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STATEMENT OF THE CASE

On 7-29-99 the State filed a Petition for Civil Commitment pursuant to the Jimmy Ryce Act (hereinafter the Act) seeking involuntary civil commitment of Petitioner, Gary Burton. (V1/R1-2) Mr. Burton had a jury trial, and on 12-14-00 the jury unanimously found Mr. Burton to be a sexually violent predator for civil commitment purposes. (V3/R487,488; V7/T388-390) On that same date the trial court entered a judgment and commitment order. (V3/501-502; V7/391) Mr. Burton's motion for new trial was timely filed on 12-20-00 and denied on 12-21-00. (V3/R489-494) Mr. Burton's notice of appeal was timely filed on 12-28-00. (V3/R497-498)

On 10-22-04 the Second District Court of Appeals issued an opinion affirming the commitment. In that opinion the Court addressed the Frye¹ issue and specifically accepted the SCR-20 as a tool to use in a Ryce Act case not subject to Frye requirements. This opinion conflicts with the Fourth District's decision in Collier v. State, 857 So. 2d 943 (Fla. 4th DCA 2003), which stated the Frye requirements were applicable to the SVR-20, the State did not establish the Frye requirements, and the use of the SVR-20 at trial was reversible error. In addition, the Second District's opinion certified the jury instruction issue as to whether the jury must be instructed on the fact that the individual has serious difficulty in controlling his dangerous behavior. A timely notice to invoke this Court's jurisdiction was filed.

(..continued)

¹ Frye v. US, 293 F. 1013 (D.C. Cir. 1923).

STATEMENT OF THE FACTS

A. The Frye Hearing Testimony:

In order to determine if there was widespread general acceptance throughout the medical community for making recommendations as to future dangerousness and recidivism for sexual offenders, a Frye hearing was held (Dr. Doren and Dr. Shaw for the State, Dr. Hart and Dr. Otto and Dr. Berlin for Mr. Rodgers).

Dr. Doren, a psychologist in Wisconsin, has performed sex offender commitments, done sex offender civil commitments, specialized in the assessment and treatment of sex offenders and testified in 5 or 6 states--including Florida. (V4/R673-688) He uses actuarial instruments in the assessment and prediction of recidivism of sexual predators. An actuarial instrument is a scale that is a systematic way of organizing and interpreting pieces of information. (V4/R692):

VRAG (Violence Risk Appraisal Guide) came out in 1994 and is a 12-item instrument designed to assess likelihood for violent recidivism in previously convicted violent offenders. He received training in administering this test, and it is used by everyone in Kansas, everyone in North Dakota (4 people), some in Florida and some in Washington. Other instruments became more popular, so other states don't use it. While it assesses the likelihood for being arrested for a new violent offense within 7 years or 10 years after release from incarceration, it is not relevant to just sexual violence risk assessment. Dr. Doren believes it has gained general acceptance in the field of psychology that deals with assessment and prediction of recidivism in sexual predators, but those who use the VRAG use something else too. (V4/R693-697,768) The VRAG is more subjective than other tests. (V4/R744) He stopped using it a year ago (V4/R700), and it's not used much since other tests more geared toward sex offenders came along (V4/R787).

SORAG (Sex Offender Risk Appraisal Guide) assesses violence likelihood for just sex offenders. It's used in 4 states, and Dr. Doren believes it has general acceptance even though he doesn't use it as he believes it to be redundant to VRAG. (V4/R697-700) It is not used much since other tests have come along. (V4/R787) There is no manual. (V4/R745)

MnSOST (Minnesota Sex Offender Screening Tool) was specifically developed to assess risk of sexual reoffense for sex offenders leaving prison in Minnesota in response to the creation of the sex offender civil commitment process. It's used in 7 states, and Dr. Doren believes it has gained general acceptance. It's for the likelihood of re-arrest for a new sex offense within 5 years. Dr. Doren still uses it but is about to stop, because there is now a better revised test--the MnSOST-R. This test is used in 10 states. (V4/R700-706) MnSOST is not useful for incest offenders. MnSOST-R was recently cross-validated by the same person who created it, but never by an independent person. The people used in this small sample do not reflect the diversity of Florida's incarcerated population. MnSOST-R scored information related to charges that did not lead to convictions. (V4/R752-757)

RRASOR (Rapid Risk Assessment for Sex Offense Recidivism) assesses reconviction for new sex offense likelihood for previously convicted sex offenders. Dr. Doren believes it has gained general acceptance, and it is used in the 13 states he surveyed. (V4/R706-708) Though the MnSOST-R and RRASOR are strongly embraced and test for the same thing, they do not agree with each other--there is not a good correlation between the two scores on predicting reliability. Dr. Doren does not see this as a problem, because he believes they test for different things--RRASOR tends to assess sexual deviancy and MnSOST-R tends to assess violent antisocial behavior. RRASOR should not be used in isolation. (V4/R761-768)

PCL-R (Psychopathy Check List Revised) is a psychological test designed to assess someone who has a syndrome or collection of personality characteristics called psychopath. It's not an actuarial. He uses it regularly except in juveniles (10 states are using it), and he believes it has gained general acceptance. (V4/R708-710) The PCL-R recommends an interview; but if records are sufficient, it's not necessary. It should never be based on an interview alone. Although not designed for juveniles, he believes it's okay to use it on

someone who was incarcerated as a juvenile when that person becomes 18. Although not designed for predictive purposes, that is how it's being used. (V4/R777-783)

SVR-20 is not used by Dr. Doren because it's not well researched. (V4/R711-712) That test has a clinical structure, and he doesn't trust his own clinical judgment. Also, the risk factors on that instrument include some that have an unknown degree of research support relative to sexual violence. It's not generally used. (V4/R780-783) However, the SVR-20, MnSOST, and MnSOST-R are the tests used by the 18 doctors under contract with the Department of Children and Family Services (DCF). (V4/R769-774)

Dr. Doren has done about 145 sexual predator risk assessments and has supervised over 150. (V4/R714) There are 5 different approaches to evaluating a sexual predator: (1) pure clinical with no research, (2) guided clinical judgment, (3) research guided clinical judgment, (4) clinically adjusted actuarial assessment, (5) pure actuarial assessment. He uses the fourth approach, as do the vast majority of evaluators. (V4/R718-720) St. Ex. 6 is Dr. Doren's survey results from sending out e-mails to people in 13 states asking what they use. (V4/R721-723)

Dr. Doren admitted many actuarials were derived from very limited populations based on small areas where they were developed --the northeast, southern Canada, Minnesota. These actuarials have not gone through research looking at racial or cultural issues or for those physically disabled. (V4/R727-734) The people used in these small samples do not reflect the diversity of Florida's incarcerated population, and Dr. Doren doesn't know if the tests created in small areas without hispanics or blacks or caribbean people would cast doubt on

the applicability to a Florida person. This was "an interesting question." (V4/R752-757,787-793) These samples included people who had been re-arrested or re-convicted for illegal sexual behavior; but because sexual behavior varied, it might be legal conduct in Florida. That was, he admitted, a very important point. (V5/R984-998)

Dr. Doren noted the use of actuarials to assess sex offender recidivism is new (VRAG--1994, RRASOR--1997, Minnesota--1997,1998) and that clinical judgment is only slightly above chance levels. (V4/R737-740) Although none of these actuarials have gone through assessment procedures, Dr. Doren said the procedures that apply to psychological tests do not apply to actuarial tests. The actuarial does not assess psychological functioning; it does not assess any type of psychological concept since it is not about personality, achievements, intelligence, or behavioral descriptions of the individual. None of the actuarials were designed to be psychological tests nor were they designed to be used specifically by psychologists.

They are open to anyone and are on the Web. It's easy to administer these instruments, and the ease of use means the reliability is straightforward and expected to be high. However, there was a problem with one of the examiners on the MnSOST-R; but Dr. Doren blamed that on a lack of training. When the MnSOST-R was tested for inter-rater reliability (i.e., when several doctors evaluate the same person to come up with the same score), one rater was way off from the rest.

Dr. Doren said that rater had been hired the day before and had not been trained on how to find information in the Minnesota Dept. of Corrections records. None of the other actuarials have been tested specifically for inter-rater reliability. Instead, people who moved on to the next step of testing for meaningfulness. Consistency in scoring has been found in one study for MnSOST and several times for VRAG, RRASOR and SORAG. (V4/R743-745;V5/R961-967)

Dr. Doren agreed that actuarials are not used in any other psychological or psychiatric areas. He also admitted no manuals have been published for them, and it's unlikely there ever will be. (V5/R972-976) Dr. Doren noted actuarials have only a moderate degree of usefulness in predicting recidivism, but they are useful in assessing the degree of likelihood. The expert is assessing risk, not recidivism, with the expert assessing the degree of likelihood the individual has for committing a new offense. In the proffer (the State objected) Dr. Doren was concerned about the accuracy and clarity of the information conveyed by experts to the trier of fact, including whether the trier of fact will understand the difference between recidivism and likelihood. In his opinion the trier of fact will still fall back on the numbers and misinterpret them to decide if a person will or will not recidivate despite the caveats. (V5/R1005-1010)

Dr. Shaw is a psychologist in Florida specializing in the evaluation and treatment of sex offenders. He was accepted by Florida courts as an expert in the sexually violent predator

program. (V4/R794-798) He is currently under contract with DCF to provide assessment of sexually violent predators under the Act. He uses actuarials--mostly MnSOST-R and RRASOR, sometimes the VRAG, PCL-R whenever he can interview the offender or has the appropriate data, never the SORAG or MnSOST. These instruments have gained widespread use among those providing Act evaluations. There are a number of doctors not using actuarials, and DCF allows doctors to do their assessments without using an actuarial. Experienced sex offender clinicians are using actuarials. In his opinion actuarials have gained general acceptance for predicting sexual predator recidivism, and it would be unethical to do this type of evaluation without using actuarials. (V4/R799-806)

Dr. Shaw admitted there has been no formal peer review process of these actuarials and that MnSOST-R was cross-validated by the same people who created it. It is possible to do an assessment under Florida's Act without using an actuarial, because Florida's list of instruments allowed includes SVR-20 which is not an actuarial. He does not believe SVR-20 is generally accepted. (V4/R807-813,821)

Dr. Hart, a professor of psychology and a clinical forensic psychologist, is a professor at Simon Frazer Univ. in British Columbia, Canada. He has written in the general area of risk assessment; lectured in this area to mental health professionals, law enforcement, corrections professionals, and legal professionals in North America and Europe; and testified

in court in Canada and the United States. He is not licensed to practice psychology. (V5/R835-843) In his professional opinion there is no actuarial instrument for risk for sexual violence that would be of any use to decision makers. (V5/R879)

The first item in VRAG and SORAG is PCL-R--a psychological test that requires clinical evaluation. The standards for educational and psychological testing are promulgated by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement and Education. They create guidelines in their manual which are intended to apply across professions. Any kind of assessment concerning people has to comply with these standards. The reason for these standards are because various professional organizations recognize assessment procedures and tests have an impact on peoples' lives, and they are needed in order to be accorded weight within and outside the profession. That is why these assessment procedures should meet minimal professional and scientific standards. Criteria are used to try to judge the adequacy of a test's contents, the items that make up a test, and the accuracy and meaningfulness of decisions made using a test.

