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Other:

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– **Jurisdictional Statement**

Appellant Francis' Points I and II make facial and as-applied challenges to the constitutionality of Missouri's Sexually Violent Predator Act, ' 632.480, *et seq.*, RSMo 2000. If these claims are preserved, and if they have some *prima facie* validity, then under general concepts of appellate jurisdiction, jurisdiction of this appeal would lie in the Supreme Court of Missouri pursuant to Article V, ' 3 of the Missouri Constitution.

But there is a wrinkle presently existing in this area of the law, that is relevant to the issue of this court's jurisdiction. The constitutional challenges contained in Appellant's Points I and II are identical to challenges that have been raised in a sexually violent predator case that is presently pending before the Supreme Court of Missouri: *In re Thomas*, no. SC83186. That case is submitted. And *In re Thomas* is certainly likely to be decided before this case is decided -- whether by this court now, the Supreme Court on transfer, or by this court later (after transfer to the Supreme Court, a decision in *In re Thomas*, and remand to this court).

Therefore, if Appellant Francis has preserved constitutional issues, this court should either transfer this case to the Supreme Court, or stay the appeal, pending the Supreme Court's decision in *In re Thomas*.

Statement of Facts

Respondent herein, the State of Missouri, filed a petition on May 18, 1999 for the civil commitment of appellant, James Francis, pursuant to ' 632.480 et seq., RSMo 2000.¹ LF 7. The case was tried before a jury, on January 23 - 25, 2001, in the Butler County Circuit Court, Division 3, the Honorable William J. Clarkson, presiding. Tr. 24. The jury reached a unanimous verdict, finding beyond a reasonable doubt that Francis is a sexually violent predator as that term is defined by Missouri law. LF 123; Tr. 290. Viewed in the light most favorable to the jury's decision, the record shows:

Francis had at least eight child victims, both boys and girls, between the ages of 2 and 12, whom he raped, sodomized, otherwise sexually molested, and threatened, beginning in 1969 and continuing during periods when he was not incarcerated.

The Morris sisters

The first set of victims was the Morris sisters, ranging in ages from about 2 to 6 at the time Francis first came into contact with them in 1969. All four sisters -- Anita, Rita, Sheila, and Andrea -- testified at trial that Francis, whom they called "Pete," Tr. 143, 154, 160, 165, had sexual contact with each them (discussed in turn below) and that they observed him engaging in sexual contact with their sisters, Tr. 145, 148-149, 155, 158, 161, 163. Two of the sisters testified that he threatened them (discussed below). The sexual contact continued for six years, until 1975, when Francis was arrested for molesting Andrea and, as a consequence,

¹ All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

never returned to their home. Tr. 150, 154-155, 165. The sisters' testimony stood unchallenged, as Francis neither cross-examined them, Tr. 151, 159, 163, 171, nor himself put on any evidence, *see* Tr. 256.

Anita. The oldest sister, Anita (Morris) Potts explained that after their father had passed away, her mother met Francis in late 1969 and married him on December 25 of the same year. Tr. 143. There were several incidents of sexual contact; it happened "all the time." Tr. 145. Sometime prior to the marriage, Francis took Anita home with him to spend the night. As soon as they arrived at his house, he insisted that it was bedtime and took Anita to his bedroom. After she got in bed, he put his hand in her panties and put his fingers into her vagina. Tr. 144. After she cried and begged him to quit, he finally did and told her to go to sleep. Tr. 145. She woke up later with him against her back, holding her with an arm up under her head. *Id.* He had pulled off her panties and was trying to insert his penis into her vagina from behind. She remembers it hurting and that she was crying. He put his hand over her mouth and told her, "really hateful," to stop yelling and crying. *Id.*

She recounted another incident when she and her sister Andrea were outside playing by their grandfather's porch; Francis told them to get in the car, to go to the store with him. They did not want to go, "because by this time, we knew anytime he took one or two of us anywhere or got alone with one or two of us anywhere, we knew what was going to happen." Tr. 146. If they resisted, "he would get so fighting mad, and he would curse and tell [their] mother . . . , <make them get their ass in the car.>" Tr. 146. On this particular occasion, Anita and Andrea got in the car with him, and he drove down a dirt road off the highway, parking the car on the side of the road where there were woods on both sides and no houses. *Id.* Anita was in the front seat and Andrea was in the back seat. *Id.* He got out, came around to Anita's side, opened the door, and pushed her down into the seat. He pulled on her panties and pulled his penis from his pants. Tr. 147. Anita was kicking and fighting him while he was trying to penetrate her with his penis. *Id.* Her head was laying by the steering wheel and she honked the horn, "just laying on" it. *Id.* Finally, he pulled a knife out

from underneath the driver's seat and put it to her throat, as he was holding her down in the seat. *Id.* He said, "I will kill you. I will cut your throat." *Id.* She quit fighting. *Id.* But a truck came down the road, causing Francis to sit her back up in the seat; he came back around the car before the truck "could get up to see what was going on," and then he got into the car and drove away. Tr. 148.

In the summertime, he would make the sisters lay down and take naps with him, cursing and getting angry to make them do it, and insisting that their mother make them do it. *Id.* While they lay there, he would put his fingers into their vaginas. He would have a girl on either side of him, and would go from one to the other. Tr. 149.

Anita told her mother about some incidents, and when her mother asked Francis, he would deny it. He convinced her that the children were lying. Tr. 150.

Rita. Rita (Morris) Williams testified that she was about four years old in 1969. Tr. 153. Francis sexually molested her "over and over and over again for six years." Tr. 154-155. She recalled that he would hide in the shower, pulling the curtain shut, waiting for one of the girls to come in to use the bathroom: "It didn't matter which one, just one of us to come in." Tr. 155. He would put the seat down on the toilet, and bend Rita over it. Tr. 155. Then he "would try to insert his penis, which would not fit. So he would ejaculate . . . in between [her] legs." Tr. 155. "This happened many, many times." Tr. 156.

Another time, when Rita had a burn on her leg, Francis dropped off her mother at the drugstore to pick up prescriptions for her. Francis parked the car in the back of the parking lot and while Rita's mother was in the drugstore, he got into the back seat with Rita. He made her lay down, and "would poke his head up periodically to see if anybody was coming." Tr. 157. When he saw her mother coming, he pulled up her panties and wrapped a sweater around her legs; he told her mother that Rita was crying because her leg hurt. *Id.*

She remembers other incidents when she and Francis were behind a barn in the tall weeds, and he would pull down her panties and try to insert his finger into her vagina. *Id.*

Another time, Rita and her sister Sheila were taking a shower together. Tr. 158. At the time, Sheila could not talk very well. He leaned Sheila over the toilet seat and had sexual contact with her. *Id.* He let Sheila go when he saw Rita trying to leave the bathroom. *Id.* Then he leaned Rita over the toilet seat and tried to insert his penis into her vagina. *Id.*

Sheila. Sheila (Morris) Law testified. Tr. 159. What she remembers most about Francis is that he hurt every one of the sisters, and fearing being alone with him or around him at any time whatsoever. Tr. 163.

She specifically recalls that one night, while she lay sleeping in bed, she awoke to a noise, looked up and saw Francis with Rita in the corner, his hand over Rita's mouth. Tr. 162. Francis was behind Rita, and had his penis either in her rectum or vagina. Tr. 162. She also recalls another incident when the family spent the night with their grandfather, and made pallets on the floor. She was the one chosen to sleep with her mother and Francis, and remembers not wanting to because she was afraid that he would touch her or try to harm her in some way. Tr. 162-163.

Andrea. Andrea (Morris) Deghera testified. In 1969, when Francis began living with her, she was about 2 or 3 years old. Tr. 164-165. Francis perpetrated "a lot" of incidents against Andrea. Tr. 170. She recalls a time that she was lying at the foot of the bed where her mother and Francis were sleeping, and waking up with him sticking his finger into her vagina. Tr. 170.

On July 23, 1975, when she was 8, Francis was taking her to a birthday party. On the way, he pulled off the blacktop road onto a gravel road and into a clearing. Tr. 166. He leaned her over the car seat and pulled down her panties. *Id.* He tried to put his penis into her vagina and he ejaculated. Tr. 167. She remembers being wiped off afterward with her panties. *Id.* Then he took her to the birthday party. He also

picked her up. When they were driving home, and alone in the car, his pants were unzipped; he made Andrea pull out his penis and masturbate him. Tr. 168. He also had her lay down in the seat, pull down her panties, and show him her vagina. *Id.* Back at home, Andrea told her older sister what had happened. Tr. 167, 168.

Francis was arrested as a result of that incident. Tr. 169.

