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NEXT CASE ON THE COURT'S DOCKET , STATE VERSUS WHITE . HALE VERSUS STATE.

MAY IT PLEASE THE COURT. RICHARD POLAND ON BEHALF OFTHE STATE. WE ARE HERE ON TWO CONSOLIDATED CASES WHICH REVOLVE AROUND PRIMARILY THE SAME ISSUE , CANDACE VERSUS CRAIN AND WHETHER IT PROVIDES , A SPECIAL JURY INSTRUCTION, TO THE EFFECT THAT THE INDIVIDUAL HAS SERIOUS DIFFICULTY CONTROLLING SEXUALLY-VIOLENT BEHAVIOR.

IF THE INSTRUCTIONS WERE GIVEN, WOULD THEY BE INCORRECT?IN OTHER WORDS, IF THE TWO , WHERE IT WAS SPECIFICALLY , SAID THAT SIGNIFICANT IMPAIRMENT MEANS THIS AND THAT LIKELY IT MEANS MORE PROBABLE THAN NOT, WOULD THAT BE AN INCORRECT STATEMENT OF THE LAW?

IF THE INSTRUCTION TRACKEDTHE LANGUAGE O F CRAIN THAT SAID , QUOTE/UNQUOTE , SERIOUS DIFFICULTY CONTROLLING SEXUALLY VIOLENT BEHAVIOR , IT WOULD OBVIOUSLY NOT BE A N INCORRECT INSTRUCTION.

HOW ABOUT LIKELY? WE HAVE ALREADY SAID THAT LIKELY MEANS MORE LIKELY THANNOT.WOULD THAT B E A CORRECTSTATEMENT OF THE LAW?

I DON'T THINK IT IS INACCURATE TO SAY THAT LIKELY MEANS MORE LIKELY THAN NOT OR LIKELY MEANS PROBABLE . THEY ARE SYNONYMOUS BURKES THAT IS WHY WE SAID

DOESN'T THE STATE, I MEAN, DOESN'T THAT HAVE TO B E ESTABLISHED, THAT IS IT IS MORE LIKELY THAN NOT THAT THE DEFENDANT WILL NOT BE ABLE TO CONTROL HIS BEHAVIOR?

IT HAS TO B E ESTABLISHEDTHAT IT IS LIKELY , AND SINCE LIKELY DOES MEAN MORE LIKELY THAN NOT , 51 PERCENT AS OPPOSED TO 49 PERCENT OR PROBABLY THAT THEY ARE ALL SYNONYMOUS, THAT IT IS ONE ANDTHE SAME.

YOU ARE AWARE THAT THERE ARE CASES THAT HAVE BEEN TRIEDOUT THERE , WHERE PROSECUTORS HAVE ARGUED THAT , EVEN IF IT IS 2 0 PERCENT THAT, THAT STILLWOULD BE A SERIOUS RISK TO THE PUBLIC , AND

I HIM ONLY AWARE O F ONE CASE WHERE THAT COMMENT WAS ACTUALLY AT ISSUE, THE PEDROSA CASE OUT OF THE FIFTH DISTRICT. THAT IS THE ONLY ONE THAT I HAVE SEEN WITH A COMMENT TO THAT EFFECT, WHICH WAS COMMENTED ON BY THE , I THINK IT WAS THE CONCURRING OPINION OF JUDGE SHARP.

DO YOU , SOCK , SO YOU AGREE DO YOU , OKAY , S O YOU AGREE THAT IT WOULD NOT BE ERROR. SO NOW THE QUESTION IS WHAT IS THE ISSUE HERE , WHETHER IT IS CONSTITUTIONALLY REQUIRED OR

YES .

O R WHETHER

AND I THINK THE ISSUE IS NOT AS TO THE TERM LIKELY. BEFORE THIS COURT TODAY, IS ONLY AS TO THE PHRASE UNDER CRANE, WHETHER THERE IS SERIOUS DIFFICULTY CONTROLLING

SEXUALLY VIOLENT BEHAVIOR,WHICH IS A DISTINCT, WHICH IS A DISTINCT ISSUE . THE QUESTION ABOUT LIKELY, I THINK, IS A QUESTION WHICH WAS CLEARLY DECIDED THROUGH THE WESTERHEIDE OPINION. THE REASON THAT THE CRANE ISSUE ABOUT SERIOUS DIFFICULTY CONTROLLING BEHAVIOR , HAS COME UP , AND MAY OR MAY NOT BE RESOLVED BY WESTERHEIDE , IS BECAUSE, FIRST , THE WHITE CASE OUT OF THE FIRST DISTRICT , A DECISION THAT PRECEDED THIS COURT'S DECISION IN WESTERHEIDE AND THE FIRST DISTRICT HAD CONCLUDED THAT CAME CRANE ADDED AN ADD THAT CRANE ADDED AN ADDITIONAL ELEMENT TO THE SEXUALLY-VIOLENT PREDATOR COMMITMENT CASE.

NOW,, WHERE YOU SAY THAT THE ANALOGY IS SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR IS FOUND IN THE PRESENT JURY INSTRUCTION .

WELL , I THINK IT IS THREE , I THINK IT IS THREE SEPARATE THINGS. FIRST, EVEN BEFORE YOU GET TO THE JURY INSTRUCTS S THEMSELVES INSTRUCTIONS , THEMSELVES , YOU HAVE TO CONSIDER THE EFFECT O F BOTH CRANE AND HENDERSON ON THE CONTROLLINGSTATUTE. FOR A STARTING POINT, IF CRANE HAD, IN FACT , ADDED AN ADDITIONAL ELEMENT TO THE CANDACE ACT THAT WAS NOT ALREADY EMBODIED WITHIN THE STATUTORY TERMS OF THE ACT, IT NECESSARILY FOLLOWS THAT THE UNITED STATES SUPREME COURT WOULD HAVE HAD TO CONCLUDE THAT THE CANDACE STATUTE WAS INSUFFICIENT FOR MATTERS WHICH INCLUDE NO REQUISITE LANGUAGE WHICH HAD TO BE FOUND, BUT WE KNOW THAT THE UNITED STATES SUPREME COURT DID NOT D O SO AND WE KNOW TO THE CONTRARY THAT, THE UNITED STATES SUPREME COURT SPECIFICALLY FOUND THAT THE MENTAL HEALTH COMPONENT OF THE CANDACE STATUTE WAS CONSTITUTIONALLY SUFFICIENT IN HENDRICKS , AND ABIDED BY THAT AND REITERATED IN CRANE, S O OF NECESSITY, IT FOLLOWS THAT THE SUPREME COURT HAS HELD THAT THE STATUTORY LANGUAGE IS CONSTITUTIONALLY SUFFICIENT , AND IF THE STATUTORY LANGUAGE I S CONSTITUTIONALLY SUFFICIENT - -

IS CANDACE IDENTICAL T O OURS?

YES. YOU CANNOT FIND A SIGNIFICANT DIFFERENCE BETWEEN THE TWO STATUTES.

THIS IS WHAT I AM CONCERNEDABOUT , IS THAT , OUR STATUTE SAYS "SUFFERS FROM MEANTAL ABNORMALITY O R PERSONALITY DISORDER." AND THE MENTAL ABNORMALITY MAKES HIM OR HER LIKELY TO ENGAGE IN ACTS OF SEXUAL VIOLENCE, ALL RIGHT , AND THEN YOU GET DOWN TO WHAT DEFINITION OF A MENTAL ABNORMALITY IS , AND IT SAYS A MENTAL CONDITION AFFECTING A PERSON'S EMOTIONAL OR VOLITION AL CAPACITY. AND I WAS REALLY STRUCK , I THINK IT WAS JUDGE BLUE THAT POINTED THAT OUT. THE USE OF THAT DISJUNCTIVE , WOULD SEEM THAT IT WOULD TAKE AWAY FROM THE SERIOUS DIFFICULTY I N CONTROLLING BEHAVIOR , BECAUSE IT SAYS AFFECT ING A PERSON'S EMOTIONAL , I DON'T EVEN KNOW WHAT THAT MEANS , EMOTIONAL CAPACITY , AND RATHER THAN JUST FOCUSING ON THE VOLITIONAL CAPACITY.

