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INSTRUCT THE JURY: *CRANE*'S "SERIOUS DIFFICULTY" REQUIREMENT AND DUE PROCESS

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I. INTRODUCTION

Since 1996, when states began passing Sexually Violent Predator (SVP) laws in earnest, the cost of committing SVPs has been ever increasing. In 1998, the estimated annual cost of committing SVPs, exclusive of new facility construction, exceeded $5,000,000.[1] According to a 1998 Washington State Institute for Public Policy report, the State of Iowa, for example, planned to spend over one million dollars in the first year after passage of its SVP law and over two million in the second year for housing and treatment of six to eleven commitments.[2] In addition, Iowa expected to spend over $600,000 during the same two-year period for legal services associated with those commitments.[3] In 1998, most of the states with SVP laws anticipated spending an average of over $90,000 per offender for housing and treatment alone.[4] These amounts are all in addition to the cost of incarceration for the original criminal sex offense. These costs will continue to escalate, because more states have passed SVP laws, and thus will civilly commit more offenders than the 523 in 1998.[5] One reason for this ever expanding number of SVP commitments is trial courts' continued reliance on the overly broad standard for SVP commitments set forth in *Kansas v. Hendricks*,[6] and the refusal of trial courts to

1. *See* ROXANNE LIEB & SCOTT MATSON, WASH. STATE INST. FOR PUB. POLICY, SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE 10–11 tbls.12, *available at* http://www.wa.gov/wsipp/crime/pdf/sexcomm_98.pdf (Sept. 1998) (providing charts containing the numbers of committed sexual predators in states with SVP laws and the estimated costs of such commitments). *Id.* at 11 tbl.2.

2. *Id.* Iowa enacted its SVP law in 1998. *Id.* at 10 tbl.1.

3. *Id.*

4. *Id.* at 10–11 tbls.1–2.

5. ROXANNE LIEB & SCOTT MATSON, WASH. STATE INST. FOR PUB. POLICY, SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE 10 tbl.1, *available at* http://www.wa.gov/wsipp/crime/pdf/sexcomm_98.pdf (Sept. 1998).

6. 521 U.S. 346 (1997).

give a jury instruction on "serious difficulty in controlling behavior"[7] in accordance with the narrower commitment standard from *Kansas v. Crane*.[8] Use of the proper *Crane* standard on volitional impairment arguably would reduce the number of SVP commitments and the ensuing inpatient cost to the states.

This Article advances the position that *Kansas v. Crane* requires, at a minimum, that trial courts, upon defendants' requests, instruct juries that the law under *Crane* requires a finding of "serious difficulty in controlling behavior" before the state can civilly commit a defendant as an SVP. Especially in states that advance criminal procedural safeguards for civil SVP commitments, a trial court's failure to give a requested "serious difficulty" instruction is a violation of the defendant's right to a fair trial under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[9] Alternatively, even a state court's narrow interpretation of *Crane* should require that trial judges specifically inform juries what language in the particular state SVP law implies "serious difficulty in controlling behavior," so that jurors can tie the constitutionally-mandated finding to the particular statutory language. Many state courts read *Crane* as not requiring a separate finding of "serious difficulty," rendering a specific jury instruction on this issue unnecessary. Where states' highest courts interpret *Crane* in this manner, the clear trend has been to hold that, because other language within the state's SVP statute implies "serious difficulty," a jury instruction on "serious difficulty" is unnecessary. However, in *Crane*, the Justices built upon the law of *Kansas v. Hendricks*[10] by adding an element to what the government must prove, applying whatever standard of evidentiary proof the

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7. "It is enough to say that there must be proof of serious difficulty in controlling behavior." *Id.* at 413.

8. 534 U.S. 407 (2002).

9. The Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fifth Amendment protects individuals against the power of the federal government. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Bill of Rights limits federal power but does not limit state power). The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law" and protects individuals against the power of state governments. U.S. CONST. amend. XIV, § 1.

Courts have generally interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments identically so that procedural due process rights enjoy the same protection in federal and state criminal trials. *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1349 (1990) ("Theories concerning the interpretation of the Fourteenth Amendment's due process clause apply, of course, in almost identical fashion to the interpretation of the same language in the Fifth Amendment.").

The Due Process Clause of the Fifth Amendment protects the right to a fair trial in a federal court. *See* United States v. Agurs, 427 U.S. 97, 107 (1976) ("We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution."). The Due Process Clause of the Fourteenth Amendment protects the right to a fair trial in a state court. *See* Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting) ("And a fair trial, after all, is what the Due Process Clause of the Fourteenth Amendment above all else guarantees."); Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in judgment) (noting the "responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment"); Lisenba v. California, 314 U.S. 219, 236 (1941) (opining that adoption of rules by states cannot "work [ ] a deprivation of the prisoner's life or liberty without due process of law").

10. 521 U.S. 346 (1997).

state jurisdiction employs. Like *Hendricks*, the *Crane* case originated in the State of Kansas where the evidentiary standard is "beyond a reasonable doubt."[11]

At least sixteen states have enacted SVP statutes. These states delay commitment until after completion of the defendant's sentence for a prior criminal conviction.[12]

At least one commentator has noted:

> While the Acts are politically popular, they carry with them significant potential for abuse. The suspension of the, "great safeguards which the law adopts in the punishment of crime and the upholding of justice," and the use of civil commitment against criminally responsible individuals is an assumption of power that ought to concern us greatly.[13]

Proponents of such commitments typically cite the extremely dangerous nature of such offenders and argue that existing civil and criminal proceedings are inadequate to address the risks these offenders present to society. Opponents assert that treatment is not available to such offenders and, when provided, it is often ineffective, release is infrequent, and such commitment may serve as a de facto life sentence. *Crane* provides opponents an additional reason to be skeptical of post-criminal sentence civil commitment laws for sexually violent predators. Juries do not receive proper instructions on the correct law for involuntary commitment of sexually violent predators under *Crane*. This lack of instruction denies sex offenders constitutional guarantees of due process and fairness, because juries do not know the required degree of volitional control for commitment. In short, under *Crane*, due process and fairness demand that trial judges inform juries that they cannot civilly commit respondents as SVPs absent a finding that respondents have "serious difficulty" controlling their dangerous behavior.

Part II of this Article presents the development of "serious difficulty" as a necessary element of proof in sexually violent predator commitment hearings from *Hendricks* through *Crane*. Part III discusses various states' interpretations of the "serious difficulty" requirement and describes the trend toward not giving "serious

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11. KAN. STAT. ANN. § 59-29a07(a) (1994) ("The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator."). *See also Crane*, 534 U.S. at 416 ("that act permits the civil detention of a person convicted of any of several enumerated sexual offenses, if it is proven beyond reasonable doubt.").

12. ARIZ. REV. STAT. ANN. §§ 36-3701 to -3713 (West 2003 & Supp. 2004); CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 1998 & Supp. 2004); FLA. STAT. ANN. §§ 394.910–.931 (West 2002 & Supp. 2004); 725 ILL. COMP. STAT. ANN. 207/1-99 (West 2002 & Supp. 2004); IOWA CODE ANN. §§ 229A.1–.16 (West 2000 & Supp. 2004); KAN. STAT. ANN. §§ 59-29a01 to -29a15 (1994 & Supp. 2003); MASS. GEN. LAWS ANN. ch. 123A §§ 1–16 (West 2003 & Supp. 2004); MINN. STAT. ANN. §§ 253B.185 (1)–(6) (West 2003 & Supp. 2004); MO. ANN. STAT. §§ 632.480–.513 (West 2001 & Supp. 2004); N.J. STAT. ANN. §§ 30:4-27.24–.29 (Supp. 2004); N.D. CENT. CODE §§ 25-03.3-01–.23 (2002); S.C. CODE ANN. §§ 44-48-10 to -170 (West 2003); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.150 (Vernon 2003 & Supp. 2004); VA. CODE. ANN. §§ 37.1-70.1–.16 (Supp. 2004); WASH. REV. CODE. ANN. §§ 71.09.010–.902 (West 2002 & Supp. 2004); WIS. STAT. ANN. §§ 980.01–.13 (West 2002 & Supp. 2004).

13. David J. Gottlieb, *Preventative Detention of Sex Offenders*, 50 U. KAN. L. REV. 1031, 1032 (2002) (quoting Cooper v. Oklahoma, 517 U.S. 348, 366 (1996)).

difficulty" jury instructions. Part IV argues that, in states that have adopted the criminal standard of proof, a trial court's failure to give a "serious difficulty" jury instruction in SVP commitment proceedings violates the Due Process Clause of the Constitution and Part V discusses practical reasons why a trial court's failure to properly and explicitly instruct the jury on *Crane*'s "serious difficulty" requirement intrudes further upon a respondent's due process right to a fair trial. Part VI offers the State of Ohio's SVP Act as an example of an efficient, well-intentioned SVP commitment law that, like other states' laws, could benefit from the suggested uniform jury instruction on the "serious difficulty" requirement of *Crane*.

II. DEFINING A SEXUALLY VIOLENT PREDATOR: THE EVOLUTION OF "SERIOUS DIFFICULTY" AS AN ELEMENT OF PROOF

A. Kansas v. Hendricks*: The Beginning*

In *Kansas v. Hendricks*,[14] the Supreme Court set forth the substantive due process requirements of statutes that civilly commit sexual offenders. The Kansas Sexually Violent Predator Act, dating back to 1994,[15] provides for the civil commitment of a person who "has been convicted of or charged with a sexually violent offense," and who "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."[16] Leroy Hendricks, the first person civilly committed under the Act, had served a ten-year criminal sentence for taking "indecent liberties" with two thirteen-year-old boys.[17] During his incarceration, doctors diagnosed Hendricks with pedophilia, a mental abnormality involving a lack of control component.[18] Hendricks stated he could not "control the urge" to molest children.[19] Appealing his commitment to the Kansas Supreme Court, Hendricks alleged, *inter alia*, substantive and procedural due process violations.[20] The Kansas Supreme Court, in reversing his commitment based on the substantive due process claim, held that the pre-commitment condition of a "mental abnormality" under the Kansas Act did not meet the court's prior substantive due process standard of "mental illness."[21] Kansas appealed the reversal to the United States Supreme Court. The Court found the statute sufficiently narrow to meet due process requirements, because the statute restricted commitment to those individuals who have "[committed] past sexually violent behavior and [have] a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."[22] The Court concluded that a finding of dangerousness alone is an insufficient ground for civil

14. 521 U.S. 346, 358 (1997).
15. KAN. STAT. ANN. §§ 59-29a01 to -29a15 (1995).
16. *Id.* § 59-29a02.
17. *Hendricks*, 521 U.S. at 355.
18. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 528 (4th ed. 1994) (listing as a diagnostic criterion for pedophilia that an individual have acted on or been affected by "sexual urges" toward children).
19. *Hendricks*, 521 U.S. at 360.
20. *Id.* at 356.
21. *Id.* at 350.
22. *Id.* at 357-58.

commitment. The additional required proof of a "mental abnormality"[23] prevented the statute from being unconstitutional, because the requisite showing limited civil commitment to those "who suffer from a volitional impairment rendering them dangerous beyond their control."[24]

In upholding the statute, the Court gave the states broad discretion to define mental abnormality and to determine whether a violent sex offender who has completed his[25] prison sentence poses a continuing danger to others.[26] However, the Court provided no guidance on the degree of volitional impairment necessary to trigger civil commitment in the SVP context.

B. Kansas v. Crane*: The "Serious Difficulty" Standard*

Five years after *Hendricks*, the Supreme Court decided *Kansas v. Crane*.[27] In *Crane*, the Court further refined the limits of the Kansas Sexually Violent Predator Act. The *Crane* Court analyzed Kansas's argument that a showing of an absolute loss of control was unnecessary under *Hendricks*. The Court explained the reach of the Act as limited to those who find "it *difficult* if not impossible" to control their behavior, although use of the word "difficult" indicated that the requisite lack of control is not absolute.[28] In reaching this conclusion, the Court reasoned that an "[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities."[29]

The Kansas court convicted Michael Crane of kidnapping,[30] attempted aggravated sodomy, [31] attempted rape,[32] lewd and lascivious behavior,[33] and sentenced him to thirty-five years to life imprisonment.[34] Crane's convictions resulted from two separate incidents, which occurred on the evening of January 6, 1993.[35] In the first incident, giving rise to his conviction of lewd and lascivious behavior, Crane entered a tanning salon, dropped his pants below his genitals, and made sexual gestures with his penis toward the clerk.[36] The second incident occurred at a nearby video store thirty minutes after the first incident. This incident resulted in Crane's conviction for kidnapping, attempted aggravated criminal sodomy, and attempted rape.[37] Crane attacked the video clerk, pulled his

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23. Kansas v. Hendricks, 521 U.S. 346, 358 (1997).
24. *Id.*
25. Generic references to the male gender are for the sake of simplicity and encompass the female gender as well.
26. "Contrary to Hendricks' assertion, . . . we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Id.* at 359.
27. 534 U.S. 407 (2002).
28. *Id.* at 411 (quoting *Hendricks*, 521 U.S. at 358) (alteration in original).
29. *Id.* at 412.
30. KAN. STAT. ANN. § 21-3420 (1992).
31. *See id.* §§ 21-3301, 21-3506.
32. *See id.* §§ 21-3301, 21-3502.
33. *See id.* § 21-3508.
34. State v. Crane, 918 P.2d 1256, 1258 (Kan. 1996).
35. *Id.*
36. *Id.*
37. *Id.* at 1259.

sweatpants down, and exposed himself.[38] On at least three occasions, he ordered her to perform oral sex and threatened to rape her.[39] After both situations, Crane fled the premises before committing any serious physical harm against his victims.[40]

On appeal, the Kansas Supreme Court affirmed Crane's conviction of lewd and lascivious behavior for exposing himself to the tanning salon attendant.[41] However, the court reversed his convictions for attempted aggravated criminal sodomy, attempted rape, and kidnapping.[42] Kansas filed a petition seeking to adjudicate Crane a sexually violent predator under the Kansas Sexually Violent Predator Act.[43] The Kansas District Court committed Crane to custody as a sexual predator, and Crane appealed, arguing that the State failed to show he lacked volitional control.[44] The Kansas Supreme Court reversed and remanded, holding that *Hendricks* required "'a finding that the defendant cannot control his dangerous behavior'—even if . . . problems of 'emotional capacity' and not 'volitional capacity' prove the 'source of bad behavior' warranting commitment."[45] On certiorari to the United States Supreme Court, Kansas "argue[d] that the Kansas Supreme Court wrongly read *Hendricks* as requiring the State *always* to prove that a dangerous individual is *completely* unable to control his behavior."[46] The Supreme Court held that the Kansas Sexually Violent Predator Act did not require the state to prove the offender's total or complete lack of control over his dangerous behavior, but that the Federal Constitution forbids civil commitment under the Act without any lack of control determination.[47] More precisely, absent a showing that the sex offender has serious difficulty in controlling behavior, the state cannot seek civil commitment.[48] In reaching this decision, the Court emphasized that the impairment of self-control must be so significant as to distinguish the defendant clearly from other dangerous recidivist offenders.[49]

These pronouncements clearly illustrate that the state cannot abridge a defendant's liberty interest without first providing proof of the defendant's serious difficulty in controlling behavior. Justice Breyer, writing for the majority in *Crane*, stated:

> We agree with Kansas insofar as it argues that *Hendricks* set forth no requirement of *total* or *complete* lack of control. *Hendricks* referred to the Kansas Act as requiring a "mental abnormality" or

38. *Id.*
39. *Id.*
40. State v. Crane, 918 P.2d 1256, 1258–59 (Kan. 1996).
41. *Id.* at 1274.
42. *Id.* The state refiled the dismissed charges, except for the kidnapping charge, and Crane pled guilty, pursuant to a plea agreement, to one count of sexual battery. *In re* Crane, 7 P.3d 285, 286 (Kan. 2000).
43. *In re* Crane, 7 P.3d at 286.
44. *Id.* at 287.
45. Kansas v. Crane, 534 U.S. 407, 411 (2002) (quoting *In re* Crane, 7 P.3d at 290).
46. *Id.*
47. *Id.* at 411–13.
48. *Id.* at 413.
49. *Id.* at 412–13. In so holding, the Court rejected the claim that a sex offender's lack of control must be demonstrably total or complete; rather, the Court acknowledged a state's authority to commit those sex offenders who have "serious difficulty in controlling [their] behavior." *Id.* at 413.

