STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2010AP658

IN RE THE COMMITMENT OF PASCHALL LEE SANDERS:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

PASCHALL LEE SANDERS,

Respondent-Appellant.

On Notice of Appeal to Review an Order for Commitment and an Order Denying Postcommitment Relief, Both Entered in the Circuit Court for Milwaukee County, the Honorable Jeffrey A. Kremers Presiding

---

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

ELLEN HENAK
Assistant State Public Defender
State Bar No. 1012490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail: henake@opd.wi.gov

Attorney for Respondent-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Statutes

Other Statutes

OTHER AUTHORITIES CITED

ISSUE PRESENTED

> Did the circuit court misuse its discretion in denying the motion of Paschall Lee Sanders for a new trial in the interests of justice when the jury was not properly instructed about the element of serious difficulty in controlling behavior and the evidence that was presented clouded the issue regarding serious difficulty in controlling behavior?

The circuit court denied a postcommitment motion raising this issue.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Sanders welcomes the opportunity for oral argument if the court has questions not resolved by the briefs. Publication is warranted because this case is likely to clarify the jury instructions in commitment proceedings in Chapter 980 cases. *See* Wis. Stats. (Rule) 809.23(1)(a).

STATEMENT OF THE CASE AND FACTS

The state filed a petition on August 9, 2004 alleging that Mr. Sanders was a sexually violent person and should be committed pursuant to Wisconsin Statutes Chapter 980. (2). The case was tried to a jury on December 14 and 15, 2009. (61; 62)

At trial, the state presented the testimony of psychologist Dale Bespalec. Dr. Bespalec testified that he had diagnosed Mr. Sanders as having the mental disorders of paraphilia not otherwise specified and antisocial personality disorder. (61:120, 126). Dr. Bespalec also testified that he had concluded that Mr. Sanders was more likely than not to engage in acts of sexual violence in the future. (*Id*.:156).

Mr. Sanders presented the testimony of psychologists Susan Sachsenmaier and Shiela Fields. They both also diagnosed Mr. Sanders as having the mental disorders of paraphilia not otherwise specified and antisocial personality disorder. (62:32-33, 58-59). They testified, however, that they could not conclude to a reasonable degree of certainty that Mr. Sanders was more likely than not to engage in acts of sexual violence in the future. (*Id*.:13, 15, 58).

After the evidence was complete, this Court instructed the jury. (*Id*.:107-115). Among the jury instructions given was the pattern jury instruction, WIS JI-CRIM 2502, which sets forth what must be proven before the jury can find a person to be a sexually violent person. (*See id*.:109-112). Following deliberation, the jury found Mr. Sanders to be a sexually violent person (45) and the circuit court entered an order committing Mr. Sanders as a sexually violent person (46).

Notice of appeal was timely filed on March 10, 2010. (51). Mr. Sanders successfully moved in this Court for an order remanding the matter to the circuit court so that he could file a postcommitment motion.[1] (65; 71).

On June 25, 2010, Mr. Sanders filed a postcommitment motion in the circuit court seeking a new trial in the interests of justice. (68; 69). Mr. Sanders sought this relief on the ground that the jury was not properly instructed about the element of serious difficulty in controlling behavior and the evidence that was presented further clouded the issue regarding serious difficulty in controlling behavior. (*Id*.)

---

[1] Because the petition for commitment in this case was filed prior to August 5, 2006, the provisions of Wisconsin Statutes (Rule) 809.30 do not apply. 2005 WI Act 414 §§ 131, 132. Instead, the rules of civil procedure apply. ***State v. Treadway*****,** 2002 WI App 195, 257 Wis.2d 567, 651 N.W.2d 334.

On October 14, 2010, the circuit court, the Honorable Jeffrey A. Kremers presiding, denied the motion on the record (88) and subsequently entered an order denying the postcommitment motion (78). Pursuant to this Court's order of July 14, 2010, this case then was re-transmitted to this Court. (71).

Additional relevant facts will be included in the argument section of this brief.

ARGUMENT

This Court Should Grant Mr. Sanders a New Trial in the Interests of Justice Because The Jury was Not Properly Instructed on the Element of Serious Difficulty in Controlling Behavior and the Evidence Presented at Trial Further Clouded the Issue.

