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

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE FACTS

Petitioner relies on his initial brief.

ISSUE I

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

Mr. Hale relies on his initial brief.

ISSUE II

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

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

The State claims Mr. Hale's arguments in this issue are simply jury arguments that must be rejected. Of course, Mr. Hale does not agree with this assessment; but it is to be acknowledged that there are no real cases on point in Florida since this area is so new. There is at least on case however, this Court should consider by analogy. In Hill v. State, 358 So. 2d 190 (Fla. 1st DCA 1978), the issue was what degree of proof was required for the release of insanity acquittals. It was clear to the court Mr. Hill was being held at the hospital because he could not guarantee his illness would remain in remission. Such a guarantee would be impossible to make, and the court ordered reconsideration of his being found not guilty by reason of insanity in a first-degree murder case. Mr. Hill had been hospitalized for 13 years, and his psychosis was in remission and under medicinal control. Although Mr. Hill's family was ready to

provide daily supervision and medication resulting in a doctor's belief this would probably continue Mr. Hill's peaceful conduct, the trial court feared the possibility of something going wrong. It was apparent Mr. Hill was being denied liberty because he could not prove he was able to live peaceably out of custody while still in custody.

The evidence of Mr. Hill's past and present psychiatric condition and propensities were sparse. No one testified he is still psychotic, and only one psychiatrist who had observed Mr. Hill for just 6 months described him as schizophrenic. The court found this sole doctor's testimony "an inadequate offering on such serious issues." Hill, 358 So. 2d at 206. The court discussed the use of psychiatric evidence in this of hearing:

> Expert psychiatric testimony is essential in these proceedings. But the committing court's determination of release issues cannot be dictated by such testimony. When determining the accused's competency at the time of an offense, the trial judge or jury is not bound to accept unrebutted psychiatric opinions when there is other evidence of the accused's competence. [Fn 32 omitted] For stronger reasons, judges weighing the complex questions of dangerous propensities may properly find that unrebutted psychiatric opinion testimony is overcome by other substantial evidence. We do not denigrate psychiatric expertise. But that discipline does not claim infallible prophetic powers. Even within the field, opinions on the nature and extent of mental illness vary with "the examining psychiatrist's personal conception of normal social behavior." [Fn 33 omitted] Moreover, psychiatrists' predictions of future dangerousness are increasingly subject to doubt, not necessarily because of a few dramatic cases of recidivism by insanity acuities who have been released, but because there is empirical evidence that psychiatrists generally are inclined to perceive dangerousness where there is none. (FN34) Finally, whether an acquitee is still mentally ill and for that reason likely to injure others is a legal question, not a medical question. In re Beverly, In re Connors, supra....

> FN34. Statistical studies are summarized in D.Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa.L.Rev. 439, 444, 35 seq. (1974):
>
> One can only conclude that psychiatrists who make such judgments tended to over-predict dangerousness greatly, by a factor somewhere between ten and a hundred times the actual incidence of dangerous behavior. It is understandable why this should be so. If the psychiatrist underpredicts danger, and clears a patient who later commits a violent act, he will be subjected to severe criticism. If, on the other hand, he over-predicts danger, he will suffer no consequence from such faulty prediction....(Id. at 447)

Hill, 358 So. 2d at 206-208, 211 (emphasis added).

The court also pointed out that someone found not guilty by reason of insanity had been absolved of criminal responsibility:

> Though he killed, he was "unable to form the requisite intent" to commit murder. [Fn 26 omitted] For punishment's sake, or to deter others, Hill could not then and cannot now be imprisoned for a moment, even if the prison were a hospital idyllic except for walls and fences. Hill is not lawfully hospitalized to pacify someone's distress over his acquittal for insanity. He is not lawfully detained on the theory, however beneficent, that he is in need of treatment. [Fn 27 omitted] The government's sole legitimate interest in Hill is protecting others from a likelihood of injury that would result from his being at liberty. Irrespective, then, of the enormity of Hill's 1964 act, a judicial decision relieving Hill of absolute confinement must be made at the moment when a preponderance of all the reasonably available evidence shows that in his release there is no longer a likelihood of injury to others as a result of mental illness. Under this standard, a court of law cannot extend Hill's confinement until some psychiatrist of a bolder school than Dr. Rodriguez will utter a fatuous guaranty; or until the memory of Hill's violence has satisfactorily faded; or until time removes all risks by removing Hill or by performing on him, as inevitably it will, a lobotomy by isolation.