> "personality disorder" that makes it "*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior." . . . We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination.[50]

Justice Breyer then emphasized that *Hendricks* stressed that this determination was necessary in order to maintain the distinction between sex offenders subject to civil commitment and other criminal recidivists.[51] Justice Breyer continued: "It is enough to say that *there must be proof of serious difficulty in controlling behavior.*"[52]

Bolstered by Justice Scalia's dissent in *Crane*,[53] several states have seized on the ambiguity of Justice Breyer's upholding Hendricks' commitment in *Crane* to deny sex offenders facing civil commitment a jury instruction on "serious difficulty." Although *Crane* examines substantive due process issues under the same Kansas statute applicable in *Hendricks*, the Court clearly deals with a different aspect of the Kansas Act not at issue in *Hendricks*, namely, what degree of volitional control is necessary for civil commitment of sex offenders following criminal sentences.

1. Crane: *The Dissenting Opinion*

In his *Crane* dissent, Justice Scalia argued that the Court's decision was inconsistent with the holding in *Hendricks*.[54] He contended that the Court upheld the Kansas statute in its entirety in *Hendricks*, and therefore found no reason to reevaluate its constitutionality.[55] Justice Scalia asserted that the statute as written, without a separate control requirement, sufficiently distinguished between those offenders subject to civil commitment and those subject to criminal liability, because the statute required a finding of a "causal connection" between the probability of future acts of sexual violence and the present existence of a mental disorder.[56] Justice Scalia argued that this combination of factors—a causal connection between future acts and present existence of a mental disorder—already assumed the "difficulty, if not impossibility" of controlling behavior and that a separate finding by a factfinder was unnecessary.[57] Furthermore, he argued that, because the Court narrowly interpreted *Hendricks* to cover only applications of the statute to volitional control issues, the holding in *Crane* reopened the question of whether emotional and cognitive impairments also fell within the scope of the

50. Kansas v. Crane, 534 U.S. 407, 411–12 (2002) (citations omitted) (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997)).
51. *Id.* at 412.
52. *Id.* at 413 (emphasis added).
53. *See infra* Part II.B.1.
54. *Crane*, 534 U.S. at 415–16 (Scalia, J., dissenting).
55. *Id.* at 422.
56. *Id.* at 419–20.
57. Kansas v. Crane, 534 U.S. 407, 419–20 (2002) (Scalia, J., dissenting).

statute.[58] Scalia saw no merit in the distinction between volitional and other types of impairments. He noted that "[i]t is obvious that a person may be able to exercise volition and yet be unfit to turn loose upon society."[59] At the conclusion of his dissent, Justice Scalia strongly criticized the ambiguity that the *Crane* majority created.[60] Justice Scalia argued that the Court's failure to provide guidance to trial courts in how to instruct juries in future civil commitment cases left the law in "a state of utter indeterminacy."[61] Moreover, Justice Scalia complained that the majority's opinion required a finding of a lack of volitional control in every case, even though the Act also provided for committing those who lack emotional control.[62] He argued that this requirement might prevent the commitment of those dangerous sexual predators who can control their behavior: "[T]he man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances, is surely a dangerous sexual predator."[63] Scalia's dissent further admonished the majority for giving trial courts "not a clue" regarding how to charge a jury in a commitment proceeding.[64] Justice Scalia felt this failure would cause nationwide confusion in those states with sex offender commitment laws.[65]

The dissenters, Justices Scalia and Thomas, understood that the majority meant to add "serious difficulty" as an element that the state must prove, thereby logically mandating a separate finding by a jury of an inability to control dangerous behavior. Scalia wrote, "It is the italicized language in the foregoing excerpt [referring to the 'makes it difficult if not impossible' language from *Hendricks*] that today's majority relies upon as establishing the requirement of a separate *finding* of inability to control behavior."[66] Justice Scalia squarely acknowledged the intent of the majority's opinion in *Crane* to require a separate finding by juries of "serious difficulty" in controlling one's dangerous behavior.[67] Although he disagreed with the holding of the majority, Justice Scalia acknowledged that the standard *Crane* imposed is the law for civil commitments of SVPs. However, the majority of states implementing SVP laws appear to follow Scalia's dissent.

III. POST-*CRANE* INTERPRETATIONS: STATE COURTS AND "SERIOUS DIFFICULTY"

A. State Courts Exploit the Ambiguity of Crane

The trend of state appellate courts, with Justice Scalia's blessing, has been to ignore *Crane*.[68] Most state courts have maintained that their civil commitment laws

58. *Id.* at 421.
59. *Id.* at 422.
60. *Id.* at 424 ("Today's holding would make bad law in any circumstances. In the circumstances under which it is pronounced, however, it both distorts our law and degrades our authority.").
61. *Id.* at 423–24.
62. *Id.* at 421–23.
63. Kansas v. Crane, 534 U.S. 407, 422 (2002) (Scalia, J., dissenting).
64. *Id.* at 423.
65. *Id.* at 423–24.
66. *Id.* at 419 (emphasis added).
67. *Id.*
68. *See id.* at 424 ("The State of Kansas . . . ask[ed] nothing more than the reaffirmation of our 5-year-old opinion—only to be told that what we said then we now unsay. There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try.").

already commit only those who lack significant volitional control because of the nexus between the targeted disorder and the offender's acts that "necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior."[69] These states concede that *Crane* requires determination of some lack of control before the state can civilly commit an offender. However, these states argue that *Crane* does not require a specific jury finding that a respondent lacks volitional control, because the Court in *Crane* upheld the commitment in *Hendricks* as constitutional despite the absence of any specific jury determination of lack of control.[70] Arizona, California, Illinois, Massachusetts, Minnesota, South Carolina, Texas, Washington, and Wisconsin have all adopted this interpretation.[71] These state court decisions are contrary to the Court's determination in *Crane*, which required specific proof of "serious difficulty controlling behavior."[72]

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69. *In re* Commitment of Laxton, 2002 WI 82, ¶ 22, 647 N.W.2d 784, 793. The Wisconsin court further explained that "the required proof of lack of control, therefore, may be established by evidence of the individual's mental disorder and requisite level of dangerousness, which together distinguish a dangerous sexual offender . . . from a dangerous but typical recidivist." *Id.* at ¶ 21, 647 N.W.2d at 793. *See also* California v. Ghilotti, 44 P.3d 949, 971 (Cal. 2002) (explaining that the California law "seeks to identify, combine, and treat only those volitionally impaired sex offenders whose chances of [controlling their impulses] are sufficiently low to present a serious, well-founded risk of reoffense"); People v. Hancock, 771 N.E.2d 459, 465 (Ill. App. 2002) (finding that "the fact that respondent was proved to have repeatedly committed criminal offenses in the pursuit of his uncontrolled sexual urges over the course of at least 25 years is sufficient to satisfy the [*Crane*] requirement"); *In re* Dutil, 768 N.E.2d 1055, 1064 (Mass. 2002) (analogizing the state SVP law's requirement of a "general lack of power to control" to the "serious difficulty" requirement from *Crane*).

70. *See* People v. Hancock, 771 N.E.2d 459, 465 (Ill. App. Ct. 2002) (interpreting *Crane* as not requiring a specific determination of lack of volitional control, because the nature and severity of the mental disorder distinguishes individuals subject to commitment from typical recidivists).

71. *See In re* Leon G., 59 P.3d 779, 788 (Ariz. 2002) (declining to require a specific instruction under *Crane*, but concluding that a "serious difficulty" jury instruction was necessary to help jurors understand the link between a mental disorder and a volitional impairment); People v. Williams, 74 P.3d 779, 792 (Cal. 2003) (holding that the statute's plain language encompasses the *Crane* "serious difficulty" requirement and therefore a separate finding is not required); People v. Ghilotte, 44 P.3d 949, 971 n.12 (Cal. 2002) (interpreting the link between mental disorder and dangerousness as satisfying *Crane*, because the "particular form of dangerous *mental disorder*, not the particular *degree* of dangerousness," distinguishes individuals subject to commitment from the typical recidivist and holding that even those sex offenders who are not more likely than not to recidivate may thus be subject to commitment); People v. Masterson, 798 N.E.2d 735, 749 (Ill. 2003) (reading SVP act's definition to imply "serious difficulty" into the act); *Hancock*, 771 N.E.2d at 465 ("*Crane* does not stand for the proposition that in every civil commitment case a jury must make a specific determination that the respondent lacks volitional control"); *In re Dutil*, 768 N.E.2d at 1064 (analogizing the state SVP law's requirement of a "general lack of power to control" to the "serious difficulty" requirement from *Crane*); *In re* Civil Commitment of Ramey, 648 N.W.2d 260, 266–67 (Minn. Ct. App. 2002) (noting that the Minnesota statute in question implicitly includes finding of "serious difficulty"); *In re* Treatment and Care of Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002) ("Inherent within the mental abnormality prong of the Act is a lack of control determination . . . ."); *In re* Commitment of Almaguer, 117 S.W.3d 500, 505–06 (Tex. App. 2003) (holding that a broad jury instruction sufficiently encompasses statutory volitional requirement); *In re* Detention of Thorell, 72 P.3d 708, 718 (Wash. 2003) (holding that the jury does not need to make a separate "lack of control" finding); *In re* Commitment of Laxton, 2002 WI 82, ¶ 22, 647 N.W.2d 784, 793 (holding that the statute's mental disorder and dangerousness elements encompassed the "serious difficulty" standard).

72. Kansas v. Crane, 534 U.S. 407, 413 (2002).

The state court decisions also fail to distinguish *Crane* from *Hendricks*. In *Hendricks*, the respondent conceded his utter inability to control his behavior.[73] The states further ignore *Crane*'s emphasis on the unequivocal proof in *Hendricks*, "of what the 'psychiatric profession itself classifie[d] . . . as a serious mental disorder'" and that, as "a critical distinguishing feature of that 'serious . . . disorder' there consisted of a special and serious lack of ability to control behavior."[74] Thus, in *Hendricks*, unlike *Crane*, the respondent's admission established proof of significantly impaired self-control.[75] Rather than follow *Crane*'s edict adding proof of "serious difficulty" as some protection to ensure that each committed sex offender lacks volitional control, these state courts appear to follow Justice Scalia's dissent.[76] Further, these state courts fail to consider and appreciate the importance of the procedural aspect of the Court's decision to vacate and remand *Crane* instead of simply reversing the Kansas court's opinion. This procedural move arguably supports the conclusion that the Court intended to clarify, rather than just reaffirm, *Hendricks*.

In contrast, a few state courts have remanded cases for trial courts to consider whether or not offenders lacked volitional control. Like the states that follow the *Crane* dissenters, these states affirm the constitutionality of their states' sex offender commitment statutes. They hold that the preexisting "definition of 'mental abnormality' specifically speaks of the 'degree' of the emotional or volitional condition suffered by the offender," and "[t]he Supreme Court's requirement of 'serious difficulty' is a refinement of this term, not the addition of a new element."[77] For example, the Missouri Supreme Court reversed the commitment of a sex offender and remanded the case for a new trial using an amended jury instruction defining mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior*."[78] Similarly, the New Jersey Supreme Court remanded a commitment for the trial court to determine whether or not the respondent had "a substantial inability to control [his] conduct."[79]

The Iowa Supreme Court has also recently decided an SVP commitment case and adopted the Missouri jury instruction embodying the lack of control requirement.[80] The court explained, "By interpreting [the Iowa SVP statute] as requiring a showing of a serious difficulty in controlling behavior, we are not changing the statute but rather clarifying the language already in it. Because the [trial] court's instruction did not embody this concept, we reverse and remand for new trial."[81]

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73. *Id.* at 414.
74. *Id.* at 412–13 (alteration and omission in original).
75. Kansas v. Hendricks, 521 U.S. 346, 360 (1997); *contra Crane*, 534 U.S. at 410–11.
76. *See Crane*, 534 U.S. at 417–21 (Scalia, J., dissenting).
77. *See, e.g.*, Thomas v. Missouri, 74 S.W.3d 789, 791 n.1 (Mo. 2002).
78. *Id.* at 792.
79. *In re* Commitment of W.Z., 801 A.2d 205, 216 (N.J. 2002).
80. *In re* Detention of Barnes, 658 N.W.2d 98, 101 (Iowa 2003).
81. *Id.*

In *Lee v. Florida*,[82] the Florida District Court of Appeal recognized "the significance of this issue and its potential impact in numerous cases" and "the fact that liberty interests are at stake in commitment proceedings . . . ."[83] Under Florida's court rules, the Florida District Court of Appeal certified the following question to the Florida Supreme Court: "May an individual be committed under the [Florida SVP commitment 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?"[84] Although the Florida Supreme Court has not yet answered this question, Judge Casanueva wrote, in a concurring opinion for the Florida District Court of Appeal:

> I interpret *Crane* as establishing a fourth element to the Ryce Act cause of action—an element requiring not only proof from the State but also jury evaluation and finding. Without a proper instruction, the likelihood that the jury will make a constitutionally required finding on volition will be diminished or impaired.[85]

Prior to the *Lee* certification, the Florida Supreme Court faced the issue of a defendant's right to a jury instruction on "serious difficulty" in the case of *Westerheide v. Florida*.[86] While four justices agreed to affirm the district court, only three justices agreed to the opinion. Under the Florida Constitution, an opinion is not binding precedent unless "at least four members of the Court have joined in an opinion and decision."[87] Therefore, the majority in *Lee* decided "that *Westerheide* does not resolve with finality the question of the sufficiency of the jury instructions [on 'serious difficulty']."[88] The Florida District Court of Appeal then affirmed Lee's commitment because the *Westerheide* court upheld the commitment and rejected the challenge to the jury instructions.[89] Hence, the Florida District Court of Appeal certified the question on sufficiency of the jury instructions regarding "serious difficulty."[90]

The next section explores in greater detail some of the previously discussed cases as well as state cases interpreting the *Crane* decision. The following discussion illustrates the wide variation of vague language, such as "likely" and "substantially probable," that states use to define SVPs and shows how state courts argue that the vague language of these definitions implicitly satisfies *Crane*'s volitional control requirement. These state decisions fall within two categories according to whether or not they support a specific jury finding on "serious difficulty."