There are procedures to comply with the standards for testing. For psychopathic personality disorder test, start with a thorough review of professional literature on that particular concept to identify what people believe are key

features or symptoms of the disorder. A decision is made as to what format is to be used for the test. A number of items are developed, and a rough version is administered to hundreds of people. A statistical analysis is done to determine the adequacy of the items to see if they yield reliable or consistent measurements and the extent to which these measurements have some kind of meaning or are associated with external criteria relevance. The test is revised in light of that research. The final version is then tested. At the end of the process, which typically takes many years, there is a psychological test with full and complete technical information subject to peer review. Research based on the test is published in scientific journals and books. The test manual is also published by a psychological test publisher. This psychological test is also reviewed by a major review called the mental measures yearbook. At the end of this lengthy process, there is a formal psychological test that is used and accessible to other people. (V5/R844-850)

The VRAG doesn't have full and complete technical information available for peer review. There's no place to go to get information on how to use this test or what kind of qualifications the person giving the test must have. Another basic is lacking as to what type of technical information is needed to interpret the scores. In the VRAG manual there are lots of errors--insufficient and flawed information. The VRAG was created for violent offenders and not sex offenders. What research was done was not relevant to sex offending. (V5/R851-

856)

The SORAG has the same kinds of flaws as VRAG, but they are worse. There is no published manual, there is much less technical information available, and much of the original research is unpublished. It's essential or critical for a formal psychological test to have information available so that others can understand and review the way the test was originally constructed. That information is not completely available for VRAG and SORAG. The sample used for these tests was very unusual--40-60% were psychotic and non-culpable in a legal sense, and the rest came from maximum security prisons in Canada. This was not a typical correctional or forensic group, but a highly unusual group who had been the subject of considerable research over the years and received unusual treatment. This group was not representative of offenders outside northern Ontario. No cross-validation to see if these tests applied to other populations has been done on the VRAG or SORAG. There has been some inter-rater reliability testing on VRAG to see if the same results are achieved when tests are administered by different individuals, but it was inadequate in that it was only done in 20 cases when usually hundreds have to be evaluated. There has been no inter-rater reliability studies on SORAG. (V5/R856-863)

There is no full and complete technical information published and available for peer review for MnSOST or MnSOST-R. Putting something on a website is no guarantee of quality. There is no published test manual, just a user's guide

distributed by a government agency in Minnesota. There was no cross-validation or inter-rater reliability studies. The sample used was from released Minnesota prisoners who reoffended. (V5/R863-867,869)

VRAG, SORAG, MnSOST, MnSOST-R, and RRASOR are actuarial instruments; and there are certain rules and criteria used to judge actuarial tests. The general procedure of actuarial assessment is accepted in the profession of psychology and in the relevant scientific community; however, the VRAG, SORAG, MnSOST and MnSOST-R are not accepted. They do not even exist in the relevant scientific or professional literature. They exist mainly in fugitive documents--copies passed around that are not widely accessible or open to scrutiny. These tests have not been submitted to the necessary level of scrutiny and tests, and they have not even existed long enough to gain general acceptance in the scientific community. There is so little information about actuarial assessment of risk for sexual violence that it's a suspect enterprise now. (V5/R870-875)

The Association for Treatment of Sexual Abusers (ARSA) is not a professional organization nor a scientific organization.

It's a collection of people who have a common interest--it's not a group of scientists. They are not an appropriate organization to look to in determining whether or not they represent the relevant community to see if these tests meet the minimum requirements to be accepted within the scientific community. (V5/R876-878)

Dr. Hart does not do predictions of likelihood of sexual recidivism in the future, because he believes there is insufficient scientific information to permit any kind of meaningful or precise estimate of someone's absolute risk for future sexual violence. The tests at issue are not widely used in Canada in these kinds of proceedings even though the VRAG, SORAG, and RRASOR were developed there. VRAG is used in Canada to look at risk for general violence. (V5/R880-890)

Absolute likelihood instruments that yield a score and that score is then translated into a probability statement (such as a particular man has an 85% likelihood of committing another offense within the next 15 years) are particularly error prone in the sexual recidivism area. A percentage likelihood that someone will commit a sex crime in the future is based on a very very small sample size--as few as 20 or 30 people. There's a lot of error in that estimate, and this is the worst possible use of actuarial tests at this point in time. The fact that lots of people use a particular test does not make it a valid one. (V5/R891-895)

Dr. Otto, a psychologist in private practice in Tampa and associate professor in the mental health law and policy department that is part of the University of South Florida, has evaluated people subject to civil commitment under the Act and conducted training on evaluating individuals under the Act. He has testified as an expert witness in this area in Ft. Lauderdale and Ocala. The majority of evaluators are making an adjusted actuarial assessment where they administer

one or more actuarial instruments and then "between tweak it" with their clinical judgment and opinion. They then offer some kind of estimate to the court of an individual's likelihood for reengaging in sex offenses. Research indicates actuarial instruments are generally more accurate than just clinical judgment for sexual offending, but he does not use them. He uses SVR-20 which is not an actuarial test but is approved by DCF. He does not believe actuarial tests comport with the standards for educational and psychological testing. As a licensed psychologist and member of the American Psychological Association, he would be prohibited from using these tests. The Association, around for over 100 years, directs how tests or assessment instruments be developed under certain criteria; and he is obligated to follow those standards. (V5/R900-905)

There are many problems with actuarials. One is the lack of testing for inter-rater reliability. It has not been determined for the RRASOR, and there is good reason to think results would not be great. It has also not been done for VRAG and SORAG. It was done on MnSOST-R, but the scores of one of the testers had to be dropped as he was so off he skewed the results. Some inter-rater reliability tests were done in a training seminar put on by DCF. After receiving the training, getting the data, and scoring it, the scores in the room were incredibly discrepant. Not having a showing of inter-rater reliability is in direct contravention of ethical and scientific standards by the American Psychology Assoc.

(V5/R906-910) Not having standard manuals that describe how the test is to be scored and training testers with no mental health expertise is also a problem. (V5/R945)

Another problem is the lack of testing for cross-validation which is crucial, because you can't draw any conclusions about a test based on only one group. When the RRASOR was used on the group being used to develop MnSOST, it did not do well. When used on Americans, it did not do well.

Saying the reason is because the RRASOR measures something different from the MnSOST or MnSOST-R by claiming one measures pedophilia while the other measures violence is not an acceptable excuse--they are still trying to predict the same thing. Such an after-the-fact explanation is not very convincing. There has been no cross-validation on SORAG, and VRAG was tested on a few samples. (V5/R911-916)

Dr. Otto could not think of another area where you get a document off the internet and use it as an assessment measure or get an instrument from someone who got it at a workshop and then uses it to assess someone. Peer review via publications and feedback that is then published with more feedback and more publications resulting in a test published a few years later is how a test is developed. That is not happening in any of the actuarial tests. Working in the field to see if the tests work is not how to do it. You don't give doctors drugs to test on people to see how the drugs work--drug companies must test first. (V5/R971-919)

Dr. Otto doesn't agree with Dr. Doren's survey as

scientifically valid. This is a survey of court-appointed/state-appointed evaluators, but we don't know how many participated or if it relied on hearsay. The fact that one test may be used in several states or by a lot of psychologists doesn't give it validity. In a survey given to people under contract with DCF, there is a wide range among the doctors as to what instruments are appropriate in identifying sexually violent predators. (V5/R919-922) "Tweaking" an actuarial instrument with clinical judgment is contrary to the actuarial approach and is bad. Some studies show adjusted actuarials tend to make estimates less valid. (V5/R926-927)

New actuarials are being developed with significant frequency. The first actuarials for predicting sexual reoffending were published in 1997, so these are brand new tests without adequate research and peer review. In the last 3 years tests have been developed, not been evaluated and approved, and then were discarded when a new one came along--also not evaluated and approved. These tests did not exist before the civil commitment laws. In Minnesota the civil commitment law was enacted and a test was needed to comply with that law. (V5/R929-931)

Although actuarials are generally accepted, they are rarely used in psychological or psychiatric assessment. For purposes of predicting recidivism in sex offenders, actuarials or adjusted actuarials are not sufficiently established to have gained general acceptance. (V5/R932-933) Actuarial

numbers are being offered as if they are a temperature or blood pressure number, but they are far from that kind of accuracy. Dr. Otto is concerned these tests will make the jury feel confident about conclusions they reach, but there are little grounds for that confidence. Juries will be given a false confidence. (V5/R945-948)