I WOULD SAY A COUPLE OF THINGS .

DID CANDACE HAVE THAT SAME DISJUNCTIVE?

YES , AND I HAVE GOT IT QUOTED VERBATIM AT FOOTNOTE TWO, AT THE BOTTOM OF PAGE 15 IN BRIEF AND HEAL AND THE SIMILAR QUOTATION SHOULD APPEAR IN THE WHITE BRIEF AS WELL AND THE CANDACE STATUTE CITING MENTAL ABNORMALITY , IT WAS DEFINED QUOTE, A CONGENITAL CONDITION WHICH AFFECTS THE MENTAL CAPACITY AND PREDISPOSES THE PERSON TO COMMIT SEXUAL VIOLENT , ET CETERA, SO THE LANGUAGE IS N O SIGNIFICANT DIFFERENCE , AND SINCE THE LANGUAGE IS CONSTITUTIONALLY SUFFICIENT , IT FOLLOWS, AND THAT IS WHAT MANY STATE SUPREME COURTS ACROSS THE COUNTRY , MOST EMPFATCALLY THE CALIFORNIA SUPREME COURT IN PEOPLE VERSUS WILLIAMS, HAS HELD TO THE COMBINED SIGNIFICANCE OF HENDRICKS AND CRANE , SINCE THE LANGUAGE IS CONSTITUTIONAL, AND IT NECESSARILY FOLLOWS THAT JURY INSTRUCTIONS WHICH TRACK THAT LANGUAGE MUST LIKEWISE BE

CONSTITUTIONAL, IN TERMS OF DUE PROCESS.

SO THAT LANGUAGE THAT YOU WERE JUST TALKING ABOUT , THAT TALKS ABOUT MENTAL CONDITION AFFECTING A PERSON'S VOLITIONAL CAPACITY , IS THAT WHAT WE ARE USING TO SAY THAT THE DANGEROUSNESS THAT THE JURY IS BEING INSTRUCTED , ON THE ISSUE OF DANGEROUSNESS ?

WE HAVE GOT, I THINK , THREE OR FOUR INTERRELATED PHRASES IN THE JURY INSTRUCTIONS, WHICH ALL REINFORCE THIS. LET'S TAKE THEM IN THE SEQUENCE , IN SEQUENCE. FIRST YOU START WITH THE BASIC DEFINITION OF A SEXUALLY VIOLENT PREDATOR , WHICH SAYS , AMONG OTHER THINGS, THAT THE INDIVIDUAL SUFFERS FROM MENTAL ABNORMALITY OR PENALTY DISORDER , THAT MAKES THE PERSON LIKELY TO ENGAGE IN ACTS OF SEXUAL VIOLENCE. THAT ESTABLISHES THE LINK BETWEEN THE MENTAL CONDITIONAND THE FUTURE SEXUALLY VIOLENT OFFENSES IN THE FIRST PLACE.IT IS A CAUSE AND EFFECT RELATIONSHIP. IT IS NOT AS THOUGH EACH ONE EXISTS IN ITS OWN REALM , INDEPENDENT OF ONE ANOTHER. YOU HAVE A MENTAL CONDITION, AND YOU HAVE A DANGEROUSNESS, AND NEITHER OF THE TWO INTERSECT WITH ONE ANOTHER. IT HAS TO AND CAUSE AND EFFECT RELATIONSHIP WHICH IMPLIES THE SERIOUS DIFFICULTY AND THAT B Y NATURE IS MENTAL ABNORMALITY THAT WE JUST READ, WHICH FOCUSES ON THE MENTAL VOLITION AL CAPACITY WHICH PREDISPOSES THEPERSON TO COMMIT SEXUALLY VIOLENT OFFENSES, SO YOU HAVE GOT PREDISPOSITION AS A RESULT OF MENTAL CONDITION , AGAIN, REINFORCING THE CAUSAL LINKBETWEEN THE MENTAL CONDITION AND RESID VIST CONDUCT.

SO -IN ESSENCE WHEN A JURY FOUND SO IN ESSENCE WHEN A JURY FINDS THAT A DEFENDANT IS LIKELY TO ENGAGE IN ACTS OF SEXUAL VIOLENCE , THEN OBVIOUSLY THAT PERSON HAS SERIOUS DIFFICULTY IN CONTROLLING HIS SEXUAL BEHAVIOR. YOU HAVE FOUND ONE. YOU DON'T NECESSARILY HAVE TO FIND THE OTHER.

CORRECT AND THAT IS WHAT AT LEAST A HALF A DOZEN STATE COURTS ACROSS THE COUNTRY , ADDRESSING THE SAME ARE ISSUEON STATUTES WHICH ARE ALL ESSENTIALLY THE SAME IN THEIR TERMINOLOGY , HAVE CONCLUDED.

LET ME ASK YOU SOME QUESTIONS ABOUT HEAL'S CASE IN PARTICULAR, AS TO WHETHERTHERE WAS ACTUAL PROOF. WHAT IS THE STANDARD? CLEAR AND CONVINCING EVIDENCE?

YES.

WAS THERE CLEAR AND CONVINCING EVIDENCE THAT HEAL WAS LIKELY TO ENGAGE IN ACTS OF SEXUAL VIOLENCE ? FROM WHAT I CAN SEE OF THE RECORD, HIS LAST SEXUAL OFFENSE WAS I N 1987. HIS FIRST SEXUAL , THE ONLY OTHER SEXUAL OFFENSES THAT I COULD SEE , WAS SODOMY , FOR WHICH I THINK HE WAS CONVICTED IN '73 , AND A BATTERY , FOR WHICH HE WAS ARRESTED BUT NOT CHARGED IN 1973. AND HOW MANY YEARS DID HE SPEND IN J AIL BETWEEN 1987 AND WHEN HE, WHEN THE PETITION WASFILED IN 1999?

AS FAR AS HIS INCARCERATIVE PERIODS OF TIME , ACCORDING TO THE DEPARTMENT OF CORRECTION RECORDS , WHICH ARE ONLINE IF ANYONE WISH TOES CHECK THEM , HE WAS RELEASED FROM INCARCERATION SOMETIME IN 1992. HE WAS, THEN , REINCARCERATED IN 1997 , AND A PERIOD OF AS I RECALL , A.M. APPROXIMATELY APPROXIMATELY FOUR AND-A-HALF TO FIVE YEARS WHERE HE WAS NOT INCARCERATION , PRIOR TO HIS RECENT INCARCERATION AND THE ENSUING PROCEEDINGS.

FOR WHAT CRIME?

BURGLARY.

SO THERE WAS NOTHING IN THE ENTIRE TIME THAT HE WAS OUT OF JAIL , OR PRISON, IN THAT FOUR AND-A-HALF YEAR PERIOD , WHICH INDICATED ANY TYPE OF SEXUAL ACTS OR

WELL , THERE IS ONE EXCEPTION.THERE IS A REFERENCE TO AN OFFENSE, WHICH IS IN 1991 , WHICH I AM NOT SURE IF THERE WAS A PERIOD WHERE HE WAS IN AND OUT ON PROBATION AND BACK IN , PERHAPS , THE DATE THAT COMES OUT OF THE TRANSCRIPT IS 1991 FOR A LOITER ING AND PROWLING, WHERE HE WAS LOOK INTERESTING A WINDOW , WHERE THE TESTIMONY IS THAT THE MENTAL HEALTH PROFESSIONALS BELIEVED THAT THAT HAD SEXUALLY MOTIVATED CONNOTATIONS , BASED UPON THE FACT THAT SEVERAL OF HIS OTHER OFFENSES THAT DID NOT RESULT IN SEXUAL CONVICTIONS THROUGHOUT THE MID'80s .