The central constitutional justification for allowing commitment of sexual violent persons is that they are *fundamentally different* from ordinary criminal recidivists. *See* ***Kansas v. Crane*****,** 534 U.S. 407 (2002)**;** ***Kansas v. Hendricks***, 521 U.S. 346 (1997); ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. Although the Wisconsin Supreme Court has held that the jury instructions in a sexually violent person case need not refer to a "serious difficulty in controlling behavior," *see* ***Laxton***, 254 Wis. 2d at 206, if the jury is instructed concerning a "serious difficulty in controlling behavior," that instruction must fully and fairly inform the jury of the law. *See* ***State v. Dix***, 86 Wis. 2d 474, 487, 274 N.W.2d 250 (1979).

WIS JI-CRIM 2502, the pattern instruction which was given to the jury in this case (*see* 62:109-112), does not correctly state the law regarding serious difficulty in controlling behavior. Instead, it makes internally inconsistent statements about the element of "mental disorder;" it fails to make clear that an offense history alone is insufficient to find

a "mental disorder;" and it fails to explain that a diagnosis from reference books and a criminal history are not enough to establish a legally-sufficient "mental disorder" and a serious difficulty in controlling behavior.

This Court may order a new trial in the interests of justice under Wisconsin Statutes § 752.35 when the real controversy was not fully tried because the jury instructions were incorrect. ***State v. Perkins***, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762. This Court therefore should order a new trial in this case.

A. WIS JI-CRIM 2502 incorrectly states the law regarding serious difficulty in controlling behavior and mislead the jury.

The validity of a jury's verdict rests upon the correctness and completeness of the instructions the court gives on the law. Thus, proper instruction of the jury is a crucial component of a jury's decision. Jury instructions are erroneous if, when viewed as a whole, they misstate the law or misdirect the jury on an issue. ***State v. Pettit***, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992); *cf.* ***Laxton***, 254 Wis. 2d at 208 (a new trial will be ordered if the jury instructions, as a whole, "misled the jury or communicated an incorrect statement of law"). Pattern jury instruction WIS JI-CRIM 2502, which was given to the jury in this case (*see* 62:109-112), does not correctly state the law regarding serious difficulty in controlling behavior.

Whether a jury instruction is appropriate is a matter of law which this Court reviews independently. ***State v. Ziebart***, 2003 WI App 258, 268 Wis. 2d 468, 480, 673 N.W.2d 369.

1. To be a sexually violent person, a person must have a volitional impairment that causes him or her to have serious difficulty in controlling his or her behavior.

Decisions in three leading cases involving challenges to the constitutionality of sexually violent person commitment laws establish that the core justification for committing sexually violent persons is that they are fundamentally *different* from ordinary criminal recidivists. *See* ***Crane*****,** 534 U.S. 407**;** ***Hendricks***, 521 U.S. 346; ***Laxton***, 254 Wis. 2d 185.

In ***Hendricks***, 521 U.S. at 350, 371, the United States Supreme Court upheld the Kansas sexually violent person statute as against a substantive due process challenge. Kansas law required that, to be committed, a person "suffer[] from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." ***Id***. at 352 (quoting Kan. Stats. Ann. § 59-29a02(a) (emphasis added)). The Court explained that the statute is narrowly drawn because it "requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." ***Id***. at 357 (emphasis added).

Subsequently, in ***Crane***, 534 U.S. at 409-15, the United States Supreme Court expanded and clarified this component of the civil commitment of sexually violent persons and clarified portions of its decision in ***Hendricks***. The Court concluded that ***Hendricks*** mandated "proof of serious difficulty in controlling behavior." ***Crane***, 534 U.S. at 413. The Court explained that such proof, "when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to *distinguish the dangerous sexual offender whose serious mental illness abnormality or disorder subjects him to civil commitment*

from the dangerous but typical recidivist convicted in an ordinary criminal case." ***Id***. (emphasis added).

Finally, in ***Laxton***, 254 Wis. 2d 185, the Wisconsin Supreme Court applied ***Crane*** to Chapter 980. The Court explained that, under ***Crane***, the focus is on the nexus between the mental abnormality and the level of dangerousness, and whether those requirements are sufficient to distinguish a dangerous sexual offender from the dangerous but typical recidivist." ***Laxton***, 254 Wis. 2d at 197-98. The Court noted that "***Crane*** holds that there must be proof of a mental disorder and a link between the mental disorder and the individual's lack of control." ***Id***. at 201. The Court then held that there need not be a "separate finding" on difficulty in controlling behavior, and that Chapter 980 satisfies the requirement for proof of lack of control because it "requires proof of a nexus between the person's mental disorder and dangerousness, which necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior." ***Id***. at 201-02.

