IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-166

WILLIAM HALE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT
ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On April 5, 1999, the State of Florida, through the Office of the State Attorney for the Thirteenth Judicial Circuit, filed a commitment petition, seeking the involuntary civil commitment of William Charles Hale, as a sexually violent predator, pursuant to §916.31, Fla. Stat. (Supp. 1998). The petition alleged that Hale had a prior conviction for a sexually violent offense; that he had a mental abnormality or personality disorder - impulse control disorder; depressive control disorder; personality disorder (antisocial) - and that the mental abnormality or personality disorder made it likely that Hale would commit further sexually violent offenses if not committed and confined to a secure facility for long-term control, care and treatment. (R. V1/1-5). Pursuant to the petition and its attachments, the lower court entered an order finding the existence of probable cause to believe that Hale was a sexually violent predator in need of commitment. (R. V1/6). Subsequently, in October, 1999, Hale sought and obtained an adversarial probable cause hearing, with evidence presented (R. V4/ 637, et seq.), pursuant to which the lower court again found the existence of probable cause. (R. V4/722-23; R. V3/321).

The trial commenced on November 15, 1999. (V5/T. 1, et seq.). At the conclusion of the trial, the jury rendered a verdict finding that Hale was a sexually violent predator, and

the lower court entered an order committing Hale to the custody of the Department of Children and Families. (V11/T. 960-62; R. V3/476-78). The defense's motion for new trial or rehearing (R. V3/479) was thereafter denied (R. V3/486; V12/T. 996-1006), and this appeal was commenced.

At trial, the State presented testimony from three victims of offenses previously committed by Hale. In 1973, Mary McCown was approached by Hale while outside her home. Hale knocked her down and put a knife to her throat. (V7/T. 361). He then forced her to go inside, where he ordered her to perform oral sex on him. Hale had intended to rape her vaginally, until she told him that she was having her period. (V7/T. 363). McCown complied, and after Hale ejaculated into her mouth, he threatened her, stating that if she did not swallow it, he would "break her head." (V7/T. 365). During the entire incident, McCown's infant son was beside her, screaming. (V7/T. 364). Hale threatened the child, stating that if McCown did not quiet her child, Hale would hurt the baby. (V7/T. 364-65). Upon leaving, Hale stated that he had been watching the victim, and that if she told anyone of the incident, he would know it and would return. (V7/T. 365-66). Hale also became upset when he observed that McCown was upset with him. (V7/T. 365).

Cindy Boswell was 16 years old in 1973. (V7/T. 370). While waiting at school for her mother, Hale grabbed her from behind,

put his hand over her mouth, and told her not to scream. (V7/T. 372). She was able to break free and attempted to fend off Hale's assault. (V7/T. 372). Hale continued to grab her until she fell, twisting her ankle. (V7/T. 373). Hale then pulled her back towards the back of the room in which she had been waiting. (V7/T. 373). Hale stopped to grab a knife from the floor and Boswell escaped, fleeing across the hall to her mother. (V7/T. 375).

Billy Rice, with the Crystal River Police Department in 1973, investigated the Boswell incident and questioned Hale about it. Hale stated, at the time, that he wanted and needed help. (V7/ T. 389). As to the McCown incident, Hale admitted having forced the victim to engage in oral sex and that he used a knife. (V7/T. 389-90).

In 1987, Dana Whitley encountered Hale when he offered help with a flat tire on her car. (V10/T. 689-90). Hale gave her a lift for assistance, and on the way back to Whitley's car, Hale passed her vehicle and grabbed her when she attempted to get away, saying that he wanted to see her breasts. (V10/T. 691). During the struggle, Hale threw her to the ground and choked her, saying that he intended to take her into the nearby woods where nobody would find her. (V10/T. 691-92). Whitley finally escaped, ran to a house and called the police. (V10/T. 692).

Karen Cain, who was with the Hillsborough Sheriff's Office,

investigated the 1987 incident involving Ms. Whitley. (V7/T. 401, 410-12). Hale gave Cain a statement, admitting that on the return trip to Whitley's car, he turned off the road, and told Whitley that he wanted "to see her tits." (V7/T. 415). Hale stopped his vehicle, grabbed Whitley's breasts, and Whitley ran. (V7/T. 415). Hale admitted that he knew that he had problems. (V7/T. 416).

The State introduced into evidence the judgments of conviction which corresponded to the foregoing offenses. (V7/ T. 419; R. V3/498-503). The first conviction was for assault with intent to commit rape. The 1987 conviction was for attempted sexual battery and false imprisonment.

Dr. Jeffrey Benoit, a psychologist, evaluated Hale for the purpose of these commitment proceedings. (V7/ T. 421-22; V8/T. 446, et seq.). Benoit reviewed police reports, DOC records, and Hale's probation file, and contacted two of the former victims. (V8/T. 446-49). Benoit also interviewed Hale. (V8/T. 450).

With respect to the 1973 McCown incident, Hale downplayed the severity of the attack and never admitted that he forced McCown to perform oral sex. (V8. T. 451). Hale only admitted to possibly having touched her breasts. Id. Dr. Benoit noted that there were significant differences between Hale's account and the one set forth in the police report. (V8/T. 455). Thus, Benoit found that there was significant minimization on Hale's

part. (V8/T. 466).

Benoit also related that there had been a 1982 loitering and prowling incident in which Hale looked into the window of a house. (V8/T. 462). There was a similar incident in 1991. Id. In 1982, there was a sex offense in which Hale first said that the woman lost her balance and fell on him; Hale then changed the story, stating that he startled the woman from behind and touched her, before she fell. (V8/T. 463).

In 1984, there was an incident in which Hale said that he gave a woman a ride, reaching across his truck and touching the woman's breasts; he intentionally did it "for the hell of it." (V8/T. 464). As to the 1987 incident with Ms. Whitley, Hale indicated that he had been having marital discord at the time. (V8/T. 465-67). Hale admitted having touched Whitley "sexually" on the breasts. (V8/T. 467). The most recent sexually related offense was in 1991, with a loitering and prowling charge, where Hale was found looking into a juvenile's window. (V8/T. 498-99)

Benoit compared the police reports, the victim information and Hale's statements and found significant minimizing. (V8/T. 469-70). It was further relevant to Benoit that Hale had had prior treatment in the 1970's and 1990's, and that the records reflected a lack of success in the prior treatment. (V8/T. 470).