THERE IS A PROBLEM IN GOING BACK TO JUSTICE CANTERO 'S QUESTION HERE. IF THE JURY IS TOLD THAT LIKELY TO ENGAGE IN ACTS OF SEXUAL VIOLENCE , THAT IT HAS TO BE LIKELY.THEY HAVE TO HAVE SERIOUS DIFFICULTY IN CONTROLLING THEIR BEHAVIOR. HOW IS IT EXPLAINED THAT HE COULD GO FOR ALL THOSE YEARS , WITHOUT ENGAGING IN ANY ACT O F SEXUAL VIOLENCE?

I THINK THE EXPLANATION COMES FROM THE , COMES FROM THE DIAGNOSIS , WHICH REVOLVED IN LARGE PART, ON AN IMPULSE CONTROL DISORDER AND I BELIEVETHERE WAS A PERSONALITY DISORDER, WITH ANTISOCIAL FEATURES , A LARGE PART OF BOTH DIAGNOSIS BEING DIFFICULTY CONTROLLING CONDUCT, AND EVEN THOUGH

BUT DID ANY OF THEM ACTUALLY SAY ANYTHING? WE ARE TALKING ABOUT MR . HEAL, CORRECT?

YES.

DID THE MENTAL HEALTH EXPERTS ACTUALLY SAY ANYTHING ABOUT HIS FAILURE TO CONTROLOR VOLITION AL?

YES . THE STATE'S TWO EXPERTS , DR . BENOIT AND PRICHARD, AND IT IS SET FORTH IN THE STATE'S BRIEF , THEY , BOTH , SAID IN SEVERAL INSTANCES THAT THIS IS AN INDIVIDUAL WHO HAS PROBLEMS CONTROLLING HIS , PROBLEMS CONTROLLING HIS BEHAVIOR, REFERRING TO AN IMPULSE CONTROL DISORDER , AND THE PERSONALITY DISORDER WITH ANTISOCIAL FEATURES , WHICH IS BASED ON

IF WE HEARD THIS ON A DEATHCASE, WE WOULD SAY THIS IS PSYCHOLOGICAL MUMBO JUMBO. WHAT ACTUALLY IS IT THAT HE DID , FROM THE TIME THAT HE WAS RELEASED FROM PRISON UNTIL HE CAME OUT, HE WENT IN , IT SHOWSTHAT HE HAS GOT, NOT IMPULSE CONTROL BEHAVIOR PROBLEMS, THAT HE IS A CRIMINAL , BUT THAT HE HAD PROBLEMS IN CONTROLLING ACTS OF SEXUAL VIOLENCE.

IN THE FIRST PLACE, I HAVE HEARD A LOT OF ORAL ARGUMENTS IN DEATH PENALTY CASES AND READ A LOT OF TRANSCRIPTS AND NOT ONCE , NOTWITHSTANDING SIMILAR TESTIMONY FROM DOCTORS ON BEHALF OF DEFENDANTS , HAVE I EVER HEARD THIS COURT 'S EXPERT TESTIMONY AS MUMBO JUMBO . SECOND, YOU HAVE GOT THE CONTINUED PSYCHOLOGICAL DISORDER WHICH IS AT THE ROOT HERE, AND EVEN THOUGH IT DID NOT REMANIFEST ITSELF IN A SEXUALLY VIOLENT MANNER IN THE MID-TO-LATE 1990s , THE UNDERLYING KNTS STILL EXISTED , WHICH IS WHY, BASED UPON NOT JUST A SINGLE ISOLATED SEXUAL OFFENSE A LONG TIME AGO BUT ON MULTIPLE OFFENSES WHICH WERE SAID TO BE SEXUAL , BY EXPERTS , OF APPROXIMATELY SIX OFFENSES FROM 1973 TO AT LEAST 1987, IF NOT ONE MORE IN 1991 , BASED UPON THE TOTAL COMBINATION OF A LARGE NUMBER O F OFFENSES.

I ONLY SAW THREE OFFENSES, AND ONE OF THEM WAS NOT CHARGED . WHAT WERE THE OTHERS?

IN 1982, THERE WAS A HOYT A LOITERING AND PROWL ING AND BATTERY AND IN 1982 , A SITUATION WHERE THE DEFENDANT TOUCHED THE BREAST OF A WOMAN, AND IN 1991 , THERE IS LOITERING AND PROWLING, WITH LOOK INTERESTING A WINDOW. THOSE DID NOT RESULT IN CONVICTIONS , BUT NEVERTHELESS THE EXPERTS BELIEVE AND AS TO AT LEAST ALL ACCEPT THE ALL EXCEPT THE 1991 , AND EVEN ON THAT ONE I AM NOT CERTAIN, BUTAS TO THE OTHERS, EVEN THE DEFENSE EXPERT SAID THAT THEY WERE PROBABLY SEXUALLY MOTIVATED , SO YOU HAVE GOT SIX OR SEVEN.

WHEN YOU SAY THOSE WERE NOT CONVICTIONS , WERE THEY ANY KIND OF PLEA? I MEAN, IF THEY WEREN'T, IF HE WASN'T CONVICTED , THEN HOW , HE HASN'T, THEY HAVEN'T PROVEN THAT H E HAS COMMITTED THAT OFFENSE.

WELL , EVEN THE DEFENSE EXPERT HAS SPOKEN TO THE , HAS SPOKEN TO THE DEFENDANT ABOUT THOSE. AND WITH THE POSSIBLE EXCEPTION OF THE 1991 OFFENSE, AND AS TO THOSE , EVEN THE DEFENSE EXPERT WAS SELF-CONVINCED THAT THEY WERE PROBABLY SEXUALLY MOTIVATED , BASED UPON WHAT HE HAD HEARD AND READ FROM POLICE ARREST REPORTS AND FROM OTHERS' DOCUMENTARY SOURCES.

SO ARE YOU SAYING THAT , FORPURPOSES OF THIS HEARING , THE DEFENSE CONCEDED THAT, EVEN THOUGH HE HADN'T BEEN CONVICTED OF THOSE CRIMES, THAT HE HAD COMMITTED THE CRIMES?

CERTAINLY AS TO , CERTAINLYAS TO ALL EXCEPT , POSSIBLY , THE 1991 OFFENSE. THE 1982 AND THE 1984 , IF YOU READ DR . LUSK'S TESTIMONY , DR . LUSK IS ACCEPTING THAT THOSE WERE SEXUALLY MOTIVATED .

CHIEF JUSTICE: YOU ARE WELL INTO YOUR REBUTTAL TIME.

I JUST WANT TO ASK ONE QUESTION. YOU INDICATED THAT IS THERE CONFLICTING EVIDENCE HERE IN MR . HEAL'S CASE, CONCERNING WHETHER OR NOT HE CAN CONTROL OR THIS WAS VOLITION AL ACTS BY HIM OR NOT. IF THAT IS THE CASE, IF THERE IS CONFLICTING EVIDENCE ON THIS ISSUE , SHOULDN'T THERE BE IN FACT , A JURY INSTRUCTION THAT WOULD FOCUS IN TO THE JURY THAT , THEY NEED TO FOCUSON THAT ISSUE , IF THERE IS IN FACT , CONFLICTING EVIDENCE?

AS A MATTER OF CONSTITUTIONAL LAW, I DO NOT BELIEVE THAT A JURY INSTRUCTION IS REQUIRED, ANDTHAT IS WHAT MOST COURTS ACROSS THE COUNTRY HAVE BEEN CONCLUDEDING, THAT THE CONCLUDING, THAT THE STANDARD STATUTORY ELEMENTS ALREADY COVER THIS, SO IF THE JURY IS COMING TO THIS CONCLUSION, THEJURY I S O F NECESSITY , MAKING A DETERMINATION THAT THERE IS SERIOUS DIFFICULTY . I DON'T THINK THAT SUCH AN INSTRUCTION IS ERRONEOUS , OBVIOUSLY, BUT I T IS NOT CONSTITUTIONALLY REQUIRED AND IT IS ALREADY COVERED, AND AS FAR AS CONFLICTING EVIDENCE, THE SCOPE OF THE CONFLICT IS NOT PARTICULARLY GREAT , EVEN DR. LUSK ADMITS THAT THERE ARE SERIOUS PERSONALITY DISORDERSAND PROBLEMS HERE , AND THEREIS A RISK OF RECIDIVISM , EVEN ON HIS RISK ASSESSMENT INSTRUMENTS. HE CALCULATED I T ANYWHERE BETWEEN 29 AND 4 8 PERCENT. THAT IS THE DEFENSE'S CASE, SO THE SCOPE OF THE CONFLICT IN THE TESTIMONY HERE, NOT ALL THAT GREAT. DR . LUFCK ADMITTED THERE ARE DR . LUSK ADMITTED THERE WERE SERIOUS PROBLEMS. HE JUST THOUGHT IT COULD BE TREATED BY OUTPATIENT TREATMENT INSTEAD OF FULL CONFINEMENT AND STILL ADMITTED THERE WERE LIKELY PROBLEMS AND RECIDIVISM. THE REST OF MY TIME, I WILL RESERVE FOR REBUTTAL. THANK YOU .