Robert Patrick, who testified below, was a Deputy Sheriff in the Ripley County Sheriff's Department in July 1975; he investigated the July 23 birthday party incident. Tr. 172-174. In the course of that investigation, he spoke with Francis, and Francis made a statement, admitting having had sexual contact with Andrea. Tr. 176-177. Francis' statement was Petitioner's Exhibit 1, admitted and read at trial without objection from Francis' counsel. Tr. 178.² Therein, Francis admitted that he took the little girl to the party and on the way, pulled off the blacktop road onto the gravel road. He said he had the little girl bend over the seat, then, "I put my thing between her legs and rubbed it back and forth until I shot my load. Then we got back in the car, Then later I went to get her, and on the way back home I played with her several times, but I didn't do anything else to her." Tr. 179-180. When asked why he did it, Francis said, "I don't know why. My wife won't let me touch her, so I was just driving along and the thought came to me, so I just stopped and I did it." Tr. 180.

Andrea testified in the criminal case against him. Tr. 169. While they were in court, she sat in "a pew" with her mother, grandfather, and older sister. Francis was holding up a newspaper, and kept looking over toward the pew. Tr. 169. At one point, when Andrea thinks that Francis caught her mother, grandfather,

² The deputy read Francis his rights twice. Tr. 176-177. Francis made his statement to the deputy after indicating that he understood his rights. The deputy wrote out the statement by hand. Tr. 181.

and older sister not watching, he looked at Andrea and mouthed the words, "will kill you." *Id.* She understood him to be saying that he would kill her. *Id.*

Deputy Patrick testified that Francis ultimately pleaded guilty to the charge. *Id.*

The Lashley children

In 1980, Francis sodomized the Lashley children, Walt and Anita. Walt Lashley testified below. He was 12 years old when he met Francis, whom he knew as "Pete," in August 1980. Tr. 185. Francis sodomized Walt on multiple occasions. One time, they were clearing weeds out of bean fields and during a water break, Francis unbuttoned Walt's pants. Tr. 185. He had Walt get down on his knees, with his pants down, and then Francis inserted his penis into Walt's rectum. Tr. 186. The same thing happened a couple of times after that, in a trailer near the field. Tr. 187. Francis' counsel did not cross-examine Walt. Tr. 188.

Robert Burdiss, with the Platte County, Missouri Sheriff's Department, testified. Tr. 188. In 1981, he was a corporal, and took part in an investigation involving Walt and Juanita Lashley, and Francis. Tr. 189. In the course of that investigation, Francis admitted having sexual contact with Walt and Juanita. Francis' waiver of rights and voluntary statements were Petitioner's Exhibit 2, admitted into evidence at trial below, without objection. Tr. 191.³ With respect to 11-year old Juanita, Francis admitted that he "just pulled her pants down and did it" and "just screwed her" in the bean field where they were cutting weeds. Tr. 193-194. When asked if Juanita consented, Francis said, "She didn't fight back." Tr. 194. With respect to Walt, Francis admitted that he inserted his penis, at least partially, into Walt's rectum. Tr. 195-196. When asked if Walt consented, Francis said, "He didn't fight back." Tr. 196.

³ Corporal Burdiss witnessed Francis' signing of the waiver of rights, and of the statements. Tr. 190-191.

Petitioner's Exhibit 3, admitted and read at trial below, was a certified copy of the Platte County Circuit Court's record indicating the conviction of Francis for the sodomy of Walt and Juanita, upon Francis' guilty plea. Tr. 196. That exhibit was admitted without objection. *Id.*

John David Smith

Donwell Clark, who was a Detective Sergeant with the Poplar Bluff Police Department in December 1988, testified. Tr. 203. He recalls meeting a 3-year old boy named John David Smith, on December 29, 1988. He also met and interviewed Francis. Tr. 204-205. The officer recalls giving Francis his Miranda Rights. Tr. 207-208. Francis admitted to the officer that he was babysitting John, for approximately 10 minutes, while the mother was visiting neighbors. Tr. 205. The officer talked to the boy about what happened. Tr. 205. He also, in the course of the investigation, talked to a Dr. McGath at Doctor's Regional Medical Center, now known as Three Rivers Health Care System, at 621 Pine Boulevard in Poplar Bluff. Tr. 205-206.

Petitioner's Exhibit 7, admitted into evidence and read at trial, was a medical record from Three Rivers Health Care relating to John David Smith. Tr. 215-216. The medical record reflected:

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. Mother states she has not bathed child since yesterday a.m. Exam requested by Poplar Bluff Police Department. "Pete stuck his wee-wee in me."

Tr. 216. Francis' counsel objected to the first sentence of the medical record, reflecting what the mother related to the person who wrote it down, on the basis that it was hearsay, irrelevant, and cumulative. Tr. 211-213, 215. Counsel did not specifically object to the child's statement; she in fact remarked, in chambers, "I think that would be all right." Tr. 211; *see also* Tr. 212.

Curtis Self

Captain Clifford Morris, with the Poplar Bluff City Police Department, testified. Tr. 198. He was a detective with that police department in 1989. *Id.* On May 31, 1989, he was called by another police officer to a Dr. Elliott's office at the Kniebert Clinic, and advised that there was an incident of alleged sexual abuse involving a 5-year old boy, Curtis Self. Tr. 198-99.

Petitioner's Exhibit 8, admitted into evidence and read at trial, was a medical record relating to Curtis Self from the Kneibert Clinic. Those records reflected:

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. The exhibit had been redacted by agreement between the State's and Francis' counsel, prior to its admission into evidence. Tr. 212-213. Francis' counsel made a general objection as to relevance. Tr. 213, 215.

Petitioner's Exhibit 6 was a certified copy of the sentence and judgment from the Butler County Circuit Court, indicating the conviction of Francis for sodomy of Curtis Self. Tr. 202. It was admitted into evidence without objection. *Id.*

The expert witness, Dr. Baker

Finally, the State put on an expert, Helen Baker, Ph.D. Tr. 217-218. Dr. Baker is a psychologist, licensed in the State of Missouri and certified as a forensic examiner. Tr. 218-220. She has training and experience involving sexual offenders. Tr. 221.

She undertook an assessment or evaluation of Francis on the court's request in this case, and was asked to answer two questions: 1) Does Francis have a mental abnormality; and 2) if he does, does the mental

abnormality make him more likely than not to commit predatory acts of sexual violence? Tr. 221-222. In the course of answering such questions, and as a forensic examiner, she collects as much relevant information as possible. That information includes documents such as police reports, offender statements, victim statements, and other records; usually, in addition to record review, the information also includes an offender interview. Tr. 222-223. In this case, she did not have the benefit of an interview with Francis, who refused to participate, on the advice of counsel. Tr. 223. In coming to opinions in cases like this and doing forensic evaluations, she testified that in her profession, such evaluations can be done without offender interviews, and often must be; it is a legitimate practice to perform the evaluation without the offender interview. Tr. 224.

In this case, the items that Dr. Baker examined were referral data from the circuit court, such as police reports, sheriff's reports, statements made in the course of investigation, and charges filed and the outcomes. Tr. 225. She looked at numerous documents from the Department of Corrections, including the Diagnostic Center report and criminal history, conduct violations while imprisoned, presentence investigation form, mental health records, records from MOSOP (the Missouri Sexual Offenders Program), offender correspondence, information from the treatment team, and the end of confinement report. Tr. 225.

She obtained psychiatric treatment records of Farmington State Hospital and Fulton State Hospital, as well as the FBI identification record, arrest records, petitions for release filed by Francis, the order for Francis' conditional release, and the order to rescind the conditional release. *Id.* She looked at an order for mental evaluation in regard to the past situations from Butler County, an order from the Circuit Court of Ripley County for Francis' commitment as a criminal sexual psychopath under the old law, Chapter 202, and reports of the Poplar Bluff Police Department. Tr. 225-226.

She also received some progress reports following the assessment. Tr. 226.

Dr. Baker arrived at the opinion, within a reasonable degree of psychological certainty, that Francis has a mental abnormality called pedophilia. Tr. 227. Pedophilia is described in the Diagnostic and Statistical

Manual-IV (DSM-IV), a guide for diagnosis that is widely used by psychiatrists and psychologists; that is the text that Dr. Baker used to help in making Francis' diagnosis. Tr. 227-228. Pedophilia is characterized by intense and recurrent sexual fantasies, urges, or behavior, and it often interferes with the person's occupational, social, and general functioning. Tr. 227. The intense and recurrent pattern must have been present for at least six months, which in Francis' case, Dr. Baker testified, "[i]t certainly was." Tr. 228. Further, the behavior must be directed at children under the age of 13, or prepubescent children, which Francis' victims were. *Id.* Another criteria is that the person has acted on the urges or fantasies such that it has caused market distress in that person's life, such as being in the penitentiary for years or being in a mental hospital. Also, the person must be at least 16 years old to receive the diagnosis, and at least five years older than his/her victims. Dr. Baker testified that Francis meets both of these criteria, as well. *Id.* She explained that Francis has had a pattern of molestation or child abuse or sodomy, first reported in 1972. Tr. 228-229. He had several hospitalizations, as opposed to charges, as a result of these episodes. Tr. 229. And at one point, he was designated a criminal sexual psychopath as a result of his continuing sexual contact with children. *Id.* He has also been imprisoned for some time. *Id.*

Dr. Baker also formed the opinion, to a reasonable degree of psychological certainty, that the mental abnormality of pedophilia makes Francis more likely than not to engage in predatory acts of sexual violence if he is not confined to a secure facility. Tr. 230. In arriving at the conclusion that he is more likely than not to reoffend, Dr. Baker noted that Francis has a number of risk factors. Those factors included the fact that he has not completed any program designed for sex offenders. Tr. 231. He has not been able to refrain from reoffending in the short periods of time that he has been living in the community. *Tr. 230.* He had male victims, in addition to female victims, and all of the victims were children. Tr. 231-232. She also noted that, as far as the professionals know, pedophilia has never gone into spontaneous remission; there are no such documented cases in the literature. Tr. 233-234.

