

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

IN THE MATTER OF)
THE CARE AND TREATMENT)
OF JAMES FRANCIS,) No. 24198
Respondent/Appellant.) Oral Argument Requested

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF BUTLER COUNTY
36TH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM J. CLARKSON

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

On January 25, 2001, a jury found appellant James Francis to be a sexually violent predator pursuant to Section 632.480, et seq., after a jury trial in Butler County, Missouri. The trial court entered its judgment on January 25, 2001. Francis timely filed a motion for new trial on February 26, 2001. The court denied the motion on March 16, 2001, and Francis timely filed a Notice of Appeal on March 23, 2001.

To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court. To the extent that this appeal does not involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri, jurisdiction lies in the Missouri Court of Appeals, Southern District. Rules 83.01-83.04; Mo.Const. Article V, Section 3; Section 477.060 RSMo.

STATEMENT OF FACTS

Appellant James Francis was convicted of sodomy in 1989 in Butler County Circuit Court (Tr. 202¹). The state thereafter filed a Petition in Butler County Circuit Court pursuant to Section 632.480 RSMo (Cum.Supp. 1998) (the Sexually Violent Predator (SVP) statute) alleging that Francis is a sexually violent predator (L.F. 7-18). The cause proceeded to trial and the following evidence was adduced.

Anita Potts, Rita Williams, Sheila Law, and Andrea Deghera testified that Francis, whom they called “Pete”, was their stepfather from 1969 to 1975 (Tr. 141, 153, 160, 165). All four testified that Francis committed various acts on them. Potts testified that Francis put his finger in her vagina and tried to put his penis in her vagina (Tr. 144, 145, 149). Potts said that Francis’ sexual contact with her was an “all the time thing” (Tr. 145). She related one story where she was asleep and awoke to his attempt to put his penis in her vagina (Tr. 145-146). She related another story where she and her sister Andrea were in a car with him when he stopped and attempted to penetrate her with his penis (Tr. 145-146). She testified that she “laid” on the horn and he threatened her with a knife to her throat, telling her that he would kill her (Tr. 147).

Rita Williams testified that Francis “molested” her for six years (Tr. 154). She stated that he would hide in the shower and wait for her to use the bathroom (Tr. 155). He would then appear and try to insert his penis into her vagina (Tr. 155). She said it

¹ The Record on Appeal shall be cited as follows: Legal File (L.F.); Trial Transcript (Tr.).

happened “many times” (Tr. 155). Williams said she and Law were bathing on one occasion when Francis took Law and bent her over the toilet seat (Tr. 158). Francis let Law go because she was too young to talk and bent Williams over the toilet seat, attempting to put his penis in her vagina (Tr. 158). Williams related a story about a time when her mother went into a drugstore while she and Francis waited in the car, and Francis “molested” her (Tr. 156).

Sheila Law testified that she saw Francis having sexual intercourse with Williams one night (Tr. 162).

Andrea Deghera testified that Francis molested her often, and that she saw him doing things to her sisters as well (Tr. 170). She stated that on July 23, 1975, Francis was taking her to a birthday party when he pulled over, told her to open the door, “leaned” her over the car seat, and pulled her underwear down (Tr. 166). She testified his penis would not go in, but he ejaculated (Tr. 167). He then took her to the party (Tr. 167). Deghera testified that when he picked her up from the party he had his pants unzipped and had her touch his penis and had her show him her vagina (Tr. 168). Francis was arrested as a result of the incident (Tr. 169).

Officer Robert Patrick testified that he took the complaint from Deghera concerning the 1975 incident, and arrested Francis (Tr. 180). Francis made a statement admitting to the offense (Tr. 179-180). Francis later pleaded guilty to the charge (Tr. 180).

Walt Lashley testified that in August 1980, he was twelve years old (Tr. 184). He met Francis when they worked on a farm together (Tr. 185). During that time period, Francis put his penis in Lashley’s rectum on three separate occasions (Tr. 185-187).

Officer Robert Burdiss testified that he took a complaint concerning Walt Lashley and Juanita Lashley (Tr. 188-189). Francis made statements to him admitting to attempted sexual intercourse with Juanita², and partially inserting his penis into Walt's rectum (Tr. 195-196). Francis was convicted of sodomy of Walt Lashley and sexual abuse of Juanita Lashley (Tr. 196-197).

Officer Clifford Morris testified that on May 31, 1989, he investigated a complaint of sexual abuse involving five-year-old Curtis Self (Tr. 198). Francis was convicted of sodomy in Butler County Circuit Court as a result (Tr. 202). Self's medical records note that the child stated that "Pete's wee-wee was stuck in there", and that he had a "tiny fissure" in the inferior anal position (Tr. 216). This conviction is the offense pleaded in the petition (L.F. 7-18).

Officer Donwell Clark testified that on December 29, 1988, he investigated an incident concerning three-year-old John David Smith (Tr. 204). Smith's medical records reflected that Smith's mother stated that the child told her that an "adult acquaintance performed anal sex on him", and that the child reported that "Pete stuck his wee-wee in me" (Tr. 216).

Dr. Lucinda Baker testified that she evaluated Francis pursuant to court order to determine if his is a SVP (Tr. 217-223). Dr. Baker noted that she did not interview Francis because he refused "on advice of counsel"; all she had were records in order to form her opinion (Tr. 223). She admitted that this placed limits on her information, such

² The record reflects that Juanita was eleven years old at the time (Tr. 194).

as assessing current attitudes towards the crimes, his personality, and his plan to prevent relapse (Tr. 223).

Dr. Baker testified that Francis has a mental abnormality of pedophilia (Tr. 227). She noted that the records demonstrate a “pattern of molestation ... first reported in 1972”, and that he had been hospitalized several times as a result of “these episodes” (Tr. 229).

Dr. Baker testified that she believed there was a “good chance” he would reoffend if not in a secure facility, and that he will more likely than not engage in predatory acts of sexual violence in the future (Tr. 230). She noted that he showed a pattern of reoffending, and he “hasn’t been able to refrain from doing so” (Tr. 230). Dr. Baker testified that pedophilia does not go into spontaneous remission, but there is effective treatment available (Tr. 233-234). Dr. Baker testified that the “past is the best predictor we have”, but acknowledged that Francis’ records show that while he was on parole he had no new sex allegations or violations (Tr. 233, 242). Dr. Baker testified that Francis “meets the criteria” of a SVP (Tr. 235).

Francis made a motion for summary judgment at the end of all the evidence, and the trial court overruled the motion (Tr. 255-256). The jury found Francis was a SVP, and Francis was thereafter committed to the Department of Mental Health (DMH) (Tr. 290; L.F. 123). This appeal follows.

POINTS RELIED ON

I

The trial court erred and abused its discretion when it (a) denied Francis' motion for summary judgment, and/or b) submitted Instruction No. 6 while refusing Francis' proffered Instruction Nos. 6A and/or C. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Francis lacks volitional capacity to control his behavior. Francis was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.

Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation permits the state to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses without also requiring a showing of inability to control conduct. The trial court's rulings deprived Francis of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Francis' volitional capacity, nor was it instructed that before finding Francis to be

an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997);

In the Matter of Crane, 7 P.3d 285 (Kan. 2000);

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

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 2, 10.

