IN THE SUPREME COURT OF FLORIDA

WILLIAM HALE,	:	
Petitioner,	:	
vs.	:	Case No.SC03-0166
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On 4-5-99, Petitioner William Hale was to be released from prison after serving his sentence for dealing in stolen property. (V2/R245-254; V13/T65-72; V8/T498; V3/R508-552) However, on that date the State filed a Petition for Civil Commitment pursuant to the Jimmy Ryce Act (hereinafter the Act). (V1/R1-4) Mr. Hale had a jury trial, and on 11-18-99 the jury unanimously found Mr. Hale a sexually violent predator. On that same date the trial court entered a judgment and commitment order. (V3/R476-478; V5-11) Mr. Hale's motion for directed verdict, new trial, and rehearing was timely filed on 11-23-99 and denied on 12-13-99. (V3/R479-486) Mr. Hale's notice of appeal to the Second District was timely filed on 1-24-00. (V3/R487)

On 11-15-02 the Second District issued an opinion denying Mr. Hale relief. The focus of that opinion was whether or not Kansas v. Crane, 534 U.S. 407 (2002), requires a specific jury instruction on the subject of a civil commitment proceeding having serious difficulty controlling his or her behavior. The Second District found no such requirement. The Second District denied a timely filed motion for rehearing, and Mr. Hale timely invoked this Court's jurisdiction based on conflict with decisions arising from the First District.

STATEMENT OF THE FACTS

During Mr. Hale's trial for civil commitment, there were 3 prior incidents the State mainly relied on to support its position of Mr. Hale's future risk of sexual violence--2 were 26 years old (1973) and 1 was 12 years old (1987).

Mary McCown was outside her home with her child in 1973 when Mr. Hale approached her and forced her and her son into the house at knifepoint. There he forced her to perform oral sex on him. He told her not to call anyone and then he left. She called the police; and when the police arrested Mr. Hale, he admitted having forced Ms. McCown to have oral sex while he had a knife in his hand. (V7/T356-366,389,390) A week or so later Cindy Boswell was waiting in a locked room at a high school for her mother when Mr. Hale knocked on the door. She let Mr. Hale in, and they were sitting there when Mr. Hale grabbed her from behind. He told her not to scream, and she fought him. He grabbed at her arms and legs. She fell and twisted her ankle. She saw him reaching for a knife on the floor, and she ran to the door. When Mr. Hale was arrested for this, he said he intended to attack her; and the police officer testified he "assumed" this meant "rape" (objection granted, testimony struck, but mistrial denied). Mr. Hale said he did not want to hurt her and did not know what he intended to do--probably would have felt her. No knife was found even though Mr. Hale was arrested immediately afterward at the school, and the charges were dropped. (V7/T370-376,380-386,392-396) It was noted the officer on both cases read from his report--a report typed up 13 days after the interview and not signed by Mr. Hale, Ms. McCown or Ms. Boswell. (V7/T384-386,397-399)

In 1987 Dana Whitley had a flat tire, and Mr. Hale stopped to help. She went with Mr. Hale to a gas station to get air in the spare tire; and as they were driving back, Mr. Hale passed the car and turned onto a dirt road. He started to touch her and said he wanted to see her tits. When the car stopped, she got out and fought him as he grabbed at her. At one point he choked her and said no one could hear her screaming. He would take her into the woods, and no one would find her. She got away, and Mr. Hale was subsequently arrested. (V10/T689-693) When Mr. Hale was interviewed by an officer, he admitted stopping to help Ms. Whitley with her flat tire, getting air in the flat, going down the dirt road where he grabbed her breasts, and then struggling with her outside the car before she got away. The officer read from her report (she had no independent recollection) as to Mr Hale referring to a 1984 arrest for a sexual offense and his statement that he enjoyed going on Nebraska Avenue to harass whores. The officer knew Mr. Hale pled guilty and was sent to prison. (V7/T400-418)

The State introduced into evidence the judgments and sentences from the McCown and Whitley cases. (V3/R498-507; V7/T419)

The State presented two psychologists who found Mr. Hale likely to reoffend. Dr. Benoit had been a psychologist licensed in Florida for 5 years at the time of trial, but he had not done risk assessment for indefinite civil commitment before 1-1-99. He did not receive training in risk assessment until 7-99--after he had assessed Mr. Hale. Although he had done 82[1] risk assessments under the Act at the

[1] Out of the 82 assessments, he recommended commitment in 48% of those cases. (V7/T428)

time of trial, he had done very few evaluations (16-30) prior to Mr. Hale's. He testified in 6 probable cause hearings, but this was his first trial. (V7/T422-430; V8/T534,535) He was paid by the State $125 per hour and had put several hours into this case. (V8/T492-494) Although his contract prohibits him from assigning or subletting his work and he had no permission to do so in this case, he worked with an unlicensed doctor of psychology on this case. When he said in his 9/99 deposition he did not write the report in this case (believing the unlicensed doctor had written it), he had since decided this was wrong and he had written the report. (V7/T430; V8/T506,507) He was "confused" at the deposition when he gave wrong information as to what score numbers and risk percentage meant--at the deposition he said those scoring 5 on a particular test had a 60% chance of reoffending, but the correct statement is a score of 5 or higher with a total possible score of 17. (V8/T514) He also said the name "William Fussell" in the report was a scrivener's error because he was using an old report "for the format." (V8/T481,482) In this doctor's opinion grabbing or touching a breast without permission and looking in a window (loitering and prowling) are sexually violent offenses. (V8/T537-540,542-543)

After telling Mr. Hale at the start of the interview he has the right not to be interviewed, there is no confidentiality, and the report could go to the State Attorney's office for purposes of involuntary civil commitment, Dr. Benoit also told Mr. Hale what was in the reports brought the doctor here; so not participating would not be very good because a recommendation for commitment would be based on the reports. Mr. Hale also would have been told that often

the doctor discovers from the interview the risk factor is lower than the reports indicate and telling details of the offense does not necessarily mandate involuntary commitment. (V8/T441-442,497) The face-to-face interview is considered a critical portion of the risk factor analysis. (V8/T442) After Mr. Hale discussed details of prior incidents, the doctor found Mr. Hale attempting to minimize the events by describing himself in a favorable light which, in turn, demonstrated Mr. Hale had not been successfully treated in his prior treatment programs. (V8/T469,470) If a person has successfully completed sex offender treatment, they should have learned to talk honestly about what they have done. (V8/T457) In the McCown incident Mr. Hale's version was he ended up in her house, asked her to have sex, and when she said she was menstruating he asked for oral sex. When she refused, he left. (V8/T450,451) At the time Mr. Hale had just returned to the United States after military service and was depressed and angry. (V8/T449,450) In the Whitley incident Mr. Hale described getting the tire filled and then driving past the car onto a dirt road. He then touched her breasts "sexually" (the doctor added the word "sexually"). (V8/T466, 467, 536) At that time Mr. Hale was unemployed, having problems finding a new job, and having problems with his wife. (V8/T465, 466) Dr. Benoit spoke with two of the victims because he wanted to know how this had affected their lives and what were their symptoms (objection, trial court struck, mistrial denied). (V8/T446-448)

In Mr. Hale's interview, he talked about other sex-related offenses. The doctor considered voyeurism (looking into windows/loitering and prowling) to be sex-related, and Mr. Hale

talked about several of these acts--8/82, 1/91. In 11/82 Mr. Hale talked about having drinks with a woman, going for a walk, the woman losing her balance, and then falling on top of her. He changed his story to walking behind a woman he did not know, putting his hand on her shoulder, and she fell. (V8/T457-463) In 1984 Mr. Hale gave a ride to Heidi Rusfall; and when he went to open the broken (not locked) door by reaching over her, he accidentally touched her breast. Then Mr. Hale said he intentionally touched her breast, and he later said he punched her in the breast. The doctor spoke to Ms. Rusfall, but she did not testify. (V8/T463-465)

Although Mr. Hale had not committed a sexually violent offense since 1987, the doctor considered the 1991 loitering and prowling offenses sex-related. In 1973 Mr. Hale told Ms. McCown he had been watching her and her husband have sex, so the doctor considered all of the loitering and prowling sex-related based on that. (V8/T498-500,567) The doctor had no specific facts on the loitering and prowling. (V8/T468) The doctor knew Mr. Hale had gone to prison for the 11/87 offense and for the dealing in stolen property offense, but he also knew there were gaps when Mr. Hale was not in prison. At one point Mr. Hale was in Louisiana, and "God knows what happened there." (V8/T556,557)