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82. 854 So. 2d 709 (Fla. Dist. Ct. App. 2003).
83. *Id.* at 716.
84. *Id.*
85. *Id.* at 719 (Casanueva, J., concurring).
86. 831 So. 2d 93, 107 (Fla. 2002).
87. Lee v. Florida, 854 So. 2d 709, 716 (Fla. Dist. Ct. App. 2003) (quoting Santos v. Florida, 629 So. 2d 838, 840 (Fla. 1994)).
88. *Id.*
89. *Id.*
90. *See supra* text accompanying note 84.

B. State Court Decisions: Specific Finding Not Required

1. California

The California Sexually Violent Predator Act of 1998 defines a sexually violent predator as:

> a person who has been convicted of a sexually violent offense against two or more victims . . . and who has a diagnosed mental disorder that makes that person a danger to the health and safety of others in that it is likely he or she will engage in sexually violent criminal behavior.[91]

People v. Ghilotti interprets the California Sexually Violent Predator Act in light of *Crane*'s refinement that states must now prove that offenders have "serious difficulty in controlling behavior."[92] *Ghilotti* held that evaluators who assess the person subject to commitment as having a diagnosed mental disorder making the probability "likely" that he will engage in acts of sexual violence without appropriate treatment and custody need not find the risk of reoffense to be higher than fifty percent.[93] Instead, the court held that the word "likely" in this context requires a determination that, as the result of a current mental disorder that predisposes the person to commit violent sex offenses, he "presents a *substantial danger*, that is, a *serious and well-founded risk*" of reoffending in this way if not committed.[94]

In reaching its conclusions, the court explained, "'likely,' when used in this context, must be given a meaning consistent with the statute's clear overall purpose."[95] The court continued:

> That purpose is to protect the public from that limited group of persons who were previously convicted and imprisoned for violent sex offenses, and whose terms of incarceration have ended, but whose current mental disorders so impair their ability to control their violent sexual impulses so that they *do in fact* present a high risk of re-offense if they are not treated in a confined setting.[96]

The court determined that the term "likely" "must be construed in light of the 'difficulties inherent in predicting human behavior' particularly in mathematical terms."[97] The court concluded the phrase "'*likely* to engage in acts of sexual violence,'"[98] as set forth in the Act, "connotes much more than the mere *possibility*

91. People v. Ghilotti, 44 P.3d 949, 959 (Cal. 2002).
92. *See id.* at 982 (quoting Kansas v. Crane, 534 U.S. 407, 407 (2002)).
93. *Id.* at 968.
94. *Id.* at 972.
95. *Id.* at 971.
96. *Id.*
97. People v. Ghilotti, 44 P.3d 949, 971 (Cal. 2002) (citation omitted).
98. *Id.* at 972 (alteration in original).

that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control."[99] *Ghilotti* recognizes "a particular form of dangerous *mental disorder*."[100] *Ghilotti* does not recognize "a particular *degree* of dangerousness, that 'distinguish[es] a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."'"[101]

California's Sexually Violent Predator Act "requires both a qualifying mental disorder *and* a 'likelihood' of reoffense, and the one does not predetermine the other."[102] However, the statute does not require an exact finding regarding potential for the future reoffense.[103] The court found that

> an evaluator applying this standard must conclude that the person is "likely" to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community.[104]

The court found this interpretation of "likely" consistent with legislative standards that parties use to justify the civil commitment of SVPs who remain a danger to society.[105]

2. Illinois

In Illinois, under the Sexually Dangerous Persons Act (SDPA), the definition of a sexually dangerous person includes those persons suffering for more than a year from a mental disorder, "coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children . . . ."[106] Illinois also has a statute called the Sexually Violent Persons Commitment Act (SVPCA) requiring a factual finding that the subject of the proceeding "is dangerous because he or she suffers from a mental disorder that makes it *substantially probable* that the person will engage in acts of sexual violence" before the court may civilly commit such a person under the SVPCA.[107] Either act provides authority for civil commitment. The Illinois Supreme Court has construed both acts under *Crane* as not requiring a jury instruction on "serious difficulty."[108]

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99. *Id.*
100. *Id.* at 971 n.12.
101. *Id.* (quoting Kansas v. Crane, 534 U.S. 407, 412 (2002)).
102. *Id.*
103. *See* People v. Ghilotti, 44 P.3d 949, 972 (2002).
104. *Id.* at 972.
105. *Id.*
106. 725 ILL. COMP. STAT. ANN. 205/1.01 (West 2000).
107. *Id.* § 207/5(f) (West 2002) (emphasis added).
108. *See* People v. Masterson, 798 N.E.2d 735, 749 (Ill. 2003).

In *People v. Hancock*,[109] the Illinois Supreme Court found that evidence of the respondent's repeated criminal behavior "in the pursuit of his uncontrolled sexual urges over the course of at least 25 years" was sufficient to satisfy the requisite "'proof of serious difficulty in controlling behavior.'"[110] Respondent argued that *Crane*'s holding required that a properly charged jury specifically find a lack of volitional control before civilly committing an offender.[111] The Illinois court made no such finding and ordered Hancock civilly committed.[112] The court found that *Crane* does not require a specific jury determination regarding a respondent's lack of volitional control, because the *Crane* Court upheld the *Hendricks* commitment as constitutional despite a lack of any specific jury determination in *Hendricks* regarding the control issue.[113] The court in *Hancock* recognized that *Crane* highlighted the "importance of distinguishing dangerous sexual offenders subject to civil commitment from normal criminals better dealt with through the criminal justice system."[114]

To the extent the holding in *Hancock* relies on *Crane* as upholding *Hendricks* but not condemning Hendricks' commitment without a separate jury determination on volitional control, the Illinois court misstates the meaning and purpose of *Crane*. The court's reliance on *Crane*'s upholding Hendricks' commitment is faulty, because *Crane* did not discuss Hendricks' commitment within the purview of the "serious difficulty in controlling behavior" standard. Rather, *Crane* cited *Hendricks* for the principle that the state must demonstrate some degree of lack of volitional control.[115] Use of the word "finding" in the *Crane* opinion suggests that the Court would require more than mere evidence in the record; that "something more" is a finding based on evidence produced at trial measured against an appropriate legislative standard. Nonetheless, applying *Hendricks* and *Crane* to the facts of *Hancock*, the Illinois Appellate Court found that the respondent had "serious difficulty in controlling his behavior."[116] The court held that Hancock's diagnosis of pedophilia, combined with evidence of his repeated criminal offenses, satisfied the state's burden of proving that Hancock had "serious difficulty in controlling behavior."[117]

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109. 771 N.E.2d 459, 462 (Ill. App. Ct. 2002).
110. *Id.* at 465 (quoting Kansas v. Crane, 534 U.S. 407, 413 (2002)).
111. *Id.* at 463.
112. *Id.* at 465.
113. *Id.* at 465.
114. *Id.*
115. Kansas v. Crane, 534 U.S. 407, 412 (2002) ("We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination.").
116. People v. Hancock, 771 N.E.2d 459, 465 (Ill. App. Ct. 2002).
117. In light of *Crane*, the *Hancock* court interpreted "serious difficulty" with respect to the features of the case, expert testimony, and the nature of Hancock's mental abnormality. The state introduced testimony of two police officers, who reported that the respondent not only admitted committing the underlying crimes, but also confessed to a number of other sex-related offenses over a period of several years. *Id.* Respondent reported that he preferred nine- to twelve-year-old girls, and that he had, on occasion, broken into a house, stood over the bed of a sleeping child, and masturbated. *Id.* at 464. Respondent also described taking trips to look for young girls, though he never followed through with any sexual activity with the children. *Id.* On one occasion, respondent kissed an eleven-year-old girl in public and then ran away, while on another occasion, respondent broke into a house, climbed into bed with a sixteen-year-old girl and stifled her when she started screaming. *Id.*

Like Kansas and California, the Illinois statutory definition of a sexually dangerous person does not seem to imply a need to prove a respondent's "serious difficulty" in controlling behavior. Illinois' statute provides that the state must prove three elements: the existence of a mental disorder for more than one year; the existence of criminal propensities to the commission of sex offenses; and the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children.[118] None of these elements suggests that the offender has "serious difficulty in controlling behavior." Nonetheless, respondent's argument for a specific charge on serious difficulty failed.

Crane refrained from precisely setting forth the state's burden of proof in demonstrating serious difficulty.[119] Although *Hancock* purports to distinguish the respondent from the typical recidivist, the state probably did not establish that Hancock had "serious difficulty in controlling his behavior," because the SDPA failed to address volitional capacity.

In a later case involving a pedophile, *People v. Masterson*, the Illinois Supreme Court stated that when legislative oversight causes omissions in a statute, Illinois courts can read the missing language into the statute to the extent that their reading does not offend the spirit and policy of the statute.[120] The court then imported the definition of "mental disorder," from the SVPCA, which addressed volitional capacity, into the SDPA.[121] The court, without changing its stance on *Crane*'s "serious difficulty" requirement, remanded the case for an additional finding on whether "it is 'substantially probable' the person . . . will engage in the commission of sex offenses in the future if not confined."[122]

3. Massachusetts

In Massachusetts, a "sexually dangerous person" is:

> any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual

118. 725 ILL. COMP. STAT. ANN. 205/1.01 (West 2002).

119. Whatever the proof may be, it must "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." *Crane*, 534 U.S. at 413.

120. *See* People v. Masterson, 798 N.E.2d 735, 748 (Ill. 2003).

121. *Id.* at 749.

122. *Id.*

> misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.[123]

In 1986, a Massachusetts court sentenced David Dutil to two years probation after he pled guilty to a charge of indecent assault and battery on a child under the age of fourteen years.[124] In 1987, a court sentenced him to a one-year prison term after finding him in violation of his probation.[125] Later that year, Dutil pled guilty to four separate charges of indecent assault and battery on a child under the age of fourteen years.[126] In a writ of habeas corpus, Dutil challenged the constitutionality of his civil commitment. Dutil's primary argument was that the pre-1990 version of Massachusetts's SVP statute violated the substantive due process requirements of both the United States Constitution and the Massachusetts Declaration of Rights, because the statute's definition of a "sexually dangerous person" allowed "commitment of an individual on a finding of dangerousness alone, without requiring a finding that the individual's dangerousness be linked to any mental illness or abnormality."[127]

The Massachusetts Supreme Court held the statutory requirement of a "general lack of power to control" to be analogous to the *Crane* standard.[128] The court found that "[t]he statute's use of the phrase 'uncontrolled or uncontrollable desires' rather than 'uncontrolled *and* uncontrollable desire' does not change this result. A mental condition may create serious difficulty in controlling behavior even though the individual's desires are not completely 'uncontrollable.'"[129]

Massachusetts takes the same approach as those states which interpret their sexually violent predator statutes to implicitly require a finding of "serious difficulty in controlling behavior." In reaching this conclusion, the Massachusetts court held that an "individual's sexual desires may remain 'uncontrolled' as the result of a mental condition even though that individual retains some measure of control over his actions."[130] According to the court, a statute satisfies due process concerns because it provides for a showing that the SVP's behavior derives from a mental condition that causes serious difficulty in controlling behavior.[131] Because the Massachusetts statute requires such a showing, the court found no due process violations.[132]

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123. MASS. GEN. LAWS ANN. ch. 123A, § 1 (West 2003).
124. *In re* Dutil, 768 N.E.2d 1055, 1060 (Mass. 2002).
125. *Id.*
126. *Id.*
127. *Id.* at 1059.
128. *Id.* at 1064.
129. *Id.*
130. *In re* Dutil, 768 N.E.2d 1055, 1064 (Mass. 2002).
131. *Id.*
132. *Id.* ("The language of [the SVP statute], as we have interpreted it, clearly requires such a showing.").

4. South Carolina

In South Carolina, a sexually violent predator is a person who "has been convicted of a sexually violent offense" and "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[133]

The South Carolina Supreme Court decided *In re Treatment and Care of Luckabaugh*[134] six months after the *Crane* decision. Luckabaugh went to prison in 1996 for committing serious sex crimes on a comatose patient.[135] The state sought his civil commitment under its SVP statute. At the non-jury hearing, three mental health experts concluded that Luckabaugh suffered from sexual sadism, a major mental abnormality.[136] Luckabaugh's expert disagreed with the others as to whether Luckabaugh should receive outpatient or inpatient treatment.[137] Luckabaugh testified at the hearing, and he rejected the sadism diagnosis, although he admitted to attempting to publish graphic stories involving themes of kidnapping, torture, and murder.[138] He stated that he did not actually publish the stories, because "at some point they got too violent and gross, even for me."[139] Luckabaugh also testified that he would not reoffend because of a his new-found spiritual beliefs.[140] The trial court not only concluded that the state failed to meet its burden of proving that Luckabaugh was an SVP, but also found the South Carolina Sexually Violent Predator Act (SCSVPA) unconstitutional.[141] The state appealed. On appeal, Luckabaugh argued, *inter alia*, that the SCSVPA was unconstitutional, because the substantive due process requirements of *Crane* mandate a separate lack-of-control determination before a state may involuntarily commit respondents under SVP statutes.[142]

In reaching its conclusion in *Luckabaugh*, the South Carolina Supreme Court disagreed with the respondent. The court opined that *Crane* does not require a separate and specially made lack-of-control determination—it requires "only that a court must determine the individual lacks control while looking at the totality of the evidence."[143] The South Carolina Supreme Court took the position that "[t]o read *Crane* as requiring a special finding would be to suggest the United States Supreme Court mandated at least sixteen states to hold new commitment hearings for over 1,200 individuals committed under their state's sexually violent predator acts."[144] Instead, the court ruled that *Crane* held "the substantive due process clause requires a court to determine an individual suffers from a mental illness which

133. S.C. CODE ANN. § 44-48-30(1)(b) (West 2002).
134. 351 S.C. 122, 568 S.E.2d 338 (2002).
135. *Id.* at 128–29, 568 S.E.2d at 341.
136. *Id.* at 129, 568 S.E.2d at 341.
137. *Id.* at 130, 568 S.E.2d at 341.
138. *Id.* at 129–30, 568 S.E.2d at 341.
139. *Id.* at 130, 568 S.E.2d at 341.
140. *In re* Treatment and Care of Luckabaugh, 351 S.C. 122, 130, 568 S.E.2d 338, 341 (2002).
141. *Id.* at 128, 568 S.E.2d at 341.
142. *Id.* at 142, 568 S.E.2d at 348.
143. *Id.* at 143, 568 S.E.2d at 348.
144. *Id.*

makes it seriously difficult, though not impossible, for that person to control his dangerous propensities."[145]

The South Carolina Supreme Court takes the position that the SCSVPA satisfies *Crane*, because

> Inherent within the mental abnormality prong of the Act is a lack of control determination, i.e., the individual can only be committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act.
>
> The Act's requirements are the functional equivalent of the requirement in *Crane*. The purpose of each is to ensure involuntary commitment procedures are only used to control a "limited subclass of dangerous persons" and not used to broadly subject any dangerous person to what may be indefinite terms.[146]

In reluctance to rely on *Luckabaugh* and in response to *Crane*, the South Carolina Attorney General requests a jury instruction for SVP commitment cases that appears to comply with *Crane*'s directive.[147]

The fact that the South Carolina Attorney General has independently decided to insert *Crane*'s volitional control standard into its proposed request to charge lends support to the view that the *Crane* Court intended to add a new element of proof for states. This course of action also indicates that the state would rather hedge its bet on the volitional control issue than risk the possibility of a successful constitutional challenge to the commitment based on the trial court's failure to follow *Crane*. However, this jury instruction would be less subject to constitutional challenge under *Crane* if the proposed charge replaced the required finding that the respondent's mental disorder makes him "likely to engage in acts of sexual

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145. *Id.*

146. *In re* Treatment and Care of Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002).