II

The trial court erred when it denied Francis’ motion to dismiss the state’s petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Francis was prejudiced by the trial court’s error because there was no evidence of or consideration given to placing him in the least restrictive environment. Thus, Francis was deprived of his liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.

Baxtrom v. Herold, 383 U.S. 107, 86 S.Ct. 760 (1966);

In re Young, 857 P.2d 989 (Wash. 1993);

Section 632.300 RSMo et seq;

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 2.

III

The trial court erred and abused its discretion when it overruled Francis' objections and allowed Petitioner's Exhibits 7 and 8 into evidence which included hearsay statements from out-of-court declarants concerning acts allegedly committed by Francis. The statements were hearsay and not subject to any exception to the hearsay rule. The statements were also more prejudicial than probative and included accusation of a sexual offense which was never proven or charged. Francis was prejudiced because the jury used the evidence as proof of the truth of the matter. The trial court's error violated Francis' rights to due process, to be tried only for the allegations charged, to confront and cross examine, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution.

State v. Miller, 924 S.W.2d 513 (Mo.App.W.D. 1996);

Bynote v. National Super Markets, Inc., 891 S.W.2d 117 (Mo.banc 1995);

U.S. Const. Amends. 5, 6, 14;

Mo. Const Art. I, Sec. 10, 18(a).

IV

The trial court erred and abused its discretion when it overruled Francis' motions in limine and objections, and allowed the state to present testimony from Anita Potts, Sheila Law, Rita Williams, and Donwell Clark, concerning evidence of uncharged allegations of other sex crimes. Their testimony was irrelevant to any element the state had to establish, irrelevant to the issues for the jury to decide, and was far more prejudicial than probative. Francis was prejudiced because the jury heard repeated testimony of bare allegations of other sex crimes in addition to the crime pleaded in the Petition. Their testimony constituted victim impact, and designed solely to prejudice the jury against Francis. The trial court's error violated Francis' rights to due process, to be tried only for the allegations charged, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution.

State v. Barriner, 34 S.W.3d 139 (Mo.banc 2000);

State v. Bernard, 849 S.W.2d 10 (Mo.banc 1993);

U.S. Const. Amends. 5, 6, 14;

Mo. Const Art. I, Sec. 10, 18(a).

ARGUMENT

I

The trial court erred and abused its discretion when it (a) denied Francis' motion for summary judgment, and/or b) submitted Instruction No. 6 while refusing Francis' proffered Instruction Nos. 6A and/or C. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Francis lacks volitional capacity to control his behavior. Francis was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.

Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation permits the state to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses without also requiring a showing of inability to control conduct. The trial court's rulings deprived Francis of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Francis's volitional capacity, nor was it instructed that before finding Francis to be

an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.

During the instruction conference, the state offered Instruction No. 6:

INSTRUCTION NO. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that respondent pleaded guilty to sodomy in the Circuit Court of Butler County, Missouri, on December 12, 1989;

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality, and

Fourth, that as a result of this abnormality, the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find that the respondent is a sexually violent predator.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you may not find respondent to be a sexually violent predator.

As used in this instruction, “sexually violent offense” includes the offense of rape.

As used in this instruction, “mental abnormality” means 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.

As used in this instruction, “predatory” means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(L.F. 113) (emphasis added).

Counsel³ offered Instruction No. 6A:

INSTRUCTION NO. 6A

If you find and believe from the evidence beyond a reasonable doubt:

First, that respondent pleaded guilty to sodomy in the Circuit Court of Butler County, State of Missouri on December 12, 1989, and

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality, and

Fourth, that as a result of this abnormality, the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, and

Fifth, that this mental abnormality impairs respondent’s volitional capacity to such a degree that he is unable to control his sexually violent behavior,

then you will find that the respondent is a sexually violent predator.

³ For clarity, Francis’ counsel shall be referred to as “counsel”.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you may not find respondent to be a sexually violent predator.

As used in this instruction, “sexually violent offense” includes the offense of rape.

As used in this instruction, “mental abnormality” means 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.

As used in this instruction, “predatory” means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(L.F. 114-115) (emphasis added).

Counsel offered Instruction No. C:

INSTRUCTION NO. C

A diagnosed mental abnormality which makes the person more likely than not to sexually violently reoffend requires that the diagnosed mental abnormality be of a type and severity which impairs the volitional capacity of the Respondent to such a degree that respondent is unable to control his sexually violent behavior.

(L.F. 116).

The trial court refused the instructions (L.F. 114-116, Tr. 260). Counsel included these rulings as assignments of error in the motion for new trial (L.F. 132-133).

In reviewing challenges to jury instructions, the appellate court decides whether the error materially affected the merits of the case. EPIC, Inc. v. City of Kansas City, 37 S.W.3d 360, 366 (Mo.App.W.D. 2000). The party alleging error must show that the instruction misdirected, misled, or confused the jury. Id. Errors in refusing tendered instructions are reviewed for abuse of discretion. Quinn v. Leonard, 996 S.W.2d 564 (Mo.App.E.D. 1999).

Counsel made a motion for summary judgment at the close of the state's case and renewed the motion after all the evidence (Tr. 255-256). The trial court denied the motion (Tr. 256). Counsel included this ruling as an assignment of error in the motion for new trial (L.F. 129).

While counsel used the term "motion for summary judgment" in her verbal motion and used the term "directed verdict" in the motion for new trial, this makes little difference. The difference between the two motions is procedural. A motion for summary judgment is made before trial on documentary evidence, and a motion for directed verdict is made at trial after presentation of evidence. Martin v. City of Washington, 848 S.W.2d 487, 492 (Mo.banc 1993). The trial court certainly understood what counsel meant and treated the motion as one for a directed verdict (Tr. 255-256). For that reason, the issue is preserved for review. Frisella v. Reserve Life Ins. Co. of Dallas, 583 S.W.2d 728, 731 (Mo.App.E.D. 1979).

A motion for a directed verdict essentially presents an issue of submissibility. Love v. Hardee's Food Systems, Inc., 16 S.W.3d 739, 741-2 (Mo.App.E.D. 2000). To make a submissible case, the plaintiff must present substantial evidence for every fact essential to

the case. Id. In determining whether there is admissible evidence, the appellate court views the evidence and all reasonable inferences in the light most favorable to the plaintiff. Id.

Francis asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Francis would assert that manifest injustice would result if left uncorrected, and would request plain error review. Rule 84.13(c).

The issues presented above involve answering this question: is the state required to prove that the prisoner lacks volitional capacity to control his sexually violent behavior before the jury may find a prisoner to be a SVP pursuant to the SVP statute and thus involuntarily commit him? The answer is “yes”.

Volitional capacity is a required element , and the SVP statute is unconstitutional because it fails to require the state to prove lack of volitional capacity

The Missouri SVP statute violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it does not – on its face – clearly limit its application to those who, because of a mental abnormality, are **unable to control their behavior**⁴. Put another way, one who has the **volitional** capacity to refrain from predatory acts can be committed as a SVP in Missouri. The Missouri statute defines a sexually violent predator as “any person who suffers from a mental abnormality which makes the person more likely than

⁴ This issue is currently before the Missouri Supreme Court. See In re Thomas, SC 83186, argued March 28, 2001.

not to engage in predatory acts of sexual violence if not confined in a secure facility . . .” Section 632.480 (5) RSMo. The Missouri statute defines a “mental abnormality” as an impairment “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[.]” Section 632.480(2) RSMo (emphasis added).