Dr. Benoit gave Mr. Hale some tests, but there were problems with these tests. The MMPI results were normal, but the doctor rejected these results because he believed Mr. Hale was not normal and should not have scored normal. (V8/T471) Mr. Hale was given the MMPI-2 test by the Dept. of Corrections and got consistent results with the test given by the doctor. The doctor said the MMPI-2 test

results were also invalid based on Mr. Hale's history. Dr. Benoit admitted it was improper to call MMPI-2 results invalid just because he did not agree with the results, but he maintained the results were not valid. (V8/T510, 511) On direct examination Dr. Benoit said his results from the MSOST-R scored Mr. Hale in the 87%-reoffend-within-6-years range. (V8/T489) On cross-examination he admitted giving Mr. Hale the MSOST once and the revised MSOST-R twice, and this time the doctor said he scored Mr. Hale at 5 which meant only 60% of the people reoffend for those who score 5 or higher up to 17. After admitting he had been "confused" as to how to interpret the score, it was pointed out that in Minnesota (where the test was developed) they have 3 categories -- low, moderate, and high. A 7 is considered moderate, and the revised table shows a score of 4-7 is in a 45% rate to reoffend. That 45% is based on averaging 4-7, and there is no specific percentage on what 5 is. (V8/T513-517) Even though the cut off in Minnesota is 15 and Mr. Hale is only a moderate risk under the tables, the doctor believes even low scores present a significant risk. He also noted that in Florida there is no moderate classification as in Minnesota. (V8/T544-547) On the RRASOR test Mr. Hale scored 4 which has a recidivism rate of 32.7% in 5 years. In the doctor's opinion you need 51% for recidivism to be more likely. A 32.7% is only a moderate risk. (V8/T511-513) He admitted he did not give Mr. Hale the Psychopathy Checklist that measures empathy, callousness, glibness, grandiose, self-worth, lying, manipulative, and early behavior problems; but Dr. Benoit still gave the opinion that Mr. Hale has no conscience based solely on clinical judgment. (V8/T518,519) He admitted that denial and lack of victim empathy are

not risk factors for reoffending, but he believed having no conscience is a risk factor. (V8/T522)

In Dr. Benoit's opinion because of his substantial criminal history and number of documented sex offenses, Mr. Hale had a persistent and pervasive disorder that qualified him for a personality disorder with anti-social features.[2] This disorder is a long-term pattern that is persistent and encompasses many facets of functioning. Many of the incidents Mr. Hale described were impulsive; and when you combine committing crimes with impulsiveness, you have a personality disorder with a charge. Mr. Hale does not handle stress appropriately. Looking at the whole picture--number of incidents, difficulty controlling his behavior even though he has been to prison several times--Mr. Hale is a high risk for another sexually related offense. He could be amenable to treatment, but it would take some time because it's a long-standing pattern like a habit. (V8/T472-479) Dr. Benoit considers Mr. Hale a menace to the health and safety to others because of his propensity to commit acts of sexual violence, and he needs long term care and treatment in a secured environment. (V8/T487,488)

Dr. Gregory Pritchard, a licensed Psy.D in psychology (as opposed to the traditional Ph.D in philosophy) in Florida since 1996, also testified for the State. He has worked at Florida State Hospital in Chattahoochee since 1994. He has evaluated about 40 people for purposes of the Act, and he recommended commitment for about 40%

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[2] The doctor believed Mr. Hale came closest to an anti-social personality disorder, but that diagnosis requires evidence of problems by the age of 15. Because this did not exist, the classification is "NOS" (not otherwise specified). (V8/T525)

of those. Prior to interviewing Mr. Hale, he had only evaluated 6 or 7 others. (V9/T601-608,650) He received some training after he evaluated Mr. Hale. (V9/T606,649,653)

At the time of the interview he told Mr. Hale there would not be any confidentiality and this was for commitment after release; he did not say what Mr. Hale said could be used against him in court. (V9/T648,649) He spoke with Mr. Hale for about 90 minutes. Without giving specifics the doctor said Mr. Hale talked around his past crimes and gave a different version in some cases that showed he was minimizing and denying events in order to show himself in a more favorable light. Mr. Hale was not being honest and taking responsibility, he was trying to con and manipulate people, and he was in denial about his problems without motivation to change. (V9/T611,612,635-637) Dr. Pritchard also interviewed 3 victims--McCown, Whitley and Queen--in order to verify what was in the police reports, to know how they felt, and to see if they feared for their lives--in spite of his presumption that the information in the file was reliable. (V9/T612-614)

The doctor went through Mr. Hale's criminal history year-by-year (1973, 1982, 1984, 1987, 1990, 1991) and considered all to be sexually motivated with the possible exception of the 1990 violation of community control. He concluded Mr. Hale was not learning as he was making the same mistakes and was not listening to authority or abiding by laws. (V9/T619-635) In Dr. Pritchard's opinion Mr. Hale meets the commitment criteria under the Act. He has had multiple convictions for sex offenses spanning 2-3 decades, he has a personality disorder, and he is likely to reoffend. The doctor diagnosed Mr.

Hale with an anti-social personality disorder, a provisional diagnosis that has a certain degree of diagnostic uncertainty; but because Mr. Hale did not have symptoms prior to becoming 15, the doctor had to change this initial diagnosis of anti-social personality disorder to personality disorder NOS. Mr. Hale has symptoms of a specific disorder, but does not meet all the criteria; so the personality disorder is not a specific one. (V9/T614-618) Mr. Hale's past treatment has not benefitted him since he committed new crimes after treatment. Mr. Hale has an impulse control problem--when his is having a bad day, he does things on the spur of the moment. Stress is also a factor. Mr. Hale has no long-term plan for a job. (V9/T637-640)

Dr. Pritchard did use some tests. He agreed actuarial instruments are better than strict clinical judgment in isolation. One of the most difficult things to do in clinical work is to predict re-offending. Clinical judgment alone is not used to predict outcome. Even though the reliability of the MSOST[3] is low (between 15-30%), the test is still better than clinical judgment. Clinical judgment is nothing more than mere chance of predicting future sexual reoffending. (V9/T658,659) The VRAG is used, but it predicts violence as opposed to sex reoffending. It has a manual, but Dr. Pritchard did not use it. The PCLR is a score that plugs into the VRAG, and Mr. Hale scored 30.5 with the cutoff being 30. However, the doctor omitted points for Mr. Hale not having juvenile problems. That would have lowered the score on the PCLR which in turn would

[3] On the MSOST test (which was replaced by the MSOST-R) Mr. Hale scored 46 and the cutoff is 47. (V9/T656)

have affected the VRAG. The doctor also used Mr. Hale's statements when he did the PCLR, but the manual says self-reporting statements cannot be used to diagnose this disorder reliably. Mr. Hale scored 7 on the VRAG, which goes in the 7-13 range. If there was a mistake, the VRAG would be incorrect. In a range of 7-13 there is a 44% of violent reoffending within 7 years and 58% within 10 years. (V9/T659-670) But even "if" Dr. Pritchard scored Mr. Hale incorrectly on the VRAG and the range changes, the doctor refused to change his opinion Mr. Hale was likely to reoffend. (V9/T670,671) On the RRASOR Mr. Hale scored 4/6 which has a recidivism rate of 32.7% after 5 years and 48.6% after 10 years. In the doctor's opinion 48.6% is a high likelihood. (V9/T642-644)

On Mr. Hale's behalf his brother, sister, and mother testified. They never knew Mr. Hale to have any problems with violence or acting up at school when he was under 15. The family stated they would be supportive upon Mr. Hale's release, and his brother said he could get a job for Mr. Hale. (V10/T704-715; V11/T816-825)

Dr. Ray Lusk, a clinical psychologist licensed in Florida in 1986, has been dealing with sex offenders for about 30 years. He evaluates sexual offenders and sex victims, and he has dealt extensively with anti-social personality disorders. He was on the Commission Against Sexual Assault as a volunteer to help sexual assault victims, has done extensive work in sexual abuse and sexual offender counseling and evaluation, has contracted with the Dept. of Children and Family Services to do sexual violence assessments under the Act, and has done 19 assessments. Out of those 19, he recommended 8 for commitment. Although hired by the Public Defender's Office to

evaluate Mr. Hale, he used the same procedures when doing evaluations for the State. (V10/T715-725)

In general Dr. Lusk noted the following: Dr. Epperson of the Minnesota test says you only need to get the top 16% of reoffenders to get to the worst. Dr. Hanson (another test) says don't look at any other crimes but sex crimes, because the studies clearly show other crimes don't help with the prediction of sexual recidivism. The doctor should not talk to the victims for two reasons: (1) it is not important to do so because it does not give information as to predictors, and (2) the doctor is human and may be affected by emotion. (V10/T726,727,754)

Dr. Lusk's diagnosis was Mr. Hale has a personality disorder NOS. In his opinion there is no diagnosis of a mental abnormality that would predispose Mr. Hale to be in a high risk group of sexual reoffending. Even though Mr. Hale has a personality disorder, it does not predispose him to reoffend. (V10/T738,739,751) On the Psychopathy Checklist Revised Mr. Hale scored 20, and the cutoff is 30 with 30 or above meaning probably a psychopath. When Mr. Hale was interviewed, he showed an appropriate level of anxiety. Mr. Hale appeared forthcoming and honest--including taking personal responsibility for things he had done in the past. When the prosecutor ran through all of Mr. Hale's criminal history on cross-examination, the doctor repeated what Mr. Hale had said about each incident; and Mr. Hale's version was the same as in the reports--the doctor saw no minimization. (V10/T740-746,759-766) It is, however, normal for a person being interviewed when something is at stake to present themselves in the best light. (V10/T799)

