

IN THE SUPREME COURT OF FLORIDA

GARY WAYNE BURTON,

Petitioner,

Case No. SC04-2211

vs.

STATE OF FLORIDA,

Respondent.

_____ /

DISCRETIONARY REVIEW OF THE DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

**AMENDED ANSWER BRIEF OF
RESPONDENT ON THE MERITS**

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STATEMENT OF THE CASE AND FACTS

Respondent does not accept Petitioner's statement of the case and facts, in its place submits the following:

On July 29, 1999, the State of Florida filed a Petition for Commitment as a sexually violent predator against the Petitioner pursuant to §394, Fla. Stat. (R. V1; 1-2) In the petition, the State alleged that the Petitioner (respondent below) had been examined by Dr. Harry A. McClarin, Ph.D. and Dr. David J. Partyka, Ph.D. Both Dr. McClarin and Dr. Partyka are licensed psychologists. On August 5, 2002, the Petitioner filed a Memorandum of Law and Argument in Support of Motion to Exclude Evidence, concerning the use of actuarial tests in his civil commitment trial. (R. V8; 1177-1311)

On December 11, 2000, the Petitioner's civil commitment trial began. The Petitioner was the first witness. (R. V6; 97) He revealed that he was 28 years old and had been adopted. (R. V6; 97) He testified that he moved from school to school due to conflicts that occurred in the schools and eventually left school in the ninth grade. (R. V6; 100) He did obtain a graduate equivalency degree, "probably around 1986" from the Polk Halfway House. (R. V6; 101)

The Appellant continued his testimony and spoke of his

juvenile delinquency history. He had a problem with his stepmother in 1985. According to the Appellant, "he bit her on the arm because she was putting her arm in my face." (R. V6; 104) As a result of this altercation, the Petitioner was placed in foster care and received community control. After problems with the Petitioner's relationship with his family continued, he was permanently removed from his family and placed in the Department of HRS. (R. V6; 104-106)

The Petitioner, however, did continue to visit his home and continue to have problems with his stepmother, Joelyn. (R. V6; 106)

In further testimony, he stated that in 1987 he pled guilty to Count 1, sexual battery of an eight year old girl in case # JV87-903898. (R. V6; 106), (SR, SCE#2, Exh. D, pp. 1-4)¹ The girl was the daughter of Joelyn, his stepmother. The Petitioner stated that "I was on psychotropic medications because of emotional problems and behavioral problems of that specific

¹ The references to the Supplemental Record, Sealed Court Exhibits (SCE), noted in this Amended Answer Brief rely exclusively upon the citations in the lengthy and well-researched briefing previously filed at the Second District Court of Appeal. It is noted that the original supplemental record was forwarded to the District Court to be included in the record on appeal; however, a copy was not retained, therefore, counsel for the Respondent relies upon those references to the supplemental record, SCE, cited to by

occurrence and -- well, basically right around that one-year period I have very little actual recollection of." (R. V6; 107) Additionally, Petitioner was convicted of committing a Lewd Act in the Presence of a Child in case # JV87-90973. The victim in this case was the Petitioner's ten year old stepbrother. (SR, SCE#2, Exh. E, pp. 1-4)

In August, 1987, the Petitioner was convicted of criminal mischief involving a fire that he set while in Anchor House, a juvenile facility. (R. V6; 110-111), (SR, SCE#2, Exh. F, pp. 1-4) The Petitioner then related that around the same time period, he was accused in police reports of committing anal intercourse with another resident of the facility (R. V6; 111-112), (SR, SCE#2, Exh. G, pp. 1-3) While at another facility, Camp Alafia, the Petitioner was convicted of striking a counselor in case #JV88-900567. (R. V6; 113-114) (SR, SCE#2, Exh. H, pp. 1-2) He also testified that he had been convicted of escape from the Polk Halfway House in case #JV88-901977. (R. V6; 114) (SR, SCE#2, Exh. I, pp. 1-5) Eventually, however, the Petitioner got his GED, and successfully completed the program at the Polk Halfway House. (R. V6; 116)

Upon his release from the juvenile facility, the Petitioner

previous counsel before the Second District Court of Appeal.

lived in the Ollie Tyler foster home in Lakeland. (R. V6; 116) He then left that foster home and was residing in a small mobile home in Mulberry. (R. V6; 116) He stated that he had been off medications for about seven to eight months at the time when the next sexual offense occurred. (R. V6; 117) The Appellant testified that he had been visiting and having dinner with Linda Durflinger, and her two sons, Joshua and Adam. When Ms. Durflinger was out of the room changing clothes, the Petitioner testified that he fondled the penises of the four (4) year old and the six (6) year old. (R. V6; 117-118)

Mrs. Durflinger saw Adam or Joshua running from the Petitioner and called the police. The Petitioner was seventeen (17) years old at the time of this offense. (R. V6; 118) The Petitioner was convicted of two counts of Lewd Act on a Child in case number CF89-5660A1-XX and served nine and one half years of a twelve-year sentence. (R. V6; 119), (SR, SCE#2, Exh. J, pp. 1-4) The Petitioner further admitted that he had used drugs from the ages of thirteen (13) to eighteen (18). (R. V6; 119) The drugs he used included "marijuana, crank, alcohol, speed, Rush and acid." (R. V6; 120)

With regard to sex offender treatment, the Petitioner stated the he attended one session of sex offender treatment during a

juvenile program. He was asked not to return to the program when he tried to attend the second session because members of the group "thought that he was intimidating." (R. V6; 123), (SR, SCE#1, Exh. Mc, pp. 1-20) He stated that he received thirty seven disciplinary reports during his prison stay. (R. V6; 125)

One of the disciplinary reports was for sexual activity in a bathroom stall with another inmate. The remainder of the disciplinary reports were for fighting, disobeying written or verbal orders, disrespect of the officers and being in an unauthorized area. (R. V6; 128) The Petitioner testified that he had problems with authority in the past but did not have problems with authority right now. (R. V6; 129)

As a result of the disciplinary reports and violations, the Petitioner stated that he served "one to two years, if you added it all together" in confinement. (R. V6; 131) Confinement was described by the Petitioner as "a 6 by 9 room with a single bunk or two bunks, and you are locked in basically 24 hours out of the day." (R. V6; 130) While in prison, the Petitioner did attend anger management, stress management, impulse control and sex offender classes. Like his participation in the juvenile sex offender program, the Petitioner testified that he attended only one (1) sex offender treatment meeting. (R. V6; 132) He

stated that he and the psychologist were having difficulties communicating with each other so he asked to be taken out of the program.

Dr. Partyka, a licensed psychologist, testified for the state. He received his undergraduate degree from Clark University in 1979, his doctorate from Florida State University in 1991, and was licensed by the State of Florida in 1993. (R. V7; 181) In 1998, Dr. Partyka began working with sexually violent predators and has continued working with them since that time. Prior to that time, he stated that he had treated in excess of three hundred (300) juvenile and two hundred (200) adult sex offenders. (R. V7; 184) In addition to conducting a number of initial evaluations or "chart and file" evaluations, Dr. Partyka stated that he has done twenty-four comprehensive evaluations with potential civil detainees under the Ryce Act. (R. V7; 186)

On June 17, 1999, Dr. Partyka conducted his face-to-face evaluation with the Petitioner. Prior to meeting with the Petitioner, he reviewed documentation from the Department of Corrections, various law enforcement agencies, and the Office of the State Attorney. (R. V7; 211), (SR, SCE#1, Exh. A, pp. 1-13)

Dr. Partyka found that the Petitioner suffered from

"pedophilia, which is a subset of paraphilia, which is a set of arousal patterns where an individual might be sexually attracted or sexually aroused by items, inanimate objects, or sexual partners that are not within the norm of society." (R. V7; 210)

Additionally, he testified that the Petitioner suffered from cannabis dependence, which was in remission and a personality disorder called antisocial personality disorder. (R. V7; 211)

In further describing the Appellant's antisocial personality disorder, the psychologist stated:

In general, we're looking for a continuation of antisocial behavior, behavior that does not conform to our laws, our societal norms, that generally begin during late childhood, into adolescence, and then ultimately into adulthood.

Generally, they talk about age ten in terms of early childhood. If you begin showing antisocial behavior prior to the age of ten, generally that's a poor predictor of future progress. And then you see a series of acts until approximately eighteen, which is the age at which you can then give an individual a diagnosis of antisocial personality disorder. (R. V7; 212)

Dr. Partyka continued and reviewed the Petitioner's juvenile and adult offenses. In case numbers, JV87-903898 and JV87-03973, involving the Petitioner's stepsister and stepbrother, Dr. Partyka testified that the Appellant used a cigarette as a reward for sex from the eight-year-old stepsister and ten-year-old stepbrother. He also stated that the stepsister had

contracted gonorrhea as a result of the penile/vaginal contact. (SR, SCE#1, Exh. A, pp. 1-13; SR, SCE#2, Exh. D, Eshow) According to this psychologist, the Petitioner denies any involvement with sexual misconduct. "He reported that the 1987 assault on the step-siblings could not have occurred as he was hospitalized at the time, was on psychotropic medications, and has no recall of the event." (SR, SCE#1, Exh. A, pg. 7) As to the adult conviction, Dr. Partyka states that:

Mr. Burton denies the abuse of the two young children. He indicated that the young man had simply asked him if he could help him get dressed and at the time, the mother believed that he was committing an abusive act, he was simply helping the young man to zip his trousers. (SR, SCE#1, Exh. A, pg. 7)

In this offense that occurred December 10, 1989, Dr. Partyka reported law enforcement reports that he reviewed revealed that this was more than a single incident. "It appears that both young children reported to their mother that Mr. Burton had molested them on at least 7 occasions, both indoors and outdoors." (SR, SCE#1, Exh. A, pg. 2)

Dr. Partyka tested the Petitioner using the Minnesota Multiphasic Personality Inventory (MMPI-2). He additionally used the Hare Psychopathy Checklist and the SVR-20 instrument. (SR, SCE#1, Exh. A, pp. 9-11) Some of the findings in the

MMPI-2 were as follows:

Mr. Burton responds in a well-defined pattern that is consistent with individuals who are noted to be immature, impulsive, hedonistic and rebellious against authority.