147. This charge, in pertinent part, reads:

> The elements which the state must prove in the case beyond a reasonable doubt are:
>
> 1. That the respondent has been convicted of a sexually violent offense. I charge you that [the underlying offense] is a sexually violent offense.
>
> 2. That the respondent suffers from a mental abnormality or personality disorder that makes the respondent likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.
>
> *Inherent in these two elements the state must prove is the requirement that the respondent's mental abnormality or personality disorder causes him "serious difficulty in controlling [his] behavior."*
>
> In order for you to better understand the two elements of the state's cause of action, I am going to define for you some of the terms which I have just used:
>
> 1. "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses. *This mental abnormality or personality disorder must cause the respondent serious difficulty in controlling his behavior.*

violence," with a required finding that the disorder "causes him 'serious difficulty in controlling his behavior.'"[148]

5. Wisconsin

Wisconsin requires a jury determination that an individual is a sexually violent predator to civilly commit an individual under Wisconsin's SVP Act.[149] The statute defines a sexually violent predator as:

> a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness, and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.[150]

The statute defines "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."[151]

In *In re Commitment of Laxton*,[152] the Wisconsin Supreme Court held that evidence proving an SVP's predisposition to engage in future acts of sexual violence "necessarily and implicitly includes proof that such person's mental disorder involves serious difficulty in controlling his or her behavior. Such evidence distinguishes such a person from the dangerous but typical recidivist."[153] The court found that a nexus between an SVP's mental disorder and his level of dangerousness established lack of control.[154]

In 1987, a Wisconsin court convicted Laxton of three counts of second-degree sexual assault and two counts of child abduction.[155] Laxton's sentence was eleven years in prison, but he obtained parole in May 1994.[156] Five months later, authorities arrested Laxton for window peeping at two young girls, and this incident led to the revocation of his parole.[157] At his commitment hearing, experts testified that Laxton suffered from "pedophilia, voyeurism, and/or paraphilia" and a jury found Laxton was a sexually violent predator.[158] On appeal, Laxton challenged the Wisconsin statute as unconstitutional by asserting that the statute did not sufficiently narrow those eligible for commitment to dangerous persons readily distinguishable

148. *See supra* note 147.
149. *In re* Commitment of Laxton, 2002 WI 82, 647 N.W.2d 784.
150. WIS. STAT. ANN. § 980.01(7) (West 1998).
151. *Id.* § 980.01(2).
152. 2002 WI 82, 647 N.W.2d 784.
153. *Id.* at ¶ 2, 647 N.W.2d at 787.
154. *Id.*
155. *Id.* ¶ 3, 647 N.W.2d at 787.
156. *Id.*
157. *Id.*
158. *In re* Commitment of Laxton, 2002 WI 82 ¶ 4, 647 N.W.2d 784, 787–88.

from the typical recidivist.[159] Laxton also argued that the definitions of "mental disorder" and "sexually violent person" in the Wisconsin statute did not have the "requisite link to an individual's serious difficulty in controlling behavior."[160]

The court interpreted *Crane* as focusing 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."[161] The court held that persons will not fall within the Wisconsin SVP statute absent a finding of a disorder that predisposed them to commit acts of sexual violence.[162] In rationalizing that the statute's definition of dangerousness was constitutionally sound, the Wisconsin Supreme Court held that the Act, as written, implicitly required proof that the respondent had "serious difficulty in controlling his behavior."[163] Accordingly, the court found due process guarantees satisfactory, because the state had to prove that an SVP had a volitional impairment sufficient to justify commitment.[164] The statutory definitions of "mental disorder" and "sexually violent person" in the Wisconsin Act require proof that the person who the state seeks to commit had a qualifying mental condition which affected his volitional or emotional capacity and "[made] it substantially probable that the person [would] engage in acts of sexual violence."[165] Because of this proof requirement, the court held that the statutory terms necessarily implied the *Crane* standard of "serious difficulty."[166]

C. State Court Decisions: Specific Finding Required

1. Missouri

Missouri's Sexually Violent Predator Act is similar to most states' sexually violent predator statutes.[167] The statute defines a "sexually violent predator" as a person "who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined . . . ."[168] "Mental abnormality," the critical element of this definition, is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[169] The act

159. *Id.* ¶ 17, 647 N.W.2d at 792.
160. *Id.* ¶ 18, 647 N.W.2d at 792.
161. *Id.* ¶ 15, 647 N.W.2d at 791.
162. *Id.* ¶ 12, 647 N.W.2d at 790. The court went on to conclude "that the same nexus between the mental disorder and the substantial probability that the person will engage in acts of sexual violence, necessarily and implicitly requires proof that the person's mental disorder involves serious difficulty for such person in controlling his or her behavior." *Id.* at ¶ 23, 647 N.W.2d at 793.
163. *In re* Commitment of Laxton, 2002 WI 82, ¶ 23, 647 N.W.2d 784, 793.
164. *Id.* ¶ 20, 647 N.W.2d at 792.
165. *Id.*
166. *Id.* ¶ 21, 647 N.W.2d at 793.
167. *See* MO. ANN. STAT. §§ 632.480–.513 (West 2000 & Supp. 2004).
168. *Id.* § 632.480(5).
169. *Id.* § 632.480(2) (West 2002 & Supp. 2004).

also specifically enumerates the sexually violent offenses that make an individual eligible for commitment.[170]

In *Thomas v. State*,[171] the Missouri Supreme Court held unconstitutional jury instructions requiring a finding that, because of a mental abnormality, the respondent was "more likely than not to engage in predatory acts of sexual violence if . . . not confined . . . ."[172] In 1982, a court convicted Eddie Thomas of multiple counts of raping and sodomizing children.[173] Prior to his release from imprisonment, the state filed a petition to civilly commit Thomas as an SVP. After a jury subsequently found against Thomas, the state civilly committed him.[174] The court noted that sufficient evidence existed to warrant a finding of "serious difficulty in controlling behavior"; but the instructions to the jury had not defined mental abnormality in this essential way.[175] In reaching this conclusion, the court held: "Both *Hendricks* and *Crane* make clear that sexual predator statutes as enacted in Kansas and Missouri are constitutional so long as the mental abnormality causes the individual 'serious difficulty in controlling his behavior.'"[176] The court held that, although the jury instructions required findings that "respondent is more likely than not to engage in predatory acts of sexual violence if . . . not confined," the instructions were deficient, because they "did not require the juries to distinguish the dangerous sexual offender whose mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist."[177] The Missouri court held that jury instructions defining mental abnormality should define "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior.*"[178] Accordingly, the Missouri Supreme Court reversed the trial court's order for commitment and remanded the case for a new trial.[179]

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170. *Id.* § 632.480(4).

171. Thomas v. State, 74 S.W.3d 789, 791–92 (Mo. 2002).

172. *Id.* at 790–92.

173. *Id.* at 790.

174. *Id.*

175. *Id.* at 792. To comply with *Crane*, the instruction defining mental abnormality must read as follows:

> As used in this instruction "mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior.*

Id.

176. Thomas v. State, 74 S.W.3d 789, 791 (Mo. 2002). "Accordingly, to be constitutional under *Crane*, the instruction must require that the 'degree' to which the person cannot control his behavior is 'serious difficulty.'" *Id.* (footnotes omitted).

177. *Id.* at 791–92.

178. *Id.* at 792. Dissenters argued that "proving that defendant had a 'mental abnormality' that makes him 'more likely than not to engage in predatory acts of sexual violence' is simply one way of proving (more than enough!) that defendant had 'serious difficulty in controlling behavior.' In short, there is no need for a new instruction." *Id.* at 792–93.

179. *Id.* at 792.

2. New Jersey

In New Jersey, to find a sexual offender a sexually violent predator, the state must prove that a previously convicted individual "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment."[180] The New Jersey legislature passed its SVP Act in October 1997. The language of New Jersey's Act is almost identical to the language of the Kansas Act at issue in *Hendricks*, and the Act mimics the structure that many legislatures have adopted.[181]

In *In re Commitment of W.Z.*, the New Jersey Supreme Court examined the language of the New Jersey SVP Act to determine if the definition of "sexually violent predator" complied with *Crane*'s "serious difficulty" standard.[182] W.Z. committed a variety of sex-related criminal offenses against women between 1982 and 1994.[183] When W.Z. approached the expiration of his sentence for the 1994 conviction, New Jersey filed a petition to civilly commit W.Z.[184] The trial court held that the record contained clear and convincing evidence of W.Z.'s inability to control his dangerous sexual behavior and of the likelihood of his committing additional sexual offenses "if not confined in a secure facility for treatment."[185] Accordingly, the trial court ordered his commitment.[186]

After an affirmance of his commitment at the intermediate appellate level, W.Z. appealed to the New Jersey Supreme Court. He argued that New Jersey's "likely to engage in acts of sexual violence" standard did not comply with the "serious difficulty" test of *Crane*.[187] The Act reads in part: "'Mental abnormality' means a mental condition that affects a person's emotional, cognitive or volitional capacity in a manner that predisposes that person to commit acts of sexual violence."[188] The phrase, "likely to engage in acts of sexual violence," means that "the propensity of a person to commit acts of sexual violence is of such a degree as to pose a threat to the health and safety of others."[189] The New Jersey statute therefore implicitly imports the "serious difficulty" standard of *Crane*.[190]

The New Jersey Supreme Court determined that the legislature intended to place some "loss of control" requirement in the Act, even though the statute does

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180. N.J. STAT. ANN. § 30:4-27.26(b) (West Supp. 2004). The state must show that the respondent was either "convicted, adjudicated delinquent or found not guilty by reason of insanity" of one of the statutorily-delineated sexual offenses. *See id.* §§ 30:4-27.26(b), 30:4-27.26(a).

181. *See In re* Commitment of W.Z., 801 A.2d 205 (N.J. 2002).

182. *Id.* at 207.

183. *In re* Commitment of W.Z., 773 A.2d 97, 101 (N.J. Super. Ct. App. Div. 2001).

184. *Id.* at 100.

185. *Id.* at 104.

186. *Id.* at 116.

187. *In re* Commitment of W.Z., 801 A.2d 205, 207 (N.J. 2002).

> Moreover, [W.Z.] asserts that only those sex offenders who are at risk of specifically committing additional sexual offenses or who have a strong demonstrable preference for sexual offenses may be included in the class of sex offenders that a state may seek to civilly commit as a dangerous sexual predator.

Id. at 210.

188. N.J. STAT. ANN. § 30:4-27.26 (West Supp. 2004).

189. *Id.*

190. *Id. In re* Commitment of W.Z., 801 A.2d 205, 216 (N.J. 2002).

not require a complete loss of control.[191] The court interpreted the "serious difficulty" standard of *Crane* as requiring a "substantial inability to control conduct."[192] This interpretation of "serious difficulty" is the part of the Act that "links a diagnosed mental abnormality or personality disorder to the likelihood of engaging in repeat acts of sexual violence."[193] The New Jersey Supreme Court held that in New Jersey, an individual is a sexually violent predator subject to involuntary commitment under the Act if the court finds the person, "by clear and convincing evidence . . . [to have] serious difficulty in controlling his or her harmful sexual behavior such that it is highly likely that the person will not control his or her sexually violent behavior and will reoffend."[194] The court remanded the case to the trial level for a determination of "whether W.Z.'s mental condition cause[d] the required degree of inability to control sexually violent behavior to justify his commitment under the [Act]."[195]

3. Iowa

The Iowa Code defines a sexually violent predator as "a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility."[196]

Albert Barnes had several unchallenged convictions for sexually violent offenses at the time of the trial for his civil commitment.[197] In 2001, the State of Iowa filed a petition alleging that Barnes was a sexually violent predator under the Iowa Code. After a jury trial, the state confined Barnes as a sexually violent predator in accordance with the Iowa Code.[198] Barnes challenged his commitment on due process grounds by arguing that the trial court's jury instruction regarding "mental abnormality"[199] did not comply with *Crane*'s "serious difficulty" requirement.[200] Although the trial court's instruction quoted the statute almost verbatim, Barnes argued that *Crane*'s due process directive required reading an additional volitional control element into the statute.[201] The Iowa Supreme Court read *Crane* as clarifying the "difficult" standard of *Hendricks*.[202] The Iowa court held that "[t]he *Crane* court rejected any reading of *Hendricks* that would require

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 219.
195. *Id.*
196. IOWA CODE ANN. § 229A.2(11) (West Supp. 2004).
197. *In re* Detention of Barnes, 658 N.W.2d 98, 98 (Iowa 2003). The court noted:
> In 1983 he pled guilty to sexual abuse and in 1985 was convicted of two counts of sexual abuse. He also pled guilty to assault with intent to commit sexual abuse on another occasion, although he denied this in the trial of the present case. In 1985 and 1996 he was convicted of third-degree sexual abuse.