Dr. Berlin, a physician with a specialty in psychiatry and a Ph.D. in psychology, works at Johns Hopkins Hospital. His specialty is in sexual disorders. He does clinical care of patients, teaching, and research. He has been qualified to address sexual disorders in court and has testified in other Frye hearings in Florida on the Act. Although Dr. Berlin has been trained to administer and interpret psychological tests, actuarials don't fall into that category. Psychological tests are designed to diagnose or identify a particular disorder or condition. Actuarials try to make statements about groups as a whole and about the probability of the occurrence of some type of event with that group. He is the senior author on a published study on over 600 sex offenders and recidivism. He treats sex offenders. (V8/R1021-1036)

In his professional opinion there is no scientific evidence that RRASOR, VRAG, SORAG, MnSOST, MnSOST-R, or SVR-20 can make accurate predictions about the likelihood of sexual recidivism of a given individual. Dr. Berlin does not believe these tests can do with a high degree of certainty and confidence what they purport to do. He has not seen, and the data doesn't support, that any of these tests make predictions

to an individual within a group. These instruments are designed to look at the likelihood of what's going to happen within a given group via a percentage and do not say which individual within the group will be at risk. For example, in a group of people with high blood pressure, high cholesterol, and high weight, 50% are going to have a heart attack; but the actuarial won't tell you which ones within the group will have the attacks. (V8/R1037-1050,1056-1058,1092)

When asked if these tests were generally accepted with the relevant scientific community on being able to predict future risk of sexual recidivism, Dr. Berlin noted there was a small group of people working in the area of civil commitment who have been using one or more of these tests; however, the larger group of people in the psychology profession, psychiatrists, forensic psychologists/psychiatrists, or clinical psychologists in general are not using and accepting these tests. Over the years people have done things in professions simply because they are being done but should not have been done--prefrontal lobotomies, needless radical mastectomies, tonsils removed. The issue isn't "are people doing it" but is there scientific evidence the test can and should be done for a specific purpose. (V8/R1093-1095)

RRASOR is a simple instrument with 4 categories: number of priors, age of perpetrator (over or under 25), were victims outside the family, and gender of victim. Usually it comes down to priors and gender of victim, and the bottom line is you have a higher risk of reoffending if there is a number of priors and some of the victims were male. This test was tested on people who were recidivists, and it did a lousy job of predicting recidivism--i.e., the correlation between one's RRASOR score and whether

someone did or didn't become a recidivist was extremely low. (V8/R1037-1050)

MnSOST and MnSOST-R were designed to do the same thing as RRASOR--evaluate future risk of sexual recidivism; but when they are used together on a sample population, you don't get the expected similar results. After the fact a disparity in the results was discovered. RRASOR relates to sexual deviancy and MnSOST relates to criminal behavior. Neither test can identify or distinguish with a high degree of accuracy those people who will recidivate. (V8/R1055-1057) MnSOST had to be revised (MnSOST-R) because it wasn't able to accurately predict sexual recidivism, and the revised test has not been tested to see if it's doing better. The developers did, however, publish a table where they scored a population where they already knew who was and was not a recidivist. MnSOST-R was wrong in 30% of the people, even when they knew the answer. (V8/R1073-1083)

VRAG was designed to predict violence in general--not sexual recidivism, and Dr. Berlin was not aware of any evidence to show it could predict sexual recidivism. VRAG consists of 12 items, the first of which is another test--PCL-R (not an actuarial). Add up the points from all the items, and VRAG is supposed to give a likelihood of future violent acts that don't necessarily involve sexual violence. (V8/R1064-1066)

PCL-R was not designed to predict sexual recidivism--it's a psychological test designed to see if a person is an irresponsible and nonproductive individual. It was tested in Minnesota on those who were known recidivists, and it was found it had no predictive validity on committing future sex offenses. (V8/R1067-1069)

SORAG is VRAG plus the measure of sexual deviance, but you just can't add that in and say now we're measuring sexual recidivism--it's not scientifically acceptable. SORAG should have been tested to see if it was accurate in predicting sexual recidivism, but that hasn't been done. (V8/R1071-1072)

SVR-20 is not an actuarial. It's a recommendation on how to do a thorough assessment (a guided interview). (V8/R1086-1087)

Assessment under the Act is different from that under the

Baker Act. The Baker Act is a prediction for a short term basis, not for committing someone for the rest of their life.

Actuarials are never used in Baker Acts. (V8/R1112-1113) Dr. Berlin is not sure what can be done about predicting accurately long-term likelihood of sexual recidivism. The statute is asking doctors to do something for which there is no method. (V8/R1115)

As a generalization the best prediction of future behavior is prior pattern, but there are many factors that may intercede. For example, someone who's had many heart attacks and never receives treatment will probably have another; however, if the person has a cardiac bypass, then history becomes meaningless. There are many factors that can impact on a person committing a sex offense in the future: treatment, fear of a lengthy prison sentence, closer surveillance by parole and probation, medicines. Looking at the bigger picture, even a person with a lot of priors may still not be above 50% risk for recidivism; and this could be below the threshold where you say it's accurate. (V8/R1117-1119)

B. The Trial Testimony:

Mr. Burton, 28 at the trial, had difficulties with one of his 2 step-mothers while growing up. Once there was a struggle over a bicycle; and he bit his step-mother and hit her with the bicycle. This was their only physical altercation, and he was adjudicated delinquent and removed

from the home. He was put in foster care and placed on community control with frequent visits home, but he was violated and permanently removed from his home when he got into a non-physical fight and violated based on defiance of parents. He got into trouble at school because he was moving from one foster home to another and was in many different schools. He was suspended a few times due to verbal and physical fights with mostly other students. (V6/T97-106)

In 1987 he pled to one count of sexual battery on an 8-year old and one count of a lewd act involving a child. These two children were the children of the step-mother Mr. Burton was having problems with. Mr. Burton did not remember these acts because he was on psychotropic medications at the time because of emotional problems. He was adjudicated delinquent and placed on stricter community control. A sex offender program was recommended but not required, so he did not do it.

Also in 1987 he burned a small hole in the carpet when playing with some lighter fluid at the Anchor House where he had been placed. He was adjudicated delinquent for criminal mischief for this act. (V6/T106-111)

The prosecutor asked Mr. Burton about reports alleging he put his penis into his roommate's buttocks for anal intercourse at Camp Alafia 5 to 10 times in 1988. Mr. Burton denied these allegations, and he had no idea why his roommate would make this story up. The State no-billed the case and did not prosecute because the roommate did not give a statement and there was no physical evidence. (V6/T111-

112,163) Mr. Burton did admit to having accidentally struck a counselor at that camp. He was sleeping, and he hit the counselor with an elbow when the counselor woke him up. Even though this was an accident, Mr. Burton did receive a juvenile conviction for this 1988 act. (V6/T113-114,153-154) He also received a juvenile conviction in 1988 for escaping from a half-way house when he and a friend walked out and were gone for 2 days. He was picked up by the police, returned, and placed back in the program. (V6/T114-115,154)

In 1989 he pled as an adult to two counts of lewd act on a child because he had fondled the penises of two boys--one 4 and one 6. He knows he did it, but he doesn't know why. He was 17 at the time; and according to the plea agreement with the State, went to prison on a 12-year sentence to be followed by a 15-year probation period. (V6/T116-117,154-155,169)

Mr. Burton was about 12 or 13 when he received his first juvenile disposition and was 17 when he received his last conviction. Prior to prison he used marijuana, methamphetamines, alcohol, rush, acid, and speed. (V6/T119-120)

While in prison he received 37 DRs: 3 in 1991, 8 in 1992, 8 in 1993, 5 in 1994, 10 in 1995, 2 in 1996, 0 in 1997, and 1 in 1998. He got 15-20 of these DRs for disagreeing with guards; however, prison is not conducive to being cooperative with the guards because other prisoners think you are on the guards' side. That can get you in fights and get you stabbed. He received one DR for having consensual sex with another

inmate in the shower. His last DR was for being in an unauthorized area when he threw some trash in a dumpster. Mr. Burton noted that if an officer did not like you, you could get DRs instead of warnings. The DRs would go to a committee, but the committee is composed of the individual classification officer, a correctional officer, and a correctional officer supervisor. The committee looks at everyone as a criminal, so it always believes the correctional officer. (V6/T122-129,164-166) He received a scar on his arm in prison as a result of having a bet with another prisoner over who could hold their arm over a flame the longest. (V6/T122-123)

When you received a DR, you could lose gain time, go to confinement, or both. He lost about 180 days gain time and spent about 1 to 2 years of his prison time in confinement. Confinement was in a 6x9 room where you were locked in for 24 hours a day til the confinement period was over. (V6/T126-131)

Prior to his going to prison when he was about 15 or 16, he did try to attend a sex therapy group session. He just sat in the corner and watched; but he was asked to not come again because he intimidated the other 6 or 7 people in the group. He did not threaten or intimidate anyone at the session. (V6/T162,163) While in prison he refused sex offender treatment in 1991. Sex offenders in prison have a shorter life span than snitches, so few admit they are in prison for a sex offense. He did ask for the sex offender treatment in 1992, but he never received it. He did receive counseling for anger management, stress management, and impulse control. He

successfully completed counseling for his diagnosed impulse control disorder. He does not believe he has these problems now. A 1997 report states he successfully completed impulse control disorder counseling, and he does not need any further counseling as he can control his impulses. He was then removed from counseling. He believes he still has kept the impulse control lessons. He is not the same person he was. (V6/T132-134,140-146,167-169)

Mr. Burton saw several psychologists while in prison. He does not believe he was or is suicidal, but 4 or 5 reports indicate he was. Mr. Burton would say such things in order to get to a doctor, so that the doctor could contact his mother or move him to another cell with a different roommate. (V6/T137-139)

Mr. Burton was receiving treatment at the civil treatment center, and he wanted to continue getting treatment once he was released. The treatment gave him tools to keep from reoffending, but he did not believe he needed to be kept confined to get treatment. (V6/T141,172,173)