Mr. Burton appears to be interested in his own pleasure and does not appear sensitive to the needs of others.... He is likely to act impulsively, and may use other people for his own satisfaction." (SR, SCE#1, Exh. A, page 9).

Dr. Partyka went on to describe the SVR-20, stating: "this instrument has identified 20 factors that should be considered in any comprehensive sexual violence risk assessment." (SR, SCE#1, Exh. A., pp. 10-11) He found that the Petitioner posed a "high risk of further sexual violence" using this assessment instrument. (SR, SCE#1, Exh. A, pp. 10-11)

In conclusion, Dr. Partyka testified that the Petitioner's prognosis was guarded and that he would not follow through with treatment unless confined. (R. V7; 225) He found that the Petitioner was "of a high risk to reoffending." (R. V7; 256)

The state's next witness was Dr. Harry Elbert McClarin, a

licensed forensic psychologist. (R. V7; 259) Dr. McClarin received his doctorate from Virginia Tech in 1981, was licensed as a psychologist in 1983, worked at Florida State Hospital, taught at Florida State University and has been in private practice since 1986. (R. V7; 259) He stated that he has conducted between forty (40) and fifty (50) sexually violent predator evaluations and found that approximately thirty (30) to thirty-five (35) percent of the individuals that he evaluated met the criteria for commitment under the Ryce Act. (R. V7; 263)

He conducted his evaluation of the Petitioner on August 11, 1999. (R. V7; 267) As part of his evaluation, Dr. McClarin conducted an extended interview with the Petitioner, did psychometric testing which included the MMPI and Hanson's (1997) Rapid Risk Assessment for Sex Offender Recidivism (RRASOR). (SR, SCE#1, Exh. B, pp. 1-4)

In his interview with the Petitioner, Dr. McClarin reported that the Petitioner "denied sexual fantasies involving children for the past nine (9) to ten (10) years, and denied previous sexual offenses which reportedly occurred on October 27, 1987 and October 19, 1987." (SR, SCE#1, Exh. B, pg. 2) He further stated that the Petitioner described himself as a person whom was "easy to get along with." Dr. McClarin stated that "it is

noted that such a statement appears to be in contrast to his poor adjustment to confinement in FDOC as reflected in his spending much of his time in confinement status." (SR, SCE#1, Exh. B, pg. 2) Dr. McClarin, like Dr. Partyka, diagnosed the Petitioner as suffering from pedophilia. (R. V7; 274) He also found that the Petitioner had a "personality disorder, not otherwise specified, with prominent antisocial and borderline traits." (R. V7; 275)

Dr. McClarin stated that:

He appeared to have poor insight into his suffering from pedophilia despite being found to have engaged in improper sexual contact with prepubescent children on several occasions prior to the current incarceration. (SR, SCE#1, Exh. B, pp. 2-3)

Dr. McClarin found that the Petitioner presented an "extremely defensive profile" on the MMPI and also received an elevated score, outside of the normal, on the MacAndrews Alcoholism Scale, another part of the MMPI. (SR, SCE#1, Exh. B, pg. 3) The Petitioner scored 4 on Hanson's 1997 RRASOR, which was a "relatively high risk for recidivism on this instrument." (SR, SCE#1, Exh. B, pg. 3)

Dr. McClarin explained his evaluation of the Petitioner, his methodology and use of testing instruments:

Well, I don't think you need an actuarial device to realize that there is a significant level of risk. You have a person that has been repeatedly, starting at a young age, found to engage in sexual activity with prepubescent children, continues this, despite being put on increasingly restrictive probation, or I believe, community control at the end and then imprisoned. While imprisoned for going on ten years, I guess, not getting treatment specific to this area of difficulty. The man is still young.

I think that looking at these other factors, convince me that **he is likely to commit future acts of sexual violence due to his suffering from pedophilia, if he's not confined and treated for this disorder**, taking into account that he also has a personality disorder that started young, and involves conflict with the mores of society, whether it be free or a total institution like the Florida Sate Prison.(R. V7; 282-283) [Emphasis added]

Dr. McClarin concluded that the Petitioner suffers from Pedophilia, complicated by a Personality Disorder, NOS, and meets the criteria for a sexually violent predator under Ryce. (SR, SCE#1, Exh. B, pp. 3-4)

At the conclusion of the trial, the trial court gave the jury their instructions. (R. V7; 369-371) The jury unanimously found that the Appellant was proven to be a sexually violent predator. (R. V7; 389, V3; 486)

On appeal to the Second District Court of Appeal, the

Petitioner raised several claims regarding pretrial rulings of the trial court, several evidentiary rulings that took place during the course of the trial, points of the State's closing argument and issues relating to the jury instructions. However, the Second District Court of Appeal found no reversible error at trial and affirmed the commitment order in all respects.

The court below went on to write on specific issues that were likely to recur in other commitment proceedings under the Act: (1) Frye Issues, finding that the RRASOR and PCL-R satisfy the articulated requirements of Frye and that the SVR-20 is not subject to the requirements of Frye; (2) Violation of Plea Agreement, finding, in accordance with rulings by this Honorable Court, that the State does not violate a plea agreement by seeking civil commitment under the Act after the term of incarceration is served; (3) Hearsay, the court, reviewing the claims under a challenge of a violation of the right to confrontation under the Sixth Amendment, found that this argument had no merit and had been definitively ruled upon by the court in its previous decision in *Cartwright*, 870 So.2d at 156; (4) Use of the term "sexually violent predator" at trial, the court found that the use of the term was proper to explain to the jury that their job is to determine whether the defendant

meets this status; and (5) Jury Instruction, finding that the jury was properly instructed and the instructions given did not fail to include an essential element of volitional control. As the underlying appeal pre-dated this Honorable Court's decisions in *Hale v. State*, 2004 Fla. Lexis 2406 (Fla. 2004) and *State v. White*, 2004 Fla. Lexis 2402 (Fla. 2004), the Second District certified the following question:

MAY AN INDIVIDUAL BE COMMITTED UNDER THE JIMMY RYCE ACT IN THE ABSENCE OF A JURY INSTRUCTION THAT THE STATE MUST PROVE THAT THE INDIVIDUAL HAS SERIOUS DIFFICULTY IN CONTROLLING HIS OR HER DANGEROUS BEHAVIOR?

Upon this Court's ruling in *White* and *Hale, supra*, the Second District Court of Appeal's certified question became moot. Petitioner now raises several issues on appeal beyond that set forth by the Second District Court of Appeal's certified question.

SUMMARY OF THE ARGUMENT

General Statement: The Second District Court of Appeal found no reversible error on any of the points of appeal raised by Petitioner below. The court below certified only one question regarding the sufficiency of the jury instruction. This

Honorable Court has definitively ruled upon that issue against the position argued by Petitioner. See: *White, supra; Hale, supra*. All other issues raised exceed the scope of the Second District Court of Appeal's certified question and should not be entertained by this Court.

Issue I: The actuarial tests used by the State's experts; RRASOR and PCL-R, satisfy the requirements of *Frye*. The SVR-20 used by one of the State's experts is not properly subject to the requirements of *Frye*.

Issue II: Petitioner has failed to properly preserve the issue of inadmissibility regarding "uncharged allegations," as the same was not raised below except in generality. Alternatively, the limited hearsay admitted regarding Petitioner's sexual misconduct at Camp Alafia in the civil commitment trial, was properly admitted pursuant to Section 394.9155(5), as the same was more probative than prejudicial. Should the admission of this evidence be deemed error, Respondent argues the same must be found harmless.

Issue III: The *Sixth Amendment of the United States Constitution* does not apply to civil cases, Petitioner was not denied due process. Hearsay was properly admitted pursuant to

Section 394.9155(5), Florida Statutes, and did not run afoul of the Petitioner's constitutional rights provided in a civil proceeding.

Issue IV: The standard jury instructions used in Petitioner's Ryce commitment proceeding were found sufficient by this Honorable Court under *State v. White*, 2004 Fla. Lexis 2402 (December 23, 2004); therefore, Petitioner was not denied due process and this issue stands moot.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN ADMITTING THE
STATE'S EXPERTS' EVIDENCE ON FUTURE RISK
ASSESSMENT AND RECIDIVISM BASED UPON
ACTUARIAL TESTING? (RESTATED)

The Petitioner argues that actuarial and other risk assessment instruments, used by the psychologists who testified, were improperly admitted into evidence because they failed to satisfy the *Frye* test. The expert testimony below only relied upon the RRASOR, PCL-R, and SVR-20. The Second District Court of Appeal found that, in accordance with prior rulings of that court, "the RRASOR and PCL-R satisfied the requirements articulated in *Frye*."² *Burton v. State*, 2004 Fla. App. Lexis 15602 (2nd DCA, October 22, 2004), citing *Rodgers v. State (In re Commitment of Rodgers)*, 875 So.2d 737, 739 (Fla. 2d DCA 2004); *Lee v. State*, 854 So.2d 709, 712 (Fla. 2d DCA 2003). The court further concluded that the remaining test, the SVR-20, was not subject to the requirements of *Frye*.

