IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF DESI EDWARDS, Respondent/Appellant.	)	No. 78858

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT
THE HONORABLE DENNIS SCHAUMANN

APPELLANT'S REPLY STATEMENT, BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

JURISDICTIONAL STATEMENT, STATEMENT OF FACTS, POINTS RELIED ON, AND ARGUMENT

Edwards reaffirms and incorporates by reference the Jurisdictional Statement, Statement of Facts, Points Relied On, and Argument contained in his Statement, Brief, and Argument, filed with this Court on August 29, 2001.

POINTS RELIED ON

I

The trial court erred and abused its discretion when it (a) denied Edwards' motion for a directed verdict, and/or b) submitted Instruction No. 6 while refusing Edwards' proffered Instruction Nos. B, C, and/or D. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Edwards lacks volitional capacity to control his behavior. Edwards was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.

Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation 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 without also requiring a showing of inability

to control conduct. The trial court's rulings deprived Edwards of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Edwards's volitional capacity, nor was it instructed that before finding Edwards to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.[1].

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

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

In re Linehan, 594 N.W.2d 867 (Minn. 1999);

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

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

VIII

The trial court plainly erred, causing manifest injustice, when it allowed the state to call Edwards to the stand and testify as a witness against himself. The right to remain silent in an involuntary commitment proceeding includes the constitutional protection against self-incrimination. Edwards was prejudiced because the jury considered his statements as evidence against him. The trial court's error violated Edwards' rights to due process of law and right to remain

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[1] While Edwards challenges every point raised in Respondent's brief, Edwards will specifically reply only to Points I and VIII.

silent, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution.

Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988 (1986);

In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967);

State ex rel. Simanek v. Berry, 597 S.W.2d 718 (Mo.App.W.D. 1980);

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 10, 19.

ARGUMENT

I

The trial court erred and abused its discretion when it (a) denied Edwards' motion for a directed verdict, and/or b) submitted Instruction No. 6 while refusing Edwards' proffered Instruction Nos. B, C, and/or D. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Edwards lacks volitional capacity to control his behavior. Edwards was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.

Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation 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 without also requiring a showing of inability to control conduct. The trial court's rulings deprived Edwards of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Edwards's volitional capacity, nor was it instructed that before finding Edwards to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.

1. Hendricks prohibits commitment of those who can control their behavior.

Respondent argues that the United States Supreme Court decision in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997) does not bar the civil commitment of those who are able to refrain from sexually violent conduct (Resp. Br. 24). In making this argument, the State materially misconstrues Hendricks. The State seems to characterize those portions of the Hendricks decision, upholding the Kansas SVP statute because it limited its sweep to those who could not refrain from sexually violent acts, as essentially dicta (Resp. Br. 27). The basis for the Court's judgment is not "dicta." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S.Ct. 1114, 1128 (1996). The Hendricks court was called upon to decide under what circumstances a person judged to be an SVP could be involuntarily committed. Hendricks, 521 U.S. at 349, 117 S.Ct. at 2076. Specifically, the issue before the Court was whether the definition of an SVP in the Kansas statute – which provided for the commitment of persons having a "mental

abnormality," rather than "mental illness" – was consistent with the Due Process Clause of the United States Constitution. Id. at 355-56, 117 S.Ct. at 2079.

The Hendricks Court upheld the Kansas SVP scheme because it found that due process did not require a finding of "mental illness" for some one to be involuntarily committed for treatment. Id. It rejected Hendricks' claim that his confinement could not be predicated on a "mental abnormality" – a term which he characterized as devoid of medical or psychological meaning. Id. at 358-59, 117 S.Ct. 2080-81. The Court noted that the Due Process Clause did not require any particular nomenclature and stated that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.'" Id. at 358, 117 S.Ct. at 2080.

