

**IN THE
SUPREME COURT OF MISSOURI**

No. SC85304

IN RE: ANGELA M. COFFEL,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of Lincoln County, Missouri
Forty-Fifth Judicial Circuit
The Honorable Patrick S. Flynn, Judge**

**RESPONDENT'S SUBSTITUTE BRIEF,
STATEMENT AND ARGUMENT**

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JURISDICTIONAL STATEMENT

This appeal is from a finding in the Circuit Court of Lincoln County, Missouri, that Appellant is a sexually violent predator under Section 632.480, *et seq.* This cause was heard by the Missouri Court of Appeals, Eastern District, pursuant to Article V, Section 3, Missouri Constitution (as amended effective 1982). Transfer was granted by this Court on July 1, 2003, pursuant to Article V, Section 10, Missouri Constitution (as amended 1976).

STATEMENT OF THE FACTS

The Appellant was an eighteen-year-old female living in Lincoln County when she sodomized an eleven-year-old boy and a thirteen-year-old boy on October 6, 1994 (L.F. 55, Tr. 140). She pled guilty to both counts and, while awaiting sentencing, she engaged in unprotected sexual relations with a fifteen-year-old boy (Tr. 124, 143). Besides being a crime, this activity was also dangerous because Appellant had been diagnosed with the HIV virus a year earlier (Tr. 143). Although the expectation was that Appellant would receive a suspended sentence, because of her misconduct while awaiting sentencing, the Appellant was sentenced to two five-year terms for the sodomy (L.F. 55).

Philip Cantanzaro testified that during this period when Appellant was out on bond awaiting sentencing, he met Appellant, who became sexually aggressive with him during their first meeting (Tr. 14-15). He testified that she never informed him of her HIV status (Tr. 19), although they engaged in sexual intercourse on a number of occasions (Tr. 19).

While in prison, Appellant had 88 conduct violations (Tr. 353). These violations often included being in the cell or cubicle of another inmate, exposing herself to male guards or inmates, and kissing other female inmates (Tr. 26, 29, 30, 55, 66, 68, 155). Appellant also refused to participate in the Missouri Sexual Offender Program, which provides treatment for sexual offenders (Tr. 123, 150, 188). Appellant made this decision even though she knew it would delay her release from prison (Tr. 127).

On June 22, 2000, the State filed a petition in the Probate Division of the Lincoln County Circuit Court seeking to have Appellant committed as a sexually violent predator pursuant to § 632.408, *et seq.* (L.F. 7-9). On August 25, 2000, Judge Patrick Flynn found probable cause existed and had Appellant transferred to Fulton State Hospital to await trial (L.F. 29-31).

While in the Biggs Center at Fulton State Hospital, Appellant continued to act up in sexually inappropriate ways (Tr. 158, 159, 353). This included writing love letters to another inmate at the hospital (Tr. 158), and hanging out the window yelling at passing males (Tr. 159). In anticipation of being released from the hospital, Appellant began receiving Depo-Provera shots for birth control (Tr. 130, 444).

The trial of this case began on July 19, 2001, with the State presenting testimony of two expert witnesses (Tr. 6):

Dr. Patricia Davin, who practices marriage and family therapy in Nevada, discussed research she conducted on female sex offenders for her dissertation in clinical psychology (Tr. 75, 81). Dr. Davin has had her research published in a book entitled, “Female Sex Offenders” (Tr. 85). Dr. Davin testified that there is very little research available on female sex offenders and that they are rare (Tr. 80), a position agreed upon by the other experts at trial (Tr. 196).

Dr. Davin testified that most female sex offenders are “co-offenders” who assist a male partner in committing the sex crime (Tr. 89). Appellant falls into the very rare category of female “independent offenders” (Tr. 93), who engage in predatory sex acts

with minors and use persuasion rather than force to obtain compliance (Tr. 122). Dr. Davin indicated that independent offenders don't plan, but will take advantage of opportunities that arise and that they normally don't engage in sex acts for their own gratification (Tr. 109, 112, 117).

Dr. Davin agreed with the diagnosis of other experts that Appellant suffers from Anti-Social Personality Disorder and Borderline Personality Disorder and believes Appellant has had these mental problems since she was nine years old (Tr. 126, 128).

The State also introduced the testimony of Dr. Amy Phenix, a clinical psychologist who specializes in forensic psychology and has evaluated 175 individuals in various states to determine if they are a sexually violent predator (Tr. 335). Dr. Phenix also trains other professionals around the country on the evaluation of sexual predators (Tr. 332) and, in fact, provided training to one of Appellant's experts, Dr. Maskel (Tr. 446).

Dr. Phenix testified that Appellant suffers from Anti-Social Personality Disorder and Borderline Personality Disorder and that these have been consistent diagnoses for Appellant (Tr. 342, 355). Dr. Phenix concluded that these are mental abnormalities that make Appellant more likely to reoffend in a sexually violent manner if not confined (Tr. 360). Dr. Phenix indicated that Appellant has "extreme behavioral impulsivity" (Tr. 352) and has "absolutely no volitional control over her behavior." (Tr. 360).

Both experts for the State testified that Appellant has always used sex as the means of making friends, and continues to do so (Tr. 105, 108, 126, 359-60, 372). In fact,

at the trial, Appellant testified that the “only way, I guess, to be a friend is do whatever they tell me to do.” (Tr. 158).

Appellant presented the testimony of four expert witnesses.

Ms. Kathleen Colebank works for Kentucky’s sexual offender program and found of the 97 female sex offenders in Kentucky, none had reoffended (Tr. 195, 206, 207). She testified that she did not know if any of these 97 women suffered from Anti-Social Personality Disorder, Appellant’s diagnosis, and acknowledged that such a mental abnormality is extremely rare in women (Tr. 220, 225).

