

IN THE SUPREME COURT OF MISSOURI

Case No. SC89408

**IN THE MATTER OF THE CARE AND TREATMENT OF
RICHARD WHEELER**

Appellant,

v.

STATE OF MISSOURI

Respondent.

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Kristie J. Swaim, Judge**

Respondent State of Missouri's Brief

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Jurisdictional Statement

The appellant, Richard Wheeler, initially appealed to the Missouri Court of Appeals, Western District, case no. WD68756. On his motion, filed during briefing, the Western District transferred the appeal to this Court, in light of Mr. Wheeler's challenge to the constitutionality of MO. REV. STAT. § 632.495.1 (Supp. 2007).

Statement of Facts

I. Procedural history

Richard Wheeler pleaded guilty to his index offense, within the meaning of Missouri's sexually violent predator law,¹ in April 1997, specifically, statutory sodomy in the first degree. Tr. 120, 137-139; LF 12. He was sentenced to 10 years in prison, with a maximum release date of August 26, 2006. *Id.*

In June 2006, the agency with jurisdiction, the Missouri Department of Corrections, prepared Mr. Wheeler's end-of-confinement evaluation. LF 15-17. The Department provided notice to the Attorney General and the Multidisciplinary Team, advising that Mr. Wheeler may meet the criteria for commitment as a sexually violent predator. LF 11, 19-20. The Multidisciplinary Team found on August 3, 2006, that Mr. Wheeler appeared to meet the definition of a sexually violent predator. LF 20. On August 7, 2006, the Prosecutor's Review Committee similarly concluded that Mr. Wheeler met them. LF 21-22.

The State filed its petition for Mr. Wheeler's commitment on August 11, 2006. LF 11.

In preparing the end-of-confinement report, also referred to as a sexually violent predator evaluation, Dr. Kimberly Weitzl testified that she reviewed Mr. Wheeler's records

¹ The statutory definition of a sexually violent predator includes the requirement that the person has pleaded guilty to, or been found guilty of, a "sexually violent offense." MO. REV. STAT. § 632.480(5)(a) (Supp. 2007). Sexually violent offenses, for purposes of the SVP law, include sodomy in the first degree. Section 632.480(4) (Supp. 2007).

from the Missouri Department of Corrections, including mental health and medical records; his sex offender treatment program file; probation and parole records; and police records. Tr. 37, 57-58. The police reports were generated by the Kirksville Police Department, and concerned his repeated sexual assault of an 11-year-old boy in the boy's trailer. Tr. 41, 58-59. All of the information Dr. Weitzl reviewed is reasonably relied upon in her profession to arrive at conclusions and provide opinions in this type of case. Tr. 37.

In response to a question by Mr. Wheeler's counsel, Dr. Weitzl affirmed that she received the police reports from the Attorney General's Office. Tr. 59. She explained that the Attorney General's Office usually sends records upon her request, and in fact could not recall any instance in which the Office sent her anything without being requested to do so. Tr. 61-62. Her procedure is that if she is reviewing a file and believes the person may meet the sexually violent predator criteria, she asks her secretary to contact the Office and ask for whatever they have or can obtain for her, although in some instances she may ask for particular types of records. Tr. 61-62. She testified that the Office's "secretary ... gets them to us as fast as she can [.]" Tr. 62. She could not recall how many records she received from the Office in this case, though she did recall that some records came before she completed the end of confinement report, and some after. *Id.* She did not testify to having had any conversations with the Office's personnel herself, or to having received any other information from the Office.

The probate court held a hearing and found probable cause. Tr. 83-85.

The probate court subsequently conducted a bench trial in August 2007. Tr. 87. The State's evidence at trial included the expert testimony of Dr. Ericia Kempker, a psychologist and certified forensic examiner. Tr. 113-114. Mr. Wheeler put on no evidence. Tr. 223.

The probate court issued its judgment and commitment order on August 17, 2007, finding by clear and convincing evidence that Mr. Wheeler is a sexually violent predator. LF 168-169.

II. The evidence

A. Mr. Wheeler's history

As addressed in more detail below, Mr. Wheeler's known history of sexually violent offenses includes offenses against children, ranging in ages from 4-11 years old, both girls and boys, including his own children and other family members, as well as non-family members, and offenses against adult women. He has primarily been diagnosed with pedophilia, sexually attracted to both, non-exclusive type.