GOOD MORNING. MAY IT PLEASE THE COURT. COUNSEL. ROBERT FRIEDMAN ON BEHALF OF RESPONDENT JAMES WHITE. I THINK, WHEN WE LOOK AT THESE CASES, THE CRITICAL DISTINCTION FOR A JURY TO MAKE , IS HOW DO WE DISTINGUISH THE DANGEROUS SEXUAL OFFENDER , WHOSE MENTAL ABNORMALITY OR PERSONALITY DISORDER , SUBJECT HIM TO CIVIL COMMITMENT , VERSUS THE DANGEROUS OFFENDER WHO IS A TYPICAL RESID VIST IN AN

ORDINARY CRIMINAL CASE .

LET'S JUST FOCUS ON WHAT HAS BEEN ARGUED , WHICH IS THAT IT MIGHT BE BETTER OR OKAY , I DON'T THINK THE ISSUE IS BETTER, BUT IT WOULDN'T BE ERRONEOUS TO DEFINE LIKELY OR TO FOCUS IN ON SERIOUS DIFFICULTY, BUT THAT IT IS NOT CONSTITUTIONALLY INFIRM, AND WHAT IS POINTED OUT IS THAT OUR STATUTE IS EXACTLY THE SAME AS KANSAS 'S STATUTE , WHICH , IF THE U.S. SUPREME COURT WAS GOING TO SAY THAT THAT STATUTE WAS CONSTITUTIONALLY DEFICIENT , THAT THEY WOULD HAVE SAID SO. SO HOW DO YOU RESPOND TO THAT? THAT IS NOT , WE ARE NOT HERE AS TO WHETHER THE INSTRUCTIONS COULD BE BETTER BUT WHETHER THE INSTRUCTIONS ARE CONSTITUTIONALLY ADEQUATE .

MY POSITION IS THAT THE FLORIDA IN TRUCKS IS NOT CONSTITUTIONALLY ADEQUATE , IN LIGHT OF CRANE AND PENDRIFF. AND IT CAME UP , QUITE FRANKLY , THE QUESTION OF WHAT WAS THE EFFECT O F CRANE ON THE KANSAS STATUTE , AND I FILED THE SUPPLEMENTAL AUTHORITY THAT THE , YOU KNOW, THE STATE OF KANSAS , THEY CAME UP WITH A DIFFERENT JURY INSTRUCTION IN LIGHT OF CRANE , AND BASICALLY THEIR JURY INSTRUCTION SAYS THAT THE RESPONDENT WAS CONVICTED O F A SEXUALLY VIOLENT OFFENSE AND SUFFERSFROM AN ABNORMALITY WHICHMAKES THE RESPONDENT LIKELY TO ENGAGE IN REPEAT ACTS OF SEXUAL VIOLENCE , AND THE THIRD ELEMENT POST CRANE IS THE RESPONDENT'S ABNORMALITY MAKESIT SERIOUSLY DIFFICULT FOR HIM OR HER TO CONTROL HIS DANGEROUS BEHAVIOR , SO WE CANSIT HERE AND ARGUE THAT THE FLORIDA STATUTE IS PATTERNED AFTER

WAS THAT CHANGE MADE AFTER THE KANSAS SUPREME COURT CHANGE AND BEFORE

THAT WAS MADE , THAT CHANGE WAS MADE AFTER THE UNITED STATES SUPREME COURT ISSUED THE CRANE DECISION , AND IN CRANE, IT WAS REMANDED BACK TO THE, IT WAS REMANDED NOT , THE KANSAS DECISION WAS NOT VACATED. IT WAS REMANDED , AND IN LIGHT OF CRANE , THEY CHANGED THEIRJURY INSTRUCTION , AND AS I INDICATED , I FILED SUPPLEMENTAL AUTHORITY , AND IT ALSO INCLUDED THE NOTES ON USE AND A COMMENT WHICH GOES THROUGH THE HISTORY OF IT , SO , YES, AFTER THE UNITED STATES SUPREME COURT RULED IN KANSAS V CRANE, THE STATE OF KANSAS CHANGED THEIR JURY INSTRUCTION, TO LOOK THE ADDITIONAL ELEMENT, AND ITHINK IF WE READ CRANE, EVEN WHAT JUSTICE SCALIA SAYS IN DISSENT , I MEAN, HE BASICALLYIS SAYING THAT TODAY, THE MAJORITY OPINION IN THE COURT, YOU KNOW, FINDS THE ADDITION OF AN ADDITIONAL FINDING THAT THE SUBJECT SUFFERS FROM AN INABILITY TO CONTROL BEHAVIOR, SO I MEAN , IT IS RECOGNIZED THAT THERE IS AN ADDITIONAL ELEMENT , SO THEREFORE THE FIRST DIFFERENCE

THAT IS ONLY ONE JUSTICE'SVIEW THAT THAT IS AN ADDITIONAL ELEMENT. THE ENTIRE COURT DID NOT COME OUT AND STATE THAT THAT IS AN ADDITIONAL ELEMENT, DID IT?

THE PROBLEM I GUESS, WITH THE CRANE DECISION , IS THEY DIDN'T GIVE US A BRIGHT-LINE RULE TO FOLLOW . BUT WHEN YOU READ CRANE , IT SAYS, IN ORDER TO CIVILLY COMMIT THESE INDIVIDUALS , THERE HAS TO B E A SHOWING AND A FINDING OF INABILITY TO CONTROL BEHAVIOR. THE WORDS THAT THEY USED, SERIOUS DIFFICULTY CONTROLLING BEHAVIOR, SO, A , THE STATE HASTO OFFER PROOF , AND , B , THE FACT FINDER , WHETHER IT BE THETRIAL COURT OR THE TRIAL JURY, A HAS TO MAKE A SPECIFIC FINDING .

WOULD YOU SAY THAT THEY CONSTRUED THE KANSAS STATUTORY SCHEME SORT OF FAVORABLY, T O INCLUDE THAT REQUIREMENT THAT WE ARE TALKING ABOUT?

YES.

THAT IS THAT , WHEN THEY EVALUATED IT AND UPHELD IT, THEN THEY CONSTRUED IT IN SUCH AWAY THAT IT WOULD INCLUDE THAT REQUIREMENT , THAT ARTICULATION S THAT CORRECT?

YES. AND I BELIEVE THAT , EVEN IF YOU LOOK AT KANSAS V HENDRICKS , THE ORIGINAL CASE, IT IS REPLETE WITH REFERENCES TO INABILITY TO CONTROL BEHAVIOR. I MEAN, THE POINT OF THESE FACTORS IS THAT FUTURE DANGER USNESS ALONE IS INSUFFICIENT. THERE HAS TO BE A LIN K BETWEENTHE FUTURE DANGEROUSNESS AND THE MENTAL ABNORMALITY, WHICH CAUSE THE INDIVIDUAL SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR, BECAUSE WITHOUT THAT LINK AND THE TRIAL JURY BEINGPROPERLY INSTRUCTED , I MEAN , WE ARE BACK TO DEALING WITH AN INDIVIDUAL WHO SHOULD BE TREATED IN THE CRIMINAL JUSTICE SYSTEM , AND THAT IS A DISTINCTION IN THESE CASES.