In Kansas v. Hendricks 521 U.S. 346, 117 S.Ct. 2072 (1997), the United States Supreme Court addressed the due process requirements on involuntary commitment in the context of a person accused of being a SVP. Kansas has a SVP statute similar to Missouri’s. Id. Within the Kansas statutory scheme, a “mental abnormality” was defined as 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.” Id. at 352, 117 S.Ct. at 2077, quoting Kan. Stat. Ann. Section 59-29a02(b).

The majority in Hendricks stated that “[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as ‘mental illness’ or ‘mental abnormality.’” Hendricks, supra, at 358, 117 S.Ct. at 2080. The Supreme Court also held that “[t]hese added statutory requirements **serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.**” Id. at 358, 117 S.Ct. at 2080. The Court upheld the Kansas scheme because it

require[d] a finding of future dangerousness, and then link[ed] that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ **that makes it difficult, if not impossible, for the person to control his dangerous behavior.** Kan. Stat. Ann. Sec. 59-29a02(b) (1994). The precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of these other statutes that we have upheld in that it **narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.**

Id. at 358, 117 S.Ct. at 2081 (emphasis added). The Court noted that “[t]hose persons committed under the [Kansas] Act are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that **prevents them from exercising adequate control over their behavior.** Such persons are unlikely to be deterred by the threat of confinement.” Id. at 362-363, 117 S.Ct. at 2082 (emphasis added). The Supreme Court concluded:

To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual’s inability to control his dangerousness, the Kansas Act sets forth comparable criteria . . . The admitted lack of volitional control, *coupled with a* prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.

Id. at 760, 117 S.Ct. at 2081 (emphasis added).

It is clear from the Hendricks opinion that, to meet the strictures of the Due Process Clause, a statute which provides for the indefinite involuntary commitment must limit its

sweep to those who, as a result of their mental abnormality, are unable to control their behavior.

In In the Matter of Crane, 7 P.3d 285 (Kan. 2000)⁵, the Kansas Supreme Court had the opportunity to apply the Hendricks opinion to the Kansas SVP statute. The majority examined the U.S. Supreme Court's opinion in Hendricks and determined that due process requires the state to prove that Crane cannot control his behavior before involuntarily committing him. Id. at 288-91. The Crane Court found that "Kansas' statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Id. The Kansas statute provided for the commitment of those who had a mental condition that affected their "emotional capacity or volitional capacity." Id. This, the court found, was insufficient to meet the Hendricks standard because the inclusion of "emotional capacity" permitted indefinite confinement of those who could control their behavior.

Volitional capacity is the capacity to exercise choice or will; a condition affecting the capacity to exercise choice or will in this context would be one that adversely affected the capacity, thereby rendering the person unable to control his or her behavior. The legislature identified **emotional capacity** as an alternative faculty that could be affected by the condition. Logic would seem to dictate that the alternative

⁵ This case is currently before the U.S. Supreme Court. In re Crane, Docket No. 00-957, 2000 WL 966703 (KS 2000).

to a capacity involving the exercise of will is one in which the exercise of will is not at issue. Thus, a condition affecting that faculty would not necessarily remove the person's ability to control his or her behavior. **It seems, therefore, that the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior.**

Crane, supra. (emphasis added).

The law as discussed above, therefore, clearly requires the state to prove that Francis lacked volitional capacity to control his conduct before he could be committed as a SVP.

The state's failure to prove lack of volitional capacity means that the state failed to meet its burden of proof; therefore the trial court erred in overruling Francis' motion for directed verdict. In re Linehan, 594 N.W.2d 867 (Minn. 1999), is instructive. There, the Minnesota Supreme Court examined the constitutionality of that state's SVP regime. To be committed under the Minnesota SVP act, a person "must evidence an 'utter lack of power to control [his or her] sexual impulses.'" Id. (citations omitted, brackets in the original). The Linehan court referred to this standard as the "utter inability test." Id.

At his commitment hearing, there was no testimony that Linehan either passed or failed the "utter inability test." Id. No evidence supported a finding that Linehan either could or could not control his sexual impulsivity. Id. Linehan was nonetheless committed and, in Linehan's first appeal, the Minnesota Supreme Court reversed for lack of evidence. Id., citing In re Linehan, 518 N.W.2d 609, 614 (Minn. 1994). That is what

this Court should do, for the same reasons. This Court should reverse the judgment of the trial court and order Francis discharged from confinement.

Francis further argues that a “fair reading” of the Hendricks opinion should lead this Court “to the inescapable conclusion that commitment under the act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in Hendricks.” Crane, *supra* at 290-91. The Crane Court determined that Hendricks required a finding that a person could only be committed if the State showed that he could not control his dangerous conduct. *Id.*

As noted previously, the Missouri SVP statute violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it does not – on its face – clearly limit its application to those who, because of a mental abnormality, are **unable to control their behavior**. One who has the **volitional** capacity to refrain from predatory acts can be involuntarily committed as a SVP in Missouri. The Missouri statute defines a sexually violent predator as “any 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 in a secure facility . . .” Section 632.480 (5) RSMo. Like the Kansas statute, the Missouri statute defines a “mental abnormality” an impairment “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[.]” Section 632.480 (2) (emphasis added).

The Missouri SVP statute, like the Minnesota and Kansas statutes, can be read to permit the confinement of those who are able to control their conduct. The U.S. Supreme Court held in Hendricks that commitment of persons who are able to keep their dangerous actions in check violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Crane, supra. By allowing involuntary commitment of persons whose **emotional**, but not **volitional**, capacity predisposes them to commit sexually violent acts, does not satisfy the requirements of due process that only persons who lack the volitional capacity to control their actions be committed as sexually violent predators.

In determining if a statute is constitutional, the reviewing court will presume the statute to be valid “unless it clearly contravenes a constitutional provision,” and will “adopt any reasonable reading of the statute that will allow its validity” and will “resolve any doubts in favor of constitutionality.” State v. Burns, 978 S.W.2d 759, 760 (Mo.banc 1998). Not only must the **procedural** safeguards involved in a commitment proceeding satisfy the demands of the Due Process Clause, but the **substantive** basis for the commitment must also pass constitutional scrutiny. Foucha v. Louisiana, 504 U.S. 71, 79-81, 112 S.Ct. 1780, 1784-1785 (1992). “[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them.” Id. at 81, 112 S.Ct. at 1785, quoting Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990).

The Crane court decided that, to bring the Kansas SVP statute into compliance with Hendricks, juries in SVP proceedings had to be instructed that they could only find

someone to be a sexually violent predator if they found that he could not control his behavior. Crane, supra, at 290. The Linehan court reached a similar conclusion regarding the Minnesota statute. Linehan, supra, at 873. In this case, Missouri law requires that the SVP statute be struck down **in toto** and the case against Francis dismissed.

This Court cannot change the statute to comply with Hendricks without materially changing the SVP statute's scope and meaning beyond what the Legislature intended, and therefore cannot do as the Linehan and Crane courts did – “clarify” the SVP statute to require a finding of volitional impairment. The Missouri Legislature, in enacting the SVP statute, mandated that enormous resources be dedicated to enforcing its provisions. This Court cannot say that the Legislature would have done so if it knew that the only persons who could be committed were those who could not control their actions.