Benoit concluded that Hale had a mental abnormality - personality disorder with antisocial features, with a long-term

pattern. (V8/T. 472). Benoit found that Hale was impulsive, based upon the mixture of anger and sex in the prior incidents which Hale discussed. (V8/T. 477-78). Benoit also found that Hale suffered from "depressive disorder NOS." (V8/T. 478). This was both a mental abnormality and emotional disorder, and reflected that Hale could not handle stress. (V8/T. 478).

With respect to a risk assessment for the likelihood of future recidivism, Benoit emphasized several factors: the number of incidents in the past; the difficulty Hale had in controlling his behavior; and the results of actuarial risk assessment instruments which Benoit administered. (V8/T. 479). Benoit described Hale's risk for recidivism as "significant," within a reasonable degree of psychological probability. (V8/T. 485-86). Hale posed a menace to society and needed long-term care and treatment in a secured environment. (V8/T. 487-88). While Hale would be amenable to treatment, it would take time. (V8/T. 479).

The MnSOST-R, one of the tests administered by Benoit, reflected an 87% reoffense rate within six years. (V8/T. 489). On cross-examination, Benoit referred to a test score of 5, which corresponded to a 60% rate of sexually violent recidivism. (V8/T. 513-17). While a range of scores, from 4-7, had an "average" recidivism rate of 45%, based on his understanding of the test, including conversations with the individual who

developed the test, a score of 5 would be higher than that. Id. Furthermore, Benoit subsequently revised the score on the test from a 5 to a 7 (V8/T. 558, 561), which would correspond to an even higher likelihood of recidivism than the 50% attributed to the score of 5. Benoit also felt that the predicted likelihood was a conservative prediction, as Benoit did not even factor in various misdemeanor guilty please which Hale had entered. (V8/T. 561).

Benoit also administered the MMPI. Although the result of that test, which is not an actuarial test and does not measure risk assessment, was "normal," Benoit believed the result of the test to be invalid. The invalidity was attributed to Hale's evasiveness, as a man with such a measure of evasiveness should not have a "normal" score on the test. (V8/T. 471).

Another actuarial instrument, the RRASOR, consisting of four factors, reflected a 32.7% likelihood of recidivism over a five year period. (V8/T. 511-13). While defense counsel elicited this on cross-examination, defense counsel did not elicit that the score on the test also corresponded to a 48.6% likelihood of recidivism over a 10 year period. (V9/T. 642-43).

Dr. Pritchard, also a psychologist, similarly reviewed extensive records regarding Hale's criminal history, and similarly interviewed Hale, as well as three victims from the prior crimes. (V9/T. 607-13). Pritchard concluded that Hale

suffered from an Axis II personality disorder, with a provisional evaluation of antisocial personality disorder; the latter diagnosis was provisional, because the doctor lacked sufficient evidence of its onset prior to age 15 - one of the requirements for the disorder. (V9/T. 614-15). As to the general personality disorder from which Hale suffered, Pritchard emphasized the following facts: There was a chronic pattern of difficulty adapting; this was a lifelong pattern, reflecting an inability to abide by society's rules or to get along with people. (V9/T. 617-18). Hale had insight problems and kept repeating the same mistakes, while blaming others and making excuses. (V9/T. 619). Hale had "inconsistent" employment and personal relations. Id. This was a pattern which encompassed three decades of maladaptive behavior, with a significant history of sex crimes, violence and threats. (V9/T. 620-21).

Dr. Pritchard then addressed some of Hale's criminal conduct. In 1982, there had been a battery conviction which Pritchard considered to be sexually motivated. (V9/T. 629-32). In 1984, there was also a battery conviction, which Pritchard again, based upon information from the victim, considered sexually motivated. (V9/T. 632-33). The 1987 Whitley offense was again sexually motivated. (V9/T. 633).

Hale was found to be likely to commit further sexually violent offenses based on the following factors: the extent of

his prior criminal history; the fact that he violated community control; the existence of the personality disorder; Hale's dishonesty and minimization of his role in the criminal conduct; the failure to succeed with treatment in the past; the existence of a current impulse control problem; the absence of any efforts on Hale's part to change; the existence of stress and Hale's inability to handle stress well; the absence of any real plan's on Hale's part. (V9/T.639-40).

Several actuarial instruments confirmed Pritchard's clinical impressions. The score of 4 on the RRASOR corresponded with a 32.7% recidivism rate over a five year period; 48.7% over 10 years. (V9/T. 642-43). Moreover, these were "very conservative numbers," as the instrument produces a "very deflated estimation," as it is based on recidivism conviction rates, while significant numbers of sex offenses result in underreporting, coupled with failures to arrest or convict perpetrators. (V9/T. 643-44). Those factors result in the conclusion that the actual risk of recidivism is therefore higher.

A second risk assessment instrument, the VRAG, resulted in a likelihood of recidivism of violent criminal conduct of 44% over 7 years; 58% over 10 years. (V9/T. 669-70). Yet another test, the PCL-R, which is not an actuarial instrument, but measures the presence of a psychopathic disorder, resulted in a

score of 30.5, with the score of 30 being the "cutoff." (V9/T. 661-63).[1] Pritchard emphasized that the actuarial instruments were not ends in and of themselves; they were just "clinical aids." (V9/T. 644). His opinions were therefore based upon the totality of the factors.

After the State rested (V10/T. 695), the defense's motion for directed verdict was denied. (V10/T. 696-702).

After presenting some family members who basically stated that Hale had been good while growing up and that Hale could work for his brother if not committed (V10/T. 704-12), Roy Lusk, a psychologist, testified for the defense. As with the State's psychologists, Lusk reviewed a wide array of records regarding Hale's background as part of the process for forming his opinions, and Lusk similarly interviewed Hale. (V10/T. 725, 728-29). The records included criminal history records, DOC records, DCF records, and police reports. Id. While Lusk found that Hale had a personality disorder NOS, and that there was a risk of recidivism, he did not believe that the risk level was sufficiently high to warrant commitment. (V10/T. 749-52).

