scales in the favor of the defense, as the defense's expert testimony will go unrefuted.

The usefulness of a state's expert in cases where BWS is alleged will be limited, and dishonesty will be encouraged during the state's expert examination, as a defendant's deceitfulness has little consequence unless a diagnosis of malingering is substantiated. If the state's expert cannot offer an opinion because the defendant lacks credibility and the expert cannot explain the reasoning behind the inability to form an opinion, then it will make it much easier for the defense, even when inappropriate, to use battered woman syndrome as a successful defense.

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Determination of Volitional Impairment as a Condition of Continued Involuntary Confinement of Insanity Acquittee

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While the *Kansas v. Crane* Holding Concerning Proof of Volitional Impairment Applies to the State's Criteria for Continued Confinement of an Insanity Acquittee, a Separate Finding of Volitional Impairment Is Not Necessary

In *Richard S. v. Carpinello*, 589 F.3d 75 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit denied Mr. S.'s petition for a writ of *habeas corpus*, holding that while the New York state courts erred in not applying the *Kansas v. Crane*, 543 U.S. 407 (2002), standards to the determination of his continued confinement as an insanity acquittee, they did not conclude unreasonably that the basis for his confinement met the requirements of the due process clause, since a separate finding of "volitional impairment" was not needed where a nexus between mental illness and such impairment can be established.

Facts of the Case

While on probation after pleading guilty to second-degree manslaughter for the killing of a male sex partner in 1978, Mr. S. was charged with attempted second-degree murder for stabbing a 15-year-old boy after a sexual encounter in 1980. In 1981, Mr. S. pleaded and was found not guilty by reason of mental disease or defect (NGRMDD) to that charge.

Pursuant to New York's Criminal Procedure Law, Mr. S. began his involuntary commitment at a secure psychiatric facility, after having been determined to be both mentally ill and dangerous. In 1986, Mr. S. was convicted of the murder of another male partner in 1979 and was sentenced to 25 years to life. However, in 1991, Mr. S.'s conviction was reversed, as his initial disclosure of that crime, made under hypnosis, was considered unreliable, and he was transferred back to a secure facility.

In 2004, Mr. S. appealed an order for his continued confinement in a nonsecure psychiatric facility. After a four-day hearing, the county court found Mr. S. to be both mentally ill and dangerous, warranting his continued retention. Mr. S. then appealed to the Third Department of the New York Supreme Court Appellate Division, arguing that the state must apply the holding of the U.S. Supreme Court decision in *Kansas v. Crane*, which was that under the Kansas Sexually Violent Predator (SVP) Act of 1994, involuntary civil commitment can be imposed only if "serious difficulty in controlling behavior" can be proven as a separate mental condition, in addition to evidence of mental illness and dangerousness. After weighing arguments and psychiatric testimony from both sides, the New York appellate division court agreed with the county court's finding of Mr. S.'s mental illness and dangerousness "by a strong preponderance of the credible evidence." Regarding his claim of improper confinement since the state had failed to prove that he had a volitional impairment, the court found the argument to be "without merit."

In 2008, Mr. S. petitioned the U.S. District Court, seeking a writ of *habeas corpus* on the grounds that the lower New York courts failed to extend and apply the *Crane* holding to his case. The federal district court held that Mr. S.'s main argument, that the holding in *Crane* applied to the conditions of his confinement, was irrelevant, as he had not been charged as a Sexually Violent Predator (SVP), and that the provisions of *Crane* did not extend to insanity acquittees (*Richard S. v. Carpinello*, 628 F. Supp.

2d 286 (N.D. N.Y. 2008)). Moreover, the court found no violation of Mr. S.'s due process rights, as the state's criteria for determining Mr. S.'s continued confinement adhered to standards established by federal case law concerning commitment, confinement, and release (*Addington v. Texas*, 441 U.S. 418 (1979); *Jones v. United States*, 463 U.S. 354 (1983); and *Foucha v. Louisiana*, 504 U.S. 71 (1992)). Interestingly, the court interpreted the Supreme Court's holding for volitional impairment in *Crane* as an additional due process requirement for cases involving SVP statutes. Therefore, although Mr. S.'s petition for a writ of *habeas corpus* was denied and dismissed, he was allowed to appeal further, as this issue had not yet been ruled on by any other federal court.

In 2009, Mr. S. appealed to the U.S. Court of Appeals for the Second Circuit.

Ruling and Reasoning

In considering Mr. S.'s due process claim, the Second Circuit overruled the district court and held that the Kansas SVP Act applied not only to convicted sex offenders nearing the end of their sentences, but also covered those found to be incompetent to stand trial and those found legally insane. The court also opined that *Crane* "elaborated" only on the general constitutional standard for civil commitment in the context of the Kansas SVP Act, and intended neither to change the standard for commitment of insanity acquittees nor to establish a distinction between the two groups. Therefore, the circuit court held that the district court erred in failing to apply *Crane* to insanity acquittees.

In addressing Mr. S.'s argument that a separate finding of volitional impairment is required in the determination of involuntary confinement, the federal circuit court examined interpretations from other state and circuit courts that cited *Crane*. It found and agreed with the majority of those opinions that the Supreme Court did not "add a factor" to the due process test for involuntary civil commitment. Rather, it concluded that the additional provision for a separate finding of a volitional impairment as set out in *Crane* merely provided "an explanation of the mental illness portion of the test: the state may satisfy this component by proving that an individual has a mental condition, abnormality or disorder that is sufficiently severe that he has serious difficulty in controlling his dangerous behavior" (*Richard S.*, p 84).