Dr. Lusk looked at other factors that would either raise or lower the risk of reoffending, and he believes the risk has been reduced: Mr. Hale has not been convicted of a sex offense since 1987; he is 48, and at that age the risk of reoffending goes down; his worst sex crime conviction was in 1972--27 years ago; since 1972 his crimes have not grown in intensity; and all of the factors--the instruments, the diagnosis, other factors, and the literature--are consistent. Mr. Hale had not had a DR since 1978; and if he had a real anti-social personality, he would have more DRs since anti-social personality types do not cooperate even in confined situations. Mr. Hale does not meet the criteria for high risk category. (V10/T748,751-754)

As far as testing went, the results and the literature and the doctor's opinion put Mr. Hale in a moderate range. On the RRASOR the doctor gave Mr. Hale a 4 which meant 32.7% recidivism in 5 years and 48.6% in 10 years. On the MSOST-R Mr. Hale scored a 5, and the author of the test says the cutoff is 13--below that is below high risk. Those who score between 4 and 7 fall into a moderate range. Mr. Hale was given the MMPI-2 in 1977, and the scores on personality factors were all within normal limits. The MMPI-2 test given in 1999 had consistent results. Although this test has nothing to do with predicting sexual recidivism, it can be used to look for mental abnormality. (V10/T729-736)

As far as Mr. Hale's prior crimes were concerned, stress and depression were only factors in two of the cases. There were some impulsive factors, but not enough for there to be an impulsive control disorder. Mr. Hale's anti-social behavior was shown in his

criminal behavior in 1994 and 1997, but this was not sexual criminal behavior. Anti-social conduct has no predictive ability in terms of sexual crimes. In fact, Mr. Hale's risk factor may be even lower because he is not a pedophile; and this was not taken into account. (V10/T767-798)

SUMMARY OF THE ARGUMENT

Mr. Hale was denied due process when his jury was not instructed on volitional control. Kansas v. Crane, 534 U.S. 407 (2002), has added a fourth element to Ryce Act cases. The jury must be instructed as to Mr. Hale's serious difficulty in controlling his sexually dangerous behavior. In Mr. Hale's case volitional control was hotly contested; therefore, the harmless error analysis must be resolved in Mr. Hale's favor.

The record fails to show competent, substantial evidence of clear and convincing evidence Mr. Hale's likelihood to reoffend. The Act does not apply to Mr. Hale since he was not incarcerated for a sexually violent offense at the time the Act was enacted or the petition for commitment filed. The plain meaning of the statute is that it applies to those incarcerated for a sexually violent offense. If the meaning of the statute is not clear, then it should be constructed not favorably to Mr. Hale.

Prior bad acts were used extensively in case, but they should have been excluded as irrelevant--too remote and not similar. Even

if there was some relevance to these remote, dissimilar bad acts, their prejudice outweighed their probative value.

There were several areas of prejudicial material throughout the trial: the prosecutor and State witnesses made highly prejudicial statements about Mr. Hale.

ARGUMENT

ISSUE I

WHETHER THE JURY INSTRUCTIONS ARE INADEQUATE BY NOT REQUIRING A FINDING OF A SERIOUS DIFFICULTY IN CONTROLLING DANGEROUS BEHAVIOR?

When the trial court read the jury instructions, it used the standard instruction with the standard definitions on what "mental abnormality" and "likely to engage" meant:

> Statement of the case. This is a civil case filed by the Petitioner, the State of Florida, against the Respondent, William Charles Hale. The State alleges the Respondent is a sexually violent predator and should be confined in a secure facility for long-term control, care and treatment.
>
> To prove the Respondent, 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 is of such a degree as to pose a menace to the health and safety of others.
>
> "A sexually violent offense" includes sexual battery or an attempt, conspiracy, or criminal solicitation of, or to commit a sexually violent offense.

(V11/T949,950; emphasis added.) Counsel for Mr. Hale was concerned about the issue of volitional control, and had asked the trial court for an instruction that would establish the jury's need to find Mr. Hale's mental condition made it "difficult, if not impossible for him to control his dangerous behavior." This requested language comes

from Kansas v. Hendricks, 521 U.S. 346 (1997). Mr. Hale's trial was in November 1999 -- prior to issuance of Kansas v. Crane, 534 U.S. 407 (2002). Mr. Hale also based his request on due process. When Mr. Hale's request was denied, he renewed his objection immediately after the jury instructions were read. (V11/T805,831-834,837,958)

Unlike the situations in Westerheide v. State, 831 So. 2d 93 (Fla. 2002), and Hendricks where volitional control was not a issue (Hendricks testified he couldn't control his urge to molest children -- Hendricks, 521 U.S. at 355), Mr. Hale did hotly contest his volitional control. His most serious sexual crimes were extremely old (26 and 12 years at the time of the trial -- 1973 and 1987), were decreasing in intensity, Mr. Hale was now over 40, he was not a pedophile, he'd been out of custody, Mr. Hale was out of prison for a substantial period of time before committing the non-sexual offense of dealing in stolen property (the offense for which he was in custody when the commitment proceedings were filed) during which time he had not been charged with a crime, and he had an extremely qualified expert who testified Mr. Hale was not likely to reoffend sexually. Thus, volitional control was an important issue in this case; yet, the jury was not told they had to make a finding of serious difficulty in controlling dangerous behavior that is more dangerous than a typical criminal recidivist in Mr. Hale's case (as per Crane). They were told about the mental condition predisposing the person to commit sex offenses and the propensity to commit such sexual acts of violence posed a menace to other, but they were not told they had to find Mr. Hale had a serious difficulty in controlling his dangerous behavior that was more dangerous than a typical criminal recidivist.

The jury instructions in Mr. Hale's case were not adequate, and he's entitled to a new trial.

Mr. Hale's requested jury instruction came from Hendricks; but since Mr. Hale's trial, the United States Supreme Court has issued the Crane decision which toned down the level of proof needed as to volitional control. Whereas Hendricks spoke of total or complete lack of control, Crane stated that was not the standard. Instead Crane required proof of serious difficulty in controlling behavior; however, it also noted that the difficulty in controlling said behavior must be sufficient to distinguish the individual from the dangerous but typical recidivist convicted in an ordinary criminal case:

> Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." 521 US, at 360....That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence" — functions properly those of criminal law, not civil commitment. Id. at 372-373 .... 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.
>
> 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.

Crane, 534 U.S. at 412-413. (Emphasis added.) The Crane Court vacated the judgment of the Kansas Supreme Court and remanded the case for further proceedings.

Since Crane, other states ordered new trials when the jury instructions did not adequately address volitional control.

In In re Thomas, 74 S.W. 3d 789 (Mo. 2002)(en banc), the Missouri Supreme Court examined the commitment of an individual who had been convicted of several forcible sexual offenses against children. The court held that "for all relevant purposes, the Kansas and Missouri sexual predator statutes are the same." Id. at 790. Citing to Hendricks and Crane, the court concluded that the jury instructions given by the trial court were insufficient because they did not direct the jury to "distinguish the dangerous sexual offender whose mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist." Id. at 791-792. The court held that a jury instruction requiring a finding that `the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined,' is not enough because it did not require the jury to `distinguish the dangerous sexual offender whose mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist'." [Footnotes omitted.] Id.

The Iowa Supreme Court agreed in In re Detention of Barnes, 658 N.W. 2d 98 (Ia. 2003). The court held the:

> statute must be interpreted to require a showing of a serious difficulty in controlling behavior, as the Supreme Court held in Crane. The Missouri Supreme Court has suggested an instruction embodying the lack-of-control requirement, and we suggest this as an instruction to be used in Iowa cases [citing the instruction in Thomas v.

> Missouri, discussed supra]. Iowa Code section 229A.2(4) in defining "mental abnormality" states that it means an emotional or "volitional" capacity predisposing the person to commit sexually violent offenses. By interpreting this section as requiring a showing of a serious difficulty in controlling behavior, we are not changing the statute but rather clarifying the language already in it. Because the court's instruction did not embody this concept, we reverse and remand for a new trial.