The prosecution examined Lusk about the relevance of the various prior criminal offenses. As to Hale's second offense (1973), Lusk admitted that it was "probably sexually motivated."

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[1] The Appellant suggests that Pritchard omitted information which would affect the PCL-R score. Pritchard never states that he would alter the score of 30.5. (V9.T. 663-64).

(V10/T. 761). On the 1982 incident, Hale admitted having touched the victim's breasts. (V10/T. 761-62). As to the 1982, 1984, and 1987 offenses, Lusk believed that they were all sexually motivated. (V10/T. 764-66). Lusk believed that Hale needed therapy, for anger control, problem solving, personal responsibility, self esteem and social relationships. (V10/T. 795).

The trial court instructed the jury as follows:

> To prove the Respondent, William Charles Hale, is a sexually violent predator, the State must prove each of the following three elements by clear and convincing evidence:
>
> 1. William Charles Hale has been convicted of a sexually violent offense.
>
> 2. William Charles Hale suffers from a mental abnormality or personality disorder.
>
> 3. The mental abnormality or personality disorder makes William Charles Hale likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.
>
> A "mental abnormality" means 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 os of such a degree as to pose a menace to the health and safety of others.

(V11/T. 949-50).

On appeal to the Second District Court of Appeal, Hale

raised multiple points, of which the Court stated "only two of which merit discussion." Hale v. State, 834 So. 2d 254, 255 (Fla. 2d DCA 2003). The Court first found that the jury instructions regarding Hale's ability to control sexually violent behavior were sufficient, relying on this Court's opinion in Westerheide v. State, 834 So. 2d at 255. Second, the Court summarily rejected Hale's double jeopardy and ex post facto challenges to the commitment act, again relying on this Court's opinion in Westerheide. The Court's opinion was filed on November 15, 2002, and motions for rehearing, rehearing en banc and certified question were denied on January 9, 2003.

SUMMARY OF ARGUMENT

Florida's standard jury instruction regarding proof that an individual is a sexually violent predator are sufficient, and include within them the requirement that the individual has difficulty controlling behavior, without a specific instruction using the phrase "serious difficulty."

The State presented sufficient proof of Hale's mental condition and the likelihood that the mental condition would cause further sexually violent offenses absent commitment. The commitment act clearly applies to Hale who was incarcerated on the Act's effective date and had a prior qualifying conviction for a sexually violent offense.

Prior "bad acts" are relevant to the issues being decided

in sexually violent predator commitment cases. The acts demonstrate elements of the psychological diagnoses, the acts demonstrate difficulty controlling behavior, and the acts demonstrate the likelihood of recidivism.

Prosecutorial comments at issue herein were not improper or were harmless in the context of the entire case.

ARGUMENT

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, Carribeean Conservation Corp., Inc. v. Florida Fish and Wildlife Commission, 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." Section 394.912(10), Florida Statutes. 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." (emphasis added). Section 394.912(5), Florida Statutes. 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." Section 394.912(4), Florida Statutes. "Propensity" connotes a natural or innate inclination or tendency. See, *American Heritage Dictionary of the English Language, New College Ed.* (Houghton Mifflin 1980 ed), at 1048. An "innate" condition further connotes something which is firmly rooted in one's constitution. 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.").[2] 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 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

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[2] 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.

inability to control behavior required a jury finding, and "the failure to son 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.[3] Other state appellate courts, prior to the 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

[3] 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 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.

beyond his control.[4]

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. 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 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

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[4] 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).

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.[5] 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, 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,

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[5] As stated in Crane, the Hendricks decision held that the statutory criterion for confinement embodied in the statutes words 'mental abnormality or personality disorder' satisfied '"substantive" due process requirements.'" (emphasis added).

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[6] stated: "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." 831 So. 2d at

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[6] 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.

107. Subsequent District Court of Appeal decisions have consistently been treating Westerheide as dispositive on this issue. Hale, 834 So. 2d at 255; 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, 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. 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. 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. 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.

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 incorporate 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,[7] 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 which track those statutory elements are therefore

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

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.

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. Given the testimony of the State's experts regarding difficulty controlling behavior, and the defense expert's admission that there were impulsive factors, any error should be deemed harmless. Dr. Benoit stated that Hale's crimes were impulsive, providing several examples of such impulsivity, both from his crimes and other, non-criminal conduct. (R. Vol. 8, pp. 472, 476-78). Hale either suffered from an impulse control disorder, and impulse control was a part of his personality disorder. (R. Vol. 8, p. 478). Hale had "difficulty controlling behavior." (R. Vo. 8, p. 479). Dr. Pritchard diagnosed Hale as having a personality disorder, which was reflected, in part, by his "inability to abide by standards of law," as well as an "impulse control problem." (R. Vol. 9, pp. 635, 638). Hale exhibited no evidence of change over the years to reflect a current ability to control his impulse problems. (R. Vol. 9, p. 639).

The defense expert, Dr. Lusk, while rejecting a diagnosis

of an impulse control disorder, did admit that there were impulsive factors. (R. Vol. 10, p. 769). He also admitted that Hale need anger control therapy. (R. Vol. 10, p. 795).

II. THE TRIAL COURT PROPERLY FOUND THAT THE EVIDENCE WAS SUFFICIENT AND THAT THE COMMITMENT ACT WAS APPLICABLE TO HALE.

The instant case is before this Court on the basis of an alleged conflict regarding the need for jury instructions regarding serious difficulty controlling behavior. While this Court does have discretion to entertain other claims after accepting a case on the basis of a conflict, the issues presented in this argument are routine issues for which the district court of appeal below should be treated as the court of final appeal and this Court should decline to address the issues.

A. Sufficiency of Evidence

Hale asserts that the case against him should have been dismissed due to insufficient evidence. Presumably, Hale is suggesting that the defense's motion for directed verdict should have been granted. Hale's argument is based on a variety of claims that the testimony from the State's experts is somehow lacking in credibility.