The Supreme Court also held that "[t]hese added statutory requirements **serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control."** Id. at 358, 117 S.Ct. at 2080 (**emphasis** added). The Court upheld the Kansas scheme because it

> require[d] a finding of future dangerousness, and then link[ed] 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.** Kan. Stat. Ann. Sec. 59-29a02(b) (1994). The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements

of these 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.**

Id. at 358, 117 S.Ct. at 2080 (emphasis added). Thus, the Hendricks Court did not state – as Respondent would have this Court believe – that **any** "mental abnormality" or "personality disorder" that causes a person to be dangerous would permit involuntary commitment, just those ailments that rendered that person unable to control their dangerous behavior.

The Court noted that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that **prevents them from exercising adequate control over their behavior.** Such persons are unlikely to be deterred by the threat of confinement." Id. at 362-363, 117 S.Ct. at 2081 (emphasis added). The Hendricks Court's decision that Hendricks could be committed on the basis of a "mental abnormality" was, therefore, predicated upon its finding that the Kansas commitment statute limited confinement to those who could not control their behavior.

The limited sweep of the Kansas SVP statute, as interpreted by the Hendricks Court, was the reason that it comported with Due Process. Nonetheless, the State would have this Court disregard the very basis for the Hendricks decision as "dicta." Contrary to the State's position here, in mentioning Hendricks' lack of control, the Hendricks court was not merely "discussing the facts of the case," as Respondent would have this Court believe, it was establishing its rationale for upholding the Kansas statute (Resp. Br. 24-28).

Appellate courts in Kansas and Minnesota differ with Respondent's analysis and found that Hendricks required that a person subject to commitment be found to have a volitional impairment that renders him unable to adequately control his actions. In the Matter of Crane, 7 P.3d 285 (Kan. 2000); In re Linehan, 594 N.W.2d 867 (Minn. 1999).

Respondent criticizes Crane, purportedly for "not articulating a rationale" for requiring a volitional impairment (Resp. Br. 28). Respondent does not see any meaningful distinction between a person who cannot refrain from sexually violent conduct and a person who can stop himself, but for whatever reason, will not do so (Resp. Br. 28). According to the State, "Nothing in Hendricks suggests that the Crane line [of cases] would make sense to the U.S. Supreme Court" (Resp. Br. 28*)*. Not true. By repeatedly emphasizing that it was upholding the Kansas Act because it was limited to those with volitional impairments, the Hendricks Court would see those cases as logical applications of the reasoning it employed.

The rationale for the distinction between persons who can and who cannot control their behavior is fairly straightforward. The Hendricks Court noted that those suffering under a volitional impairment "are unlikely to be deterred by the threat of confinement." Hendricks, supra, at 362-363, 117 S.Ct. at 2081. On the other hand, people who can control their behavior, can be deterred from acting out by the possibility of discovery and punishment. As the Hendricks Court stated, these persons are distinguished from Hendricks –who lacked volitional control over his actions – and, unlike Hendricks, are "more properly dealt with exclusively through criminal proceedings." Id. at 760, 117 S.Ct. at 2081. Therefore, the only way to deal with the dangerous impulses of those who

cannot control their behavior is to confine them for treatment. However, those who can control their behavior can be deterred through the threat of ordinary criminal sanctions.

Under Hendricks, the State is permitted to deal with those who have "irresistible desires" to commit sexually violent acts by confining them for treatment until they are cured. Therefore, in those cases, commitment satisfies substantive due process. This is the common thread that began in Hendricks and runs through Linehan and Crane. The converse is laid out in Hendricks: a person who has desires that he does not resist – but could if he wanted to – must be dealt with through the normal criminal process.

The Hendricks court stated as much when it held that those lacking a volitional impairment are "more properly dealt with exclusively through criminal proceedings." Id. at 760, 117 S.Ct. at 2081.

The weakness of Respondent's arguments are readily apparent from the fact that it does not cite to Hendricks in arguing that due process permits confining in a mental institution those who can control their behavior (Resp. Br. 24-27). Other than critiquing Edwards' reliance on Hendricks – which it asserts is misguided – the State ignores it, preferring to base its argument upon one pre-Hendricks Supreme Court case, Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780 (1992), this Court's opinion in State v. Revels, 13 S.W.3d 293 (Mo. banc 2000), and In re Gordon, 102 Wash.App. 912, 10 P.3d 500 (Wash. App. 2000). Respondent cannot rely on these cases to support its argument.