Once released from commitment, he would have 15 years of probation with the following conditions: submit a written monthly report; cannot change residence or employment or leave county without consent of probation officer; cannot possess, carry, or own any weapons or firearms or destructive weapons; do not violate the law; do not get intoxicated or visit places where intoxicants are unlawfully sold, dispensed, or used; work and advise employer of supervision; be honest with

probation officer and follow their instructions; not consume any alcohol and stay away from places where alcohol is the main source of business, like a bar; submit to warrantless searches of his person, premises, or vehicles; submit to urinalysis at his own expense; submit to and pay for alcohol-drug evaluation and get treatment if needed; submit to and pay for mental health evaluation and get treatment if needed; random drug or alcohol testing by treatment facility; no contact with any children under 18 without approved adult present; no contact with victims or their families; restitution. (V6/169-170)

If Mr. Burton were released, he would stay with his real mother in Lake Wales. He does not believe he would commit new crimes as he has no impulse to commit sex acts on children. He was given a sex offender screening in 1994, and the counselor found no evidence of a psychosexual disorder. Therefore, he did not receive treatment. He does not believe he will have problems following his probation conditions. (V6/T173-174; V7/T338-341)

Dr. Partyka, a psychologist, testified for the State. He relied on his face-to-face interview with Mr. Burton, 3 tests (MMPI-II, Hare Psychopathy Checklist Revised, and SVR-20), and Mr. Burton's records as supplied by the prison, DCF, and the State to give his opinion that Mr. Burton had an antisocial personality disorder and a paraphilia disorder (subgroup pedophilia) and was a high risk for reoffending sexually. (V7/T180-257) According to Mr. Burton's juvenile history, he

was uncontrollable in his home. Mr. Burton also had 2 batteries, 1 criminal mischief, several sexual offenses, and an escape. This showed Mr. Burton has conduct/behavioral problems leading up to an antisocial personality disorder. Under the DSM-IV Mr. Burton also meets the criteria for paraphilia, subgroup pedophilia; because as he grew older, he remained fixated and had sex acts with children under 13. This information was set forth in arrest reports or clinical notes. (V7/T211-217)

Mr. Burton did not admit he did these things and denied them during the interview. That is common. Mr. Burton also did not avail himself of treatment while in prison even though it was offered. During an interview with a Dr. Powell, Mr. Burton admitted to strong sexual urges towards children that caused him significant psychological disturbance. The most basic beginning of treatment is the ability to no longer deny what you've done; to take responsibility. To continue to deny these offenses had hindered Mr. Burton's treatment. Now that Mr. Burton has had about 6 months of treatment (as of the trial) and is admitting his priors, that is an improvement. Dr. Partyka believes Mr. Burton, however, needs at least 2 years of treatment and will not get it if not required to do so because of his prior failure to avail himself of the DOC treatment. (V7/T217,218,222-225,257)

While in the treatment home, Mr. Burton ran away, offended sexually at least once, set fire to the carpet, and violated probation. While in prison he received DRs--one for

a sex act. Thus, the doctor concluded Mr. Burton could not control himself on an out-patient basis. The doctor said he was not sure Mr. Burton would be able to not commit unlawful sex acts. Even though Mr. Burton had been incarcerated and the sex offenses are over 10 years old, his inability to maintain his behavior while under the restrictive conditions of prison shows Mr. Burton cannot control himself without restrictions.

Getting a DR for burning himself with a lighter to prove his machoness was like a red badge of courage and fit the doctor's diagnosis. (V7/218-221)

Dr. Partyka admitted that 50-75% of all adult males in prison suffer from antisocial personality disorder. (V7/T227)

He also admitted there was controversy in assessing future risk. He does not use actuarials, but uses a structured guided interview to assess future risk for sexual violence. He admitted that the MMPI-II was not designed to predict the likelihood of committing a new sexual offense. The Hare Psychopathy Checklist was developed to determine psychopathy and not for sexual behavior. As for the SVR-20, one of the leading authorities in sex offender risk assessment, Dr. Hanson, has done a study that shows 5 of the 20 risk factors are not relevant when predicting sexual recidivism. According to Dr. Hanson, there is no correlation with being a victim of child abuse and recidivating with a sex offense, there is no correlation with substance abuse and sex recidivism, there is no correlation with employment problems and sex recidivism, there is no correlation with past

nonviolent convictions and sex recidivism, and there is no correlation with denial of offenses and sex recidivism. Yet, all of these are on the SVR-20. In the DOC reports none of the diagnoses set forth include pedophilia. Finally, Dr. Partyka admitted that no psychologist can provide information about risk for any one person. They can only provide estimates of risk for groups of people. Using the SVR-20, he considered Mr. Burton a high risk for reoffending. (V7/T227-256)

Dr. McClaren, a psychologist hired by the State, relied on his face-to-face interview with Mr. Burton, the results of testing, and a review of the records (DOC and police) in forming his diagnosis. (V7/T267) His diagnosis of Mr. Burton is pedophilia--a pattern of urges, behaviors, fantasies, involving prepubescent children that lasts for more than 6 months and the person is at least 16 years old and 5 years older than the children involved. This then results in an impairment. He also believes Mr. Burton suffers from a personality disorder NOS. (V7/T274-275)

Mr. Burton's history shows he's had 4 incidents involving sexual misconduct, and at least 3 of them involve prepubescent children with more than 6 months span of time separating the incidents. Mr. Burton's having committed other sex offenses while on supervision shows he is at greater risk for committing future sexually violent acts. Although it had been 8 or 9 years since Mr. Burton had committed a sex act on a child, his DRs went to his

personality disorder. Also, Mr. Burton had no opportunity to offend against children while in prison. It was pointed out there were 2 years between incidents of sex attacks on children, but Dr. McClaren relied on the no-billed allegations of Mr. Burton forcing anal penetration. The reason it did not go to trial was because the victim refused to testify. This showed a continuing pattern. (V7/T276-277,299-300)

Since Mr. Burton could not live in a structured environment without violating the rules, he could not live on the outside in a less-structured environment without violating the rules. Mr. Burton would have more success in a commitment facility where he can get in-house treatment rather than on probation, because Mr. Burton had not been successful in a family setting or on probation or in prison.

Dr. McClaren believes Mr. Burton must be in a structured controlled environment in order to make changes to reduce his risk. (V7/T277-278)

Dr. McClaren used the RRASOR, an actuarial instrument, to assess sex reoffender risk. The results of the RRASOR were consistent with his diagnosis. Mr. Burton scored 4 which equals 32.7% risk for sexual recidivism within 5 years and 48.6% within 10 years. (V7/T279-281) Even though these percentages were below 50%, Dr. McClaren believes Mr. Burton will likely recidivate; because he was repeatedly engaged in sexual activity with prepubescent children starting at a young age, he continues this activity despite being placed on

increasingly restrictive conditions, he didn't get sex offender treatment while in prison, and he is still young. Mr. Burton also has a personality disorder and is suffering from pedophilia. (V7/T282)

On cross it was pointed out that once a person is over 25, the RRASOR score will never change no matter how long you're in prison. It wouldn't matter if Mr. Burton was in prison for 20 years and got treatment the entire time--his score would not change. Dr. McClaren admitted newer tests are being developed that will replace the RRASOR and it would be a very bad practice to base one's decision on just a 4-item test like the RRASOR. He also admitted no one can predict human behavior with 100% accuracy. (V7/T285-291,296)

SUMMARY OF THE ARGUMENT

In order to civilly commit Mr. Burton, the State had to rely on its experts to state Mr. Burton suffered from a mental abnormality or personality disorder; and that abnormality or disorder makes him likely to engage in sexual violent acts in the future if not confined. This area is new and novel and must be established as reliable before it can be admitted. The expert testimony, however, was not reliable and failed the Frye test.

Mere allegations of prior bad acts never proven were used extensively. These allegations were irrelevant and should not have been used at trial, and they were based solely on hearsay that was not admissible. The State also used other

extensive amounts of inadmissible hearsay: the State used doctors to get in inadmissible hearsay, the prejudicial value of the hearsay outweighed the probative value, hearsay is unconstitutional because it is unreliable and denies the right to confrontation.

The jury instructions failed to require a determination of lack of control.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN ADMITTING THE STATE'S EXPERTS' EVIDENCE ON FUTURE RISK ASSESSMENT WHEN IT WAS NOT RELIABLE AND FAILE THE FRYE TEST?

In order to civilly commit Mr. Burton, the State had to rely on its experts to state he suffered from a mental abnormality or personality disorder; and that abnormality or disorder makes him likely to engage in sexual violent acts in the future if not confined. Sec. 394.912(10), Fla.Stat. (1999). Without such expert testimony, there can be no involuntary civil commitment under the Act. This area is new and novel and must be established as reliable before it can be admitted. The expert testimony in this case, however, was not reliable and failed the Frye test.

As pointed out most recently in Ramirez v. State, 810 So. 2d 836 (Fla. 2001) (Ramirez III), determining reliability is different when the court is faced with expert testimony based on new or untried scientific evidence. The balancing test in sec. 90.403, Fla. Stat. (2000), does not apply initially "because the court may be unable to gauge accurately the

danger of misleading or confusing the jury due to the unproven nature of the testimony. In such a case, 'scientific' reliability must be established as a predicate to 'legal' reliability." Id. at 842.

"Scientific" reliability is determined by the Frye test in Florida:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be 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)

(emphasis added. In adopting the Frye test this Court stated:

The underlying theory for this rule is that a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.

Stokes v. State, 548 So. 2d 188,193-194 (emphasis added).

Ramirez III, which goes into great detail on legal reliability versus scientific reliability Frye test, states a court is not required to accept a "nose count" of experts in the field when applying the Frye test; but it may use many sources--expert testimony, scientific and legal publications, judicial opinions--so it can decide for itself whether the theory in issue has been "sufficiently tested and accepted by the relevant scientific community." Brim v. State, 695 So. 2d

268, 272 (Fla. 1997); quoted in Ramirez III, 810 So. 2d at 844. Ramirez III goes on to state:

In gauging acceptance, the court must look to properties that traditionally inhere in scientific acceptance for the type of methodology or procedure under review--i.e., "indica" or "hallmarks" of acceptability. [FN12] A bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness's application of these principles is untested and lacks indica of acceptability. [FN13]

[FN12] See generally Brim, 695 So. 2d at 272 ("of course, the trial courts, in determining the general acceptance issue, must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique.") (quoting People v. Leahy, [8 Cal.4th 587, 34 Cal.Rptr.2d 663,] 882 P. 2d 321, 336-37 (Cal. 1994)).