This Court has stated that "unless the evidence is so one-sided as to call for an instructed verdict by the Court," the

"evidence is for the jury to evaluate and apply." Lithgow Funeral Centers v. Loftin, 60 So. 2d 745, 746 (Fla. 1952). See also, Professional Computer Management, Inc. v. Tampa Wholesale Liquor Co., Inc., 374 So. 2d 626,627 (Fla. 2d DCA 1979); Ticor Title Guarantee Co. v. Harbin, 674 So. 2d 781 (Fla. 1st DCA 1997). It is also axiomatic that credibility determinations are beyond the scope of the appellate court's powers, as the evidence, in considering a motion for directed verdict must be viewed in the light most favorable to the nonmoving party, with all reasonable inferences deduced from the evidence indulged in favor of the nonmoving party. Cecile Resort, Ltd. v. Hokanson, 720 So. 2d 446, 447 (Fla. 5th DCA 1999).

In the instant case, the evidence to support the verdict was more than adequate under the above-quoted standards. Under the sexually violent predators commitment act, the State must prove that the respondent had a mental abnormality or personality disorder, and that that mental condition made it likely that the respondent would commit further sexually violent offenses if not confined to a secure facility for long-term custody, control and treatment. Sections 394.912, 394.916, 394.917, Fla. Stat.. Both of the State's experts testified that Hale had a mental abnormality or personality disorder, with Dr. Benoit concluding that Hale had a personality disorder with antisocial features, with a long-term pattern, as well as a depressive disorder NOS,

which was both a mental abnormality and emotional disorder. (V8/T. 472-78). Dr. Pritchard likewise concluded that Hale suffered from a personality disorder, with a provisional evaluation of antisocial personality disorder. (V9/T. 614-15). Indeed, even the defense expert, Dr. Lusk, acknowledged that Hale had significant mental health problems requiring therapy. (V10/T. 795). Consistent with Crane, there was ample evidence of Hale's difficulty controlling sexually violent behavior. Dr. Benoit stated that Hale's crimes were impulsive, providing several examples of such impulsivity, both from his crimes and other,non-criminal conduct. (R. Vol. 8, pp. 472, 476-78). Hale either suffered from an impulse control disorder, or impulse control was part of his personality disorder. (R. Vol. 8, p. 478). Dr. Pritchard diagnosed Hale as having a personality disorder, which was reflected, in part, by his "inabiilty to abide by standards of law," as well as an "impulse control problem." (R. Vol. 9, pp. 635, 638). Hale exhibited no evidence of change over the years to reflect a current ability to control his impulse problems. (R. Vol. 9, p. 639). Indeed, even the defense expert admitted that there were impulsive factors in Hale's behavior. (R. Vol. 10, p. 769).

Hale takes issue primarily with the evidence regarding the likelihood of recidivism. The State's experts presented testimony, both in terms of their clinical opinions and in terms

of actuarial risk assessment instruments, to support the conclusion that Hale was likely to commit further sexually violent offenses if not committed. Dr. Benoit emphasized multiple factors - the substantial number of prior sexual offenses; Hale's difficulty in controlling his behavior; the results of the actuarial instruments; the failure to successfully complete prior treatment; the failure to accept responsibility and the concomitant efforts at minimizing the prior wrongful conduct; Hale's inability to handle stress. (V8/T. 451, 455, 466, 477-88). Dr. Pritchard emphasized similar factors: the chronic pattern of difficulty adapting; insight problems, with repetitions of prior mistakes, while blaming others and making excuses; problems with personal and employment relations; three decades of maladaptive behavior; an extensive history of sex crimes, violence and threats; actuarial risk assessment instruments; a prior violation of community control; dishonesty and minimization; the failure to succeed with past treatment; an impulse control problem; the absence of efforts to change; the inability to handle stress; and the absence of any real plans for the current time. (V9/T. 639-40, 619-21, 629-33).

With respect to the risk assessment instruments, not only does the RRASOR result in a score reflecting a recidivism rate of 48.6% over a 10 year period, but, Dr. Pritchard explained that that is a low, conservative estimate, based on the fact

that it is predicated on recidivists' reconviction rates, whereas large numbers of sex offenses result in underreporting, failures to arrest or failures to convict. (V9/T. 642-43). With respect to the MnSOST-R, Dr. Benoit indicated that he had revised the scoring on the test from a 5 to a 7, and that while scores in the range of 4-7 correspond to a 45% recidivism rate, the higher the score within that range, the greater the recidivism rate, and Benoit stood by his assertion that the 60% figure was valid. (V8/T. 513-17, 558, 561).

Beyond the foregoing factors, it must further be noted that Hale's pattern of sexually violent conduct is clearly substantial and repetitious. In addition to the offenses for which there had been convictions, there were several other incidents which did not arise to the level of sex offense convictions, but which nevertheless were perceived by the experts, including the defense expert, Dr. Lusk, as involving sexually motivated conduct.

Accordingly, Hale's arguments are no more than jury arguments, which were made and rejected, and the evidence presented was clearly sufficient to withstand a motion for directed verdict or an appeal from the denial of a motion for directed verdict.

B. <u>The Commitment Act is Applicable to Hale</u>

In the trial court, Hale filed a Motion for Judgment on the

Pleadings and Motion to Dismiss, arguing that the commitment act did not apply to him. (R. V2/245). Hale asserted that his most recent conviction for a criminal offense was in October, 1997; that it was not for a sexually violent offense - it was for dealing in stolen property - and that he had a release date of April 5, 1999, from the Department of Corrections. Id. As a result of those facts, Hale argued that the terms of §394.925, Fla. Stat. (1999), and/or its predecessor, §916.45, Fla. Stat. (Supp. 1998), rendered the act inapplicable to him. The trial court heard argument on this motion and denied it. (R. V3/508-52).

The commitment petition in the instant case was filed on April 5, 1999. (R. V1/1-5). The commitment act had gone into effect on January 1, 1999. Section 916.31, et seq., Fla. Stat. (Supp. 1998); Ch. 98-64, Laws of Florida. Effective May 26, 1999, the act was moved to Chapter 394. Ch. 99-222, Laws of Florida; Section 394.910, et seq., Fla. Stat.. Under the original version of the act, which was in effect on both January 1, 1999, the initial date of the act, and on April 5, 1999, the date on which the commitment petition was filed, section 916.45, Fla. Stat. (Supp. 1998), provided:

> Sections 916.31-916.49 apply to all persons currently in custody who have been convicted of a sexually violent offense, as that term is defined in s. 916.32(8), as well as to all persons convicted of a sexually violent offense in the future.