Mr. Wheeler was born in 1947. Tr. 127.

When he was 8 years old, he tried to shoot his mother with a BB-gun, and accidentally shot his brother, who had to be hospitalized for removal of 14 pellets from his intestines. Tr. 127-128.

As an adolescent, Mr. Wheeler had a history of threatening family members with guns, knives, and whips, and was reported to keep himself armed with a hunting knife. Tr. 127.

When he was about 20, he was arrested for sodomizing a 9-year-old male cousin. Tr. 128. In connection with that arrest, he was admitted to Fulton State Hospital for a pretrial evaluation regarding his competency to stand trial. *Id.*

In 1971, he was charged with molesting a 4-year-old girl, and readmitted to Fulton State Hospital for a competency evaluation. Tr. 129. The girl was a neighbor, whom he enticed into his house with the promise of candy. *Id.* He was found competent to stand trial. *Id.* At the time, the victim's mother also reported having witnessed Mr. Wheeler assaulting his 11-year-old sister. *Id.*

Subsequently, he was readmitted to Fulton State Hospital for another pretrial evaluation, in connection with a charge of a peace disturbance or flourishing a deadly weapon. Tr. 130-131. The incident occurred in a hospital when Mr. Wheeler's wife was having a baby, and was directed at a nurse. Tr. 131. He was convicted of peace disturbance and received five years' probation. *Id.*

Less than a year later, in January 1976, while still on probation, he self-reported to the Missouri Board of Probation and Parole that he was also on probation from the City of Kansas City for holding a girl against her will, and that he had received one year of unsupervised probation for that incident. Tr. 131-132.

In 1978, he was accused of sexually abusing a 4-year-old boy whom his wife was babysitting. Tr. 132.

A few years later, in 1981, he was convicted of a Class D Felony, sexual abuse of an adult female, sentenced to two years in the Missouri Department of Corrections with five

years' probation, and received a suspended execution of sentence. Tr. 132. During that 5-year probationary period, he and his wife divorced. *Id.* In the context of the divorce proceeding, his wife testified that one of the reasons for the dissolution of the marriage was Mr. Wheeler's sexual abuse of his son. Tr. 132-133.

In 1987, he was charged with breaking and entering. In that incident, he tried to force himself on a woman asleep in a bedroom. Tr. 133-134. He offered her food stamps in exchange for sex and when she refused, threatened her with physical violence, pulled her pants down, and fondled her genitals. Tr. 134. He subsequently pled guilty to a charge of sexual abuse. *Id.*

Mr. Wheeler was arrested in September 1994 in connection with numerous incidents concerning an 11-year-old boy, J.B., that occurred between November 1993 through May 1994. Tr. 135. Mr. Wheeler was living in a trailer park, and would go to J.B.'s trailer when the boy was alone, entering unannounced and telling the boy to hang up the phone if he was talking to his friends. *Id.* In one instance, Mr. Wheeler rubbed the boy's genitals and buttocks through the boy's clothing. Tr. 135-136. The boy locked himself in his room, Mr. Wheeler pounded on the door and tried to get in, and the boy climbed out of the window to get away. Tr. 136. Mr. Wheeler told the police that that incident was "an impulse thing," and that he was unable to keep himself from behaving that way. Tr. 136. Mr. Wheeler was convicted of first degree sexual misconduct in 1996. Tr. 137. He was sentenced to 30 days in the county jail, with suspended execution of sentence and received two years' unsupervised probation. *Id.*

Later that same year, in July, Mr. Wheeler sodomized a 4-year-old boy. *Id.* He invited the boy into his house, pulled off the boy's pants and diaper, put a condom on himself, and made contact with his penis and the child's bottom. Tr. 139. Mr. Wheeler was convicted and sent to the Department of Corrections for 10 years. Tr. 139.

During his incarceration in the Missouri Department of Corrections, he was offered sex offender treatment three times and refused it each time. Tr. 166.

And he continued to engage in sexually offending behaviors while incarcerated. For example, he offered inmates money in exchange for sex. Tr. 139. He offered to exchange oral and anal sex with an inmate. *Id.* He bragged to an inmate about raping young girls and told the inmate that when he was released from the Department of Corrections, he would get a station wagon to pick up girls, that he already knew where there was a young girl, and that all he had to do was get out to get her. Tr. 140. Another inmate reported that Mr. Wheeler continually approached him asking for sex. Tr. 141. When a female Corrections Officer instructed him to leave the shower, Mr. Wheeler masturbated in her presence. Tr. 142. He invited an inmate into his cell for a cup of coffee and when the inmate turned around, Mr. Wheeler placed his hands down the other inmate's pants and rubbed the inmate's buttocks. Tr. 143.