Because the language of Chapter 980 "necessarily and implicitly" incorporates proof of lack of control, ***Laxton***, ***id.*** at 206, the Court held that it was not error for the circuit court to have used a jury instruction that did not refer in any way to the serious-difficulty-of-control requirement.[2] But the Court noted that, after the trial in ***Laxton*** and after the United States

---

[2] Some courts have held that the jury needs to be instructed on the serious-difficulty-of-control requirement. *See* ***Thomas v. State***, 74 S.W.2d 789 (Mo. 2002); ***In re Commitment of W.Z.***, 801 A.2d 205 (N.J. 2002); ***In re Detention of Barnes***, 658 N.W.2d 98 (Iowa 2003). But most courts that have addressed the issue have agreed with ***Laxton*** that no separate jury finding on the issue or jury instruction on the requirement is necessary. *See* ***Richard S. v. Capinello***, 589 F.3d 75, 83-84 (2d Cir. 2009) (collecting cases accepting both positions and adopting the majority view).

Supreme Court decided ***Crane***, the Criminal Jury Instruction Committee changed the pattern jury instruction to include a reference to "serious difficulty in controlling behavior." *See* ***Laxton***, 254 Wis. 2d at 204 n.14 (quoting WIS JI-CRIM 2502 (Special Release 2/2002)). Because the amended instruction was not used when Mr. Laxton was committed, the court did not "discuss the impact of the revised language" and did not "comment with either approval or disapproval of the revised language." ***Id***.

The Criminal Jury Instruction Committee did not change the pattern jury instruction in light of ***Laxton***, although the commentary in the footnotes indicates that, under ***Laxton***, the serious-difficulty-in-controlling-behavior requirement need not be conveyed to the jury because it is implicit in the other standards for commitment. WIS JI-CRIM 2502 n.8 (2007), at 10. Nevertheless, "the Committee decided to keep the ***Crane*** addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to "make explicit what is implicit in the statutory standard." WIS JI-CRIM 2502 n.8 (2007), at 10.

Making the serious-difficulty-in-controlling-behavior requirement explicit to the jury is prudent as well as helpful. As the cases establish, the key to the constitutionality of Chapter 980 in the realm of substantive due process is that there be a link between the person's mental disorder and the person's level of dangerousness in the form of a serious difficulty in controlling behavior that is sufficient to distinguish the person from the dangerous but typical recidivist. This minimal constitutional requirement logically makes the notion of "serious difficulty in controlling behavior" into the core component of sexually violent person status. It is not dangerousness or the likelihood of sexual violence *per se* that makes a person eligible for such status. Instead, it is the *difference* between the ordinarily dangerous sexual recidivist and those who are dangerous based upon a

risk that rises from some condition that puts their behavior beyond their control.

2. WIS JI-CRIM 2502 misleads juries because it does not correctly state the law regarding serious difficulty in controlling behavior.

WIS JI-CRIM 2502, which was given to the jury in this case (*see* 62:109-112), does not correctly state the law regarding serious difficulty in controlling behavior. The pertinent part of the jury instruction is the description of the element of "mental disorder." That portion of WIS JI-CRIM 2502, at 2, reads:

> 2. That (name) currently has a mental disorder.
>
> "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. You are not bound by medical opinions, labels, or definitions.

(Footnotes omitted).

a. WIS JI-CRIM 2502 is misleading because it contains contradictory language and fails to give a complete explanation of serious difficulty in controlling behavior.