Pursuant to that provision, the act applied to persons who were "currently in custody." As the act became effective January 1, 1999, "currently in custody" referred to those who were in custody on the effective date of the act, and Hale was admittedly in custody on January 1, 1999. In addition to applying to those currently in custody, the act applied to those "who have been convicted of a sexually violent offense." Once again, Hale was convicted of multiple prior sexually violent offenses.

The statute did not require that the person currently be in custody for a sexually violent offense. If that had been the legislative intent, it would have been a simple matter to state that the act applies to those who are "currently in custody for a conviction for a sexually violent offense." Rather, the act applied to those currently in custody and who had a sexually violent offense conviction, whether it be for the current sentence being served or for a past sentence. Thus, the act would apply to two classes of individuals: 1) all those who were in custody on January 1, 1999, for any current conviction, with a sex offense conviction either being the current one or a past one; and 2) those who were not in custody on January 1, 1999, but who were convicted of sexually violent offenses in the future. This dichotomy would enable the State to evaluate all prisoners, starting with January 1, 1999, as they were released,

to determine whether there was anything in their backgrounds which would warrant commitment as sexually violent predators.

Shortly after the petition was filed, former section 916.45 was amended and moved to §394.925, Fla. Stat. (1999), with language that remains essentially the same, apart from adding that the future sexually violent offense must be accompanied with a sentence of total confinement - i.e., state prison, with a few exceptions.

The foregoing analysis is corroborated by additional language in §§ 394.912(9)(g), and 394.913(1), Fla. Stat., regarding the applicability of the act to the use of out-of-state convictions for sex offenses as qualifying predicates for the commitment proceeding. Section 394.913(1) provides that: "If the person has never been convicted of a sexually violent offense in this state but has been convicted of a sexually violent offense in another state or in federal court, the agency with jurisdiction shall give written notice to the multidisciplinary team and a copy to the state attorney of the circuit where the person was last convicted of any offense in this state." That section makes it clear that the act would apply to an offender, serving a sentence for a non-sex offense in Florida, who has a prior qualifying sexual offense conviction from another state or the federal government. The Act was clearly not limited in application to those who were currently

serving sentences for sex offenses in Florida.

"When interpreting a statute, courts must determine legislative intent from the plain meaning of the statute." State v. Dugan, 685 So. 2d 1210, 1212 (Fla. 1996). "If the language of the statue is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended." Id. That is precisely the situation here, as the statute clearly provides that it all applies to all those in custody on the effective date of the act, who have a conviction for a sexually violent offense - without any requirement that the current sentence be for the sexually violent offense.

III. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF PRIOR OFFENSES AND BAD ACTS.

As with the preceding issue, this claim goes beyond the conflict that provides this Court with jurisdiction and review of this issue is discretionary with this Court.

A. Relevancy of Prior Acts

Hale, relying exclusively on opinions from criminal cases which applied the Williams rule, argues that Hale's prior criminal conduct was inadmissible, as irrelevant, because the acts which he committed were too remote in time from the current cause of action. The analogy to the Williams rule in criminal cases, however, is irrelevant, as the purpose for the evidence

adduced is considerably different in the two classes of cases. Determinations of relevancy, including issues such as remoteness of prior offenses, rest within the discretion of the trial court. Duffy v. State, 741 So. 2d 1192, 1196 (Fla. 4th DCA 1999).

In the criminal cases upon which Hale relies, the State, when prosecuting a criminal offense, would attempt to use prior criminal conduct for the purpose of establishing a pattern of conduct, and then arguing that since the person had committed a similarly unique act in the past, the current offense, having the same uniqueness, must have been committed by the same person - i.e., the defendant currently charged. However, the purpose of relying on prior conduct in a civil commitment case is considerably different. The State is no longer proving that prior conduct establishes that the individual must have committed a particular act now at issue - indeed, the commitment case is not a prosecution for a current offense or current wrongful conduct. Rather, the State must establish that the respondent has the requisite state of mind - a mental abnormality or personality disorder; and, that the requisite state of mind makes the person dangerous at the current time, through the likelihood that the person will commit sexually violent offenses if not committed. Sections 394.912, 394.916-.17, Fla. Stat. Thus, the past conduct must relate to either

the diagnosis of the mental condition, or, to the current and future dangerousness.

Appellate courts across the country, in similar commitment cases, have routinely acknowledged the relevance of prior criminal acts and other wrongful conduct to the current diagnoses of mental conditions and dangerousness. In re the Detention of Young, 857 P. 2d 989 (Wash. 1993), presents one of the first extensive analyses of both the constitutional issues related to sexually violent predator commitment acts, and, the evidentiary issues arising under those acts. That Supreme Court opinion, which evaluated the commitments of two different individuals, presented a detailed summary of the evidence in the cases. As to Young, the commitment action was filed in 1990, just prior to his release from prison. 857 P. 2d at 994. The history of his criminal conduct, as introduced into evidence, included a series of sexual offenses dating back to 1962. The trial court heard evidence from both mental health experts, and, prior victims of offenses, with the experts testifying that the prior conduct supported their diagnoses as to the existence of the requisite mental health condition and dangerousness. Id. at 994-95. The Court's opinion also detailed the similar history of Cunningham, whose prior sexually violent conduct dated back 10 years prior to his release from current incarceration. Id. at 995.

On appeal, Young and Cunningham contended that such evidence was irrelevant to their current mental conditions and dangerousness and that it was, alternatively, unduly prejudicial. Id. at 1015. The state Supreme Court rejected that contention:

> The evidence here was properly admitted. The manner in which the previous crimes were committed has some bearing on the motivations and mental states of the petitioners, and is pertinent to the ultimate question here. Moreover, the likelihood of continued violence on the part of the petitioners is central to the determination of whether they are sexually violent predators under the terms of the Statute. Thus, we cannot say that the trial court abused its discretion in admitting the victims' testimony. Although we agree that the testimony represented by the victims was compelling, and, therefore, had a substantial effect on the jury, we do not believe that its prejudicial effect outweighed its probative value. In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence.

Id. at 1015.

