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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

REPLY BRIEF OF RESPONDENT-APPELLANT

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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.

WIS JI-CRIM 2502, as the state admits, *see* Brief of Petitioner-Respondent at 8-9, makes internally inconsistent statements about the element of "mental disorder." Invoking the idea that the instruction should be viewed as a whole does not solve this problem as no words, phrases, or sentences resolve these internally inconsistent statements for the jurors. Despite the state's assertions to the contrary, the instruction also fails to clarify that prior offenses do not automatically equate with a "mental disorder," and that a medical diagnosis is not the same as meeting the legal standard. Thus, this Court should grant Mr. Sanders a new trial on the basis that 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 76.

As the state concedes, *see* Brief of Petitioner-Respondent at 3-4, 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. Although the state suggests that this issue would be best dealt with as an ineffective assistance of counsel claim, *see id*., the state fails to argue that that claim is the only way to bring these issues to the Court. Indeed, the state could not do so. That an issue might be raised by a claim of ineffective assistance of counsel does

not mean that it *must* be raised and analyzed that way. An issue may be framed and analyzed under an interest of justice standard even if the claim was not preserved by a proper objection made at trial. ***State v. Romero***, 147 Wis. 2d 274, 2781, 432 N.W.2d 899 (1988); *see also* ***State v. Williams***, 2006 WI App 212 ¶¶ 14-17, 296 Wis. 2d 834, 723 N.W.2d 719; ***State v. Harp***, 161 Wis. 2d 773, 776-79, 469 N.W.2d 210 (Ct. App. 1991).

In addition, as the state admits, "the two sections of the [jury] instruction [concerning mental disorder] appear contradictory" and that the problem occurs because "the first definition of mental disorder is referring to the legal standard, while the latter explanation is a reference to the medical concept of a mental disorder." The state, however, believes that viewing the statute as a whole and in context solves the problem. *See* Brief of Petitioner-Respondent at 8-9. But, for the statute as a whole to correct the misapprehension, there either needs to be clearly clarifying language or some language that explains the different usages of the terms. To be correct, some other phrase, sentence, or paragraph within it should resolve the conflict. The state points to no other such section of the jury instruction as clarification or correction and Mr. Sanders can find none. Instead, the state merely suggests that a requirement that Mr. Sanders be found "dangerous" somehow resolves the matter of whether he has a "mental disorder" as the term is defined legally (as opposed to medically.) It does not.

Moreover, despite the state's assertion to the contrary, the jury instruction fails to make it clear that offense history cannot simply equate to "mental disorder." Although the state attempts to point to a portion of the jury instruction that states otherwise, that section is not always given. *See* WIS JI-CRIM

2502 at 3. The section is in brackets, *see id*., which indicates that it is optional and only given under certain circumstances.

Finally, ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, does not settle this question as the state would have this Court believe. *See* Brief of Petitioner-Respondent at 11-12. The issue at bar, unlike the issue in ***Laxton***, ***id***., ¶ 24, is not whether due process requires that the jury instructions say that the state must prove "that he has a mental disorder that involves serious difficulty for him in controlling his dangerous behavior." More important, the jury instruction used in Laxton's case was not the one used in this case as to mental disorder did not contain "language linking the mental disorder to the person's difficulty in controlling behavior." ***Id***., ¶ 24 n.11.

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 March, 2011.

Respectfully submitted,

_____
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CERTIFICATION AS TO FORM/LENGTH

I certify that this reply 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 reply brief is 761 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 March, 2011.

Signed:

_____

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