THE EVALUATIONS ARE LEGALLY ERRONEOUS BECAUSE THEY DO NOT INCLUDE A SEPARATE FINDING OF A "SERIOUS AND WELL FOUNDED RISK."

by: Tom Watson (2003)

On January 22, 2002, the U.S. Supreme Court set new substantive due process standards for SVP commitments that were previously misinterpreted by the Department of Mental health ("DMH") evaluators when applying the Act. The Court in *Kansas v. Crane* (2002) 534 U.S. 407, now requires a separate and distinct finding of a "special and serious lack of ability to control behavior." (*Id.* Slip Opin. At p. 5.)

On April 25, 2002, the California Supreme Court set new standards for SVP evaluations when it issued the opinion in *People v. Superior Court (Ghilotti* (2002) No. 102527, 2002 WL 725423(Cal.), where a "serious and well founded risk" was defined. While the issue of whether the *Ghilotti* decision meets the constitutional standard set in *Crane,* and other U.S. Supreme Court precedent, has not yet been decided in the federal courts, the following argument is based on evaluations being infected with other legal error as defined by *Ghilotti,* in situations where the evaluators did not make a separate and distinct finding of a "serious and well founded risk," or a "special and serious lack of ability to control behavior," irrespective of the definition applied.

The reality is that evaluators' predictions of defendants' present or future behavior are being extrapolated from history. The predictions are simply visions divined from history without regard to defendants' actual present state. Defendants' actual present state, based on recent records typically show they have excellent present behavior. The defendant often received excellent prison program participation evaluations, yet the finding of current dangerousness is solely based on history.

Prior to the decisions in *Crane and Ghilotti*, the DMH evaluators would diagnose a mental abnormality and that automatically carried an accompanying dangerousness. These were not considered separate findings in pre-*Crane* or *Ghilotti* evaluations, and those evaluations will, therefore, contain this type of legal error. California will, no doubt, attempt to ignore the language in *Crane* that distinguishes these items, making them two separate elements that now require separate consideration before making a commitment pursuant to a SVP Act. The dissent in *Crane* complained about the majority creating the two separate elements.

Previously, evaluators would review the historical convictions, find a mental disorder at that historical time, attach to that an automatic finding of dangerousness at that historical time, both based on each other and on the overt acts that resulted in the underlying historical criminal convictions. The evaluators then extrapolate that forward. To accomplish this, they re-evaluate the person's past, but do so in the present. In reality, they would have the past history do double duty, by making the recent paper review of

history appear to be based on something other than the person's history, when actually, it is nothing but the history re-visited in the present. To this the evaluators add hearsay about unconvicted crimes and speculation about undiscovered and uncharged crimes. This should be additional legal error in violation of the use of hearsay and the right to confrontation as explained by the California Supreme Court in *People v. Otto* (Cal. 2001) 26 P. 3d 1061.

The previous evaluator methodology comes from an improper application of a California Supreme Court decision hat required a finding that a person "currently" suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which "makes" him dangerous and "likely" to reoffend. (§6600, subd. (a))" (*Hubbart v .Superior Court* (1999) 19 Cal. 4th 1138, 1162, 81 Cal. Rptr. 2d 492, 507.) The constitutional standard relied on by *Hubbart* comes mainly from *Kansas v. Hendricks* (1997) 521 U.S. 346. At 19 Cal. 4th, at 1161, the *Hubbart* Court makes it clear that the finding of dangerousness must be "current dangerousness" citing *Conservatorship of Hofferber, supra*, 28 Cal. 3d 161, 176-178, or "present dangerousness" citing *People v. Superior Court (Myers)* (1996) 50 Cal. App. 4th 825, 830.

Defendants like Hubbart and Hendricks must be distinguished. After serving a prison term for his first setoff convictions, the defendant in *Hubbart* was released on parole, and almost immediately reoffended. He was subsequently again convicted, and following his second prison term, Hubbart was again released on parole, and again soon reoffended. (See *Hubbart* at 19 Cal. 4th at 1150, 81 Cal. Rptr. 2d 499.). Correspondingly, Hubbart's finding of dangerousness flowed from history to the present based on numerous overt acts of his continuous reoffending. His history and his present behavior were one in the same. Likewise, the defendant in *Hendricks* admitted to his dangerousness. (*Hendricks*, 522 U.S. at 360.) Therefore, his dangerousness flowed from his history to his present based on his own self admission. Accordingly, the finding of dangerousness for both Hendricks and Hubbart were consistent with both the statutory and constitutional requirements for commitment under their particular circumstances.

While *Hubbart,* under these circumstances, allows "the use of prior dangerous behavior to establish both present mental impairment and the likelihood of future harm," (*Hubbart*, 19 Cal. 4th at 1164.), this has been distinguished so as to apply to defendants such as Hubbart and Hendricks because it is not derived solely from their history, but rather from their self admissions or their ongoing and continuous pattern of misbehavior.

