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JURISDICTIONAL STATEMENT

Richard Wheeler appeals the judgment and order of the Honorable Kristie J. Swaim following a bench trial in Adair County, Missouri, committing Mr. Wheeler to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal challenges the constitutionality of Section 632.495, RSMo Cum. Supp. 2006, investing exclusive appellate jurisdiction of the Missouri Supreme Court, Article V, Section 3, Missouri Constitution (as amended 1982). Mr. Wheeler has filed a motion contemporaneously with this brief to transfer this cause to the Missouri Supreme Court.

STATEMENT OF FACTS

Richard Wheeler pleaded guilty on April 21, 1997 to first degree statutory sodomy and sentenced to ten years in prison (L.F. 12, Tr. 137, 139).¹ He was scheduled for release on August 26, 2006 (L.F. 12).

The Department of Corrections (DOC) maintains a database of all persons incarcerated for sex offenses, and identifying those inmates incarcerated on qualifying offenses under the Sexually Violent Predator Act (Tr. 60-61). Dr. Kimberly Weitzl, a psychologist with DOC, conducts an end of confinement file review for those inmates with qualifying offenses prior to their release from prison (Tr. 32, 34, 61). If Dr. Weitzl believes that the person may meet the criteria for commitment under the SVP Act, she contacts the Attorney General's Office to see if they can get her any more records on the individual under review (Tr. 62). During her review of Mr. Wheeler, Dr. Weitzl requested and received information from the Attorney General's Office before she completed her end of confinement report (L.F. 15, 68-80). Dr. Weitzl ultimately concluded that Mr. Wheeler qualified for involuntary commitment as a sexually violent predator and sent notice of that conclusion to the Attorney General's Office (L.F. 15-17).

The Attorney General's Office filed a petition in the Adair County probate court to involuntarily commit Mr. Wheeler to the Department of Mental Health (L.F. 11-22). The probate court scheduled a hearing to determine whether

¹ The record on appeal consists of a legal file (L.F.) and a trial transcript (Tr.).

probable cause existed to believe that Mr. Wheeler meets the criteria for SVP commitment (L.F. 2). Mr. Wheeler made an oral motion prior to that hearing to dismiss the petition because the involvement of the Attorney General's Office in Dr. Weitzl's review prior to her notice of qualification for commitment was contrary to the requirements of Section 632.483, RSMo, thereby violating his right to due process of law (Tr. 15-18). The probate court took the motion under advisement, requested a written motion with accompanying argument, and proceeded with the probable cause hearing (Tr. 27). The court found probable cause to believe that Mr. Wheeler might meet the criteria for commitment under the SVP Act, and ordered a sexually violent predator evaluation of Mr. Wheeler by DMH (L.F. 3, 101). Mr. Wheeler filed his written motion and argument following the probable cause hearing (L.F. 60-97), which the court denied (L.F. 5).

Prior to trial, Mr. Wheeler filed a motion asking the probate court to declare unconstitutional the 2006 amendment of Section 632.495 to reduce the State's burden of proof to secure his commitment to DMH from proof beyond a reasonable doubt to clear and convincing evidence (L.F. 129-135). He argued that the lower standard of proof violated his constitutional right to due process of law because his liberty interest required the State to meet the highest standard of proof before he can be deprived of that liberty (L.F. 129-135). Mr. Wheeler renewed this request just prior to trial (Tr. 96). The probate court denied Mr.

Wheeler's motion and specifically noted at the end of the trial that it was judging the evidence by the lower standard of proof (Tr. 222-223).

Dr. Erica Kempker performed the court-ordered evaluation (L.F. 101-124, Tr. 113, 119). Mr. Wheeler's evaluation was the second evaluation she had performed (Tr. 116). Dr. Kempker was not a certified forensic examiner when she performed the evaluation, but she was under the supervision of a certified examiner for the State and she had submitted all of the necessary paperwork for certification (Tr. 117).