The first problem with the pattern instruction is that it makes internally inconsistent statements about the element of "mental disorder." The first sentence correctly states a definition of "mental disorder" that largely tracks the provisions of Wisconsin Statutes § 980.01(2). It defines

"mental disorder" as requiring: (1) a condition affecting the emotional or volitional capacity that (2) predisposes a person to engage in acts of sexual violence. Compare WIS JI-CRIM 2502 with Wis. Stats. § 980.01(2). In addition, it sets forth the requirement that the condition cause "serious difficulty in controlling behavior" as ***Crane*** suggests. Unfortunately, however, the penultimate sentence of this paragraph directly contradicts this first sentence. That sentence says that *not* all persons who have a "mental disorder" are "predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior." WIS JI-CRIM 2502, at 2. Yet, as correctly explained in the first sentence, a person *cannot* have a mental disorder *unless* they are in fact predisposed to commit sexually violent offenses *and* in fact have serious difficulty in controlling behavior. This inconsistency is confusing and misleading and allows a jury to conclude that a person has a mental disorder even if the person does *not* have either a predisposition to commit sexually violent offenses or a serious difficulty in controlling his behavior.

Although the Jury Instruction Committee cites ***State v. Post***, 197 Wis. 2d 252, 306, 541 N.W.2d 105 (1995) as the source of the language in the penultimate sentence, *see* WIS JI-CRIM 2502 n.10, the language is taken out of context and is therefore misleading. Although the Wisconsin Supreme Court in ***Post***, 197 Wis. 2d at 306, stated that "[n]ot all persons who commit sexually violent crimes can be diagnosed as suffering from mental disorders, nor are all persons with a mental disorder predisposed to commit sexually violent offenses," the Court was discussing the relationship between the *medical or psychological* concept of "mental disorder," as set forth in the DSM-IV, and the *legal* definition set forth in § 980.01. The Court was specifically dealing with the "argument that a 'mental disorder' cannot be a sufficient condition for commitment" for which "the dissent cite[d] testimony that 'mental disorders are the broad big umbrella that all of us could fall under.'" ***Post***, 197 Wis.2d at 306. Thus, correctly read, what the Court was saying in ***Post***

was that not all persons diagnosed with a mental disorder, *as that term is used in psychology*, would meet the definition of someone with a mental disorder, *as that term is used in Chapter 980.* The use in the jury instruction of this language is too broad, fusing and confusing the very terms that the Wisconsin Supreme Court was attempting to separate in ***Post***. Nor is the problem solved by telling the jury that it is not bound by medical terms.

b. WIS JI-CRIM 2502 should give a full and accurate explanation of the important concept of serious difficulty in controlling behavior.

The second problem with the jury instruction is that it fails to make clear enough that a person's offense history is not, by itself, sufficient to find a "mental disorder." Past misconduct is not enough for commitment without a link to a mental disorder. *See* ***Addington v. Texas***, 441 U.S. 418 (1979). But this requirement is meaningless if past misconduct equates with mental disorder. "At some level, virtually all of those who choose to commit criminal acts, especially those who commit unusually violent or otherwise abhorrent crimes (like sexual assaults on children) can be considered 'abnormal.'" Carol S. Steiker, ***Forward: The Limits of the Preventative State***, 88 J. Crim. L & Criminology 771, 786 (1998). Although the jury instruction states that "[n]ot all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder," the instruction fails to give much guidance on the point. Although many juries also are instructed, following the definitional portion of the findings, that evidence "that (name) committed other sexually offenses before committing" the offense on which the petition is based, "alone is not sufficient to establish that (name) has a mental disorder, WIS JI-CRIM 2502 at 3, that instruction is only given when other offenses have been introduced into evidence. There is no instruction

that the offense on which the petition is based is, by itself, insufficient to find a "mental disorder."

Without such guidance, juries are likely to conflate the commission of sexually violent acts with the inability to control one's self. But commission of an act and the inability to control one's self are not the same thing. A person can commit one or more sexually violent acts by choosing not to control inclinations, motivations, or predispositions. Many people, criminal and non-criminal, have inclinations, predispositions, or urges to commit unlawful acts. Of course, having those inclinations is not against the law; what is against the law is acting on them. Whether to have an inclination is not a choice but people generally choose their response to an inclination. A person who cannot be deterred by threat of punishment, by conscience, or by empathy because he lacks the *ability* to control his response is very different from someone who merely ignores these strictures. To say that someone is unlikely to be deterred is therefore not the same thing as saying that he cannot control himself and, unfortunately, prisons are replete with people who chose to ignore consequences, conscience, or empathy. Likelihood of deterrence therefore is not the same as serious difficulty controlling behavior. If it were, then dangerousness alone, in the form of risk of reoffense, would be sufficient for commitment, *all* dangerous sexual offenders could be committed, and there would be no need for the requirement for commitment that, as identified in ***Crane,*** there be serious difficulty controlling behavior. *See* Daniel F. Montaldi, ***The Logic of Sexual Predator Status in the United States of America***, 2 Sexual Offender Treatment 1-28 (2007), at 2-3.[3]