Edwards submits that the Supreme Court's opinion in Hendricks is unquestionably the leading authority on the constitutionality of SVP commitment. Respondent cites In re Linehan, 557 N.W.2d 171, 182 (Minn. 1996) for the proposition that Foucha was "the

leading United States Supreme Court case on the subject" (Resp. Br. 26, internal quotes omitted). This case has been superceded by In re Linehan, 594 N.W.2d 867 (Minn 1999), which was decided after the U.S. Supreme court remanded the earlier case for reconsideration in light of Hendricks. Linehan, 594 N.W.2d at 871. The later Linehan case does not apply Foucha, but rather relies on Hendricks for its analysis. Id. at 871-76.

Further, neither Foucha nor Revels deal with the topic: both cases involved the continuing confinement of persons who had been acquitted of criminal charges on the grounds of insanity and who remained confined after trial. Foucha, supra, at 73-75, 112 S.Ct. at 1782-83; Revels, supra, at 294-95. It is clear that Hendricks, not Foucha or Revels, is determinative on this question. This is particularly apparent from the fact that In re Gordon, the only SVP case that Respondent does cite, purports to apply Hendricks but not Foucha in making its decision that Washington's SVP statute is constitutional. In re Gordon, supra, at 917, 10 P.3d 500, 502.

Although Respondent faults Crane, supra, for supposedly lacking analysis, the In re Gordon decision truly fails in this regard. Gordon argued that the jurors in his case were misinstructed because they were not required to find that he was unable to control his actions. In re Gordon, supra, at 917, 10 P.3d at 502. The Washington Court of Appeals noted the language in Hendricks where the Court held that the Kansas SVP act was constitutional because it was limited to those who had a volitional defect. In re Gordon, supra, at 917-18, 10 P.3d 502. However, the Gordon court held that the Supreme Court's discussion on this topic merely reflected that it was "troubled by the prospect of commitment based on only a general finding of dangerousness and a

condition, such as a mental illness or abnormality, that deprives the individual of his ability to control that dangerousness." Id. at 918, 10 P.3d at 503. The Gordon court then went on to say that Washington's statute passed muster under Hendricks by requiring a link between the prisoner's "mental abnormality or personality disorder" and "the likelihood that he or she will engage in predatory acts of sexual violence in the future." In re Gordon, supra, at 918, 10 P.3d at 503. What the court in Gordon overlooked – and the Hendricks, Crane, and Linehan courts did not – was the fact that some mental abnormalities do not deprive a person of his free will and do not render him unable to control his acts.

Put another way, there are people whose disorders cause them to have desires to, for example, molest children. In all those people, their conduct is linked to their disorder. However, not all of those people have been rendered unable to resist those desires. A person who can resist those desires can be deterred from reoffending by the threat of discovery, capture and imprisonment. A person who cannot resist those desires will not be deterred by anything, so may, under Hendricks, be confined for treatment.

2. Edwards was prejudiced by the erroneous verdict director because there was no evidence at trial that Edwards lacked volitional control over his actions.

Respondent asserts that the evidence established beyond dispute that Edwards lacked the volitional capacity to refrain from acts of sexual violence (Resp. Br. 38-39). Respondent, citing Linehan, argues there was sufficient evidence to support a finding that Edwards lacked "adequate control of his harmful sexual impulses" (Resp. Br. 38-39) (internal quotes omitted). Respondent essentially states that evidence of Edwards' past

actions is evidence of lack of volitional capacity (Resp. Br. 38-39). There is no basis upon which to make such an assumption. In fact, Hendricks requires more than a lack of "adequate" control in order for a person to be confined. As the Crane decision noted, Hendricks mandates a lack of control, without the qualifier "adequate."

For all the reasons discussed, the SVP statute violates the guarantees of Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it permits the state to deprive a person of his liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses, without also requiring the state to prove that he is unable to control his behavior. This Court cannot both change what the state needs to charge and prove to bring the statute into compliance with Hendricks and effectuate the Legislature's intent in enacting it. This Court must, therefore, declare the Missouri SVP statute unconstitutional, reverse the judgment of the lower court, and order Edwards discharged from custody.