[FN13] This is particularly true if the expert has a personal stake in the new theory or is prone to an institutional bias. See generally People v. Young, [425 Mich. 470], 391 N.W. 2d 270 (Mich. 1986); D.H. Kaye, Science in Evidence 85 (1997).

Ramirez III, 810 So. 2d at 844. As Ramirez III emphasizes, trustworthiness of expert scientific testimony is especially important because "[t]he jury will naturally assume that the scientific principles underlying the expert's conclusion are valid." Flanagan v. State, 625 So. 2d 827,828 (Fla. 1993), as cited in Ramirez III, 810 So. 2d at 844. The appropriate burden and standard of proof was set forth in Ramirez v. State, 651 So. 2d 1164,1168 (Fla. 1995) (Ramirez II):

In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a

preponderance of the evidence.

As for the appellate court review of a trial court's Frye issue ruling, it is de novo; "and the reviewing court must consider the level of acceptance at the time of review, not the time of trial. A Frye error is subject to harmless error analysis." Ramirez III, 810 So. 2d at 844,845.

Most importantly, Ramirez III clearly states "[i]n applying the Frye criteria, general scientific recognition requires the testimony of impartial experts or scientists. It is this independent and impartial proof of general scientific acceptability that provides the necessary Frye foundation." Id. at 851. Although this particular quote was changed slightly from the initial opinion (apparently revised although rehearing was denied on 3-7-02), the change in wording does not alter the bottom line--the party wishing to present the Frye evidence must present testimony from independent and impartial sources. This requirement is extremely important in Mr. Burton's case.

In Ramirez III the issue was the reliability of the State's knife expert who testified the knife found in the defendant's possession was the murder weapon to the exclusion of all others. In coming to the conclusion that such testimony on knife mark identification was new and novel but did not reach the threshold for admissibility under Frye, the Court pointed out many problems with the State's main expert Dr. Hart: Unlike traditional knife mark testimony in which the expert testified a particular knife could have been the

weapon or was similar to the weapon used or not similar, Dr. Hart's testimony was every knife blade is unique and leaves signature striations in human cartilage that allows an identification that excludes all other knives. This made Dr. Hart's testimony new and novel. Dr. Hart claimed absolute certainty in his matches--a claim that exceeds DNA testing. Dr. Hart's methodology and claim of infallibility have never been formally tested or verified. The evidence presented to supposedly support Dr. Hart failed to provide substantive proof of scientific acceptance of such testing and its reliability. There was no peer review or publication as a prerequisite to scientific acceptance. The State's experts' testimony that photographs are not taken because lay people would not understand them or that notes or written reports are not done are belied by published articles in the record. The error rate for Dr. Hart's method was never quantified. This method is not governed by objective scientific standards but was extremely subjective. There was no written authority that upheld Dr. Hart's methodology. The fact that others supported Dr. Hart's methodology by claiming the underlying principle used by Dr. Hart was generally accepted in the field, this was insufficient under Frye--Dr. Hart's testing procedure had none of the hallmark's of acceptability that apply in the relevant scientific community to this type of evidence.

The same problems exist in Mr. Burton's case. The State's doctors all used actuarials they "tweaked" with their own clinical judgment. These actuarials are only generally

accepted in the scientific community that needs tests to determine future risk assessment for sexual violence for their jobs with the States that hired them for that purpose. The only doctors that testified for the State were those who worked for states doing sex offender civil commitments. (V4/R673-692,794-806) These two doctors were not impartial because their jobs relied on such tests; thus, there was no impartial proof of general scientific acceptance.² The first tests were initially published in 1997, so they are new with no time for adequate research and peer review.

The newness of risk assessment for sexual violence and the actuarials created for this assessment is a major problem.

Dr. Doren admitted no manuals have been published for these actuarials and there would probably never be. (V5/R1000-1005)

As Dr. Hart pointed out, the process for testing a test is complex and takes many years; and these actuarials have not been submitted to the necessary level of scrutiny--they haven't existed long enough. (V5/R844-850,870-875) Dr. Otto emphasized the problems of no proper testing. Instead of obtaining peer review via publication with feedback and more publication, the people using these actuarials are experimenting in the field to see if the tests work and how to use them; but just as doctors cannot test drugs on people to

² Dr. Doren also did a survey via e-mail directed to those in each state who also did such risk assessments for sexual violence for their states. Dr. Otto did not consider such a survey scientifically valid. But as they were supposedly responded to by court-appointed/state-appointed evaluations, their responses would not be impartial. (V4/R721-723;V5/R919-922)

see how they work, field testing of actuarials is not appropriate. (V5/R917-919) Instead of using proper procedures for establishing a test, actuarials are being developed and then

discarded when new ones come along.³ (V5/R929-931) No other area of psychological assessment obtains its tests from the internet or workshop and then uses them for assessment. (V5/R917,918)

Dr. Berlin pointed out what little testing was done demonstrates how unreliable these actuarials are. When RRASOR was tested on recidivists, it did a lousy job of predicting recidivism. (V8/R1037-1050) MnSOST and MnSOST-R were designed to do the same as RRASOR; but when used on a sample population, the results were not the same. MnSOST had to be revised (MnSOST-R) because it could not accurately predict sexual recidivism; and the revised test when used on a population where they knew who the recidivists were, was wrong in 30% of the people. (V8/R1055-1057,1073-1083) PCL-R was similarly tested on a population with known recidivists, and it had no predictive validity on risk assessment for sexual offenders. (V8/R1067-1069) Dr. Berlin, however, found very little testing done on these actuarials; and he does not believe these tests can do what they purport to do. The only group who generally accepted these tests was the

³ As Dr. Doren noted, MnSOST and SORAG are not used much since other tests have come along; and some tests used he doesn't consider well researched. (V4/R700-706,780-783,787)

small group working in the area of civil commitment; however, the larger group of people in psychology, psychiatry, forensic psychology/psychiatry, or clinical psychology are not using and accepting these tests. (V8/R1093-1095)

In addition to problems with what little testing has been done, there is a larger question that even the State's experts could not answer--do these tests that were created in small areas without hispanics or blacks or caribbeans apply in Florida where the population is very diverse? Dr. Doren admitted this was an interesting question, for which he had no answer. (V4/R727-734,752-757,787-793) Dr. Hart emphasized this lack of cross-validation on other populations. (V5/R855-863)

Mr. Burton's experts clearly showed the actuarials and tests used in his case and in all other civil commitments under the Act had no valid testing and none of the hallmarks of acceptability that apply in the relevant scientific community to this type of evidence. This new and novel area was not established by a preponderance of the evidence by the State to have gained general acceptance in the particular field in which it belongs via impartial experts or scientists. The State's experts did not pass the Frye threshold; therefore, scientific reliability was not established by the State.

The use of this expert testimony in Mr. Burton's case was not harmless. Unlike Green v. State, 826 So. 2d 351 (Fla. 2d DCA 2002), wherein the Court found the use of actuarials

harmless because the State's doctors did rely on them for their opinions, the State's doctors did rely on the tests and actuarials in Mr. Burton's case. At the hearing on commitment, the State's two experts relied on actuarials to reach their opinions. Although Dr. Partyka said he did not rely on actuarials but structured guided interview to assess future risk for sexual violence, he did use and rely on the SVR-20 (V7/T229-231,256)--one of the tests at issue in the Frye hearing and highly questioned by Mr. Burton's experts and even by the State's experts Dr. Doren and Dr. Shaw. (V4/R711-712,807-813,821;V8/R1092) Both Dr. Doren and Dr. Shaw stated in the Frye hearing the SVR-20 was not generally used. During trial Dr. Partyka admitted that one of the leading authorities in risk assessment for sex offenders, Dr. Hanson, had done a study showing 5 out of 20 factors listed in the SVR-20 are not relevant when predicting sexual recidivism. (V7/T237-244) Still Dr. Partyka held fast to the SVR-20, and in using that test considered Mr. Burton a high risk for reoffending. (V7/T256) The state's other expert at trial, Dr. McClaren, used the actuarial RRASOR to reach his opinion that Mr. Burton posed a future risk. Although he did not rely solely on the RRASOR, it was part of what he used in reaching his opinion. It also bolstered the doctor's diagnosis, because the results were consistent with the opinion the doctor was developing. Dr. McClaren then testified Mr. Burton scored 4 on the RRASOR which equaled a 32.7% risk for sexual recidivism within 5 years and 48.6% in 10 years. (V7/T279-291,304) The State then

used this 48%-in-10-years figure in its closing argument to the jury. (V7/T367)

Thus, the State's experts relied on these highly questionable tests in order to reach their opinion Mr. Burton was likely to reoffend in a sexually violent way. The State then argued these test results in its closing argument. It cannot be said the use of these tests attacked in the Frye hearing was harmless.

In its opinion, the Second District held the SVR-20 was "not the type of objective scientific principle or test with which Frye is concerned." Burton v. State, 2D01-223 (Fla. 2d DCA Oct. 22, 2004), pg.3. The Court found the SVR-20 is pure opinion testimony and not subject to the Frye requirements. The Fourth District did not make this same finding. In Collier v. State, 857 So. 2d 943 (Fla. 4th DCA 2003), the court held the State failed to meet its burden under Frye to show the general scientific acceptability of the SVR-20. The State's expert admitted the SVR-20 remained in an experimental phase and "some in the psychological science community questioned its use. Clearly, the State failed to establish SVR-20's general acceptance in the relevant scientific community by a preponderance of the evidence." Id. at 946. Because both of the State's experts at trial relied on the SVR-20, the Court concluded the use of the SVR-20 was not harmless. "[T]he jury did not hear any expert testimony establishing Collier's mental state that was untouched by the SVR-20. Therefore, it cannot be said with any assurance that

the error in admitting the SVR-20-based testimony in the case at bar did not influence the jury." Id. at 946.