Dr. Kempker diagnosed Mr. Wheeler with pedophilia, attracted to boys and girls, non-exclusive type, meaning that he is also sexually attracted to adults (Tr. 126, 149). Dr. Kempker also identified as areas of clinical concern Mr. Wheeler's adult antisocial behavior and borderline intellectual functioning (Tr. 126).

As a child, Mr. Wheeler had a reported history of threatening family members with weapons (Tr. 127). When he was eight years old he shot his brother who came between Mr. Wheeler and his intended target, his mother (Tr. 127-128). Mr. Wheeler was labeled "quick tempered" (Tr. 128).

In 1968, when Mr. Wheeler was twenty years old, he was arrested for molesting a nine year old male cousin (Tr. 128). In 1971 he was charged with molesting a four year old girl by reportedly attempting to entice her into his home with candy (Tr. 129). This girl's mother claimed to have seen Mr. Wheeler

assaulting his eleven year old sister (Tr. 129). Mr. Wheeler was never charged with molesting his sister (Tr. 183). The charge for molesting the four year old was dismissed, but Dr. Kempker noted a reference that someone told the court clerk that Mr. Wheeler had behaved in a manner consistent with immoral and vicious acts (Tr. 130). Dr. Kempker also noted that Mr. Wheeler had indicated that all of the sexual charges brought against him were false; leading the doctor to believe that this was not the first time Mr. Wheeler had been accused of sexual misconduct (Tr. 130).

Mr. Wheeler was charged with a peace disturbance in 1975 (Tr. 130-131). He had allegedly exhibited a gun in a hospital where his wife was delivering a baby (Tr. 131). Dr. Kempker found this incident noteworthy because the nurse who made the complaint was the mother of the four year old girl, and Mr. Wheeler believed that she made this accusation to even the score with him (Tr. 131).

A 1976 probation and parole report asserted that Mr. Wheeler admitted to previously holding a girl against her will in Kansas City (Tr. 131). A 1981 pre-sentence investigation report asserted that Mr. Wheel was accused in 1978 of abusing a four year old girl his wife was babysitting (Tr. 132). The 1978 accusation was investigated by DFS, but there is no record that the accusation was ever substantiated (Tr. 183-184). Mr. Wheeler was convicted in 1981 of sexually abusing an adult woman (Tr. 132).

In 1987, Mr. Wheeler was charged with breaking and entering into a woman's room (Tr. 133). Because Mr. Wheeler prevented the woman from calling the police, Dr. Kempker said it appeared that the incident was sexually motivated (Tr. 133). She acknowledged that other records regarding the incident noted that the alleged victim was also a patient at the mental hospital and that her allegation of sexual behavior was not credible (Tr. 185).

Mr. Wheeler's wife asserted as a basis for a divorce in 1993 that he had sexually abused their son (Tr. 132-133). In 1994, Mr. Wheeler was arrested for sexual misconduct with an eleven year old boy (Tr. 135-136). Mr. Wheeler pleaded guilty in 1996 to sexual misconduct, and was placed on probation (Tr. 137). Forty-nine days later he sodomized a four year old boy (Tr. 137). It was the conviction of this offense for which Mr. Wheeler was incarcerated at the time the State filed its commitment petition (Tr. 139).

Dr. Kempker testified that Mr. Wheeler continued to exhibit sexually offending behaviors in prison (Tr. 139). He propositioned other inmates for sex (Tr. 139). He made sexual remarks toward other inmates (Tr. 141). Another inmate reported that Mr. Wheeler talked about having sex with or raping young girls when he got out, and that he knew where one such girl was located (Tr. 140). Mr. Wheeler was placed in administrative segregation in 2003 for refusing a female guard's order to stop masturbating in the shower (Tr. 142). He was written up for inappropriate comments about the way a female guard was

dressed (Tr. 142). While this comment was not sexually violent, Dr. Kempker said that “[i]t is indicative of sexual preoccupation which could lend itself to additional factors that could lend themselves to committing future predatory acts.” (Tr. 189). In 2005, when Mr. Wheeler was fifty-seven years old, he put his hand inside another inmate’s pants and rubbed his buttocks (Tr. 143).