Section 1.140 RSMo provides that “the provisions of every statute are severable.” The severability of Missouri statutes is limited, however, if it cannot be presumed that the Legislature would have enacted the statute without a provision that is found unconstitutional:

If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that **it cannot be presumed the legislature would have enacted the valid provisions without the void one; or**

unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Section 1.140 RSMo (emphasis added). This Court cannot presume that the Legislature would have established the commitment procedure if its application was limited to persons who could not control their behavior, because the entire SVP statute is so tightly intertwined with, connected to, and dependent upon the definition of a sexually violent predator.

The unconstitutional definition of “mental abnormality” winds its way through the entire SVP statute to an extent that it becomes inextricable because “mental abnormality” is included in discussing who is and who is not a SVP, and what the various players’ roles are pursuant to Section 632.480, et seq. It is the controlling factual issue at each and every stage of the proceedings. From the notice that the DOC and DMH give to the Attorney General and Multidisciplinary Committee, to the Prosecutor’s Committee and Multidisciplinary Committee’s reports and recommendations, to the facts that must be pled in the petition, to the probable cause determinations by the probate court, to the fact-finder’s determination after trial, and finally to the issue to be determined when the prisoner petitions for release – the central matter that must be pled and proved is that the person has a condition which affects “the **emotional or volitional** capacity to commit sexually violent offenses.” Section 632.480, et seq. (emphasis added). At no time in the proceedings is the issue limited to whether the person can control his actions, as required by Hendricks.

There are likely many individuals who have some sort of mental defect that incline them to commit sexually violent acts, but whose behavior is not beyond their control. The Legislature clearly intended the SVP statute to deal with this class of offenders **in addition to** those who, like Hendricks, cannot resist what their mental abnormality compels them to do. Under Hendricks, however, this statute can only be constitutionally applied to the latter group and not the former.

This Court cannot say that the Legislature would have placed all these burdens on the DMH, the Office of the Attorney General, the courts, the local prosecutors, the jurors and the Public Defender System if the only people that could be confined pursuant to the SVP statute were those who could not control themselves. Clearly, this is a smaller subset of those that the Legislature targeted, and it is impossible to determine if the Legislature would still have enacted the SVP statute in its present form – if at all – if it knew its reach would be constricted. For all these reasons, the SVP statute should be struck down because it violates the Due Process clauses of the United States and Missouri Constitutions. This Court should reverse the judgment and order Francis discharged.

The trial court erred in failing to grant Francis’ motion for summary judgment because due process requires the state to prove lack of volitional capacity before it may involuntarily commit Francis

An involuntary civil commitment “for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809 (1979). Commitment to a mental institution impinges upon the “[f]reedom from bodily restraint [that] has always been at the core of the liberty

protected by the Due Process Clause from arbitrary governmental action.” Foucha, 504 U.S. at 81, 112 S.Ct. at 1785. The Supreme Court has “always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty.” Id., quoting United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 2103 (1987). In order to involuntarily confine someone to a mental institution, the state must show “by clear and convincing evidence that the individual is mentally ill *and dangerous*.” Foucha, supra, at 81, 112 S.Ct. at 1786 (internal quotes omitted) (emphasis added).

Further, volitional capacity must be a required element before someone can be found to be a SVP. Without the element the statute would not be narrowly tailored to suit the purpose of confining only those with a present mental abnormality that makes him or her presently dangerous. In Foucha v. Louisiana, 504 U.S. at 71, 112 S.Ct. at 1780, the U.S. Supreme Court found that a Louisiana statute allowing the state to civilly commit insanity acquitees unless the acquittee proved he was *not* dangerous violated due process. Id. The Court went on to say that one of the problems with the Louisiana law was that it was not narrowly tailored to suit the purpose.

...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.

Id. at 82-83, 112 S.Ct. at 1787.

Here, the State presented no evidence that Francis lacked volitional capacity. Thus, the jury certainly found against Francis without determining that he lacked the ability to restrain himself from such conduct. The jury likely found that Francis had an **emotional** but not a **volitional** defect. This is particularly true because the verdict director did not define “volitional,” a word that is not so commonplace that a person of ordinary intelligence would have a clear understanding of what it meant. “Emotional,” on the other hand, is virtually self-explanatory. The jury focused on Francis’ emotional capacity and gave no heed to whether his volitional capacity was such that he could control his actions.

As noted above, volitional capacity must be a required element before someone can be found to be a SVP. Without the element, the statute would not be narrowly tailored to suit the purpose of confining only those with a present mental abnormality that makes them presently dangerous. In Foucha v. Louisiana, 504 U.S. at 71, 112 S.Ct. at 1780, the U.S. Supreme Court found that a Louisiana statute allowing the state to civilly commit insanity acquitees unless the acquitee proved he was *not* dangerous violated due process. Id.

Without a requirement that the state demonstrate a lack of volitional capacity, Francis would be in the same position as the detainee in Foucha – facing the prospect of lifetime confinement because he has a personality disorder which *may* lead to criminal behavior and for which there is no effective treatment (thus creating a situation where he could never demonstrate that he would never be able to demonstrate that he no longer had antisocial personality disorder (ASPD)). If a mental abnormality is all that is required, then it would run afoul of Foucha. The trial court, therefore, erred in failing to grant Francis’ motion for a directed verdict, because the state failed to prove that he lacked volitional capacity.

***The trial court further erred in failing to instruct the jury
on the element of volitional capacity***

Francis notes that Minnesota resolved the issue differently. After Linehan’s release, the Minnesota Legislature altered the SVP statute, removing the “utter inability test” and permitting commitment if the defendant “has manifested a sexual, personality, or other mental disorder or dysfunction and . . . as a result, is likely to engage in acts of harmful sexual conduct . . .” Linehan, 594 N.W.2d at 870. After the amendment of the act, Minnesota again moved to commit Linehan. Id.

The circuit court found that Linehan “lack[ed] control in connection with sexual impulses.” Id. The Minnesota Supreme Court affirmed Linehan’s commitment, concluding “that an utter inability to control one’s sexual impulses was not integral to narrowly tailoring the . . . Act to meet substantive due process requirements.” Id., citing In re Linehan, 557 N.W.2d 171 (Minn. 1996).

Linehan then petitioned the U.S. Supreme Court for certiorari and, before granting the writ, the Court decided Hendricks. Linehan, 594 N.W.2d at 870. The Supreme Court granted Linehan’s writ and remanded the cause for further consideration under Hendricks. Linehan, 594 N.W.2d at 871, citing Linehan v. Minnesota, 522 U.S. 1011, 118 S.Ct. 596 (1997). The Supreme Court’s acceptance of certiorari and subsequent remand in light of Hendricks is significant. One can reasonably assume that, had the Supreme Court agreed with the Minnesota Supreme Court’s original reasoning – that due process did not mandate a lack of volitional control for civil commitment – it would not have remanded the cause for further consideration. Thus, it should be inferred that the U.S. Supreme Court was disapproving of the initial Linehan decision. By remanding the cause, it is clear that the Court directed Minnesota to bring its law in line with Hendricks by requiring that only persons who lack control of their sexual impulses be committed under its SVP statute.