The admissibility of expert testimony concerning a new or

² Although considered by the Second District Court of Appeal to comply with the criteria of *Frye*, the Respondent's position is that the PCL-R is not subject to *Frye* analysis because it is a checklist and not a true actuarial test.

novel scientific principle entails a four-step process:

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Sec. 90.702, Fla. Stat. (1993) (adopted by the Florida Supreme Court in *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979)). Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that this 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This standard, commonly referred to as the 'Frye test,' was expressly adopted by this Court in *Bundy v. State*, 471 So.2d 9, 18 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Sec. 90.702, Fla. Stat. (1993). All three of these initial steps are decisions to be made by the trial judge alone. See *Johnson v. State*, 393 So.2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); *Rose v. State*, 506 So.2d 467 (Fla. 1st DCA), review denied, 513 So.2d 1063 (Fla. 1987). Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

Ramirez v. State, 651 So.2d 1164, 1167 (Fla. 1995). The standard of review on appeal is *de novo*. *Hadden v. State*, 690

So.2d 573, 579 (Fla. 1997); *Brim v. State*, 695 So.2d 268, 276 (Fla. 1997). This includes an appellate examination of three areas: expert testimony; scientific and legal writings; and judicial opinions. *Brim*, 696 So.2d at 268; *Hadden*, 690 So.2d at 579. The *Frye* test requires proof that the new scientific test, procedure, or principle "has some reasonable degree of recognition and acceptability among the spectrum of scientific or medical experts who study, diagnose, test, and otherwise deal with the particular subject which is sought to be examined and diagnosed by the proffered test," procedure, or principle. *Page v. Zordan By and through Zordan*, 564 So.2d 500, 502 (Fla. 2d DCA 1990). Appellate courts should consider the issue of general acceptance at the time of the appeal; not the time of the trial. *Id.*; *United States Sugar Corporation v. Henson*, 823 So.2d 104, 109, 2002 Fla. Lexis 1159 (Fla. 2002)(an appellate court should consider the issue of general acceptance at the time of appeal rather than at the time of trial).

Psychological testimony has been subjected to further qualification in the context of *Frye* analysis. For example, an expert's "pure opinion testimony," based "solely on the expert's training and experience," is admissible without having to

satisfy the *Frye* standards. *Hadden*, 690 So.2d at 579-80; *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993). Whereas scientific testimony other than pure opinion testimony "implies an infallibility," *Flanagan*, 625 So.2d at 828, "pure opinion testimony" does not. *Id.* Unlike scientific testimony where a jury "will naturally assume that the scientific principles underlying the expert's conclusion are valid," *id.*, such a danger does not exist with "pure opinion testimony," as "the jury can evaluate this testimony in the same way that it evaluates other opinion or factual testimony." *Hadden*, 690 So.2d at 579-80.

This dichotomy between "pure opinion testimony" and other expert testimony subject to the *Frye* analysis is explained in the partially concurring - partially dissenting opinion of Judge Ervin, in *Flanagan v. State*, 586 So.2d 1085, 1109-1111 (Fla. 1st DCA 1991). Judge Ervin noted the roots of this analysis in the California appellate court decisions which applied and interpreted *Frye*. *Id.* Judge Ervin's analysis of "pure opinion testimony" in *Flanagan* was expressly discussed and approved by this Court's subsequent opinion in *Flanagan*. *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993) What is significant here is that

both Florida and California apply the same *Frye* standards, and both recognize the same "pure opinion" exception to *Frye*. *People v. Kelly*, 549 P.2d 1240 (Cal. 1976); *Seering v. Dept. of Social Services of Cal.*, 239 Cal.Rptr. 422 (Cal. App. 1987); *Flanagan*, 586 So.2d at 1109-11 (Ervin, J., partially concurring/partially dissenting). Judge Ervin's opinion similarly summarizes relevant case law to the effect that, as a general rule, medical expert testimony, including a psychiatrist's opinion, is not subject to the *Frye* analysis. *Flanagan*, 586 So.2d at 1009-10.

Given that the analysis under Florida and California law is the same, it is therefore significant that a number of California appellate courts have addressed the admissibility of actuarial risk assessment instruments in California's sexually violent predator commitment proceedings. In *Garcetti v. Superior Court*, 102 Cal.Reptr.2d 214 (Cal. App. 2000), reversed on other grounds, *sub nom*, *Cooley v. Superior Court*, 57 P.3d 654 (Cal. 2002), the court stated:

It is therefore clear that a psychological instrument that uses an actuarial method to produce a profile of a person's likelihood of re-offense with an accuracy rate of over 70 percent, and that is supplemented or adjusted by use of clinical factors, can form the basis

for an expert opinion on future dangerousness without having to satisfy Kelly-Frye standards of reliability applicable to new scientific evidence.

102 Cal.Rptr.2d at 238-39. The foregoing findings were made with respect to an actuarial risk assessment instrument known as the Static-99, one which is not at issue in the instant case, but which is essentially a revision of the RRASOR, which is at issue in the instant case. (R. V7; 268-274, 279-282) What is significant upon review before this Court is that California's principles are identical to Florida's.

As noted above, the purpose of subjecting some expert opinions to *Frye* analysis is to prevent the aura of infallibility from being attached to the scientific principle at issue. However, with the risk assessment instruments, there is no pretense of 100% perfection. The instruments reflect that their databases show that various individuals satisfying their criteria have recidivated within a specified number of years. The percentage may be 10%, 25% or 70%, depending on the instrument and the length of time. Not only do the instruments acknowledge that significant numbers did not recidivate - thus disavowing the aura of infallibility - but, as to the percentages of those who did recidivate, the instruments do not

purport to predict whether the individual on trial will be the one to fall within the 50% of re-offenders or the 50% who did not re-offend. The expert is still going to have to establish the reasons why the expert is opining that the individual on trial is one who is likely to recidivate. The risk assessment instruments apply only to the likelihood that certain classes of individuals will re-offend; not that a particular person within that class is certain to re-offend. Thus, as established by both the testimony at the *Frye* hearing, and the relevant academic literature, these instruments are no more than guidelines to assist experts in making their evaluations. As such, they are not subject to *Frye* analysis.

Many studies have been done which have routinely concluded that actuarial risk assessment instruments are either at least as good, if not significantly superior to, pure clinical assessments. See, *Grant Harris, et al.*, "Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy," 4 *Psychol., Public Policy and Law* 73, 90-91 (1998); Judith V. Becker and William D. Murphy, "What Do We Know About Assessing and Treating Sex Offenders," 4 *Psychol., Public Policy and Law* 116, 124 (1998); William Grove and Paul

Meehl, "Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy," 2 Psychol., Public Policy and Law 293 (1996) ("the mechanical method is almost invariably equal to or superior to the clinical method."); John Monahan, "Violence Prediction: The Last 20 Years and the Next 20 Years," 23 Crim. Justice and Behavior 107 (1996). Thus, any decision to exclude actuarial instruments would, at a minimum, relegate fact-finders to basing decisions on what has reasonably been established to be an inferior method of predicting dangerousness - the pure clinical approach.

Dr. Dennis Doren, a psychologist involved in sex offender treatment since 1983 and in sex offender risk assessment since 1994 in Wisconsin, when testifying in *In the Matter of the Commitment of R.S.*, 339 N.J. Super. 507, 523, 773 A.2d 72 (N.J. Sup. App., April 20, 2001), articulated the difference between the five types of sex offender assessment procedures:

The first is **unguided clinical judgment**; this is simply the opinion of a psychiatrist or psychologist who has no preformed set of ideas of what factors contribute to risk. The second is **guided clinical judgment** where the

clinician has some fixed or articulable ideas of what risk factors are important perhaps based on experience or theory. These first two methods have been used in routine civil commitment proceedings in New Jersey. The third procedure is **research guided clinical judgment** in which the clinician considers factors that research has shown as important.

The fourth, which is the method used by the NRU, is the **clinically-adjusted actuarial assessment** in which the clinician starts with a statistically-based formula and makes clinical adjustments according to the specific details of each case. Finally, there is the **pure actuarial method** which uses statistical formulas without any clinical adjustment.

Of these methods, Doren said, research-guided clinical judgment and clinically-adjusted actuarial assessment are the most often used in the field of sexual offender risk assessment. The difference between the two approaches is the weighting of the risk factors. In research guided clinical judgment the evaluator knows what factors are important but not how much weight to give one factor relative to the others. By using statistics, the actuarial approach standardizes how much weight is given to each factor.

Doren testified that there are currently about 150-175 experts nationwide in the field of sex offender risk assessment and most employ the clinically-adjusted actuarial assessment method. At the time of his testimony, June 16, 2000, fifteen states had sexually violent predator (SVP) laws, and only two, Texas and Massachusetts, did not use actuarial assessment tools. In July 1999, Doren surveyed the thirteen states which employ these

instruments to determine which were most used for risk assessment. He discovered that the RRASOR was used by most of the evaluators in all thirteen states. Dr. Doren further stated that the clinically-adjusted actuarial method is the most accurate method for risk assessment.

According to Dr. Doren, research has shown that actuarial analysis is at least as efficacious as clinical judgment and is often better than pure clinical judgment. The reason for this is because clinicians are often not systematic in data gathering, or their memories may not be totally accurate. A Canadian study ". . . showed that clinicians tend to overestimate violence of all types, including sexual violence, so that unguided clinical judgment tends to come up with higher assessments of risk than does the actuarial process. By restricting and structuring clinical judgment, actuarial instruments produce more refined and accurate results." *Ibid.*; See generally Dennis M. Doren, "Using Risk Assessment Instrumentation in Evaluating Sex Offenders: A Manual for Civil Commitment and Beyond", ch. 5 at 103 (2002).

