IN THE
MISSOURI SUPREME COURT

No. 83186

IN THE MATTER OF THE CARE AND TREATMENT OF EDDIE J. THOMAS

Appellant,

v.

STATE OF MISSOURI,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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The decision in *Kansas v. Crane*, 122 S.Ct. 867 (2002), does not change the result as to Thomas's claim that Missouri's Sexually Violent Predator Law, §§ 632.480-513, RSMo. 2000, is unconstitutional. It does clarify the evidentiary requirements for cases brought under that law. When read carefully with *Kansas v. Hendricks*, 521 U.S. 346 (1997), *Crane* affirms that pedophilia – a diagnosis shared by Hendricks and Thomas – meets that evidentiary requirement.

In Part I, we discuss what the Supreme Court actually did in *Crane*. In Parts II and III, we explain that the Court did not do what *Thomas* asserts. And in Part IV, we discuss the specific application of the Court's latest precedents to Thomas, a diagnosed pedophile.

I. In *Crane*, the U.S. Supreme Court clarified its decision in *Hendricks*, explaining that the State's evidence must be sufficient to show that the alleged predator has "serious difficulty in controlling behavior."

The U.S. Supreme Court was presented in *Crane* with a stark contrast.

At one extreme, Crane insisted (and the Kansas Supreme Court had held, *see In the Matter of the Care and Treatment of Crane*, 7 P.3d 285 (Kan. 2000)) that the Constitution of the United States permits the placement of a person in secure custodial treatment only when that person has "total or complete lack of control" over his behavior. *Id*. at 870. The Supreme Court rejected that argument. The Court pointed out that "[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities." *Id*. The Court recognized that the standard Crane proposed was "unworkable," and that "most severely ill

people – even those commonly termed 'psychopaths' – retain some ability to control their behavior." *Id.*

In his initial brief to this court, Thomas urged the extreme position that Crane had successfully argued before the Kansas Supreme Court. In his supplemental brief, Thomas appropriately retreats from that position.

At the other extreme, Kansas took the position that "the Constitution permits commitment ... without any lack-of-control determination." *Id.* The Court rejected that argument, too. The Court pointed to the prevalence of mental and emotional disorders among the criminal population, and concluded that a civil commitment statute cannot be read so broadly as to "become a 'mechanism for retribution or general deterrence' – functions properly those of criminal law, not civil commitment." *Id.*, quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring).

In two steps, the Court then clarified the constitutional limits on this type of civil commitment law by further explaining the type of evidence of impairment, caused by a mental abnormality, that is sufficient to justify placing an alleged sexually violent predator in custodial treatment. First, in any such commitment proceeding, "there must be proof of serious difficulty in controlling behavior." *Crane*, 122 S.Ct. at 870. And second, the nature of the difficulty "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.*

That was not, the Court indicated, a new rule of constitutional law. The Court took great pains to tie its analysis back into its holding five years ago in *Hendricks*. *Id., citing*

Hendricks, 521 U.S. at 358. It refused to modify its *Hendricks* decision to create the kind of "bright line" rules that both sides sought. Instead it reiterated that it had stated "a less precise constitutional standard than would those more definite rules." *Id.* The level of proof that is constitutionally required "will not be demonstrable with mathematical precision." *Id.* Whether there is sufficient evidence that meets this constitutional threshold will depend entirely on the specific facts of each case. But evidence elicited at trial is sufficient if, when considered in totality, it shows that the person has serious difficulty controlling his behavior, difficulty with a cause or of a type that distinguishes him from the typical criminal recidivist.

At some points in Thomas's supplemental brief, he states the evidentiary clarification correctly. But Thomas demands in his "point relied on" that the State prove that is "nearly impossible for him to control his behavior" (App. Supp. Br. at 7, 10). Later, in his argument, he insists that "the State must prove that he suffers from an impairment so serious that makes it 'difficult if not impossible' for the person to refrain from committing sexual offenses." *Id.* at 22. But he takes those words out of context. Each time they are used in *Crane*, it is in a quotation from *Hendricks*. And each time, the Court's message is that the Kansas statute already contains that requirement – in linking a finding of dangerousness with a finding of mental abnormality. *See* 122 S.Ct. at 869, 871. Nowhere does the Court suggest that "difficult if not impossible" is a constitutional standard of proof, as Thomas suggests. To the contrary, the Court expressly holds that its

earlier reference to "difficult" meant "serious difficulty in controlling behavior." *Id*. at 870.