Francis' case in chief

At the close of the State's case, Francis' trial counsel made an oral "motion for summary judgment," indicating that she would submit the motion in written form later. Tr. 255-256. She said, "The State has not presented evidence on each and every element of the sexually violent predator statute, and they have failed to make a submissible case on each and every element." Tr. 255-256. The trial court denied the motion. Thereafter, Francis' counsel announced in open court that Francis would not present any evidence, and renewed "the motion" on the same grounds, which the trial court also denied. Tr. 256.

The verdict and post-trial matters

The jury rendered a unanimous verdict on January 25, 2001, finding beyond a reasonable doubt that Francis is a sexually violent predator. LF 123; Tr. 290. The trial court signed and entered the judgment and order of commitment on that same date. LF 5-6, 123.

On February 21, 2001, Francis' counsel filed a written motion for judgment notwithstanding the verdict, or in the alternative, a new trial. LF 6, 124. The trial court denied it on March 16, 2001. LF 6.

The instant appeal followed.

Points Relied On

I.

The trial court did not err in overruling Francis' objections to Instruction 6, nor in denying his motion for a directed verdict or new trial, because ' 632.480, RSMo, does not violate the due process clauses of the constitutions of Missouri and the United States, in that the State may place a person in involuntary custodial treatment if he has a mental abnormality causing dangerousness.

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

State v. Revels, 13 S.W. 3d 293 (2000)

Kincaid Enterprises, Inc. v. Porter, 812 S.W.2d 892 (Mo.App. W.D. 1991)

' 632.480, *et. seq.*, RSMo

Rule 72.01

II.

The trial court did not err when it denied Francis' motion to dismiss the petition, because the Sexually Violent Predator Law does not violate the equal protection clauses of the constitutions of Missouri and of the United States, in that he failed to identify any similarly situated person who would be subjected to different treatment and the legislature may constitutionally distinguish between sexually violent predators and all others who have mental abnormalities that may or may not render them dangerous.

State ex rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270 (1940)

State v. Kee, 510 S.W.2d 477 (Mo. 1974)

' 632.480, *et seq.*, RSMo.

III.

The trial court did not abuse its discretion or plainly err when it admitted Petitioner's Exhibits 7 and 8 into evidence, because the records contain statements that fall within a hearsay objection and were not prejudicial, in that the statements were reasonably related to medical diagnosis and treatment, were cumulative, and Francis' trial counsel did not properly object.

Robertson v. Robertson, 15 S.W.3d 407 (Mo.App. S.D. 2000)

Missouri Public Svc. Comm'n v. Juergens, 722 S.W.2d 105 (Mo. 1988)

Gage v. Morse, 933 S.W.2d 410 (Mo. App. 1996)

Krieg v. Director of Revenue, 39 S.W.3d 574 (Mo.App. E.D. 2001)

IV.

The trial court did not err when it permitted the State to put on evidence of sexual contact that Francis had with children, that had not resulted in convictions, because the evidence was directly relevant to the State proving, beyond a reasonable doubt, that Francis is a sexually violent predator, in that the State had to prove that Francis suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility.

Robertson v. Robertson, 15 S.W.3d 407 (Mo.App. S.D. 2000)

In re Hay, 953 P.2d 666 (Kan. 1998)

State v. Smith, 32 S.W.3d 532 (Mo. banc 2000)

▪ 632.480(5), RSMo

▪ 632.495, RSMo

Argument

I.

The trial court did not err in overruling Francis' objections to Instruction 6, nor in denying his motion for a directed verdict or new trial, because ' 632.480, RSMo, does not violate the due process clauses of the constitutions of Missouri and the United States, in that the State may place a person in involuntary custodial treatment if he has a mental abnormality causing dangerousness.

For his first point on appeal, Francis argues that ' 632.480 is unconstitutional insofar as it does not require the State to prove lack of volitional capacity. That element was not in Instruction 6, nor was it required by the law to be in the instruction.

A. Standard of review and preservation

Francis complains about the denial of his motion for a directed verdict or, in the alternative, for a new trial, arguing in his Point I that the jury instruction was incorrect. Generally, an appellate court does not overturn a jury verdict unless there is a complete absence of probative facts to support it. *Environmental Protection, Inspection, and Consulting, Inc. v. City of Kansas City*, 37 S.W.3d 360, 366 (Mo.App. W.D. 2000). Where a jury instruction is challenged, this court will look for error that materially affected the merits of the case. *Id.* (quotations omitted). Thus, an appellant who claims prejudicial error must show that the instruction misdirected, mislead, or confused the jury. *Id.*

In terms of preservation of issues for appellate review, Rule 72.01(a) directs that a motion for a directed verdict at the close of the opponent's case "shall state the specific grounds therefor." Rule 72.01(b) permits a party to move for a directed verdict at the close of all the evidence. Section (b) further permits a party, who has moved for a directed verdict, to "move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict" (if the motion is made within 30 days). A "motion for directed verdict that does not conform to the rules presents no basis

for relief in the trial court nor preserves the issue in the appellate court." *Kincaid Enterprises, Inc. v. Porter*, 812 S.W.2d 892, 895 (Mo.App. W.D. 1991) (and citation therein). And a trial court does not err in failing to grant a motion for directed verdict on a ground not contained in the motion; such grounds are not preserved for appellate review. *Wisch & Vaughan Construction Co. v. Melrose Properties Corp.*, 21 S.W.3d 36, 42 (Mo.App. S.D. 2000), *citing Kincaid*, 812 S.W.2d at 895).

It appears that Francis failed to preserve instructional error for purposes of obtaining an outright reversal (in other words, a directed verdict in his favor), even if this court construes Francis' oral "motion for summary judgment" made at the close of the evidence as a motion for a directed verdict, *see Frisella*, 583 S.W.2d at 731-732 (construing motion for summary judgment as motion for directed verdict).⁴ At trial, the only basis for summary judgment that Francis' counsel articulated was that "the State has not presented evidence on each and every element of the sexually violent predator statute, and they have failed to make a submissible case on each and every element." Tr. 255-256. The State does not concede that a party who chooses to make an oral motion for a directed verdict at trial can subsequently add new bases for a directed verdict or a judgment notwithstanding the verdict in a subsequently filed written motion, and Rule 72.01(b) does not appear to permit it, but the portion of Francis' post-trial motion concerning directed verdict did not even purport to do that. Therein, Francis again simply argued that the trial court should have granted him a

⁴ It is well settled that the denial of a motion for summary judgment is not subject to appellate review, *Trimble v. Pracna*, 51 S.W.3d 481, 497 (S.D. App. 2001), even when the appeal is taken from a final judgment, *Carlund Corp. v. Crown Center Development Corp.*, 910 S.W.2d 273, 276 (Mo.App. W.D. 1995).

directed verdict because the State allegedly failed to make a submissible case on all the elements. *See* LF 129, & 1.

Therefore, if there was instructional error (which the State does not concede occurred and will address below), it is Francis' motion for a new trial that provides the only vehicle for relief, unless this court chooses to perform plain error review, in its discretion, pursuant to Rule 84.13(c). But under any standard, the trial court correctly denied a directed verdict and new trial.

B. Involuntary custodial treatment is constitutionally permissible for those whose mental abnormalities make them likely to commit acts of sexual violence, not merely for those whose mental abnormality causes complete volitional impairment.

The constitutional test for involuntary commitment has long consisted of two elements: dangerousness and a serious mental problem. *See, e.g., In re Gordon*, 10 P.3d 500, 502-03 (Wash.App. 2000), *citing Kansas v. Hendricks*, 521 U.S. 346 (1997). The Missouri Supreme Court recognized that test most recently in *State v. Revels*, 13 S.W. 3d 293 (2000). There, the court considered arguments that the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992), had modified the traditional test, and concluded that it had not. *Revels*, 13 S.W.3d at 296. Here, Francis challenges that conclusion, arguing for an additional constitutional requirement in proceedings involving the involuntary custodial treatment of sexually violent predators. In his view, due process precludes involuntary custodial treatment of sexually violent predators except for those who, "as a result of their mental abnormality, are unable to control their behavior," Appellant's Brief, pp. 23, 26, and entirely lack the volitional capacity to refrain from predatory acts@regardless of whether they have mental abnormalities that make them dangerous. This Court should reject the claim that due process requires something more than proof of a mental abnormality, dangerousness, and causation.⁵

The Missouri Supreme Court's conclusion in *Revels* was consistent with the opinion of the U.S. Supreme Court in *Foucha*. In *Foucha*, the Court repeatedly stated that the due process test for civil commitment required that the state prove by clear and convincing evidence@just two things: that the

⁵ That question is pending before the Missouri Supreme Court in *In re Thomas*, No. 83186, and before the U.S. Supreme Court in *Kansas v. Crane*, No. 00-957.

individual is mentally ill and dangerous.@ 504 U.S. at 80; see also *id.* at 75-76, 86. The Court in *Foucha* prohibited merely the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.@ 504 U.S. at 83, *quoted in Revels*, 293 S.W.3d at 296. Thus, in *Revels*, the Missouri Supreme Court found that *Foucha* allows the continued custodial treatment of a person who has, and in the reasonable future is likely to have, a mental disease or defect rendering the person dangerous to self or others.@293 S.W.3d at 296.