Id. at 98–99.
198. *Id.* at 99.
199. IOWA CODE ANN. § 229A.2(5) (West Supp. 2004).
200. *Barnes*, 658 N.W.2d at 99.
201. *Id.*
202. *Hendricks* held that the state must prove that the respondent's control over himself is difficult, if not impossible. Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

the state to prove total or complete lack of control to constitute a 'mental abnormality.'"[203] The court then reiterated the holding in *Crane* that "*[i]t is enough to say that there must be proof of serious difficulty in controlling behavior*,"[204] and agreed with Barnes that the Iowa statute's definition of "mental abnormality" requires a showing of serious difficulty in controlling behavior.[205] The Iowa Supreme Court suggested that Iowa courts use the Missouri Supreme Court's adopted jury instruction, which embodied the lack-of-control requirement of *Crane*.[206] The Iowa court noted, "By interpreting this section as requiring a showing of a serious difficulty in controlling behavior, we are not changing the statute but rather clarifying the language already in it."[207]

Like Missouri, New Jersey and Iowa have not chosen to read an implication of "serious difficulty" into their statutes, but now mandate that trial courts give a specific jury charge requiring that determination. The above state supreme court decisions reflect a deliberate effort by these states to comply with *Crane*'s requirements by directing their trial courts to add a separate finding of "serious difficulty in controlling behavior" to their jury instructions.

D. Crane's Ambiguity Unraveled: "Serious Difficulty" is a Jury Question

Because *Crane* did not overrule *Hendricks*, many states narrowly read *Crane* as implicitly approving the *Hendricks* position that requires no separate finding as to volitional impairment. This reading advances an unintended ambiguity on the issue. Most state courts have not read *Crane* to require any additional jury finding.[208] These states have taken advantage of the ambiguity that *Crane* created and continued employing pre-*Crane* no-separate-finding procedures. However, some state courts ignore the fact that *Crane* did not reverse the decision of the Kansas court, but rather vacated it. This procedural move by the Court clarified that *Crane* was not a blind reaffirmation of *Hendricks*, but instead a clarification that requires states to add additional due process protections beyond those that may be implicit in their statutory definitions of mental abnormality. The Court's decision to vacate, rather than reverse, the state court protects those sex offenders who *can* exercise adequate volitional control. Notwithstanding the Court's decision, several state courts have focused on Justice Scalia's dissent and ignored the majority's jurisprudence in *Crane*. This line of reasoning suggests that judicial economy and convenience subjugate individual liberty interests.

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203. *Barnes*, 658 N.W.2d at 100 (citing Kansas v. Crane, 534 U.S. 407, 411 (2002)).

204. *In re* Detention of Barnes, 658 N.W.2d 98, 101 (Iowa 2003) (alteration in original) (citing *Crane*, 534 U.S. at 411).

205. *Id.* at 101.

206. *Id.* The instruction reads: "As used in this instruction, 'mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior." *Id.* (citing Thomas v. Missouri, 74 S.W.3d 789, 792 (Mo. 2002)).

207. *Id.*

208. *See supra* notes 53–65 and accompanying text.

The unpublished case of *In re Martinelli*[209] can dispell any lingering doubt about *Crane*'s meaning. The United States Supreme Court, after granting certiorari, vacated the Minnesota court's opinion.[210] The Minnesota court had relied on the reasoning of a 1999 Minnesota Supreme Court case[211] to read into the Minnesota statute an implicit lack of control instead of requiring proof of a lack of control as a separate element that the state had to prove for civil commitment of an SVP.[212] The Supreme Court remanded the case for reconsideration in light of *Crane*.[213] On reconsideration, the Minnesota Court of Appeals recognized that *Crane* requires a specific finding of "'lack of control' based on expert testimony tying that 'lack of control' to a properly diagnosed mental abnormality or personality disorder before civil commitment may occur."[214]

Similarly, the Supreme Court granted certiorari, vacated, and remanded an Illinois SVP commitment case for further consideration in light of *Crane*.[215] Below, the Illinois Supreme Court found "no need for the jury to make any additional findings . . . regarding [the subject party's] ability to control his sexually violent conduct."[216] However, a subsequent Illinois appellate decision recognized that *Crane* requires proof that the respondent has serious difficulty controlling his behavior, and failure to make this determination at trial results in remand to the trial court.[217] The significance of these cases is that the action of appellate courts in vacating and remanding decisions for reconsideration in light of *Crane* underscores the Court's requirement of a separate jury finding of serious difficulty in controlling behavior. These cases also forecast how the Court will handle future cases challenging an absence of lack of volitional control findings. The Supreme Court ordered the Minnesota and Illinois courts to apply *Crane*'s volitional control standard as new law. Thus, *Crane* is distinguishable from *Hendricks*, because *Crane* creates new law requiring a separate finding of lack of volitional control as an additional element of proof from which a court or jury is to make a decision.

In her dissent in *In re Commitment of Laxton*, the Chief Justice of Wisconsin insightfully wrote that several courts appear to be following Justice Scalia's dissent in *Crane*, not the majority holding, by finding implicit lack of volitional control in their determinations.[218] For seemingly self-serving reasons,[219] a majority of state courts have found a way to follow Justice Scalia's dissent in *Crane* by ignoring and

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209. *In re* Martinelli, No. C4-00-748, 2000 Minn. App. LEXIS 973 (Min. Ct. App. Sept. 12, 2000).

210. Martinelli v. Minnesota, 534 U.S. 1160 (2002).

211. *In re* Linehan, 594 N.W.2d 867 (Minn. 1999).

212. *In re Martinelli*, 2000 Minn. App. LEXIS 973, at *4–5 (citing *In re* Linehan, 594 N.W.2d at 867).

213. *Martinelli*, 534 U.S. at 1160.

214. *In re* Martinelli, 649 N.W.2d 886, 890 (Minn. Ct. App. 2002), *cert. denied sub nom.* Martinelli v. Minnesota, 538 U.S. 933 (2003).

215. *In re* Detention of Varner, 759 N.E.2d 560 (Ill. 2001), *vacated sub nom.* Varner v. Illinois, 537 U.S. 802 (2002).

216. *Id.* at 564.

217. People v. Gilford, 784 N.E.2d 841, 850–51 (Ill. App. Ct. 2002).

218. *In re* Commitment of Laxton, 2002 WI 82 ¶¶ 34–49, 647 N.W.2d 784, 796–99 (Abrahamson, C.J., dissenting) (arguing that the jury instructions were defective since they did not direct the jury to determine that the offender lacked a degree of volitional control).

219. *See supra* notes 53–65 and accompanying text.

circumventing the requirement for a separate volitional control finding. Those state courts that champion a narrow reading of *Crane* deny sex offenders due process and basic fairness under the Constitution by failing to recognize the limitation of *Hendricks* to its facts, including the fact that the parties did not dispute the lack of volitional control issue. More concisely, Justice Scalia and the state courts that seek to take advantage of the ambiguity *Crane* created fail to understand, given the relative disparity in power between states and incarcerated sex offenders, that the Supreme Court, as the final arbiter of individual rights, has a duty to err on the side of individual liberty and justice by applying *Crane*'s "serious difficulty" standard rather than promoting the state's interest in avoiding the reopening of SVP cases. The *Crane* decision demonstrates the Court's desire to provide due process safeguards in recognition of the potential for abuse of individual rights.[220] The policy and tone of our Constitution should make denial of fundamental rights of freedom more difficult, not easier. Justice Scalia's cause and effect formula[221] for civil commitment of sex offenders too easily permits states to deny individual liberty.

Although Justice Breyer dissented in *Hendricks* on other grounds, he spent the better portion of that dissenting opinion explaining why he supported the view that the Due Process Clause permitted Kansas to classify Hendricks as both "mentally ill" and a "dangerous" person for commitment purposes.[222] Among his given reasons, he stated, "Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions . . . . The law traditionally has considered this kind of abnormality akin to insanity for purposes of confinement."[223] Justice Breyer, recognizing that *Crane*'s facts were different because the volitional control issue was in play, correctly recognized the need for another safeguard to protect individual liberty and freedom. That safeguard manifests itself in requiring that the state prove "serious difficulty in controlling behavior" by the applicable quantum of proof and that a court or jury make a separate finding that the sex offender has "serious difficulty controlling his behavior" before committing him.

The unintended ambiguity that *Crane* created should favor individual liberty rather than the conveniences of the government in not reexamining possibly flawed cases. Both the majority and the dissent in *Hendricks* cited lack of volitional control as the key factor to support the Court's holding the Kansas Act constitutional. If the *Hendricks* holding applies only to its own facts, then *Crane*'s separate finding requirement makes more sense as a new element of proof. The *Crane* decision embraces a sense of fairness under the Constitution, because it separates the volitional control issue from the possible arbitrariness of states' varying definitions of mental abnormality or personality disorder. Justice Scalia's endorsement of *Hendricks*' cause and effect determination for civil commitment of SVPs is flawed, because the *Hendricks* test may unconstitutionally allow

220. An earlier holding of the Court provides further support for this safeguard. *See* Foucha v. Louisiana, 504 U.S. 71, 82–83 (1992) (rejecting an approach to civil commitment that would permit the indefinite confinement "of any convicted criminal" after completion of a prison term).

221. *See* Kansas v. Crane, 534 U.S. 407, 419–20 (2002) (Scalia, J., dissenting).

222. Kansas v. Hendricks, 521 U.S. 346, 374–76 (1997) (Breyer, J., dissenting).

223. *Id.* at 375.

commitment in cases like Crane's where proof of the volitional control component of the mental disorder is lacking or in doubt. By adding a "serious difficulty" finding requirement, *Crane* provides some measure of guarantee that the distinction will remain between those requiring civil commitment and those deserving treatment as recidivists through our criminal justice system. This distinction takes on added importance given the strong potential for abuse of the civil commitment procedure for punitive reasons rather than for treatment of alleged mental disorders.[224]

Although Justice Scalia would disagree, *Crane*'s "serious difficulty" requirement meets an important concern his dissent raises. Justice Scalia raised a concern that the majority's opinion, requiring proof to a jury of "serious difficulty in controlling behavior," might prevent commitment of "[t]he man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances [who] is surely a dangerous sexual predator."[225] Here, Justice Scalia's indifference to the volitional control standard misses the point. *Crane* seeks to focus on the offender's ability to *control* behavior as determined by a factfinder because of definitional incongruity of state statutes defining SVPs.[226] Justice Scalia's hypothetical man represents a man with a will of steel who states should not commit as an SVP absent a determination that he cannot control his dangerous behavior to the requisite degree. According to *Crane*, this differentiation is important enough to warrant a separate jury determination by a factfinder. Offenders who are able to control their dangerous behavior are "better dealt with through the criminal justice system."[227] Therefore, Justice Scalia's hypothetical sex offender with a will of steel accompanied by delusional tendencies would probably not escape commitment under Justice Breyer's "serious difficulty" standard if his behavior did not conform to the requisite degree of volitional control.

The evidence of volitional impairment was so overwhelming in *Hendricks* that a jury would have had little trouble finding that he had "serious difficulty" in controlling his dangerous behavior.[228] By vacating the Kansas decision in *Crane*, the Court sent a clear message that it was adding to and not simply affirming *Hendricks*. Those who have read the majority opinion in *Crane* with approval would likely agree that reading *Crane* as defeating individual liberty makes far less sense than reading the case as protecting individual liberty. The design of SVP laws is to commit and to treat those who do not have a "will of steel" and, consequently, cannot control their dangerous behavior. When faced with the degree of volitional impairment necessary to commit an SVP, the potential for disagreement in the mental health community regarding inclusion of volitional impairment as a diagnostic consideration, and respondent's serious liberty interest, Justice Breyer reasoned that "serious difficulty in controlling behavior" provides the

224. One of Crane's victims stated that the prosecutor told her during the criminal prosecution that the statute provides an "'option later down the road'" to ensure that individuals like Crane cannot reoffend. *In re* Crane, 7 P.3d 285, 287 (Kan. 2000).

225. Kansas v. Crane, 534 U.S. 407, 421–22 (2002) (Scalia, J., dissenting).

226. *See supra* notes 196–207.

227. Kansas v. Hendricks, 521 U.S. 346, 360 (1997).

228. *Id.* at 375–76 (Breyer, J., dissenting).

constitutionally necessary measure to ensure that the line between civil commitment and penal commitment remains clear.

The law since *Crane* requires a separate instruction to the jury to find either the presence or lack of volitional control. The failure to provide such an instruction, as Part III discusses, denies respondent's due process guarantees. While neither Justice Thomas nor Justice Scalia denies that lack of volitional control was the linchpin that made SVP acts constitutional,[229] these Justices peculiarly take an adamant stand against respondents' rights to have juries decide issues with such important constitutional consequences.

IV. "SERIOUS DIFFICULTY" INSTRUCTIONS AND DUE PROCESS OF LAW

A. Beyond a Reasonable Doubt: Civil Case Application

The United States Supreme Court has not addressed the appropriate standard of review applicable to the evidence in SVP commitment cases. Only the Wisconsin and Washington state courts have addressed the issue. In both states, legislatures enacted the beyond a reasonable doubt standard for civil commitment of SVPs. In *In re Commitment of Curiel* the Wisconsin Supreme Court held that, while its SVP statute "is a civil proceeding . . . it shares many of the same procedural and constitutional features present in criminal prosecutions."[230] The Washington Supreme Court likewise held that the criminal standard of proof should apply in SVP commitment proceedings, but so held because the legislature had already adopted the "beyond a reasonable doubt" standard for commitments and therefore provided the standard for testing the sufficiency of evidence under its SVP Act.[231]

Nine states have approved the "beyond a reasonable doubt" standard for their SVP commitment hearings. The remaining states employ either "probable cause" or "clear and convincing" standards of proof for SVP commitments. For purposes of the following discussion—arguing that the trial court's failure to give a jury instruction on "serious difficulty" in civil commitment hearings is a constitutional due process violation—applicable criminal jurisprudence serves as the analogical basis for the arguments. Criminal adjudications and SVP civil commitments contain many evidentiary parallels, because both types of proceedings impinge on an individual's protected liberty interest.

B. Theory of Defense Instructions

A defense is a "set of identifiable conditions or circumstances which may prevent a conviction for an offense."[232] In SVP cases, a *Crane* defense raising reasonable doubt as to lack of volitional control may prevent commitment. In

229. *See id.* at 360.

230. *In re* Commitment of Curiel, 597 N.W.2d 697, 709 (Wis. 1999).

231. *In re* Detention of Thorell, 72 P.3d 703 (Wash. 2003) (citing *In re* Detention of Ross, 6 P.3d 625 (Wash. Ct. App. 2000)).

232. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 (1982).

criminal cases, defenses includes failure of proof, which serves to negate an element of the alleged crime.[233] Similarly, in SVP commitments, the volitional control defense negates an element necessary for commitment. At the SVP commitment hearing, the defendant challenges the state's proof or, through experts, puts on evidence raising doubt as to volitional impairment in relation to the defendant's ability to control his dangerous behavior. This defense negates the element of proof that *Crane* requires before committing a defendant as an SVP. The respondent's defense at the commitment hearing is that he has the ability to control his dangerous behavior and, therefore, is entitled to release. Because "the prosecution must prove the elements [for a civil commitment], it follows that the prosecution must disprove defenses that assert the non–existence of those elements."[234] Additionally, under criminal jurisprudence, a defendant has a right to present a complete defense. A trial court therefore must instruct the jury on the defendant's theory of defense. Support for this is found in the Supreme Court and federal courts of appeals.