Hill, 358 So. 2d at 203, 211 (emphasis added). Finally, as the court noted, jurisdiction over acquitees is not to just lock the acquitees away until the committing judge is moved, like some

potentate, to release them. "[T]he judicial system's monitoring responsibilities are to be carried out in a way that visibly serves the rules of law...." Hill, 358 So. 2d at 204.

The issues are very similar in Mr. Hale's case. No one can guarantee he will never commit another sexual offense, but that is not the burden. Still he is being denied liberty because he could not prove he would not reoffend. As in Hill, the State had doctors testify for further commitment; but their testimony tended to over predict future risk. In the end the question of risk is a legal question, not a medical question. And as Hill pointed out the defendant had been acquitted by reason of insanity and could not be criminally punished, so has Mr. Hale served his criminal punishment and cannot be repunished in violation of double jeopardy and ex post facto constitutional protections.

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.

The State in its Answer Brief, pp.32-33, and the Fourth District in Tabor v. State, 4D02-1972 (Fla. 4th DCA Jan. 7, 2004), have pointed to sec. 394.913(1), Fla. Stat. (2003), for support in rejecting Mr. Hale's issue. That sec. provides:

> 394.913. Notice to state attorney and multidisciplinary team of sexually violent predator; establishing multidisciplinary teams; information to be provided to multidisciplinary teams
>
> (1) The agency with jurisdiction over a person who has been convicted of a sexually violent offense shall give written notice to the multidisciplinary team, and a copy to the state attorney of the circuit where that person was last convicted of a sexually violent offense. If the person has never been convicted of a sexually violent offense in this state but has been convicted of a sexually violent offense in another state or in federal court, the agency with jurisdiction shall give written notice to the multidisciplinary team and a copy to the state attorney of

> the circuit where the person was last convicted of any offense in this state. If the person is being confined in this state pursuant to inter-state compact and has a prior or current conviction for a sexually violent offense, the agency with jurisdiction shall give written notice to the multidisciplinary team and a copy to the state attorney of the circuit where the person plans to reside upon release or, if no residence in this state is planned, the state attorney in the circuit where the facility from which the person to released is located.

The Fourth District and the State have focused on the sentence that deals with a person convicted of a sexually violent offense in a jurisdiction other than Florida to support their position that if the Ryce Act applies to someone convicted somewhere other than Florida of a sexually violent offense and is in total confinement in Florida, that must mean the person's Florida confinement has nothing to do with a sexually violent offense. That assumption is not valid--especially in light of that entire section which also mentions interstate compacts.

First, 394.913 (1) is a notice provision. A party's compliance with a notice provision generally is a prerequisite to a trial court having subject matter jurisdiction over a law suit. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997); see Adams v. Travel, Inc., 220 So. 2d 420 (Fla. 1st DCA 1969). However, there is an exception to this consequence, where the legislature specifically provides, within the statute, that a failure to comply with the notice does not effect the trial court's jurisdiction over the subject matter. Id. The legislature, in §394.913 (4), Fla. Stat. (2003), specifically provided just that.

However, contrary to the State's argument, a notice provision, which itself does not require the State's full compliance to invest subject matter jurisdiction in the trial courts, cannot be relied upon to be the sole determining factor which would establish the parameters of the courts' subject matter jurisdiction.