The language used in *Revels* recognizes that the two traditional parts of the test, mental illness and dangerousness, cannot be applied independently: Continued custodial treatment is permissible if the mental abnormality render[s] the person dangerous.@ *Id.* Considering a statute parallel to the one at issue here, the Washington Court of Appeals recently phrased the constitutional test in the same way, insisting on a mental illness, dangerousness, and a link between the two. That court upheld Washington's sexually violent predator statute because it requires the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future.@ *In re Gordon*, 10 P.3d at 503. The Missouri sexually violent predator law should similarly be upheld. Like the unconditional release statute at issue in *Revels*, it meets the constitutional test.

Francis does not challenge the traditional test, nor does he argue that the Missouri law fails it. Rather, he argues that the U.S. Supreme Court has added another requirement to the test when the involuntary custodial treatment of a sexually violent predator law is at issue. He claims that in addition to findings of mental abnormality, dangerousness, and causation, there must also be a finding that the abnormality makes the person unable to control his behavior. Appellant's Brief, p. 23. Thus, Francis would limit the scope of the statute cases in which the jury finds that the person cannot, rather than merely will not or find it difficult to, restrain his violent behavior. That claim was rejected in the State of Washington, where the court of appeals

confirmed that *Hendricks* does not require a jury to **A**make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior. *In re Gordon*, 10 P.3d at 503.

In arguing for this new, stricter test, Francis cannot rely on any holding of the U.S. Supreme Court **B** though he purports to do so, citing repeatedly to *Hendricks*. See Appellant's Brief, pp. 21-27, 29, 33-37. In fact, in *Hendricks*, the Supreme Court was never asked whether the Kansas law (which is substantially similar to both the Washington and Missouri statutes) could be applied to someone who was not completely volitionally impaired. Francis cannot contest that Hendricks **A**conceded at his hearing that he *could not control* his urge to sexually molest children and the only sure way he could keep from continuing his deviant behavior was ~~to die.~~ *521 U.S. at 760.*⁶ Thus the Supreme Court did not decide whether a sexually violent predator law could extend to persons who may have some control over their behavior. In other words, what Francis relies on is not any legal conclusion that the Court drew, but the Court's statements about Hendrick's own admissions of fact. Or to use the language of the Arizona Supreme Court, Francis **A**read[s] *Hendricks* too narrowly and intermingle[s] fact-specific comments in that decision with principles central to its holding. *In re*

⁶ Leroy Hendrick's claim of complete inability to control his conduct is doubtful; surely not even Hendricks abused every child with whom he came into contact, regardless of time, place, or audience. Thus, Hendricks and Francis are simply at two points on the same spectrum of ability to control conduct though, as discussed in section B.3, *infra*, Francis' admissions place him at least near Hendricks' point.

In re Leon G., 26 P.3d 481, 484 (Ariz. 2001). The language that Francis cites does not purport to define either an existing, or a new, constitutional rule. If it changed the traditional two-part test at all, *Hendricks* did so by broadening the state's power to involuntarily commit individuals; the Court clarified that a condition defined as a "mental abnormality" was constitutionally sufficient to allow commitment, and the state's power to commit was not limited to conditions medically defined as "mental illnesses."

Unable to rest on the holding in *Hendricks*, Francis also turns to the decisions of two courts that have, like the Washington Court of Appeals, considered the "volitional impairment" question: *Kansas v. Crane*, 7 P.3d 285 (Kan. 2000), *cert. granted*, No. 00-957; and *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999). Both courts carried the *Hendricks* dicta too far, though only the Kansas court carried it as far as Francis suggests.

In *Crane*, the Kansas Supreme Court held that the constitution demands proof of complete volitional impairment. 7 P.3d at 290. Thus, the only person who can be constitutionally placed in involuntary custodial treatment is one who "cannot control his dangerous behavior." *Id.* For support, the court relied solely on the *Hendricks* dicta. *See id.* at 288-90. But again, such dicta is not sufficient to establish a new constitutional due process requirement. Moreover, the Kansas court did not articulate a rationale for its rule. It failed to articulate any meaningful, much less constitutionally significant, distinction between a person who *cannot* refrain from harmful behavior, and a person who, while suffering from a mental abnormality that leads to acts of sexual violence, *can* refrain from that behavior to some extent, but *will not*. Certainly such a distinction makes no sense to the victim of the next sexual offense. Nor does it make sense to the psychologist or psychiatrist; the mental abnormality merits treatment, regardless of whether it compels the patient to act out or merely makes it more likely than not that he will do so. Nothing in *Hendricks* suggests that the *Crane* line would make sense to the U.S. Supreme Court.

Certainly nothing in *Linehan* suggests that there is any sense to the line drawn in *Crane* and urged by Francis. In fact, the Minnesota court rejected that line and drew another.

Linehan began as a case arising under Minnesota's "sexual psychopath" law, which covers those persons who have "conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." Minn. Stat. § 526.09 (1992).⁷ Some years before, the Minnesota Supreme Court had interpreted this language to require a finding that the person whose commitment was proposed had "an utter lack of power to control their sexual impulses." *State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270, 272 (1940).⁸ The state's initial effort to commit Linehan failed because the state did not make the requisite showing that he was completely unable to control his behavior. *In re Matter of Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

The Minnesota legislature then adopted a new law, providing for the commitment of "sexually dangerous persons." They are defined as persons who have "engaged in a course of harmful sexual conduct" (defined elsewhere in the statute) and have "manifested a sexual, personality, or other mental disorder or dysfunction," and as a result are "likely to engage in acts of harmful sexual conduct." Minn. Stat. 253B.02

⁷ The "sexual psychopath" law, though later amended, is now codified at Minn. Stat. § 253B.02 subd. 18b.

⁸ The U.S. Supreme Court, in quoting the Minnesota Supreme Court's interpretation of the statute, neither endorsed it nor gave it constitutional significance. Rather, the Court observed that the Minnesota court's interpretation of state law was "binding" upon the Court. 309 U.S. at 272.

subd. 18c. The Minnesota Supreme Court contrasted it with the prior law as interpreted in *Pearson*:
A Commitment under the SDP Act does not require proof that the proposed patient is unable to control his or
her sexual impulses. @ *In re Linehan*, 557 N.W. 2d 171, 175-76 (1996) (*Linehan II*). The Act thus A created
a new class of individuals eligible for civil commitment for treatment. @ *Id.* at 179.

Linehan challenged the law by arguing, in part, for the rule adopted by the Kansas Supreme Court in
Crane, *i.e.*, that A an utter inability to control sexual impulses is required in order to satisfy the narrow tailoring
demand of strict scrutiny. @ *Id.* at 180. The Minnesota Court nonetheless held the statute to be constitutional.
Id. Walking through the steps required by strict scrutiny, the court first confirmed the state's compelling
interests A in protecting the public from sexual assault @ and A in the care and treatment of the mentally
disordered. @ 557 N.W. 2d at 181, *citing In re Blodgett*, 510 N.W.2d 910, 914, 916 (Minn. 1994), and
Addington v. Texas, 441 U.S. 418, 426 (1979). The court then held that those A intertwined @ interests are
served by the involuntary custodial treatment of sexually dangerous persons: A Treating sexual predators for
the disorders that explain their dangerousness serves and falls within the state's interest in protecting the public
from sexual assault. @ 557 N.W. 2d at 181. Finally, the court referred back to one of its own precedents,
Blodgett, 510 N.W.2d at 916, where it had similarly concluded that A [s]o long as civil commitment is
programmed to provide treatment and periodic review, due process is provided. @ 557 N.W. 2d at 181.

The court then turned to the last question in the strict scrutiny analysis: A whether the SDP Act is
sufficiently narrow . . . to satisfy strict scrutiny. @ *Id.* The court recognized that the A leading United States
Supreme Court case on the subject @ was *Foucha*. The court then restated the *Foucha* holding: a person
A may be committed only so long as the patient is both mentally ill and dangerous. @ 557 N.W. 2d at 182, *citing*
Foucha, 504 U.S. at 77-78, *Jones v. United States*, 463 U.S. 354, 370 (1983), and *O'Connor v. Donaldson*,
422 U.S. 563, 574-75 (1975). The Minnesota court thus agreed with the Washington court in *In re Young*,
857 P.2d 989, 1001-1005 (Wash. 1993): An involuntary commitment statute meets constitutional requirements

of due process if it affects only persons who are mentally ill, and who -- because of that illness -- are dangerous.