In *Mathews v. United States*,[235] the Supreme Court stated that "[a]s a general proposition a defendant is entitled to [a jury] instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."[236] Although the *Mathews* Court did not base its rule on the Constitution, opinions of the courts of appeals, including the First,[237] Tenth,[238] and Fourth Circuits,[239] suggest that failure to give a jury instruction on the defendant's theory of the defense may be a due process violation, notwithstanding varying evidentiary standards. Although federal courts of appeals are apparently unanimous in holding

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233. *See id.* at 204.

234. *Id.* at 259 n.224 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 48 (1972)).

235. 485 U.S. 58 (1988).

236. *Id.* at 63 (citing Stevenson v. United States, 162 U.S. 313 (1896)). In *Mathews*, the district court convicted a federal employee for the federal crime of accepting a bribe in return for granting government favors. *Id.* at 60–62. After the intermediate appellate court affirmed, the Supreme Court granted certiorari and reversed the conviction. The court found that the district court had denied the defendant's request for an entrapment defense instruction on the erroneous grounds that the entrapment defense is inconsistent with the defendant's denying that he committed the crime. *Id.* at 62. The Court held that a defendant who denies commission of the charged crime is entitled to an entrapment instruction if sufficient evidence supports a finding of entrapment. *Id.*

237. *See* United States v. McGill, 953 F.2d 10, 12 (1st Cir. 1992) (quoting United States v. Rodriguez, 858 F.2d 809, 812 (1st Cir. 1988)) ("'It is hornbook law that an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it.'"). In *McGill*, the defendant appealed a conviction for willful federal income tax evasion on the grounds that the district court failed to give the defendant's requested instruction that the defendant could not "be held criminally liable if in good faith he misunderstood the requirements of [the] law, or in good faith believed that his income was not taxable." *Id.* (alteration in original). The court held that the jury instruction, even if not in the specific words that the defendant requested, adequately communicated the defendant's theory of defense. *Id.* at 12–13.

238. *See* United States v. Scafe, 822 F.2d 928, 932 (10th Cir. 1987) (citing United States v. Lofton, 776 F.2d 918, 920 (10th Cir. 1985)) ("A defendant is entitled to jury instructions on any theory of defense finding support in the evidence and the law. Failure to so instruct is reversible error.").

239. In *Kornahrens v. Evatt*, the Fourth Circuit explained that "if a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it." 66 F.3d 1350, 1354 (4th Cir. 1995). The Ninth Circuit states that "[t]he right to have the jury instructed as to the defendant's theory of the case is 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." United States v. Escobar de Bright, 742 F.2d 1196, 1201 (9th Cir. 1984).

that a defendant has a constitutional right to such an instruction, the Supreme Court has not directly addressed this situation. Therefore, if a respondent has a constitutional right to a "serious difficulty" instruction, the right is not part of a general right to an instruction on respondent's defense theory, but rather arises from the unique characteristics of the "no serious difficulty" defense. While the Supreme Court does not recognize a general constitutional right guaranteeing a jury instruction on a viable defense theory, a denial of the instruction certainly may violate a respondent's due process right to a fair trial. Therefore, if *Crane* requires a "serious difficulty" instruction as part of the respondent's defense theory, the right is arguably not an explicit or constitutional right, but rather, a right within the purview of the Due Process Clause of the Fourteenth Amendment.

C. "Per se *Constitutional Error*" *Approach*

A trial court's failure to give the jury a "serious difficulty" instruction, where the defendant offers some support that he has control of his behavior, may be a *per se* constitutional violation subject to harmless error review. Three basic arguments involving a trial court's failure to give a jury a "serious difficulty" instruction form the basis for this argument: First, unconstitutionally shifting the burden of proving "serious difficulty" to the defendant is a per se due process error. Second, "serious difficulty" instructions are similar to reasonable doubt instructions. Lastly, "serious difficulty" instructions are indirectly analogous to *Sandstrom*[240] burden shifting instructions.[241]

1. *Unconstitutional Shift of Burden of Proof of "Serious Difficulty"*

A trial court's failure to instruct the jury on "serious difficulty," when the respondent so requests, shifts the burden of proof for "serious difficulty" to the respondent and thus is *per se* constitutional error. This unconstitutional burden shifting, in this unique civil context, is analogous to the Court's holding in *Johnson v. Bennett*,[242] as well as holdings from several federal courts of appeals cases that failure of a trial court to give a criminal jury an alibi instruction unconstitutionally shifts the burden of proving the alibi to the defendant.[243]

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240. Sandstrom v. Montana, 442 U.S. 510 (1979).

241. *See infra* Part III.C.3.

242. 393 U.S. 253 (1968).

243. *See* United States v. Zuniga, 6 F.3d 569 (9th Cir. 1993); United States v. Hicks, 748 F.2d 854 (4th Cir. 1984); United States v. Burse, 531 F.2d 1151 (2d Cir. 1976); United States v. Booz, 451 F.2d 719 (3d Cir. 1971); United States v. Megna, 450 F.2d 511 (5th Cir. 1971). In *Zuniga*, *Hicks*, *Burse*, and *Megna*, the courts of appeals each reversed convictions due to trial courts refusing to give alibi instructions. This failure works a hardship on the defendant, because where the jury is not aware that the prosecution has the burden of proof as to the alibi, the burden of proof shifts to the defendant. *See Zuniga*, 6 F.3d at 570–71; *Hicks*, 748 F.2d at 857–58; *Burse*, 531 F.2d at 1153; *Megna*, 450 F.2d at 513. In *Booz*, the Third Circuit reversed the defendant's conviction, because the trial court refused to give the alibi instruction that the defendant requested and instead gave the jury an ambiguous alibi instruction followed by an overbroad instruction that confused the jury as to which party bore the burden of proof for an alibi defense. *See Booz*, 451 F.2d at 723.

In *Johnson v. Bennett*, the Supreme Court overturned the defendant's murder conviction, because the trial court's jury instruction impermissibly shifted the burden of proof to the defendant in violation of the Due Process Clause.[244] In the trial court, witnesses testified in support of defendant's alibi that he was 165 miles away from the scene of the crime at the time of the murder.[245] The trial court gave a jury instruction stating that the defendant had the burden of proving his alibi by a preponderance of the evidence.[246] Johnson filed a petition for a writ of habeas corpus, which the district court rejected.[247] The Eighth Circuit Court of Appeals affirmed the district court's rejection of Johnson's petition, and the Supreme Court granted *certiorari* to determine the constitutional challenge to the jury instruction on alibi.[248] However, rather than rule on the issue, the Supreme Court vacated the Eighth Circuit judgment because of another Eighth Circuit case prohibiting a jury instruction requiring a defendant to prove his alibi.[249] On remand, the Eight Circuit reconsidered *Johnson* and vacated the defendant's conviction, because the instruction was unconstitutional.[250]

While shifting the burden of proof by giving an erroneous instruction may differ from shifting the burden of proof by refusing to give an instruction, the resulting due process violation is the same. At least one court has held that a trial court's refusal to charge on an alibi defense causes the most extreme possible burden shift, because "'removing the issue from the jury's consideration [i]n effect . . . directs a verdict on that issue against the defendant.'"[251] Just as an alibi instruction is necessary, because it leaves no doubt as to the allocation of the burden of proof, a jury instruction on "serious difficulty" should be necessary, because it would leave no doubt to the state's burden of proof under *Crane*.

2. *Reasonable Doubt Instructions: Never Harmless*

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[252] This constitutional protection reflects the fact that "proof

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244. Johnson v. Bennett, 393 U.S. 253, 254–55 (1968).
245. *Id.* at 253.
246. *Id.* at 253–54.
247. *Id.* at 254.
248. *Id.*
249. *Id.* at 255 (vacating for determination of case in light of *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968)). By vacating, the Supreme Court implicitly approved *Stump*'s determination that shifting the burden of proof of an alibi defense to the defendant is a due process violation.
250. Johnson v. Bennett, 414 F.2d 50, 57–58 (8th Cir. 1969). Lower federal courts have cited *Johnson v. Bennett*, 393 U.S. 253 (1968), for the proposition that shifting the burden of proof for an alibi defense to the defendant violates due process guarantees. *See* United States v. Robinson, 602 F.2d 760, 762 (6th Cir. 1979). State courts are in accord. *See* Grace v. State, 200 S.E.2d 248, 257 (Ga. 1973); Commonwealth v. French, 259 N.E.2d 195, 232 (Mass. 1970).
251. United States v. Hicks, 748 F.2d 854, 858 (4th Cir. 1984) (quoting United States v. Strauss, 376 F.2d 416, 419 (5th Cir. 1967)).
252. *In re* Winship, 397 U.S. 358, 364 (1970). In *Winship*, the New York Family Court found a twelve-year-old boy delinquent based on proof the court examined under a preponderance of the evidence standard. The New York Family Court Act dictated this evidentiary standard. *See id.* at 360. Both the Appellate Division of the New York Supreme Court and the New York Court of Appeals rejected the defendant's claim on appeal that a finding based on a standard less than "beyond a

beyond a reasonable doubt dates at least from our early year as a Nation"[253] and protects against "'dubious and unjust convictions, with resulting forfeitures of life, liberty and property.'"[254] Not only must the prosecution offer proof for each element of the alleged crime,[255] but the Supreme Court also considers failure of a trial court to give a jury a reasonable doubt instruction relating to the required standard of proof for the charged crime to be a per se violation of due process that is never harmless error.[256]

Application of the *Winship* requirements to the "serious difficulty" instructions is straightforward. The reasonable doubt instruction informs a criminal jury that the state must prove each element of the charged crime beyond a reasonable doubt, and the "serious difficulty" instruction accomplishes the same purpose. Because *Crane* provides that "serious difficulty" is an element the state must prove before committing a defendant,[257] and because a trial court's failure to so instruct the jury as to the requisite burden of proof for civil commitment of SVPs is arguably a per se constitutional error,[258] a reasonable inference is that a trial court's failure to give a "serious difficulty" instruction is a per se constitutional error.

3. Sandstrom *Burden-Shifting Instructions: An Indirect Analogy*

Failure to give *Crane*'s "serious difficulty" instruction is also analogous to a class of constitutionally flawed instructions that impermissibly shifts the burden of proof for the *mens rea* element of the charged criminal offense to the defendant.[259] In *Sandstrom*, defendant's of conviction "deliberate homicide" required proof that he purposely or knowingly killed the victim.[260] The trial court overruled the defendant's objection to the instruction that "'[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.'"[261] On appeal to the Montana Supreme Court, the defendant contended that the instruction erroneously shifted the burden of proof on the element of intent to him in violation of the Due Process Clause.[262] The Montana Supreme Court, affirming the conviction, found that the instruction merely required the defendant to present "*some* evidence that he did not intend the ordinary consequences of his voluntary acts" and, therefore, that the instruction did not violate the Due Process Clause.[263] The United States

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reasonable doubt" violated his due process rights. *Id.* In reversing the conviction, the United States Supreme Court held that the reasonable doubt standard of proof is a per se requirement of due process that applies to juveniles as well as adults. *Id.* at 365, 368.

253. *Id.* at 361.

254. *Id.* at 362 (quoting Brinegar v. United States, 338 U.S. 160, 174 (1949)).

255. *See* Victor v. Nebraska, 511 U.S. 1, 5 (1994). In *Victor*, the issue was whether the trial court's instruction defining "reasonable doubt" violated the Constitution. *Id.* The *Victor* opinion began its discussion of this issue with the statement that "[t]he government must prove beyond a reasonable doubt every element of a charged offense." *Id.*

256. *See* Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979) (citing Cool v. United States, 409 U.S. 100 (1972)).

257. Kansas v. Crane, 534 U.S. 407, 413 (2002).

258. *See supra* notes 176–79.

259. Sandstrom v. Montana, 442 U.S. 510, 513–14 (1979).

260. *Id.* at 512.

261. *Id.* at 513 (quoting defendant's proposed instruction) (alteration in original).

262. *Id.*

263. *Id.* at 513–14 (quoting Montana v. Sandstrom, 580 P.2d 106, 109 (1978)).

Supreme Court reversed the conviction.[264] Holding that the erroneous instruction was a per se constitutional error, the Court decided that a jury might interpret the presumption[265] in the instruction, in this context, in four possible ways, including a burden-shifting inference.[266] The Court also held that the instruction was unconstitutional, because it would relieve the prosecution of proving the element of intent beyond a reasonable doubt.[267] The Court found an unconstitutional deprivation of the defendant's due process rights, because, under *Winship*, the prosecution must prove each element of the charged offense beyond a reasonable doubt.[268]

While a *Sandstrom* instruction shifts the burden of proof in a criminal case as to the *mens rea* element regarding a defendant's intent,[269] failure to give a "serious difficulty" instruction also indirectly shifts the burden of proof as to the degree of volitional impairment necessary for commitment of an SVP. When the court does not give a "serious difficulty" instruction, the jury may hold the respondent responsible for proving that he can control his behavior. That understanding shifts the burden of proof to the respondent. While the burden-shifting in a *Sandstrom* instruction literally is within the text of the instruction, failure to give a "serious difficulty" instruction implicitly shifts the burden of proof, because the jury does not focus on the state's burden of proving the respondent's degree of volitional impairment. The jury may therefore mistakenly assume that the respondent is responsible for proving that he has no volitional impairment. To compound the problem, the cause and effect language in most SVP acts that links the defendant's mental abnormality and the likelihood of commission of future sex offenses reinforces the possibility of burden shifting, because such language fails to inform the jury of the state's burden of proof on volitional impairment. A *Sandstrom* instruction leads the jury in a wrong direction, while failure to give a "serious difficulty" instruction fails to provide the jury any direction. Because the trial court's failure to give a jury *Crane*'s "serious difficulty" instruction is analogous to giving a *Sandstrom* burden-shifting instruction which violates due process, such a refusal is arguably a due process error.

A trial court's failure to give a "serious difficulty" instruction is a per se constitutional error, which should be subject to a harmless error analysis under *Sandstrom*. Constitutional harmless error analysis traces it roots to the Supreme Court's decision in *Chapman v. California*.[270] In *Chapman*, the Court stated that some constitutional errors are not severe enough to require automatic reversal.[271] *Chapman* held that a constitutional error is harmless if the government proves,

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264. *Id.* at 514.

265. "'A presumption is an assumption of fact *that the law requires to be made* from another fact or group of facts found or otherwise established in the action or proceeding. Sandstrom v. Montana, 442 U.S. 510, 515 n.4 (quoting MONT. R. EVID. 301(a) (1979)). Presume means "'to suppose to be true without proof.'" *Id.* at 517 (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 911 (1974)).

266. *Id.* at 514–15, 517.

267. *Id.* at 521.

268. *Id.* at 523.

269. *See id.* at 517.

270. 386 U.S. 18 (1967).