In Mr. Burton's case Dr. Partyka's testimony was clearly tainted by the SVR-20. The only other tests he used were not designed for predicting sexual recidivism. He admitted the MMPI-II was not designed to predict the likelihood of committing a new sex offense, and the Hare Psychopathy Checklist Revised was developed to determine psychopathy and not for sexual behavior. (V7/T227-256) However, using something called Sexual Violence Risk-20 in order reach the conclusion that Mr. Burton had a high risk for reoffending in a sexually violent manner had to have a substantial impact on the jury.

Dr. McClaren said he only used the RRASOR; and his test results were below 50% for future risk--a score of 4 equals 32.7% risk for sexual recidivism within 5 years and 48.6% within 10 years. There were additional problems pointed out with the RRASOR, including the fact the score will never change no matter how long someone is in prison and no matter how much treatment someone received for their sexual conduct.

Dr. McClaren admitted newer tests were being developed to replace the RRASOR, and he stated it would be a very bad practice to base one's decision on just a 4-item test like the RRASOR. (V7/R279-282,285-291,296)

As in Collier the State failed to demonstrate the general scientific acceptability of the SVR-20, and just as in Collier the use of the SVR-20 in this case was not harmless error.

The same is true for the RRASOR actuarial. It cannot be said with any assurance in Mr. Burton's case that the error in admitting the SVR-20 and RRASOR testimony did not influence the jury.

Since the State did not establish scientific reliability by a preponderance of the evidence (as was their burden), legal reliability need not be reached; however, even if it were to go on this next step, legal reliability cannot be shown. Under sec. 90.702, Fla. Stat. (2000), experts can only testify if their specialized knowledge will assist the trier of fact; and under sec. 90.403, Fla. Stat. (2000), relevant evidence is inadmissible if its probative value is substantially outweighed by its unfair prejudice or confusion or misleading the jury.

Dr. Doren admitted there was a difference between assessing recidivism versus likelihood. According to Dr. Berlin, this means these tests are designed to look at the likelihood of what's going to happen within a given group via a percentage but does not say which individual within the group will be at risk. Dr. Doren, Dr. Hart, and Dr. Otto were all concerned with what the trier of fact would do with such information. In Dr. Doren's opinion (set forth in the proffer), the trier of fact would fall back on numbers to decide recidivism despite caveats (numbers that the State then relied on in closings). Even though it was up to the expert to set the record straight, he still feared the trier of fact will misinterpret the numbers. (V5/T1008-1010) Dr. Hart noted

a test yielding a score translated into a probability statement was particularly error prone in the sexual recidivism area. This percentage likelihood is based on a very small sample size with a high percentage of error. (V5/R891-895) Dr. Otto feared actuarial numbers being offered as if they had the same degree of accuracy as temperature or blood pressure numbers, even though the actuarials did not have that level of precision. Juries would have a false confidence from these numbers (V5/R945-948)

From the testimony it is clear likelihood is not determined by the individual but a percentage of possibility within a group. It is also clear the numbers used to quantify that likelihood will be pounced upon by the juries and used for the wrong reason no matter how much the expert tries to qualify and explain these numbers. This problem was enhanced in Mr. Burton's case when the prosecutor emphasized the numbers without any caveats. The experts in this area, therefore, are not assisting the trier of fact with their risk assessment and are, in reality, confusing and misleading the jury with their numbers and percentages. Such problems show that the use of tests/actuarials cannot pass the legal test. Again, the use of such tests/actuarials in Mr. Burton's case cannot be considered harmless error in light of the State's experts' reliance on such tests to establish their diagnoses and opinions of the need for involuntary civil commitment.

Mr. Burton's objections to the use of this expert testimony were prior to and during the proceedings.

ISSUE II

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO USE EVIDENCE OF A MERE ALLEGATION OF WRONG-DOING THAT WAS NEVER PURSUED BY THE STATE DUE TO A LACK OF EVIDENCE TO SHOW FUTURE RISK OF COMMITTING A SEXUALLY VIOLENT ACT?

The State and its two expert doctors relied heavily on Mr. Burton's prior convictions and allegations to support its case that Mr. Burton was likely to commit a sexually violent act in the future. Due to the age of the priors (over 10 years old) and the spacing in between juvenile dispositions and convictions, the State and its doctors needed to rely on uncharged allegations claiming Mr. Burton committed 5-10 lewd acts on a child by placing his penis in a boy's buttocks while they were at Camp Alafia in 1988. Mr. Burton denied these allegations, and the State no billed those charges because the boy did not give a statement and there was no physical evidence. Still, the prosecutor and his two doctors relied heavily on these particular unproven allegations to strengthen their argument/opinion that Mr. Burton presented a future risk. Mr. Burton repeatedly objected to the use of the unproven allegations to during trial as being irrelevant and highly prejudicial. (V3/R402-407,442,489-494,580-602;V6/T32-40,82,84,111-112,152,156;V7/T218,276,282,299,300,315,342,348,353,354,356) The motions were all denied. (V3/R442;V6/T40)

First of all, the prosecutor put Mr. Burton on the stand

to talk about all his priors--including these allegations that Mr. Burton consistently denied. (V6/T111-112,152,156) Then Dr. Partyka used these allegations to support his opinion that Mr. Burton was a future risk as part of Mr. Burton's prior sex offenses. (V7/T218) Then Dr. McClaren relied even more so on these allegations. The doctor counted these allegations as one of three incidents involving prepubescent children. Since there was a significant span of time between the 1987 sexual batteries on his stepsister and stepbrother and the 1989 fondling of the 2 boys, the doctor needed the 1988 allegations to show a continuing pattern. (V7/T276,282-299,300) Finally, the prosecutor used these unproven allegations in closing arguments, repeatedly referring to the "5" children Mr. Burton violated. (V7/T353,354,356)

Mere allegations based solely on hearsay to establish prior bad acts, a pattern of child sexual abuse, and a future risk should not have been allowed in this case. These allegations were never established by substantial, competent evidence because the State did not prosecute them. The mere fact that the State did not have any evidence to go forward on these charges should speak for itself, and the use of a probable cause affidavit containing these allegations is not allowed.

In the recent case of Burgess v. State, 831 So. 2d 137 (Fla. 2002), this Court rejected using a sworn arrest report in order to glean facts showing consecutive habitual offender sentences were illegal. This Court held that information in

police reports are ordinarily considered hearsay and inadmissible in an adversary criminal proceeding. Also, there is no hearsay exception for recognizing facts contained within such reports. "A police report or criminal arrest affidavit is not admissible into evidence as a public record exception to the hearsay rule because that exception expressly excludes 'in criminal case matters observed by a police officer or other law enforcement personnel.' §90.803(8), Florida Statutes (1999)." Id. at 140 (emphasis added). As the Court pointed out these observations by police officers are not considered reliable because of the adversarial nature between the police and defendant.

The bottom line in Burgess is that the facts contained in the sworn police report could not be used because the sworn report was not admissible as evidence. The same holds true for the criminal arrest affidavit. Inadmissible evidence equates with irrelevant evidence.

Section 394.9155(4), Florida Statutes (1999), allows evidence of prior behavior if it is relevant to proving the person is a sexually violent predator. "Relevancy" should be considered a legal term of art which includes concerns for remoteness and nature of the prior behavior. Relevancy is something for the trial court to determine—not the State's psychologists who, in their minds, decided every shred of bad prior behavior was relevant no matter how remote in time or vague in facts. As defined in Wadsworth v. State, 201 So. 2d 836,838 (Fla. 4th DCA 1967):

The subject of relevancy in the law of evidence is considered an elementary concept—yet its application to a given fact in a given case is often difficult to determine as any trial judge can attest. Relevancy is not a precise concept, and its use as a test for admissibility must often rest upon the court's informed notions of logic, common sense and simple fairness.

As pointed out in Williams v. State, 110 So. 2d 654,663 (Fla. 1959), "...relevancy should be carefully and cautiously considered by the trial judge." While the decision on relevancy and admissibility of prior bad acts is addressed to the discretion of the trial court,⁴ the erroneous admission of these prior bad acts is subject to the harmless error test set forth in DiGuilio.⁵ In Mr. Burton's case the trial court abused its discretion by not exercising it at all—all prior acts came in. The State's use of highly prejudicial, inadmissible, irrelevant evidence of prior bad acts had to have impacted on the jury, so a new trial is required.

The Act itself requires relevancy and prior bad acts involve criminal cases. Although the Act is titled a "civil" case, it should be considered quasi-criminal since its goal is to commit people for indefinite, long-term periods. A higher standard for relevancy must be used, and interpretations of relevancy as set forth in criminal cases would be applicable in this case. Because the State claims "anything goes" under the Act as long as the State's experts rely on it for their opinion, guidelines need to be established. As stated in Hodges v. State, 403 So. 2d 1375, 1378, ftnt. 4 (Fla. 5th DCA

⁴ Duffy v. State, 741 So. 2d 1192,1197 (Fla. 4th DCA 1999).

1981), are we going to arraign a defendant's whole life? How can a defendant defend himself and how many issues are to be raised? Clearly, the prior allegations used in Mr. Burton's case were never proven and should never have been allowed before the jury. The prior allegations were based on nothing more than inadmissible double and triple hearsay and should have been excluded as irrelevant.

The erroneous use of these allegations cannot be harmless. The standard of review is harmless error. This test "places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129,1138 (Fla. 1986). Although this is the standard used in criminal cases and this is supposedly a "civil" case, a case tried under the Act is actually quasi-criminal with the State seeking indefinite civil commitment--a deprivation of a person's liberty. The DiGuilio test, therefore, is the appropriate test.