On remand, the focus of the Minnesota Supreme Court’s analysis was Linehan’s substantive due process claim that Hendricks required proof of “a lack of volitional control over sexual impulses in order to narrowly tailor a civil commitment law to meet substantive due process.” Linehan, 594 N.W.2d at 872. The Linehan Court concluded it did, and conducted an extensive review of the Hendricks decision. Id. at 872-75. It noted that the Hendricks Court repeatedly pointed to Hendricks’ inability to prevent himself from committing sexually violent acts as justification for his commitment. Id.

In Linehan, the court noted that this requirement was not only the holding of the **majority** in Hendricks, but also was agreed to by the **dissent**:

At no point in its analysis did the Supreme Court state that a civil commitment statute aimed at sexually violent persons could pass substantive due process without a volitional impairment element. Rather the Court’s reasoning establishes that some lack of volitional control is necessary to narrow the scope of civil commitment statutes Even the dissent in Hendricks subscribed to the notion that some lack of volitional control is necessary for civil commitment statutes to stay within substantive due process bounds. The dissent noted that Hendricks was committed under the Kansas Act not just on the basis of his antisocial behavior, but also because of Hendricks’ “**highly unusual inability to control his actions.**” Hendricks, 521 U.S. at 375, 117 S.Ct. 2072 (Breyer, J., dissenting).

Linehan, *supra*, at 873 (boldface in Linehan). Thus, like the Kansas Supreme Court, the Minnesota Supreme Court found that, to pass muster under Hendricks, the SVP statute must require that the inmate be found to lack the ability to prevent himself from committing further acts of sexual violence. *Id.* at 876. The Linehan Court held that “**the conclusion that some degree of volitional impairment must be evidenced to satisfy substantive due process garnered nearly unanimous Supreme Court approval.**” *Id.* (emphasis added).

The Linehan Court then “clarified” the Minnesota SVP statute to incorporate such a requirement, allowing “civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to adequately control their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future.” *Id.* If this Court

rules that the SVP statute need not be struck down *in toto*, then Francis argues this Court should adopt the same clarification that the court in Linehan adopted.

Francis submits that the omission from Instruction No. 6 of the element required by Hendricks – that Francis was unable to control his behavior – is akin to the submission of an erroneous jury instruction in a criminal case which does not contain an element of the offense. In both cases, the jury is charged with finding every element beyond a reasonable doubt and in both cases, a finding in favor of the State results in the involuntary confinement of the defendant. The verdict director in Crane was virtually identical to the one submitted to the jury in Francis’ case:

[T]he jury was instructed that in order to establish Crane is a sexually violent predator, the State had to prove (1) that Crane had been convicted of aggravated sexual battery and (2) that he “suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility. “Likely” was defined as “more probable to occur than not to occur.” “Mental abnormality” was defined for the jury in accordance with K.S.A. Supp. 59-29a02(b) as a “condition affecting the **emotional or volitional** capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” “Personality disorder” was defined for the jury as a “condition recognized by the . . . [DSM IV] and includes antisocial personality disorder.”

Crane, supra, at 288 (emphasis added). Instruction No. 6 did not encompass personality disorders, as does the instruction in Crane, but it is not a material difference.

As noted above, the focus of the analysis in Crane was on whether the instruction permitted the accused to be found a SVP without a determination that he is unable to control his actions, as was required by Hendricks. Crane, supra, at 289. The court noted that, while having a “volitional” disorder implies that the person cannot control his actions, having an “emotional” impairment does not. Id. Thus, the defect with the instruction in Crane was not that it included a “personality disorder,” but that it – like Instruction 6 in this case – also included an “emotional” disorder. Id. Like the instruction in Crane, the instruction in this case did not require the jury to find that Francis was unable to control his actions before finding him to be a SVP and violated the strictures of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as enunciated in Hendricks.

This conclusion is reinforced by Crane, where the court noted that only an impairment of the volitional capacity raises the implication that the person’s behavior is beyond his control. In this case, the jury was not required to find that Francis could not control his behavior before finding that he was a SVP and permitting him to be involuntarily confined. The trial court’s refusal to submit Instruction No. 6A and submitting Instruction No. 6 without also submitting Instruction No. C, in order to make sure that the jury was instructed on the requirement of volitional capacity, therefore prejudiced Francis.

Conclusion

For all the reasons discussed, the SVP statute violates the guarantees of Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and

Article I, Section 10 of the Missouri Constitution because it permits the state to deprive a person of his liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses, without also requiring the state to prove that he is unable to control his behavior. This Court cannot both change what the state needs to charge and prove to bring the statute into compliance with Hendricks and effectuate the Legislature's intent in enacting it. This Court must, therefore, declare the Missouri SVP statute unconstitutional, reverse the judgment of the lower court, and order Francis discharged from custody.

In the alternative, should this Court – like the courts in Crane and Linehan – find that Hendricks only requires an additional element be added to the jury instructions, this Court should reverse Francis' commitment and remand with directions for a new trial with a corrected verdict director, such as Instruction No. 6A. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

II

The trial court erred when it denied Francis’ motion to dismiss the state’s petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Francis was prejudiced by the trial court’s error because there was no evidence of or consideration given to placing him in the least restrictive environment. Thus, Francis was deprived of his liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.

Francis filed a Motion to Dismiss or in the Alternative, to Declare Statute Unconstitutional (L.F. 59-70). He asserted, *inter alia*, that the SVP statute violated his right to equal protection of law because there is no consideration for placing someone detained pursuant to the SVP statute in the least restrictive environment, while there is such consideration for someone committed pursuant to “ordinary civil commitment.” (L.F. 68-69). The trial court denied Francis’ motion (L.F. 4).

Francis included the issue in the motion for new trial (L.F. 130). Francis asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Francis asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c).

The trial court erred when it denied Francis' Motion to Dismiss because the Equal Protection Clause of the United States Constitution "does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Baxtrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 763 (1966), quoted in In re Young, 857 P.2d 989, 1011 (Wash. 1993):

The Supreme Court has said that the dangerousness of the detainee "may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all."

Young, supra. "A person cannot be deprived of procedural protections afforded other individuals merely because the State makes the decision to seek commitment under one statute rather than another statute." Id., citing Humphrey v. Cady, 405 U.S. 504, 512, 92 S.Ct. 1048, 1053-54 (1972).

The SVP statute is not the only provision of Missouri law that permits the involuntary commitment of individuals to the DMH. Section 632.300 RSMo et seq., provides that persons who present "a likelihood of serious harm to himself and others" may be involuntarily detained. Section 632.355.1. Such a person is entitled to a jury trial

on the issue, and if the jury finds that the person is “mentally ill” and dangerous, the court is presented with options:

At the conclusion of the hearing, if the court or jury finds that the respondent, as a result of mental illness, presents a likelihood of serious harm to himself or others, and the court finds that a program appropriate to handle the respondent’s condition has agreed to accept him, the court shall order that the respondent be detained for involuntary treatment in the least restrictive environment for a period not to exceed one year or for outpatient detention and treatment under the supervision of a mental health program in the least restrictive environment not to exceed 180 days.

Section 632.355.3. Someone who is involuntarily committed pursuant to this Section is done so for treatment according to an “individualized treatment plan” developed by the program which treats him. Section 632.355.3.