YOU HAVE AN AWFUL LOT OF GROUND TO COVER. WOULD YOU COMMENT ON JUSTICE CANTERO 'S QUESTION, WHICH IS A MAJOR CONCERN OUT THERE, ASFAR AS THE EVIDENCE OF ARREST S OR O F INCIDENTS WHERE THERE HAS BEEN A CHARGE BUT AN ACQUITTAL , AND HOW, WHAT, WHAT IS BEING USED AS A DATABASE , SO TO SPEAK , WHEN THESE TRIALS ARE ACTUALLY CONDUCTED , TO ADD UP THE EVIDENCE OF PRIOR OFFENSES? ARE ARRESTS BEING USE D AND ARE CASES WHERE THERE HAVE BEEN ACQUITTAL S BEING USED?

POLITICAL , YES , ARRESTS ARE BEING USED. AS FAR AS THE PREDICATE , YOU KNOW , YOU CAN USE AS AN ARREST AS PREDICATE CONVICTION , BUT IN A NUMBER OF THESE CASES , WHEN THE PSYCHOLOGIST EVALUATES THE INDIVIDUAL , THEY WILL TAKE INTO ACCOUNT A PERSON'S PRIOR ARREST RECORD , TO MAKE A CLINICAL EVALUATION , TO MAKE THEIR CLINICAL OPINIONI DON'T KNOW.

NOW, DO THEY D O THAT ON THE BASIS THAT THE DEFENDANT HAS ADMITTED IMPROPER CONDUCT UNDERLYING THOSE ARRESTS , OR DO THEY DO IT JUST ON THE BASIS THAT THERE IS A RAP SHEET?

IN SOME INSTANCES THEY DO AND IT TURNS INTO A CATCH-22 , BECAUSE YOU MAY HAVE A DEFENDANT WHO WILL NOT ADMIT TO THE FACT OF AN ARREST , AND THEN THEY SAY, WELL , OKAY, HE IS I N DENIAL. SO IT BECOMES A REAL CATCH-22, IF, OKAY , SOMEONE

IS THAT INVOLVED IN YOUR CASE?

NO, IT IS NOT. IN MY, IN MR . WHITE'S CASE , HIS PREDICATE CONVICTION WAS 1995 , AND WHEN HE WAS SET TO BE RELEASED FROM PRISON IN 1999 , THE STATE FILED A PETITION , THE TWO STATEDOCTORS WERE SENT OUT. ONE REPORT CAME BACK SAYING THAT HE MET THE CRITERIA. THE OTHER REPORT SAID HE DID NOT MEET THE CRITERIA , SO ACTUALLY IN MR . WHITE'S CASE , THERE WAS A SPECIFIC REQUEST FOR AN INSTRUCTION , AND AT THE TIME IT WAS UNDER THE HENDRICKS CASE. HE ASKED THAT THE ADDICTION AL ELEMENT THAT JAMES WHITE IS UNABLE TO CONTROL HIS BEHAVIOR

YOUR BOTTOM LINE IF I UNDERSTAND IT , IS THE WAY THAT THE U.S. SUPREME COURT HAS CONSTRUED THE KANSAS ACT, IS TO INCLUDE THIS REQUIREMENT , AND THAT THERE FOR IT IS CONSTITUTIONAL WITH THAT GLOSSIT , AND THAT KANSAS IS FOLLOWED UP BY ACTUALLY INCLUDING AN INSTRUCTION IN THE ARTICULATION OF THE U.S. SUPREME COURT .

THAT IS MY ARGUMENT, ANDTHAT , WITHOUT THE INCLUSION OF THAT LANGUAGE , WHETHER OR NOT THERE IS ACTUALLY A BRIGHT LINE BUT WITHOUT THE INCLUSION , WITHOUT THE JURY BEING ABLE TO MAKE THE DIFFERENTIATION BETWEEN WHAT IS INVOLVED HERE AND THESE CIVIL COMMITMENT CASES , THEN IT IS CONSTITUTIONALLY INFIRM .

WHY DOESN'T A JURY FINDING THAT A RESPONDENT HAS , IS LIKELY TO COMMIT A SEXUAL OFFENSE IN THE FUTURE , NECESSARILY INCLUDE AT LEAST AN IMPLICIT FINDING THAT THE RESPONDENT HAS SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR?

WELL , I THINK THAT IS WHAT THESE, THAT IS WHAT CRAIN AND HENDRICKS ADDRESS. I MEAN,

YOU CAN'T MAKE THAT , YOU

BUT CRANE SAYS YOU NEED AN ADDITIONAL JURY INSTRUCTION , AND CRANE DOESN'T SAY THAT THE KANSAS STATUTE IS UNCONSTITUTIONAL, UNLESS WE ARE GOING TO READ IN A FOURTH REQUIREMENT. IT DOESN'T SPEAK IN THOSETERMS. THOSE ARE OTHER CASES INTERPRETING CRANE.

BUT IF YOU LOOK AT HENDRICKS , THE FIRST CIVIL COMMITMENT CASE , KANSAS V HENDRICKS , I MEAN , THE COURT SPECIFICALLY STATES THAT DANGEROUSNESS ALONE , IS INSUFFICIENT TO CIVILLY COMMIT, SO WHEN WE ARE TALKING ABOUT LIKELIHOOD, I MEAN , ALL WE ARE TALKING ABOUT IS YOU KNOW, THEPOET EX-OF FUTURE DANGEROUSNESS THE POTENTIAL OF FUTURE DANGEROUSNESS . THE POINT OF THE LANGUAGE IN CRANE , IS THAT IN ORDER TO GET TO THAT EXCEPT, THERE HAS T O BE A SHOWING AND FINDING OF SERIOUS DIFFICULTY CONTROLLING BEHAVIOR. I MEAN , AWAY THAT I WOULD TRY TO EXPLAIN IT

I GUESS THAT DOESN'T ANSWER MY QUESTION THOUGH , BECAUSE IF SOMEBODY, A FUTURE DANGEROUS , HE MIGHT NOT BE LIKELY TO COMMIT A SEXUAL OFFENSE IN THE FUTURE , BUT IF THERE IS A FINDING THAT HE MIGHT LIKELY COMMIT A SEXUAL OFFENSE IN THE FUTURE, THEN WHERE DOES THAT MEAN H E IS HAVING DIFFICULTY CONTROLLING HIS BEHAVIOR?

WHERE IS THE SPECIFIC FINDING? I THINK IN THESE CASES THE JURY IS NOT REQUIRED TO MAKE A SPECIFIC FINDING. I THINK A NUMBER OF THE APPELLATE COURT JUDGES AROUND THE STATE YOU KNOW , HAVE SAID THAT THE BETTER PRACTICE , YOU KNOW, WOULD BE TO INSTRUCT THE JURY AS TO ESSENTIAL ELEMENT. I THINK

LET'S SAY WE AGREE WITH YOU THAT THAT IS THE BETTER PRACTICE. THE ISSUE IN THIS CASE IS WHETHER IT IS CONSTITUTIONALLY REQUIRED .

AND THE ANSWER TO THAT IS YES. IT IS CONSTITUTIONALLY REQUIRED TO INSTRUCT THE JURY AS TO AN INDIVIDUAL 'S INABILITY TO CONTROL BEHAVIOR OR SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR, BEFORE HE COULD BE CIVILLY COMMITED FOR LIFE .

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU THE WAY YOUHAVE DIVIDED YOUR TIME , I BELIEVE .

I WON'T HAVE ANOTHEROPPORTUNITY , ILL RESPECTFULLY REQUEST THIS COURT TO AFFIRM THE HOLDING AND THE OPINIONS OF THE FIRST DISTRICT COURT OF APPEAL.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. THANK YOU , JUDGE .

MS. BRUECKHEIMER , CAN YOU ADDRESS THE CONVERSATIONS WE HAVE BEEN HAVING WITH THE ASSISTANT ATTORNEY GENERAL HERE , ABOUT HEAL'S PREVIOUS ABOUT HALE'S PREVIOUS, WELL , HIS SEXUAL BATTERY HISTORY. WHAT WAS ACTUALLY INTRODUCED AT THE HEARING ABOUT WHAT HIS HISTORY WAS AND WHAT WAS THAT BASED ON ?