Barnes, 658 N.W. 2d at 101. In In re Spink, 48 P.3d 381 (Wash. App. 2002), the Court of Appeals of Washington considered a commitment case where the record reflects that the trial court affirmatively omitted a jury instruction to the effect that a lack of ability of behavior was required to commit the respondent. The Court of Appeals reversed because no "lack-of-control" determination was made by the trial jury; the defect was found to be constitutional and a new trial was required. The appellate court rejected the State's argument that the required lack-of-control determination was a legal question for the court rather than an issue of fact for the jury. The Washington appellate court reasoned that by emphasizing that the phrase "lack of control" did not have "a particularly narrow or technical meaning," the Crane majority had implied that the phrase was to be applied by a lay jury rather than a judge. The court observed that the Crane dissenters, Justices Scalia and Thomas, clearly thought the Crane majority was requiring a lack-of-control determination by the trier of fact; they objected in part because they thought it would be too difficult to instruct a jury as the majority was requiring. The Spink court concluded that the Crane majority had ruled that lack of control is a constitutionally required element of the cause of action, and that a trier of fact must make the lack-of-control determination.

The New Jersey Supreme Court reached a similar conclusion in In re Commitment of W.Z., 801 A.2d. 205 (N.J. 2002). The court observed that "[o]ur S[exually] V[iolent] P[redator] A[ct] is essentially the same as the Kansas statute[4] examined in Hendricks in that it 're-quires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated.' Hendricks[,] 521 U.S. at 357." Id. at 215. Citing to Hendricks and Crane, the court observed that "inability to control one's sexually violent behavior is the very essence of the SVPA". Id. at 216. Therefore the court con-cluded that "to support involuntary commitment of a sex offender under the SVPA, the State must prove by clear and convincing evidence that the individual has serious difficulty controlling his or her harmful sexual behavior such that it is highly likely that the person will not control his or her sexually violent behavior and will reoffend." Id. at 218.

In People v. Masterson, Case No. 93579 (Ill. Oct. 2, 2003), the Illinois Supreme Court found their jury instructions so lacking under their Sexually Dangerous Persons Act (SDPA) that they ordered a new hearing for Mr. Masterson with revised standards so that "the parties will have a full and fair opportunity to adduce evidence pertinent to the applicable standards ...." Id. Changing their instructions to "ensure compliance with Crane," the Illinois Supreme Court made two changes:

> [M]ental disorder...mean[s] a congenital or volitional capacity that predisposes a person to engage in the com-

[4] The New Jersey statute does not, however, provide for trial by jury. See §§ 30:4-27.28-30:-27.31, N.J. Permanent Statutes.

> mission of sex offenses and results in serious difficulty controlling sexual behavior.
>
> . . .
>
> [A] finding of sexual dangerousness ... must hereafter be accompanied by an explicit finding that it is "substantially probable" the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined.

Id. (emphasis added). Thus, Illinois has added in the Crane requirement concerning serious difficulty in controlling sexual behavior and it has given a solid definition of future dangerousness. Although Florida's jury instruction has a similar definition for "mental abnormality" as Illinois for "mental disorder," Florida does not have the additional statement concerning serious difficulty in controlling sexual behavior. Florida also defines its degree of future dangerousness as "likely to engage" which is further defined as the propensity to commit violent sex acts so as to pose a menace to the health and safety of other, whereas Illinois defines future dangerousness as "substantially probable" the person will commit sex crimes in the future if not confined. In coming to this conclusion, the Illinois Supreme Court took particular note of New Jersey's In re Commitment of W.Z. which also added in the requirement of showing "serious difficulty" in controlling dangerous sexual behavior.

This Court's decision in Westerheide has not yet settled the issue in Florida. In Westerheide this Court considered how, in the light of Crane, a trial court must instruct a jury in a post-sentence civil commitment case. Three justices (Harding, SJ., joined by Wells and Lewis, JJ.) held that "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." Westerheide, 831 So. 2d at 107. Three justices (Pariente, J., joined by Anstead, CJ., and Shaw, J.) clearly and strongly disagreed.

> Because it is the jury as the fact-finder who must make these critical determinations, I also disagree with the majority's conclusion that the jury is not required to be explicitly instructed on the State's burden of proof regarding the standard for commitment of `serious difficulty in controlling behavior.' Majority op. at 107. The jury instructions must contain clear guidance so that the jurors understand that they are deciding that the defendant is a 'dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment rather than a dangerous but typical recidivist convicted in an ordinary criminal case. Crane, 122 S.Ct. at 870.

Id. at 115. Justice Quince took the position that the inability of Westerheide to control his behavior had been proven. However she did not address the propriety of the jury instructions at all. Concurring "only in the result" with Justices Harding, Wells and Lewis, she held that

> [w]hile I agree with much of Justice Pariente's dissent, I cannot agree that the State did not demonstrate that Westerheide has serious difficulty in controlling his behavior, as that phrase has been used by the United States Supreme Court in Kansas v. Crane, 122 S.Ct. 867 (2002). The mental health experts testified that sexual sadism, Westerheide's diagnosis, is a chronic and progressive disease that leads to other experimentation and increases to life-threatening behavior. Indeed the experts indicated Westerheide also suffers from an antisocial personality disorder, and he has problems conforming his conduct to that of others in society.

Westerheide, 831 So. 2d at 113-114. Thus in Westerheide, this Court was equally divided in opinion as to the requirement of a jury instruction addressing proof of serious difficulty in controlling behavior. Harding, SJ., Wells and Lewis, JJ., held that a specific instruction was not required. Pariente and Shaw, JJ., and Anstead,

CJ., held that a specific instruction was required. Quince, J., (concurring in result only) did not address the subject of jury instructions, but relied on a harmless error analysis.

Because there was no majority opinion in Westerheide regarding jury instructions, this issue remains unresolved. The law is that when an appellate court is evenly divided, the decision of the lower court stands affirmed. See, e.g., Powell v. Rodriguez, 145 Fla. 495, 200 So. 700, 701 (Fla. 1939); Johnson v. Landefeld, 138 Fla. 511, 512, 189 So. 666 (Fla. 1939). However the Fifth District in Westerheide, 767 So. 2d 637 (Fla. 5th DCA 2000), did not address the issue of a jury instruction regarding "serious difficulty in controlling behavior." Writing in September 2000, the district court did not have the benefit of the opinion in Crane, which issued in January 2002. The district court did consider the issue of proper jury instructions, but only in the context of the meaning of the word "likely." Westerheide, 767 So. 2d at 655-656. The requirement for a jury instruction addressing control of behavior was not discussed at all.

The First District, however, has addressed the jury instructions in light of Crane; and it has found Florida's present instructions so lacking as to require new trials.

In Hudson v. State, 825 So. 2d 460 at 471 (Fla. 1st DCA 2002), the First District ruled that in light of the Supreme Court holding in Crane, the state must prove that a person has serious difficulty in controlling his behavior in order to be legally sufficient to satisfy the demands of substantive due process. The court observed that at the time of Hudson's trial (i.e. prior to the decision in

Crane), evidence regarding Hudson's ability to control his dangerous behavior would not have been required to commit him. "Because this fourth element was not required when appellant was tried, the state offered no evidence, and the trial court made no finding, regarding it." Id. (emphasis added). However the court observed that in Crane the Supreme Court further defined the nature of the findings necessary to justify confinement and added a new requirement – that the person was suffering from "serious difficulty in controlling behavior." Id., citing Crane, 122 S.Ct. at 870 (534 U.S. at 413). The court also observed that appellate courts are generally required to apply the law as it exists at the time of appeal, rather than that which existed when the case was tried;[5] so it correctly ruled it was constrained to apply the law as set out in Crane. Hudson, 825 So. 2d at 471-472. Therefore, the court concluded that in such a situation, where the insufficiency is wholly attributable to a subsequent change in the law, the party adversely affected by the change in the law is entitled to an opportunity to supply the missing proof upon a retrial of the case.[6] Accordingly, the court held that the state should be entitled to an opportunity to prove, at a new trial, that

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[5] Citing Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978); Clay v. Prudential Ins. Co. of Am., 670 So. 2d 1153, 1154 (Fla. 4th DCA 1996); City of Miami v. Harris, 490 So. 2d 69, 73 (Fla. 3d DCA 1986) (on rehearing).

[6] Citing Harris, 490 So. 2d at 74. Accord Winter Park Golf Estates, Inc. v. City of Winter Park, 114 Fla. 350, 153 So. 842 (1934). See also Yates v. St. Johns Beach Dev. Co., 122 Fla. 141, 143, 165 So. 384, 385 (1935) (when there is a supervening change in the law, an appellate court may simply vacate the lower court's decision and remand so that the trial court might deal appropriately with the case in light of the change).

appellant suffers from serious difficulty in controlling his dangerous behavior, as required by Crane. Hudson, 825 So. 2d at 472.

At the trial of Converse v. Dept. of Children and Families, 823 So. 2d 295 (Fla. 1st DCA 2002), (also prior to Crane) no evidence was presented and no finding was made that Converse lacked control over his sexually dangerous behavior. The Converse court recited the contemporaneous objection rule, but then noted "the Florida Supreme Court has recognized an exception to the requirement of a contemporaneous objection to a jury instruction if the error results in a denial of due process." Id., at 296. The court observed that Crane, 534 U.S. at 412, expressly rejected the state's argument that the Constitution permits commitment of persons alleged to be sexually violent predators without any lack-of-control determination. Therefore, the Converse court ruled that "the omitted finding in the case at bar was basic to [Converse's] commitment and its omission amounts to a denial of due process...." Converse, 823 So. 2d at 296-297. The court concluded that the failure of the trial court to advise the jury of the lack-of-control requirement was fundamental error because it was a denial of substantive due process. Id. at 297.