Thus, a person who is not adjudged to be a SVP – but is still considered dangerous – may receive either inpatient treatment while detained for a year or may be given outpatient treatment for 180 days. Id. If such a person is detained, he must be held in the least restrictive environment:

Notwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department, the order of detention shall be to the custody of the director of the department, who shall determine where **detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting.**

Section 632.365 (emphasis added). Once he is committed, the facility where he resides “shall release a patient, whether voluntary or involuntary, from the facility to the least restrictive environment, including referral to and subsequent placement in the placement program of the department.” Section 632.385.1. He may also be furloughed and allowed to leave the facility for short periods. Section 632.385.4.

In contrast, a person adjudged to be a SVP must be committed to the custody of the DMH and confined to a “secure facility.” Section 632.495. He cannot be housed with non-SVP detainees and may be placed in one of the prisons run by the DOC. Id. Once there he must be segregated from the incarcerated criminal offenders. Id.

The judge who presides over the proceedings against a non-SVP shall remand him for “treatment in the least-restrictive environment.” Id. He is given an “individualized treatment plan” and remanded to a program that can carry it out, on either an inpatient or outpatient basis. Id. Someone found to be a SVP, however, is simply dispatched to be confined within a secure facility operated by the DMH, without consideration of any outpatient treatment. Section 632.495.

There is no rationale that would suffice to justify the blanket incarceration of persons adjudged to be SVPs while others – who are also found to be dangerous – are given individualized treatment in the least restrictive environment appropriate to their condition. This is what the Washington Supreme Court found under similar circumstances in Young, supra.

Washington had a SVP statute very similar to the Missouri scheme. It defined a SVP in virtually the same way as the Missouri statute, as a person “who has been convicted of

or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.” Young, supra, at 993. The proceedings against the accused Washington SVP are very similar to those provided by the Missouri SVP statute. Id. The respondent in Young argued that the Washington SVP statute violated his right to equal protection of the law because “it does not require consideration of less restrictive alternatives to confinement.” Id. at 1012. Young contrasted the SVP statute with the general provisions for civil commitment, which required “considerations of such alternatives as a precursor to confinement.” Id.

The Washington Supreme Court agreed with Young’s argument, holding that the court, prior to committing a person found to be an SVP to confinement, must consider less restrictive alternatives:

The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so. Here, the State offers no justification for not considering less restrictive alternatives under [the civil commitment statute] and denying the same under [the SVP statute]. ***Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under [the civil commitment statute], it is necessary to account for these differences by considering alternatives to total confinement.*** We therefore hold that equal protection requires the State to comply with provisions of [the civil commitment statute] as related to the consideration of less restrictive alternatives.

Id. at 1012 (emphasis added).

Like the Washington SVP scheme, the Missouri SVP statute violates equal protection by not providing for the consideration of less restrictive alternatives to total physical confinement. The judge and jury in SVP cases – unlike in other commitment proceedings – have only one option if the person is found to be an SVP: incarceration.

In Baxtrom v. Herald, 383 U.S. at 107, 86 S.Ct. at 760, the statute in question differentiated between civil commitments for those nearing the end of a prison term from all other civil commitments by denying jury review of civil commitment only to those nearing the end of a prison term. The United States Supreme Court held that to be a violation of Equal Protection of the law. Id. In the same way, differentiating between civil commitments as a SVP and all other civil commitments by requiring that only SVP committees to be held in a secure environment, no exceptions, is a violation of Equal Protection.

As Francis discussed in Point I, there is no way under Section 1.140 RSMo to sever out those portions of Section 632.495 which mandate confinement while preserving the Legislature's intent. It was the clear intention of the Legislature that the targets of these proceedings be confined; that much is clear from Section 632.495, which made no provision for any outcome except for incarceration for SVPs. The SVP statute is an elaborate, multileveled scheme for identifying, evaluating and confining sexually violent predators. Again, the Legislature has directed that numerous state and local agencies dedicate extensive resources to this task. This Court cannot say that the Legislature would have done so if it knew that the Equal Protection Clause mandated that an SVP be

subjected to anything less than automatic total confinement at the close of the proceedings. Because there is no way to read a less restrictive alternative requirement into Section 632.495, the SVP statute must be struck down **in toto**.

The lack of consideration given to less restrictive alternatives prejudiced Francis because there was no indication that he required complete confinement in order to receive treatment for his condition. For the foregoing reasons, the trial court erred when it denied Francis' Motion to Find the SVP statute in violation of the Equal Protection Clause. The SVP statute violates the guarantees of the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution because, unlike other persons involuntarily committed, a person found to be a SVP does not have the benefit of the court considering less-restrictive alternatives to total confinement. This Court must, therefore, declare that the Missouri SVP statute is unconstitutional, reverse the judgment of the lower court and order that Francis be discharged from custody. Should this Court not strike down the entirety of the SVP statute, it should do as the Young court did, remand for a new trial at which the jury will be instructed that they can consider less restrictive alternatives to total confinement in a secure facility. Young, supra, at 1012. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

III

The trial court erred and abused its discretion when it overruled Francis' objections and allowed Petitioner's Exhibits 7 and 8 into evidence which included hearsay statements from out-of-court declarants concerning acts allegedly committed by Francis. The statements were hearsay and not subject to any exception to the hearsay rule. The statements were also more prejudicial than probative and included accusation of a sexual offense which was never proven or charged. Francis was prejudiced because the jury used the evidence as proof of the truth of the matter. The trial court's error violated Francis' rights to due process, to be tried only for the allegations charged, to confront and cross examine, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution.

The state sought to introduce Petitioner's Exhibits 7 and 8, medical records on John David Smith and Curtis Self, respectively (Tr. 210-213). Counsel objected on hearsay grounds to Petitioner's Exhibit 7 on grounds that the records recorded that "mother reports child told her 6:00 p.m. yesterday that an adult acquaintance performed anal sex with him between 4:00 and 5:00 p.m. yesterday" (Tr. 211). The state responded that the exception for statements made to treating physicians applied (Tr. 211-212). The court overruled the objection (Tr. 212).

On Petitioner's Exhibit 8, the state redacted certain statements made by the father of the complainant (Tr. 212-213). Counsel objected on relevance grounds and grounds that

they were cumulative to the exhibits evidencing Francis' conviction involving Curtis Self (Tr. 213). The court overruled the objection (Tr. 213).

Counsel renewed the objection when the exhibits were presented before the jury, and again the court overruled the objections (Tr. 215). The state read portions of the records to the jury:

Petitioner's Exhibit No. 7 are medical records ... relating to John David Smith.

Mother reports child told her about 6:00 p.m. yesterday that an adult acquaintance performed anal sex on him between 4:00 and 5:00 p.m. yesterday. ... Quote, Pete stuck his wee-wee in me, end quote.

Petitioner's Exhibit 8 are medical records relating to Curtis Self...

This is a six-year-old brought in by his father. He says his bottom is red and cracked. He does, in fact, have a tiny fissure horizontally in the inferior anal position, and Curtis says that Pete's wee-wee was stuck in there. Positive evidence of sexual child abuse.

(Tr. 216).

Francis included the trial court's errors as issues in the motion for new trial (L.F. 131). Francis asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Francis would assert that manifest injustice would result if left uncorrected, and would request plain error review. Rule 84.13(c).