Linehan sought review by the United States Supreme Court, challenging the constitutionality of the Minnesota law. His petition was held pending a decision in *Hendricks*. Once *Hendricks* was decided, the Court did what it typically does in cases being held: It granted the petition, vacated the Minnesota Supreme Court's decision, and remanded the case for consideration in light of *Hendricks*. 522 U.S. 1011.⁹

⁹ Francis suggests that the Supreme Court's decision to grant the petition, vacate the decision below, and remand (AGVR) in light of *Hendricks* was significant. Appellant's Brief, pp. 33-34. Perhaps, but its precise significance is far from clear. Certainly the GVR did not amount to a final determination on the merits. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). The significance of a GVR has been variously stated as indicating that the case remotely involv[es] the principles laid down in the decision being announced, *Goldbaum v. U.S.*, 348 U.S. 905, 906 (1955); that it is not certain that a case was free from all

obstacles to reversal on an intervening precedent,¹⁰ *Henry*, 376 U.S. at 776; or that ~~A~~the intervening decision has shed new light on the law which, if it had been available at the time of the [lower court~~s~~] decision, might have led to different results,¹¹ *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J. dissenting). Evaluating the significance of a GVR is particularly problematic without knowing the precise questions presented in the petition, which Francis does not provide.

On remand, the Minnesota Supreme Court addressed various arguments Linehan made based on *Hendricks*. *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999) (*Linehan III*). When it reached substantive due process, the court considered and rejected Linehan's demand that the court follow the *Crane* approach and thus retreat from its conclusion that the constitution did not limit sexually violent predator laws to those who are utterly unable to control their behavior. *Id.* at 873 n. 3. The majority criticized the dissent for finding in the *Hendricks* dicta the rule later applied in *Crane*. *Id.* Thus the court refused to insert[] the word "totally" in front of the word "control" whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses. *Id.* It is sufficient that a person's mental abnormality merely makes it difficult . . . to control his dangerous behavior. *Hendricks*, 521 U.S. at 358, quoted at 594 N.W. 2d at 873 n.3. A commitment law is constitutional, then, if it can be interpreted to allow only the 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.* at 876 (emphasis added). To put it another way, the Minnesota court concluded that the statute must be constitutionally limited to provide for the involuntary custodial treatment only of one who demonstrates a lack of adequate control over his sexually harmful behavior. *Id.*

The question addressed in *Linehan* and *Crane* was recently considered in *In re Leon G.*, 26 P.3d 481 (Ariz. 2001). There, the Arizona Supreme Court rejected the argument that the Supreme Court in *Hendricks* imposed a volitional impairment as a separate requirement for civil commitment statutes. *Id.* at 484. The Arizona court found in *Hendricks* the same two-part analysis that the Missouri Supreme Court used in *Revels*: If the state establishes not only that a person is dangerous, but also that a mental illness or abnormality caused the dangerousness, the state has met its burden to show a lack of control. *Id.* at 485.

This question was also addressed recently in *In re Varner*, 2001 Ill. LEXIS 1433 (Ill. October 18, 2001). By the time he was 28 years old, Varner had raped at least three children. *Id.* at *2. He refused treatment in prison and denied committing the sexual assaults. *Id.* Before his release, he was evaluated under the Illinois commitment statute, and psychologists diagnosed him as having pedophilia and a personality disorder, a combination that created a substantial probability that he would reoffend if released. *Id.* Varner challenged the constitutionality of the statute on grounds that it was not limited to persons who lack volitional control over their behavior. *Id.* at *7. The Illinois Supreme Court found that, under *Hendricks*, the statutory requirement that the mental condition must affect the ability to control the conduct was sufficient to uphold the Illinois law. *Id.* at *9. The court examined *Crane*, and found it unpersuasive. *Id.* at *10.

If a person can adequately control his behavior, then he will not fit the statutory definition of a sexually violent predator. *B i.e.*, he will not be more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. ' 632.480(5). Anything else is inadequate control. Thus, Missouri's law goes no further than the *Linehan*, *Leon G.*, and *Varner* rules would permit. But again, this court need not decide whether that is true. The real test is still the two-part test articulated in *Foucha* and *Revels*, which Francis never even suggests that the Missouri law fails.

1. Limiting interpretations are available in Missouri

To argue for complete reversal rather than remand, Francis goes beyond a demand for a showing of complete volitional impairment and a retrial under that standard, and insists that the statute must be stricken in its entirety for failure to include such a limitation. He begins by discussing Missouri's severance law, ' 1.140, RSMo. Appellant's Brief, p. 28. That statute does not directly apply here, for it deals only with the question of whether to retain the remainder of a statute once a portion is deleted, not how to handle statutes that may be constitutionally applied to one person (one who is volitionally impaired), but not to another (one who can -- but will not -- refrain from violent acts).

Moreover, the analysis that Missouri courts have applied under that statute would not be helpful to Francis. The statute requires the court to preserve the nonoffending portions of the statute, unless we determine that the legislature would not have enacted the valid provisions without the void one. *Kilmer v. Mun*, 17 S.W. 3d 545, 553 (Mo. banc 2000). The question would be whether the legislature would not have enacted the statute if it applied only to those with complete (*Crane*) or partial (*Linehan*) volitional impairment. In this case, as in so many others, the answer is rather obvious. *National Solid Waste Mgmt. Assoc. v. Director of the Dept. of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998). It is absurd to argue that the legislature would prefer to release all mentally ill people likely to commit sexually violent offenses rather than to commit at least the worst of them. There is no logical basis for Francis's argument that the legislature would not have passed the statute if it would only have led to the custodial treatment of the worst of those the existing language sought to reach.

Certainly a contrary conclusion cannot be based, as Francis suggests, on the fact that the statute defines "sexually violent predator" in one place, then refers back to that place repeatedly. Appellant's Brief, p. 29. Francis has no precedent for the premise that repeated use of the term for which a limiting reading is proposed has any impact, much less a dispositive impact, on the availability of severance. And he provides no logical explanation for that claim. Indeed, the consistent use of a single, defined phrase is a legislative tool that should be encouraged, not discouraged by finding it to be the basis for precluding either severance or a limiting reading of the statute.

But again, the question here is not really one of severance; it is whether a limiting interpretation is possible. And *Linehan*, if not *Crane*, shows that it is. What this Court would have to do, in order to retain the law but adopt even the *Crane* interpretation, is no more difficult than what the Missouri Supreme Court did recently in *Oliver v. State Tax Commission*, 37 S.W. 3d 243 (Mo. banc 2001): add a constitutional gloss to statutory language in a manner that prevents anyone's rights from being violated.

Certainly taking such a step is easier here than in was in *Linehan*. There, the court required proof of lack of adequate control despite a specific provision in the law stating that it is not necessary to prove that the person has an inability to control the person's sexual impulses. Minn. Stat. § 253B subd. 18c(b). If Minnesota law can be so read, surely Missouri's could, if it were constitutionally required.

2. The instruction submitted to the jury conformed to the statute

Francis also argues that the jury was improperly instructed. But his argument is merely a reiteration of those addressed above. He does not suggest that Instruction 6 failed in any way to conform to the statute. Instead, he argues that the jury was required to find that he is unable to control his actions, as was required by *Hendricks*. Appellant's Brief, p. 23.

If complete volitional impairment were a constitutional or statutory requirement, then Francis would be right; the jury instruction should reflect it. But as discussed above, there is no such constitutional requirement.

If inadequate ability to control behavior were a constitutional requirement, the instruction was sufficient, because it, as the statute required, required the jury to find that Francis was more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, and that he is likely to commit such acts as a result of his mental abnormality. LF 113.

3. The record supports the jury's finding that Francis could not adequately control his behavior, i.e., that he was likely to commit further sexual violent acts unless placed in custodial treatment in a secure facility

Even if this Court were to apply either the *Linehan* or *Crane* standards, the evidence would still be sufficient to sustain the verdict.

In *Linehan*, the court found that there was sufficient evidence in the record to support the conclusion that Linehan lacks adequate control over his harmful sexual impulses. *Id.* at 878. This fact was not shown

by testimony on **A**volitional impairment; rather, it was shown by Linehan's behavior. *See id.* 876-78. That behavior established Linehan's **A**impulsivity and **A**lack of control.

There is similar evidence in this case. In 1975, when Francis admitted molesting 8-year old Andrea Morris to a police officer, he said he didn't know why he did it -- he said, "I was just driving along and the thought came to me, so I just stopped and I did it." Tr. 180. In 1981, when Francis admitted molesting 11-year old Juanita Lashley, his remarks displayed the same impulsivity or lack of control. He said he "just pulled her pants down and did it"; he "just screwed her." Tr. 193-194. When he molested 3-year old John Smith in 1988, he admitted that the incident occurred in the approximately 10 minutes that the child was left alone with him. Tr. 205. The more recent incidents occurred in the relatively short periods between confinements. Tr. 230. Moreover, Francis has never completed a treatment program for pedophilia, Tr. 231, and there was unrebutted expert testimony that pedophilia does not spontaneously remit, Tr. 233-234. The evidence demonstrated that Francis lacks ability to refrain from raping children.