Similarly, in In the Matter of Hay, 953 P. 2d 666 (Kan. 1998), Hay's commitment proceeding, in 1995, was predicated upon proof of a variety of prior sex offenses, occurring between 1984 and 1993. Id. at 671-72. Hay similarly argued that such conduct was irrelevant, especially as it included uncharged conduct, and the state Supreme Court disagreed:

> In order to establish that Hay was a

> sexually violent predator, the State was required to show he had been convicted of or charged with a sexually violent offense and suffers from a mental abnormality or personality disorder which makes him likely to engage in predator acts of sexual violence. The evidence Hay challenges was clearly relevant to prove he suffers from the condition of pedophilia and that he is likely to engage in predatory acts of sexual violence in the future. We are hard-pressed to see how such evidence can be prohibited by K.S.A. 60-455 when it is an essential element of the required proof and necessary for the decision-making process of the jury.

Id. at 677. Thus, the Court continued: "The critical issues in a sexual predator case make the evidence of prior conduct, charged or uncharged, material evidence in the case." Id. at 678.[8] See also, People v. Hubbart, 106 Cal. Rptr. 2d 490 (Cal. App. 2001); In re Detention of Williams, 628 N.W. 2d 447, 457 (Iowa 2001); In the Matter of Robb, 622 N.W. 2d 564, 573 (Minn. App. 2001). Given the more-than-ten-year history of sexually violent predator commitment proceedings across the country, and the literally hundreds of trials and appellate court opinions that have resulted, the foregoing conclusions have become routine, and such evidence is routinely introduced in such cases. Florida appellate courts have come to the same

[8] The Supreme Court of Minnesota has gone further, and has mandated that a trial court's determination that a person requires commitment as a sexually violent predator must take into consideration, inter alia, the person's history of violent behavior and the similarity of present and future contexts to past contexts. In re Linehan, 557 N.W. 2d 171, 189 (Minn. 1996).

conclusion. See, Lee v. State, 854 So. 2d 709 (Fla. 2003).

The same principles apply in the instant case, as the prior conduct was relevant to both the mental condition and current dangerousness. Both of the State's experts emphasized the relevancy of the former conduct, and that relevancy remained, notwithstanding the alleged "remoteness" of some of the prior conduct. Thus, one of the key points was that Hale kept on repeating the same mistakes, and did not learn from them. Another relevant factor was that Hale, after all these years, still minimized his own role in the prior criminal conduct. Minimization reflects that the person does not take responsibility, and that, in turn, makes the person more likely to keep on committing such acts. Likewise, the prior incidents corresponded to prior treatment programs, and, Hale failed to successfully complete such treatment - another factor which ties in to the assessment of the likelihood for current recidivism.

Dr. Benoit specifically assessed Hale as having a personality disorder with antisocial features, and the factors which corroborated that disorder included a "long-term pattern." (V8/T. 472). The impulsive conduct, mixing anger and sex, was demonstrated by those prior acts, and they similarly demonstrated Hale's inability to handle stress. (V8/T. 477-78). Dr. Pritchard similarly opined that there was a personality

disorder with antisocial features. The only reason why a full antisocial personality disorder could not be assessed was the lack of evidence of the onset of the disorder prior to age 15, as that is one of the elements of the antisocial personality. That, however, reflects the highly relevant nature of conduct relating back to an early age. Thus, it was significant to Pritchard that Hale displayed "a lifelong pattern," encompassing three decades of maladaptive behavior, with a significant history of sex crimes, violence and threats. (V9/T. 620-21, 617-18). It should also be noted that the defense expert, Dr. Lusk, clearly believed that offenses and conduct from the 1970's and 1980's were relevant to the diagnoses which had to be made. Dr. Lusk admitted that during his clinical interview of Hale, he asked Hale about those prior incidents. (V10, T. 759-67). If such conduct were irrelevant to a current diagnosis, it would stand to reason that the defense expert would not have inquired of Hale regarding such incidents.

The relevancy of older conduct to current mental health evaluations can be seen in a variety of other contexts as well. A useful analogy in the criminal context would be the use of testimony from mental health professionals in the penalty phases of capital cases. When such testimony is so used by the experts, they routinely rely upon a lifetime of history, often going back to the defendant's childhood, to explain how various

mental health factors were currently relevant, as explained by incidents which occurred in the distant past. By way of example, in Morton v. State, 789 So. 2d 324, 329-31 (Fla. 2001) (Fla. 2001), the defense had presented evidence of an antisocial personality disorder as mental health mitigation at the penalty phase, and this evidence included such "recent" factual background evidence as the defendant's separation from his mother for several weeks following a premature birth; difficulties during school years; parental discipline during childhood; and other equally distant matters. Such mental health evaluations in capital penalty phase proceedings routinely rely on such distant histories - they present the same potential for relevance of a current mental condition as in the commitment cases. Conversely, if the Appellant's current argument were carried to its logical conclusion, it would seem to suggest that such evidence would have to be irrelevant in capital penalty phase proceedings.

Furthermore, even in Hale's misguided effort to analogize the commitment case to criminal prosecutions, similar fact-pattern evidence regarding past offenses has routinely been admitted, especially in the context of prior sex offenses, notwithstanding the passage of many years since the prior conduct. For example, in Heuring v. State, 513 So. 2d 122 (Fla. 1987), in a sexual battery prosecution, similar fact evidence of

sexual batteries which occurred over 20 years prior to the instant charges, was deemed relevant, with the District Court of Appeal rejecting the claim of remoteness. Id. at 123. The Supreme Court concurred that the prior conduct was not too remote. Id. at 124.

Another relevant factor to consider is the academic literature, which clearly renders all prior conduct relevant to the assessment of the person's current mental condition and dangerousness. A clinical and forensic psychologist, Harry Hoberman, details the components of a clinical evaluation of an individual in sexual predator commitment proceedings, in "The Forensic Evaluation of Sex Offenders in Civil Commitment Proceedings," Chapter 7, The Sexual Predator: Law, Policy, Evaluation and Treatment (1999 Civic Research Inst., Kingston, N.J.) (eds. Schlank, Anita, and Cohen, Fred. As to general criminal history, Hoberman states:

> Inquiring about apparently nonsexual criminal offenses can be an important source of information about several relevant areas for evaluations of PPSPs [persons petitioned as sexual predators]. First, information can be obtained about the onset, duration, and variety of general antisocial behavior. Second, a history of criminal behavior directed at or involving harm to others can provide useful information relevant to evaluating the respondent's propensity for violent behavior. . . .