Elsewhere, Thomas states the standard in another, also inconsistent, but more accurate way. He says that the State must "show that the abnormality at issue is so serious that is causes the prisoner a lack of control over his conduct." App. Supp. Br. at 15. Though imprecise, that is a restatement, in lay terms, of the Supreme Court's clarification. The Court itself pointed out the lay use of such language: "[I]n ordinary English," we may refer to someone as being "'unable to control their dangerousness'" when we mean merely that they "find it particularly difficult to control their behavior." 122 S.Ct. at 871.

Again, what the Supreme Court did in *Crane* was to more specifically describe the evidence that is required under the constitutional standard it had already articulated in *Hendricks*. As further discussed in part II, the Court did not disturb a key holding in *Hendricks*: that the Kansas statute was constitutional. *See id*. at 870. Nor did it insist upon some additional jury instruction, as discussed in part III. And as discussed in part IV, the Court recognized that the diagnosis of pedophilia – a diagnosis that Hendricks and Thomas share – is sufficient *per se* to meet the *Hendricks--Crane* standard.

II. The Missouri statute, like the essentially identical Kansas statute, is constitutional.

Before arguing the facts of his own case, Thomas makes two arguments for striking the statute in its entirety. The first, that Missouri's law is invalid absent a specific statutory provision limiting the statute to those with proven, serious difficulty in controlling behavior is invalid, is simply wrong – and, if right would have led to striking down the Kansas law that survived *Hendricks* and *Crane*. The second, that the law would not have been passed had the legislature knew of that evidentiary requirement, is simply incredible.

A. Like the Kansas statute, Missouri's sexually violent predator law is constitutional without including additional language expressly limiting its application to those who have a serious difficulty controlling their behavior.

After examining the Kansas act, the Supreme Court in *Hendricks* expressly found that the statutory language sufficiently encompassed all the elements required by the Constitution: "To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria." *Id*. at 360. That was true even though the word "control" did not appear in the Kansas statute. *Id.* at 873-74. The Court thus found that the control element was sufficiently embodied in the words defining "mental abnormality" and "sexually violent predator." In other words, the language of the Kansas statute, read against constitutional requirements, already embodied the constitutional concept that the person's control be impaired.

Though the Court had occasion in *Crane* to elaborate on the implicit control element, it did not change the *Hendricks* holding – as shown by its choice to vacate the decision of the Kansas Supreme Court and remand, rather than to strike the Kansas law. Indeed, the Court studied the Kansas statute and again concluded that the "criterion for confinement embodied in the statute's words 'mental abnormality or personality disorder' satisfied substantive due process requirements." *Crane*, 122 S. Ct. at 868, *citing Hendricks*, 521 U.S. at 356, 360. Thus, from the outset, the Court repeatedly reaffirmed its decision to uphold the statutory language:

> It [*Hendricks*] noted that the Kansas "Act unambiguously requires a finding of dangerousness either to one's self or to others," and then "links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior." And the Court ultimately determined that the statute's "requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."

Crane, 122 S. Ct. at 869 (citations omitted), *quoting Hendricks*, 521 U.S. at 357-358. Again, the court reaffirmed its conclusion that the Kansas statute embodies everything that the constitution requires. Nothing in *Crane* or *Hendricks* suggests that a statutory scheme must *expressly* require the person's abnormality be so severe that he has serious difficulty controlling his behavior.

Thomas's argument that Missouri's statute is unconstitutional pays lip service to the Supreme Court's decision to uphold the Kansas law in *Hendricks* and again in *Crane*, but then ignores that holding. Similarly, he ignores the parallel language in the two statutes – and the necessary implication of the *Hendricks* and *Crane* holdings on any statute that follows the Kansas model.

Both Missouri and Kansas define "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the

health and safety of others." § 632.480(2), RSMo 2000; K.S.A. § 59.29a02(b); *see Hendricks*, 521 U.S. at 352 . Both statutes also require that a sexually violent predator suffer from a "mental abnormality" which makes the person likely to engage in predatory acts of sexual violence.[1]

Neither the Missouri nor the Kansas law uses the phrase, "inability to control." But the Supreme Court refused, in *Crane*, to place "talismanic significance" (*Hendricks*, 521 U.S. at 359) on its use of that term in *Hendricks*. The term was used, the Court pointed out, to simply describe the definition of mental abnormality in "ordinary" English. *Crane*, 122 S. Ct. at 871. Thus, while the Kansas statute contained no express reference to the person's control, its definition of mental abnormality and link of that condition to likely future acts were affirmed in *Crane* as tantamount to requiring that the mental condition affect the person's control.

