IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF EDDIE J. THOMAS	)	
Appellant,	)	
vs.	)	Appeal No. SC83186
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE PROBATE DIVISION OF
THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE DENNIS SCHAUMANN, JUDGE

APPELLANT'S SUPPLEMENTAL STATEMENT, BRIEF AND ARGUMENT

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Jurisdictional Statement

On July 13, 1999, respondent State of Missouri filed a petition alleging that appellant Eddie Thomas was a sexually violent predator pursuant to Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) and seeking to remand him to the custody of the Missouri Department of Mental Health. On August 6, 1999, the Probate Division of the Circuit Court for the City of St. Louis, Dennis Schaumann, J., presiding, found probable cause to believe that appellant was a sexually violent predator. After a jury trial conducted on April 10-12, 2000, appellant was found to be a sexually violent predator. On April 13, 2000, the court entered judgment in accordance with the jury's verdict and committed appellant to the custody of the Missouri Department of Mental Health. On May 24, the court denied appellant's motion for new trial. Notice of appeal was filed on June 1, 2000. This cause was transferred to this Court from the Court of Appeals, Eastern District on November 13, 2000 and submitted for decision on March 28, 2001. On February 1, 2002, this Court issued an order directing the parties to file supplemental briefs addressing the issues raised by the United States Supreme Court's opinion in Kansas v. Crane, 534 U.S. ___, 122 S.Ct. 867 (2002).

Appellant challenges the constitutionality of the Missouri statute under which he was confined, Sections 632.480 – 632.513. RSMo (2000).[1] Therefore,

[1] Unless otherwise noted, all references shall be to RSMo (2000).

jurisdiction properly lies in this Court, the Supreme Court of the State of Missouri. Mo. Const., Art. V, Sec. 3.

* * *

The record on appeal will be cited to as follows: trial transcript, "Tr." and legal file, "LF."

Statement of Facts

Appellant restates and incorporates by reference the **Statement of Facts** included in his brief in chief, filed with this Court on January 19, 2001.

Points Relied On

I.

The trial court erred when it (a) denied appellant's motion to dismiss the State's petition or, in the alternative, (b) overruled his objections to Jury Instruction No. 6. Due Process requires that no person be involuntarily committed except upon proof that the prisoner suffers from a serious mental abnormality that makes it nearly impossible for him to control his dangerous behavior. Sections 632.480 RSMo, et seq. (2000) ("the SVP statute") violate the guarantees of Due Process because it permits the State to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses. Appellant was prejudiced by the trial court's error because there was no evidence whatsoever that he could not control his conduct and there was an abundance of evidence that, if he remained in treatment, he was not likely to reoffend. Thus, appellant was deprived of his liberty (a) pursuant to a statute which, on its face and as applied, violates the guarantees of Due Process and (b) the jury which convicted him was not instructed that, before finding appellant to be an SVP, it had to determine that it was nearly impossible for him to refrain from committing sexually violent acts. The SVP statute therefore violates the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution.

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780 (1992),

In the Matter of Crane, 7 P.3d 285 (Kan. 2000)

Kansas v. Crane, 534 U.S. ___, 122 S.Ct. 867 (2002)

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997)

U.S. Const., Amend. 14

Mo. Const., Art. I, Sec. 10

Section 1.140 RSMo

Sections 632.480 RSMo, et seq. (2000)

Argument

I.

The trial court erred when it (a) denied appellant's motion to dismiss the State's petition or, in the alternative, (b) overruled his objections to Jury Instruction No. 6. Due Process requires that no person be involuntarily committed except upon proof that the prisoner suffers from a serious mental abnormality that makes it nearly impossible for him to control his dangerous behavior. Sections 632.480 RSMo, et seq. (2000) ("the SVP statute") violate the guarantees of Due Process because it permits the State to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses. Appellant was prejudiced by the trial court's error because there was no evidence whatsoever that he could not control his conduct and there was an abundance of evidence that, if he remained in treatment, he was not likely to reoffend. Thus, appellant was deprived of his liberty (a) pursuant to a statute which, on its face and as applied, violates the guarantees of Due Process and (b) the jury which convicted him was not instructed that, before finding appellant to be an SVP, it had to determine that it was nearly impossible for him to refrain from committing sexually violent acts. The SVP statute therefore violates the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution.