271. *Id.* at 22.

beyond a reasonable doubt, that the error did not contribute to the conviction.[272] Justice Stewart's concurrence in *Chapman* gave examples of constitutional violations not subject to harmless error analysis, including denial of counsel at trial, a jury instruction containing an unconstitutional presumption, and the judge's having a financial interest in the outcome of a trial.[273] The *Sandstrom* Court declined to decide whether an unconstitutional burden shifting presumption error could ever be harmless,[274] and only after deciding *Rose v. Clark*,[275] seven years after *Sandstrom*, did the Court opine that *Chapman*'s harmless error analysis should apply to a *Sandstrom* error.[276]

In *Rose*, the defendant's conviction for second-degree murder required proof of malice under Tennessee law.[277] On habeas corpus review, the federal district court granted the petition and deemed the jury instruction a *Sandstrom* error that violated due process by shifting the burden of proof to the defendant on the malice element.[278] The Sixth Circuit Court of Appeals affirmed the conviction. However, the court found the instruction to be more than harmless error, because the defendant had contested the issue of malice during the trial.[279] The Supreme Court reversed and remanded the case for a determination of whether the instruction was a harmless error under *Chapman*.[280] The Court reasoned that "an instruction that impermissibly shift[s] the burden of proof on malice . . . is not 'so basic to a fair trial' that it can never be harmless"[281] since sufficient evidence may prove, beyond a reasonable doubt, each element of the charged offense.

One could argue that, under *Rose*, failure to give a jury instruction on "serious difficulty," if an impermissible burden-shifting instruction, would be subject to harmless error analysis under *Chapman*. If the state offers overwhelming evidence from which a jury could conclude beyond a reasonable doubt that the respondent had "serious difficulty" in controlling his behavior, and the respondent either does not dispute the evidence or offers a weak reply to such evidence, then the failure to issue a jury instruction and the indirect burden-shifting presumption that follows

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272. *Id.* at 24. Until 1993, the *Chapman* harmless error rule applied to the direct review of state and federal convictions as well as to the collateral review of habeas corpus cases. *See* Leslie R. Stern, Comment, *Constitutional Law–Less Onerous Harmless Error Standard Applies on Habeas Corpus Review*—Brecht v. Abrahamson, 113 S. Ct. 1710 (1993), 28 SUFFOLK U. L. REV. 172, 177 (1994). However, in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court established a different harmless error standard for habeas corpus petitions arising from state criminal convictions; namely, the test of whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 622 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Thus, a federal court's granting a habeas corpus petition arising from a state criminal conviction under *Brecht* became more difficult than reversing a criminal conviction on direct appeal from a state or federal court under *Chapman*.

273. *See Chapman*, 386 U.S. at 43–44 (Stewart, J., concurring).

274. *See* Sandstrom v. Montana, 442 U.S. 510, 526–27 (1979).

275. 478 U.S. 570 (1986).

276. *Id.* at 579–80.

277. *Id.* at 574.

278. *Id.* at 574–75.

279. *Id.* at 575.

280. *Id.* at 584.

281. Rose v. Clark, 478 U.S. 570, 580 (1986) (citing Chapman v. California, 386 U.S. 18, 23 (1967)).

may be harmless.[282] For example, if the state could show, as it did in *Hendricks*, that direct testimony from the respondent and unchallenged expert testimony established beyond a reasonable doubt that respondent suffers from a mental abnormality causing him "serious difficulty" in controlling his dangerous behavior, then, drawing on *Chapman* and *Rose*, a reviewing court might invoke a harmless error standard of review. Thus, the respondent must zealously and vigorously challenge the state's evidence on "serious difficulty" in order to minimize possible application of *Chapman*'s harmless error rule.

D. "Serious Difficulty" Instructions and "Conditional Constitutional Error"

A trial court's failure to give the jury a "serious difficulty" instruction should be a "conditional constitutional error." To develop this argument, this section reviews key Supreme Court decisions regarding whether the Constitution requires a presumption of innocence instruction. Again, this requirement applies to the issue of whether the Constitution requires a "serious difficulty" instruction via application of a "totality of the circumstances" test. Two cases, *Taylor v. Kentucky*[283] and *Kentucky v. Whorton*,[284] elucidate the conditional error theory based on a totality of the circumstances test for determining whether a trial court's refusal to give a presumption of innocence jury instruction violates a defendant's due process rights. This author's position is that harmless error analysis should not apply to the determination of constitutional error by a totality of the circumstances test under a conditional error theory. The "serious difficulty" and presumption of innocence instructions, though somewhat analogous, are critically different. Therefore, while the totality of the circumstances test of *Kentucky v. Whorton* is an appropriate conditional error test for assessing the constitutionality of "serious difficulty" instructions, the "per se error" approach is preferable.

1. Presumption of Innocence Instructions

A presumption of innocence lies at the foundation of the administration of the criminal justice system.[285] The law is well settled that a presumption of innocence is an element of fundamental fairness under the Due Process Clause.[286] The Supreme Court, in *Taylor v. Kentucky*, found a violation of the defendant's due process rights where the trial court failed to give the jury a presumption of innocence instruction.[287] In *Taylor*, although the trial court had instructed the jury that a conviction required proof beyond a reasonable doubt, the Supreme Court stressed that giving only the reasonable doubt instruction does not alert the jury to

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282. *See* United States v. Hicks, 748 F.2d 854, 858 (4th Cir. 1984) (citing United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976)).

283. 436 U.S. 478 (1978).

284. 441 U.S. 786 (1979).

285. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

286. The government's burden of proof, which is the "beyond a reasonable doubt" standard, is an application of the principle. "The [reasonable doubt] standard provides concrete substance for the presumption of innocence." *In re* Winship, 397 U.S. 358, 363 (1970).

287. Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

the need for judging the defendant solely on admitted evidence and certainly did not compensate for the absence of a presumption of innocence instruction.[288]

A year later, in *Kentucky v. Whorton*,[289] the Supreme Court limited *Taylor* to its facts and held that a jury instruction on the presumption of innocence is a conditional, not absolute, requirement of the Due Process Clause.[290] *Whorton* established that a trial court's failure to give a presumption of innocence instruction violates the Constitution if, in light of the "totality of the circumstances," the defendant did not receive a fair trial.[291] Subsequent cases, including *Arizona v. Fulminante*[292] and federal appellate cases[293] fueled confusion regarding *Whorton*'s "conditional error" standard as to the presumption of innocence instruction. However, the standard remains, and courts must address *Whorton* when analyzing a failure to give a "serious difficulty" instruction.

2. *The Analogy for "Serious Difficulty" Instructions*

The presumption of a defendant's innocence and a respondent's "no serious difficulty" defense have analogous constitutional roles in SVP commitment hearings that apply criminal trial standards. Four factors support the analogy. First, the presumption of innocence and the respondent's no "serious difficulty" defense are both constitutional rights derivative of the right to a fair trial[294] under the Due

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288. *Id.* at 484–88.

289. 441 U.S. 786 (1979).

290. *Id.* at 789. The Court concluded that the Kentucky Supreme Court did not correctly interpret *Taylor*. *Id.* The Court remanded the case to the Kentucky Supreme Court for the application of a "totality of the circumstances" test to determine if the trial court's failure to give a presumption of innocence instruction deprived the defendant of his constitutional due process rights. *Id.* at 789–90. On remand, the Kentucky Supreme Court, after applying the test, found no due process violation. Whorton v. Kentucky, 585 S.W.2d 388, 389 (Ky. 1979).

291. *Whorton*, 441 U.S. at 789.

> Under *Taylor*, [failure to give a requested instruction on the presumption of innocence] must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming and other relevant factors—to determine whether the defendant received a constitutionally fair trial.

Id.

292. 499 U.S. 279 (1991).

293. The Ninth Circuit has been inconsistent in its *Whorton* interpretations regarding the constitutional implications of a trial court's failure to give a presumption of innocence instruction. In *United States v. Boyland*, No. 93-10324, 1994 U.S. App. LEXIS 3205 (9th Cir. Feb. 14, 1994), the court restated the *Whorton* "totality of the circumstances" standard. *Id.* at *2 (citing Kentucky v. Whorton, 441 U.S. 786, 789 (1979)). In contrast, the court, in *United States v. Thornton*, 1994 U.S. App. LEXIS 24382 (9th Cir. Sept. 1, 1994), viewed *Whorton* as applying "harmless error analysis . . . to [a] trial court's failure to give [a] requested 'presumption of innocence' jury instruction." *Id.* at *2 (citing Kentucky v. Whorton, 441 U.S. 786, 789 (1979)). Adding to the confusion, the United States Court of Appeals for the Fourth Circuit has cited *Fulminante* for the list of constitutional errors, including a trial court's failure to instruct the jury on the presumption of innocence, to which harmless error analysis applies. *See* Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir. 1996); United States v. Johnson, 71 F.3d 139, 147 (4th Cir. 1995) (Niemeyer, J., dissenting).

294. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.") (citation omitted).

Process Clauses of the Fifth and Fourteenth Amendments.[295] Second, both the presumption of innocence and a no "serious difficulty" defense relate to the requirement of the "beyond a reasonable doubt" burden of proof. A criminal defendant's presumed innocence is sufficient to acquit him unless and until the state's production of evidence convinces a jury beyond a reasonable doubt that the defendant is guilty.[296] Similarly, a respondent's "no serious difficulty" defense is sufficient to avoid commitment until the state's proof otherwise convinces a jury beyond a reasonable doubt that the respondent lacks the degree of volitional control that *Crane* contemplated. Third, both a presumption of innocence instruction and a "serious difficulty" instruction direct the jury's attention to jury responsibilities that a reasonable doubt instruction do not make obvious. A presumption of innocence instruction makes the jury aware of its duty to assess guilt beyond a reasonable doubt solely on facts the court admitted into evidence and not on extrinsic facts that come to the jury's attention.[297] In a like manner, a "serious difficulty" instruction makes the jury aware of its duty to assess the no "serious difficulty" defense in terms of the state's burden to disprove it beyond a reasonable doubt and not on the respondent's burden to prove it.[298] Fourth, both a presumption of innocence instruction and a "serious difficulty" instruction respond to factors in a trial which are extrinsic to the instruction. A presumption of innocence instruction counteracts the effect of the presentation of non-evidentiary facts to the jury.[299] In parallel fashion, a "serious difficulty" instruction negates any inclination that the jury might have to require the respondent to prove the truth of a "no serious difficulty" defense.[300]

However, the analogy is not perfect, as the presumption of innocence defense contains important distinctions from the "serious difficulty" defense. The presumption of innocence defense relates to the jury's frame of mind regarding the defendant's innocence but does not relate specifically to the elements of the charged offense.[301] On the other hand, a "no serious difficulty" defense pertains to a specific element that is a prerequisite for commitment. Because of the relationship of the "no serious difficulty" defense to an element of what the state must to prove for commitment, failure to give the "no serious difficulty" instruction directly impacts the burden of proof for that element. This failure can devastate a defendant who relies primarily on a "no serious difficulty" defense to avoid commitment. Failure to give the presumption of innocence instruction, on the other hand, does not negatively impact the respondent in as singular a manner as does a failure to give

295. *See supra* note 9.

296. "[E]very person is presumed innocent until proved guilty beyond a reasonable doubt . . . ." *Estelle*, 425 U.S. at 518 (Brennan, J., dissenting).

297. *See* Taylor v. Kentucky, 436 U.S. 478, 485 (1978) ("This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.").

298. *See* Robinson, *supra* note 232, at 204, 208, 259 n.224 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 48 (1972)), for the proposition that the state has the burden of disproving the defendant's alibi. By analogy, the state has the burden of disproving the defendant's lack of serious difficulty defense.

299. *See supra* note 294.

300. *See* Robinson, *supra* note 232.

301. Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting).

a "no serious difficulty" instruction. Therefore, failure to give the presumption of innocence instruction lacks the particularized effect on the case that failure to give a "no serious difficulty" instruction may have. To the extent that "serious difficulty" instructions are analogous to presumption of innocence instructions, a trial court's failure to give the jury a "serious difficulty" instruction is a due process error that should be subject to a test consistent with the rule in *Whorton*.[302] Accordingly, the appropriate test under this analysis is that a trial court's failure to give a requested "no serious difficulty" instruction is a due process constitutional error if, in light of the totality of the circumstances, the respondent did not receive a fair trial.

If the court's failure to give a "no serious difficulty" instruction is a constitutional error based on the results of a totality of the circumstances test, then a harmless error test is unnecessary. This rule is consistent with *Taylor*,[303] where the court reversed the defendant's conviction, without a harmless error test, by applying a totality of the circumstances test to the trial court's failure to give the jury a presumption of innocence instruction.[304] Consequently, if the respondent establishes that failure to give the "no serious difficulty" instruction deprived him of a fair trial, then the error could not have been harmless, because the state will not be able to prove beyond a reasonable doubt that the error did not affect the verdict.

After weighing both the "per se error" and the "conditional error" approaches regarding a trial court's failure to give an alibi instruction, the "per se error" approach supports a due process violation regarding a failure to give a "no serious difficulty" charge for three reasons. First, failure to give the instruction unconstitutionally shifts the burden of proof to the respondent. Second, the instruction is analogous to the reasonable doubt instruction, and failure to give a reasonable doubt instruction is a per se due process error. Third, the instructions are indirectly analogous to the *Sandstrom* burden-shifting instructions. Admittedly, the analogy to *Sandstrom* is not perfect, because lack of volitional control instructions relate to the state's burden of proving facts extrinsic to the instruction, while *Sandstrom* instructions relate to defects in the instructions themselves.

In contrast, the "conditional error" approach is dependent on an imperfect analogy between "no serious difficulty" instructions and presumption of innocence instructions. An important imperfection in the analogy is that failure to give a "no serious difficulty" instruction may devastate a defendant who is relying on the "no serious difficulty" defense to avoid commitment, while failure to give a presumption of innocence instruction is not as likely to have such a direct effect on the outcome of the trial. Additionally, a "conditional error" approach imports the risk that a trial

302. *Id.* at 789.

303. Taylor v. Kentucky, 436 U.S. 478 (1978).

304. The *Whorton* opinion, which never discussed harmless error, stated that the "totality of the circumstances" test arose from the *Taylor* Court's holding that the trial court's refusal to give a presumption of innocence instruction violated Taylor's due process rights. *Whorton*, 441 U.S. at 789. In fact, the *Taylor* Court reversed the defendant's conviction on grounds of constitutional error without applying harmless error analysis. The implication is that the *Whorton* Court viewed the "totality of circumstances" test as requiring reversal, without a *Chapman* harmless error inquiry, when the test determines that a court's failure to give a presumption of innocence instruction is a due process error. By analogy, a harmless error test is unnecessary when a "totality of the circumstances" test determines that failure to give a "no serious difficulty" instruction is a constitutional error.

judge may incorrectly assess the totality of the circumstances when deciding not to give a "no serious difficulty" instruction. This possibility leads to a heightened burden on appeal, because the respondent bears the burden of proving that the trial judge erred.[305]

The conditional error approach also provides an opportunity for judges to construe vague statutory language in SVP statutes such as "substantially probable," to implicitly mean "no serious difficulty." A "per se error" approach reduces this risk of denying the respondent a fair trial, because the trial judge must give the instruction, and if the judge fails to give the instruction, the state must to meet the strict standards of a harmless error test in order to avoid reversal of the defendant's commitment.[306]

Because the failure to give a jury instruction on *Crane*'s required standard for lack of volitional control is analogous to other types of jury instructions, the omissions of which constitute per se constitutional due process violations subject to harmless error review, the law favors a similar constitutional violation when the trial court fails to give an instruction on "serious difficulty in controlling behavior."