As set forth by the State's expert witnesses at the *Frye*

hearing, the instruments at issue herein are all widely used in states with sexually violent predator commitment proceedings. (R. V4; 660-827, V5; 828-1015) Although the actuarial instruments have been developed between 1995 and 1998, they are already showing up in significant numbers of appellate court opinions that summarize the trial evidence in commitment proceedings.³

³ *In re Commitment of Stephen E. Simons*, 213 Ill.2d 523, 821 N.E.2d 1184 (Ill. 2004)(MnSOST-R, VRAG, SORAG, and Static-99); *In re Commitment of Alan Field*, 349 Ill.App.3d 830, 813 N.E.2d 319 (Ill. 2d DCA 2004)(RRASOR); *Commonwealth of Pennsylvania v. Dengler*, 2004 PA Super 38, 843 A.2d 1241, 2004 Pa.Super Lexis 114 (Penn. Sup. Ct., February 20, 2004); *People of the State of Illinois v. Erbe*, 344 Ill.App.3d 350, 800 N.E.2d 137 (Ill. 4th DCA, November 13, 2003)(Minnesota Screening Tool-Revised, Static-99, VRAG, Hare Psychopathy Checklist - Revised); *Collier v. State*, 857 So.2d 943, 2003 Fla. App. Lexis 15450 (Fla. 4th DCA 2003)(SVR-20); *In re Commitment of Eugene Bushong*, 351 Ill.App.3d 807, 815 N.E.2d 103 (Ill. 2nd DCA, August 30, 2004); *In re the Detention of Bernard Thorell, et al.*, 149 Wn.2d 724, 72 P.3d 708 (Wash., July 10, 2004); *In the Matter of the Commitment of R.S.*, 339 N.J.Super. 507, 773 A.2d 72 (N.J. Sup. Ct., Appellate Division, April 20, 2001); *Garcetti v. Superior Court*, 102 Cal. Rptr. 2d 214 (Cal. App. Dec. 14, 2000) (RRASOR and Static-99 (revision of RRASOR); *State v. Kienitz*, 585 N.W. 2d 609 (Wis. App. 1998) (VRAG); *State v. Kienitz*, 597 N.W. 2d 712 (Wis. 1999); *In re the Detention of Thorell*, 2000 WL 222815 (Wash. App. 2000) (unpublished) (RRASOR; VRAG; SORAG (a modified VRAG)); *In re the Detention of Dean*, 2000 WL 690142 (Wash. App. 2000) (VRAG; SORAG); *State v. Barrett*,

The Fourth District Court of Appeal in *Jackson v. State*, 833 So.2d 243 (Fla. 4th DCA 2002) determined that the actuarial tests used by the expert witnesses were generally accepted in the relevant scientific community as part of the overall risk

2000 WL 566155 (Ohio App. 2000) (Mn-SOST-R); *State v. Bare*, 2000 WL 1874113 (Wis. App. 2000) (RRASOR; VRAG); *People v. Roberge*, 2000 WL 1844791 (Cal. App. Dec. 15, 2000) (RRASOR); *In re the Detention of Walker*, 731 N.E. 2d 994 (Ill. App. 2000) (RRASOR); *People v. Otto*, 95 Cal. Rptr. 2d 236 (Cal. App. 2000) (RRASOR); *People v. Turner*, 93 Cal. Rptr. 2d 459 (Cal. App. 2000); *State v. Wilson*, 2000 WL 156908 (Wis. App. 2000) (RRASOR); *People v. Poe*, 88 Cal. Rptr. 2d 437 (Cal. App. 1999) (RRASOR); *State v. Moore*, 2000 WL 1176870 (Ohio App. 2000) (RRASOR; Mn-SOST-R); *State v. Morris*, 2000 WL 1010822 (Ohio App. 2000) (RRASOR; Mn-SOST-R). The Hare Psychopathy Checklist, which dates back to the early 1980's and 1991 in its current revised form, appears in numerous appellate court opinions. *Bare, supra*, 2000 WL 1874113; *In the Matter of Wilson*, 2000 WL 1182807, at *2 (Minn. App. 2000) (referring to the test as one "used by many researchers to classify an individual as a psychopath."); *In re Thorell*, 2000 WL 222815, at *3 (Wash. App. 2000); *In the Matter of Patterson*, 1994 WL 615035, at *2 (Minn. App. 1995); *In the Matter of Poole*, 2000 WL 781381, at *2 (Minn. App. 2000); *Walker, supra*, 731 N.W. 2d at 996; *People v. Turner*, 93 Cal. Rptr. 2d 459, 463 at n. 13 (Cal. App. 2000); *People v. Dacayana*, 91 Cal. Rptr. 2d 121, 123 (Cal. App. 1999); *State v. Watson*, 595 N.W. 2d 403, 410 (Wis. 1999); *State v. Lauderdale*, 1998 WL 906482; at *1 (Ohio App. 1998); *Smetana v. State*, 991 S.W. 2d 42, 46 (Tex. App. 1998); *In the Matter of McClure*, 1998 WL 436878, at *2 (Minn. App. 1998) (unpublished); *In the Matter of Shaw*, 1997 WL 243454, at *2 (Minn. App. 1997) (unpublished) (quoting expert as referring to the checklist as "one of the 'best predictors of sexual offender recidivism. . . .'"); *In re Kunshier*, 1995 WL 687692; at *2 (Minn. App. 1995).

assessment for sexual predator recidivism. When considering this same issue, the courts of other states have come to the same conclusion, permitting the use of actuarial testing and the expert testimony based upon such testing.⁴

The RRASOR (Rapid Risk Assessment for Sexual Offender Recidivism) was developed by R. Karl Hanson in 1997, and it scores and weights four variables: prior sex offenses; age under 25; male victims; and extra-familial victims.⁵ Hanson is one of the foremost authorities engaged in original research regarding sex offender recidivism, and has published numerous

⁴ *People v. Simons*, 821 N.E.2d 1184 (Ill. 2004); *Goddard v. Missouri*, 144 S.W.3d 848 (Mo. 2004); *In re Fugelseth*, 2004 Minn. App. Lexis 219 (March 2004); *People v. Erbe*, 800 N.E. 2d 137 (Ill. App. 2003); *Thorell v. State*, 72 P.3d 708 (Wa. 2003); *In re the Commitment of James Lalor*, 661 N.W.2d 898 (Wis. 2003); *In re Holtz*, 653 N.W.2d 613 (Iowa App. 2002); *In re the Commitment of Bernard G. Tainter*, 655 N.W.2d 538 (Wis. 2002); *State ex rel Romely v. Fields*, 35 P.3d 82 (Ariz. App. 2001).

⁵R. Karl Hanson, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* (User Report 97-04) (Ottawa: Department of the Solicitor General of Canada) (App. 242); Hanson, "What Do We Know About Sex Offender Risk Assessment?", 4 *Psychology, Public Policy and Law* 50, 63-65 (1998); Hanson and Thornton, "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales," 24 *Law and Human Behavior* 119 (Feb. 2000); Dempster, Rebecca Jane, "{Prediction of Sexually Violent Recidivism," M.A. Thesis, Simon Fraser University (Dec. 1998)

studies on the subject. Prior to developing the RRASOR, he authored a meta-analysis of 136 independent studies of sex offender recidivism, and identified the factors that had the most significant correlation with such recidivism.⁶ Two years later, he published a similar report, synthesizing evidence from 61 follow-up studies of sex offender recidivism.⁷ Based on these studies, Hanson identified the seven factors with the highest correlation, and then reduced those seven factors to four, to avoid overlapping factors.⁸ After identifying the relevant factors and the manner in which to determine their existence, Hanson used seven different follow-up studies, and one independent sample for validation. These studies included sex offender prison databases and/or treatment centers, where the offenders were followed for periods of time ranging from 2-23

⁶ R. Karl Hanson and Monique T. Bussiere, "Predictors of Sexual Offender Recidivism: A Meta-Analysis (User Report 96-04) (Ottawa: Department of the Solicitor General of Canada).

⁷ R. Karl Hanson and Monique T. Bussiere, "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies," 2 *Journal of Consulting and Clinical Psychology* 348-62 (1998).

⁸ Hanson, "The Development of a Brief Actuarial Risk Scale," *supra*, at 4, 12.

years after release from institutionalization. *Id.* at 7-9. These facilities included several Canadian institutions, one large California correctional facility, and a British prison facility. *Id.*

Hanson then used two measures of predictive accuracy, to test the application of the identified factors to the databases.

The preferred measure, the "Receiver Operating Curve" (ROC), also referred to as the "area under the curve," utilizes a graph, to display the number of true positive decisions and false positives.⁹ The ROC can range from .5 to 1.0, with 1.0 being perfect, and results exceeding .5 being better than chance. *Id.* The second measure, the correlation coefficient, referred to as "r" is not as useful, because its accuracy is limited when base rates are low, and it is contingent upon

⁹ John A. Swets, et al., "Better Decisions Through Science," *Scientific American* 82, 83 (Oct. 2000); Hanson, "What Do We Know About Sex Offender Risk Assessment?," *supra*, at 54; Marnie Rice and Grant T. Harris, "Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists," 21 *Law and Human Behavior* 231, 232-33 (1997); Vernon L. Quinsey, Grant T. Harris, Marnie E. Rice, Catherine A. Cormier, *Violent Offenders: Appraising and Managing Risk* (Washington, D.C.: American Psychological Assn. 1998), pp. 49-54. Both the *Scientific American* article and the Quinsey, Harris treatise have extensive discussions about the validity and significance of the ROC measurement.

variables. *Id.* Since overall base rates for sex offender recidivism are typically found to be low¹⁰, the use of this measure has been highly questioned. This measure ranges from -1 to +1, with results greater than zero reflecting greater predictive accuracy. The correlation coefficient suggests the relationship that one factor has with another factor. The average ROC for Hanson's eight original sample databases was .71 and *r* equaled .27 for the seven samples and .25 for the subsequent validation sample.¹¹ This was viewed by Hanson as showing "moderate predictive accuracy."¹² This level of predictive accuracy suggested "that it is possible to identify a large group of relatively low risk offenders whose chances of recidivism are less than 15% over ten years, as well as identify a small group of sexual offenders whose chances of long-term

¹⁰ Dempster, Rebecca Jane, "Prediction of Sexually Violent Recidivism," M.A. Thesis, Simon Fraser University (Dec. 1998), at pp. 2-6

¹¹ Hanson, "The Development of a Brief Actuarial Risk Scale," pp. 13-15; Hanson, "What Do We Know About Sex Offender Risk Assessment?", p. 64; Dempster, *supra* at pp. 20-21.