In White v. State, 826 So. 2d 1043 (Fla. 1st DCA 2002), the First District again addressed the same issue and again reversed for a new trial citing Hudson and Crane.

Even the Second District has indicated second thoughts about the jury instruction issue since its opinion in Hale. In Lee v. State, 854 So. 2d 709 (Fla. 2d DCA 2003), the Second District certified a question as to the need for a jury instruction that requires the State to prove the individual has serious difficulty in control-

ling their dangerous behavior. The Second District certified this question because of (1) the division of this Court in Westerheide on this issue, "(2) the significance of this issue and its potential impact in numerous cases in the Act, and (3) the fact that liberty interests are at stake in commitment proceedings ...." Lee, 854 So. 2d at 716. In his concurring opinion, Judge Casanueva specifically found that Crane had created a fourth element to the Ryce Act and the jury instructions had to be changed to reflect a determination of whether the offender has serious difficulty in controlling their behavior. Lee, 854 So. 2d at 719.

More recently in Gray v. State, 854 So. 2d 287 (Fla. 4th DCA 2003), the Fourth District certified the same question as that in Lee. Judge Klein's concurring opinion expresses a concern for what the U.S. Supreme Court will do should it get this issue from Florida:

> Trial judges, in my opinion, would be well advised to give the instruction, even though Westerheide does not require it at the present time, because the United States Supreme Court has not yet addressed jury instructions in these cases. I don't see how anyone could object to such an instruction, since it would be consistent with the burden of proof established in Crane, and it could obviate the need for a new trial if the United States Supreme Court ultimately holds that such an instruction is necessary.

Gray, 854 So. 2d at 288.

In view of the plain language of Hendricks and Crane, the construction of Crane by the First District and subsequent opinions from the Second and Fourth Districts, and opinions by foreign state courts, this Court should order the jury be instructed as required by Crane. Nothing in Westerheide stands contrary to that requirement. All of the justices in Westerheide agreed that "serious difficulty in controlling behavior" is required to civilly commit an individual as

a sexually violent predator. Westerheide, 831 So. 2d at 107, 113, 114.

In Mr. Hale's case this issue was preserved,[7] and there can be no question as to the harm in failing to give a proper jury instruction on what amounts to a fourth element. Mr. Hale's present ability to control his behavior as far as future sexual criminal acts were concerned was the issue in this case, and Mr. Hale hotly contested the State's claims. The jury needed to be instructed on their need to find Mr. Hale had a serious difficulty in controlling his behavior, but they were not. The standard jury instructions need to be changed to meet the requirements of Crane, and Mr. Hale is entitled to a new trial.

ISSUE II

DID THE TRIAL COURT ERR IN NOT DISMISSING THE CASE AGAINST APPELLANT?

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[7] Florida courts have long recognized that only "fundamental error" can be considered on appeal without objection in the lower court. Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). In that civil case, the Florida Supreme Court defined fundamental error in the trial context as "error which goes to the foundation of the case or goes to the merits of the cause of action." Id. More recently the Court again addressed "fundamental error" as error that "goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998), cited in Maddox v. State, 760 So. 2d 89, 95-96 (Fla. 2000). For an error to be so fundamental that it can be raised for the first time on appeal, the error must be equivalent to a denial of due process". Ray v. State, 403 So. 2d 956, 960 (Fla. 1981). In Mr. Hale's case, the requested instruction was similar to that ordered in In re Crane, 7 P.3d 285 (Kan. 2000), but rejected in Crane as going too far. Crane modified the proposed jury instruction from "difficult, if not impossible" to "serious difficulty". Mr. Hale's request should be considered a preservation of this issue. If not, the error is fundamental.

There are two aspects to this issue: (1) whether the evidence was sufficient to commit Mr. Hale under the Act, and (2) whether the Act even applied to Mr. Hale.

A. The evidence was not sufficient to commit Mr. Hale.

Defense counsel attacked the sufficiency in this case by pointing out the complete lack of credibility and evidence presented by the State's two doctors and the State's failure to show more than just a possibility of future risk. (V10/T696-702; V11/T833,834;T12/1009) The standard of review is the record fails to show competent, substantial evidence that would have allowed a jury to conclude clear and convincing evidence existed to indefinitely civilly commit Mr. Hale as a sexually violent predator. See Bowen v. State, 791 So. 2d 44 (Fla. 2d DCA 2001). As noted in Westerheide v. State, 767 So. 2d 637 at 648,649 (Fla. 5th DCA 2000):

> In essence, the Act requires that the jury find by clear and convincing evidence that the person is a violent sexual predator who has a mental abnormality that predisposes him or her to commit sexually violent offenses. Moreover, they must determine that he is likely to reoffend if not confined in a secure facility because his or her propensity to commit acts of sexual violence makes the person a menace to the health and safety of others. If the evidence fails to establish that the person is a violent sexual predator in need of secure commitment, that person will not be civilly committed.

"Likely" to reoffend means "probable rather than merely possible. Thus Petitioners may not be committed upon the mere possibility of future dangerousness." Id. at 652.

In Mr. Hale's case the State presented 3 women who testified to facts that occurred over 26 and 12 years ago. The rest of the State's case consisted of two doctors, psychologists, with relatively little experience in the area of civil commitment and risk assess-

ment. Their lack of experience was made clear when it came to the testing and interpreting of results. Both doctors made serious mistakes in scoring Mr. Hale and testifying as to what those scores meant by erring on the side least favorable to Mr. Hale. If it was possible to slant the results against Mr. Hale, that is what the State's doctors did. For example, Dr. Benoit (who was "confused") claimed at his disposition that a score of 5 on a certain test meant a 60% chance of reoffending; however, this statement was wrong as the doctor admitted at trial. In reality, anyone scoring from 5-17 was lumped in the 60%-chance-of-reoffending group with no breakdown given for those who score only 5. (V8/T514) Dr. Pritchard skewed his test scores on the PCLR which affect the marginal score on the VRAG (30.5 where the cutoff is 30) by omitting points for no juvenile problems. The doctor also used Mr. Hale's statements on this test when such statements were clearly not to be used according to the manual--a manual the doctor did not bother to use. (V9/T659-670) Whereas "likely" to reoffend should mean greater than a 50% chance,[8] as agreed to by Dr. Benoit, according to Dr. Pritchard a score in one test of 48.6% likely recidivism after 10 years (32.7% after 5 years) was a high likelihood. (V9/T642-644) Of course, most of the test results did not establish a likelihood of recidivism; so the doctors rejected the results they did not like. Dr. Benoit admitted it was improper to reject the MMPI-2 results, given on 2 separate occasions with consistent results, because he believed the results to be invalid. Still he rejected them. When all of Dr. Pritchard's

[8] See Judge Sharp's concurring opinion in Westerheide, 767 So. 2d at 660.

scoring errors were pointed out to him, he simply declared that the ranges did not matter--his opinion on Mr. Hale being likely to reoffend would not change. Dr. Pritchard made this statement after having testified that tests are better than strict clinical judgment, and clinical judgment alone is not used to predict re-offending. Clinical judgment is nothing more than guesswork or mere chance in predicting future sexual reoffending. (V9/T658,659)

By rejecting the test results, the State's doctors were relying on pure clinical judgment which translated into their own biased opinions. Their bias came out strongly against Mr. Hale: In Dr. Benoit's opinion touching a breast without permission and looking into a window constituted sexually violent offenses. This was especially applicable to Mr. Hale's 1982 and 1991 loitering and prowling cases where no facts were on the record, but Dr. Benoit connected Mr. Hale's 1976 statement to Ms. McCown about watching through a window years later to totally different and unrelated offenses. After telling Mr. Hale not participating in the interview process would mean a recommendation of commitment and that Mr. Hale's statements would be given to the prosecutor, he holds it against Mr. Hale for describing himself in a favorable light. Both doctors spoke to the victims to see how their lives had been affected (something Dr. Lusk noted was totally irrelevant yet damaging to the doctor's opinion because of its emotional affect). Dr. Benoit insinuated Mr. Hale's continued bad conduct in Louisiana even though no one knew anything about Mr. Hale's time in Louisiana ("God knows what happened there." V8/T566,567) Dr. Pritchard also focused on Mr. Hale's

criminal history and added points for a juvenile history that did not exist.

