IN THE SUPREME COURT OF FLORIDA

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

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

William Hale appealed his civil commitment as a sexually violent predator, pursuant to sections 394.910-.931, Florida Statutes (1999), more commonly known as the Jimmy Ryce Act (hereinafter the Act); Mr. Hale was civilly committed on November 18, 1999, and timely filed his notice of appeal to the Second District Court of Appeal on December 13, 1999.

Among the issues raised, Mr. Hale attacked the Florida jury instructions as being fatally flawed as per Kansas v. Crane, 534 U.S. 407 (2002); because the Florida jury instructions did not instruct the jury there must be proof of Mr. Hale's serious difficulty in controlling his behavior. Based on Westerheide v. State, 27 Fla. L. Weekly S866 (Fla. Oct. 17, 2002), the Second District found the given jury instructions adequate and upheld the commitment. Hale v. State, 2D00-604 (Fla. 2d DCA Nov. 15, 2002). (App.A)

Mr. Hale timely filed a motion for rehearing, motion for hearing en banc, and motion for certification of question on November 25, 2002, which was denied January 9, 2003. (App. B) Mr. Hale timely filed a notice to invoke this Court's jurisdiction based on express and direct conflict with opinions from another district court of appeal.

SUMMARY OF THE ARGUMENT

Based on the First District cases of Hudson v. State, 825 So.2d 460 (Fla. 1st DCA 2002); White v. State, 826 So.2d 1043 (Fla. 1st DCA 2002); Converse v. Department of Children and Families, 823 So. 2d 295 (Fla. 1st DCA 2002), the Ryce Act jury instructions are fatally flawed because they do not instruct the jury on the State's need to prove the person to be committed has serious difficulty in controlling his behavior. Westerheide is not controlling and did not reject the First District cases because a majority of the court did not address the issue. The Second District's opinion expressly and directly conflicts with the First District cases of Hudson, White, and Converse.

ARGUMENT

ISSUE I

> WHETHER THE SECOND DISTRICT'S DECISION IN HALE V. STATE, 2D00-604 (FLA. 2D DCA NOV. 15, 2002), IS IN CONFLICT WITH DECISIONS FROM THE FIRST DISTRICT COURT OF APPEAL?

On appeal to the Second District, Mr. Hale presented the issue of the requirement for a jury instruction pursuant to Kansas v. Crane, 534 U.S. 407 (2002), specifically whether the following instruction was required:

> To prove its case, the State must prove each of the following three elements by clear and convincing evidence:
> . . . .

> (b) William Charles Hale suffers from a mental abnormality or personality disorder that makes it difficult[,] if not impossible, for him to control his dangerous behavior and, ...

Hale v. State, Case No. 2D00-604 (November 15, 2002), slip opinion at 3. The Court determined the instruction given was adequate, and the above stated instruction was not required. Slip opinion at 3. The court based its opinion on Crane and the recently decided Florida Supreme Court case Westerheide. Slip opinion at 2. The Second District's reliance upon Westerheide is misplaced.

In Crane the U.S. Supreme Court considered 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.'" Crane, 534 U.S. at 412. The Court held:

> [T]here 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.

Id. at 413. The Court clearly intended that trial courts give a jury instruction encompassing that principle. Least there be any doubt, one need look no farther than Justice Scalia's dissent. "This formulation of the new requirement certainly displays an elegant subtlety of mind. Unfortunately, it gives trial courts, in future cases under the many commitment statutes similar to Kansas's

S[exually] V[iolent] P[redator] A[ct], not a clue as to how they are supposed to charge the jury! Indeed, it does not even provide a clue to the trial court, on remand, in this very case." Id. at 423. (Emphasis in original.) 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, 27 Fla. L. Weekly at S870. Three justices (Pariente, J., joined by Anstead, CJ., and Shaw, J.) clearly and strongly disagreed.

> Because it is the jury as the factfinder 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 ___ [Id. at S870]. 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. [534 U.S. at 413.]

Westerheide, 27 Fla. L. Weekly at S872. 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:

> While 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, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (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.

Westerheid, 27 Fla. L. Weekly at S872. In effect, Justice Quince held the element of Westerheide's serious difficulty controlling behavior had been proven and failure to give the instruction was harmless error.

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 a specific instruction was not required. Pariente and Shaw, JJ., and Anstead, CJ., held a specific instruction was required. Quince, J. (concurring in result only) did not address the subject of jury instructions. Therefore, there was no majority opinion in Westerheide regarding jury instructions.