While deliberating on Mr. S.'s contention that a specific finding of volitional impairment is necessary, the court concurred with the Supreme Court's position on the lack of clear boundaries delineating degrees of impairment, but reasoned that an explicit finding of volitional impairment is not necessary, as long as there exists a "proof of a mental disorder or abnormality that makes it seriously difficult to control one's dangerous behavior" (*Richard S.*, p 85). The circuit court further concluded that Mr. S. did not meet his burden of proof by clear and convincing evidence to rebut the evidence of the state, which found that he had a "complex and serious mental disorder for which he refuses to receive treatment" (*Richard S.*, p 85), was dangerous as a result of untreated mental illness, and was "unable or unwilling to recognize or to avoid the circumstances that prompt him to engage in dangerous and potentially homicidal behavior" (*Richard S.*, p 85).

Discussion

In defining volitional impairment in the concurring opinion for *Crane*, Justice Breyer admitted that "an absolutist approach is unworkable" (*Crane*, p 411), referring to an evocative statement contained within the *amicus* brief filed by the American Psychiatric Association, that "the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk" (*Crane*, p 412). At the same time, the majority in *Crane* reaffirmed the Court's deference to the states in defining "mental abnormalities and personality disorders," as well as to the "ever-advancing science" of psychiatry. Furthermore, the Court did not address the distinction between "volitional" and "emotional" impairments, choosing to "proceed deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require" (*Crane*, p 414).

However, Justices Scalia and Thomas, in their joint dissenting opinion for *Crane*, called the Court's majority opinion "a remarkable feat of jurisprudential jujitsu" (*Crane*, p 425) and also castigated the Court for "leav[ing] the law in such a state of utter indeterminacy" (*Crane*, p 424). Although the Second Circuit attempted to apply the context and holding of *Crane* while deliberating on *Richard S.*, it nevertheless found little guidance, given the vague stance and cautious direction the Court chose in interpret-

ing the Kansas SVP statutory criteria on volitional impairment.

Perhaps recognizing the semantic wordplay and anticipating potential liberty challenges, the courts in Minnesota endeavored to establish a more detailed, consistent, and empirical legal framework to elucidate the criterion of "an utter lack of power to control sexual impulses" in their SVP statute. In determining dangerousness, trial courts in Minnesota are therefore directed to consider a combination of demographic and actuarial factors, as well as contextual variables such as environmental stressors and outcomes of previous treatment (*In re Linehan*, 510 N.W.2d 910 (Minn. 1994), p 614).

On May 20, 1989, seven-year-old Ryan Alan Hade was found strangled, raped, mutilated, and left for dead in a Tacoma, Washington, park. The perpetrator was Earl K. Shriner, a convicted sex offender who had been released from prison two years prior and was unable to be civilly committed at the time. A public backlash led to Washington's becoming the first state to pass an SVP statute, the Community Protection Act, in 1990. Twenty states soon followed suit, many with provisions eerily similar to the mentally disordered sex offender (MDSO) laws enacted 40 years earlier, starting with Michigan in 1937. Although criticism from organizations such as the American Bar Association (ABA) and the Group for the Advancement of Psychiatry (GAP) was instrumental in the repeal of most statutes in the 1980's, a similar trajectory does not appear to be on the horizon for SVP legislation, as the Adam Walsh Child Protection and Safety Act was signed into federal law in 2006.

While SVP statutes can vary in terminology, the use of the terms "mental abnormality and personality disorders," instead of "mental illness," as well as the scope of what is considered a "sexually violent offense," are designed as to all but guarantee the continued civil commitment of an individual such as Mr. Shriner after release from prison. For Mr. S., who had been diagnosed with "sexual sadism," the diagnostic criteria in the current iteration of the DSM (American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision. Washington, DC: American Psychiatric Association, 2000; DSM-IV-TR) strays beyond mere symptoms by incorporating the "psychological suffering" visited on the victim and even insinuation of future violence and illegality by stipulating the recurrent and nonconsensual aspects of the behaviors themselves.

The advances made in fields such as social psychology, behavioral economics, and neuroscience have eroded the once-sacred landscape carved out by Plato and Descartes, rendering the sovereignty of reason and free will illusory and untenable. Dwelling on distinctions between twilight and dusk will only strand us further in the darkness. Standing at the intersection of psychiatry and law, we have an opportunity to relieve this potential gridlock, by developing rational, empirical, and practical systems of evaluation and treatment while facilitating an honest and sensible discourse that can lead to transparent, meaningful, and effective legislation.

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Right to Neuropsychological Examination for Death Sentence Mitigation

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Indigent Defendants' Rights to Appointment of an Expert to Conduct a Neuropsychological Examination Are "Clearly Established" Federal Law for the Purpose of Federal Court *Habeas* Review of State Court Decisions

In *Alverson v. Workman*, 595 F.3d 1142 (10th Cir. 2010), the Tenth Circuit Court of Appeals reviewed Billy Alverson's appeal of lower courts', state and federal, denial of his petition for a writ of *habeas corpus*. Mr. Alverson had been sentenced to death in 1997 by an Oklahoma state court for his participation in a brutal robbery and murder. The issues before the Tenth Circuit were threefold: whether Mr. Alverson, an indigent, had a due process right to publicly funded expert mental health evaluation and testimony; if so, what thresholds had to be met to qualify for such expert assistance; and whether the state trial proceedings met the minimum due process