¹² Hanson, "What Do We Know About Sex Offender Risk Assessment?", p. 64.

recidivism are greater than 50%.”¹³ The author cautioned against using the instrument in isolation, while noting that it was an improvement over pure clinical predictions. *Id.* at 18. In a subsequent, independent validation, Dempster, testing the RRASOR on yet another prison database, concluded that it had moderate predictive accuracy, with an ROC of .77. Dempster also noted that the RRASOR “underestimates” sex offender recidivism, since it is based on reconviction rates, and does not consider recidivism that does not result in a reconviction - whether by pleas, failure to report, or inability of law enforcement to make an arrest. *Id.* at 71. The foregoing summaries are consistent with the evidence adduced by the State at the *Frye* hearing. (R. V4; 660-827, V5; 828-1015)

One of the elements to be established in sexually violent predator commitment cases is a form of dangerousness - the likelihood that the person will commit further sexually violent offenses if not committed for long-term care, treatment and control. Dangerousness is a concept which is routinely addressed through the opinions of mental health professionals in

¹³ Hanson, “The Development of a Brief Actuarial Risk Scale,” p. 17.

many contexts: general civil commitment proceedings; sexually violent predator commitment proceedings; capital penalty phase proceedings in jurisdictions in which future dangerousness is an aggravating factor; mitigating circumstance evidence in capital proceedings in which the defense often presents evidence that the defendant will be a model prisoner if given a life sentence in lieu of death. It is thus significant that the United States Supreme Court has routinely upheld the use of the concept of future dangerousness, as established by the opinion testimony of mental health professionals, while noting that such opinions are less than scientific, but nevertheless sufficiently reliable to present to a jury.¹⁴ The risk assessment instruments are simply

¹⁴ In *Jurek v. Texas*, 428 U.S. 262 (1976), seven justices rejected the claim that future dangerousness was an improper consideration since it was impossible to predict future behavior and dangerousness with certainty. In *Barefoot v. Estelle*, 463 U.S. 880, 896, et seq. (1983), the Court upheld the use of psychiatric testimony as to future dangerousness, notwithstanding the claim that such expert testimony was too unreliable on that issue. The inherent uncertainties as to future dangerousness and expert testimony on the issue did not call into question the validity of the judicial determinations that had to be made. "All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury." 463 U.S. at 899, n. 7. In a similar vein, the "clear and convincing" burden of proof was deemed appropriate, in civil commitment proceedings, because the inherent uncertainties in psychiatric diagnoses would typically be incapable of satisfying the reasonable doubt standard. *Addington v. Texas*, 441 U.S. 418, 430 (1979). See

a part of future dangerousness opinions, and it should go without saying that no such opinions can be given with anything approaching mathematical certainty. Nevertheless, such opinions of dangerousness are permitted. See *In re Beverly*, 342 So.2d 481 (Fla. 1977).

In the instant case, one of the two psychologists who testified for the state, Dr. McClarin, used the RRASOR sex offender instrument in addition to his face-to-face interview with the Petitioner and the review of the records provided by the Department of Corrections and law enforcement including the State Attorney's Office. (R. V7; 267-275, 279-283)

One other instrument, the Hare Psychopathy Checklist - Revised (PCL-R), is treated separately herein because it is not an actuarial risk assessment instrument. In the instant case, Dr. Partkya, testified that he used the Hare Psychopathy Checklist, together with his face-to-face interview of the Petitioner and his review of documents in arriving at his diagnosis and assessment of the Petitioner. (R. V7; 185-186, 195-226) Like many other standardized psychological tests diagnosing mental disorders, the psychopathy is viewed as a disorder. (R. V7; 202, 219)

also, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Research, however, has shown that there is a correlation between psychopathy and both violence and sex offender violence.

The Revised Checklist was developed in 1991, with its original version going back several more years. Psychopathy, as measured by the PCL-R, is a personality disorder, summarized as follows:

The PCL-R (Hare, 1991) was constructed to provide a reliable and valid measure of the psychopathic personality described by Cleckley (1976). Hare's 20-item measure has two correlated factors. The first factor taps core personality traits of impulsivity, irresponsibility, and callousness; and the second factor addresses antisocial behavior. As in other studies . . . PCL-R scores were assessed through file review. The PCL-R has been a reliable predictor of general (Wong, 1984) and violent recidivism (Serrin, 1996). Although previous research has not found large, direct relationships between psychopathy and sexual offense recidivism, these studies have found high rates of recidivism among those offenders who rated highly on both psychopathy and sexual deviance (Gretton, McBride, & Hare, 1995); Rice & Harris (1997).

R. Karl Hanson and Andrew J. R. Harris, "Where Should We Intervene? Dynamic Predictors of Sexual Offense Recidivism," 27 *Criminal Justice and Behavior* 6, 11 (Feb. 2000) See also, Robert Hare, et al., "Psychopathy and the Predictive Validity of the PCL-R: An International Perspective," 18 *Behavioral Sciences and the Law* 623, 624-27 (2000). The Hare checklist has been the subject of extensive study, literally hundreds of academic articles. Psychopathy is closely related to the antisocial personality

disorder, those diagnosed as psychopaths have higher levels of violence than other offenders or forensic patients. *Id.* Psychopathy is also a well-established risk factor for recidivism in general and violence in particular. Psychopathic sex offenders tend to recidivate the earliest and the most often.

When psychopathy is coupled with evidence of deviant sexual arousal, "that is one of the most deadly combinations to emerge from the recent research on sex offenders."¹⁵

In view of the foregoing, the general acceptance of the PCL-R is beyond dispute. Its correlation to both violent recidivism and sexual recidivism (at least when psychopathy is combined with sexual deviance) is also well documented. Although such an

¹⁵ H. Gretton, et al., *Psychopathy and Recidivism in Adolescent Sex Offenders* (manuscript referred to as being in preparation); A.J.R. Harris and R.K. Hanson, *Supervising the Psychopathic Sex Deviant in the Community* (1998 paper presented at ATSA Annual Research and Treatment Conference); M.E. Rice and G.T. Harris, "Psychopathy, Schizophrenia, Alcohol Abuse, and Violent Recidivism," 18 *Interpersonal Journal of Law and Psychiatry* 333-42 (1995). See also, Michael C. Seto and Howard Barbaree, "Psychopathy, Treatment and Sex Offender Recidivism," 14 *Journal of Interpersonal Violence* 1235 (1993) (PCL-R was a significant predictor of failure on parole and a significant predictor of general recidivism) Dempster, supra at pp. 16-17 (predictive ability of PCL-R is well documented, with moderate predictive ability as to sex offenders, and the combination of psychopathy and sexual deviance making a particularly high risk sex offender); Tengstrom, supra (finding strong relationship between psychopathy

instrument should not be subject to *Frye* analysis for reasons previously set forth herein, if it is, it clearly satisfies the *Frye* criteria.

The Second District Court of Appeal reviewed the use of these scientific tests in *Lee v. State*, 854 So.2d 709(Fla. 2d DCA 2003), holding:

Although there were conflicts in the evidence as to the reliability of the tests and the conclusions drawn by the experts, we conclude that the trial court did not err by allowing the test results to be presented to the jury as part of the experts' testimony. See *Jackson v. State*, 833 So.2d 243, 246 (Fla. 4th DCA 2002)(upholding the trial court's determination that the actuarial instruments 'are generally accepted in the relevant scientific community as part of the overall risk assessment for sexual predators'). However, even if there were any error regarding the *Frye* analysis and the admissibility of actuarial evidence, a harmless error analysis must be undertaken. See *Green v. State*, 826 So.2d 351, 353 (Fla. 2d DCA 2002).

See also *Rodgers v. State (In re Commitment of Rodgers)*, 875 So.2d 737 (Fla. 2d DCA 2004)(allowing for expert opinion testimony, in concurrence with the requirements of *Frye*, when relying upon actuarial; RRASOR, PCL-R) When addressing this issue in *Robert Roeling v. State*, 880 So.2d 1234 (Fla. 1st DCA 2004), the First

and violent recidivism, through use of PCL-R).

District Court of Appeal ruled:

The testimony presented to the trial court provides substantial support for the proposition that the risk-assessment instruments used by the experts who testified regarding appellant's propensity to re-offend are a generally accepted diagnostic tool in the relevant scientific community (licensed clinical psychologist specializing in forensic psychology and the evaluation of sexually violent predators), and are based on scientific principles that are sufficiently established to have gained general acceptance in the relevant field. All of the experts except one offered by appellant testified that they use such instruments on a regular basis; that they are generally accepted among forensic clinical psychologists who evaluate persons alleged to be sexually violent predators, provided they are used in conjunction with a clinical assessment. . . ; and that **the use of risk-assessment instruments in conjunction with a clinical assessment was a superior method of evaluating an individual to reliance on a clinical assessment alone.** Even appellant's expert conceded that such instruments were being used "with great frequency by people doing these evaluations"; and that an evaluation based on only a clinical assessment would at best be equal to (but no better than) a pure actuarial approach.

See contra *Collier v. State*, 857 So.2d 943, 2003 Fla. App. Lexis 15450 (Fla. 4th DCA 2003).

Lastly, in the event that this Court concludes that any error existed with respect to the admission of one or more of those test results into evidence, any such error is clearly

harmless. Both of the State's experts, Dr. Partkya and Dr. McClarin, testified at trial as to both mental abnormalities/personality disorders and the high likelihood of recidivism. (R. V7; 180-257, 258-304) Their reliance upon one actuarial test is minimal and insignificant.

ISSUE II

DID THE TRIAL COURT ERR IN ALLOWING THE
STATE TO USE EVIDENCE OF AN UNCHARGED
SEXUALLY VIOLENT INCIDENT? (RESTATED)

To the extent that Petitioner has now revised this argument from the original argument raised to the Appellate court below, Respondent argues that this issue has not been properly preserved for appellate review. The Petitioner presented a general evidentiary claim to the Appellate court below claiming that the trial court erred in admitting the facts underlying his prior **criminal convictions** because such evidence was irrelevant, unduly prejudicial, and tended to show bad character or propensity. Now, Petitioner attempts to raise an argument that "uncharged" sexually violent acts were admitted into evidence; specifically, the "uncharged allegations claiming Mr. Burton committed 5-10 lewd acts on a child by placing his penis in a boy's buttock while they were at Camp Alafia in 1988." See Petitioner's Initial Brief, pg. 40.