More recently, while being held at the Missouri Sex Offender Treatment Center, he has loudly discussed "rough" sex and sexual practices; asked for ages of the female staff; told a female staff member that he could tie her up with his shirt; constantly stares at female staff; told a female staff member that she could sit on his lap; and received numerous disciplinary

sanctions, including sanctions for threats of bodily harm, creating a disturbance, assault, boundary violation, and failure to follow rules. Tr. 174-178.

B. The expert testimony

Dr. Ericia Kempker, the State's expert, is a psychologist and certified forensic examiner with extensive experience in making forensic evaluations. Tr. 114-116. She performed a sexually violent predator evaluation of Mr. Wheeler, which is a form of forensic evaluation. Tr. 116. Dr. Kempker testified to a reasonable degree of psychological certainty that Mr. Wheeler meets the definition of a sexually violent predator under Missouri law. Tr. 179.

In evaluating Mr. Wheeler, the doctor applied the following definition of a sexually violent predator:

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 and who ... has pled guilty or been found guilty or has been found not guilty by a reason of mental disease or defect pursuant to Section 552.030 of the Revised Statutes of the State of Missouri, of a sexually violent offense.

Tr. 120.

She defined "predatory acts" as:

Acts directed toward individuals, including family members for the primary purpose of victimization.

Tr. 143.

And she defined “mental abnormality” as:

A congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior.

Tr. 125.

In performing Mr. Wheeler’s evaluation, the doctor explained that her process was to review a variety of documentation, which in this case involved boxes of paper, including history of hospitalizations from several facilities; a variety of police reports including records from the Kirksville Police Department; Department of Corrections records including probation and parole records; pretrial evaluations that ranged from 1971 to 1997; and Missouri Sex Offender Treatment Center records. Tr. 121-122. Dr. Kempker noted that Mr. Wheeler was sent for various reasons to Fulton State Hospital or Department of Mental Health facilities on five occasions. Tr. 122. This type of documentation is reasonably relied upon in her profession to arrive at conclusions and form opinions in this type of case. *Id.* She also reviewed circuit court records and Division of Family Services records. Tr. 122-123. She did not have an opportunity to interview Mr. Wheeler, but concluded that she was able to perform a full evaluation based on record review. Tr. 123.

The doctor testified, to a reasonable degree of psychological certainty, that Mr. Wheeler has a mental abnormality as defined under Missouri law. Tr. 125, 156. Based on the information she reviewed about Mr. Wheeler, Tr. 127-150, and referring to the Diagnostic and Statistical Manual of Mental Disorders, the DSM-IV, a resource commonly used in her profession to arrive at diagnoses, Tr. 125-126, Dr. Kempker diagnosed Mr. Wheeler with pedophilia, sexually attracted to both, non-exclusive type, Tr. 126-127. With regard to the serious difficulty component of the definition of mental abnormality, the doctor noted, “Mr. Wheeler has essentially demonstrated offending behaviors in all environments that he’s been a part of, whether ... the community or prison, even during his time at the Missouri Sex Offender Treatment Program,” Tr. 153, and “despite receiving sanctions and the opportunity to be placed on supervision in the community, he was still unable to control his urges as demonstrated by his commission of other offenses,” Tr. 156.

Dr. Kempker also opined to a reasonable degree of psychological certainty that Mr. Wheeler’s mental abnormality makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. Tr. 179.

In terms of assessing whether Mr. Wheeler is more likely than not to commit a sexually violent offense if not confined in a secure facility, Dr. Kempker looked at known risk factors for sex offense recidivism, and an actuarial measure, a test that has been empirically demonstrated to correlate with sexual recidivism. Tr. 156-158. Here, the actuarial measure that Dr. Kempker used was the Static-99, which is commonly used in her profession to arrive at risk assessment, when guided by clinical assessment. Tr. 158-159.

Mr. Wheeler's score on the Static-99 associated him with the group having a high risk of reconviction, not just reoffense. Tr. 160-161.

