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 REPLY BRIEF

Douglas R. Hoff, MOBar #45257
Nancy Vincent, MOBar #36335
Attorneys for Appellant
1221 Locust Street
Suite 350
St. Louis, MO 63103
(314) 340-7658

Index

Table of Authorities

Cases **Page**

Other Authority

Jurisdictional Statement and Statement of Facts

Appellant restates and incorporates by reference his Jurisdictional Statement and Statement of Facts previously filed with this Court.

* * *

The record on appeal will be cited to as follows: trial transcript, "Tr.," legal file, "LF," Respondent's Supplemental Brief, "Resp. Br.," Appellant's Supplemental Brief, "App.Br."

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.

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

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

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979).

Sections 632.492, 632.495 RSMo (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.

In response to appellant's supplemental brief, the State argues that the U.S. Supreme Court's opinion in Kansas v. Crane, 534 U.S. ___, 122 S.Ct. 867 (2002) was a substantially meaningless "clarification" of its prior opinion in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997). The State reiterates its earlier position – which has now twice been rejected by the United States Supreme Court – that a linkage between any mental abnormality and future dangerousness is in and of itself sufficient to justify involuntary commitment. The State's position appears to be the dissent in Crane. Therefore, a response is necessary.

Respondent concedes that Crane held that no person may be involuntarily committed as an SVP absent evidence he suffers from a serious difficulty in controlling his dangerous behavior. Resp. Br., 5-6. However, the State simultaneously argues that the definition of an SVP in both the Missouri and Kansas statutes – which makes no mention of a serious difficulty in controlling behavior – meet the requisites of Crane because they both link the mental abnormality to dangerousness. Resp. Br., 7, 9, 11, 12. According to the State, "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." Resp. Br., 10.

This is simply untrue. Crane Court that no one may be committed as an SVP unless he suffers a "serious difficulty in controlling [his dangerous] behavior." Id. at 870. Further,

> 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, supra, at 870, citing Hendricks, 521 U.S. at 357-58. Thus, any serious mental abnormality will not suffice, as the State contends. Resp.Br., 12.

If **any** mental abnormality would suffice, the Supreme Court would have said so. If it wanted to "clarify" Hendricks along the lines urged by the State, it could have done so in a paragraph. Crane was not a mere "clarification" of Hendricks. Justice Thomas, who authored Hendricks, joined the **dissent** in Crane, which lambasted the majority for, in his view, standing Hendricks on its head:

> It could not be clearer that, in the [Hendricks] Court's estimation, the very existence of a mental abnormality or personality disorder that causes a likelihood of repeat sexual violence in itself establishes the requisite 'difficulty if not impossibility' of control. Moreover, the passage in question [stating that the Kansas SVP statute is limited to those unable to control their actions] cannot possibly be read as today's majority would read it because nowhere did the jury verdict of commitment that we reinstated in Hendricks contain a separate finding of 'difficulty, if not impossibility, to control behavior.' That finding must (as I have said) have

been embraced within the finding of mental abnormality causing future dangerousness.

Crane, supra, at 873-74 (Scalia, J., dissenting).

The State argues that the Crane Court held that link between mental abnormality and dangerousness suffices to exclude the typical 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 it 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.

Resp.Br., 12. This was the position of the **dissent**, not the **majority**, in Crane:

> The [Crane majority] relies upon the fact that '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.' Ante, at 870. (quoting 521 U.S., at 360, 117 S.Ct. 2072). But the [Kansas] SVPA as written – without the benefit of supplemental control finding – already achieves that objective. It conditions civil commitment not upon a mere finding that the sex offender is likely to reoffend, but only upon the additional finding (beyond a reasonable doubt) that the *cause* of the likelihood of recidivism is a 'mental abnormality or

personality disorder.' Kan. Stat. Ann. Sec. 59-29a02(a) (2000 Cum. Supp.).

Crane, supra, at 874 (Scalia, J., dissenting).

The State argues that the dissent's position in Crane was in fact the majority holding. It urges this Court to find that Crane merely "clarified" Hendricks and announced no new rule of constitutional law. Resp.Br., 4, 5, 6. This would likely come as a surprise to Justice Scalia who – joined by Hendricks author Justice Thomas – accused the Crane majority of "gutting" Hendricks. Crane, supra, at 875 (Scalia, J., dissenting). According to the dissent, the Crane majority opinion "says that the Constitution requires the addition of a … finding that the subject suffers from an inability to control behavior…" Id. While adopting the Crane dissent's arguments regarding the meaning of Hendricks, the State – unlike the Crane dissent – blithely ignores the impact the Crane opinion actually had on Hendricks.

The obvious conclusion is that Crane holds that Due Process places Constitutional limits on the sort of mental abnormalities for which a person could be confined as an SVP. It limits SVP commitment to those who suffer from mental abnormalities which make it "difficult if not impossible" for the person to control his dangerous behavior. The State's current position garnered two votes out of nine in Crane. This Court should reject it out of hand.

Next, the State argues that the Crane Court did not require the juries in SVP cases be instructed that they must find that the defendant suffered from any lack of

control. Resp. Br., 14-15. The first part of this argument is largely a rehash of its earlier attempt to morph the Crane dissent into the Crane majority, and substantially parrots Justice Scalia's critique of Crane. Resp. Br., 14-15; Crane, supra, at 875 (Scalia, J., dissenting).

In the second part of its argument, respondent takes a more novel tack. Earlier, the State argued that mental abnormality and resulting dangerousness are the only facts that must be found to justify SVP commitment (Resp. Br., 7, 15) and that lack of control is implicit in this finding. Resp. Br., 9. Nonetheless, the State suggests that Crane required "proof" of a lack of control, but does not require any "jury finding" to that effect. Resp.Br., 15. The State then argues that Crane requires that a **court**, not a **jury**, find that the evidence at trial showed that an SVP defendant was "different from the 'typical criminal recidivist'." Resp. Br., 15.