The centrality of the concept of serious difficulty in controlling behavior flows from the case law's distinction

---

[3] Sexual Offender Treatment is an online peer-reviewed journal. The issue cited above is available at http://www.sexual-offender-treatment.org/1-2007.html and the article is at http://www.sexual-offender-treatment.org/57.html.

between a narrow class of "dangerously impaired" sex offenders and a larger "typical" class of dangerous offenders who chose not to control themselves. Given this distinction, the logical and legal default explanation for someone's past crimes and current dangerousness, in the absence of more than the crimes and the dangerousness, must be that the person chooses not to control himself. As noted above, the United States Supreme Court in ***Crane***, 534 U.S. at 413, there are "typical recidivists" who, although "dangerous," are unlike sexually violent persons, and "are perhaps more properly dealt with exclusively through criminal proceedings." These typical recidivists must be distinguished from sexually violent persons "lest civil commitment become a mechanism for retribution or general deterrence." ***Id***. at 412. Essentially, this distinction requires us to regard persons predisposed to commit crimes as acting voluntarily when they commit their crimes *unless proven otherwise*. The law therefore presumes that the "typical" offender does *not* have serious difficulty controlling his behavior and can obey the law, regardless whether he repeatedly fails to exercise his ability to do so.

Similarly, the law correctly presumes, even in the case of a sexual recidivist, that the person is not impaired. As the WIS JI-CRIM 2502 at 4 correctly states, "The law presumes that (name) is not a sexually violent person. Furthermore, (name) does not have to prove anything." Because of this presumption, a history of sexual offending cannot itself be sufficient evidence to establish that the person has serious difficulty controlling his behavior. Because every person in the "typical" class of repeat offenders has a history of offending, and because the presumption requires the default view that the person is capable but unwilling to control his behavior, something more than a history of offending is necessary to overcome the presumption. Thus, pointing to a person's failure to stop offending after punishment or to suggest that his past behavior is the best indicator of his future behavior is not sufficient because it does not

distinguish the typical offender from the narrow class covered by Chapter 980.

c. WIS JI-CRIM 2502 should explain that a diagnosis from reference books together with a criminal history is not enough to establish a legally-sufficient "mental disorder" and a serious difficulty in controlling behavior.

The third problem with the instruction is that it does not explain the need for more than a diagnosis from the American Psychiatric Associations' ***Diagnosis and Statistical Manual of Mental Disorders*** (4th ed., text rev. 2000) ("DSM-IV-TR"), or similar reference books, and a criminal history to establish a *legally-sufficient* mental disorder and the required serious difficulty in controlling behavior. The need to distinguish between typical offenders (who cannot be committed) and dangerously impaired offenders (who can be committed) means that the "mental disorder" needed for commitment cannot be established simply by arriving at a generally accepted psychological diagnosis based on a person's record of sexual offenses, with "serious difficulty controlling behavior" functioning as an alternative label for the diagnosis in legal language. Montaldi, ***The Logic of Sexually Violent Predator Status***, at 2, 10. This need is clear from the DSM-IV-TR, at xxxiii, the standard reference used by mental health professionals in making a diagnosis, which explicitly warns against using any particular diagnosis to conclude that an individual is unable to control his behavior. The DSM-IV-TR specifically states that "[n]onclinical decision makers" should be cautioned that a diagnosis of a DSM mental disorder does not carry any necessary implications regarding impairment:

> …[T]he fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individuals' degree of control over the behaviors that may be associated with

> the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

Id.

In fact, the question to be decided in a Chapter 980 case is whether there is convincing evidence of "serious difficulty" that shows the person has a "mental disorder," not whether the person has a mental disorder that shows serious difficulty. Only the showing of serious difficulty proves that the offender is dangerous because of his volitional or emotional impairment as opposed to his dangerousness arising from an enduring desire for sexual offending or an attitude that is dismissive of law and the rights of others. Montaldi, ***The Logic of Sexually Violent Predator Status*** at 10.