Thomas ignores that holding, arguing that a "diagnosis of a mental abnormality does not in and of itself prove lack of control of the behaviors associated with the diagnosis." App. Supp. Br. 22. Though he makes this statement in a supplemental brief that is supposed to address the impact of *Crane*, Thomas does not specifically refer to *Crane*. That is not surprising; *Crane* contains no holding to that effect.

Thomas relies, instead, solely upon the DSM. Of course, *Hendricks* and *Crane*, not

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[1] The Kansas and Missouri laws differ slightly at this point. Kansas merely requires a finding that the person is "likely" to commit future violent acts (K.S.A. §59-29a02(a)); Missouri limits involuntary custodial treatment to those "more likely than not" to so act (§ 632.480(5), RSMo (2000)).

the DSM, are the proper source of law on the matters before the court in supplemental briefing. But even if resort to the DSM were now appropriate, reliance on it would be misplaced. The DSM does not include a definition of "mental abnormality." As recognized in *Hendricks*, that term is a legislative creation, not a psychological term. *Hendricks*, 521 U.S. at 359. The DSM speaks in terms of "mental disease," "mental disorder," or "mental defect," all psychological labels that have no constitutional significance. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, xxxiii (rev. 4th ed. 2000); cited in *Hendricks*, 521 U.S. at 359-60.

But again, the Supreme Court in *Hendricks* expressly equated the statutory standard with the constitutional requirement. 521 U.S. at 358. And it reiterated that conclusion in *Crane*. 122 S.Ct. at 869. Thus the Court twice held that the the Kansas statute, limited as it is to those with mental abnormalities – of whatever type – that makes the predator likely to commit future, sexually violent acts, sufficiently distinguishes those it affects from the typical criminal recidivist. That distinction is evident in the link or causation requirement in the statute. A recidivist is one who commits repeated crimes; what causes him to do so is irrelevant. By contrast, for a predator, causation is key. Thomas and others are subject to commitment only if their actions are caused by their "serious mental illness, abnormality, or disorder." 122 U.S. at 870.

For the Kansas law to stand, that conclusion was sufficient. Thomas's suggestion that this court, based on *Crane*, reach a contrary conclusion as to Missouri's statute defies explanation.

B. There is no support for the assertion that the legislature would never have passed a statute that ensures secure custodial treatment for those with serious difficulty controlling their behavior.

Thomas reiterates his argument that Missouri law regarding severance is somehow different from other states, suggesting that though it may be possible to retain the Kansas law with the *Crane* evidentiary rule, the same is impossible in Missouri. App. Supp. Br. 18-19. That is wrong.

The legal basis for his argument is the same as the one he made in his opening brief. *See* Appellant's Br. at 48-49. Thomas begins by discussing Missouri's severance law, § 1.140, RSMo. 2000. But again, that statute does not directly apply here, for it deals only with the question of whether to retain the remainder of a statute once a portion is deleted, and here there is no language to delete. As shown above, the Supreme Court has twice held that the existing language is sufficient.

And even if § 1.140 were applicable, it would not help Thomas. The statute requires the court "to preserve the nonoffending portions of the statute, unless we determine that the legislature would not have enacted the valid provisions without the void one." *Kilmer v. Mun*, 17 S.W. 3d 545, 553 (Mo. banc 2000). As Thomas recognizes, the question posed by the "unless" clause would be whether the legislature "would not have enacted" the statute if it applied only to those with serious impairment. In this case, as in so many others, the "answer is rather obvious." *National Solid Waste Mgmt. Ass'n v. Director of the Dept. of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998).

In fact, there is no logical basis for arguing that the legislature would not have

passed the statute merely because it would have led to the custodial treatment only of the worst of those who have mental abnormalities that affect the likelihood that they will commit sexually violent acts. The legislature was trying to protect the public to the maximum extent possible. There can be no question that those, like Thomas, whose conditions makes them likely to commit violent acts against women and children were among its principle targets – and that ensuring their custodial treatment was sufficient to justify the statute.

III. The Supreme Court has not mandated that juries be asked whether the proof at trial meets the legal requirements identified in Crane.

Thomas's attempt to reduce the holding in *Crane* to a bright-line standard – requiring a definition for "volition" – leads to his conclusion that something was erroneously omitted from the jury instruction. Thomas then proposes a jury instruction that he believes incorporates this additional element. App. Supp. Br. 26-27.[2] His argument departs dramatically from the course charted by the Supreme Court in the Kansas cases.