Dr. Kempker opined that Mr. Wheeler’s pedophilia is a mental abnormality predisposing him to acts of sexual violence, and causing him serious difficulty controlling his behavior (Tr. 150, 152). She based this opinion on Mr. Wheeler’s pattern of offending behavior in all the environments he has been in, in the community or in prison, and that he continued to do so in spite of sanctions (Tr. 153). Dr. Kempker also relied upon Mr. Wheeler’s numerous inappropriate sexual remarks which demonstrated sexual preoccupation or hypersexuality which “lends itself to him having serious difficulty” (Tr. 153-154). She looked through the available records for evidence of impulsivity and she found scattered throughout the records statements regarding Mr. Wheeler’s poor impulse control and difficulty limiting his behaviors (Tr. 154-155).

Dr. Kempker begins her assessment of an individual’s risk of reoffense by scoring the Static-99 actuarial instrument (Tr. 157). This instrument contains ten factors that lend themselves to predictions of risk for the sample group upon which the instrument was developed, and then assigns risk categories according to the score (Tr. 158). She assigned Mr. Wheeler a score of 7 on the instrument,

meaning that he has characteristics similar to those in the study group with a high risk of reconviction (Tr. 160-161). Dr. Kempker explained that she uses the actuarial instrument “as an anchor to see if my clinical opinion is consistent with what has been laid out with research....” (Tr. 162). In Mr. Wheeler’s case, she claimed that her clinical opinion was consistent with the result of the instrument (Tr. 162).

Dr. Kempker identified other factors apart from the actuarial instrument upon which she assessed Mr. Wheeler’s risk to reoffend (Tr. 162). She again cited his offending behavior in spite of sanctions (Tr. 162). While the Static-99 includes a factor for the number of prior charges or convictions, Dr. Kempker did not believe this factor accurately captured the extent of Mr. Wheeler’s behavior (Tr. 198). She said that the presence of pedophilia, a sexual deviance, “in and of itself does pose risks.” (Tr. 162-163). Mr. Wheeler’s behavior has not been exclusive to any gender or age, leading Dr. Kempker to describe his pool of potential victims as “virtually inexhaustive,” thus increasing his risk to reoffend (Tr. 163). She agreed that the Static-99 contains separate factors for unrelated victims, stranger victims and male victims, somewhat accounting for the breadth of the person’s victim pool (Tr. 199). But Dr. Kempker said that the instrument does not consider the age of the victim or non-human objects, and that it does not “capture fully all of the paraphilias that are available for diagnosis in the DSM.” (Tr. 199).

Dr. Kempker said that the labeling Mr. Wheeler with adult antisocial behavior simply meant that his “criminality has existed in adulthood.” She said that antisocial behavior “exacerbate[s] or lend[s] itself to continued criminality, sexual and non-sexual, poor decision making, kind of a lack, disregard for self or others or – and a variety of things including impulsivity.” (Tr. 164). She acknowledged that the Static-99 factor of prior sentencing dates picks up antisocial behavior, but she said that the instrument did not account for Mr. Wheeler’s generally defiant behavior which could amount to crimes (Tr. 200). Dr. Kempker said that the combination of pedophilia with antisocial behavior is, “in and of itself,” an increased risk factor (Tr. 164). She acknowledged that the research she was relying upon for this testimony dealt with the combination of sexual deviance and psychopathy, a condition Mr. Wheeler does not have, but that non-sexual criminality “could be a risk factor within the psychopathy arena.” (Tr. 200-201).

Dr. Kempker said that Mr. Wheeler’s borderline intellectual functioning will cause him to have difficulty with impulsivity in all areas, not just sexually (Tr. 164-165). She said that difficulty controlling behavior is perhaps a limited insight into behavior, which exacerbates Mr. Wheeler’s mental abnormality (Tr. 165). Dr. Kempker acknowledged that a meta-analysis of over 23,000 subjects found no predictive value in low intelligence or cognitive impairment (Tr. 189, 190, 202). But she discounted these data because she was focusing on poor

impulse control, poor decision-making, and limited insight associated with borderline intellectual functioning (Tr. 202). Dr. Kempker suggested that the meta-analysis focused on intellectual deficits, not on behaviors consistent with borderline intellectual functioning (Tr. 202).