Questions of admissibility of evidence are left to the trial court's discretion, and those decisions will be overturned only upon a showing of abuse of that discretion. Willman v. Wall, 13 S.W.3d 694 (Mo.App.W.D. 2000). Abuse of discretion occurs when the ruling

is clearly against the logic of the circumstances and is so unreasonable as to shock the conscience. Robertson v. Robertson, 15 S.W.3d 407 (Mo.App.S.D. 2000).

When a witness offers out-of-court statements of another as proof of the matters asserted in those statements, the testimony is hearsay. Bynote v. National Super Markets, Inc, 891 S.W.2d 117, 120 (Mo.banc 1995). This rule protects against accusations of out-of-court declarants “who cannot be cross-examined as the bases of their perceptions, the reliability of their observations, and the degree of their biases.” State v. Brown, 833 S.W.2d 436, 438 (Mo.App.W.D. 1992). Admission of hearsay that does not fall within a deeply rooted exception violates the Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980).

Applying these principles to Petitioner’s Exhibits 7 and 8, it is abundantly clear that the state used the objectionable statements as proof that the incidents actually occurred. In closing argument, the state argued that Francis in fact “committed all of these offenses against all of these children” (Tr. 286). No declarant (Curtis Self, Curtis Self’s father, John David Smith, or John David Smith’s mother) testified; consequently, Francis was unable to confront and test the statements.

The state argued that the hearsay rule did not apply because the statements were made to a “treating physician” (Tr. 212). Statements made to a doctor which are reasonably related to diagnosis and treatment are admissible over a hearsay objection. Young v. St. Louis Univ., 773 S.W.2d 143, 145 (Mo.App.E.D. 1989). This rule, however, does not inoculate every statement made to a doctor. State v. Russell, 872 S.W.2d 866, 870 (Mo.App.S.D. 1994).

Statements made by a victim to a treating doctor which identify the alleged perpetrator do *not* fall within the treating physician exception to the hearsay rule. State v. Miller, 924 S.W.2d 513, 515 (Mo.App.W.D. 1996). The doctor performing the examination does not need to know the identity of the alleged abuser in order to examine and treat the victim. Id. Therefore, the statements in Petitioner’s Exhibits 7 and 8 indicating that “Pete” was the perpetrator were hearsay and not subject to any exception. The statements identifying Francis were thus inadmissible.

The statements made by the parents of the victims likewise do not fall within the exception. The exception applies to the person seeking treatment, not to hearsay statements of third parties. See State v. Naucke, 829 S.W.2d 445, 458 (Mo.banc 1992) (treating physician’s testifying to child’s statements as related to him through a third party “constituted some form of double hearsay” but were cumulative and therefore not prejudicial error).

Furthermore, the statements did not have any indicia of reliability. Petitioner’s Exhibits 7 and 8 both contain hearsay statements directly from the victims or as related by the parents of the victims concerning the allegations. Statements made by someone under twelve years old pertaining to certain offenses (including sex crimes) are admissible *if* the court finds, *after a hearing*, that the statements have a sufficient indicia of reliability, *and* the child either testifies or is unavailable as a witness (either literally or practically). Section 491.075 RSMo; Miller, 924 S.W.2d at 515. Here, none of the statements contained in Petitioner’s Exhibits 7 and 8 met this standard. In fact, the record is utterly devoid of any indicia of reliability: there is no evidence as to the conditions

under which the statements were made, the mental state of the declarants, or evidence of motive to fabricate. See Kierst v. D.D.H., 965 S.W.2d 932, 938 (Mo.App.W.D. 1998).

Petitioner's Exhibits 7 and 8 were also more prejudicial than probative. To examine prejudice the courts weigh the probative value of the evidence against the "dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence." See State v. Sladek, 835 S.W.2d 308, 314 (Mo.banc 1992) (Thomas, J., concurring).

Petitioner's Exhibit 7 was completely irrelevant (see Point IV, incorporated by reference as if fully set forth herein), and Petitioner's Exhibit 8 was unnecessary. The state had all the evidence it needed on the Curtis Self case – the record of his conviction and sentence. To add to that inadmissible hearsay allegations which by their very nature will cause sympathy towards small defenseless children was needless overkill.

For all the reasons stated, the trial court erred and abused its discretion when it allowed Petitioner's Exhibits 7 and 8 into evidence. Francis was prejudiced because the statements were used for the truth of the matters asserted therein (that he was the perpetrator of acts committed against Curtis Self and John David Smith), in order to support the conclusion that he is a SVP. The trial court's error violated Francis' right to due process, to be tried only for the charges, to confront and cross examine, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution. This Court must reverse and order Francis discharged, or, in the alternative, this Court must reverse and remand for a new trial.

IV

The trial court erred and abused its discretion when it overruled Francis' motions in limine and objections, and allowed the state to present testimony from Anita Potts, Sheila Law, Rita Williams, and Donwell Clark, concerning evidence of uncharged allegations of other sex crimes. Their testimony was irrelevant to any element the state had to establish, irrelevant to the issues for the jury to decide, and was far more prejudicial than probative. Francis was prejudiced because the jury heard repeated testimony of bare allegations of other sex crimes in addition to the crime pleaded in the Petition. Their testimony constituted victim impact, and designed solely to prejudice the jury against Francis. The trial court's error violated Francis' rights to due process, to be tried only for the allegations charged, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution.

Prior to trial, counsel filed a Motion to Exclude Witnesses, specifically listing Anita Potts, Rita Williams, Sheila Law, and Officer Clark (L.F. 93-94). Counsel renewed the motion prior to trial, and the trial court overruled the motion (Tr. 8-18). Counsel renewed the objections to the lay witnesses prior to Potts' testimony, and the trial court recognized the objection as pertaining to all the witnesses listed (Tr. 140, 161). Counsel also renewed the objection pertaining to the police officers prior to Officer Patrick's testimony, and the objections were considered continuing (Tr. 172, 214).

Over objection, Potts, Williams and Law testified to various sex acts Francis allegedly committed that never were previously reported or charged (Tr. 140-163). Officer Clark testified concerning the John David Smith allegation, over objection (Tr. 203-210). The details of each witness' testimony are contained in the Statement of Facts.

Francis included the trial court's errors as to Potts, Law, Williams, and the officers as issues in the motion for new trial (L.F. 130-131). Francis asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Francis would assert that manifest injustice would result if left uncorrected, and would request plain error review. Rule 84.13(c).

Questions of admissibility of evidence are left to the trial court's discretion, and those decisions will be overturned only upon a showing of abuse of that discretion. Willman v. Wall, 13 S.W.3d 694 (Mo.App.W.D. 2000). Abuse of discretion occurs when the ruling is clearly against the logic of the circumstances and is so unreasonable as to shock the conscience. Robertson v. Robertson, 15 S.W.3d 407 (Mo.App.S.D. 2000).

Here, Potts, Williams, Law, and Clark testified about incidents for which there was no other proof of the alleged occurrences. The incidents were more than ten, and in some cases probably closer to thirty, years old. None resulted in charges or convictions. "The possibility that a thing may [have] occur[red] is not alone evidence, even circumstantially, that the thing did occur." Boyington v. State, 748 So.2d 897, 901 (Ala.Crim.App. 1999).