Since this case was submitted, the United States Supreme Court issued its opinion in Kansas v. Crane, 534 U.S. ___, 122 S.Ct. 867 (2002)[2], interpreting its previous decision in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997). In Crane II, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits the involuntary commitment of a prisoner without a finding that he suffers from a serious mental illness, abnormality or disorder which causes the person serious difficulty in controlling dangerous behavior. Crane II, supra, at The Missouri Sexually Violent Predator Statute, Sections 632.480 – 632.513. RSMo (hereinafter the "SVP statute") does not require such a finding and, therefore (a) the statute is invalid on its face and the trial court should have granted appellant's motion to dismiss; or (b) the trial court erred in overruling appellant's objection to jury instruction number 6, the verdict director.

Kansas v. Crane

In Kansas v. Crane, the U.S. Supreme Court reviewed the Kansas Supreme Court's decision, In the Matter of Crane, 7 P.3d 285 (Kan. 2000).[3] Crane was charged with attempted aggravated criminal sodomy, attempted rape, and lewd and lascivious behavior arising from his attack on a video store clerk. Id. at 286. His convictions for the first two offenses were reversed, and he was incarcerated for the lewd and lascivious behavior. Id. Kansas succeeded in having Crane

[2] Hereinafter referred to as Crane II.

[3] Hereinafter referred to as Crane I.

found to be a sexually violent predator under the same statute that the U.S. Supreme Court reviewed in Hendricks. Id. at 286-87. At the commitment hearing, the prosecution presented the testimony of a psychologist who stated that Crane was a sexual predator due to his antisocial personality disorder and exhibitionism. Id. at 287.

On appeal, the Kansas Supreme Court had to consider "whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior." Id. The majority examined the U.S. Supreme Court's opinion in Hendricks and determined that Due Process required the State to prove that Crane could not control his behavior before it could involuntarily commit him. Crane I, supra, at 288-91.

The Kansas Supreme Court stated that the "Kansas" statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Id. The Kansas statute provided for the commitment of those who had a mental condition that affected their "emotional capacity or volitional capacity." Id. This, the court found, was insufficient to meet the Hendricks standard because the inclusion of "emotional capacity" permitted indefinite confinement of those who could control their behavior. Id.

A "fair reading" of the Hendricks opinion, the Kansas court held, "leads us to the inescapable conclusion that commitment under the act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To

conclude otherwise would require that we ignore the plain language of the majority opinion in Hendricks." Crane I, supra. The Kansas Supreme Court determined that Hendricks required a finding that a person could only be committed if the State showed that he could not control his dangerous conduct. Id. at 290-91.

While the United States Supreme Court held that the Kansas Court's interpretation was "overly restrictive", the Court clearly stated that **some** lack of control must be present before the detainee is subject to involuntary commitment. Crane II. at 870. Citing to both the majority opinion in Hendricks and Justice Kennedy's concurrence, the Crane II Court noted that the Constitution has to place some limits on the State's ability to define what served as grounds for involuntary commitment:

> 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 U.S., 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 (KENNEDY, J. concurring)[.]

Id. at 870. Without some heightened Constitutional standard of what can and cannot serve as the basis for an involuntary commitment, these technically 'civil'

proceedings – with their lesser procedural protections for the defendant and indefinite periods of confinement – could subsume criminal prosecutions.

To demonstrate this, the Crane II Court made particular note of a study that showed 40-60% of the male prison population suffered from Antisocial Personality Disorder (hereinafter ASPD), which the psychiatric profession called a "serious mental disorder." Id., citing Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999). The "essential feature" of ASPD is "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 701 (rev. 4th ed. 2000). All crimes against persons and virtually all crimes against property involve varying levels of disregard for the rights of others.

Without some additional check on the requirements for involuntary commitment, just about any offender could be classified as having ASPD and therefore be subject to involuntary civil commitment, because the other component – that the mental abnormality rendered him dangerous – is virtually inherent in ASPD. The "dangerousness" component offers no further distinguishing feature to assure that loss of liberty occurs only to a select group. Disregarding the rights of others very frequently places them at danger, whether it be from armed robbery, improper storage of toxic chemicals or careless and imprudent driving. The Due Process Clause, which "contains a substantive

component that bars certain arbitrary, wrongful governmental actions" Foucha v. Louisiana, 504 U.S. 71, 81, 112 S.Ct. 1780, 1785 (1992), does not permit such an outcome. Greater protections for the most fundamental liberty interest – the right to freedom from confinement – are needed, and the United States Supreme Court found that requirement continues to exist in SVP commitments. Crane II, supra, at 870.