Nevertheless, the non-jurisdictional notice provision of §394.913(1) concerns itself with three distinct situations. First, it requires that notice be given by the institution which maintains jurisdiction over the individual during the period of time the person is under total confinement to the multidisciplinary team and the State Attorney of a person who has committed a sexual violent offense. This is the part of the statute directly applicable to Mr. Hale and, as he previously argued, must be read in pari materia with §394.925, Fla. Stat., (2003). See also Gordon v. Regier, 839 So. 2d 715, 718 (Fla. 2003). A combined reading of these two statutory provisions shows that it is the legislature's intent that those subject to Ryce Act commitment are currently incarcerated for a sexually violent offense at the time the petition is filed, or else a trial court is without subject matter jurisdiction.

The second part of subsection 394.913(1) concerns the alternative situation where a person is under total confinement in Florida, yet has been convicted of a sexually violent crime elsewhere. The third part deals with non-Florida convicts serving their out-of-state sentences in Florida under the "interstate compact."

Initially, while Mr. Hale recognizes that the Ryce Act has been held not to be penal law, Westerheide v. State, 831 So. 2d 93, 102-4

(Fla. 2002), it is, at the very least, a regulatory statute. See Freeman v. State, 832 So. 2d 923 (Fla. 1st DCA 2002). To the extent that commitment under the Ryce Act results in indeterminent involuntary commitment for "long-term control, care and treatment," §394.912 (10)(b), 394.918, 394.919, 394.920, Fla. Stat. (2003), it is a highly regulatory statute. Yet, both "penal and highly regulatory statutes.... are strictly construed" in favor of those whom the state seeks to invoke the law in order to control and/or regulate. Equity Corp. Holdings, Inc. v. Department of Banking and Finance, Div. of Finance, 772 So. 2d 588, 590 (Fla. 1st DCA 2000).

Strictly constructing the second part of the notice provision in §394.913(1) in Mr. Hale's favor, contrary to the State's contention, it does not authorize the Ryce Act proceeding against persons who have a sexually violent crime conviction in their past, but a current sentence for a non-sexually violent offense. Rather, this part of the subsection must refer to those individuals who are imprisoned in Florida on a conviction and sentence for a non-sexually violent crime while, simultaneously, serving a concurrent term of imprisonment for a sexually violent crime convicted in another state or from federal prosecution. See State v. Reynolds, 238 So. 2d 598 (Fla. 1970).

The third part of subsection 394.913(1) concerns itself with persons confined in Florida under the "interstate compact." Although the Ryce Act fails to state which interstate compact applies, Mr. Hale assumes that it is either the Interstate Corrections Compact, §941.56, Fla. Stat., (2003), or the Interstate Compact on Mental

Health, §394.479, Fla. Stat. (1995). Under the Interstate Corrections Compact, an inmate from another member state, the "sending state," would be sent to serve a prison sentence imposed by the sending state in Florida, the "receiving state." §941.56 (Art. II), Fla. Stat., (1997). At all times, the sending state, not the State of Florida , retains jurisdiction over that inmate, §941.56 (Art. IV) (c), Fla. Stat. (1997); and Florida, as the receiving state, acts only as the sending state's agent and has no rights to make any final determinations regarding the sending state's inmate. §941.56 (Art.IV) (e). Moreover, this interstate compact requires that the sending state's prisoner must be returned to the sending state at the end of the prison term served in Florida, unless the sending state, Florida, as the receiving state, and the inmate, himself, agree that the inmate should be released in some location other than the sending state. §941.56 (Art. IV) (g), Fla. Stat. (1997).

The Ryce Act's notice provision, §394.913(1), Fla. Stat. (2003), cannot apply to a sending state's inmates in Florida under the Interstate Corrections Compact. By the compacts terms, §941.56 (Art. IV) (c) and (e), such an inmate cannot be under "total confinement" in Florida, because no Florida institution or court has any jurisdiction over that inmate's prison term. Meyers v. State., 826 So. 2d 330, 331 (Fla. 2d DCA 2002). §394.912(11), Fla. Stat., (2003). Nevertheless, to be eligible for Ryce Act commitment such an inmate would have to be currently serving his or her out-of-state sentence in Florida for a sexually violent crime. §394.925, Fla. Stat. (2003).