Dr. Kempker also explained that she applied her own clinical judgment and reviewed Mr. Wheeler's risk factors for reoffending, as supported by research. Tr. 162. The doctor testified that Mr. Wheeler's risk factors increased his risk of reoffending even beyond the risk predicted by the Static-99. Tr. 162. His risk factors included: offending in essentially every environment in which he has been, despite having received sanctions, Tr. 162; his sexual deviance, Tr. 163; his wide victim pool, including children of both genders and adults, *id*; his adult antisocial behavior, Tr. 164; his borderline intellectual functioning, Tr. 163-165; his expressed, specific intent to reoffend, Tr. 165; his failure to complete sex offender treatment, Tr. 166-167; and the chronic nature of his pedophilia, Tr. 168.

The doctor noted that Mr. Wheeler's age, now 60, is not a mitigating factor in his case. Tr. 168. Although research suggests that as age increases, recidivism decreases, "Mr. Wheeler individually has already demonstrated the fact that despite his age, he has continued to act in an inappropriate sexual manner." *Id*.

The doctor concluded to a reasonable degree of psychological certainty that Mr. Wheeler 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, and that he qualifies as a sexually violent predator under Missouri law. Tr. 179.

Mr. Wheeler offered no expert testimony, nor any other evidence. Tr. 223.

Argument

I. The probate court appropriately applied a “clear and convincing” evidentiary standard. This standard comports with due process. (Responds to Appellant’s Point I.)

Over Mr. Wheeler’s objection, the probate court applied the clear and convincing evidence standard, Tr. 96, as provided by MO. REV. STAT. § 632.495.1 (Supp. 2007). Mr. Wheeler’s substantive due process challenge to this standard fails.² Neither the United States Supreme Court nor this Court has ever held that the reasonable doubt standard is required in sexually violent predator commitment proceedings, nor civil commitment proceedings in general. The United States Supreme Court has approved the use of the clear and convincing standard in general civil commitment proceedings, and the high courts of at least two other states have approved the use of that standard in sexually violent predator commitment proceedings.

A. Standard of review.

This Court reviews issues of law *de novo*. *In the Matter of the Care and Treatment of Murrell v. State*, 215 S.W.3d 96, 102 (Mo. 2007) (en banc).

² Mr. Wheeler’s substantive due process challenge to the clear and convincing evidentiary standard is virtually identical to a challenge made in an appeal brought by John Van Orden, now fully briefed in this Court but not yet set for argument: *In the Matter of the Care and Treatment of Van Orden v. State*, case no. SC89224.

B. The clear and convincing standard is appropriate in civil commitment cases, including sexually violent predator cases. The beyond a reasonable doubt standard is not constitutionally mandated.

The United States Supreme Court has “consistently upheld” statutes prescribing the involuntary civil commitment of persons who are unable to control their behavior and thereby pose a danger to public health and safety, “provided the confinement takes pursuant to proper procedures and evidentiary standards.” *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1982), and *Addington v. Texas*, 441 U.S. 418, 426-427 (1979)).

More than three decades ago, in *Addington*, the Court examined what standard of proof is required by due process in a civil proceeding brought under state law, for an individual’s involuntary and indefinite commitment to a state mental hospital. 441 U.S. at 419³. Describing the reasonable doubt and preponderance of the evidence standards as lying at opposite ends of the proof continuum, *id.* at 424, the Court concluded that both were too extreme, *id.* at 431-433.

The burden of proof standard, the Court explained, “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Id.* at 423. “In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual’s interest in not being

³ A copy of *Addington* is included in the Appendix.

involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions." *Id.* at 425 (citations omitted). While "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection, ... [t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Id.* at 425-426.

The Court noted that at the time, only two states permitted involuntary commitment under the preponderance standard, one (Mississippi) by statute and the other (Texas) by caselaw. *Id.* The Court attributed the two states' stances "not to any lack of concern ... but rather to a belief that the varying standards tend to produce comparable results." *Id.*

The Court rejected the criminal standard of proof beyond a reasonable doubt for civil commitment proceedings, explaining that there were "significant reasons why" civil and criminal proceedings apply different standards of proof. *Id.* at 428. One, in civil commitment proceedings, "state power is not exercised in a punitive sense." *Id.* at 428 (footnote omitted).

Two, the reasonable doubt standard has historically been reserved for criminal cases, and "we should hesitate to apply it too broadly or casually in noncriminal cases." *Id.* (quotation and citation omitted).