Requiring an additional jury finding, and thus remanding this case for a new trial, would place this court on a different road from *Hendricks* – despite the Supreme Court's decision in *Crane* to reaffirm that *Hendricks* was the right course. In *Hendricks*, the Court affirmed the verdict committing Hendricks, despite the apparent absence of the instruction Thomas now deems essential. Even when it revisited the *Hendricks* volition issue in light

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[2] Besides being unnecessary, the proposed instruction distorts the language in *Crane*, drawing out of context the "impossible" language discussed on p. 5, *supra*.

of the more difficult facts in *Crane*, the Supreme Court neither suggested that remand should have been ordered in *Hendricks*, nor instructed the Kansas courts to return that burden to a jury in *Crane*.[3]

Hendricks was committed under statutory language identical to that submitted to the jury in *Crane*. *Crane*, 122 S. Ct. at 872 (Scalia, J. dissenting). Thus, the jury instruction in *Hendricks* contained no explicit reference to his ability to control. Hendricks' commitment was nonetheless upheld as constitutional because the Kansas statute encompassed, among other things, the required control element. See pp. 7-8, *supra*.

Expressly in *Hendricks*, then, and by reference back to *Hendricks* in *Crane*, the Court recognized that it was sufficient for the jury to be instructed on the statutory definitions for "mental abnormality" and "sexually violent predator." It follows that those terms, found in the jury instructions in this and other Missouri cases, themselves require a determination that the person's control is impaired. Nothing in *Crane* demands more. Thomas's supplemental brief identifies no express support in *Crane* for his insistence on more.

Thus, contrary to Thomas's contention, a jury instruction that further defined the term "volition" would have no constitutional import. Under *Crane*, as long as the

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[3] The only argument to the contrary is found in Justice Scalia's dissent. 122 S.Ct. at 872. He portrays a worst-case scenario, interpreting *Crane* to wreak havoc on sexual predator jurisprudence. That conclusion would only be justifiable if the *Crane* majority had actually overruled *Hendricks* – which it did not do.

condition, whatever its root cause,[4] seriously affected the person's control, the statutory and constitutional criteria would be satisfied. It follows that while the Kansas Supreme Court repeatedly referred to the need for a jury "finding" on the control issue, the Supreme Court spoke only in terms of "proof" sufficient to meet the statute. *See In the Matter of the Care and Treatment of Crane*, 7 P.3d 285. Nowhere in *Crane* does the Supreme Court use the term "finding" in conjunction with the "control" standard.

Nowhere in *Crane* does the Court include a mandate, express or implied, that the jury be invested with discerning whether the evidence does in fact transform the individual from the "typical criminal recidivist" into a sexually violent predator. As discussed above, the Court in both *Hendricks* and *Crane* held that the statutory language is enough. It already distinguishes those subject to the law from the "typical criminal recidivist."

But even the statute were not enough, no jury could reasonably be expected to make a finding that the facts in a particular case were sufficient to demonstrate that a person was

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[4] Though his proposed instruction does not reflect it, Thomas also returns briefly to his claim that there is constitutional difference between emotional and volitional impairments. App. Supp. Br. at 27. But the *Crane* majority discussed that point – and found no constitutionally significant distinction. "Emotional" and "volitional" impairments are subject to "ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Crane*, 122 S. Ct. at 867. Whether a mental abnormality's root psychological cause stems from "emotional, volitional, or cognitive" conditions is a psychiatric issue "which informs but does not control ultimate legal determinations." *Crane*, 122 S. Ct. at 867.

different from the "typical criminal recidivist." That is a threshold question of law and fact, or the sort that lies outside a jury's competence. It is akin to questions such as proportionality in death penalty cases, *see, e.g., State v. Link*, 25 S.W. 3d 136, 150 (Mo. banc 2000); *State v. Johnson*, 22 S.W.3d 183, 191-93 (Mo. banc 2000), and immunity in civil cases, *see, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). In fact, in *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court recently held that trial courts must determine threshold constitutional questions of qualified immunity even when presented with disputed facts.

Saucier was an excessive force case filed against a police officer. The officer filed for summary judgment asserting that he was entitled to qualified immunity. The U.S. Court of Appeals for the Ninth Circuit, however, refused to grant summary judgment, ruling that the question of whether the officer's conduct was reasonable was a jury question. *See id.* at 199. On certiorari, the Supreme Court held that it was improper to refer that question to the jury. *Id*. at 209. Whether it would be clear to a reasonable officer that his conduct was unlawful was considered a constitutional threshold question outside the jury's purview. This was so even though the facts in that case were disputed.