The bottom line for the State's two doctors was Mr. Hale's prior criminal history--that was the sole basis to find Mr. Hale's likelihood to reoffend. On the other hand, Dr. Lusk's expert testimony not only pointed out all the problems inherent to the State's doctors' evaluations but gave a well-reasoned diagnosis/opinion on Mr. Hale's risk assessment based on tests and other important factors--Mr. Hale's age, sex crimes have decreased in intensity with the last one committed in 1987, no crimes involving pedophilia. Dr. Lusk also had an impressive history working with sex offenders and victims and assessing risk. The State's doctors' contradicted themselves to the point where they have nothing to contribute to this case, and their testimony should be rejected. See Jackson v. State, 511 So. 2d 1047 (Fla. 2d DCA 1987), wherein the State's case came down to some hairs (which did not result in absolute certainty identification) and a bite mark. The State's expert in forensic odontology and bite-mark analysis was contradictory--first saying they matched and then saying it was not a positive match and finally saying he hoped the defendant wasn't arrested on this bitemark. This contradictory testimony combined with the testimony of the defense expert in forensic odontology that cast considerable doubt on the State's expert and resulted in this Court rejecting the bitemark as evidence. This same thing happened in Mr. Hale's case and should also result in the rejection of the State's contradictory and highly refuted expert witnesses. The record fails to show competent, substantial evidence of clear and convincing evidence of Mr. Hale's

likelihood to reoffend. The State failed to show a probability of reoffending, as opposed to a mere possibility of reoffending.

The evidence is insufficient to commit Mr. Hale under the Act, and he must be released.

B. The Act does not apply to Mr. Hale because he was not in custody for a sexually violent offense when the commitment petition was filed.

Defense counsel also argued this case should be dismissed because the Act did not apply as Mr. Hale was not incarcerated for a sexually violent offense at the time the Act was enacted or the petition for commitment filed. (V2/R245-254,283,284; V3/R508-552,479-482,574-599; V12/T1007; V13/R13-83) The applicability of the Act is found in Section 394.925, Florida Statutes (1999):

> Applicability of Act. --This part applies to all persons currently in custody who have been convicted of a sexually violent offense, as that term is defined in s. 394.912(9), as well as to all persons convicted of a sexually violent offense and sentenced to total confinement in the future.

The first consideration in construing the language of a statute is its plain meaning. Capers v. State, 678 So. 2d 330,332 (Fla. 1996). Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. Id. at 332. When read as a whole the plain meaning of the statutory language, "persons currently in custody who have been convicted of a sexually violent offense," is that the Act applies to those persons now in custody for the conviction of a sexually violent offense.

The legislature amended section 394.925 (formerly s 916.45) and added the words "and sentenced to total confinement." This language clarified the meaning of the applicability of the Act. The plain

meaning of that part of 394.925 is the Act applies to those in the future who are incarcerated or in custody for the conviction of a sexually violent offense.

If this Court can not make a determination as to the plain meaning of section 394.925, then the language and purpose of the statute must be ambiguous and susceptible to different interpretations. Wallace v. State, 724 So. 2d 1176 (Fla. 1998). Where the plain meaning of the statutory language of a statute is vague or ambiguous, the Court may look to the legislative history and intent to help determine the meaning the legislature intended. Id. at 1176. Under the Act, the legislative findings and intent only address sexually violent predators "likely to engage in criminal, sexually violent behavior." Section 394.910, Florida Statutes (1999). There is no discussion or statutory language which would indicate the legislature intended the Act apply to those in custody for the conviction of a non-sexually violent criminal offenses, such as Mr. Hale's case for dealing in stolen property. The legislative history and intent indicates the legislature was merely concerned with the involuntary commitment of violent sexual predators who were incarcerated or in custody for a sexual violent offense by the legislature's finding "that the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high." Section 394.910, Florida Statutes (1999).

Since the intent of the Legislature is to apply the act to a person in custody for a sexually violent offense, it does not apply to a person in custody for dealing in stolen property. Where there has not been a sexually violent offense for which the person has been

convicted and for which that person is presently in custody, the Act is not triggered as to him or her. Therefore, based on the legislative history and intent of the Act, the Act does not apply to Mr. Hale who was in custody for a non-sexually violent offense.

Should it not be clear to this Court that the legislative finding and intent of the Act does not apply to a person in custody for a non-sexually violent offense, the policy of lenity should apply. Carawan v. State, 515 So. 2d 161 (Fla. 1987). Where neither the wording of the statute nor its legislative history points clearly to either of two possible meanings, the court applies a policy of lenity and adopts the less harsh meaning. Ladner v. United States, 358 U.S. 169 (1958):

> (W)hen choice has to be made between two reading of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite....When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.

Id. at 177-8. Here the Act should be applied to those in custody for a sexually violent offense (rather than to anyone in custody for a non-sexually violent offense who has been convicted at some time in the past for a sexually violent offense), because that is the less harsh meaning.

While it is arguable whether the Act is criminal, quasi-criminal, or civil, it is instructive as a rule of statutory construction that "criminal statutes must be strictly construed most favorably to the accused." Wallace, 724 So. 2d at 1180. Mr. Hale has been involuntarily committed. The Act must be strictly construed most favorable to Mr. Hale, so it does not apply to him.

ISSUE III

DID THE TRIAL COURT ERR IN ALLOWING EVIDENCE OF PRIOR OFFENSES AND OTHER BAD ACTS?

The entire trial was about Mr. Hale's prior convictions and allegations of other bad acts. Although defense counsel objected to the introduction of all this evidence on several grounds (relevancy because many acts were too remote and prejudice outweighed probativeness), the trial court allowed all of the bad acts into evidence. (V2/R326-333,359-384;V3/R472;V7/T357,359,367-370,379,401-409;V8/T457-459,463-465;V10/T688,689)

A. Many of the prior bad acts were irrelevant because they were too remote.

The most serious prior act was 26 years before the trial when Mr. Hale forced Ms. McCown to perform oral sex on him. A week or so later Mr. Hale grabbed Ms. Boswell, and these charges were dropped. The second most serious prior was 12 years before the trial with Ms. Whitley who was driven onto a dirt road. Although Mr. Hale grabbed Ms. Whitley and there was a struggle, Ms. Whitley escaped physically unharmed. There was a reference to a 15-year-old arrest for a sexual offense, a vague reference to harassing whores (when and how unknown), loitering and prowling approximately 17 and 8 years ago, a 17-year-old incident wherein Mr. Hale put his hand on a woman and she fell, and a 15-year-old incident where Mr. Hale punched a woman in the breast. Only McCown, Boswell and Whitley testified as to their attacks; the rest of these incidents came via the State's doctors who read police reports, spoke to Mr. Hale, and spoke to other alleged victims. It was agreed Mr. Hale had not committed a sexually violent act since 1987, and now the issue of his indefinite civil commitment-

-the likelihood of committing sexually violent acts in the future--was being raised 12 years later in 1999.

Section 394.9155(4), Florida Statute (1999), allows evidence of prior behavior if it is relevant to proving the person is a sexually violent predator. "Relevancy" should be considered a legal term of art which includes concerns for remoteness and nature of the prior behavior. Relevancy is something for the trial court to determine -- not the State's psychologists who, in their minds, decided every shred of bad prior behavior was relevant no matter how remote in time or vague in facts. As defined in Wadsworth v. State, 201 So. 2d 836 at 838 (Fla. 4th DCA 1967):

> The subject of relevancy in the law of evidence is considered an elementary concept--yet its application to a given fact in a given case is often difficult to determine as any trial judge can attest. Relevancy is not a precise concept, and its use as a test for admissibility must often rest upon the court's informed notions of logic, common sense and simple fairness.

As pointed out in Williams v. State, 110 So. 2d 654 at 663 (Fla. 1959), "...relevancy should be carefully and cautiously considered by the trial judge." While the decision on relevancy and admissibility of prior bad acts is addressed to the discretion of the trial court,[9] the erroneous admission of these prior bad acts is subject to the harmless error test set forth in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).[10] In Mr. Hale's case the trial court abused its discretion by not exercising it all--all prior acts came in no matter how remote or weak in fact. The State's use of so much irrelevant

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[9] Duffey v. State, 741 So. 2d 1192 at 1197 (Fla. 4th DCA 1999).

[10] State v. Lee, 531 So. 2d 133 at 136 (Fla. 1988).

evidence of prior bad acts had to have impacted on the jury, so a new trial is required.

Cases that discuss prior bad acts and remoteness vary in how to determine relevancy. In Duffey, 741 So. 2d at 1197, remoteness was just one aspect of relevancy to prove or disprove a material fact in issue; and when faced with a claim of the prior crime being too remote to be relevant, age should be related to how it affects the quality of the evidence (unverifiable through loss of memory, un-availability of witnesses, etc.). Frequently, remoteness is tied to similarity--if the crimes are remarkably similar so as to show a continuing pattern, then age is less of an issue. Rossi v. State, 416 So. 2d 1166 (Fla. 4th DCA 1982). If, however, the prior bad acts are not similar, "...the trial court should take into account that the 'absence of similar conduct for an extensive period of time might suggest that the conduct is no longer characteristic of the defen-dant.'" Duffey, 741 So. 2d at 1197, quoting Heuring v. State, 513 So. 2d 122 at 124 (Fla. 1987).