Three, while the heavy criminal standard minimizes the risk of error to the individual,

“even at the risk that some who are guilty might go free[,] ... [t]he full force of that idea does not apply to a civil commitment.” *Id.* The Court explained:

[E]ven though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient’s condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma.... It cannot be said, therefore, that it is much better for a mentally ill person to ‘go free’ than for a mentally normal person to be committed.

Id. at 428-429.

Finally, the Court noted, while the basic issue in a criminal prosecution is whether the accused in fact committed the alleged act, the issue is more complex in a civil commitment proceeding, because

factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the

meaning of the facts which must be interpreted by expert[s]....

Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

Id. at 429 (citations omitted).

But, “an individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significant and greater than any possible harm to the state.... [T]he individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.” *Id.* at 427.

A middle level of proof, then, between preponderance and reasonable doubt, is the appropriate standard for a civil commitment, the Court concluded. *Id.* at 432-433.

The Court added a final observation about the wording of the instruction that the trial court had used: “clear, unequivocal and convincing.” *Id.* at 433. The Court said that the instruction was constitutionally adequate, but that the word “unequivocal” is not constitutionally required. *Id.* at 432.

Three years later, in *Foucha*, the Court reaffirmed its *Addington* holding, *i.e.*, that a state may use the clear and convincing evidence standard for civil commitment proceedings on the grounds of insanity and dangerousness. 504 U.S. at 86.

A 1997 case that came before the Court, *Hendricks*, involved a challenge to the

Kansas statutory scheme for the civil commitment of sexual violent predators. 521 U.S. at 350. Mr. Hendricks was committed upon a jury’s application of a reasonable doubt standard, *id.* at 355, a standard that he did not challenge on appeal. But in addressing the panoply of his constitutional challenges, the Supreme Court never opined that that evidentiary burden was constitutionally required.

The Court examined the Kansas law again in *Kansas v. Crane*, 534 U.S. 407 (2002), rejecting an absolutist approach to the requirement that the state prove a “lack of control,” as described in *Hendricks*. Again, the Court did not depart from *Addington*, *i.e.*, the Court did change the rule that a clear and convincing burden of proof suffices for civil commitments.

Note, in addition to civil commitment cases, the United States Supreme Court has also approved the use of the clear and convincing standard in other cases involving liberty interests, *e.g.*, deportation, *Woodby v. INS*, 385 U.S. 276, 285 (1966), and denaturalization, *Chaunt v. U.S.*, 364 U.S. 350, 353 (1960), cases.

Several other states with sexually violent predator commitment provisions, analogous to Missouri’s, likewise apply the clear and convincing evidentiary standard by statute, *e.g.*, Florida,⁴ Minnesota,⁵ New Jersey,⁶ New York,⁷ North Dakota,⁸ and Virginia.⁹

⁴ FLA. STAT. § 394.917(1) (2004).

⁵ MINN. STAT. § 253B.18, subd. 1(a)(2006) (applying clear and convincing standard to commitment petitions for persons who are mentally ill and dangerous); MINN. STAT. § 253B.185, subd. 1 (2006) (providing generally that provisions relating to

Footnote continued on next page

And the high courts of at least two of those states, Virginia and Florida, have easily rejected substantive due process challenges to their respective state's clear and convincing standards, relying almost exclusively on *Addington* grounds. See *Shivae v. Commonwealth of Virginia*, 613 S.E.2d 570, 578 (Va. 2005), cert. denied 546 U.S. 1134 (2005) and *Westerheide v. State of Florida*, 831 So.2d 93, 109-110 (Fla. 2002).

* * * * *

Mr. Wheeler's substantive due process challenge is brought under the federal and state constitutions. Missouri's due process provision parallels its federal counterpart, and this Court treats the state and federal due process clauses as equivalent. *Jamison v. State*, 218 S.W.3d 399, 405 n. 7 (Mo. 2007) (en banc).

As the above discussion makes clear, *Addington* leaves the Missouri legislature free to select the clear and convincing standard. The reasonable doubt standard urged by Mr. Wheeler is not constitutionally required, because the sexually violent predator proceedings are civil in nature. *In the Matter of the Care and Treatment of Elliott v. State*, 215 S.W.3d

commitment of mentally ill endangers persons apply also to commitment of sexually dangerous persons).

⁶ N.J. STAT. ANN. § 30:4-27.32 (2008).