Where a prior conviction for a sexually violent offense would make one in Florida under an interstate compact eligible for Ryce Commitment would be under the Interstate compact, persons who are physically present in Florida, yet under another state's jurisdiction due to a mental illness or mental deficiency, can be institutionalized in Florida. §394.479 (Art. III) (a), Fla. Stat. (1995). The Ryce Act notice provisions, §394.913(1), Fla. Stat., (2003), comport with the terms of the Interstate Compact on Mental Health to the extent that an out-of-state mental health patient in Florida would have a residence in Florida; whereas out-of-state inmates in Florida under the Interstate Corrections Compact would not. Also, the out-of-state mental health patient could have a prior conviction for a sexually violent offense inasmuch as the Ryce Act defines "conviction" to include on "adjudicated not guilty by reason of insanity of a sexually violent offense". §394.912(2) (b), Fla. Stat., (2003). Finally, there is no provision in the Interstate Compact on Mental Health that requires an out-of-state mental health patient be returned to the sending state upon the expiration of his or her involuntary commitment. Consequently, a person who has previously been adjudged not guilty by reason of insanity for a sexually violent crime committed in another state and is in Florida while furloughed from his out-of-state mental health commitment can be subject to the Ryce Act if they are reinstitutionalized in Florida for the mental illness or deficiency which warranted their acquittal for a sexually violent offense.

The foregoing review of §394.913(1), Fla. Stat. (2003), strictly construed to Mr. Hale's benefit, Equity Corp. Holdings, Inc., 772 So. 2d at 590, provides a reading of the Ryce Act which harmonizes with the statute's subject matter jurisdictional limitations, §394.925, Fla. Stat. (2003); and, contrary to the State's argument, does not render meaningless any part of the Act. State v. Goode, 830 So. 2d 817, 824 (Fla. 2002). Hence, the State's contention that §394.913(1) would permit one to be involuntarily committed under the Ryce Act where his or her current prison term is not for a sexually violent offense is of no merit. Section 394.925 provides that the Ryce Act, "applies to all persons currently in custody and who have been convicted of a sexually violent offense.... as well as to all persons convicted of a sexually violent offense and sentenced to total confinement in the future." For Mr. Hale to fall within the Ryce Act's subject matter jurisdiction, this Court would have to interpose the word "previously" within the body of this section. Such a provision does not exist; nor can this Court create it. See State v. Byars, 804 So. 2d 336, 338 (Fla. 4th DCA 2001).

The legislative history of the Ryce Act illustrates that it was intended to apply to Florida inmates currently serving sentences for sexually violent offense convictions at the time the petition is filed. The original House Bill provided for the State's ability to petition against persons who were not in custody and serving sentences for sexually violent crimes upon commission of a recent overt act. 1998 HB 3327. The Florida Senate amended the House Bill to delete the "overt act" provision, because it would have had, at that

time, included 4300 more person, who had already been released from prison, as being eligible for voluntary commitment as sexually violent predators. Fla. H. Health and Human Services Appropriations, CS for HB 3327 (1998), Staff Analysis 8 (March 26, 1998). Additionally, the Senate analysis commented that, "Kansas does not include a provision for persons who are not presently confined but who have been previously convicted of a sexually violent offense." Id. Inasmush as the Ryce Act was patterned after the Kansas sexually violent predator statue, Goode, 830 So. 2d at 821; see also Westerheide, 831 So. 2d at 99 n.6, its subject matter jurisdictional purview does not include persons, such as Mr. Hale, who were not serving a sentence for a sexually violent crime conviction at the time involuntary commitment proceedings commenced.