In addition, the mere likelihood that the person will engage in sexual violence in the future is not the primary issue in a Chapter 980 case. Assessing the individual's dangerousness based primarily on reconviction rates in samples of offenders differentiated only by type of crime and not by the psychological reason for offending is insufficient because it fails to differentiate between the risks created by those ignoring the law as opposed to those having serious difficulty controlling behavior. ***Id***. at 2. While a history of offending obviously shows *some* risk of future offense, the history by itself does not distinguish between the person ignoring the law and the person who has serious difficulty controlling his behavior such that he remains within it.

d. A more accurate WIS JI-CRIM 2502 could avoid these problems.

In short, WIS JI-CRIM 2502, which was given to the jury in this case, fails to fully and accurately advise the jury of the meaning of the requirement that a person have serious

difficulty in controlling behavior and of the evidence needed to establish it. It fails to specify the need for more evidence than a diagnosis under the DSM-IV-TR and a criminal history in order to prove a mental disorder exists, including proof of the required serious difficulty in controlling behavior. A more complete and accurate instruction would replace the current language regarding element two (mental disorder). This proposed instruction, in which deletions from the original are show by strikethroughs and the additions are show in italics, would read something like this:

> 2. That (name) currently has a mental disorder.
>
> "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence ~~and~~ *to such a degree that it* causes serious difficulty in controlling *(his) (her)* behavior.
>
> *[New paragraph:] Evidence has been submitted that (name) has committed one or more sexually violent offenses. This evidence alone is not sufficient to establish that (name) has a mental disorder.* Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. ~~Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior.~~ *Further, not every person who has engaged in one or more sexually violent offenses in the past has a condition affecting (his) (her) emotional or volitional capacity, a predisposition to engage in acts of sexual violence, or serious difficulty in controlling (his) (her) behavior.*
>
> *[New paragraph:]* You are not bound by medical opinions, labels, or definitions. Before you may find that (name) has a mental disorder, you must be satisfied beyond a reasonable doubt from all of the evidence in the case that (he) (she) has a condition that causes (him) (her) to have serious difficulty in controlling behavior to

> a degree that distinguishes (him) (her) from ordinary offenders who are likely to commit new crimes.

An instruction such as this one would correctly and completely advise the jury about the requirements for finding a mental disorder under Chapter 980.

B. The giving of the misleading pattern jury instruction and the testimony of the experts resulted in the real controversy not being tried and Mr. Sanders therefore is entitled to a new trial in the interests of justice.

As already noted above, the current version of the pattern jury instruction, WIS JI-CRIM 2502, was given in this case. Although trial counsel's failure to object to this instruction at the jury instruction conference or suggest a better version ordinarily constitutes a waiver of error in the proposed instructions,[4] s*ee* Wis. Stats. § 805.13(3), this Court may order a new trial in the interests of justice under Wisconsin Statutes § 752.35 if it determines that the real controversy was not fully tried. One ground for finding that the real controversy was not tried is that the jury was incorrectly instructed. ***Perkins***, 243 Wis. 2d at 167 (deficiencies in the jury instructions resulted in controversy not being fully tried and in a new trial); ***State v. Harp***, 161 Wis. 2d 773, 782, 469 N.W.2d 210 (Ct. App. 1991); *see also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 22, 456 N.W.2d 797 (1990) (discretionary reversal power may be exercised where a jury

[4] Ordinarily, if an issue is waived, it must be raised by arguing that trial counsel was ineffective for failing to make the objection. But "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Because Mr. Sanders argument is relatively novel in Wisconsin, the law and counsel's duty were not clear, especially as trial counsel relied upon the standard pattern jury instructions. Thus, a claim of ineffective assistance of counsel is inappropriate.

instruction "obfuscates the real issue or arguably caused the real issue not to be tried…"). It is not necessary to consider whether a retrial would probably have a different result when deciding whether to grant a new trial on the grounds that the real controversy has not been fully tried. ***Harp***, 151 Wis. 2d at 779.

1. The testimony of the experts suggested a jury could find a legally-sufficient "mental disorder" based upon criminal history.