In the alternative, should this Court – like the courts in Crane and Linehan – find that Hendricks only requires an additional element be added to the jury instructions, this Court should reverse Edwards' commitment and remand with directions for a new trial with a corrected verdict director, such as Instruction No. B. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

VIII

The trial court plainly erred, causing manifest injustice, when it allowed the state to call Edwards to the stand and testify as a witness against himself. The right to remain silent in an involuntary commitment proceeding includes the constitutional protection against self incrimination. Edwards was prejudiced because the jury considered his statements as evidence against him. The trial court's error violated Edwards' rights to due process of law and right to remain silent, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution.

Respondent cites Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988 (1986) in support of its proposition that there is essentially no such thing as the right to remain silent when the talismanic "civil" label is bestowed upon a proceeding (Resp. Br. 74-76). Allen's sweep is not so broad. The Supreme Court admitted that "our conclusion that proceedings under the [Illinois Sexually Dangerous Persons] Act are not 'criminal' within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination does not completely dispose of this case." Id. at 373, 106 S.Ct. at 2994.

Allen is distinguishable on its facts. There, the petitioner submitted by court order to two psychiatric examinations, the purpose of which was commitment in the Illinois Department of Corrections as a "sexually dangerous person". Id. at 366-367, 106 S.Ct. at 2990-2991. At a trial on the petition, he objected to the psychiatrist's testimony on grounds they had elicited information in violation of his privilege against self-incrimination. Id. Allen did not testify at that trial. Id. Thus, the issue before the Court

was whether the privilege allowed Allen to refuse to answer questions in those psychiatric interviews and/or rendered his statements to those professionals inadmissible. Id. Since the purpose of the Illinois statute was treatment, the state interest in that purpose would have been "almost totally thwarted" if the petitioner was allowed to avoid answering questions in psychiatric interviews. Id. at 367, 106 S.Ct. 2991.

That is not the issue in Edwards' case. Here, Edwards complains of being called to the witness stand and being forced to testify against himself. He submitted to professional interviews, and his statements were used. (*See* Tr. 243-285; 310-356). Thus, whatever compelling interest the state had in his statements had been met. There was no reason to put him on the stand.

The Allen Court also found significant the fact that statements to a psychiatrist in a compulsory examination under the provisions of the Illinois law "may not be used against him in any subsequent criminal proceeding." Id. at 367-368, 106 S.Ct. at 2991. The Court held that the Due Process Clause did not force application of the privilege against self-incrimination in a noncriminal proceeding *where the claimant is otherwise protected against his compelled answers in any subsequent criminal case*. Id. at 374, 106 S.Ct. at 2995.

In the SVP statute, there is no guarantee that Edwards' statements will not be used against him. Section 632.480 RSMo, et seq. Edwards has no guarantee that the state won't choose to proceed with charges as a result of his forced testimony. Thus, placed in its correct context In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967) and State ex rel. Simanek v. Berry, 597 S.W.2d 718 (Mo.App.W.D. 1980), are still persuasive authority for the

proposition that the Constitutions of the United States and Missouri protect Edwards from self-incrimination**.**

The trial court's error violated Edwards' rights to due process of law and freedom from self incrimination, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution. This Court must remand this cause with directions that the case against Edwards be dismissed and Edwards discharged from confinement, or in the alternative reverse and remand for a new trial.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I-IX of this brief, Edwards respectfully requests this Court reverse the trial court's finding that he is a SVP and discharge him from confinement, or in the alternative remand for a new trial. Should this Court determine that any of the claims represent a colorable challenge to a state statute, Edwards requests this Court transfer this case to the Missouri Supreme Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Local Rule 360, I hereby certify that on this ___ day of _____ 2001, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Pursuant to Missouri Supreme Court Rule 84.06(c) and Local Rule 360, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(g). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 3875 words. The word-processing software identified that this brief contains 3836 words, excluding the cover page, signature block, and certificates of service and compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfree Anti-Virus software and found virus-free.

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Nancy L. Vincent