This expansion, or refinement, of Petitioner's argument is further demonstrated by a review of the ruling by the Appellate court, in which the court phrased Petitioner's hearsay argument:

Burton argues that the admission of hearsay

under the Act is unconstitutional because it **violated his right to confrontation** under the *Confrontation Clause of the Sixth Amendment of the U.S. Constitution* and the parallel provision in *article I, section 16(a) of the Florida Constitution*. This court has recently rejected this argument. See *Cartwright [v. State (In re Commitment of Cartwright)]*, 870 So.2d 152 (Fla. 2d DCA 2004)] at 156.

Burton v. State, 884 So.2d 1112, 1114, 2004 Fla. App. Lexis 15602 (Fla. 2d DCA 2004). This finding was based upon the rudimentary principle that "[t]he *Confrontation Clauses of both the United States and Florida Constitutions* are expressly limited to 'criminal prosecutions.'" *Cartwright*, 870 So.2d at 156. As now presented, Petitioner's argument was not reviewed by the Appellate court; therefore, has not been preserved for further appellate review and should be dismissed.

Should this Court disagree with the foregoing argument, then, Respondent alternatively argues that the allegations and criminal reports surrounding the 1988 Camp Alafia sexual acts were properly relied upon by the State's experts and, to the extent the same were introduced before the jury, did not constitute impermissible hearsay, nor could such information be considered double and triple hearsay as now alleged by Petitioner.

Further, if it is determined that the allegations constituted impermissible hearsay, then to the limited manner in which these allegations impacted the trial, the same must be deemed harmless in light of the overwhelming information available to the State's experts in reaching their considered opinions and diagnoses. The proper standard of review regarding harmless error in a civil commitment case was articulated by the Second District Court of Appeal in *In re Commitment of Joseph Green*, 826 So.2d 351, 353:

Section 59.041, Florida Statutes (2001), provides that no judgment shall be reversed because of the improper admission of evidence unless 'in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.' Furthermore, appellate courts have an independent and inherent obligation to assess the effect of error on a verdict. *Goodwin v. State*, 751 So.2d 537 (Fla. 1999).

See generally, *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Dr. David Partyka testified that he relied on multiple sources of information in coming to his expert opinion and diagnosis of Petitioner. Dr. Partyka specifically testified that, relating to the acts of sexual violence against children

under the age of thirteen, he relied upon ". . . things that were reported either in arrest records or clinical notes throughout the file." (R. V7; 216-217)

Dr. Harry McClarin testified that when assessing the Petitioner's mental condition, he ". . . relied both on my impressions from talking with the man, the results of the psychological testing that I did, a review of corrections records, local police reports, and some other records that were prepared in the process of his trial being resolved, which led to his incarceration." (R. V7; 267-268)

Petitioner misapprehends the State's experts' level of reliance upon those specific allegations of sexual violence. Contrary to the Petitioner's argument that there was heavy reliance on these allegations, the record presents a clearly different story. The experts reviewed and considered myriad factors, including: Petitioner's Department of Juvenile Justice record history; listing a number of convictions and prior offenses, a predisposition report prepared for adult court, rating form prepared by HRS in regard to determining the level of restrictiveness for Petitioner at the time he was a juvenile offender, criminal investigative records from the City of Mulberry Police Department relating to an investigation of the

Petitioner in late 1989, documents prepared by the Florida Department of Children and Family Services requesting examination of the Petitioner to determine whether he meets the definition of a sexual predator, disciplinary reports from the Florida Department of Corrections documenting disciplinary actions taken against the Petitioner during his period of incarceration, outpatient treatment summaries prepared by the Florida Department of Corrections, a discharge summary for inpatient mental health care prepared during Petitioner's incarceration with the Florida Department of Corrections for his criminal conviction for a lewd and lascivious act on a child, his history of drug abuse, and the State of Florida Department of Corrections' bio-psycho-social assessment prepared by a psychological specialist and a senior psychologist at Hamilton Correctional Institution dated September 30, 1996. (R. V7; 203-209, 213-215) Additionally, both of the State's experts conducted one-on-one personal interviews with the Petitioner and administered actuarial testing evaluations in reaching their opinions and diagnoses.

In *Westerheide v. State*, 831 So.2d 91, 112 (Fla. 2002), this Court found that the Ryce Act is civil, serving the "dual state interests of providing mental health treatment to sexually

violent predators and protecting the public from these individuals." This Court further recognized that "[t]he state's purposes for the Ryce Act - - long-term mental health treatment for sexual predators and protection of the public from them - - are both compelling and proper. 831 So.2d at 104. Petitioner's argument is without merit because it ignores the specific purpose that evidence of prior acts serves in a civil commitment proceeding.

In a sexually violent predator commitment proceeding, the State must establish that the respondent has the requisite state of mind and that the requisite state of mind makes that person dangerous at the present time, through the likelihood that the person will commit sexually violent offenses if not committed. §§394.912, 394.916-917, Fla. Stat. Thus, past conduct must relate to either the diagnosis of the mental condition or personality disorder, or, to the assessment of current and future dangerousness of behavior.

Petitioner alleges that the State's experts needed to rely upon the 1988 allegations to "show a continuing pattern." This is a misnomer simply because it is not necessary to show a continuing pattern of sexually violent acts for purposes of civil commitment. This Court in *Westerheide* interpreting section

394.912(10), Florida Statutes, articulated the basis for commitment under the Ryce Act:

In order to be committed under the Ryce Act, an individual must meet the two-prong definition of a sexually violent predator. Pursuant to this statutory definition, a sexually violent predator is any person who has been **convicted of a sexually violent offense** and who **suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.**

831 So.2d at 106. There is no requirement to show a pattern of behavior over a specified period of time, rather, the nature of a person's acts are considered under the constraints of the statutory provisions and definitions of the Ryce Act. This is strongly demonstrated in the facts presented to this Court in *Hale v. State*, 2004 Fla. Lexis 2406, *16 (Fla. 2004), as set forth by Justice Pariente in her dissent:

The petition for civil commitment was filed in April 1999 against Hale, who was forty-eight at the time, on the day he was to be released from prison for dealing in stolen property. The prior offenses on which the petition was based, attempted sexual battery and false imprisonment, occurred in 1987. Two previous sexual offenses had occurred fourteen years earlier, in 1973. As this case illustrates, the net cast by the Ryce Act encompasses an individual whose crime of sexual violence is far in the past, whose prior record shows no evidence that he is a

danger to young children, and whose most recent incarceration subjecting him to civil commitment was for an offense unrelated to sexual violence.

This unquestionably demonstrates that Petitioner's argument that the State's experts had to rely upon the 1988 Camp Alafia allegations to reach their respective opinions, is wholly without merit.

Moreover, Petitioner mistakenly relies upon criminal cases to support his argument that the use of the allegations was improper in the context of this civil commitment proceeding. To bridge the readily apparent gap between relying upon criminal case law and this civil commitment proceeding, Petitioner continues to proclaim that the Ryce Act, against the holdings of the United States Supreme Court and this Honorable Court, is not civil in nature, rather, it must be considered "quasi-criminal since its goal is to commit people for indefinite, long-term periods," and "[a] higher standard for relevancy must be used, and interpretations of relevancy as set forth in criminal cases would be applicable in this case." See Petitioner's Initial Brief, pg. 43. See also: *Kansas v. Hendricks*, 521 U.S. 346, 138 L.Ed.2d 501, 117 S.Ct. 2072 (1997); *Westerheide*, *supra*.

Specifically regarding the introduction of the information

related to Petitioner's prior sexual acts at Camp Alafia, the trial judge carefully weighed the arguments of counsel below and found:

Well, I'm reading the affidavit, which is a two-page affidavit, a total of six paragraphs. The court finds that it has several bases of factual accounts and indicia of reliability. Everything from circumstantial evidence, physical evidence, statements from the alleged victim, and an arguable, questionable denial by the alleged perpetrator.

Altogether, the court finds that there is an indicia of reliability sufficient to satisfy the court that - - to the extent that I do not find it unreliable. The hearsay evidence can be admissible under Florida Statute 394.91 - - 9155(5).

Furthermore, the court finds that this is relevant to the issue of whether or not the respondent has - - or suffers from a mental abnormality or personal - - personality disorder that makes the person likely engage in sexual violence. The court further finds that the probative value is not outweighed by its unfair prejudice. And accordingly, I'm denying the motion in limine.

(R. V6; 40)

Prior sexually violent conduct goes to the very heart of the civil commitment case, relating, as it does, to both the mental condition component and the likelihood of recidivism. Under such circumstances, such evidence has routinely been held to be highly relevant, and, even though obviously prejudicial to a

respondent, the prejudice does not outweigh the relevancy. *People v. Hubbart*, 106 Cal.Rptr.2d 490 (Cal. App. 2001); *In re Young*, 857 P.2d 989 (Wash. 1993); *In the Matter of Hay*, 953 P.2d 666 (Kan. 1998); *Lee v. State*, 854 So.2d 709, 713 (Fla. 2d DCA 2003)(evidence of prior offenses is properly presented at a commitment proceeding because the evidence is directly relevant to and highly probative of the issues that are involved, and any prejudice does not outweigh the probative value of the evidence).

Thus, in view of the foregoing, it cannot be said that the lower court abused its discretion in permitting the State to introduce details of prior criminal conduct of the Petitioner through the evaluation of the State's experts. This appeal should be denied.

ISSUE III

DID THE TRIAL COURT ERR IN ALLOWING THE USE
OF HEARSAY IN THE CIVIL COMMITMENT TRIAL?
(RESTATED)

Petitioner raises several sub-issues related to hearsay, in an attempt to most coherently respond to these allegations of error, each will be addressed as presented by Petitioner in his Initial Brief.