The long standing law in Florida is that when an appellate court is evenly divided, the decision of the lower court stands affirmed. See, e.g., Powell v. Rodriguez, 200 So. 700, 701 (Fla.

1939); Johnson v. Landefeld, 189 So. 666 (Fla. 1939); see also State ex rel. Landis v. Circuit Court for Eleventh Judicial Circuit, 135 So. 870, 877 (Fla. 1931); Neil v. Biggers, 409 U.S. 188, 191-192 (1972), and cases cited therein.

The Fifth District in Westerheide v. State, 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.

Even if the Florida Supreme Court could annul a due process requirement imposed by the U.S. Supreme Court, this Court did not do so in Westerheide. The 3-3 split opinions would have affirmed the holding of the district court, had the district court ruled on the issue of "serious difficulty in controlling behavior." However, the district court did not address that subject. Had Justice Quince addressed the issue, a Supreme Court majority might have emerged; however, she did not opine thereupon. Therefore, one can not properly draw a conclusion from the Westerheide cases as to whether or not a jury instruction specifically addressing "serious difficulty in controlling behavior" may be required. Previously existing Florida and federal decisional law continues to control the issue.

The decisions of the First District in Hudson v. State, 825 So. 2d 460 (Fla. 1st DCA 2002); Converse v. Dept. of Children and Families, 823 So. 2d 295 (Fla. 1st DCA 2002); and White v. State, 826 So.2d 1043 (Fla. 1st DCA 2002), "represent the law of Florida" as to circuit courts in Florida absent inter-district conflict. Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992). Likewise, the same are "persuasive" as to the district courts of appeal. Id. at 667, quoting State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th DCA 1976). Even if the Florida Supreme Court were to accept jurisdiction in one or more of those cases, they should still be relied upon as precedent. Where a decision is not yet final since rehearing is pending before the Florida Supreme Court, that decision controls until it is altered or overturned. Rock v. State, 800 So. 2d 298, 299 (Fla. 3d DCA 2001).

In Hudson the court agreed with the district court in Westerheide on the constitutionality of the statute, but held that "in light of the Crane holding, the state's proof was legally insufficient to satisfy the demands of substantive due process because the state presented no evidence regarding appellant's ability to control his dangerous behavior." Hudson, 825 So. 2d at 471. In Converse the court held that the "statute was
constitutional because the statute required a finding that the offender's dangerousness was caused by or linked with a mental abnormality or personality disorder that made it 'difficult, if not impossible, for the person to control his dangerous behavior.' Crane, 122 S.Ct. at 869 (quoting [Kansas v.] Hendricks, 521 U.S. [346,] 358

[(1997)])." The court concluded that failure to give a jury instruction is a denial of due process. "The failure of the lower court to advise the jury of such requirement below was a denial of substantive due process, which is fundamental error." Converse, 823 So. 2d at 297. In White the court specifically held that in Crane, the Supreme Court had added a "fourth element" of proof under the Kansas Act – that the person has "serious difficulty" in controlling his or her behavior. The White court concluded that "[a]s explained in Hudson, this fourth element of proof is likewise essential under the Florida Act. The appellant was therefore entitled to an instruction as to this element, and the trial court erred in refusing to give it." White, 826 So.2d at 1044.

Florida courts have long held that failure to instruct a jury on every disputed element of a cause of action impermissibly takes from the jury part of its essential function. A fair and impartial trial requires that a party be accorded the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the cause which must be proven by competent evidence. Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953).

Taking in Gerds together with Hudson, Converse, and White, existing Florida law requires that to civilly commit a person as a violent sexual predator, a jury must be instructed as required by Crane. Nothing in Westerheide stands contrary to that requirement. The entire Westerheide Court agreed there must be proof of 'serious difficulty in controlling behavior' in order to civilly commit an individual as a sexually violent predator. Westerheide, 27 Fla. L.

Weekly at S870, S872. Thus, all of the justices on the Westerheide Court agreed as to the necessary elements of proof, in accord with existing Florida law.

Because the First District cases hold contrary to the Second District's decision and Westerheide has not overruled these First District cases, this Court should accept jurisdiction over this case due to the express and direct conflict with the First District.

CONCLUSION

Based on the above argument and authorities, the Second District's opinion in Hale is in express and direct conflict with the First District's opinions in Hudson, White, and Converse. This Court should accept jurisdiction in order to settle the issue.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard L. Polin, Attorney General's Office, 444 Brickell Avenue, Suite 950, Miami, FL 33131-2407, this _____ day of February, 2003.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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