Moreover, the great dichotomy between Respondent’s behavior in the Susan Stokes sexual battery case strongly suggests someone who cannot control his anti-social behavior and violent sexual urges. He initiated a social situation with Ms. Stokes, with whom he had been at most only casual friends and probably only an acquaintance, and, as they were about to leave to go shoot pool, he grabbed her from behind, bound her arms and legs – inflicting great pain, as her body is partially paralyzed owing to a brain aneurism – and raped her repeatedly, both vaginally and anally. He kept her tied for several hours, re-

binding her even after allowing her to get dressed. Then, feeling remorseful, he released her and allowed her to take him to seek psychological help, which he logically would have known could result in his arrest, making no effort to injure her further or to evade capture. His actions during the second part of the episode are so greatly at odds with his behavior during the attack, that a reasonable juror could conclude that Respondent was driven to attack Ms. Stokes by impulses he could not control.

In civil cases, the proper analysis in determining whether an erroneous instruction requires reversal is "whether the jury might reasonably have been misled." Fla. Power & Light Co. v. McCollum, 140 So.2d 569 (Fla. 1962). "The test regarding jury instructions is whether, under the particular facts of the case, the instructions misled the jury or prejudiced a party's right to a fair trial." ITT-Nesbitt, Inc. v. Valle's Steak House, 395 So.2d 217, 220 (Fla. 4th DCA 1981). In light of the overwhelming evidence adduced at trial that Respondent had frequently in the past experienced a serious difficulty in controlling his behavior, and in light of the expert testimony that the conditions that produced that serious difficulty remained unabated, the jury was not misled by the standard jury instruction for sexually violent predator cases.

The fact that a liberty interest is at stake does not mean that error cannot be harmless. Even in death penalty cases this Court has repeatedly found that, when the evidence of a certain

factor is overwhelming, a faulty jury instruction may be considered harmless error. For example, in Jennings v. State, 782 So. 2d 853, 862-863 (Fla. 2001) this Court found that unconstitutionally vague jury instructions on two aggravating factors were harmless error. The aggravator that the killing was committed in a cold, calculated and premeditated manner was demonstrated by the fact that the defendant had located his victim in her home, had left, and then had returned to kidnap, rape and murder her. 782 So. 2d at 862. The aggravator that the killing was especially heinous, atrocious or cruel was proven by the overwhelming evidence, including the defendant's admissions to a cellmate, that the defendant had taken a 6-year-old girl from the bedroom where she slept, raped her, bashed her head on pavement, and then drowned her. Id. at 863. Both aggravators would have been found by the jury even if the instruction had been proper, the Court held. Id.

Similarly, in Breedlove v. State, 655 So. 2d 74, 76 (Fla. 1995) this Court found that while the HAC instruction was unconstitutional, the error was harmless.

> The evidence presented at the trial clearly established that Breedlove committed the murder in a heinous, atrocious, or cruel manner. The fatal stabbing was administered with such force that it broke the victim's collar bone and drove the knife all the way through to the shoulder blade. The puncture of the victim's lung was associated with great pain and the victim literally drowned in his own blood. The victim had defensive stab wounds on his hands and did not die immediately. Moreover, the attack occurred while the victim lay asleep in his bed as contrasted to a murder committed in

> a public place. . . . Under the facts presented, this aggravator clearly existed and would have been found even if the requested instruction had been given.

655 So. 2d at 76-77. See, also, Krawczuk v. State, 634 So. 2d 1070, 1073 (Fla. 1994) ("Moreover, this murder was heinous, atrocious, or cruel under any definition of those terms and, thus, any error in the instruction was harmless beyond a reasonable doubt.")

Applying the reasoning of those authorities to this case, it is apparent that the jury would have found that Respondent has a serious difficulty in controlling his behavior even if it had been instructed that it must so find in order to commit him.

CONCLUSION

Based on the foregoing, the State respectfully submits the the decision of the District Court of Appeal reported at 826 So. 2d 1043 should be disapproved, and the order committing Respondent as a sexually violent predator entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert Friedman, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by mail on December 31, 2003.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
THOMAS H. DUFFY
Assistant Attorney General
Florida Bar No. 470325

Attorney for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4595
(850) 922-6674 (Fax)

RICHARD L. POLIN
MIAMI BUREAU CHIEF, CRIMINAL APPEALS
Office of the Attorney General
444 N. Bickell Ave.
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (Fax)
[AGO# L02-1-15857]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Thomas H. Duffy
Attorney for State of Florida

STATE OF FLORIDA,

Petitioner,

v.

JAMES CHRISTOPHER WHITE,

Respondent.

CASE NO. SC02-2172

A P P E N D I X

White v. State, 826 So. 2d 1043 (Fla. 1st DCA 2002).