Dr. Kempker testified that Mr. Wheeler's statements that he intends to reoffend, his statements in prison that he had a victim in mind, is "the biggest red flag ... available." (Tr. 165).

Dr. Kempker also considered that Mr. Wheeler refused sex offender treatment three times in prison. She agreed that the rules established for the Static-99 direct the evaluator to consider all persons in the sample group to be "untreated," but she said that the rules also allow for consideration of factors not contained in the Static-99 and no factor is included in the instrument for completion or absence of treatment (Tr. 194-195). She acknowledged that refusal of treatment may or may not increase someone's risk of reoffending, depending upon why the person refused treatment (Tr. 166). But because she was unable to interview Mr. Wheeler - she was informed by counsel that Mr. Wheeler would refuse an interview - she reviewed his history to speculate on his motivation for treatment (Tr. 166-167). From the records she found that at times Mr. Wheeler admitted that he was a sex offender, at other times he denied the offenses (Tr. 166-167). At times Mr. Wheeler said that he needed treatment, at other times he said that he did not need treatment (Tr. 166-167). Dr. Kempker called this poor

insight by Mr. Wheeler into his behavior, and that makes it important (Tr. 166-167).

Dr. Kempker had only passing familiarity with a 2006 study which found that the Static-99 overestimates risk of reoffense in the high-risk categories, but she was not surprised by that result (Tr. 195-196). Dr. Kempker acknowledged extensive research by a number of preeminent researchers which has shown substantial decrease in reoffending by sexual offenders as they age, especially past age sixty (Tr. 168, 204-214). But she discounted these data because they are based on group results rather than on individuals (Tr. 168). Dr. Kempker also relied upon Mr. Wheeler's inappropriate behavior in prison, and his defiant behavior at the Missouri Sexual Offender Treatment Center where he was being held pending trial to conclude that his age had not decreased his risk to engage in predatory acts of sexual violence in the future if not securely confined (Tr. 168-170, 172-179).

Dr. Kempker opined that Mr. Wheeler meets the criteria for commitment (Tr. 179). The probate court judge reached the same conclusion and committed Mr. Wheeler to the custody of the Department of Mental Health (L.F. 168-169). This appeal followed (L.F. 170-173).

POINTS RELIED ON

I.

The probate court erred in overruling the motion to declare the 2006 amendment to Section 632.495, RSMo unconstitutional, thereby depriving Mr. Wheeler of his right to substantive due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because the statute as amended is unconstitutional in that the due process clause protects against commitment except upon proof beyond a reasonable doubt of every fact necessary to qualify the person for commitment alleged in the petition.

In re Andrews, 334 N.E.2d 15 (Mass. 1975);

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 170 (Mo. banc 2004);

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997);

Superintendent of Worcester State Hospital v. Hagberg, 372 N.E.2d 242 (Mass. 1978);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Sections 632.350, 632.355, 632.360 RSMo 2000;

Section 632.483, RSMo Cum. Supp. 2005;

Section 632.495 RSMo Cum. Supp. 2006;

Section 632.501, RSMo 2000; and

Section 632.505, RSMo Cum. Supp. 2006.

II.

The probate court erred in denying Mr. Wheeler's motion to dismiss the petition upon the State's failure to follow the statutory procedures set out in the SVP Act for the initiation of such proceedings, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 632.483 RSMo, Cum. Supp. 2005, requires DOC to make a determination of whether a person qualifies for commitment before notifying the Office of the Attorney General, but here DOC contacted the Attorney General's Office prior to that notice, and the Attorney General's Office provided assistance to DOC prior to that determination.