With this in mind, the Crane II Court held that the State must show that the person targeted for SVP commitment suffers a "serious difficulty in controlling [his dangerous] behavior." Id. at 870. This standard – for which the Court gave no "narrow or technical meaning" – is compelled by Due Process to prevent the wholesale commitment of any repeat offenders in lieu of ordinary criminal prosecution and punishment:

> And this [lack of control], 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 II, supra, at 870, citing Hendricks, 521 U.S. at 357-58, and Foucha, supra, at 82-83 (1992). If there was ever any doubt as to what Hendricks held, those doubts have been dispelled by Crane II. It is now crystal clear that not only must the State prove a "mental abnormality" and resulting dangerousness, but it must also

show that the abnormality at issue is so serious that it causes the prisoner a lack of control over his conduct.

Both the Missouri SVP statute and the instruction submitted to the jury in this case permit the involuntary commitment of prisoners without any proof that they had a deficient level of control over his behavior. Appellant moved to dismiss the case against him and objected to the verdict directing instruction on this very basis. Therefore, the trial court erred when it overruled the motion to dismiss or, in the alternative, the objection to the jury instruction.

(a)

Motion to Dismiss

The Missouri SVP Statute must be struck down as unconstitutional.

The Missouri statute defines a sexually violent predator as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility . . ." Section 632.480(5) RSMo. Like the Kansas statute at issue in Crane, the Missouri statute defines a "mental abnormality" as an impairment "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[.]" Section 632.480(2) RSMo (emphasis added).

Nowhere in the SVP statute is it provided that only persons who suffer some inability to control their behavior may be committed. Indeed by its very terms, it provides for the commitment of persons who have a mental abnormality

that impacts their emotional **or** volitional capacity. "Volitional capacity is the capacity to exercise choice or will." Crane I, supra, at 288-91. By contrast, an "emotional impairment" does not necessarily impact a person's capacity for self-restraint. Id.

In Crane II, the Supreme Court explicitly declined to decide whether a person could be committed solely based upon an "emotional" abnormality. Crane II, supra, at 871. However, there is language in Crane II that suggests the Supreme Court will make no such distinction: "Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional or cognitive impairments." Id.

The general rule announced in Crane applies to volitional and emotional impairments – that whatever abnormality that is the basis for commitment must be of such severity that it inflicts upon the prisoner a "serious difficulty in controlling [his dangerous] behavior." Crane II, supra, at 870. This difficulty must be so serious that it elevates his dangerousness above and beyond that of the "dangerous but typical recidivist convicted in an ordinary criminal case." Id.

The Missouri SVP statute on its face makes no such distinction. By its terms, it sweeps in just about anyone, "recidivist" or not, regardless of whether he has difficulty controlling his behavior. Nor does it place a minimum threshold upon the severity of the "mental abnormality" – volitional or emotional – for which a prisoner may be confined. The State may well argue that limiting involuntary commitment to those "more likely than not to engage in predatory acts

of sexual violence if not confined in a secure facility," Section 632.480(5) RSMo, is sufficient to meet the Crane standard. This is wrong for two reasons. First, a "dangerous but typical recidivist" is clearly subject to commitment under such a reading of Section 632.480(5). But Crane II held that such persons must be dealt with through the criminal justice system, not civil commitment. Second, the Kansas statute at issue in Crane had a virtually-identical provision. Crane I, supra, at 288. In rendering its decision, the Supreme Court made no mention whatsoever of this language, and that silence is deafening. Clearly, the Court did not consider it sufficient to meet the requirements of the Due Process.

On its face, the Missouri SVP statute contemplates the involuntary commitment of many, many more persons than permitted by Crane II. There are likely many individuals who have some sort of mental defect that inclines them to commit sex crimes, but whose behavior is not a result of a lack of control. The evidence at trial suggested that persons under the supervision of probation or parole officers have a "substantially lower" rate of recidivism than people who are unsupervised (Tr. 299). The highest risk of recidivism for sex offenders was within the first three to five years after release on parole (Tr. 390). Also the scientific studies do not support the proposition that most offenders relapse after they are discharged from probation (Tr. 390).