Thus, even under the *Linehan* standard, the result here should be the same as in that case: a **A**holding that the [SVP] Act is constitutional and appellant's civil commitment under the [SVP] Act is appropriate. *Linehan III*, 594 N.W. 2d at 878.

Even if this Court were to apply the *Crane* standard, the evidence **B** that Francis cannot control his pedophilia when he has access to children and has never completed a treatment program, and that pedophilia does not spontaneously remit **B** is sufficient to show that Francis cannot control his behavior. If this evidence were insufficient, the remedy would be reversal, but only for a new trial, not with orders to dismiss. But again, neither the statute nor any Supreme Court precedent restricts involuntary custodial treatment to those with complete volitional impairment. Therefore, Francis's first point must fail.

II.

The trial court did not err when it denied Francis' motion to dismiss the petition, because the Sexually Violent Predator Law does not violate the equal protection clauses of the constitutions of Missouri and of the United States, in that he failed to identify any similarly situated person who would be subjected to different treatment and the legislature may constitutionally distinguish between sexually violent predators and all others who have mental abnormalities that may or may not render them dangerous.

For his second point on appeal, Francis claims that the trial court erred in denying his motion to dismiss, in which he argued that ' 632.480, *et seq.*, violate equal protection. Francis argues that other mentally ill people are given treatment in the least restrictive environment, but those whose mental abnormalities make it more likely than not that they will commit sexually violent offenses must be placed in a secure facility, and that there is no rational basis for this distinction. Appellant's Brief, p. 39. Francis is incorrect.

Equal protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances. *Ex Parte Wilson*, 48 S.W. 2d 919, 921 (Mo. 1904), quoting *Brill's Cyclopedia of Criminal Law*, vol. 1, ' 42. Thus, an equal protection claim can only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he. *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904), see *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 343 (1989). Equal protection analysis must begin by determining what class of persons is covered by the statute being challenged, and then must compare the law's treatment of that person to its treatment of the challenger.

The class of persons covered by the statute is straightforward: The law covers only those persons who have committed criminal sexual acts and who are then found beyond a reasonable doubt to have a mental abnormality which makes them **A**likely . . . to engage in predatory acts of sexual violence *if not confined in a secure facility.*^{632.480(5)} (emphasis added). Francis disregards this clear statutory language in his argument. Instead, he argues his case as if the statute covered all those who have committed criminal sexual acts and are now likely to engage in predatory acts of sexual violence -- *unless treated in an outpatient setting*. But the statute cannot possibly be read that way. Francis has been subjected to involuntary *custodial* treatment by the Department of Mental Health not merely because the jury found that he was **A**dangerous^{632.480(5)} or needed treatment, but because it found that he would be dangerous to others, not just to himself, unless subjected to treatment in a secure facility.

At its second step, equal protection analysis requires that Francis identify someone who is similarly situated, and show that the law treats that person differently in some constitutionally significant sense. There he fails, for he never identifies anyone **B** by name, class, or hypothetical circumstance **B** who is similarly situated but treated differently. Again, his argument is that the state permits some persons civilly committed to be placed in community treatment, even if they are **A**dangerous.^{632.355} Appellant's Brief, p. 41. For that proposition he cites ^{632.355}, which provides for treatment in the least restrictive environment. However, neither that section nor any other Missouri statute says that someone who would be dangerous outside a custodial setting may still be placed outside a custodial setting. Certainly neither that nor any other Missouri statute suggests that someone who is **A**likely . . . to engage in predatory acts of sexual violence if not confined in a secure facility^{632.480(5)} could nonetheless be placed in community treatment. Thus, because ^{632.480(5)} requires the jury to find that a person will more likely than not engage in predatory acts of sexual violence if not confined in a secure facility, it is silly for Francis to compare himself to a dissimilar group, those who have

not yet been found to be dangerous (and yet would be confined if such a finding were made), and then complain that his disparate treatment violates equal protection. Thus, Francis' point must fail.

Moreover, the U.S. Supreme Court has long recognized that states have the ability, under the Constitution, in the course of drafting statutes dealing with civil commitments, to treat persons who pose threats of sexual violence due to mental conditions differently from others who are otherwise dangerous. For example, in *State ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 272 (1940), the Court upheld Minnesota's "Psychopathic personality" law, which applies only to those persons who are "irresponsible for [their] conduct with respect to sexual matters." Minn. Stat. § 253B.02, subd. 18b, cited at 309 U.S. at 272. The Court rejected Pearson's equal protection claim, finding "no reason for doubt" that the legislature's decision to single out those threatening sexual violence was constitutionally permissible. *Pearson*, 309 U.S. at 274-75. The Court said the issue was not whether the statute cuts a small group out of a larger one, but whether the statute could make a class out of the group as it did. *Id.* The Court found that the terms of the statute showed that the class was selected in terms of its danger to the community, and that the legislature was free to

confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overturned because there are other instances to which it might have been applied."

Id., quoting *Miller v. Wilson*, 236 U.S. 373, 384 (1915).

Applying that test, equal protection challenges to a variety of sexual offender and predator laws have been defeated. *E.g.*, *Peterson v. Gaughan*, 404 F.2d 1375, 1377-78 (1st Cir. 1968); *Martin v. Reinstein*, 987 P.2d 779, 795-99 (Ariz. App. 1999); *Trueblood v. Tinsley*, 366 P.2d 655, 659 (Colo. 1961); *Vanderhoof v. People*, 380 P.2d 903, 904 (Colo. 1963); *State v. Evans*, 245 P.2d 788, 790-91 (Idaho 1952); *State v. Little*,

261 N.W.2d 847, 850-51 (Neb. 1978). That the legislature could have gone further and required custodial treatment of persons who threaten the public safety in ways other than through sexual violence does not establish an equal protection violation.

Here, as in *Pearson* and its progeny, the legislature has chosen to hit[] the evil where it is most felt. *Pearson*, 309 U.S. at 274-75. Although the absence of legislative history makes it impossible to cite to the precise reasons for the lines drawn here, it does not prevent this court from finding a rational basis for the legislature's decision. In Missouri, as in Michigan, [i]t is reasonable to presume that the legislature concluded that the need for such restraint as the statute imposes was greatest among that group of criminal psychopathic persons apparently predisposed to transgressions against society; that is, those persons charged with other violations of the criminal law. *State v. Chapman*, 4 N.W. 2d 18, 24-25 (Mich. 1942). Thus, under the rule in *Pearson*, [t]he legislature, in the exercise of its State police power and in its efforts to afford protection, could limit the scope of a legislative act to the eradication of evil where presumably the need is greatest, even though it might constitutionally have extended the operation of its enactment to a larger class. *Id.*

Rather than dealing with the similarly situated problem and with the rule in *Pearson*, which are fatal to his argument, Francis stresses *In re Young*, 857 P.2d 989, 1011 (Wash. 1993). *E.g.*, Appellant's Brief, pp. 41-43. There, the Washington Supreme Court cited another U.S. Supreme Court decision, one in which the test for evaluating different methods of committing or treating the mentally ill was articulated as whether the distinction being made has some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966). Unlike *Pearson* and its progeny, the Court in *Baxstrom* did not deal with the statutory scheme in its entirety. Rather, it took that law apart, comparing little pieces of the specific law at issue to comparable pieces of the law regarding civil commitments generally. Thus, it held that *Baxstrom* was deprived of equal protection because he could not invoke the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to

all other persons civilly committed in New York,⁶ and because he was committed **A**without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence.⁷ *Id.* at 110. In other words, he was deprived of two procedural protections that were given to other persons subject to commitment. In sum, the Court felt that, though the distinction between sexual offenders and others may meet constitutional requirements for equal protection purposes generally, the distinctions did not justify depriving Baxstrom of these two specific procedural rights.

Obviously neither of those specific rights is at issue here, and *Baxstrom* does not state a general rule that precludes the kind of distinctions Missouri law makes. *See State v. Kee*, 510 S.W.2d 477, 480-82 (Mo. 1974) (*Baxstrom* did not prohibit treating mentally ill criminals differently from mentally ill persons who had not committed a criminal offense). Missouri's law gives Francis the right to a jury trial at which both mental abnormality and dangerousness must be proven by the state. In fact, it gives him greater protection than it gives to civil committees generally: the state must make its case **A**beyond reasonable doubt,⁸ and the jury verdict must be **A**unanimous.⁹ 632.495. Francis does not challenge these or the other ways in which Missouri's sexually violent predator law gives him *more* protection than is allocated to civil committees generally. If there were someone who could challenge such procedures in the sexually violent predator law on equal protection grounds, it would be the person who is similarly situated (*i.e.*, equally dangerous absent custodial treatment) but not given the same protections.