In interpreting *Hubbart*, and the Act's requirements, the Court in *People v. Buffington* (1999) 88 Cal. Rptr. 2d 696, 704, 74 Cal. App. 4th 1149, held that the Act requires recent objective indicia of an offender's condition, and a recent objective basis for a finding that the offender was likely to reoffend. That the Act precludes commitment based solely on evidence of prior crimes.

The Court in *People v. Talhelm* (2000), 102 Cal. Rptr. 2d 150, 156, discussed the different applications required for defendants other than the Hubbart type where, "a diagnosis based primarily on the person's prior offenses adds little to the reliability of the finding that a person is a sexually violent predator likely to engage in future sexually violent behavior if released."

In *Hubbart, supra,* 19 Cal. 4th at 1179-1180, the Court cautions about distinguishing "meaningfully between, on the one hand, offenders whose violent predatory conduct stems in some way from an abnormality of thought, perception or affect and, on the other hand, all remaining offenders, who by virtue of their [1180] deviant conduct may properly be described as abnormal but whose abnormality only traces, in circular fashion, back to their conduct. It was to this danger that the high court alluded in *Foucha v. Louisiana* (1992) 504 U.S. 71, 82-83, 112 S1780, 118 l437, cautioning: 'It was emphasized in [*United States v.] Salerno* [(1987) 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697] that the [pretrial] detention we found constitutionally permissible was strictly limited in duration. [citations.] Here, in contrast, the state asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the state to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law.'" (*Hubbart, supra,* at 1179-1180)

Because of this comes the need to have a separate and distinct finding of both a mental abnormality and a separate finding of dangerousness that are not based primarily on the person's prior offenses. The DMH evaluations contain legal error because the evaluators have failed to distinguish between defendants such as Hendricks and Hubbart, and others for whom there is no recent objective indicia of a present serious inability to control behavior. The U.S. Supreme Court revisited the SVPA commitment criteria on January 22, 2002, and issued the opinion in *Kansas v. Crane* (2002) 534 U.S. 407, 122 S. Ct. 867, where the *Foucha* warning was incorporated in this SVPA opinion, as well as the warning from Justice Kennedy's concurring opinion in *Hendricks* where he pointed out that, "[I]f … civil commitment were to become a mechanism for retribution or general deterrence, …, our precedents would not suffice to validate it." Justice Werdegar quotes this Kennedy warning in *Hubbart, supra,* at 1179.

> The *Crane* Court sums this up in the following statement:
> "It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the

> case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. 521 U.S., at 357-358; See also *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)." (*Crane*, Slip Opinion at p. 5.)

Justice Scale's dissent in *Crane* clearly explains how the majority now requires the dangerousness finding to be separate from the mental disorder, and this is a new requirement. The dissent explains why they disagree with this stating: "It is the italicized language in the foregoing excerpt that today's majority relies upon as establishing the requirement of a separate finding of inability to control behavior. *Anti*, at 4." (*Crane, supra,* Slip Opinion, Scalia dissent, at p. 4.)

On April 25, 2002, the California Supreme Court decided *People v. Superior Court (Ghilotti)*, No. 102527, 2002 WL 75243 (Cal.), where the court established new guidelines for SVP Act evaluations. Among other things, the *Ghilotti* Court states: "The requisite likelihood of reoffense is thus a separate determination which does not inevitably flow from one's history of violent sex offenses and a predisposing mental disorder." (*Ghilotti*, at p. 22.). The associated footnote, Fn. 12, in pertinent part, quotes *Crane* and then states: "…, the SVPA requires both a qualifying mental disorder and a 'likelihood' of reoffense, and the one does not predetermine the other." (*Ghilotti*, *supra*, pg. 39, Fn. 12.) Thus, the California Supreme Court now also requires a separate finding of dangerousness.

In the *Ghilotti* concurring opinion, Justice Werdegar in discussing the legislative intent, and the necessary protections required to not violate the constitution states: "The drafters of the SVPA knew that and thus narrowly tailored the law to those who were extremely dangerous, not merely by virtue of their past offenses, but because, in their present state, they were actually likely to reoffend." (*Ghilotti, supra,* p. 30.)

In almost all cases, the evaluators consider and present only a Defendant's often decades-old criminal history, along with statistical and subjective recidivism predictions based solely on that old criminal history, with absolutely no objectively based showing of a current "serious and well founded risk," or a "special and serious lack of ability to control behavior." These findings are derived in a circular fashion from one another, and therefore, are not a separate finding on each element as now required by the SVP Act. Therefore, such evaluations surely contain legal error under the criteria set by the California Supreme Court and the United States Supreme Court.