WELL , I T WAS A COMBINATION OF MR . HALE ADMITTING CERTAIN THINGS TO HIS DOCTORS AND A COMBINATION OF SEVERAL ARREST REPORTS THAT WERE NEVER PROSECUTED, AND IT WAS COMBINATION OF THE ARRESTS THAT WENT TO CONVICTIONS. SO MR . HALE ADMITTED THINGS HAD THAT NO ONE KNEW ABOUT IN HIS CONVERSATIONS WITH DOCTORS AND THEY USED THAT AGAINST HIM , AND PLUS AFFIDAVITS THAT WER E HEARSAY WERE USED AGAINST HIM , AND

YOU WON'T BE RAISING THOSE AS SEPARATE ISSUES ON APPEAL,ARE YOU?

WELL THAT, IS ONE THING I WANT TO POINT OUT TO THIS COURT. THIS COURT COMBINED , CONSOLIDATED M R . HALE WITH MR . WRIGHT FOR ALL PURPOSES. I WANT THAT UNCONSOLIDATED . EYE KNOW YOU RAISED OTHER ISSUES BESIDES MR . WHITE. I DON'T QUESTION THAT. MY QUESTION IS I DON'T THINKYOU HAVE RAISED AS SEPARATE ISSUES, THAT THE JURY CAN CONSIDER OR SHOULD NOT BE ABLE TO CONSIDER ARRESTS THAT DID NOT RESULT IN CONVICTIONS OR ANY KIND O F SEXUAL BATTERY O R SEXUAL OFFENSE HISTORY THAT DID NOT RESULT IN CONVICTIONS. THAT I S NOT A SEPARATE ISSUE.

NO. MY ISSUE WAS UNDER THE WILLIAMS RULE , KIND O F BAD ACTING , WHERE THEY SHOULD HAVE LIMITED THAT, WHAT WAS RELEVANT AND WHAT WASN'T, AND THERE WERE NO RESTRICTIONS PLACED.

ON THE WILLIAMS RULE ISSUE , HOW IS THE STATE GOING TO PROVE THAT THIS PERSON IS LIKELY TO COMMIT A SEXUAL OFFENSE IN THE FUTURE OR THAT HE HAS SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR, IF IT IS NOT FROM HISTORY OF HIS SEXUAL OFFENSES?

WELL , THAT , IS THEIR LOGICBUT THE OTHER THING IS , ARE THEY ENTITLED TO ARRANGE HIS ENTIRE LIFE , GOING BACK TO WHAT HE DID WHEN HE WAS 13 , 14 , 15. I MEAN, THE MAN WAS 48 AT THETIME OF THE TRIAL. THEIR BIGGEST CASE WAS WHEN HE WAS 26.

THERE IS SO MUCH AT ENUATION BETWEEN HIS OFFENSES AND THIS HEARING , THAT THE STATE CANNOT PROVE ANY LONGER, THAT HE IS LIKELY TO COMMIT A SEXUAL OFFENSE IN THE FUTURE.

WELL , THE STATE REALLY WASN'T CURTAILED , AND THERE WAS, I MEAN, RELEVANCY I S FOR THE JUDGE NOT FOR THE JURY. I MEAN, YOU KNOW , ALL YOU CAN DO IS ARGUE TO THE JURY THAT THOSE WERE SO LONG AGO THAT HE IS A CHANGED MANKIND OF THING, BUT THE STATE DID EVERYTHING THEY COULDING TO TRY TO SHOW A CONTINUING PATTERN .

IF IT WERE THE CASE, I AM NOT SAYING IT, BUT IF IT WERE THE CASE THAT HE COMMITTED A RAPE IN 1973 , AND SINCE 1973, HE HAS BEEN IN JAIL I N PRISON , AND IS ABOUT TO BE RELEASED IN 1999 , WHEN THE STATE FILES THE PETITION , ARE YOU SAYING THATTHE STATE CANNOT , NOW , USE A 1993, A 1973 RAPE, BECAUSE OF THE A T ENUATION?

I AM SAYING RELEVANCE IS BASED ON AN INDIVIDUAL BASISAND IN A CASE LIKE THAT , THAT MAY BE RELEVANT, BUT IN A CASE LIKE MR . HALE'S , RELEVANCY WAS DEFINITELY AN ISSUE , AND THE STATE ONE SEEDS CONCEDES AT LEAST FOUR AND-A-HALF YEARS SINCE HE WAS OUT AFTER BEING ARRESTED FOR STOLEN PROPERTY. I WAS TOLD IT WAS MORE LIKE SEVEN YEARS AND THAT IS WHENWE GET ONE OF THE STATE'SDOCTORS WHO WANT TO MAKE THISAS BAD AS POSSIBLE BY TELLINGTHE JURY "AND GOD KNOWS WHAT HE WAS DOING DURING A TIME PERIOD."

IF THEY SAID HE WAS ARRESTED FOR LOITERING AND PROWLING DURING THAT PERIOD WHEN HE WAS OUT?

I DON'T KNOW IF HE WAS ACTUALLY ARRESTED OR IF HE WAS CONVICTED OF THAT. I DO KNOW THAT, IN 1997 , HE WENT TO PRISON FOR DEALING IN STOLEN PROPERTY.

WHAT WERE THE RESULTS OF THE RISK ASSESSMENT S DONE BY THE VARIOUS EXPERTS?

YOU KNOW, THEY DIDN'T LIKE WHAT THEY SAW FROM THE TEST RESULTS. THE TEST RESULTS WERE SHOWING HIM AS DANGEROUS , AS THEY WANTED HIM TO BE. THEY WANTED HIM TO BE FAR MORE DANGEROUS AND SO , THEY BASICALLY , THE STATE'S DOCTORS THREW OUT OF TEST RESULTS AND SAID BUT HE IS REALLY MUCH MORE DANGEROUS THAN THAT BECAUSE WE THINK HE IS ANDLOOK A T THESE CASES.

TEST RESULTS SHOWED HIM AS BEING UNDER.

PERCENT LIKELY TO COMMIT A SEXUAL VIOLENT ACT?

UM-HUM.

YES?

YES. I MEAN, IF YOU LOOK AT DR . BENOIT , , HIS RESULTS IN VARIOUS TESTS , WERE LIKE HE RATED A.M. SEVEN , WHICH WAS MODERATE , 45 PERCENT RATE WITHIN KNIFE YEARS .

- - WITHIN FIVE YEARS.

IS THAT WHAT THE EXPERTSARE NOW USING TO ASSESS LIKELIHOOD, THESE RISK ASSESSMENTS?

THEY ARE . BUT THEY ARE NOT , BACK WHEN MR. HALE WAS FIRST CHARGED IN THE EARLY YEARS , THE DOCTORS DIDN'T KNOW HOW TO USE THEM THAT WELL , SO I ALSO POINT OUT THAT DOCTOR B ENOIT WAS USING ERRONEOUS THINGS AND WAS COMING UP WITH A HIGHER RISK ASSESSMENT THAN HE SHOULD HAVEAND HE ADMITED SHOULD DROP DOWN TO 32 PERCENT , SO YOU WIND UP WITH THE DOCTORS NOTREALLY KNOWING. DR . PRICHARD COME UP WITH A 3 0 PERCENT. OR A 30.5, WITH THE CUTOFF BEING AT 30.

DID ANYONE COME UP WITH MORE THAN 50%ENT?

NO ONE CAME UP WITH MORE THAN 50 PERCENT.

SO WHERE IS THE LIKELIHOOD,THEN, COMING FROM?

BECAUSE THE STATE'S DOCTORSTHEN USED THEIR OWN PERSONAL JUDGMENT AND KICKED IT UP.

AND SAID IT WAS MORE LIKELY THAN NOT.

YES. AND DR . LUFCK, OF COURSE, DID NOT , AND DR . LUSK SPECIFICALLY SAID

I DON'T THINK ANYBODY EVER SAID MORE LIKELY THAN NOT. THEY JUST SAID IT WAS LIKELY THAT HE WOULD REOFFEND.