Crane likewise contemplates a judicial determination regarding the constitutional sufficiency of the evidence. Whether the state has produced sufficient evidence to meet that standard is a decision for trial and appellate courts to make, not the jury. The decision is prompted by a motion for directed verdict, or, as in this case, appellate review.

The state's proof must meet the standard clarified in *Crane* or risk dismissal at trial or successful challenge on appeal. As this case is now on appeal, the appropriate standard of review is whether, when considered in a light most favorable to the verdict, the evidence

is sufficient to meet that standard. *E.g.*, *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993). That the pattern jury instruction might be improved is not a basis for reversal. As discussed below, the evidence was sufficient to meet the legal standard. Thus the verdict should be upheld.

IV. Thomas's commitment should be affirmed based on the Supreme Court's determination that a diagnosis of pedophilia is sufficient, *per se*, to establish serious difficulty in controlling behavior.

In discussing the contrast between the facts in *Hendricks* and those in *Crane*, the Supreme Court provided further clarification of the process and nature of proof in sexually violent predator cases – clarification that places this case clearly within the *Hendricks* precedent, and that provides guidance for other cases.

Hendricks suffered from pedophilia. 521 U.S. at 354. The Supreme Court recognized that pedophilia "critically involves what a lay person might describe as a lack of control." *Crane*, 122 S. Ct. at 871. In other words, the Court recognized that pedophilia, as commonly defined, meets, *per se*, the evidentiary standard set in Hendricks and clarified in *Crane.*

Thomas, like Hendricks (and, again, unlike Crane), was a diagnosed pedophile. Both the state's expert, Dr. Richard Scott, and the defense expert, Dr. Daniel Cuneo, agreed that Thomas suffered from pedophilia and antisocial personality disorder. Tr. 288-89; Tr. 380-81. As recognized by the Supreme Court, that diagnosis, by definition, "critically involves what a lay person might describe as a lack of control." *Crane*, 521 U.S. at 871. The

evidence was sufficient, *per se*, to meet the statutory criteria: "[T]he Kansas Act sets forth comparable criteria and *Hendricks' condition doubtless satisfies those criteria*." *Hendricks* at 346 (emphasis added); see also *Crane*, 122 S. Ct. at 871, citing DSM-IV 571-572 ("listing as a diagnostic criterion for pedophilia that an individual have acted on or been affected by 'sexual urges' toward children").

But there is more. Thomas's pedophilia was long standing and involved numerous victims, ranging from six to thirteen years old. The grotesque facts are described in the State's opening brief; they need not be reiterated here.

Unlike Hendricks and Thomas, Crane had not been diagnosed with pedophilia. Thus the Court, in clarifying the evidentiary rule in his case, discussed other possible diagnoses. The Court implicitly recognized that there are some mental abnormalities that do not meet that standard, i.e., that do not result in a serious problem with controlling behavior. But the Court did not place any particular abnormality – nor any set of abnormalities, in combination – on that list. The Court was not presented with the specific question of whether even Crane's conditions, which he characterized as emotional rather than mental or volitional, inherently met the constitutional evidentiary threshold: "The Court in *Hendricks* had no occasion to consider whether confinement based solely on 'emotional' abnormality would be constitutional, and we likewise have no occasion to do so in the present case." *Crane*, 122 S. Ct. at 872. Maybe even those conditions are enough to establish a serious difficulty in control *per se*. But the Supreme Court was not asked that question, and did not answer it.

The Court did, however, expressly reject the idea – once asserted by Thomas here (App. Br. 41, 46) – that there is some constitutionally significant distinction between

mental abnormalities (which Thomas apparently agrees includes pedophilia) and emotional ones (where Thomas would place antisocial personality disorder): "Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments." *Crane*, 122 S. Ct. at 872. But again, the Court had no occasion to decide whether an emotional problem, standing alone, carried a link to behavior equivalent to that inherent in pedophilia.

Crane merely establishes the rule that there are some disorders that *do* meet the evidentiary requirements – *i.e.*, pedophilia – and others that *may* meet it, depending on the proof. Crane's disorder was in the second category; it will be up to the Kansas courts to determine whether in his particular case, he has a serious difficulty in controlling his behavior. Thomas's disorder, like Hendricks's, was in the first.

CONCLUSION

For the reasons stated above and in Respondent's Brief, the decision of the trial court should be affirmed and the constitutionality of Missouri's sexually violent predator law upheld.

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