Generally, however, Section 394.9155(5), Florida Statutes, allows for hearsay to be admitted in civil commitment proceedings under the Ryce Act as long as it is both reliable and is not the sole basis for the civil commitment. It is paramount to remember when reviewing Petitioner's allegations of hearsay violations that the context in which this evidence was presented was a civil proceeding, not a criminal prosecution. Consequently, a review of these claims must be made within a civil context of the applicable law. See *Green, supra*; *Addington, supra*.

The Second District Court of Appeal, when addressing the constitutionality of Section 394.9155(5), found that "the protections afforded by the statute and the role of the trial court to exclude unreliable hearsay evidence suffice to meet constitutional requirements." *Lee v. State*, 854 So.2d 709, 713

(Fla. 2d DCA 2003); *In Re Commitment: John R. Cartwright, Cartwright v. State*, 870 So.2d 152, 2004 Fla. App. Lexis 421 (Fla. 2d DCA 2004). In reaching this conclusion, the court considered the allegations raised and found the lack of any constitutional infirmity arising from Section 394.9155(5). When reviewing the instant case, the Second District Court of Appeal once again reviewed allegations of abuse by the trial court in the admission of hearsay evidence at the civil commitment trial and, consistent with its prior rulings, rejected Petitioner's claims citing to *Cartwright, supra* at 156. *Burton v. State*, 884 So.2d 1112, 1114, 2004 Fla. App. Lexis 15602 (Fla. 2d DCA 2004).

As shown below, the trial court was correct in its rulings; the hearsay was properly admissible, relevant hearsay evidence admitted did not unduly burden or prejudice the Petitioner, and hearsay was not the sole evidence presented at the civil commitment trial.

- A. Petitioner alleges that the State used its expert witnesses, specifically its doctors, to introduce inadmissible hearsay.

There is no merit to Petitioner's argument. Rule 90.704, Florida Rules of Evidence, provides that expert witnesses are permitted to rely upon otherwise inadmissible evidence, including hearsay, when such matters are of a type reasonably

relied upon by experts in that subject. The testimony of the State's expert witnesses was, to the degree of hearsay relied upon, given within the bounds of Rule 90.704. The psychologists who testified at the commitment trial detailed the types of matters upon which they based their opinions. Significantly, both experts for the State reviewed and relied upon the same types of materials in forming their respective professional opinions. Common materials reviewed included police reports, court records, prison records, and prior psychological evaluations. (V7; T. 227-256, 274-302) Additionally, each doctor conducted a face-to-face, one-on-one interview with the Petitioner as part of their evaluation process.

Rule 90.704, Florida Rules of Evidence, specifically provides that:

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible evidence.

This provision has been construed to mean that "[t]he hearsay rules pose no obstacle to expert testimony premised, in part, . . . upon tests, records, data, or opinions of another, where such information is of a type reasonably relied upon by experts

in the field." *Bender v. State*, 472 So.2d 1370, 1371 (Fla. 3d DCA 1985) (citations omitted). "[W]hile the reports and tests if offered alone may be inadmissible, testimony regarding diagnoses and opinions formulated in part through reliance upon this data is to be admitted." *Id.* at 1372 (citations omitted).

In *Riggins v. Mariner Boat Works, Inc.*, 545 So.2d 430, 431-32 (Fla. 2d DCA 1989), the Second District Court of Appeal, when construing Rule 90.704, noted the general rule that "experts are generally permitted to express opinions which are based, at least in part, upon inadmissible information." *Riggins* also recognized the exception to the general rule, that being a prohibition against the use of an expert witness' testimony to merely serve as a conduit to place otherwise inadmissible evidence before a jury. This exception was applied in *Riggins* because the case involved a piece of evidence which had previously been ruled inadmissible due to a specific finding of its unreliability and that unreliable, and otherwise inadmissible evidence, constituted the sole basis for the expert's ultimate opinion. *Id.* The facts in the instant case are directly inapposite to the facts reviewed by the court in

Riggins. In the case now before this Court for review, the trial judge below made a specific finding that the evidence was reliable and admissible. (V6; 40)

Unlike *Riggins*, the opinions of the experts in the instant case were predicated upon a wide variety of evidence, much of which was not hearsay at all. In particular, it should be noted that the experts based their opinions, to some degree, on their interviews with Petitioner. Similarly, records from the Department of Corrections, regarding Appellant's behavior and treatment while in that agency's custody, would be admissible under the hearsay exception for public records. See Rule 90.803(8), Fla. R. Evid.

The most significant point, however, is that under Rule 90.704, experts may rely on facts or data which "are of a type reasonably relied upon by experts in the subject to support the opinion expressed."

Therefore, it is clear from the trial herein that the types of materials to which Petitioner objects are materials which specialists in the field typically rely upon when formulating opinions and diagnoses. This is further corroborated by the vast body of judicial opinions emanating from sexually violent predator commitment cases across the country over the past

decade as well as the volumes of academic literature on this subject.

In *People v. Hubbard*, 106 Cal. Rptr. 2d 490, 498 (Cal. App. 2001), Dr. Phenix, a psychologist testifying on behalf of the State, indicated that "[a]s part of the latter evaluation, she interviewed defendant and reviewed all of his records." Defense experts, Dr. Missett and Dr. Donaldson, similarly gave testimony which they predicated upon a review of the defendant's records.

Id. See also, *In re Young*, 857 P.2d 989, 994-96 (Wash. 1993)(opinions of mental condition and dangerousness based on records review); *In re Detention of Aguilar*, 892 P.2d 1091, 1092-93 (Wash. App. 1995)(expert's testimony regarding likelihood of recidivism, was "based on police reports (including statements of victims), documents from the Department of Corrections, progress reports from SCC, psychological test data from the SCC, and diagnostic interviews during Mr. Aguilar's detention at the SCC"); *State v. Watson*, 595 N.W.2d 403 (Wis. 1999)(psychologist could render opinion based on otherwise inadmissible evidence such as victim hearsay statements in a PSI report).

The same point was made in Florida's first sexually violent predator case to result in an opinion from an appellate court

after a civil commitment verdict, *Westerheide v. State*, 767 So.2d 637, 641 (Fla. 5th DCA 2000), affirmed, 831 So.2d 93 (Fla. 2002)(noting that experts' diagnoses "were based on consideration and review of extensive sources of information including the facts and circumstances surrounding the underlying offense for which the appellant was convicted; personal interviews with the appellant; police reports; reports from the Department of Corrections. . . ."). The foregoing cases are just a sampling of the many written opinions that reflect similar uses of prior records as the basis for the experts' opinions.

In the instant case, the Petitioner argues that statements made during the trial, including the testimony of Dr. Partyka and Dr. McClarin relating to the allegations of sexually violent offenses were inadmissible. Such statements made during Dr. Partyka's testimony included his review of the Petitioner's Department of Juvenile Justice history, his review of Department of Corrections' disciplinary reports and treating physicians at the Department of Corrections. (V7; T. 217-220, 222) As commented upon by the court in *Westerheide*, Dr. Partyka, as an expert witness, was able to arrive at his diagnosis of the Petitioner after reviewing extensive records including

Department of Corrections records, Florida Civil Commitment Center records, and other documentation furnished to him by the Department of Children and Family Services together with his personal interview with the Petitioner.

It should be abundantly clear from the foregoing that the matters upon which the experts herein relied are matters upon which psychologists routinely rely when giving clinical opinions, both in commitment cases and in analogous settings. Without these sources, experts would be relegated to giving opinions based solely upon a clinical interview of the respondent, which the respondent could thwart, either by not giving an interview at all; effectively precluding any civil commitment proceeding to move forward. Moreover, by relegating the State's experts to sole reliance upon an interview of the respondent, the experts would again be forced to render opinions based upon self-serving and potentially manipulative statements from the respondent. Thus, the evidence was properly admissible under Rule 90.704.

In civil commitment cases hearsay has a much broader use. Section 394.9155(5), Florida Statutes, expressly permits the use of hearsay unless it is shown to be unreliable. It is within

the purview of the Legislature to determine the type of evidence which may be used to fulfill the public policy of the Ryce Act.

The testimony admitted here was precisely what the Legislature envisioned when section 394.9155(5) was created.

There was no showing of any unreliability of any matters upon which the State or its experts relied. Further, Petitioner testified and therefore had the opportunity to dispute the evidence presented by the State.

The Second District Court of Appeal reviewed the use of hearsay in a Ryce proceeding in *Williams v. Florida*, 841 So.2d 531 (Fla. 2d DCA 2003), and held that experts who testified at a civil detainee's trial could rely upon hearsay from the police reports of the detainee's prior criminal convictions in arriving at their opinions.

In *Lee v. State*, 854 So.2d 709 (Fla. 2d DCA 2003), the Second District Court of Appeals rendered an opinion concerning the use of hearsay in civil commitment proceedings. Again, the court held that the trial court carefully analyzed the hearsay evidence presented during the trial, considered the detainee's challenges and objections and excluded unreliable and irrelevant hearsay while admitting reliable hearsay pursuant to §394.9155(5), Fla. Stat. The court in *Lee* further held that

§394.9155(5), Fla. Stat., meets constitutional requirements.

Id. at 713; *Cartwright, supra.*

- B. The use of hearsay evidence at the civil commitment trial was not unduly prejudicial; rather was probative in nature outweighing any prejudice to the respondent.

The limited use of hearsay relating to the findings of the expert witnesses was not unduly prejudicial and was used in conjunction with non-hearsay information, resulting in the admission of highly probative testimony without an undue burden being placed upon the Petitioner. Apart from the unique nature of expert testimony under Rule 90.704, hearsay evidence is otherwise admissible at a commitment trial. Evidence regarding the facts of prior sexual or other violent offenses is highly relevant to the assessment of a mental condition and dangerousness. Absent such facts, experts could not formulate their opinions and explain the basis of those opinions to the jury. Thus, while such evidence is undoubtedly prejudicial to the defense, it is an indispensable part of the State's case. As such, prejudice cannot be said to outweigh probative value.

