IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JAMES CHRISTOPHER WHITE,

Respondent.

CASE NO. SC02-2277

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, James Christopher White), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner’s Initial Brief, "AB," will designate Respondent’s Answer Brief, each followed by any appropriate page number in parentheses. Bold-type emphasis is supplied; any other emphasis is in the original text.

STATEMENT OF THE CASE AND FACTS

The State relies on its Statement of the Case and Facts.

<u>ARGUMENT</u>

<u>ISSUE I</u>

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."

Respondent's Answer Brief demonstrates a fundamental misunderstanding of <u>Kansas v. Hendricks</u>, 521 U.S. 346 (1997) and <u>Kansas v. Crane</u>, 534 U.S. 407 (2002). Appellee suggests that the constitution requires the state to show an utter ability to control behavior. AB at 19-20. In addition to being an impossible standard to meet – even the most driven sex offenders sometimes resist their urges for one reason or another – this is the standard that <u>Crane</u> expressly rejected, in favor of "serious difficulty in controlling behavior." <u>Crane</u> held:

> We agree with Kansas insofar as it argues that *Hendricks* set forth no requirement of *total or complete* lack of control. *Hendricks* referred to the Kansas Act as requiring a "mental abnormality" or "personality disorder" that makes it "*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior." 521 U.S. at 358, (emphasis added). The word "difficult" indicates that the lack of control to which this Court referred was not absolute. Indeed, as different *amici* on opposite sides of this case agree, an absolutist approach is unworkable.

534 U.S. at 411 (citations omitted). The Court rejected Kansas' argument that ability to exercise control should never be a consideration, because a distinction needed to be made between dangerous sexual offenders and other dangerous people, and went on to comment:

> The presence of what the "psychiatric profession itself classifie[d] . . . as a serious mental disorder" helped to make that distinction in *Hendricks*. And a critical distinguishing feature of that "serious ... disorder" there consisted of a special and serious lack of ability to control behavior.

Id. at 412-413. The Court then made it clear it would not dictate strict terms to the states with sexually violent predator laws.

> In recognizing that fact [in *Hendricks*], 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 the dangerous but typical recidivist convicted in an ordinary criminal case. 521 U.S., at 357-358; *see also Foucha v. Louisiana*, 504 U.S. 71, 82-83, (1992) (rejecting an approach to civil commitment that would permit the indefinite confinement "of any convicted criminal" after completion of a prison term).
>
> We recognize that *Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued. But the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules. For one thing, the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. *Hendricks*, 521 U.S. at 359; *id.* at 374-375, (BREYER, J., dissenting). For another, the science of psychiatry, which

> informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law. *See id.*, at 359. . . . Consequently, we have sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach.

534 U.S. at 413-414. Nothing about Hendricks or Crane's gloss on Hendricks suggests the standard Appellee puts forth in his brief.

Respondent also provides virtually no support to oppose the State's primary argument: The serious difficulty standard is subsumed within the existing elements and existing instructions. He merely cites to a virtually analysis-free pair of cases, State v. Thomas, 72 S.W. 2d 689 (Mo. 2002) and In re Detention of Barnes, 658 N.W. 2d 98 (Iowa 2003). Those decisions do not suggest that either court engaged in a particularly detailed analysis as to why their standard jury instruction did not comport with Crane. They merely noted that Crane required serious difficulty and that instructions regarding mental abnormality "did not define mental abnormality in this essential way," Thomas, 74 S.W. 3d at 792, or "did not embody this concept," Barnes, 758 N.W. 2d at 101. A better and more thorough analysis of why an instruction that tracks the statute **does** satisfy Crane may be found, in addition to the authorities cited in the Initial Brief, in In re Browning, 115 S.W. 3d 851, 862-863 (Tex. App. 2003).

In his second issue, Browning claims that the court erred in refusing to submit to the jury a question asking whether he had serious difficulty controlling his behavior. He claims that by failing to ask this question of the jury, the court ran afoul of the United States Supreme Court's decision in *Kansas v. Crane*. 534 U.S. 407, 413 (1997). In *Crane*, the Supreme Court required "proof of serious difficulty in controlling behavior" before a person can be civilly committed as a sexually violent predator. Id.; *see also [In re] Mullens*, 92 S.W.3d [881] at 884 [(Tex. App. 2002)]. The Court did not articulate what it meant by "serious," but stated that the difficulty, considering the nature of the psychiatric diagnosis and the severity of the mental abnormality itself, must be sufficient to distinguish the committed person from the "dangerous but typical [criminal] recidivist." *Crane*, 534 U.S. at 413.

The charge of the court in this case included the following question: "Do you find that William P. Browning suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence?" The charge also defined behavioral abnormality in accordance with the statute: "Behavioral abnormality means a congenital or acquired condition that by affecting a person's emotional or volitional capacity predisposes the person to commit a sexually violent offense to the extent that a person becomes a menace to the health and safety of another person." We hold that this broad-form submission encompassed the required lack- of-control determination. A finding that a person suffers from an emotional or volitional defect so grave as to predispose him to threaten the health and safety of others with acts of sexual violence entails a determination that he has "serious difficulty in controlling behavior." *Cf. Mullens*, 92 S.W.3d at 884-87 (evidence relating to defined abnormality legally sufficient to prove serious difficulty in controlling behavior).

Crane undoubtedly requires a lack-of-control determination to be made by the jury. However, it does not require that determination to be

> made in a specific, independent finding. *See In re Detention of Harry Cain*, No. 5-02-0088, 341 Ill. App. 3d 480, 792 N.E.2d 800, 2003 Ill. App. LEXIS 758, at *10, 275 Ill. Dec. 325-12 (Ill. App. Ct. June 18, 2003).

See also, In re Almaguer, 117 S.W. 3d 500, 505 (Tex. App. 2003).

Very recently a Washington appellate court held that a jury instruction satisfied Crane.

> The trial court instructed the jury that to find Owens suffered from a mental abnormality, it must find that Owens suffered from a condition "affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." CP at 133 (Court's Instruction No. 10). **To make this finding, the jury effectively had to determine that Owens's mental condition impaired his ability to control his behavior as required under *Crane*.**

In re Owens, No. 26673-3-11, 2004 Wash. App. Lexis 68, *9-10 (Wash. App., Jan. 21, 2004).

Respondent's proposed standard jury instruction, AB at 21-22, n. 1, cannot pass without comment. The clause in subparagraph c. that "the mental abnormality or personality disorder must be sufficient to distinguish him from the dangerous recidivists convicted in the ordinary criminal cases . . ." is a misguided attempt to inject an appellate court standard into a jury trial. Jurors cannot be expected to know about "recidivists convicted in the ordinary criminal cases" because all they may properly consider are the facts of the case before them. Such an approach as Respondent suggests would be like placing proportionality

review before a jury during the penalty phase of a capital trial, which the this Court’s capital case law demonstrates is a pure question of law and therefore an appellate function, not a question for the jury. See, e.g., Adams v. State, 412 So. 2d 850, 855 (Fla. 1982). Thus, the question of comparing a specific case to other, past cases is not appropriate for the jury and, necessarily, not an appropriate matter for a jury instruction.

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 February 5, 2004.

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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STATE OF FLORIDA,

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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).