This strongly suggests that the **threat** of incarceration – as a result of a new prosecution or resulting from revocation of parole – is effective in deterring recidivism and that most offenders can restrain themselves from acting out if

motivated to do so. The inevitable conclusion is that persons who suffer from a serious impairment of their capacity to control themselves – who may be committed under Crane II – are but a fraction of all sex offenders. By making no provision for limiting commitment to those lacking control, the Missouri Legislature was aiming to confine many, many more persons than is constitutionally permissible.

Appellant notes that both the Kansas Supreme Court and the U.S. Supreme Court left the Kansas SVP Act on the books. However, whether a statute may be effectively rewritten by judicial decision or must be stricken entirely is a matter of state, not constitutional, law. Missouri law regarding statutory construction requires that the SVP statute be struck down *in toto* under Section 1.140 RSMo. This Section provides that "the provisions of every statute are severable." However, the severability of Missouri statutes is limited if it cannot be presumed that the Legislature would have enacted the statute without a provision that is found unconstitutional. Section 1.140 RSMo. The Missouri SVP Act's definition of mental abnormality – and therefore its definition of an SVP – is unconstitutional under Crane II. This Court cannot presume that the Missouri Legislature would have enacted the SVP statute if it knew that its reach would be so constricted by subsequent judicial opinion.

In enacting the expansive definition of an SVP, the Legislature was clearly intending to sweep up a broad class of persons, including many who did not lack control over their behavior. Nowhere does the statute indicate that the Legislature

was interested in confining only a smaller group – those whose mental abnormality is so severe that it seriously impinges upon their ability to exercise self-control. As detailed in appellant's original brief, the procedure established for involuntary commitment pursuant to the SVP statute taxes the personnel and resources of the Office of the Attorney General, the Department of Corrections, the Department of Mental Health, the Missouri State Public Defender System, the local prosecutors, the local Probate Courts and the Court of Appeals. See: Appellant's Brief, 51-54. Nothing in the SVP statute indicates that the Legislature would have charged all these agencies with this task if it had known that only a subset of those it sought to confine would actually be eligible for commitment. This Court cannot presume that the Legislature would have enacted such an expansive scheme if it had known that only a small portion of those it targeted with its unconstitutional definition of an SVP would actually be eligible for commitment. Therefore, the statute as a whole must be struck down and the case against appellant dismissed.

(2)

Jury Instruction

The jury was not required to find lack of control

In the alternative, this Court should reverse the judgment against appellant and remand this cause for a new trial because the verdict director did not include the requirements put forth by the Supreme Court in Crane II. Specifically, it did

not require the jury to find that it was virtually impossible for appellant to control his behavior. The given instruction read as follows:

INSTRUCTION NO. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that respondent pled guilty to forcible rape and forcible sodomy in the Circuit Court of the City of St. Louis, State of Missouri on June 25, 1982;

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality, and

Fourth, that as a result of this abnormality, the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find that the respondent is a sexually violent predator.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you may not find respondent to be a sexually violent predator.

As used in this instruction, "sexually violent offense" includes the offenses of forcible rape and forcible sodomy.

As used in this instruction, "mental abnormality" means 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.

As used in this instruction, "predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(LF, 165-66) (emphasis added).

This instruction was plainly inadequate to meet the requirements of Crane II. Nowhere did the instruction require the jury to find that appellant lacked control over his behavior and/or that his dangerous conduct was a result of that lack of control. In particular, the definition of "mental abnormality" violates Crane II – it directed the jury to commit appellant if it found that he was "predispose[d]" to committing sexual offenses without any finding that appellant had a "serious difficulty" in controlling his dangerous behavior. Although the definition includes the term "volitional control" – volition being associated with the ability to control one's conduct – it does not define "volitional control", which is hardly a term of common usage.