V. DILUTION OF THE JURY TRIAL RIGHT: COMPOUNDING DENIAL OF DUE PROCESS

Empirical studies demonstrate that juries generally have difficulty understanding court instructions.[307] Many jury instructions contain too much legalese and promote a disconnect of meaning between legal professionals and lay juries[308] so much so that juries sometimes render verdicts that are incorrect under

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305. Consider this idea in the context of *Strickland v. Washington*, 466 U.S. 668 (1984). Under a "conditional error" theory, the test for constitutional error determines, in light of the totality of the circumstances, whether the defendant received a fair trial. This framework is equivalent to a test of whether a "no serious difficulty" instruction would have affected the verdict. In *Strickland*, a convicted defendant in a capital punishment case alleged a Sixth Amendment ineffective assistance of counsel claim during the sentencing hearing. The Supreme Court held the contested conduct of the defendant's counsel subject to a conditional error test which requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, or "that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. The Court viewed the capital sentencing hearing as indistinguishable from an ordinary trial. *Id.* Therefore, under *Strickland*, if a defendant alleges a constitutional error during the trial, where the alleged error is subject to a "conditional error" test for constitutionality, the defendant has the burden of demonstrating a reasonable probability that a constitutional error occurred.

306. Chapman v. California, 386 U.S. 18, 24 (1967) (holding the test for harmless error requires the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error did not contribute to the conviction).

307. *See* Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 41–44 (1993). "Much research by linguists, psychologists and others has confirmed that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decisionmaking." *Id.* at 42. *See also* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990) (reporting the results of an empirical study of whether jurors understand jury instructions). For the following true/false statement, less than 35 percent of the participants gave correct answers after hearing instructions on reasonable doubt: "A reasonable doubt must be based only on the evidence that was presented in the courtroom, not on any conclusion that you draw from the evidence." *Id.* at 414.

308. *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 100 (1988).

the law.[309] Justice Scalia roundly criticized the majority in *Crane* for providing trial courts with "not a clue" as to how to charge a jury.[310] He suggested that "[framing] for a jury the degree of 'inability to control' which, in the particular case, 'the nature of the psychiatric diagnosis, and the severity of the mental abnormality' require" may be impossible.[311] His critique of the majority ignores the fact that imprecision plagues many, if not all, jury charges. Even after the judge provides instructions, jurors often do not understand the law. For example, over 500 subjects in a Michigan study displayed a low level of comprehension of jury instructions on reasonable doubt.[312] Often, trial judges pick and choose from various cases, instructions, which define the "reason of doubt" phrase differently. Justice Scalia is not alone in his criticism of the *Crane* standard. Some authors complain that the standard suffers from a lack of objective criteria,[313] or a lack of an "appropriate legal construct that could serve as a neutral benchmark for judges and juries in making this determination."[314] Comparatively speaking, the "serious difficulty" standard that *Crane* announced is no better and no worse than many other standards that the Court has devised.

The trial judge has a duty in every case to tell jurors what law governs the particular cause of action. *Crane* instructs that the state must prove the respondent has "serious difficulty" in controlling his behavior in order to subject him to civil commitment. The jury's duty is to apply the law to the facts of the case. The facts that establish, beyond a reasonable doubt, that the respondent has a mental abnormality or defect that may cause him to commit future serious sex offenses have no legal validity without *Crane*'s explicit standard on volitional control to aid the jury's determination.

If trial judges may refrain from giving the jury an explicit *Crane* instruction, respondents will have difficulty raising reasonable doubt in response to the state's evidence in relation to that legal standard. Where judges do not offer explicit charges on the lack of volitional control, respondents lose the benefits of tying any reasonable doubt found in the state's evidence to the *Crane* requirements, because the jury will never hear the judge mention "serious difficulty" in connection with the respondent's dangerous behavior. The result is to deprive respondents of the fundamental right to a fair trial.

States with sexually violent predator laws should have uniform proposed instructions that explicitly incorporate *Crane*'s "serious difficulty" standard in relation to a respondent's dangerous behavior. Such instructions would ensure compliance with *Crane* and eliminate the problem of appeals courts being unable to determine with any degree of certainty the legal standard juries apply in reaching

309. *Id.* at 94.
310. Kansas v. Crane, 534 U.S. 407, 423 (2002).
311. *Id.*
312. *See* Kramer & Koenig, *supra* note 307.
313. Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After* Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 141 (1999). *See also* Drope v. Missouri, 420 U.S. 162, 171 (1975) (discussing insanity); Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 446–47 (1995) (discussing incompetence).
314. Georgia Smith Hamilton, *The Blurry Line Between "Mad" and "Bad": Is "Lack of Control" a Workable Standard for Sexually Violent Predators?*, 36 U. RICH. L. REV. 481, 503 (2002).

their verdicts of commitment. State appellate courts following a narrow reading of *Crane* must examine the record for facts indicating "serious difficulty" in implicit rather than explicit terms. This "implicit" definition is unacceptable when the respondent's freedom is at stake, and the possibility of application of this unfortunate precedent to other areas of criminal justice jurisprudence is unsettling. Implicitly reading *Crane*'s "serious difficulty" standard into state sexually violent predator laws, as several state courts have done, seriously undermines the appellate function and conflicts with *Crane*'s requirements.

VI. PROPOSALS TO MAKE *CRANE*'S "SERIOUS DIFFICULTY" REQUIREMENT WORK

When the Supreme Court decided *Hendricks* in 1997, seventeen states had laws "that [sought] to protect the public from mentally abnormal, sexually dangerous individuals through civil commitment or other mandatory treatment programs."[315] Ten of those states begin treatment of an offender soon after his arrest and charge with a serious sex offense. Only seven delay civil commitment and treatment until the offender has served his criminal sentence.[316] However, of these seven states, six require consideration of less restrictive alternatives to civil commitment.[317] Minnesota and New Jersey delay commitment, but do not delay treatment. Only Iowa, which delays both civil commitment and treatment until after completion of the criminal sentence, does not consider less restrictive alternatives.[318] Although the focus of state legislatures on treatment of SVPs at the earliest possible time is laudable, most of these states still do not incorporate *Crane*'s "serious difficulty in controlling behavior" standard in the SVP determination.

A. The Ohio Approach

Opponents of SVP laws often fault the procedural posture of civil commitment hearings. At the initial sentencing, instead of authorizing treatment for offenders readily distinguishable from the typical recidivist, most states wait until the completion of the criminal sentence to initiate what is, in essence, another trial on the same offense, albeit for a different purpose. While the commitment hearings do not violate ex post facto laws because they are civil in nature, these hearings require additional court time, additional expert testimony, additional preparation, and, most important, additional funding to litigate the issues the parties could have litigated at the criminal trial.

Ohio's approach to the SVP problem is a good example of a procedural process for commitment of sexually violent predators that takes into account the respondent's rights and the time and financial demands on court systems. Although Ohio's commitment hearings for sexually violent predators are civil, Ohio organizes

315. Hendricks v. Kansas, 521 U.S. 346, 388 (1997).
316. *Id.*
317. ARIZ. REV. STAT. ANN. § 36-3702 (West 2003); CAL. WELF. & INST. CODE §§ 6607–6608 (West 1998); MINN. STAT. ANN. § 253B.185(1) (West 2003); N.J. STAT. ANN. § 30:4-27.28 (West Supp. 2004); WASH. REV. CODE ANN. § 71.09.090 (West Supp. 2004); WIS. STAT. ANN. § 980.06(2)(b) (West Supp. 1998).
318. *Hendricks*, 521 U.S. at 388.

its sexually violent predators statute under its criminal code,[319] and the standard of proof in determining whether an offender is a sexually violent predator is "beyond a reasonable doubt."[320] A review of Ohio's system reveals that the placement of the statute reduces court time and expenses for commitments. The Ohio SVP Act also defines the commitment process as criminal, not civil. Ohio adjudicates offenders as sexually violent predators before the initiation of the criminal trial.[321] Placement of this determination at the beginning of the offender's sentence suggests that the purpose of Ohio's Act is to provide treatment for these offenders.

The Ohio classification provision requires a determination of whether the sex offender falls into one of three categories: sexually-oriented offender; habitual sex offender; or sexual predator.[322] If a court convicts a person of committing a sexually violent, sexually-oriented offense and of a sexually violent predator specification, "the conviction of the . . . specification automatically classifies the offender as a sexual predator . . . ."[323] The Ohio trial court then holds a hearing prior to sentencing to determine whether the sexually-oriented offender is a sexual predator.[324]

Before a trial judge can declare the sex offender a sexual predator, the statute requires the establishment of several factors, including, but not limited to, the offender's age, prior record, the age and number of victims, and the offender's behavioral characteristics.[325] The only instance not requiring a sexual predator pre-sentencing hearing occurs when a "sexually violent predator" specification attaches to a sexually violent offense in the indictment.[326] In this instance, the sexual predator label attaches automatically.[327]

Ohio's approach makes procedural sense in terms of financial, as well as judicial, economy, because the SVP determination occurs at the same time as the criminal trial. However, the question remains whether Ohio's statute needs adjustment to include *Crane*'s "serious difficulty" requirement, and, if the offender does not have the opportunity to request a jury trial on an SVP determination, whether the trial judge should have to make separate written findings on the issue of volitional impairment before issuing an SVP ruling. If Ohio adopted and applied *Crane*'s volitional control standard in all SVP commitment determinations, Ohio would be a much better example of how the ideal functioning of the SVP commitment process. However, until respondents assert due process challenges to force states to conform to *Crane*'s volitional control standard as a predicate to an SVP commitment, Ohio and other non-conforming states will not likely change their positions.

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319. *See* OHIO REV. CODE ANN. §§ 29.50.01–.99 (Anderson 2003).
320. State v. Jones, 754 N.E.2d 1252 (Ohio 2001).
321. OHIO REV. CODE ANN. § 2950.09(B)(1)(a) (Anderson 2003).
322. *Id.* § 2950.01.
323. *Id.* § 2950.09(A).
324. *Id.* § 2950.09(B)(1)(a).
325. *Id.* §§ 2950.09(B)(3)(a)–(j).
326. *Id.* § 2950.09(B)(5).
327. OHIO REV. CODE ANN. § 2950.09(C)(1) (Anderson 2003).

B. *Proposed Model Sexually Violent Predator Jury Instructions*

Judge Casanueva, in a concurring opinion in *Lee v. Florida*, wrote, "I would respectfully suggest that a standard jury instruction consistent with *Crane* should be generated and used in future jury trials."[328] While sexually violent predators are among some of the most dangerous types of criminals, they too deserve adequate protection of Constitutional rights. Specifically, sexually violent predators do not deserve deprivation of due process rights at the hands of trial judges who fail to implement *Crane*'s edict on "serious difficulty." Notwithstanding the complaints of Justices Scalia and Thomas, given the constitutional implications and the possibility of lifetime confinement as a result of civil commitment under SVP laws, attorney John Donham, Crane's counsel, has advanced the following jury instructions, based on *Crane*'s "serious difficulty" standard.[329] Perhaps these instructions will satisfy *Crane* critics and shore up some of its perceived imperfections.

> The proposed instruction reads:
> - To find Respondent to be a "sexually violent predator," you must find his disorder causes him to have serious difficulty in controlling his dangerous behavior.
> - "Serious difficulty in controlling behavior" means "difficult if not impossible to control dangerous behavior."
> - "Serious difficulty in controlling dangerous behavior" is a degree of self-control impairment that readily distinguishes Respondent from ordinary violent sex offenders who are likely to re-offend.
> - "Behavior" means acting in a certain way. It does not simply mean "urge" or "attraction" or "desire."[330]

This instruction offers specific, direct guidance for a factfinder by providing a definition of "serious difficulty in controlling behavior." Implementing this instruction would bring uniformity and consistency to this area and would be an important step on the road to compliance with the Court's directive in *Crane*.

VII. CONCLUSION

Crane limits the state's police and *parens patriae* powers[331] to civilly commit sex offenders under sexually violent predator acts. Although the contours of the standard may be imprecise, the Court explicitly established "serious difficulty" as the degree of volitional impairment states must prove to the satisfaction of a jury

328. Lee v. Florida, 854 So. 2d 709, 719 (Fla. Dist. Ct. App. 2003) (Casanueva, J., concurring).

329. Donham represented Michael Crane. Although Donham submitted the proposed instructions to the Kansas Judiciary Council, that body has not adopted the proposal as part of Kansas's pattern instructions.

330. John Donham, *Model Jury Instructions on* Crane*'s "Serious Difficulty" Standard* (on file with author).

331. *See* Falk, *supra* note 313, at 124.

before courts can commit sex offenders who have completed their criminal sentences. Notwithstanding *Hendricks*, the court in *Crane*, underscores the inability to control dangerous behavior as a critical element of proof and as the feature distinguishing those persons subject to involuntary commitment from ordinary dangerous recidivists. The omission of a jury instruction on this element denies respondents their fundamental due process right to a fair trial. Failure to instruct the jury on this standard is analogous to depriving these respondents of similar rights in the criminal arena. Justice Scalia's dissent notwithstanding, *Crane* clearly requires such a charge before the civil commitment of an SVP. The requirements of individual liberty in this country far outweigh the burdens and costs to society.

The failure to instruct juries regarding whether the respondent has serious difficulty in volitional control is a per se constitutional error subject to harmless error review. The state must bear the burden of proof for each element required for commitment. *Crane* places this burden squarely on the state and does not allow a shift of the burden to the respondent. As a consequence of the trial court's failure to instruct a jury on "serious difficulty," the jury is not informed of the legal standard by which it is to measure the respondent's dangerous behavior. This potential error involves major due process implications. Although holding SVP commitment hearings contemporaneous with criminal trials enhances judicial economy and the treatment goals of the commitment process, *Crane*'s volitional control standard must govern these SVP commitment proceedings in order to make the commitments constitutional.

Finally, for the sake of uniformity and consistency in applying the "serious difficulty" standard, states that conduct civil commitment hearings should adopt uniform jury instructions. Even if a state desires to follow Justice Scalia's *Crane* dissent, providing for a specific jury finding on the issue of the respondent's ability to control his behavior would still be beneficial.[332]

> Such a finding might satisfy the constitutional concerns in *Crane*. Because [a Florida SVA Act] case places an individual's personal freedom and liberty at risk for an infinite term, . . . both the Constitution and logic mandate that the courts must ensure that the jury or factfinder specifically addresses this essential element of lack of volitional control.[333]

332. *See Lee*, 854 So.2d at 719.
333. *Id.*