In re Salcedo, 34 S.W.3d 862 (Mo. App., S.D. 2001);

In the Interest of A.H., 169 S.W.3d 152 (Mo. App. S.D. 2005);

In the Interest of C.W., 211 S.W.3d 93 (Mo. banc 2007);

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.483, RSMo Cum. Supp. 2005; and

Section 632.484, RSMo Cum. Supp. 2005.

ARGUMENT

I.

The probate court erred in overruling the motion to declare the 2006 amendment to Section 632.495, RSMo unconstitutional, thereby depriving Mr. Wheeler of his right to substantive due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because the statute as amended is unconstitutional in that the due process clause protects against commitment except upon proof beyond a reasonable doubt of every fact necessary to qualify the person for commitment alleged in the petition.

The SVP Act implicates a citizen's constitutional right to liberty. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. banc 2004). The Missouri legislature amended Section 632.495 in 2006 to reduce the burden on the State to deprive citizens of their liberty under the SVP Act from proof beyond a reasonable doubt to proof by clear and convincing evidence. Mr. Wheeler requested the probate court to declare this amendment unconstitutional as depriving him of his liberty without due process of law (L.F. 129-135). The probate court denied Mr. Wheeler's motion and decided the case upon the reduced standard of proof (Tr. 222-223).

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

Mr. Wheeler recognizes that four of the seventeen states with civil commitment laws for sexually violent predators or sexually dangerous persons permit commitment upon proof by clear and convincing evidence rather than proof beyond a reasonable doubt. He believes, nonetheless, that the majority rule comports with due process of law and the minority rule does not.

One of the minority states is New Jersey. The New Jersey Superior Court stated in *Civil Commitment of K.X.S.*, 2006 WL 1312984 (N.J.Super.A.D., May 15, 2006)², that proof by clear and convincing evidence was sufficient. In doing so, the New Jersey Court relied upon the statement of the United States Supreme Court in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), that "the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."

This concern has been proven unfounded by the extensive civil commitment practice in fourteen states, including Missouri, and by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The Kansas statute in *Hendricks* required the State to prove

² Not reported in A.2d.

its case beyond a reasonable doubt. The *Hendricks* Court noted the "medical and scientific uncertainties" in identifying mental illnesses, and that uncertainty affords legislatures the widest latitude in drafting its statutes. 117 S.Ct. at 2081, fn 3. The United States Supreme Court did not hold that the requirement of proof beyond a reasonable doubt imposed an impossible burden on the state. The State of Missouri has had no problem securing testimony from psychiatrists or psychologists that the subject of the commitment petition meets the criteria for commitment beyond a reasonable doubt. The other thirteen states with the same burden of proof have apparently had no problem securing expert testimony according to that standard. The concern expressed by the United States Supreme Court in *Addington* has been definitively refuted.

The State of Massachusetts requires proof beyond a reasonable doubt to commit and retain persons in civil commitment under its general commitment provisions. *Superintendent of Worcester State Hospital v. Hagberg*, 372 N.E.2d 242 (Mass. 1978). In imposing that requirement, the Massachusetts Supreme Court noted that a growing number of other states employed the standard of proof beyond a reasonable doubt. Of particular note, the Massachusetts Supreme Court found "unpersuasive expressions of doubt whether such proof is feasible." *Id.* at 277.

It must be remembered that *Addington* involved a commitment petition filed under general civil commitment statutes by Addington's mother. A

situation more similar to that in Mr. Wheeler's case came before the United States Supreme Court in *Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972). The petitioners in *Murel* had been convicted and sentenced to determinate sentences, after which the State sought to commit them for an indeterminate period to a mental institution under the state's Defective Delinquency Law. 92 S.Ct. at 2092. They contended that the State should be required to establish its case by proof beyond a reasonable doubt. *Id.* However, because the United States Supreme Court was informed that the civil commitment laws were undergoing substantial changes, it dismissed the grant of certiorari as improvidently granted. *Id.* at 2093.