The concept of volitional impairments is controversial and not subject to simple labeling. There is no agreement on the term "volition" as a legal concept. There are authorities who do not endorse any concept of volitional impairment absent a physiological problem (such as Tourette's Syndrome). See: Stephen J. Morse, "Culpability and Control", 142 U. Pa. L. Rev., 1587. Even the definition in the Kansas Supreme Court opinion in Crane I fails to clarify the term. The

Kansas Supreme Court discussed it in terms of a "capacity to exercise choice or will". Crane I, supra, at 288-91. Some speak of it in terms of "willpower". E. Janus, The Sexual Predator, Vol. II 1-8 (A. Schlank, ed. 2001).

A diagnosis of a mental abnormality does not in and of itself prove lack of control of the behaviors associated with the diagnosis. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxxiii (rev. 4th ed. 2000). It may therefore be more useful to think of "volitional impairment" in terms of a high degree of difficulty in resisting a course of action. The question then becomes one of setting a threshold.

The United States Supreme Court made it clear that this threshold must be a narrow one, by requiring that there be evidence that the person have "serious difficulty in controlling [his dangerous] behavior" before he can be subjected to involuntary civil commitment. Crane II, supra, at 870. Before committing someone as an SVP, 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 sex offenses. The "if not impossible" portion of that phrase is telling – it indicates that a minor difficulty will not suffice and the difficulty level must be closer to the "impossible" portion of the spectrum. Put differently, it must be nearly impossible for the person to control his dangerous behavior. This narrow standard serves the purpose of a constitutional standard for SVP commitments, because it excludes the "dangerous but typical recidivist."

Instruction No. 6 in this case, as written, failed to meet this standard. The instruction requires the jury to commit someone who has a mental abnormality and who is predisposed towards committing sexual offenses. In other words, the verdict director commands the commitment of a "dangerous but typical recidivist convicted in an ordinary criminal case" which is specifically prohibited by Crane II. The heightened standard – required by Due Process and Crane II to sift those who may be constitutionally committed from those who must be dealt with through the criminal justice system - is nowhere to be found in Instruction 6.

The failure of Instruction 6 to require a finding that appellant had serious difficulty in controlling his behavior prejudiced appellant. There was absolutely no evidence that appellant found it virtually impossible to control his actions. Appellant's MOSOP report reflects that appellant "gained much knowledge" through his participation in the program (Tr. 328). It also states that appellant acknowledged his problem with sexual deviance, but notes that he is "highly motivated" for treatment (Tr. 328). His success in avoiding recidivism would depend, states the report, upon his willingness to apply what he has learned once he is released (Tr. 328).

The State's expert, Dr. Scott, diagnosed appellant with two clinical conditions that he believed met the statutory definition of "mental abnormality" (Tr. 288). One was pedophilia – a disorder in which a person is sexually attracted to children (Tr. 288). The second was antisocial personality disorder, in which the

person has a high rate of committing crimes, including sexually violent crimes (Tr. 288-89).

Dr. Daniel Cuneo testified for the defense (Tr. 362). Under the DSM-IV's definition, he also diagnosed appellant as a pedophile and suffering from ASPD (Tr. 380). However, if appellant remained in treatment, Cuneo thought he was not likely to commit sexually predatory acts (Tr. 440).

Thus, the jury was presented with two diagnoses by testifying experts as well as the MOSOP report – none of which found that appellant was unable to refrain from committing the acts for which he was charged, convicted and imprisoned. Cuneo expressly believed that appellant could control his behavior and was not likely to reoffend if he continued with his treatment (Tr. 440). Scott differed from Cuneo in his conclusion, not in the disorders that he found. Cuneo gave appellant more credit for pursuing treatment, whereas Scott was skeptical that appellant was actively and sincerely seeking help (Tr. 290-95, 297, 310; 388-89).

The State did not even **attempt** to prove that appellant was unable to stop committing sexually violent acts or that he had "serious difficulty" in controlling his behavior. Thus, the jury certainly found against appellant without determining that he lacked the ability to – or had serious difficulty with – restraining himself from such conduct. As the instruction directed the jury to commit appellant to the custody of the Department of Mental Health without the finding required by Crane

II and there was no evidence that would have supplied the basis for such a finding, appellant was prejudiced by the erroneous instruction.

It is this Court's task to instruct the lower courts on what the law is and how it should be applied. Appellant respectfully suggests that, with the great number of SVP commitment proceedings either awaiting trial or on appeal, an explicit statement as to how the verdict director should read would be appropriate as part of this Court's decision of this case.