First, the Crane Court never stated that any finder of fact compare a hypothetical "typical" recidivist to the person subject to SVP commitment. What the Court did was require that the threshold "mental abnormality" be of sufficient severity that an SVP commitment regime not sweep up **all** recidivists who may suffer from a mental abnormality, even though it may make them dangerous. See: App.Br., 13-14.

Second, the State offers no justification in law for this bifurcation of the fact-finding in an SVP case, which lacks any support whatsoever outside of its brief. The SVP statute requires that, in a jury trial, the **jury** find the accused to be an SVP:

> The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand for a jury is made, the trial shall be before the court.
>
> * * *
>
> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury.

Sections 632.492, 632.495 RSMo (2000). Again, Crane requires an additional fact – a high degree of lack of control – be found before someone is committed as an SVP. It is an additional element required by Due Process and imposed by the Constitution, just as the other elements are required by the SVP statute itself. In a jury-tried case, the jury must find this fact, just as it must find the other requisite facts, unanimously and beyond a reasonable doubt.

In rendering its decision in Crane, the Supreme Court did not dictate to lower courts jot-by-jot how they should bring their SVP schemes into compliance with the Due Process Clause. This is consistent with the Court's longstanding role as setting forth the **minimal** Due Process requirements for commitment proceedings. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979). In Addington, the issue was how high a burden of proof did the Constitution require in an involuntary commitment proceeding. Id. at 425, 99 S.Ct. at 1809. The instruction at issue required that the State prove its case by "clear, unequivocal,

and convincing evidence." Id. at 421, 99 S.Ct. at 1807. The appellant sought to have the Court declare that proof beyond a reasonable doubt was required by the Due Process Clause. Id. at 427, 99 S.Ct. at 1810.

The Addington Court held that a "preponderance of the evidence" standard was insufficient and that the middle tier standard – "clear and convincing evidence" satisfied the guarantees of Due Process. Id. at 431, 99 S.Ct. at 1812. In so holding, the Court noted that its role was not to impose inflexible mandates upon the States, but rather to put forth the bare requisites of what the U.S. Constitution required:

> The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.

Id. Over twenty years later, the Crane Court followed this pattern and did not provide the States with a blueprint on exactly how to alter their SVP regimes, rather it set a "floor" that must be met.

The State offers no useful suggestions as to how to bring Missouri SVP proceedings into compliance with Crane. For the reasons put forth in his supplemental brief, appellant suggests that his model instruction puts Missouri firmly on the safe side of Crane, without imposing any more of a burden upon the State than Crane requires. See: App.Br., 19-28.

Finally, the State makes its most confusing argument of all – that a diagnosis of pedophilia is the equivalent of a lack of control, so the judgment against appellant need not be reversed. Resp. Br., 17-19. First of all, the State mischaracterizes the Crane Court's statements on the issue. According to the State, "the Court recognized that pedophilia, as commonly defined, meets, *per se*, the evidentiary standard set in Hendricks and clarified in Crane." Resp.Br., 17. The substance of the passage that the State uses to support its argument reads as follows:

> We agree that Hendricks limited its discussion to volitional disabilities. And that fact is not surprising. The case involved an individual suffering from pedophilia – a mental abnormality that critically involves what a lay person might describe as a lack of control … Hendricks himself stated that he could not "'control the urge' to molest children. 521 U.S., at 360, 117 S.Ct. 2072. In addition, our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior – in the general sense described above… And it is often appropriate to say of such individuals, in ordinary English, that they are "unable to control their dangerousness." Hendricks, supra, at 358, 117 S.Ct. 2072.

Crane, supra, at 871. Although the State would take a single sentence out of context and make this issue cut and dried, this Court should note the tentative tone of the entire paragraph ("what a lay person **might** call lack of control…"

"commitment… will **normally** involve individuals…" "in the **general** sense described above" and "it is **often** appropriate to say of such individuals…"). Nowhere in any fashion does Crane "establish[]the rule" that all pedophiles may be committed as SVPs, as the State argues. At the conclusion of this passage, the Crane Court stated unequivocally that Hendricks "must be read in context," Crane, supra, at 871, something the State, by making this argument, refuses to do.

The Crane Court noted that Hendricks himself had essentially conceded the uncontrollable nature of his individual affliction, but did not lump all pedophiles into that extreme end of the spectrum. Not only does Crane not support the State's expansive claim, neither does the medical literature. Cf. B. Winick, Sex Offender Law In the 1990s: A Therapeutic Jurisprudence Analysis 4 Psychol. Pub. Pol'y & L. 505, 520 (1998) ("There simply is no theoretical or empirical support for the proposition that people with pedophilia are unable to prevent themselves from acting on their strong sexual urges").

Therefore, for the reasons put forth in appellant's original brief and its supplemental briefs, appellant was prejudiced by the lack of this element in Instruction 6, and the judgment against him must be reversed.

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,

_____
Douglas R. Hoff, Mobar #45257
District Defender
1221 Locust, Suite 350
St. Louis, MO 63103
314/340-7662

Attorney for Appellant

Certificate of Service

One written copy of the forgoing Appellant's Supplemental Reply Brief and one copy on floppy disk were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this ___ day of _____, 2002.

_____
Attorney 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 351 lines of text and 3,171 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).

Respectfully Submitted,

_____

Douglas R. Hoff, Mobar #45257
District Defender
1221 Locust, Suite 350
St. Louis, MO 63103
314/340-7662

Attorney for Appellant