Justice Douglas dissented. He noted that the commitment law did not specify the burden of proof necessary to commit the petitioners, but that the State appellate court determined the appropriate standard was "a fair preponderance of the evidence." 92 S.Ct. at 2093. Justice Douglas noted that this allowed the petitioners to be "deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions." *Id.* It did not matter to Justice Douglas that the commitment was considered civil, because *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) hold that it is the interest involved which determines the applicable standard of proof, not the "label" assigned to the proceeding. 96 S.Ct. at 2096. "An individual who

is confronted with the possibility of commitment, moreover, runs the risk of losing his most important right - his liberty." *Id.* Justice Douglas further rejected the suggestion that it is difficult to prove state of mind, thus permitting the State a lower burden of proof, noting that proving state of mind is no more difficult than many other issues jurors and courts grapple with every day. *Id.*

The State of Massachusetts also requires proof beyond a reasonable doubt to commit persons under its sexually dangerous persons act. *In re Andrews*, 334 N.E.2d 15 (Mass. 1975). The statutes at the time did not specify a burden of proof, so the Massachusetts Supreme Court turned to cases of a similar nature decided by the United States Supreme Court, particularly *In re Winship* and *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). *Andrews*, 334 N.E.2d at 486. The Massachusetts court concluded that these cases "lead inexorably to the conclusion that a person who stands to lose his freedom and to be labeled sexually dangerous is entitled to the benefit of the same stringent standard of proof as that required in criminal cases."

Mr. Wheeler also recognizes that the burden of proof in a general commitment proceeding in Missouri is proof by clear and convincing evidence. Section 632.350, RSMo 2000. But the substantial difference in the consequences between general civil commitment and sexually violent predator commitment precludes the same standard here. The longest a person may be committed to inpatient treatment under the general commitment statutes is one year. Section

632.355, RSMo 2000. No order for civil detention under chapter 632 may exceed one year for an inpatient detention period. Section 632.360, RSMo 2000. Under the general civil commitment statutes, “[a]t the end of any detention period ordered by the court under this chapter, the respondent shall be *discharged* unless a petition is filed and heard in the same manner as provided herein.” *Id.* Upon expiration of the detention period, the person is discharged unless a petition for further detention period is filed. *Id.*

Commitment under the SVP law is for life. A new section was added to the SVP law in 2006, Section 632.505, which modified the release procedures when a person no longer meets the criteria for involuntary SVP civil commitment. Prior to the addition of Section 632.505 to the SVP law, once a person’s mental abnormality has so changed that he is safe to be at large and is not likely to commit acts of sexual violence he was *discharged* from DMH custody. Section 632.501, RSMo 2000.³ Section 632.505 eliminated the discharge from the custody of DMH of a person ever committed as an SVP. Under the new law, the person remains committed to the custody of DMH for the remainder of his life. The new law permits only release from secure confinement upon conditions, and this release from secure confinement can be revoked by a judge

³ Of course, since the enactment of the SVP law in 1998, no one was ever discharged from commitment to DMH under this section.

upon a preponderance of the evidence and without all of the protections afforded the individual in the initial commitment. Section 632.505, RSMo Cum. Supp. 2006. After 2006, a commitment to the custody of DMH as an SVP is a lifetime commitment. Because the person is forever committed to the custody of DMH, that initial commitment must require the highest level of proof.

The State argued below that this issue was decided against Mr. Wheeler by the Missouri Supreme Court in *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836, (Mo. banc 2005) (Tr. 101). Mr. Wheeler pointed out below the error of that argument (Tr. 96-97). The question in *Schottel* was one of procedural due process; whether an amended law could be applied in a pending case filed before the amendment. The Due Process Clause protects individuals both procedurally and substantively, and bars arbitrary, wrongful government actions. *Foucha v. Louisiana*, 404 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Freedom from bodily restraint is at the heart of the liberty interest protected against arbitrary government action. *Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982). Mr. Wheeler's motion raises a question of substantive due process; whether lifetime commitment upon less than proof beyond a reasonable doubt is arbitrary and wrongful government action. The Southern District Court of Appeals offered a recent explanation of an appellate court's review of a due process claim. The Southern District stated in *In the Interest of E.A.C.*, SD28412 (Mo. App., S.D. May 29, 2008):