Evidence of other crimes or uncharged misconduct which is not properly related to the cause on trial violates the rule and "is inadmissible for the purpose of showing the

propensity of the defendant to commit such crimes.” State v. Bernard, 849 S.W.2d 10, 13 (Mo.banc 1993). Although not admissible to show propensity, evidence of the defendant’s prior misconduct may be admissible for a specific, limited purpose **if it is both logically and legally relevant**. Id. at 13. Evidence is logically relevant if it has “some legitimate tendency to establish directly” the proposition in question. Id.

To be logically relevant, a piece of evidence must either directly, or indirectly by inference, establish a fact. Id. To convince a jury to commit Francis as a SVP, the state must prove that he has a mental abnormality that makes him more likely than not to reoffend. No evidence *directly* establishes a mental abnormality or a likelihood of reoffense – these propositions are not the type that lend themselves to direct proof. Instead, the state must cobble together facts from which a jury may conclude that Francis is a SVP – it is all done by inference. An inference is a “deduction or conclusion from facts *known to be true*.” Draper v. Louisville & N.R.Co., 156 S.W.2d 626, 630 (Mo. 1941) (emphasis added).

With regard to the allegations made by Potts, Williams, Law and Clark, the state lacked facts “known to be true”. Just because the incidents in question *could* have happened and that Francis could have committed the alleged acts does not make them so, and for that reason the jury did not have “facts” from which to draw the conclusion desired by the state.

Also, the age of the complaints also makes them too remote in time to be relevant. The jury had to decide if Francis *currently* suffered from a mental abnormality. The fact that symptoms of a mental abnormality existed a decade ago is irrelevant to the question

of Francis' current mental state. See State v. Chiles, 847 S.W.2d 807, 809 (Mo.App.W.D. 1992) (evidence of a sex crime occurring seven years earlier was too remote in time to establish a common scheme or plan).

Furthermore, the statements, particularly those testified to by Clark, did not have sufficient indicia of reliability. Statements made by someone under twelve years old pertaining to certain offenses (including sex crimes) are admissible *if* the court finds, *after a hearing*, that the statements have a sufficient indicia of reliability, *and* the child either testifies or is unavailable as a witness (either literally or practically). Section 491.075 RSMo. Here, the statements as testified to by Clark did not meet this standard. In fact, the record is utterly devoid of any indicia of reliability: there is no evidence as to the conditions under which the statements were made, the mental state of the declarants, or evidence of motive to fabricate. See Kierst v. D.D.H., 965 S.W.2d 932, 938 (Mo.App.W.D. 1998).

Assuming *arugendo* that the evidence in question could be considered logically relevant, it must also be *legally* relevant, meaning the “probative value must outweigh its prejudicial effect.” Bernard, 849 S.W.2d at 13.

Legal relevance involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of the evidence).

State v. Sladek, 835 S.W.2d 308, 314 (Mo.banc 1992) (Thomas, J., concurring).

Here, Potts', Williams', and Law's repeated recounts of acts Francis allegedly committed, as well as Clark's recount of his investigation into the John David Smith allegation, were far more prejudicial than probative. The sisters' statements about Francis' acts were emotionally wrenching and designed to horrify and disgust. They were also completely unnecessary. If the state's goal was to demonstrate the elements, having Deghera, Lashley and Morris testify as to incidents resulting in convictions, and having Dr. Baker discuss how past acts are probative of future behavior would have been more than sufficient. The state chose instead to stack the deck against Francis by trotting out witness after witness after witness to tell the jury about acts for which there was no other proof, and acts which Francis had absolutely no power to rebut. There were no previous recorded statements, for example, with which to cross examine the witnesses.

Instructive is State v. Barriner, 34 S.W.3d 139 (Mo.banc 2000). There, the state introduced several items of evidence including a videotape of consensual sexual activities including bondage, anal sex, and the use of sex toys, the contents of a duffel bag containing dildos, a photograph of labels of videotapes found in the defendant's house clearly indicating they contained sexually explicit material, and a photograph of *Bondage Fantasies* magazine found in the defendant's home depicting a bound woman with exposed genitalia. Id. at 145-146. The Missouri Supreme Court found that the evidence of guilt was not otherwise overwhelming. Id. at 152. In light of that, the court was unable to conclude that the admission of such prejudicial evidence of "sexual propensities and perversions" did not have an outcome-determinative effect. Id. at 152-153.

The question in this case, then, is whether the uncharged, unproven allegations had an effect on the jury. Id. No one can seriously argue that they did not. Just as repeated evidence of bondage, anal sex, and penetration with dildos permeated the Barriner trial, repeated accusations of sexual contact with children for which there was absolutely no proof served only to prejudice the jury against Francis.

The testimony from Potts, Williams and Law was essentially in the nature of victim impact testimony. Victim impact evidence and argument may be relevant and admissible at the *penalty phase* of a capital murder trial. Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609 (1991); State v. Wise, 879 S.W.2d 494, 515 (Mo.banc 1994). Victim impact evidence violates the constitution if it is “so unduly prejudicial that it renders the trial fundamentally unfair.” Id. Such testimony, therefore, has no place in trials where the jury need to decide only if someone is to be committed to an institution, as it had no tendency to establish the issue in the case. Cf. State v. Kreutzer, 928 S.W.2d 854, 867 (Mo.banc 1996) (testimony from victim’s young child, while likely to evoke the jury’s sympathy, was also relevant in establishing deliberation).

Instructive too is State v. Earvin, 743 S.W.2d 125 (Mo.App. 1988). In Earvin, this Court reversed the defendant’s conviction for assault when the state admitted evidence that the victim came to court with an armed police escort. Id. at 128. This Court found the evidence to be irrelevant, prejudicial, and with no probative value Id. “Since it is error to admit evidence of an inflammatory nature if it does not prove or disprove a disputed fact in issue ... we conclude that the defendant’s conviction must be reversed and the cause remanded for a new trial.” Id. (citation omitted).

So too it is here. Evidence of how the unproven and heretofore unreported allegations of acts allegedly committed by Francis and its effect on them has nothing to do with the issue in the case. Its sole and lone purpose was to inflame the passions of the jury and engender sympathy towards the witnesses, and had no place in Francis' trial.

For all the reasons stated, the trial court erred and abused its discretion when it allowed Potts, Williams, Laws and Clark to testify. Francis was prejudiced because the statements were used as evidence that he offended sexually more than the instances for which there was independent, reliable proof, in order to support the conclusion that he is a SVP. The trial court's error violated Francis' right to due process, to be tried only for the charges, to confront and cross examine, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution. This Court must reverse and order Francis discharged, or, in the alternative, this Court must reverse and remand for a new trial.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I-IV of this brief, Francis respectfully requests this Court reverse the trial court's finding that he is a SVP and discharge him from confinement, or in the alternative remand for a new trial. Should this Court determine that any of the claims represent a colorable challenge to a state statute, Francis requests this Court transfer this case to the Missouri Supreme Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this ____ day of _____ 2001, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(g). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words, 2200 lines, or 100 pages. The word-processing software identified that this brief contains 1256 lines, 13725 words, and 58 pages, excluding the cover page, signature block, and certificates of service and compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee Anti-Virus software and found virus-free.

Nancy L. Vincent