Unable to rely on procedural differences in *Baxstrom*, Francis focuses **B** as did the Washington court in *In re Young* **B** on a substantive application of the law: the issue of treatment location. *See* Appellant's Brief, p. 44 (arguing that Missouri statute violates equal protection by not providing for consideration of less restrictive alternations than "total physical confinement"). But even there, he ignores the teaching of *Baxstrom*, for he does not consider **A**the purpose for which the classification is made.¹⁰ The **A**purpose for

which the classification of sexually violent predators was made is obvious: to protect the public, not only by ensuring the most effective treatment of sexually violent predators, but by preventing them from gaining access to new victims while their treatment is under way. The risks of premature access to the public are dramatically demonstrated by the facts of *Linehan*. See 557 N.W. 2d at 175.

Also, at Francis's trial, Dr. Baker testified that Francis has not been able to refrain from reoffending even in the short periods of time between episodes of confinement. Tr. 230. That factor, among others, led her to conclude that it is more likely than not that he will engage in predatory acts of sexual violence if he is not confined to a secure facility. *Id.* The nature of sexual offenses, the vulnerability of victims, and the nature of sex offender treatment itself makes the need for custodial treatment greater than it is for civil committees generally.

But again, this Court need never reach that point in the analysis. Francis has yet to identify a method under which Missouri law would permit the use of community treatment for a person who is likely to engage in other equivalent kinds of violence if not confined in a secure facility. Unless and until he does so, he has no equal protection argument to make.

III.

The trial court did not abuse its discretion or plainly err when it admitted Petitioner's Exhibits 7 and 8 into evidence, because the records contain statements that fall within a hearsay objection and were not prejudicial, in that the statements were reasonably related to medical diagnosis and treatment, were cumulative, and Francis' trial counsel did not properly object.

The failure of Francis' trial counsel to properly preserve the issues that Francis raises in Point III, in combination with the standard of review regarding the claims of error in the admission of exhibits, should lead this court to reject Francis' arguments.

As Francis recognizes in his brief, pp. 47-48, the question of admissibility of evidence is left to the discretion of the trial court and on review, the question is not whether the evidence was admissible, it is whether the trial court abused that discretion. *Willman v. Wall*, 13 S.W.3d 694, 697 (Mo.App. W.D. 2000). Establishing abuse of discretion involves a very high bar: abuse of discretion occurs only when the evidentiary 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, 418 (Mo.App. S.D. 2000).

Moreover, a party cannot be prejudiced by the admission of allegedly inadmissible evidence if the challenged evidence is merely cumulative to other evidence admitted without objection. *Gage v. Morse*, 933 S.W.2d 410, 419 (Mo. App. 1996), quoting *Tryon v. McElyea*, 912 S.W.2d 73, 78 (Mo. App. 1995). See also *State v. Zamora*, 809 S.W.2d 83, 85 (Mo. App. W.D. 1991)(admission of cumulative evidence not error). In assessing whether there was prejudice, the appellate court must not focus narrowly on the error that is complained of, but must view the full range of the record and the evidence presented. *Id.* at 421.

Further, a party who complains of the admission of certain evidence on appeal is held to the specific objections presented to, and ruled on by, the trial court. No new grounds may be considered on appeal. *Missouri Public Svc. Comm'n v. Juergens*, 722 S.W.2d 105, 106 (Mo. 1988); *Robinson v. Empiregas*, 906

S.W.2d 829, 836 (Mo. App. 1995). Further, where an error is not preserved, the inquiry on review is not prejudice but manifest injustice. *Coats v. Hickman*, 11 S.W.3d 798, 805 (Mo.App. 1999).

Exhibit 7 was the medical record regarding 3-year old John Smith. Trial counsel made a hearsay objection to the first portion, reflecting what John's mother told the health care provider ("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. 210-211. But as for John's statement to the doctor ("Pete put his wee-wee in me."), trial counsel said, "[T]hat would be all right." Tr. 211. She also generally objected that the record was irrelevant in that it did not "go to an element of the offense." Tr. 211. That exchange occurred in chambers. Trial counsel renewed those objections to the exhibit in open court, before the State's trial counsel read the exhibit to the jury; she made no other objection. Tr. 215-216.

Therefore, counsel did not preserve one of the claims that Francis makes on appeal with respect to Exhibit 7 **B** that the portion of John's statement to the health care provider in which he identified **A**Pete@could not fall within the hearsay exception for statements made to obtain medical treatment. *Juergens*, 722 S.W.2d at 106; *Robinson*, 906 S.W.2d at 836. See Appellant's Brief, p. 49.

Nor does the unpreserved claim merit reversal under plain error review, as Francis urges in the alternative. Appellant's Brief, p. 47. Such relief is given only where the claim **A**facially establishes@that a **A**manifest injustice or miscarriage of justice@has occurred. *Coats*, 11 S.W.3d at 805. In view of the totality of the evidence against Francis in this case **B** including his own admissions, and in view of the discretion that the trial judge had in admitting this particular, relatively minor piece of evidence, Francis's argument about John's identification of "Pete" does not establish manifest injustice, or miscarriage of justice, in its admission.

Nor does the admission of the other sentence in Exhibit 7, reflecting what John's mother said at the doctor's office, compel reversal. Counsel did object that it was hearsay. Tr. 211. But generally, so long as a victim's statements in the medical record relate to diagnosis and treatment, and are essential to the

examination, they are not hearsay. *State v. Zamora*, 809 S.W.2d 83, 85 (Mo.App. W.D. 1991) (and citations therein). It seems obvious that the mother's statement **B** explaining to the health care provider what, specifically, had happened to her 3-year old **B** was necessary to obtain medical treatment for him; a 3-year old cannot reasonably be expected to articulate salient details (male adult, had anal sex with him, particular day, particular time) for purposes of obtaining his own medical treatment. Moreover, John's mother did not volunteer the name **A**Pete,**A**James Francis,**A**or any other name. Therefore, even if that portion of the record did not fall within a recognized hearsay exception, it was not an abuse of discretion that went clearly against the logic of the circumstances and was so unreasonable as to shock the conscience. *Robertson*, 15 S.W.3d at 418.

Finally, Francis' argument that Exhibit 7 was irrelevant similarly fails. The State had the burden of proving, beyond a reasonable doubt, that Francis was more likely than not to reoffend unless confined to a secure facility. The logic of the circumstances demonstrate that the evidence was relevant to that inquiry; the evidentiary ruling does not shock the conscience. *Robertson, supra*. The trial court did not abuse its discretion in admitting Exhibit 7 in its entirety.

With respect to Exhibit 8, the medical record regarding Curtis Self, Francis did not object to it as hearsay at trial, only that it was irrelevant. *See* Tr. 213, 215. Therefore, the hearsay argument that Francis makes on appeal is not preserved. *Juergens*, 722 S.W.2d at 106; *Robinson*, 906 S.W.2d at 836. *See also Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 863 (Mo. banc 1993)(discussing proposition that objections on grounds of relevance and improper identification do not preserve claim of hearsay for appellate review). Further, Exhibit 6, a certified copy of Francis' conviction for the sodomy of Curtis, had already been entered into evidence -- without objection. Tr. 202. Logically, the admission of Exhibit 8, also tending to establish that Francis sodomized the boy, cannot have been prejudicial. Exhibit 8 was also relevant. That Francis had sodomized Curtis went to the State's burden of proving, beyond a reasonable doubt, that Francis

suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility. ' 632.480(5) and ' 632.495. At worst, the evidence was cumulative, but the fact that the evidence might have been cumulative is not error. *Zamora*, 809 S.W.2d at 85, citing *State v. Morris*, 639 S.W.2d 589, 592 (Mo. banc 1982). And there is no plain error in the admission of evidence that is merely cumulative to evidence that was previously admitted without objection. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 446 (Mo. banc 1998); *Gage*, 933 S.W.2d at 419.

Finally, Francis complains that the admission of the documents violates his right, under the Sixth Amendment, to confront his accusers. Appellant's Brief, p. 50. The instant proceedings were initiated pursuant to a confinement procedure that is civil in nature.¹⁰ The right of confrontation does not attach in civil

¹⁰ Francis does not spend time explicitly arguing in his brief that Missouri's sexually violent predator law is a criminal law. But for purposes of clarity on this issue, the State notes that Missouri's law is modelled closely after Kansas' sexually violent predator law, which the United States Supreme Court held was civil in nature in *Kansas v. Hendricks*, 521 U.S. 346, 361 (1996). See also *Seling v. Young*, 531 U.S. 250, 262-263 (2001)(establishing that a sexually violent predator law, found to be civil in nature, cannot be deemed punitive "as applied" to a single individual).

proceedings. *Krieg v. Director of Revenue*, 39 S.W.3d 574, 576 (Mo. App. E.D. 2001)(and cases cited therein).

Francis=Point III fails. The evidence was admissible pursuant to hearsay exceptions and was not prejudicial in that it was cumulative, in the totality of the case.

IV.

The trial court did not err when it permitted the State to put on evidence of sexual contact that Francis had with children, that had not resulted in convictions, because the evidence was directly relevant to the State proving, beyond a reasonable doubt, that Francis is a sexually violent predator, in that the State had to prove that Francis suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility.