The incorrect instruction misled the jury and clouded the crucial issue of whether Mr. Sanders has a mental disorder and, in particular, whether he has serious difficulty in controlling behavior. As noted above, the inconsistent language explaining "mental disorder" incorrectly told the jury that it could find Mr. Sanders had a mental disorder even if the jury concluded that he was *not* predisposed to commit sexually violent offenses or that he did *not* have serious difficulty in controlling behavior. When coupled with the instruction's failure to state explicitly that none of the three parts of the full and correct definition of mental disorder may be shown by offense history alone, the inconsistent explanation of mental disorder allowed the jury to use Mr. Sander's offense history alone to conclude that he has a predisposition or has serious difficulty controlling his behavior. This situation occurred because the inconsistency of the definition of mental disorder allowed the jury to treat the issues of predisposition and serious difficulty controlling behavior as issues separate from, and not integral to, the finding that Mr. Sanders has a mental disorder.

The deficiencies in the jury instruction were compounded here where the key issue was the effect of aging on Mr. Sanders. None of the experts testified concerning the effect of this abatement on Mr. Sanders's ability to control his behavior. Instead, they testified in generalities. In discussing the diagnoses of antisocial personality disorder and paraphilia not otherwise specified, for example, Dr. Sachsenmaier

merely testified that both conditions can abate over time. (62:34; *see also id*:72-73 (similar testimony from Dr. Fields)).

In addition, the key basis for these expert conclusions concerning diagnosis and risk assessment was Mr. Sanders's criminal record, which invited the jury to improperly conflate offense history and mental disorder. Dr. Bespalec's diagnosis of paraphilia not otherwise specified was based upon Mr. Sanders's "repeated acts of sexual assault" and the details of them (61:122), just as Dr. Sachsenmaier's diagnosis rested on his sexual assaults (62:32). Dr. Bespalec's diagnosis of antisocial personality disorder was based on "a number of things in his history and difficulty conforming to rules, multiple criminal behavioral convictions and arrests." (61:127) just as Dr. Field's diagnosis was based upon his "series of non-sexual offenses all through his adolescence and into his adulthood, in addition to the two violent sexual offenses that occurred in 1974, one day apart" (62:59).

In addition, all of the expert evidence presented at trial concerning the effect of these diagnoses on emotional or volitional capacity compounded the jury's tendency to mistakenly diagnosis of a legally-sufficient mental disorder with criminal history. Dr. Bespalec testified in the bifurcated fashion common in Chapter 980 trials, discussing first his diagnosis of mental disorder using the DSM (whose definitions of mental disorder, as noted above, differ from the legal requirements for a mental disorder) (61:120-31), and then his opinion regarding risk based upon actuarial samples of sex offenders (*id*.:141-156). Dr. Bespalec, however, never said that this combination of factors currently created serious difficulty for Mr. Sanders in controlling his behavior.

Instead, the two separate parts of his testimony are joined with cursory and inaccurate discussions about whether the DSM diagnoses are conditions affecting Mr. Sanders's emotional or volitional capacity. (*See id*.:129). When asked whether paraphilia not otherwise specified affected Mr. Sanders's emotional or volitional capacity, Dr. Bespalec

noted that a mental disorder was different from a diagnosis and that

> the paraphilia[,] goes along with the second piece of his diagnosis, which is antisocial personality disorder. I think those two things in combination rise to the level of meeting criteria under Chapter 980 of being a mental disorder. Because I think in many ways you can kind of think of paraphilia as, to use a rough analogy, a gas pedal. It kind of moves them forward and the antisocial personality disorder is sort of a lack of brakes that say, we don't go there.

(*Id.*:125).

Dr. Sachsenmaier, testifying on behalf of Mr. Sanders, similarly testified in this inadequate bifurcated fashion, although her testimony concerning risk came before her testimony on diagnosis. (62:10-43). She stated that both paraphilia not otherwise specified and antisocial personality disorder together "would cause him serious difficulty in controlling his behavior," suggesting that these disorders naturally did so, but gave no further explanation. (*Id.*:34). This testimony was somewhat at odds with her testimony that "he can control his behavior," although she also noted that when out of the institution "he failed to control that." (*Id.*:44).[5]

Dr. Fields, who also testified on behalf of Mr. Sanders, did so in the same confusing and inadequate bifurcated fashion. (*Id.*:58-61, 68-85). Dr. Fields, however, never was asked or testified directly concerning whether Mr. Sanders's DSM diagnoses would give him serious difficulty in

---

[5] Dr. Sachsenmaier also testified of Mr. Sanders that "his behavior for five years has been good," that the people in the prison drug and alcohol program had "described him as a changed man who was a model patient in their facility, and that it was true he did not accumulate "much in the way of conduct problems while he's been institutionalized." (*See id.*:34-35). These facts suggest that, in some circumstances at least, Mr. Sanders can control his behavior.

controlling his behavior. Her direct testimony on the issue of control was that his ability to behave while institutionalized and his being complimented as a good patient in the Wisconsin Resource Center "does tell us that he is able to perhaps not even control, but just change over time." (*Id*.:74).