⁷ MCKINNEY'S MENTAL HYGIENE LAW § 10.07(d) (2007).

⁸ N.D. CENT. CODE § 25-03.3-13 (2007).

⁹ VA. CODE ANN. § 37.2-908(C) (2007).

88, 93 (Mo. 2007)(en banc). And factors in criminal cases that favor application of the reasonable doubt standard, as discussed in *Addington*, are different from the factors that apply in proceedings to commit persons who are dangerous and mentally ill under Missouri's sexually violent predator law. For example, Missouri's sexually violent predator law is not punitive in nature. *In the Matter of the Care and Treatment of Gibson v. State*, 168 S.W.3d 72, 74 (Mo. App. S.D. 2004). The law provides that the dangerous and mentally ill will be provided care, control, and treatment, for their own benefit and that of the public. Accordingly, the choice of the Missouri legislature to apply that standard to sexually violent predator commitments does not run afoul of the federal or State constitution.

Mr. Wheeler argues that whether commitment under the regular civil commitment statutes also apply the clear and convincing standard cannot justify application of the same standard in SVP cases because, he says, no regular civil commitment order may last longer than one year, while SVP commitments are not so limited. Appellant's Brief, pp. 24-25, (*citing* MO. REV. STAT. §§ 632.350.2 and 632.355.3 (2000)).

To be clear, regardless of whether any single commitment order in a non-SVP case may exceed one year, “[s]uccessive one-year detention periods...are permissible on the same grounds and pursuant to the same procedures as the initial detention period.” MO. REV. STAT. § 632.360 (2000)(emphasis added).

And the SVP law is analogous to this aspect of the regular civil commitment law. The SVP law provides that a person who is committed is statutorily entitled to a yearly examination of his mental condition, and may be authorized by the director of the department

of mental health to petition for his release, or may petition for release on his own. MO. REV. STAT. §§ 632.498 and 632.501 (Supp. 2007). The practical impact of the two commitment schemes is the same: Commitment is provided for, for as long as the person qualifies under the law. Any differences between the two commitment schemes does not remove the SVP law from the scope of authority that not only permits, but endorses, the “clear and convincing” burden of proof.

Moreover, whether commitment under the SVP law has an explicit time limit or not, the Supreme Court in *Addington* approved the use of the clear and convincing standard in a statutory scheme that provided for an “indefinite” period of commitment. 441 U.S. at 421. The lack of an explicit time limit does not alter the analysis here.

The appellant’s due process challenge fails and his Point I should be rejected.

II. Section 632.483.1 (Supp. 2007) does not prohibit a mental health professional from obtaining relevant records to inform diagnoses and conclusions. (Responds to Appellant’s Point II.)

For his second point, Mr. Wheeler argues that the statutory procedure, as provided under MO. REV. STAT. § 632.483.1 (Supp. 2007), was not followed in the initiation of his commitment proceedings, violating his due process rights. Specifically, he complains that the Department of Corrections psychologist, who performed his end-of-confinement evaluation, contacted the Attorney General’s Office for information and that the office provided it, before the Department gave the Attorney General “written notice” under § 632.483.1. The argument fails for at least three reasons: Mr. Wheeler misreads the statute; his reading is inconsistent with the purpose of the SVP law; and in any event, he was not prejudiced by the pre-notice contact.

Questions of statutory interpretation are reviewed *de novo*, *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002), and analysis begins with the plain language of the statute, *Hallmark Cards, Inc. v. Director of Revenue*, 159 S.W.3d 352, 354 (Mo. banc 2005).

Section 632.483.1 provides:

When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection 4 of this section. Written notice shall be given:

(1) Within three hundred sixty days prior to the anticipated release from a correctional center of the department of corrections of a person who has been convicted of a sexually violent offense, except that in the case of persons who are returned to prison for no more than one hundred eighty days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

(2) At any time prior to the release of a person who has been found not guilty by reason of mental disease or defect of a sexually violent offense; or

(3) At any time prior to the release of a person who was committed as a criminal sexual psychopath pursuant to section 632.475 statutes in effect before August 13, 1980.

Section 632.483.1 provides for timing of the notice from the agency with jurisdiction of a person who may qualify as a sexually violent predator and who is nearing the end of confinement, to the Attorney General and the Multidisciplinary Team, so as to avoid needlessly early referrals. The plain language of the section includes nothing about contact between a mental health professional employed by the agency with jurisdiction, and the Attorney General, prior to the agency's provision of written notice, if any, to the Attorney General. The section does not prohibit a mental health professional from requesting or

gathering pertinent information from any source, which is what the Department of Corrections psychologist, Dr. Weitzl, did here. Tr. 61-62.