Francis complains that the testimony of four witnesses -- Anita (Morris) Potts, Rita (Morris) Williams, Sheila (Morris) Law, and Officer Clark -- should not have been permitted because the incidents about which they testified "[did not] result[] in charges or convictions," and happened in the relatively distant past. Appellant's Brief, pp. 51-52.

It is important to note at the outset that in Point IV, Francis does not launch a wholesale constitutional attack on the elements that the jury was required by the law to find, beyond a reasonable doubt, *i.e.*, whether the Francis suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. ' 632.480(5) and ' 632.495.¹¹ Instead, Francis' attack

¹¹ As discussed at length in the Respondent's Point I, *supra*, the constitutional test for involuntary commitment has long consisted of two elements: dangerousness and a serious mental problem. *See, e.g., In re Gordon*, 10 P.3d 500, 502-03 (Wash. App. 2000), *citing Kansas v. Hendricks*, 521 U.S. 346 (1997). *See also State v. Revels*, 13 S.W.3d 293, 296 (Mo. banc 2000)(same standard under a Missouri civil commitment statute). Neither the United States Supreme Court nor the Missouri Supreme Court has ever held that the only evidence that a state may adduce to prove these elements is evidence of conduct that has resulted in criminal charges and convictions.

here is limited to the claim that the trial court abused its discretion in permitting the evidence to be introduced. Appellant's Brief, p. 52. As discussed in some depth in Respondent's Point III, *supra*, abuse of discretion in the admission of evidence occurs only when an evidentiary ruling is both clearly against the logic of the circumstances and so unreasonable as to shock the conscience. *Robertson v. Robertson*, 15 S.W.3d 407, 418 (Mo.App. S.D. 2000). The trial court did not abuse its discretion in the least with respect to the testimony of these four witnesses.

Francis begins the argument by turning to a criminal evidentiary standard; that is, Francis argues that "[e]vidence of other crimes or uncharged misconduct that is not properly related to the cause on trial . . . is inadmissible for the purpose of showing propensity of the defendant to commit such crimes." Appellant's Brief, p. 52 (*quoting State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993)). The criminal evidentiary standard is irrelevant, inasmuch as the proceeding was civil in nature. *See* fn. 10, *supra*. But even the criminal standard, as articulated by Francis, would permit evidence of other crimes or uncharged misconduct that *is* related to the cause on trial.

Obviously, where it is the State's burden to prove, beyond a reasonable doubt, that Francis is suffering from a mental abnormality that makes it more likely than not that he will commit sexually violent acts unless confined to a secure facility, it is relevant to put on evidence that he is likely to commit such acts when not confined. That is precisely the testimony that Anita, Rita, Sheila, and Officer Clark provided at trial.

Anita, Rita, and Sheila testified that they were Francis' victims for six years, beginning when they were very young children. They provided specific examples -- based on direct, personal knowledge -- of his rapes and sodomies over the years. They provided specific examples -- based on direct, personal knowledge -- of his use of violence, including the use of a weapon, brute strength, anger, and the element of surprise, to accomplish those acts. Anita testified that he once tried to accomplish her rape by holding a knife to her throat and threatening to kill her if she did not comply. They also testified that he got his way by covering Rita's

mouth with his hand while he raped her; using his arm to hold Anita to him while he raped her; hiding in the shower to wait until they came to use the bathroom, and then raping them over the toilet seat; getting angry with them and yelling at them to make them do what he wanted; yelling at their mother and convincing her that they were lying; and taking them off in his car, alone, though they resisted going.

Francis' argument that the testimony of Anita, Rita, and Sheila should have been excluded because it concerned "incidents for which there was no other proof of the alleged occurrences," Appellant's Brief, p. 52, is bizarre. Their straightforward testimony, set forth in detail in the Statement of Facts, plainly established that they were testifying based on their own experiences and observations. Francis cites no relevant evidentiary standard that requires such straightforward testimony, based on personal knowledge, to be buttressed by a second source of proof before it can be admitted. Even Francis recognizes, albeit belatedly, that evidence to establish a mental abnormality or a likelihood of reoffense is not of the type that lends itself to direct proof; rather, "the state must cobble together facts from which a jury may conclude that Francis is" a sexually violent predator, something that "is all done by inference." Appellant's Brief, p. 53.

Nor does Francis cite any authority standing for the blanket evidentiary proposition that testimony about events that happened in the relatively distant past must be inadmissible. Francis' argument that the incidents were too remote in time to be relevant is really an argument that goes to weight of the evidence, and could have been more effectively dealt with on cross-examination,¹² or through Francis' case in chief, had he presented one, *see* Tr. 256. Francis' trial counsel in fact did spend some time in closing argument, if briefly, saying that the incidents happened a long time ago. Tr. 278-279, 281. That Francis' trial strategy, whatever it was, failed does not compel this court to set forth a new rule of evidence.

¹² Francis did not cross-examine Anita, Rita, and Sheila. Tr. 151, 159, 163.

In fact, even in the context of criminal proceedings, where constitutional rights are at their zenith, Missouri courts have repeatedly recognized that prosecutors should not be unduly limited in the amount of proof that they put on, because prosecutors have the burden of proving a case beyond a reasonable doubt. *State v. Smith*, 32 S.W.3d 532, 546 (Mo. banc 2000); *State v. Wallace*, 504 S.W.2d 67, 71 (Mo. 1973); *State v. Branscomb*, 638 S.W.2d 306, 307 (Mo.App. E.D. 1982). Similarly, in the instant civil context, there is no constitutional or logical reason for the trial court to have excluded the testimony of which Francis complains, because the State bore the same burden of proof by statute.¹³

Francis also argues that a statement made by a child under 12 years old is not admissible unless the trial court finds various that criteria under ' 491.075, RSMo, have been satisfied. Appellant's Brief, p. 54. First, this statute cannot apply because none of the four witnesses testified to hearsay. The statutes establishes a procedure for the admission of hearsay. Second, even if the testimony involved hearsay, the statute is not, by its plain language, applicable to proceedings such as those brought under Chapter 632. Section 491.075.1 indicates that

a statement made by a child under the age of twelve relating to an offense under chapter 565, 566 or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in

¹³ In fact, had the evidence been as circumscribed as Francis would have had it, and still resulted in the same jury verdict, it is easy to conceive that Francis would argue on appeal that the State had failed to make a submissible case.

evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if: . . . [criteria omitted]

The instant proceeding under Chapter 632 was not a criminal proceeding, let alone a criminal proceeding relating to an offense under Chapter 565, 566 or 568. Francis does not cite any authority for the proposition that ' 491.075 applies outside of that limited criminal context.

Finally, this use of evidence to prove the State's elements is not unique to Missouri. Courts in other states that have laws similar to Missouri's sexually violent predator law have rejected arguments similar to Francis'. For example, in *In re Hay*, 953 P.2d 666 (Kan. 1998), the Kansas Supreme Court, applying an abuse of discretion standard to the admission of evidence of uncharged conduct, noted that the "critical issues in a sexual predator case make the evidence of prior conduct, charged or uncharged, material evidence in the case." *Id.* at 678. The court rejected Hay's argument that such evidence was irrelevant and used solely to inflame the jury. *Id.* at 677-678.

Hay preceded the Kansas' Supreme Court's decision in *Crane*, upon which Francis so heavily relies in his Point I. But even in *Crane*, where that court unnecessarily engrafted the requirement of lack of volition as an element of the state's case, the court reaffirmed its holding in *Hay*. In *Crane*, the court again rejected a sexually violent predator's challenge to the admission of uncharged conduct. 7 P.3d 285, 293. *See also In re Lair*, 11 P.3d 517, 520 (Kan. Ct. App. 2000)(following *Hay* and *Crane*, and approving use of uncharged crimes).

The Illinois Court of Appeals reached a similar conclusion in *In re Bailey*, 740 N.E.2d 1146, 1158 (Ill. App. 2000), where it held that the "admission of sexual propensity evidence is proper" in a sexually violent predator proceeding under 725 Ill. Comp. State. 205/1.01, *et seq.* (1998).

And while not directly confronted with the question, as formulated by Francis, of the admissibility of uncharged conduct, the United State Supreme Court in *Hendricks* implicitly recognized that such evidence

is proper in sexually violent predator proceedings. In discussing the elements of the case that the state must prove to establish the likelihood of future, sexually violent conduct, the Court noted that "previous instances of violent behavior are an important indicator of future violent tendencies." *Id.* at 357-358, quoting *Heller v. Doe*, 509 U.S. 312, 323 (1993). And in holding that the Kansas law passed constitutional muster, the Court recognized that the Kansas law did not make a past criminal conviction a statutory prerequisite for commitment. 521 U.S. at 362.

The trial court did not abuse its discretion in permitting the four witnesses to testify to certain instances of Francis' prior conduct, though the instances had not resulted in criminal charges or convictions. Therefore, Francis' Point IV fails.

Conclusion

The order of commitment should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 7th day of January, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 15,760 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Deputy State Solicitor