Both the statutory language of the Ryce Act and the legislature's intent in its enactment show that its subject matter jurisdiction was not designed to extend to persons whose current term of imprisonment, at the time of the State's petitioning, was for a non-sexually violent criminal conviction. Mr. Hale's Florida prison term for a sexually violent offense expired prior to the enactment of the Ryce Act. At the time the State petitioned for his involuntary commitment, he was serving a sentence for a non-sexually violent crime. The trial court fundamentally erred in committing Appellant under the Ryce Act, because it was without jurisdiction to do so. This Court should reverse the trial court's commitment order and remand with instructions to dismiss the State's petition with prejudice.

ISSUE III

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

In arguing irrelevancy, Mr. Hale stressed the nature of his priors being not only old but dissimilar. In its Answer Brief the State cites to cases that supposedly support its position of relevancy in using priors; however, these cases all demonstrate a sexual criminal history extremely similar in all seven cases cited by the State, Answer Brief pp. 35-37. In re the Detention of Young, 857 P. 2d 989 (Wash. 1993), detailed an extensive history of sexual assaults on women--mostly rapes. In the Matter of Hay, 953 P. 2d 666 (Kan. 1998); In re Detention of Williams, 628 N.W. 2d 447 (Iowa 2001); In the Matter of Robb, 622 N.W. 2d 564 (Minn. App. 2001); and In re Matter of Linehan, 557 N.W. 2d 171 (Minn 1996), all dealt with criminal sexual assaults on children. Although the types of assaults may have differed, pedophilia is in a class by itself. And in People v. Hubbart, 88 Cal. App. 4th 1202, 106 Cal. Rptr. 2d 490 (2001), the crimes were very similar--mostly similar rapes an women; and this similarity was stressed by the court. Because Mr. Hale was arguing the dissimilarity of the priors used in his case, the State's cases emphasize Mr. Hale's argument.

The State also tries to analogize testimony used in penalty phases of death cases, but this analogy does not work. Death is different; and in order to impose the ultimate punishment of death, all aspects of the defendant's life must be considered. Thus, the

penalty phase, which is separate from the guilt phase, allows unlimited mitigation to try to offset the statutory-limited appravators. By the time the penalty phase is at hand, the issue of guilt--with all of the evidentiary rules in force--has already been reached and is no longer at issue.

The state is also in err when it claims the testimony about the loitering and prowling only came out during cross-examination. The State first asked Dr. Benoit, over objection, about the loitering and prowling. (V8/T457-462,468) The cross examination on this issue did not occur until V8/T498. Contrary to the State's position that Dr. Benoit based his conclusion of the loitering and prowling being sexually related because of Mr. Hale's statements, it is obvious that Dr. Benoit leapt to the conclusion that the 1991 loitering and prowlings were sexually related because Ms. McCown said Mr. Hale told her he had peered in her window 26 years ago. (V7/T366; V8/T449-462,468,498,567) Also contrary to the State's position, Dr. Lusk never addressed the nature of the loiterings and prowlings. At V10/T759-767 (Answer Brief, p. 42) specific incidents are discussed with Dr. Lusk by the prosecutor and each incident was described as being sexually motivated. The loiterings and prowlings, however, were not discussed. In fact, Dr. Lusk testified Mr. Hale had not committed a sexual offense since 1987 -- which would specifically exclude the 1991 loitering and prowlings. (V10/T751)

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING OBJECTIONS OR MOTIONS FOR NEW TRIAL BASED ON PREJUDICIAL STATEMENTS BY

THE PROSECUTOR, TESTIMONY BY THE STATE'S WITNESSES AND REFERENCES TO APPELLANT IN STANDARD INSTRUCTIONS?

The State argues the harmless error analysis as set forth in State v. Diguilio, 491 So. 2d 1129 (Fla. 1986), is not the proper analysis for a Ryce act case. Mr. Hale notes the Fourth District used the DiGuilio harmless error analysis when it reversed a Ryce Act case in Collier v. State, 857 So. 2d 943 (Fla. 4th DCA 2003).

CERTIFICATE OF SERVICE

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