Id. at 7-24. With respect to sex offense history, Hoberman similarly emphasizes the importance of the clinical interview

developing details of that criminal history. Id. at 7-22 through 7-24. Thus, "[t]he details of an offender's behavior before, during, and after each incident of sexual acting-out has important implications for evaluating the nature (e.g., physical and/or emotional) and degree of harm perpetrated on a particular victim as well as for the total 'set' of an offender's victims.

Hale also argues that a subsequent 1991 loitering and prowling misdemeanor was somehow irrelevant. First, as can be seen from the foregoing, the entire course of a respondent's criminal, sexual and/or violent conduct is relevant to an assessment of the current mental condition and dangerousness. Second, the State's experts opined, based on their interviews of Hale, that prior loitering and prowling incidents were sexually motivated. Third, Hale's own expert, Dr. Lusk, similarly admitted that such other incidents were sexually motivated based upon his interview of Hale. (V10/T. 763-67). Fourth, the only reference to a 1991 incident appears to have been made by Dr. Benoit, in response to a defense question on cross-examination. (V8/T. 498-501). Defense counsel inquired about the last sexually violent offense of Hale, and Benoit responded, placing it at the 1991 incident. Id. Thus, apart from any relevancy arguments, the defense herein clearly can not complain about evidence which was introduced solely through its own questioning. See Norton v. State, 709 So. 2d 87, 94 (Fla. 1997).

Lastly, Hale claims that some of Hale's offenses were not for sexual offense convictions, and that the State could only use such offenses as evidence if it established that they were sexually motivated by clear and convincing evidence. One of these references, again, is to the 1991 loitering and prowling, and, as noted above, the only reference to that incident came as a result of defense counsel's questioning of Dr. Benoit, and Hale can not complain about evidence adduced solely as a result of his own questioning of a witness. Furthermore, Hale asserts, as to the McCown incident, that "Dr. Benoit made up his own sexually related facts based on Mr. Hale's statement to Ms. McCown 26 years ago that he had been watching her and her husband having sex." Brief of Petitioner, p. 41. Contrary to the Hale's assertions, Dr. Benoit did not make anything up; he was clearly relying on a statement that Hale had made. Furthermore, in the McCown incident, the testimony clearly revealed that Hale forced McCown to engage in an act of oral sex and had, in fact, intended to rape Ms. McCown; it is difficult for an offense to be more sexually motivated than that. Lastly, the defense expert, Dr. Lusk, was cross-examined by the State, and, at that time, Lusk admitted that all of the prior incidents for which the State elicited testimony were "sexually motivated." (V10/T. 759-67).

In view of the foregoing, it can not be said that the lower

court abused its discretion in permitting the State to introduce evidence or prior criminal conduct of Hale.

B. Probative Value Exceeds Prejudice

Hale further agues that the remote acts, even if relevant, were unduly prejudicial. As explained in the numerous cases from other jurisdictions encountering similar issues, testimony of prior sexually violent conduct goes to the heart of the commitment case, relating, as it does, to both the mental condition component and the likelihood of recidivism. Under such circumstances, such evidence has routinely been held to be highly relevant, and, even though obviously prejudicial to a respondent, the prejudice does not outweigh the relevancy. Hubbart, supra; Young, supra; Hay; supra.

IV. THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE OBJECTIONS TO PROSECUTORIAL STATEMENTS, WITNESS'S TESTIMONY, OR REFERENCES TO THE PETITIONER IN THE INSTRUCTIONS.

The Petitioner next complains about some half-dozen allegedly improper comments by testifying witnesses. This argument is not the subject of a certified question. While the Court does have discretion to entertain the issue, the claims are clearly of such a nature that the District Court of Appeal should be presumed to be the court of finality.

The Petitioner first asserts that it was reversible error when Officer Rice, recounting Hale's 1973 statement about the Boswell incident, stated: "He said that he had grabbed her and that he meant to rape her, I assume is what he was talking

about." (V7/T. 381). The judge then sustained an objection as to what the officer "assumed," and denied a motion for mistrial. (V7/T. 381-84). Subsequently, the officer related Hale's actual statement, that he did not mean, or want, to hurt Boswell. (V7/T. 385). Hale also stated that since there were "a lot of people there" - it was a high school - and since there were lights on, "I would probably wait until some other time." (V7/T. 386-87). He added: "I had a feeling that I would get caught." (V7/T. 389).

Insofar as the court struck Rice's objectionable assumption, and expressly instructed the jury to disregard that comment (V7/T. 384), any error was cured since it is presumed that jurors will follow a court's instruction to disregard. Greer v. Miller, 483 U.S. 756, 766, n. 8 (1987); Rivers v. State, 226 So. 2d 337, 338-39 (Fla. 1969) (improper witness statement regarding arrest of defendant for out-of-state shooting was not reversible error in murder prosecution where jury was instructed to disregard statement). Moreover, immediately thereafter, the jury heard, in its totality, Hale's verbatim statement, which is, in fact, clearly indicative of the intent to perpetrate a sexual offense. Indeed, even the defense expert, referring to Hale's second incident (which is the Boswell incident), admitted that it was probably sexually motivated. (V10/T. 761). Given this, and the overly abundant evidence of Hale's criminal and

sexual offenses, the Petitioner has not demonstrated prejudice which would affect the outcome of the trial.

The Petitioner next asserts that Deputy Cain was improperly permitted to state that Hale told her, during the Whitley investigation, that he got enjoyment from harassing whores on Nebraska Avenue. (V7/T. 416). This came in the context of other statements that Hale made to Cain, indicating that he knew he had a problem. (V7/T. 416-17). Given that the focus of the commitment case is on mental abnormalities and the likelihood of recidivism, such testimony was clearly proper and relevant.