For all its consequence, “due process” has never been, and perhaps can never be, precisely defined. “Unlike some legal rules” ... due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” Rather, the phrase expressed the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is, therefore, an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation

Slip Op. at 4, citing the Missouri Supreme Court’s holding in *C.J.G. v. Missouri Dept. of Social Services*, 219 S.W.3d 244 (Mo. banc 2007). Release from secure confinement into the community upon conditions is a restraint of individual liberty. *Rowland v. State*, 129 S.W.3d 507, 511-512 (Mo. App., S.D. 2004) (Conditional release is akin to parole. A defendant’s liberty is restrained by conditions imposed on his conduct). Because an SVP commitment is a lifetime restraint of liberty, fundamental fairness requires that it be based upon the highest standard of proof.

The probate court erred in failing to the declare unconstitutional the 2006 amendment to Section 632.495, RSMo, and in subjecting Mr. Wheeler to indefinite involuntary commitment upon a standard of proof too low to assure Mr. Wheeler due process of law. The judgment and commitment order of the

probate court must be reversed and the cause remanded for a new trial under the proper standard of proof.

II.

The probate court erred in denying Mr. Wheeler's motion to dismiss the petition upon the State's failure to follow the statutory procedures set out in the SVP Act for the initiation of such proceedings, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 632.483.1 RSMo, Cum. Supp. 2005, requires DOC to make a determination of whether a person qualifies for commitment before notifying the Office of the Attorney General, but here DOC contacted the Attorney General's Office prior to that notice, and the Attorney General's Office provided assistance to DOC prior to that determination.

Mr. Wheeler moved to dismiss the commitment petition because the agency with jurisdiction, DOC, contacted the Attorney General's Office before making the determination that Mr. Wheeler might meet the qualifications for SVP commitment and notifying the Attorney General's office of that determination; and because the Attorney General's Office provided records to DOC before that determination was made (L.F. 60-97). He argued that his right to due process of law was violated when the statutory procedures for initiating a commitment petition were not followed (L.F. 60-97). This motion was denied by the probate court (L.F. 5). This Court reviews the denial of a motion to dismiss *de*

novvo, examining the pleadings to determine whether they invoke principles of substantive law. *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App., W.D. 2004). The pleadings are liberally construed and all alleged facts are accepted as true and construed in the light most favorable to the pleader. *Id.*

Section 632.483.1, RSMo, Cum. Supp. 2005, reads in relevant part: “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” For this purpose, DOC maintains a database of all persons incarcerated for sex offenses, and identifying those inmates incarcerated on qualifying offenses under the Sexually Violent Predator Act (Tr. 60-61). Dr. Kimberly Weitzl, a psychologist with DOC, conducts an end of confinement file review for those inmates with qualifying offenses prior to their release from prison (Tr. 32, 34, 61).

If Dr. Weitzl believes that the person may meet the criteria for commitment under the SVP Act, she contacts the Attorney General’s Office to see if they can get her any more records on the individual under review (Tr. 62). During her review of Mr. Wheeler, Dr. Weitzl requested and received information from the Attorney General’s Office before she completed her end of confinement report (L.F. 15, 68-80). Dr. Weitzl ultimately concluded that Mr. Wheeler qualified for involuntary commitment as a sexually violent predator and sent notice of that conclusion to the Attorney General’s Office (L.F. 15-17). Mr. Wheeler sought

dismissal of the petition because this contact between Dr. Weitzl and the Attorney General's Office, and that Office's assistance in providing records to Dr. Weitzl before she determined whether he met the criteria for commitment, was contrary to the statutorily established procedure and a violation of his right to due process of law.

The Due Process Clause protects individuals both procedurally and substantively, and bars arbitrary, wrongful government actions. *Foucha v. Louisiana*, 404 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Freedom from bodily restraint is at the heart of the liberty interest protected against arbitrary government action. *Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982).