Other Florida cases have focused on passing length of time. In Hawkins v. State, 206 So. 2d 5 at 7 (Fla. 1968), prior crimes intro-duced at trial were committed in the same general area within 8 days and were relevant to material facts and issues. In Reed v. State, 224 So. 2d 364 at 365 (Fla. 4th DCA 1968), the court stated "...rele-vant evidence of similar crimes committed within a reasonable space in time are admissible to show intent, motive or pattern of criminal-ity." (Emphasis added.) In Crosby v. State, 237 So. 2d 286 (Fla. 2d DCA 1970), this Court thought remoteness alone does not make evidence of a prior offense inadmissible; but a few years later the Supreme

Court issued its opinion in McGough v. State, 302 So. 2d 751 (Fla. 1974). There the Court pointed out the prior crime had to be not only relevant but also "...committed within a reasonable space of time prior to the one charged." Id. at 754 (emphasis added). The Court noted in Williams the prior crime occurred only about 6 weeks before the crime at issue. The Court rejected the Second District's opinion that crimes occurring years before the charges at issue did not affect their admissibility. "Naturally, relevancy is a test, however, it is not the sole criterion for admissibility of a prior crime, and timeliness is a part of the test of relevancy." McGough, 302 So. 2d at 754 (emphasis added). In McGough 4 years was found to be too remote to be relevant to the issue of scheme or pattern, and the Court pointed to Gluck v. State, 62 So. 2d 71 (Fla. 1952), wherein a crime 3 or 4 years prior to the rape at issue was found improperly admitted. The Court also pointed to Farnell v. State, 214 So. 2d 753 at 761 (Fla. 2d DCA 1968), where this Court held reaching back to 1956 and 1957 to show a scheme or pattern "...was prejudicially unnecessary, the same as if beating on a lame horse."

The Florida Supreme Court has created an exception for remoteness when the crime charged is sexual battery on a child family member and the prior crime involves another sexual battery on another child family member. Heuring.

Other jurisdictions have also emphasized remoteness as the reason the prior crime evidence was not admissible. In Ohio prior bad acts that were 8, 13, and 26 years old were held to be too remote to be admissible. State v. Chapman, 168 N.E.2d 14 (Oh. 10th DCA 1959); State v. Strobel, 554 N.E.2d 916 (Oh. 3d DCA 1988). Strobel

noted that even if the prior acts were similar enough to have some nexus to the case at issue, the prior incidents were "...simply too remote to be admissible...." Id. at 924. In Missouri "...linkage to a common scheme or plan will cease upon passage of time between events." State v. Courter, 793 S.W.2d 386 at 390 (Mo. W DCA 1990). Missouri has held prior bad acts 7 or 8 years old and 23 or 24 years old were time barred as evidence under the remoteness doctrine. State v. Cutler, 499 S.W.2d 387 (Mo. 1973); Courter. In California, "'Remoteness' or 'staleness' of prior conduct is an appropriate factor to consider..." in an analysis of probativeness versus prejudice. People v. Harris (1998) 60 Cal. App. 4th 727, 70 Cal.Rptr.2d 689. See also People v. Burns (1987) 189 Cal. App. 3d 734, 737-739, 23 Cal.Rptr. 547. In Burns a 20-year-old conviction was found to be too remote to be admissible--"...a conviction that is 20 years old...meets any reasonable threshold test of remoteness." Burns, 189 Cal. App. 3d at 738. In Harris the defendant was paroled in 1978 and was 52 years old at time of trial. The prior incident occurred in 1972. "Although there is no bright-line rule, 23 years is a long time." Harris, 60 Cal. App. 4th at 739. Remoteness of the evidence weighed strongly for exclusion. "Staleness" of a prior bad act is "generally relevant if and only if the defendant has led a blameless life in the interim." Id. While the State argued a conviction for misdemeanor drunk driving in 1991 showed the defendant had not led a blameless life, the court disagreed. Since the defendant's present case involved sex offenses, the issue was predisposition to commit sexual offenses--not impeachment. Because the evidence of the 23-year-old prior sexual bad acts were remote, inflammatory, nearly

irrelevant, and likely to confuse the jury, a new trial was ordered. In Indiana the prior bad act must be similar enough and close enough in time to be relevant, and then its probative value must outweigh its prejudicial effect on the defendant. Pirnat v. State, 612 N.E.2d 153 (Ind. 1st DCA 1993). This was part of the test applied in the federal 7th Circuit and followed by the Indiana courts. In Pirnat the prior incident was 3 years old and found to be not recent enough to the present offense. In Fisher v. State, 641 N.E. 2d 105 (Ind. 2d DCA 1994), a 23-year-old sexual bad act was found too remote to the present allegations of sexual charges to be relevant; and, therefore, admissible. The court did connect remoteness and similarity, because the two concepts are so closely related. "Thus, a prior bad act, despite its remoteness, may still be relevant if it is strikingly similar to the charged offense. Conversely, less similarity may be required where the prior act is closer in time to the charged incident." Id. at 109. The prior bad acts evidence in Fisher failed on both counts, and a new trial was ordered.

Even the federal courts consider remoteness with striking similarity as part of a relevancy determination. In United States v. Fawbush, 900 F.2d 150 (8th Cir. 1990), the prior bad act was 8 or more years old and not strikingly similar even though the past and present acts involved sexual abuse of children. The Court further held that even if the prior bad act evidence had been relevant, it should not have been admitted because its probative value was outweighed by the potential for unfair prejudice. See also United States v. Schweihs, 971 F.2d 1302 (7th Cir. 1992)(acts occurring

within 2 years relevant and a group of prior acts admissible when last act occurred right before the crime charged).

The bottom line of these cases is the remoteness of prior bad acts to the present charge is important to relevancy, what the defendant has done or not done during the time in between can be a factor of relevancy, and how similar the prior bad acts are to the present charge can also be a factor. How to apply these principles to a case under the Act is now before this Court. That they should be applied, that there should be some limitations on the prior bad acts in an Act case, should not be an issue. The issue is not if limits should be imposed, but what those limits are.

The Act itself requires relevancy when using prior bad acts, but the cases discussing relevancy and prior bad acts involve criminal cases. Although the Act is titled a "civil" case, it should be considered quasi-criminal since its goal is to commit people for indefinite, long-term periods. A higher standard for relevancy must be used, and interpretations of relevancy as set forth in criminal cases would be applicable in this case.

The State wants to indefinitely commit Mr. Hale, long term, as a sexually violent predator; but the most recent sexually violent act was in 1987. The conviction he was to be released from in 1999 was dealing in stolen property. There was a reference to misdemeanor loitering and prowling convictions about 8 years old; but in addition to being very old, there are no facts to show sexual intent. 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. Based on this statement--which had no

other facts to support it, the State's doctor considered all loitering and prowling years later to be sex-related. Thus, evidence of these misdemeanors was irrelevant for two reasons. Because the State did not prove such acts were sex-related by clear and convincing evidence, they could not have been considered. See Bryant v. State, 26 Fla. L. Weekly D1199 (Fla. 2d DCA May 9, 2001); Audano v. State, 641 So. 2d 1356 at 1358-1359 (Fla. 2d DCA 1994)("Before evidence of a collateral offense can be admitted under the Williams Rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant." Id.). In addition, these non-sex-related misdemeanors --like the misdemeanor conviction in Harris--are irrelevant on the issue of predisposition to commit sexual offenses. Since these 1991 convictions are not relevant, we are back to 1987 and prior to that going to 1973. This same argument of lack of proof and, therefore, relevancy also applies to allegations of harassing whores, pushing a woman, and punching a woman in the breast. Dr. Benoit's continued creation of facts when none are available by trying to close the 1987 gap with pointing out Mr. Hale was in Louisiana for part of the time and "God knows what happened there.", was not only highly prejudicial but also no proof of continuing bad sexually-related acts.

If time alone were enough to say the evidence is irrelevant, then Mr. Hale's case should surely qualify--26 years is a long time, as is 17 years, 15, and 12. The question of similarity, however, seems to be related to the issue of relevancy in Florida. Similarity under the Act, however, is an open and yet-to-be-determined issue. Florida courts have required strikingly similar prior bad acts in

order to be admissible in criminal cases, but the Act only seems to be concerned with sexually bad acts in general--at least that is how the State and its experts have defined it. Again, some limitations must be created. In Mr. Hale's case there is nothing strikingly similar about these prior acts. Each woman was treated differently, and there was nothing similar about the time or location (forced oral sex with Ms. McCown with a knife at her home, grabbing Ms. Boswell at a high school, helping a woman on the road with a flat tire but then taking her to a remote spot where he grabs her breasts and struggles until she gets away, causing a woman to fall, punching a woman's breast).