In order to comply with Crane II, the jury must be directed that it can only commit someone as an SVP if it finds that he has serious difficulty in controlling his behavior. In order to determine **how** serious that difficulty must be, further examination of Crane II and Hendricks is necessary. The Crane II Court held that the Kansas Supreme Court had read Hendricks in an overly-restrictive fashion when the latter court stated that Hendricks permitted the commitment only of those who were "completely unable" to control their behavior. Crane II, supra, at 870. The Court cited to its language in Hendricks in which it stated that it was upholding the Kansas SVP Act because it was limited to those whose mental abnormality or personality disorder made it "**difficult if not impossible** for the [dangerous] person to control his dangerous behavior." Crane II, supra, citing Hendricks, supra, at 358 (emphasis added, brackets in the original).

Since this is the language from Hendricks that the Crane II Court relied on in holding that a "serious difficulty" in controlling dangerous behavior was

sufficient, appellant submits that analogous language must be included in the verdict director to bring it into compliance with Crane II.

For clarity's sake – and to ensure compliance with Crane II – appellant submits that the verdict director should include the following boldfaced language:

INSTRUCTION NO. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that respondent pled guilty to forcible rape and forcible sodomy in the Circuit Court of the City of St. Louis, State of Missouri on June 25, 1982;

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality,

Fourth, that the respondent's mental abnormality makes it almost impossible for him to control his dangerous conduct, and

Fifth, that as a result of this abnormality, the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find that the respondent is a sexually violent predator.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you may not find respondent to be a sexually violent predator.

As used in this instruction, "sexually violent offense" includes the offenses of forcible rape and forcible sodomy.

As used in this instruction, "mental abnormality" means 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.

As used in this instruction, "volitional or emotional capacity" means the ability to control the person's behavior.

As used in this instruction, "predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

These additions to the verdict directing instruction would have brought it into compliance with Crane II in appellant's case.

Defining "volitional or emotional capacity" in this way will prevent juror confusion by this abstruse legal/psychological term. Explicitly requiring a finding that it is difficult to the point of being almost impossible for the respondent to control his behavior will bring the elements in line with Crane II's mandate to distinguish between those whose mental abnormality is of such severity that they may be dealt with by civil commitment rather than by the criminal justice system.

In Crane II, the U.S. Supreme Court reemphasized the importance of limiting the extraordinary measure of involuntarily committing people to a mental institution based on speculation that they **might** commit a crime and not

permitting it to supplant the tradition – rooted in centuries of American jurisprudence and the subject of extensive constitutional protections – of confining offenders because they **did** commit a crime. The Crane II case dictates that only persons who are afflicted with a mental abnormality that almost completely prevents them from exercising control over their dangerous impulses be confined as sexually violent predators. Neither the Missouri SVP statute nor the jury instruction that mimics its language guarantee that SVP commitment will be limited and thus violate Crane II. The trial court erred when it denied appellant's motion to dismiss and overruled his objections to the verdict director. The trial court's errors prejudiced appellant and violated his right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Appellant prays this Court to reverse the judgment of the trial court and remand this cause with directions that he be discharged or, in the alternative, that he be granted a new trial.

Conclusion

Wherefore, for the forgoing reasons and for the reasons put forth in his brief in chief, appellant prays this Honorable Court to hold that Sections 632.480 – 632.513 RSMo are unconstitutional and remand this cause with orders that the judgment of the Probate Court be vacated and the petition against him dismissed or, in the alternative, for a new trial.

Respectfully Submitted,

_____
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Certificate of Service

One written copy of the forgoing Appellant's Statement, Brief, and Argument and one copy on floppy disk were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this 25th day of February, 2002.

_____
Attorneys for Appellant

Certificate of Counsel Pursuant to Special Rule 1(b)

Pursuant to Special Rule No. 1, counsel certifies that this brief complies with the limitations contained in Special Rule No. 1(b). Based upon the information provided by undersigned counsel's word processing program, Microsoft Word 2000, this brief contains 601 lines of text and 5,849 words. Further, a copy of appellant's brief on floppy disk accompanies his written brief and that disk has been scanned for viruses and is virus-free as required by Special Rule 1(f).

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