IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JAMES CHRISTOPHER WHITE,

Respondent.

CASE NO. SC02-2277

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, James Christopher White, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as "slip op."]. It also can be found at 826 So. 2d 1043 (Fla. 1st DCA 2002).

SUMMARY OF ARGUMENT

The Court below held that in a sexually violent predator civil commitment case the State had to prove, and the jury had to be instructed upon, four elements, including the respondent's "serious difficulty in controlling his behavior," language that came from Kansas v. Crane, 534 U.S. 437, ___ 122 S.Ct. 867, 870 (2002). In Westerheide v. State, 2002 WL 31319386, 27 Fla. L. Weekly S866 (Fla. Oct. 17, 2002) this Court held that no jury instruction was required and that Crane did not add an element to the State's case in s sexually violent predator commitment proceeding. The two decisions are in express and direct conflict.

ARGUMENT

ISSUE I

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND WESTERHEIDE V. STATE, 27 FLA. L. WEEKLY S866 (FLA. OCT. 17, 2002)?

A. JURISDICTIONAL CRITERIA

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions is "express and direct" and "appear[s] within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition).

Accordingly, the District Court's decision reached a result opposite to Westerheide v. State, 2002 WL 31319386 (Fla. Oct. 17, 2002) thereby bestowing conflict jurisdiction upon this Honorable Court. The State elaborates.

B. THE DECISION BELOW IS IN "EXPRESS AND DIRECT" CONFLICT WITH WESTERHEIDE V. STATE.

In its opinion the First District Court of Appeal relied upon its earlier decision in Hudson v. State, 825 So. 2d 460 (Fla. 1st

DCA 2002)[1] wherein it held that Kansas v. Crane, 534 U.S. 437, 122 S.Ct. 867, 870 (2002) required proof of a "fourth element" in a sexually violent predator commitment case, specifically that the person to be committed had "serious difficulty in controlling his behavior."[2] The Court made no determination that the State had, or had not, adduced evidence sufficient to prove this purported fourth element but held that remand was required because the jury was not instructed thereupon.

In Westerheide this Court held that no jury instruction is required because there is no fourth element to be proved. The Court first framed the issue presented, and then resolved it:

> In conjunction with his challenge to the statutory terminology, Westerheide argues that the instructions given to the jury constituted fundamental error [footnote 19] because the instructions omitted the narrowing construction announced by the United States Supreme Court in *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

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[1] The State's notice of intent to invoke the Court's discretionary jurisdiction in Hudson was untimely filed. See Order in State of Florida v. Richard Hudson, SC02-2224, issued October 17, 2002.

[2] The State must prove:

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] [her] likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Fla. Std. Jur. Inst. Crim. 2.02.

[Footnote 19] We address this issue as a claim of fundamental error because claims pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial or an alternate instruction requested and the issue has been raised on appeal. . . {F]ailure to give an instruction necessary to prove an essential element of the crime charged is fundamental error that can be addressed even if not preserved below. . . .

After the United States Supreme Court's decision in ***Hendricks***, upholding the Kansas Sexually Violent Predator Act against constitutional challenge, the Kansas Supreme Court held that a commitment under the Act required a finding that the person subject to commitment is completely unable to control his behavior. The State of Kansas sought review of that decision by the United States Supreme Court and argued that the Constitution permits such commitment without any lack-of-control determination. In ***Crane***, the United States Supreme Court held that total or complete lack of volitional control was not required, but neither could an individual be committed without any determination of a lack of control. Instead, the Court ruled that there must be proof that the person has "serious difficulty in controlling behavior." ***Id.*** at 870, 122 S.Ct. 867. This proof, when viewed in light of such features of the case as the nature of the psychiatric diagnosis and the severity of the mental abnormality, "must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." ***Id.***

Contrary to Westerheide's 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.

2002 WL 31319386 at *8, *22 (citations omitted).

In this case, the First DCA held:

> 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.

Slip op. at 2-3. Moreover, It is clear from footnote 19 that the Court held that "serious difficulty in controlling behavior" is not an element: if it had been an element, the Court would have considered the failure to instruct the jury thereon to be fundamental error; it was not fundamental error so, therefore, "serious difficulty in controlling behavior" is not an element.

Thus, the Court ruled in Westerheide that Crane did not, as the court below held, identify a separate element that had to be proven before a person could be civilly committed for custody, care and treatment as a sexually violent predator. The decision below **did** hold that Crane required proof of a fourth element.

Conflict between the two opinions is clear from the face of the opinions. The outcomes are mutually exclusive, and cannot co-exist.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court exercise its jurisdiction in this cause.

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 November 12, 2002.

Respectfully submitted and served,

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[AGO# L02-1-15857]

CERTIFICATE OF COMPLIANCE

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

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Thomas H. Duffy
Attorney for State of Florida

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