Contrary to Mr. Wheeler's argument, the case of *In the Interest of C.W.*, 211 S.W.3d 93 (Mo. banc 2007), upon which he heavily relies, does not involve "the same procedure" as the instant case. See Appellant's Brief, p. 32. The statute at issue in *C.W.*, MO. REV. STAT. § 211.455 (2004), provided that "[w]ithin thirty days after filing the petition, the juvenile officer shall meet with the court in order to determine that all parties have been served with the summons and to request that the court order the investigation and social study." Agreeing with a Southern District case interpreting § 211.455, this Court concluded that the plain language of that statute "require[d] the investigation and social study...[to] be filed after [the] filing [of] the termination petition,...grant[ing] the circuit court the opportunity to determine which of several authorized agencies will conduct the study...." *Id.* at 97 (citing *In the Interest of A.H.*, 169 S.W.3d 152, 257-158 (Mo. App. S.D. 2003). Under the plain language of § 211.455, then, a "circuit court must order the study at some point after meeting with the juvenile officer," *id.*(emphasis added) – an agency could not presume to order the study itself, before the filing of the termination petition, as had happened there, *id.* at 96-97.

In contrast to the procedural requirements found in the plain language of the statute at issue in *C.W.*, § 632.483.1 contains no language establishing the timing of contact between a Department of Corrections psychologist and the Attorney General's Office, let alone any prohibition against such a psychologist's attempt to gather relevant information from any source.

The plain language of § 632.483.1 simply does not provide any support for Mr. Wheeler's argument.

Mr. Wheeler's proposed construction of the statute is also inconsistent with the SVP law's purpose. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *In the Matter of the Care and Treatment of Norton v. State*, 123 S.W.3d 170, 172 (Mo. 2003) (en banc) (quotation and citation omitted).

The purpose of the SVP law is, as MO. REV. STAT. § 632.495.2 (Supp. 2007) says, the commitment of sexually violent predators for "control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large." Prohibiting mental health professionals from having access to relevant records, from whatever source, would not promote accurate threshold determinations by the agency with jurisdiction, as to who may qualify for control, care and treatment.

In any event, Mr. Wheeler cannot demonstrate that he was prejudiced by the contact. The lack of prejudice is an additional reason why the Court should reject his challenge. *See In the Matter of the Care and Treatment of Wadleigh v. State*, 145 S.W.3d 434, 441 (Mo. App. S.D. 1994)(rejecting argument that person found to be an SVP was entitled to additional challenges to the jury owing to implication of his liberty interests, because he failed to show any prejudice that resulted from court's compliance with applicable statute).

Here, Dr. Weitzl was preparing Mr. Wheeler's end of confinement report and determined to ask for more information. Tr. 61-62. The Attorney General's Office did not

initiate the contact. *Id.* The doctor's usual practice is to instruct her secretary to contact a secretary at the Attorney General's Office to see if there is any other information available. *Id.* And in this case, as a result of the contact, she received additional information from the Kirksville Police Department, involving Mr. Wheeler's repeated sexual assault of an 11-year-old boy. Tr. 41, 58-59.¹⁰ That information was of the type reasonably relied upon by persons in her profession in arriving at conclusions and providing opinions in this type of case. Tr. 37. The police reports were also cumulative of and consistent with other information that she obtained from other sources, which reflected numerous other sexually violent acts against other boys, as well as girls and women, that Mr. Wheeler committed over the course of more than four decades, to the present. Tr. 37-44. No evidence suggests that Dr. Weigl had any other contact with the Attorney General's Office prior to her preparation of the end of confinement report. And Mr. Wheeler certainly does not suggest that Dr. Weigl obtained information that she could not have or should not have received from some other source.

The pre-notice contact could not have, and did not, prejudice Mr. Wheeler.

Mr. Wheeler's second point should be rejected.

¹⁰ She did not know how many records she received, but she did not even receive all of them before she completed her report. Tr. 62.

Conclusion

The judgment 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 July, 2008, 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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State Public Defenders Office
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Suite 100
Columbia, MO 65203

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,257 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.

Assistant Attorney General

Appendix

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