The Petitioner next complains that Dr. Benoit was permitted to testify that Hale was a "menace" to the health and safety of others because of his propensity to commit acts of sexual violence. (V8/T. 482-85). Benoit was asked if he had an opinion "as to whether Mr. Hale has a propensity to commit acts of sexual violence to such a degree that he poses a danger to himself and others." (V8/T. 482). Over the defense objection, the doctor then testified that in his opinion, Hale's propensity to commit such acts did pose a menace to the health and safety of others. (V8/T. 487).

Such questioning and response were clearly appropriate as the doctor was giving an opinion as to an element of the cause of action that the State had to prove. Pursuant to §394.916, Fla. Stat., the State must prove that the person has a mental

abnormality or personality disorder that makes it likely that th person will engage in sexually violent offenses if not committed. The phrase "likely to engage in acts of sexual violence" is further defined as meaning 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." Section 394.912(4), Fla. Stat.. The Florida Evidence Code permits experts to testify to "an ultimate issue to be decided by the trier of fact." Section 90.703, Fla. Stat.. As the jury can render a commitment verdict only if there is proof of the requisite degree of dangerousness, the expert has to be able to give such an opinion. See also Adams v. State, 696 So. 2d 773 (Fla. 2d DCA 1996).

The Petitioner next complains that Dr. Benoit, while discussing Hale's behavioral history, referred to a period of time in Louisiana which was unaccounted for, and commented, "and God knows what happened there," in light of gaps in the record. (V8/T. 557). There was no objection to this statement from the witness, and, as such, any claim based on it is not preserved for appellate review. Pedroza v. State, 773 So. 2d 639, 640-41 (Fla. 5th DCA 2000); Hagan v. Sun Bank of Mid-Florida, 666 So. 2d 580 (Fla. 2d DCA 1996), disapproved of on other grounds, Murphy v. International Robotic Sys. Inc., 766 So. 2d 1010 (Fla. 2000); Swan v. Florida Farm Bureau Ins. Co., 404 So. 2d 802,

803-804 (Fla. 5th DCA 1981).

The Petitioner also attacks the prosecutor's closing argument, in which he stated, "It's like criminal behavior." (V11/T. 883). There was no objection to this comment and, as such, the claim is not preserved for appellate review. Pedroza, supra. Moreover, there was nothing improper about the comment. The prosecutor had been discussing the diagnosis of a personality disorder with antisocial features, noting that that "means he doesn't conform his conduct to the norms of society." (V11/T. 882-83). Immediately thereafter, the prosecutor explained that such non-conformity is "like criminal behavior. By doing things that you're not supposed to do, by satisfying your wants and needs without any regard for others. That's what anti-social behavior is." (V11/T. 883). Thus, the prosecutor was simply stating that non-conforming acts, such as criminal conduct, are the indicia of the personality disorder with antisocial features, and that was clearly an accurate assessment of the personality disorder. Thus, Dr. Benoit had explained the nature of the disorder, indicating that the substantial criminal history and number of documented sex offenses were indicia of the disorder. (V8/T. 472). Thus, this was simply a comment on the evidence of the nature of the disorder.

Lastly, the Petitioner attacks the prosecutor's comment that civil commitment, although indefinite, does not mean "forever."

(V11/T. 931-32). Once again, there was no objection to this and the issue is thus not preserved for appellate review. Pedroza, supra. The Petitioner states that defense counsel objected, in a motion for new trial, to the prosecutor's minimization of the post-commitment annual review process. (V12/T. 1005-20). As that argument, which was not a direct reference to the statement at issue herein, came after the jury verdict, it was not timely to preserve the issue for appeal. See, State Farm Mutual Automobile Insurance Co. v. Dauksis, 596 So. 2d 1169, 1171 (Fla. 4th DCA 1992) (objection to closing argument must be contemporaneous); Page v. Cory Corp., 347 So. 2d 817, 818 (Fla. 3d DCA 1977) (objection to jury instructions after jury has retired was untimely).

The Petitioner further asserts that any harmless error analysis should be governed by State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The State disagrees, as DiGuilio was a criminal case and the instant case is a civil commitment proceeding. While the instant case does involve a restraint on liberty, the harmless error analysis of DiGuilio should not be applied. First, the civil commitment proceeding requires only proof by clear and convincing evidence as opposed to the more stringent proof beyond a reasonable doubt in criminal cases, thus making the DiGuilio standard inappropriate. Second, the DiGuilio test for criminal cases was mandated by principles of

federal constitutional law as applied in criminal cases, such as Chapman v. California, 386 U.S. 18 (1967) (cited in DiGuilio, 491 So. 2d at 1134-35). No such mandate from the United States Supreme Court exists in the context of a civil commitment proceeding. Third, civil commitment proceedings have additional safety checks in place, beyond those of a criminal case. While a criminal case has limits on the nature of appellate review, and once those appellate and collateral review proceedings are concluded, the criminal case is effectively over, the commitment cases involve annual review proceedings and are going to be before the trial court year in, year out, until the individual is released, presenting numerous opportunities for mental health professionals to release a confined individual. If one is, for the sake of argument, wrongfully committed, mental health professionals could reasonably be expected to quickly spot such individuals and have them targeted for expedited completion of the treatment and ultimate release.

For such reasons, the test for determining whether an error is harmless is whether there is a reasonable probability that a different result would have been reached. See, e.g., Chrysler v. Department of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); Anthony v. Douglas, 201 So. 2d 917 (Fla. 4th DCA 1967). In the context of any erroneously admitted evidence, the burden would be on the party obtaining the benefit of the

wrongfully admitted evidence. Flores v. Allstate Insurance Co., 819 So. 2d 740 (Fla. 2002); Sheffield v. Superior Insurance Co., 800 So. 2d 197 (Fla. 2001).

In any event, under either version of the harmless error test, in the instant case, any errors would be harmless for the reasons set forth above.

In light of the foregoing, there is no basis for reversal as a result of the combination of unpreserved and meritless claims.

CONCLUSION

Based on the foregoing, the decision of the lower court should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits was mailed this ___ day of February, 2004, to DEBORAH K. BRUECKHEIMER,

Assistant Public Defender, Office of the Public Defender, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, FL 33831.

_____
RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The under signed attorney hereby certifies that the foregoing Answer Brief of Respondent on the Merits has been typed in Courier New, 12-point type.

_____
RICHARD L. POLIN