Even if the State can use evidence of mere allegations, there is still the issue of prejudice outweighing the probativeness. As was pointed out in Bryant v. State, 787 So. 2d 904 (Fla. 2d DCA 2001), even if collateral bad acts are relevant, there is still the issue of its probative value being outweighed by the prejudice. The lack of relevancy

(..continued)

⁵ State v. Lee, 531 So. 2d 133,136 (Fla. 1988).

emphasizes the lack of probative value while highlighting the extreme prejudice of these bad acts. Again, guidelines need to be set in cases under the Act. The State's position that any prior bad acts are probative--no matter what the conduct is--is simply too broad to be correct. Mr. Burton should not have to defend everything in his entire life, including every allegation. Of course, any prior act involving sexual conduct is going to be highly prejudicial; but it's especially so in the context of indefinite civil commitment as a sexually violent predator. The Act requires a determination of future danger, not punishment for all of the bad things Mr. Burton has ever done or may have done in his life.

The focus became Mr. Burton's bad character--past propensity. The State brought out the kitchen sink, and the introduction of every bad act Mr. Burton did or might have done in his entire life was highly prejudicial. This prejudice greatly outweighed the probative value of such evidence. The heavy reliance on allegations when Mr. Burton's defense was something less than commitment was required in his case had to have had an impact on the jury. A new trial without these allegations is required.

ISSUE III

DID THE TRIAL COURT ERR IN ALLOWING THE EXTENSIVE USE OF HEARSAY IN THIS CASE AND DENYING PETITIONER HIS DUE PROCESS RIGHT TO CONFRONTATION?

Prior to, during, and after trial defense counsel objected to all of the hearsay used in this case: (1) the

State used the doctors to get in admissible hearsay, (2) the extensive use of hearsay was prejudicial, (3) the allegations contained in a probable cause affidavit that were never charged was inadmissible hearsay, and (4) it was unconstitutional because the hearsay was unreliable and denied the right to confrontation. The objections were overruled and the extensive hearsay came in. (V3/R402-407,442,489-494,580-602;V6/T32-40,82,84,152,156;V7/T218,273-276,282,299,315,342,348,353-356) The trial court abused its discretion in allowing all of the hearsay, and such error cannot be considered harmless in light of the vast amount of hearsay and its highly prejudicial nature. See Maklakiewicz v. Benton, 652 So. 2d 1208 (Fla. 3d DCA 1995).

A. The State used its doctors to introduce inadmissible hearsay.

Although §90.704. Fla. Stat. (1999), allows an expert to base an opinion on facts or data made known to the expert at or before trial, even if such facts or data are not admissible, the law does not permit the expert to "...merely be used as a conduit for the introduction of the otherwise inadmissible evidence." Erwin v. Todd, 699 So. 2d 275,277 (Fla. 5th DCA 1997). Also see Maklakiewicz; Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430,432 (Fla. 2d DCA 1989). A new trial was required in Erwin when a doctor improperly referred to another doctor's report and its conclusions--a report that had been found untrustworthy. A new trial was required in Maklakiewicz when a police officer was allowed to give his conclusions on how an accident took place when those

conclusions were based on inadmissible hearsay (statements by people who could not testify). Even though the officer had inspected the accident scene, he could not render an opinion without relying on the hearsay. A new trial was also required in Riggins when a chemist was allowed to use an inadmissible lab report to come to a conclusion as to the deceased's level of intoxication. In order to come to a conclusion, the chemist had to rely entirely upon information not in evidence at trial. Unlike relying on a standard conversion factor from a treatise, the chemist was relying on facts in the lab report never introduced into evidence.

Second,...we do not believe that §90.704, Fla. Stat. (1987), should typically permit an expert to render an opinion exclusively upon inadmissible facts or data. When a doctor renders an opinion based upon an inadmissible laboratory report, that opinion is usually buttressed by additional facts which are in evidence or by an examination of a patient whom the jury has also observed [case cites omitted]. In this case, the expert's opinion concerning Mr. Riggins' blood alcohol was not based upon the police officer's report of an odor. The expert could and did render his opinion exclusively on information outside the evidence.

Riggins, 545 So. 2d at 432. All of these reversals were based on highly prejudicial inadmissible hearsay introduced through an expert who was used merely as a conduit.

The rule allowing experts to base their opinions, in part, on inadmissible hearsay is usually for doctors to base medical opinions upon tests and lab results not admitted into evidence. Riggins. Under the Act, the State is trying to extend this rule to give its experts carte blanche to introduce unlimited and extensive amounts of hearsay. Section

394.9155, Florida Statutes (1999), allows hearsay evidence-- including reports of the multidisciplinary team if reliable; and at trial it cannot be the sole basis for commitment. However, an earlier section in that same rule states the Florida Rules of Evidence apply unless otherwise specified. Section 394.9155 is not in conflict with section 90.704 and the resulting case law. Under the Act doctors/experts rely on certain tests, test results, manuals and tables to evaluate a person sought to be committed indefinitely as a sexually violent predator. This is what the hearsay should be for--to discuss and give opinions on tests. When it comes to evaluating someone based on prior conduct, witnesses must be presented to introduce the facts upon which the doctors base their conclusion of future risk. If these witnesses are not available, their statements are inadmissible hearsay; and the doctors should not be able to testify to the hearsay or utilize this hearsay in order to come to a conclusion.

The peril involved in allowing psychologists to rely on extensive amounts of hearsay in order to predict future dangerousness was clearly shown in Mr. Burton's case. The only State evidence in this case was Mr. Burton's own testimony and hearsay. The victims did not testify, and there had been no trial in the sexual battery convictions because Mr. Burton pled to them. The doctors relied heavily on bad acts and criminal offenses committed before the sexual convictions and DRs obtained while in prison; however, the information about these acts either came from Mr. Burton or from DCF and DOC

records. The hearsay in these records could have easily contained double and triple hearsay.

The DRs are especially troubling inasmuch as Mr. Burton contested the importance of them. As Mr. Burton noted, he'd gotten a DR for throwing some trash away. He got many DRs for disagreeing with guards; and if the guards did not like you, you got DRs instead of warnings. The process for contesting these DRs was not exactly a neutral process. The State did not present the people who wrote these DRs so they could be cross-examined about the incidents and questioned about the facts and possible misinterpretations. Still, the State's doctors relied heavily on these DRs to form their opinions Mr. Burton should be committed.

Of special note is the extensive use of the hearsay concerning the allegations that Mr. Burton sexually assaulted a boy at Camp Alafia. As was thoroughly argued in Issue III, the doctors relied heavily on these allegations in coming to their conclusions as to future risk; and the prosecutor argued these allegations in closing arguments to support its position. Yet, these allegations only found in a probable cause affidavit are inadmissible hearsay. See Burgess. As the Court noted, such affidavits are not considered reliable because of the adversarial nature between the police and defendant at the time they are prepared. In addition, the dispositions and convictions were all pleas where the victims never had to testify under oath. Now that Mr. Burton is facing an indefinite amount of time in civil commitment--maybe

life, the State's relying extensively on hearsay with no victims having to come forth. To add insult to injury, the State and its doctors relied heavily on allegations never resulting in convictions.

In Jenkins v. State, 803 So. 2d 783 (Fla. 5th DCA 2001), the Court found the vast amount of hearsay used in the Act proceedings so prejudicial that it tainted the entire proceedings. The case was reversed with a strong suggestion that Baker Act proceedings be used instead of Ryce Act proceedings. In coming to this conclusion, the Court made several findings: (1) Although the legislature allowed the use of hearsay in Act proceedings, the Court recognized that §394.9155(5), Fla. Stat. (2000), "...must be construed in light of the Fourteenth Amendment right of confrontation. The Florida Legislature cannot...rescind the due process protections of the United States Constitution." Id. at 785 (2) Courts have to recognize a distinction between police reports that contain unchallenged and unchallengeable prejudicial hearsay and reports that relate to cases where the respondent pled or was convicted. Only the latter such reports have an indica of reliability. (3) Hearsay constitutes a very broad spectrum that "...goes from reliable hearsay to rumor to gossip." Id. at 786 What was not clear to the Court was exactly where all the hearsay was coming from--some of it appeared to be double and triple hearsay, and the Court concluded: [t]oo much rumor and gossip were permitted to go this jury." Id.(4) The "experts" opinions were based largely

in part on the police reports that contained hearsay, double hearsay, and triple hearsay. The problem with these police reports was that it contained evidence of sexual misconduct that was never testified to in court or pled to by the respondent. In fact, the State reduced the charges to a non-sexual offense; and that is what the respondent pled to. The respondent "...had no opportunity to confront the witnesses and challenge their extremely prejudicial testimony. Confronting the messenger does not meet the due process requirement; cross-examining the officer is insufficient." Id. When it came to the experts' extensive use of this hearsay, the Court noted it was not reaching the Frye standard issue; however, it asked the question that when "...this type of unreliable hearsay is factored into the experts' opinion, do we not have a case of garbage in, garbage out?" Id. (5) Finally, using depositions when it was never shown the witnesses were unavailable was not acceptable. In conclusion, the Court held:

Because Jenkins was committed, to a large extent, on the testimony of out-of-court witnesses given through the mouths of police officers, which testimony lacked the indicia of reliability resulting from a trial which ended either in a conviction by the factfinder or in a plea to an offense relating to the criminal allegation, Jenkins was denied his right to confront his accusers. The introduction of this unreliable evidence was so prejudicial that it tainted the entire proceedings.

Id. at 787

Too much rumor and gossip was allowed to go to the jury and used by the State's "experts" in deciding Mr. Burton's

fate. The issue of Mr. Burton being a future danger was hotly contested by Mr. Burton, so the highly prejudicial nature of the extensive hearsay used in this case had to have an impact on the jury. The State's doctors were used mostly as a conduit for introducing a large amount of otherwise inadmissible hearsay. A new hearing without the impermissible hearsay is required.