WELL , DR . PRICHARD SAID MR . HALE HAD AN IMPULSE CONTROL PROBLEM.

WELL , ARE YOU ATTACKING THE SUFFICIENCY OF THE EVIDENCE?

I DID IN MY ISSUE TWO , AND THAT IS ANOTHER REASON WHY I WOULD LIKE TO MAKE SURE THAT MR . HALE'S CASE IS NOT DECIDED IMMEDIATELY , BECAUSE IN ISSUETWO , WE HAVE SUFFICIENCY. WE, ALSO, HAVE THE

YOU SAY THERE SHOULD HAVE BEEN A JUDGMENT OF ACQUITTAL .

RIGHT. I HONESTLY THINK THEY SHOULD VWE HAVE THE TABLER ISSUE HERE , WHICH IS ONE THAT IS RECENTLY COMING TO THIS COURT ON THE IDEA OF WHETHER OR NOT SOMEBODY WHO IS IN JAIL FOR A NONSEX OFFENSE SHOULD BE

IF YOU DECIDED O N INSTITUTIONAL EVIDENCE , THAT

THAT WOULD BE THE BEST ARGUMENT IN THE WORLD. I DON'T HAVE TIME TO DEAL WITH THE TAB HE WILLER ISSUE HERE. THAT WOULD THE TAB LETTER ISSUE HERE. THAT WOULD THE TABLER ISSUE HERE. I DON'T HAVE TIME .

CHIEF JUSTICE: THE MARSHALPOINTED OUT

RIGHT. I WOULD LIKE TO TAKE A LOOK AT THE ARIZONA ISSUE, IT TALKSABOUT THE CASE WHERE IT MAY NOT BE CONSTITUTIONALLY REQUIRED, BUT FOR A JURY TO UNDERSTAND ITS JOB, IT MUST BE TOLD IN LAYMAN 'S TERMS WHAT IT HAS TO DO, AND THEY CAME UP WITH VERY GOOD REASONING AS TO WHY THE JURY INSTRUCTION MUST BE

BUT IF IT IS NOT CONSTITUTIONALLY, WE CANNOT REVERSE THESE CASES.

THEY REVERSED THEIRS, TO SAY LET'S GO BACK AND SEE I F THIS GUY SHOULD HAVE HAD THE JURY INSTRUCTION WHEN IT BECAME AN ISSUE . WHEN IT IS AN ISSUE. A LOT O F CASES LIKE THE CALIFORNIA SUPREME COURT THAT EVERYBODY IS RELYING O N , AT THE VERY END THEY SAID , BUT EVEN IF IT WERE WRONG , IT WAS HARMLESS ERROR IN THIS CASE. THE REALITY IS THAT THE HARMLESS-ERROR ANALYSIS IS BEING USED A LOT, TO COVER UP WHETHER OR NOT TO DEAL WITH THE ISSUE.

HENDRICKS , A LOT OF THESE CASES, THEY HAD ACTUALLY ADMITTED THAT THERE WAS - -

EXACTLY. IF YOU HAVE A PEDOPHILE , YOU ARE NOT DEALING WITH THE ISSUESO WHY DEAL WITH IT , SO EVEN THOUGH CALIFORNIA DEALT WITH IT , AT THE BOTTOM LINE WAS AT THE VERY END THEY SAID IT IS HARMLESS IN THIS CASE , AND I WOULD JUST SAY THAT YOU REALLY SHOULD LOOK AT THAT ARIZONACASE, AS TO WHY THE JURY NEEDS TO BE TOLD , IN JUST STRAIGHT FLAT TERMS, WHAT A LAYMAN NEEDS TO KNOW TO DECIDE THIS ISSUE. THANK YOU. I THINK I HAVE GOT TWO MINUTESLEFT.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME DOES THE STATEHAVE FOR THIS?

THANK YOU.

WOULD YOU RESPOND , FIRST , YOU ARE FREE TO ARGUE WHATEVER ELSE YOU WANT , BUT MS. BRUECKHEIMER 'S DISCUSSION OF THE EXPERT 'S TESTIMONY THAT THE HALE WAS 45 PERCENT LIKELY TO REOFFEND ON YOUR FIRST ARGUMENT, YOU SEEM TO CONCEDE THAT LIKELY MEANS MORE LIKELY THAN NOT. I AM NOT SURE IF THAT IS THE CASE, BUT THAT IS WHAT YOU BELIEVE. IF IT IS MORE LIKELY THAN NOT, WHAT EVIDENCE IN THE RECORD IS THERE, THAT HE WAS MORE LIKELY THAN NOT TO REOFFEND? ANOTHER ACT WARLS RANGED FROM 48% THE ACTUARIAL S RANGED FROM 48 PERCENT LIKELIHOOD. DR . BENOIT TESTIFIED 85 PERCENT LIKELIHOOD. HE ALSO TESTIFIED THAT 45 PERCENT IS A RANGE OF 4-TO-7 IS 45 PERCENT AND THAT IS THE AVERAGE , AND THAT SEVEN IS ON THE HIGHER END OF THE SCALE , MUCH HIGHER THAN 50 PERCENT.

FOR A SEXUALLY VIOLENTCRIME.

YES.

SO UP UNTIL HE WAS 4 8 , WHATWERE THE SEXUALLY VIOLENT CRIMES THAT HE HAD COMMITTED, UP UNTIL AGE 48?

IN 1973 YOU HAVE TWO INCIDENTS , THE MCKEOWN INCIDENT AND THE BOSWELL INCIDENT N 19837

WHAT WERE THOSE?

ONE OF THEM WAS - - AND IN THE 1987

WHAT ARE THOSE?

ONE I S AN ASSAULT WITH ATTEMPT TO RAPE. AT THE SCHOOL, HE GRABBED A STUDENT , AND I BELIEVE THAT WAS BELIEVED TO HAVE BEEN TRYING TO FONDLE HER BREASTS. THEN I N 1987 , THE QUICKLY INCIDENT, WHERE HE STOPS THE WICKLY INCIDENT , WHERE HE HAS GOT SOMEONE WITH HER CAR STOPPED AND HE TRIES TO FONDLE HER BREASTS AGAIN AND IN 1982, A LOITERING AND PROWL ING AND BATTERY , WHICH THE EXPERTS

I AM NOT SAYING THAT SOMEONE , TRYING TO FONDLE BREASTS IS NOT A SIGNIFICANT ISSUE, BUT THIS MAN HAS BEEN INVOLUNTARILY COMMITTED SINCEWHAT YEAR ?

WELL, HE HAS BEEN CONFINED SINCE SOMETIME IN THE YEAR 1999, WHEN THE CASE STARTED. AND HE GOT OUT OF PRISON , AND THE TRIAL WAS HELD SOMETIME IN THE YEAR 2000, SO HE HAS BEEN

I THOUGHT YOU SAID BEFORE THAT

FOUR YEARS.

HE WAS IN PRISON SINCE '97 , RIGHT?

HE WAS IN PRISON , AGAIN , SINCE 1997 , WHICH WAS HIS MOST , HE WAS BACK IN ACCORDING T O DOC , OCTOBER 15 , 1997, UNTIL THE END OF HIS INCARCERATE I HAVE SENTENCE , WHICH THEN TRIGGERED HIMSELF INTO THE

IF THE JURY FINDS THAT SOMEBODY IS LIKELY TO FONDLE WOMEN'S BREASTS , THAT IS ENOUGH, UNDER THE JIMMY RYCE ACT , TO COMMIT THEM INDEFINITELY?

WELL , FIRST THERE HAS TO BE A CONVICTION FOR ENUMERATED SEXUAL VIOLENT OFFENSE AND HE HAS A BATTERY CONVICTION IN 1987. THE REST OF THE INCIDENTS SHED LIGHT ON HIS BEHAVIORAL PROBLEMS AND EXPLAIN THE UNDERLYING PERSONALITY DISORDER OR MENTAL ABNORMALITY.

WHAT IS HE LIKELY TO DO? THAT I S HE AT-RISK OR MORE LIKELY THAN NOT TO RAPE SOMEBODY?