The SVP law is a complete code within itself. The law is a special statutory proceeding which "erects an elaborate, step-by-step procedure" for involuntary commitment. *In re Salcedo*, 34 S.W.3d 862, 867 (Mo. App., S.D. 2001), *superseded by statute*. It outlines the process to be followed from initiating a petition to conclusion of a case.

The Missouri Supreme Court and the Southern District Court of Appeals have decided a similar issue involving a special statutory procedure, that in place for termination of parental rights. In *In the Interest of A.H.*, 169 S.W.3d 152 (Mo. App. S.D. 2005), the Court discussed proper procedure required by the Juvenile Code:

In cases involving the involuntary termination of parental rights, the Juvenile Code "is a complete code within itself, and proceedings thereunder must be in strict accordance with its terms." *In re S M W*, 485 S.W.2d 158, 164 (Mo.App.1972). Exercise of the court's power to terminate parental rights must be in accordance with due process as fixed by law, and such a termination is legally effectual only when specified procedures are punctiliously applied. *Id.*

169 S.W.3d at 157. The Court was asked to determine whether a trial court had violated a mother's constitutional right to due process by accepting an Investigation and Social Study submitted in violation of the Juvenile Code's procedure. Section 211.455 requires that "[w]ithin thirty days after the filing of 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." The Court, noting that the Investigation and Social Study was filed contemporaneously with (not after) the petition, reversed the lower court's judgment.

The Missouri Supreme Court found that a violation of the same procedure required reversal of the lower court's judgment. *In the Interest of C.W.*, 211 S.W.3d 93 (Mo. banc 2007). In the case of C.W., the Children's Division submitted an Investigation and Social Study before the petition to terminate parental rights was even filed. In concluding that the case must be reversed, the

Court first noted that "[a]lthough the statute is phrased in part as a directive to the juvenile officer, use of the term "shall" also imposes an obligation upon the circuit court to meet with the juvenile officer after the petition is filed." *Id.* at 97. The Court went on to affirm and adopt the Southern District Court of Appeals decision in *In the Interest of A.H.* "The reasoning in *A.H.* is consistent with the language of the statute." *In the Interest of C.W.*, 211 S.W.3d at 97. "Therefore, this Court holds that section 211.455 requires the circuit court to order the mandatory investigation and social study after the petition is filed." *Id.* The Court held that "[g]iven the fundamental interests involved, there must be strict and literal compliance with the statutes authorizing the State to terminate the parent-child relationship." *Id.* at 98, citing *In re K.A.W.*, 133 S.W.3d 1, 16 (Mo. banc 2004). "Failure to strictly comply with section 211.455 is reversible error." *Id.*

The parties involved in Mr. Wheeler's case should be held to the same strict standard of statutory interpretation. If severance of the parent-child relationship by act of law is "an exercise of awesome power" demanding "strict and literal compliance", then deprivation of someone's personal liberty would also require such compliance. "Strict and literal compliance" with section 632.483 RSMo should prohibit DOC from involving the Attorney General's Office in the pre-notice determination, and should prohibit the Attorney General's Office from assisting DOC in making that determination.

The probate court erred in denying Mr. Wheeler's motion to dismiss the petition for the State's failure to follow the procedure established by the statute. The judgment and commitment order of the probate court must be vacated and Mr. Wheeler must be discharged from custody.

CONCLUSION

Because the probate court erred in failing to the declare unconstitutional the 2006 amendment to Section 632.495, RSMo, and in subjecting Mr. Wheeler to indefinite involuntary commitment upon a standard of proof too low to assure Mr. Wheeler due process of law, as set out in Point I, the judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial under the proper standard of proof. Because the probate court erred in denying Mr. Wheeler's motion to dismiss the petition for the State's failure to follow the procedure established by the statute, as set out in Point II, the judgment and commitment order of the probate court must be vacated and Mr. Wheeler must be discharged from custody.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,545 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in May, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of _____, 2008, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

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