B. The extensive use of hearsay was prejudicial, and the prejudice outweighed the probative value.

The extensive amount and highly prejudicial nature of inadmissible hearsay are set forth above. Relevancy cannot be assumed, because the hearsay was never supported by actual testimony by live witnesses. However, even if this hearsay was marginally relevant, it was unfairly prejudicial to Mr. Burton and misled the jury by emphasizing otherwise inadmissible evidence and placing an aura of scientific truth upon evidence which is legally unreliable (there is no exception in the hearsay rules for allowing victim testimony to come in through police reports and psychologists, see Connor v. State, 748 So. 2d 950 (Fla. 1999); Charlot v. State, 679 So. 2d 844,845 (Fla. 4th DCA 1996)). See Riggins. As in Riggins, the State's experts' opinions should have been excluded because probative value was substantially outweighed by prejudicial effect.

C. Hearsay under the Act is unconstitutional because it is unreliable and denies the right to confrontation.

Hearsay under the Act is unconstitutional because it violated the due process constitutional right to confrontation

under the State and federal constitutions. Fourteenth Amend., U.S. Const.; Art. I, §9, Fla. Const. The Second District Court denied Mr. Burton's right to confrontation argument based on its decision in Cartwright v. State (In re Commitment Cartwright), 870 So. 2d 152 (Fla. 2d DCA 2004). In Cartwright the Court held the right to confrontation under the Sixth Amendment of the United States Constitution and its Florida parallel provision in Art. I, §16(a), Fla. Const., only applied to criminal prosecutions and not civil commitment proceedings such as here. The Court did note, however, that the Jenkins case applied the right to confrontation to a Ryce Act case via the Fourteenth Amendment, U.S. Const. The "But see Jenkins v. State, 803 So. 2d 783,785 (Fla. 5th DCA 2001)" in Cartwright, 870 So. 2d at 157, shows the Second District did not apply the Jenkins reasoning as to the right of confrontation in a civil commitment proceeding via the Fourteenth Amendment. The Jenkins case, however, does apply.

As noted in Jenkins, the U.S. Supreme Court has held due process rights apply in a civil situation involving the rights of one whose welfare benefits had been terminated. These due process rights must be meaningful, and these rights included the right to confront and cross-examine the witness against them as relied upon by the department of social services. Goldberg v. Kelly, 397 U.S. 254,269 (1970). Goldberg goes on to cite Greene v. McElroy, 360 U.S. 474,496-497 (1959), as to the importance of the right to confront when government action seeks to seriously injure an individual in cases where the

government's action is dependent on fact findings:

'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'

(Emphasis added.) The conclusion in Goldberg was that "Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department." Goldberg, 397 U.S. at 270. If a welfare recipient was entitled via due process to the right to confront the government's witnesses where money is at stake, then such a right to confront should definitely be applied in a civil commitment proceeding where the government is seeking to deprive a person of his liberty for an indefinite, and most likely lengthy, time period.

The right to confront was more recently addressed by the U.S. Sup. Ct. in Crawford v. Washington, 541 U.S. 36 (2004). Although this case was a criminal case with the confrontation clause under the Sixth Amendment utilized, the definition and historical background of the confrontation clause is equally

applicable to the Fourteenth Amendment as noted in Greene and approved in Goldberg. In Crawford the Court examined the historical right to confront and all the hearsay exceptions created that have torn away at the right. The Court went back to basics and arrived at a bottom-line ruling: "Testimonial statements of witnesses absent from trial have been admitted only when the declarant is unavailable, and only where the Defendant has had a prior opportunity to cross-examine." Crawford, 541 U.S. 36, 124 S. Ct. 1354, 1369. Testimonial statements include those given in affidavits, police interrogations, custodial examinations, prior testimony that the Defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. This list is not all inclusive, but it gives an idea as to what the Court considers to be testimonial. This test was not followed by the U.S. Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980); so the Crawford Court abrogated Ohio v. Roberts.

Roberts, which allowed all hearsay evidence as admissible if it fell under a "firmly rooted hearsay exception" or bore "particularized, guarantees of trustworthiness," was found to have departed from the historical confrontation principles because it was both too broad and too narrow. It applied to both testimonial and nontestimonial statements and it applied a malleable standard of reliability which fails to protect against confrontation violations. Crawford did not like leaving the fate of testimonial evidence based on amorphous

notions of reliability as determined by a judge. In addition, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." Crawford, 124 S. Ct. at 1371. Crawford concluded by stating that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. ...Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 124 S.Ct. at 1374.

The due process rights under the Fourteenth Amendment, U.S. Const., with its right to confrontation in civil cases, requires the same confrontation rights as set forth in Crawford—especially when liberty interests are at stake. Mr. Burton was civilly committed indefinitely based on what "facts" the State's doctors obtained from police reports and DOC reports. This testimonial hearsay from victims and alleged victims was deemed admissible because the State created a hearsay statute saying it can be admissible. However, as Jenkins points out, the Florida legislature cannot rescind the due process protections of the U.S. Constitution.

Mr. Burton was denied his due process right to confrontation under the Fourteenth Amend., U.S. Const.; Art. I, §9, Fla. Const.; and he is entitled to a new trial.

ISSUE IV

WHETHER THE RYCE ACT DENIES DUE PROCESS BY NOT
REQUIRING A FINDING OF SERIOUS DIFFICULTY IN
CONTROLLING DANGEROUS BEHAVIOR AS AN ELEMENT OF THE
ACT?

Mr. Burton raised the issue of the due process violation of the Act's jury instruction by not requiring a finding of serious difficulty in controlling dangerous behavior as an element of the Act for the first time on appeal. Kansas v. Crane, 534 U.S. 407 (2002), did not come out until after Mr. Burton's trial; so Mr. Burton argued fundamental error. Mr. Burton argued Crane required the trier to make a finding of serious difficulty in controlling dangerous behavior, and Florida's jury instructions do not address the level of volitional control. The Second District certified the following question to this Court:

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?

Since the date of Mr. Burton's opinion, this Court has rejected this issue in State v. White, Case No. SC02-2277 (Fla. Dec. 23, 2004). In that opinion this Court held "that Crane does not impose a fourth element of proof in a civil commitment proceeding under the Ryce Act. Therefore, the jury need not be instructed that the respondent must have serious difficulty controlling behavior." Id. at page 2.

While recognizing this Court's decision in White, Mr. Burton is continuing to argue this issue so that it is preserved for federal review. This issue of volitional control was hotly contested. Mr. Burton's main defense in this case was that he could control his behavior and could be successful in being on probation instead of confined in a treatment center. He was only a teenager when he committed the crimes, and now he was 28 and a different person. He successfully completed counseling for his impulse control disorder, and he was taken out of counseling when it was deemed he didn't need further counseling. It was stressed that he would be on probation for the next 15 years and had several conditions to follow or he would go back to prison. Mr. Burton did not believe he would commit new crimes as he had no impulse to commit sex acts on children.

Dr. Partyka used Mr. Burton's priors, his DRs, and 3 tests (the Hare Psychopathy checklist, the SVR-20, and the MMPI-II) to assess future risk. Dr. Partyka admitted the MMPI-II was not designated to predict the likelihood of committing a new sexual offense, the Hare checklist was not designed for sexual behavior, and a leading authority in risk assessment for sex offenders has rejected 5 out of 20 factors in the SVR-20 as not being relevant when predicting sex recidivism. Dr. Partyka also admitted he could not say Mr. Burton will or will not commit a sexually violent offense in the future--no psychologist can provide information about risk for any one individual. The doctor was not sure if Mr. Burton

would commit future sex acts. (V7/T219) Since the priors were 10 years old or older, the doctor relied on the DRs to show Mr. Burton's inability to control himself.

Dr. McClaren also relied on Mr. Burton's priors, the DRs, and one actuarial test--the RRASOR (highly contested in Issue I). When he was asked about the fact that Mr. Burton had spent the last 9 years in prison, the doctor relied on the two DRs to show his violation of rules and the lack of opportunity to offend against children. According to the doctor, an inability to live in prison without violating the rules translated to an inability to live out of confinement without violating the rules of probation.

Thus, the 2 State doctors relied heavily on questionable tests and the DRs; but as Mr. Burton had pointed out, getting DRs could be fore very minor infractions that are impossible to contest. No one from the prison testified that Mr. Burton was an extreme problem while in prison, so these DRs are solely hearsay. Also, the State stressed its definition of "likely to engage" in closings that did not include the need for the jury to decide whether Burton had serious difficulty in controlling his dangerous behavior while defense counsel was arguing that Mr. Burton had a less restrictive alternative of a lengthy term of probation that would work for Mr. Burton.

The issue of volitional control was for the jury to decide and it was, as the State's main witness noted, the issue in this case. The doctors' opinions were ones the jury could reject in light of the defense position of a lesser

restrictive means being long-term probation. Yet, the jury was never instructed on the level of volitional control necessary to commit. Florida's jury instructions list three elements that must be proved by clear and convincing evidence: conviction of a sexually violent offense, suffers from a mental abnormality or personality disorder, and the mental abnormality or personality disorder makes respondent likely to engage in acts of sexual violence if not confined. There are definitions are "mental abnormality"--which does not include "personality disorder"--that "means mental condition affecting a person's emotional or volitional capacity" and "likely to engage" means the "propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." (V7/T371) None of these definitions tell the jury to find a serious difficulty in controlling the dangerous behavior. Even though "mental abnormality" mentions "volitional capacity," it does not set forth the level of volitional capacity.

Mr. Burton was denied due process under the Fourteenth Amendment of the U.S. Constitution and Art. I, §9, Fla. Const., when his jury was given an instruction that did not require a finding of serious difficulty in controlling dangerous behavior.

CONCLUSION

The trial court's order of commitment must be reversed.

APPENDIX

PAGE NO.

1. Second District Court Opinion filed 10-22-04
A1-A18

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2005.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Defender
Tenth Judicial Circuit
(863) 534-4200

DEBORAH K. BRUECKHEIMER
Assistant Public
Florida Bar Number O278734
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

tlj