THAT DIDN'T QUITE COME OUT FROM THE TESTIMONY. I THINK IT WAS A COMBINATIONOF THE TWO, A POSSIBILITY OF A RAPE, BUT PROBABLY MORE LIKELY THE EXPERTS FELT THAT THERE WOULD BE MORE LIKELY THE LESSER TYPES OF SEXUAL CONDUCTTHAT HE HAD MAN FESTTED OVER THE THAT HE HAD MANIFESTED OVER THE SUBSEQUENT YEARS. A COUPLE OF BRIEF POINTS, I WANT TO POINT OUT THAT FROM LEON G , ONLY CHANGES THE INSTRUCTION PROSPECTIVE LY. THE COMMITMENT WAS UPHELD, THE CRIME TRIAL COURT WAS UPHELD ON THAT.

WHAT ABOUT KANSAS?

THERE ARE NO CASES SUBSEQUENT TO

I HIM TALKING ABOUT THE KANSAS JURY INSTRUCTION.

THE , THEY CHANGED IT VOLUNTARILY.ONE O R TWO OTHER STATES HAVE DONE THE SAME .

CHANGED IT IN RESPONSE,THOUGH, TO THE DECISION OF THE U.S. SUPREME COURT? I THINK THAT IS A FAIR CONSTRUCTION. ONE OTHER TWO OTHER DISTRICTS , STATES HAVE , ALSO , WISCONSIN AND ARIZONA AND KANSAS HAVE ADDED THE INSTRUCTION. NOT A SINGLE ONE OF THEM HAS SAID, HOWEVER , THAT WE DIDTHIS A S A CONSTITUTIONAL MANDATE.

DO YOU THINK THAT KANSAS MAY HAVE CONSTRUED THE U.S. SUPREME COURT T O REQUIRE THAT INSTRUCTION ?

IT IS VERY DIFFICULT TO SAY. I AM NOT SURE WHO MAKES THE DECISION IN KANSAS , AS TO AMENDING JURY INSTRUCTIONS.

YOU DON'T KNOW WHETHER I T IS THEIR SUPREME COURT.

WHETHER IT IS COURT OR COMMITTEE OR THE LEGISLATURE. BUT I DON'T REALLY THINK IT IS RELEVANT , CONSIDERING THAT KANSAS GOT THIS WRONG IN ITSDECISION OF KANSAS VERSUS CRANE BEFORE IT WENT TO THE SUPREME COURT. THEY WERE REVERSED , CONSIDERING THAT KANSAS GOT IT WRONG IN HENDRICKS BEFORE IT WENT TO THE UNITED STATES SUPREME COURT. I REALLY DON'T THINK WE SHOULD PLACE TOO MUCH DEFERENCE ON KANSAS'S COURT'S CONSTRUCTION OF THIS. THEY DO HAVE A HISTORY OF

YOU REFERRED TO CALIFORNIA VERSUS WILLIAMS. DOES CALIFORNIA HAVE THE SAME DEFINITION AS FLORIDA?

THE SAME TERMINOLOGY ABOUT VOLITIONAL CAPACITY , PREDISPOSITION, LIKELIHOOD , ALL OF THOSE KEY TERMS APPEAR IN ALL OF THOSE STATUTES. I DON'T THINK YOU CAN FIND SIGNIFICANT DIFPARENTHESES FROM ONE - - DIFFERENCES FROM ONE STATE TO THE NEXT , AS TO WHY ONE STATE WOULD NEED ADDITIONAL INSTRUCTION AS OPPOSED TO ANOTHER, AND THEREFORE THE WHITE CASE DECISION OF THE FIRST DISTRICT BE REVERSED, THAT THE INSTRUCTION WAS NOT NECESSARYAND THEY WERE WRONG, AND THAT THE RESULT IN THE SECOND DISTRICT , HALE , BE UPHELD, WHERE I T INCLUDED - - CONCLUDEDTHAT THE INSTRUCTION WAS NOT REQUIRED. THANK YOU.

CHIEF JUSTICE: TWO MINUTES. OKAY. THE FINAL ROUND. EYE FEEL LIKE A MARATHON.

LET

I FEEL LIKE A MARATHON.

LET ME ASK ONE QUESTION, HOW DOES YOUR ARGUMENT DIFFER FROM THE ARGUMENT MADE BY THE DEFENDANT IN THE CRANE CASE , BEFORE THE KANSAS SUPREME COURT WHICH WENT UP TO THE U.S. SUPREME COURT?

HOW DOES MY ARGUMENT DIFFER FROM

AS FAR AS THE INSTRUCTION.

YOU MEAN ON THE TRIAL LEVEL OR?

YOU

I MEAN

YOU ARE ASKING THAT WE IMPOSE AN ADDITIONAL ELEMENTTO THE JURY INSTRUCTION.

I AM ASKING THAT THE JURY INSTRUCTIONS BE CLARIFIED T O ADD IN THAT PARTICULAR SERIES .

HOW DOES THAT DIFFER FROM THE ARGUMENT MADE THAT REACHED THE KANSAS SUPREME COURT AND IT WAS LATER OVERTURNED OR VACATED BY THE UNITED STATES SUPREME COURT?

THEY WANTED TOGETS INABILITY TO CONTROL. WE THEY WANTED TOTALINABILITY TO CONTROL. THE U.S. SUPREME COURT SAID SERIOUS DIFFICULTY. THEY BROUGHT IT DOWN A

NOTCH.

MORE LIKELY, I F IT I S OVER 50 PERCENT THAT , THAT SATISFIES CRANE?

RIGHT , AND I WANT TO POINT OUT IN PAGE 7 OF MY INITIAL BRIEF THE STATE TALKS ABOUT THAT 87 PERCENT THAT DR . BENOIT GAVE. WELL , HE HAD TO ADMIT ON CROSS THAT HE USED, HE WAS WRONGWHEN HE DID HIS TESTS AND SCORED THINGS THAT HE SHOULDN'T HAVE AND SCORED THINGS THAT WERE WRONG RESPECT AND EVENTUALLY HE ADMITTED THAT, UNDER THE REVISED TEST , WE WOULD GET DOWN TO A 45 PERCENT RATE, SO THAT 8 7 PERCENT THAT HE TALKS ABOUT ON DIRECT , I MEAN , ON CROSS , HE BACKS AWAY. AND THEY DON'T HAVE.

WERE THERE ANY OTHERS THAT WENT OVER 50% SNEPT.

NO. I DIDN'T SEE ANY OTHERS , THAN IS WHY I KIND OF LEFT I T 45.

> WHAT WAS THE OTHER SEXUALLY VIOLENT ACT THAT THEY SAID HE WAS AT-RISK FOR?

THEY DON'T REALLY SAY. THEY JUST SAY , THE STATE JUST SAYS THAT HE IS AT-RISK TO COMMIT SEXUALLY VIOLENT ACTS IN THE FUTURE. THEY DON'T HAVE TO SAY. I MEAN THE FACT THAT DR . LUSK

WOULD FONDLING A WOMAN'S BREAST WITHOUT HER PERMISSION WOULD AND SEXUAL VIOLENT ACT?

YES. DR . LUSK SAID THAT , SINCE 1987 , HE HADN'T COMMITTED ANY SEXUALLY VIOLENT ACT , BUT THE STATE TRIED TO REACH IN AND

DID DR. LUSK KNOW ABOUTTHESE OTHER THINGS THAT WERE NOT CONVICTIONS , AND DIDN'T HE SAY THAT THIS MAN WAS NOT LIKE THROW COMMIT ANY SEXUALLY VIOLENT

RIGHT, WHICH TOOK AWAY THE HARMLESS ANALYSIS AND TOOK AWAY WESTERHEIDE. I SEE MY TIME IS UP.

CHIEF JUSTICE: WE THANK YOUALL FOR RESPONDING TO OUR QUESTIONS. THE COURT IS GOING TO TAKE ITS MIDMORNING RECESS FOR 15 MINUTES , BEFORE WE HEAR THE NEXT CASE. WE WILL STAND IN RECESS FOR 15 MINUTES.

MARSHAL: PLEASE RISE.