As for the experts' discussion of risk, that discussion further clouded the notion of serious difficulty in controlling behavior because it failed to distinguish between sex offenders with serious difficulty controlling behavior and other, "typical" sex offenders. The actuarial instruments that the experts used exacerbated this problem because they did not separate out sex offenders with serious difficulty controlling behavior from other, ordinary sex offenders.

For example, Dr. Bespalec testified that "[p]eople who score higher on the RRASOR tend to have higher levels of sexual deviancy, as opposed to necessarily just antisocial behavior" (61:144), suggesting that the sample on which the RRASOR itself was developed included many people who did not have serious difficulty in controlling behavior. This problem is not just linked to the RRASOR because Dr. Bespalec also testified that "some of the other [actuarial] instruments, they also tap more of the anti-social part" (*id*.:145).

2. The lack of focused testimony exacerbated the jury's natural tendency to find a legally-sufficient "mental disorder" based upon criminal history.

The research on age, which all of the experts testified suggested that dangerousness often abates (62:34, 72-73), demonstrates the need for a finding of "mental disorder" based on more than just criminal history. The inadequacies of the jury instruction made it harder for the jury to to sort through and understand the lack of accuracy, weight, and probative value of the evidence on mental disorder. Moreover, if the expert testimony had focused carefully and

specifically on the impairment and serious difficulty of controlling behavior questions, the jury would at least have had a clear evidentiary basis for making a decision.

The need for helpful and focused testimony is heightened because jurors likely assume that virtually all sex offenders are highly dangerous and have mental disorders that involve little ability to control sexual impulses. Montaldi, ***the Logic of Sexually Violent Predator Status*** at 11. However common this view, it lacks a scientific basis. ***Id.*** at 13; Cynthia C. Mercado, Robert F. Schopp & Brian Bornstein, ***Evaluating Sex Offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Notion of Volitional Impairment***, 10 Aggression and Violent Behavior 289, 291 (2005) ("the fact that some individuals choose to act repeatedly upon aberrant desires provides no evidence of volitional impairment"). As Montaldi puts it:

> Juries do not need expensive evaluators telling them the obvious fact that someone who committed crimes did not control himself enough to avoid committing crimes. Nor do they really need experts to say that a substantial percentage of offenders with multiple past offenses are apt to re-offend…What fact finders need in [a sexually violent predator] trial is a mental health expert who can help them determine whether an obviously risky offender is "beyond control" in a manner that makes him stand out from other offenders who have sexually recidivated.

The Logic of Sexually Violent Predator Status at 4.

Instead of focused testimony, the jury in this case heard about "mental disorder" diagnoses that satisfied *psychological* definitions without hearing a full and accurate *legal* definition of the term. As a result, the real controversy was not tried.

CONCLUSION

This Court should reverse the order denying Mr. Sanders's postcommitment motion and should remand the matter for a new trial.

Dated this __ day of December, 2010.

Respectfully submitted,

_____
ELLEN HENAK
Assistant State Public Defender
State Bar No. 1012490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail henake@opd.wi.gov

Attorney for Respondent-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,897 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ___ day of December, 2010.

Signed:

_____

ELLEN HENAK
Assistant State Public Defender
State Bar No. 1012490

Office of State Public Defender
735 N. Water Street
Milwaukee, WI 53202-4116
(414) 227-4300
henake@opd.wi.gov

Attorney for Respondent-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this __ day of December, 2010.

Signed:

_____

ELLEN HENAK
Assistant State Public Defender
State Bar No. 1012490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail henake@opd.wi.gov

Attorney for Respondent-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ___ day of December, 2010.

Signed:

ELLEN HENAK
Assistant State Public Defender
State Bar No. 1012490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
henake@opd.wi.gov

Attorney for Respondent-Appellant