Given that sexually violent predator commitments are constitutionally valid, Petitioner, in seeking to exclude the use of documentary bases for the experts' opinions, is

effectively proposing that constitutionally and statutorily permitted proceedings should bar the use of any and all evidence which could conceivably prove the case against the Petitioner. Such a claim should be viewed as frivolous. See Westerheide, supra

- C. The introduction of hearsay under the Ryce Act is not unconstitutional under a claim that it is unreliable and denies the respondent a right to confrontation. The Ryce Act is a civil commitment proceeding, not a criminal prosecution; therefore, respondent is not entitled to a full panoply of Constitutional criminal law safeguards.

There was no showing of any unreliability of any matters upon which the State relied at Appellant's civil commitment trial. Further, Appellant testified, therefore, had the opportunity to dispute the evidence presented by the State and its witnesses.

Petitioner relies heavily upon the Fifth District Court of Appeal's ruling in *Jenkins v. State*, 803 So.2d 783 (Fla. 5th DCA 2001), in which the court held that the respondent in that case was denied a fair trial because police reports containing unsworn allegations of serious sexual misconduct were introduced into evidence without providing the respondent the opportunity to confront the witnesses who had made the unsworn statements.

Importantly, *Jenkins* can be distinguished based upon the facts of that case and the facts presented by the case now before this Court for review. The *Jenkins* court specifically found that: ". . . Jenkins appears to have been committed almost **solely** on hearsay evidence. Section 394.9155(5), Fla. Stat., while permitting hearsay evidence to be used in determining whether to seek commitment 'unless the court finds that such evidence is not reliable,' mandates that 'in the trial, however, hearsay evidence may not be used as the sole basis for committing a person.'" 803 So.2d at 786. In *Jenkins* the respondent's qualifying offense was for lewd assault involving a child and that was his only conviction for sexual misconduct. The additional 'hearsay' evidence admitted in *Jenkins* consisted solely of police testimony from police reports that the respondent had broken into homes and had asked permission to go to bed with minors; however, any matters that made it as far as trial were resolved by plea to a non-sexual offense. In the case now before this Court, there was independent, substantial evidence presented upon which the jury could find that Petitioner was properly subject to civil commitment under the Ryce Act as a sexually violent predator. The State introduced

evidence of **convictions** for sexually violent offenses: Petitioner pled guilty to and was convicted of sexual battery on an eight-year-old girl; Case No. JV87-903898, Petitioner was convicted of committing a lewd act in the presence of a child; Case No. JV87-90973, Petitioner was convicted of two counts of lewd act on a child in Case No. CF89-5660A1-XX, and according to the records of the Department of Corrections, Petitioner was disciplined through the institution's disciplinary administrative process while in prison for one act of sexual misconduct with another inmate. The court in *Jenkins* recognized that when no other convictions were present, the respondent did not have the ability to confront witnesses whose testimony was coming in through police officers and not the actual witness. This is distinctively different than the underlying facts of this action. Petitioner in this case was not just "confronting the messenger," he was faced with prior convictions, in fact, in at least one case he plead guilty to criminal charges resulting in his conviction. 803 So.2d at 786. Even the court in *Jenkins* recognized the qualifying distinction between police reports which contained "unchallenged and unchallengeable prejudicial hearsay and police reports which relate to cases in which the respondent has pled or been convicted." The latter having an

indicia of reliability. 803 So.2d at 785.

Section 394.9155(5), Florida Statutes, permits the introduction of hearsay evidence in the civil commitment trial.

The Ryce Act, a sexually violent predator statute, has been definitively held to be a civil action not a criminal prosecution, regardless of the fact that it may act to compromise liberty rights of a limited group of individuals deemed by the legislature to be dangerous to society as a whole.

*Westerheide*¹⁶, *supra*. See also *Kansas v. Hendricks, supra*. Respondent respectfully disagrees with the position taken by the Fourth District Court of Appeal when it stated: "Obviously this statute must be construed in light of the Fourteenth Amendment right of confrontation." 803 So.2d at 785. Respondent contends, as found by the Second District Court of Appeals in *Cartwright* "[t]he Confrontation Clauses of both the United

¹⁶ See also *State v. Goode*, 830 So.2d 817, 819 n.1 (Fla. 2002), in which this Court stated:

We have upheld the constitutionality of the [Ryce Act] as to various challenges in *Westerheide*[].

As the court noted in *Cartwright, supra*: "This statement in *Goode* appears in an opinion joined by a majority of the members of the Court - including all the justices who did not join the plurality opinion in *Westerheide*." 870 So.2d at 154.

States and *Florida Constitutions* are expressly limited to 'criminal prosecutions.'"

Respondent further argues that any collateral hearsay evidence, if deemed improper by this Court, is harmless. *Green, supra*. As such, Petitioner's claim has no merit in the context of a civil commitment proceeding and this appeal should be denied.

ISSUE IV

THE RYCE ACT ENCOMPASSES THE REQUISITE FINDING OF SERIOUS DIFFICULTY IN CONTROLLING DANGEROUS BEHAVIOR AS AN INHERENT ELEMENT OF THE ACT, THEREBY DOES NOT REQUIRE AN ADDITIONAL JURY INSTRUCTION. (RESTATED)

Petitioner acknowledges that this Court has already definitively ruled inapposite to his argument that Florida's Ryce Act's jury instructions do not address the level of volitional control required for a determination of civil commitment; i.e., a finding that a respondent has "serious difficulty controlling behavior." Specifically, Petitioner recognizes this Court's ruling in *State v. White*, 2004 Fla. Lexis 2402, 1, 29 Fla. L. Weekly S821 (December 23, 2004), holding that *Crane*¹⁷ imposed no new element requiring an additional jury instruction and that "the jury need not be instructed that the respondent must have serious difficulty controlling behavior."

Rather, Petitioner appears to be raising a sufficiency argument in the guise of "preserving for federal review" the issue of the imposition of a new element under *Crane*. In *F.B. v. State*, 852 So.2d 226, 2003 Fla. Lexis 1177 (Fla. 2003), this Court held that:

¹⁷*Kansas v. Crane*, 534 U.S. 407 (2002).

. . . rarely will an error be deemed fundamental, and the more general rule requiring a contemporaneous objection to preserve an issue for appellate review will usually apply. We find that the interests of justice are better served by applying this general rule to challenges to the sufficiency of the evidence.

It appears that Petitioner may be misguidedly relying upon an exception to the foregoing; that being "[an] exception to the requirement that claims of insufficiency of the evidence must be preserved occurs when the evidence is insufficient to show that a crime was committed at all." *F.B.*, 852 So.2d at 230 (an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved, such complete failure of the evidence meets the requirements of fundamental error), citing to: *Troedel v. State*, 462 So.2d 392, 399 (Fla. 1984); *Vance v. State*, 472 So.2d 734 (Fla. 1985). Respondent, while acknowledging the extensive review conducted by this Court in *Westerheide*, respectfully disagrees with Petitioner that a review of the sufficiency of the evidence at trial can be made in the absence of a properly preserved claim at trial.¹⁸ P

¹⁸"[T]his error was not preserved" below as conceded by Petitioner in his Initial Brief to the Second District Court of Appeal in Case No. 2D01-223 at page 76.

Petitioner did not preserve this issue at trial. (V3; R. 489-494, V6; T. 55-61, V7; T. 315, 342, 350, 367, 371, 381)

As this Court and the Supreme Court of the United States have definitively held, civil commitment proceedings are civil, not criminal in nature. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Westerheide*, *supra*. The only exception that would allow a non-preserved fundamental error review, i.e., the evidence was insufficient to show that a **crime** occurred, does not apply to this civil proceeding.

However, should this Honorable Court disagree with Respondent's foregoing argument, then, Respondent alternatively argues that the record reflects that ample evidentiary proof was presented at trial demonstrating Petitioner's "serious difficulty in controlling behavior," as required by *Crane* and *Westerheide*.

The Petitioner has been involved in a substantial number of documented sexual offenses, this behavior began in his youth and continued into adulthood. Indeed, Petitioner's lack of volitional control is readily inferred from his behavior with the victims; his stepsister and stepbrother in 1987, another resident of a juvenile facility also in 1987, and the conviction for fondling the young boys in 1989. (V6; T. 107, 110-111, 116-

117) The Petitioner engaged in various inappropriate sexual offenses, including the fondling and touching of young boys and disciplinary reports involving a sexual violation during his incarceration.

This general, persistent course of behavioral conduct demonstrates Petitioner's inadequate control over his behavior throughout his life. Dr. McClarin opined that he thought the Appellant's pedophilia would affect his emotional or volitional capacity to the extent that he has serious difficulty controlling his behavior to any manageable degree. (V7; T. 274, 276, 282, 300)

Dr. Partyka concurred with Dr. McClarin's expert opinion and testified that the pedophilia affected the Petitioner's emotional or volitional capacity to the point that he has serious difficulty in controlling his behavior and is likely to re-offend. (V7; T. 210, 219) Additionally, the two State experts found it relevant that Petitioner neither denied nor minimized his responsibility for his actions, lacking any insight regarding the negative impact his behavior had upon his victims.

In light of the foregoing, the record unquestionably

demonstrates that ample and sufficient evidence was presented at Petitioner's civil commitment trial that he has serious difficulty controlling his behavior. This being so, there is no deficiency in the State's evidence in accordance with the evidentiary requirements of *Crane, Westerheide* and *State v. White*, 2004 Fla. Lexis 2402, 1, 29 Fla. L. Weekly S821 (December 23, 2004); therefore, this appeal should be denied.

CONCLUSION

WHEREFORE Respondent respectfully requests that this Court uphold the ruling of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief of Respondent on the Merits has been furnished by U.S. Mail to; Deborah K. Brueckheimer, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000 - - Drawer PD, Bartow, Florida 33831, this _____ day of May 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type font used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

Respectfully submitted,

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