As Dr. Lusk pointed out, the acts decreased in intensity. The only pattern here was Mr. Hale's criminal acts on women that had some sexual aspect to it. The absence of similar conduct for an extensive period of time shows sexual misconduct is no longer characteristic of Mr. Hale (Duffey). The fact that Mr. Hale's acts between 1976 and 1987 were not really similar should add to the issue of relevancy. If the State is going to prove Mr. Hale is a future danger because of a pattern of sexually violent behavior, then there should be a pattern. In this case the State could only present random, dissimilar sexual acts of a diminishing nature that were extremely remote in time to his 1999 trial. These acts did not establish a scheme or pattern, notwithstanding the State's doctors' claims that any prior bad act had to be sexually related and connected so as to show a future danger. Because the State claims "anything goes" under the Act as long as it is sexually related, guidelines need to be established. As stated in Hodges v. State, 403 So. 2d 1375 at 1378, ftnt.

4 (Fla. 5th DCA 1981), are we going to arraign a defendant's whole life? How can a defendant defend himself and how many issues are to be raised? Clearly, the prior acts used in Mr. Hale's case were not similar.

It is apparent the prior bad acts used extensively in this case to the point where they consisted totally of the evidence against Mr. Hale should have been excluded as irrelevant--they were too remote, too much time had passed between them and the trial, and they were not similar. Due to the fact that the entire trial consisted of such evidence, the erroneous use of these prior bad acts cannot be harmless. DiGuilio.

B. Prejudice outweighed probativeness in the extensive use of all the prior bad acts.

Even if there was some relevance to these remote, dissimilar prior bad acts, there is still the issue of prejudice outweighing the probativeness. As this Court pointed out in Bryant, even if collateral bad acts are relevant, there is still the issue of its probative value being outweighed by the prejudice. The weakness of relevancy emphasizes the lack of probative value while highlighting the extreme prejudice of these bad acts. Again, guidelines need to be set in cases under the Act. The State's position that any prior bad acts involving sexual conduct is probative--no matter how old or what the conduct is--is simply too broad to be correct. Mr. Hale should not have to defend everything in his entire life. Of course, any prior act involving sexual conduct is going to be highly prejudicial; but it's especially so in the context of indefinite civil commitment as a sexually violent predator. The Act requires a determination of future danger, not punishment for all of the bad things Mr. Hale has

ever done in his life. (See Issue I as to how the State's doctors only relied on Mr. Hale's prior bad acts and ignored all of his test results because they did not like the results.)

The battle of experts--State's versus Mr. Hale's--shows this was not a cut and dried case. In addition, the remoteness of the acts, lack of similarity, and long period of time between the last sexual act and the trial show this to be a close case. The jury could easily have been misled or confused.

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING OBJECTIONS OR MOTIONS FOR NEW TRIAL BASED ON PREJUDICIAL STATEMENTS BY THE PROSECUTOR AND TESTIMONY BY THE STATE'S WITNESSES?

There were several areas of prejudice throughout Mr. Hale's trial, and these areas will be discussed below. The standard of review for the trial court and State's use of highly prejudicial references to Mr. Hale as well as any other highly prejudicial statements by the prosecutor or its witnesses is the harmless error standard. This test "places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129 at 1138 (Fla. 1986). Although this is the standard used in criminal cases and this is supposedly a "civil" case, a case tried under the Act is actually quasi-criminal with the State seeking indefinite civil commitment--a deprivation of a person's liberty. The DiGuilio test, therefore, is the appropriate test. In those instances where the trial court granted Mr. Hale's objection to highly prejudicial

evidence but denied the request for a mistrial, the appellate standard of review is whether the trial court abused its discretion in its denial. In analyzing the abuse of discretion issue, this Court must determine whether the prejudicial evidence was so prejudicial as to deny Mr. Hale a fair trial. Goodwin v. State, 751 So. 2d 537 at 547 (Fla. 1999).

Retired officer Billy Rice interviewed Mr. Hale in 1973 about Ms. McCown and Ms. Boswell. The officer testified Mr. Hale said he grabbed Ms. Boswell and meant to rape her--the officer assumed. Defense counsel's objection was sustained, the motion to strike was granted, the jury was told to disregard the statement, but the motion for mistrial was denied. (V7/T381-384) When Deputy Karen Cain interviewed Mr. Hale in 1987 about Ms. Whitley, the deputy was allowed to repeat, over objection, Mr. Hale's statement that he got enjoyment from going up and down Nebraska Avenue harassing whores. (V7/T416) During Dr. Benoit's testimony, the doctor was allowed to testify, over objection, that Mr. Hale is a menace to the health and safety of others because of his propensity to commit acts of sexual violence. (V8/T482-485) While going over Mr. Hale's history of offenses with the prosecutor, Dr. Benoit was not able to place Mr. Hale in prison for all periods of time: "Also in addition to after the '87 incident and his punishment for that he went to the State of Louisiana, and God knows what happened there, but there are gaps in the record." (V8/T557, emphasis added) There was no objection to this highly prejudicial statement. Last but not least, the prosecutor compared Mr. Hale's "civil" commitment conduct to criminal behavior. (V11/T883) The prosecutor also made light of the jury's

decision in this case as to how it would impact on Mr. Hale. Instead of candidly telling the jury that indefinite civil commitment is considered long-term by the Legislature (Section 394.910, Florida Statutes (1999)) and that the yearly review does not include a jury, does not allow the defendant to be present, and puts the burden on the defendant (Section 394.918, Florida Statutes (1999)), the prosecutor told the jury:

> I want to make it clear that indefinite doesn't mean forever. Indefinite means there is a time when the civil commitment would end.
> There is a statute that allows for a minimum annual review by this Court.

(V11/T931,932) No objections were made to these statements at the time, but defense counsel did object to the prosecutor's minimization and erroneous representation of the annual review process at a motion for new trial. (V12/T1005-1020)

Be it the abuse of discretion standard for the prejudicial statements where the objection was sustained but mistrial denied or the harmless error standard where the objections were overruled, the trial court erred in denying the motions for mistrial. The cumulative effect of all these errors had to impact on the jury's decision to commit Mr. Hale.

Clearly the officer's assumption of Mr. Hale's intent to rape was highly prejudicial--especially in light of Mr. Hale's statements to the contrary. Similarly, the deputy's hearsay statement as to Mr. Hale liking to harass whores was highly prejudicial and was not relevant to the case. Even if there might be some slight relevance to vague references to harassing whores, such relevance was far outweighed by the prejudicial impact it would have on the jury. The

doctor's reference to Mr. Hale as a menace to society was hardly the standard used under the Act and basically amounted to name-calling. See Pacifico, Reaves, Lopez, Pendarvis. Any doubt as to this doctor's malicious intent towards Mr. Hale was resolved by his subsequent statement. When the doctor could not account for time periods when Mr. Hale was not in prison, the doctor inferred Mr. Hale had to be committing more crimes even though the doctor had absolutely no information on these "gaps." "God knows what happened" in Louisiana is hardly an unbiased statement of an expert. This doctor inferred other crimes committed by Mr. Hale even though there was no evidence of such 'additional atrocities.' Just as it is error for the prosecutor to infer there is additional evidence that it did not bother to introduce at trial, so it is error for the State's expert witness to make the same inferences. See Henry v. State, 629 So. 2d 1058 (Fla. 5th DCA 1994) (new trial required when the prosector's closing argument suggested the defendants had previously been involved in drug trafficking even though there was no evidentiary basis for this); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993)(new trial required when the prosecutor's closing argument told the jury he had additional evidence of the defendant's guilt which he simply saw no need to present).

As for the prosecutor's closing arguments, comparing the civil commitment conduct to criminal behavior was to inflame the jury in order to obtain indefinite civil commitment similar to character attacks. Pacifico. Minimizing and misleading the jury as to how long this commitment would be was highly prejudicial and designed to make the jury not worry about the consequences of its verdict. See

Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984)(comments by prosecutor appealing to bias, passion and prejudice is error); Pacifico (jury can be expected to attach considerable significance to a prosecutor's personal belief); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) (prosecutor suggesting to jury that an acquittal based on insanity would result in defendant's release from asylum within months reversible error).

Most of these errors were objected to and preserved, so these errors on the whole require a new trial. See Ruiz v. State, 743 So. 2d 1 (Fla. 1999), where a combination of some properly preserved objections and unpreserved errors required a new trial. The jury had to decide whether or not Mr. Hale qualified for indefinite civil commitment; and in doing so it was faced with extremely old convictions that went from worse to bad, Mr. Hale's most recent incarceration having nothing to do with sex or violence, the State's experts with insufficient backgrounds and inconsistent test results and obvious bias, and a defense expert that strenuously refuted the State's witnesses on the issue of commitment. The State cannot prove beyond a reasonable doubt the prejudicial statements had no impact on the jury's verdict.

CONCLUSION

The trial court's order of commitment must be reversed.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard Polin, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on this _____ day of January, 2004.

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