Dr. Delany Dean is a private psychologist who was hired to offer an opinion (Tr. 238-9). Dr. Dean testified that Appellant did not suffer from a mental abnormality, but does have “features” of Borderline Personality Disorder and Anti-Social Personality Disorder (Tr. 255). Dr. Dean had offered an opinion that Appellant would not reoffend because she was now a lesbian (Tr. 304), but on cross-examination conceded that Appellant continues to pursue relationships with men (Tr. 305). Appellant also told Dean that if she were to lose at trial, she would make life a “living hell” for the hospital staff (Tr. 316).

Dr. Maskel is a private psychiatrist who was hired by Appellant and who offered the opinion that while Appellant has a “flagrant” case of Borderline Personality Disorder, she does not have a mental abnormality (Tr. 409-10). Dr. Maskel acknowledged that Appellant is still very immature (Tr. 414, 415).

Dr. Richard Scott is a clinical psychologist for the Department of Mental Health (Tr. 458). Dr. Scott diagnosed Appellant as having Anti-Social Personality Disorder and Borderline Personality Disorder, but did not believe her acts were “predatory” under the statute (Tr. 462). Dr. Scott acknowledged, however, that his conclusion was based on Appellant’s assertion that she was friends with the boys (Tr. 500-501). Dr. Scott also testified that Appellant uses sex to gain affection, warmth, and acceptance and that she still has those same needs (Tr. 499). He also agreed that Appellant is impulsive (Tr. 516), and is need of treatment (Tr. 500).

At the close of the evidence, the court found Appellant to be a sexually violent predator (L.F. 160). This appeal followed.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT WAS A SEXUALLY VIOLENT PREDATOR AND APPELLANT HAS NOT OVERCOME THE LEGAL PRESUMPTION THAT JUDGE FLYNN FOLLOWED THE LAW IN FINDING APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR. THERE WAS AMPLE EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT HAS SERIOUS DIFFICULTY CONTROLLING HER SEXUALLY VIOLENT BEHAVIOR, INCLUDING TESTIMONY FROM AN EXPERT WITNESS THAT APPELLANT HAS “ABSOLUTELY NO VOLITIONAL CONTROL OVER HER BEHAVIOR,” AND APPELLANT’S FAILURE TO ASK THE COURT FOR SPECIFIC FINDINGS ON THIS ISSUE FORECLOSES HER FROM CHALLENGING THE PROPRIETY OF THE COURT’S VERDICT.

Perry v. State, 11 S.W.3d 854 (Mo.App., S.D. 2000);

State v. McDonald, 10 S.W.3d 561 (Mo.App., S.D. 1999);

State v. Feltrap, 803 S.W.2d 1 (Mo. banc 1991).

II.

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT WAS A SEXUALLY VIOLENT OFFENDER BECAUSE EVIDENCE ESTABLISHED THAT APPELLANT DOES SUFFER FROM THE MENTAL ABNORMALITIES OF ANTI-SOCIAL PERSONALITY DISORDER AND BORDERLINE PERSONALITY DISORDER AND THE APPELLANT WAS NOT PREJUDICED, NOR OBJECTED TO, EVIDENCE OF THESE TWO MENTAL DISORDERS SINCE THOSE WERE THE DIAGNOSES OF APPELLANT'S OWN EXPERT, DR. SCOTT, AND APPELLANT AND HER EXPERTS WERE FULLY PREPARED TO ADDRESS—AND ATTEMPT TO REFUTE—THOSE DIAGNOSES. THUS, TO THE EXTENT THE EVIDENCE DEVIATED FROM THE PLEADINGS, THE PLEADINGS WERE AMENDED BY CONSENT PURSUANT TO RULE 55.33(b).

RPM Plumbing v. Jim Plunkett, Inc., 46 S.W.3d 60 (Mo.App., W.D. 2001);

Chapman v. Lavy, 20 S.W.3d 610 (Mo.App., E.D. 2000);

Rudin v. Parkway School District, 30 S.W.3d 838 (Mo.App., E.D. 2000).

III.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT WAS A SEXUALLY VIOLENT PREDATOR BECAUSE THERE WAS SUBSTANTIAL AND COMPETENT EVIDENCE THAT APPELLANT SUFFERED FROM A MENTAL ABNORMALITY THAT MADE HER LIKELY TO ENGAGE IN FURTHER SEXUALLY VIOLENT ACTS OF A PREDATORY NATURE, INCLUDING THE OPINION OF DR. AMY PHENIX, AND SUBSTANTIAL EVIDENCE OF ONGOING AND UNCONTROLLED SEXUAL MISCONDUCT BY APPELLANT WHILE IMPRISONED, WHILE ON BOND, AND WHILE AWAITING TRIAL.

State v. Broseman, 947 S.W.2d 520 (Mo.App., W.D. 1997);

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995);

State v. Dulany, 781 S.W.2d 52 (Mo. banc 1989).

IV.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS BECAUSE THE SEXUALLY VIOLENT PREDATOR LAW DOES NOT VIOLATE APPELLANT'S RIGHT TO EQUAL PROTECTION IN THAT APPELLANT IS NOT SIMILARLY SITUATED TO OTHER CIVIL DETAINEES SINCE THE SEXUAL PREDATOR LAW REQUIRES A SPECIFIC FINDING THAT THE PREDATOR IS SUCH A DANGER THAT HE/SHE MUST BE CONFINED IN A SECURE FACILITY, SEXUAL PREDATORS HAVE A HEIGHTENED PROBABILITY OF DANGEROUSNESS THAT OTHER CIVIL COMMITTEES NEED NOT DEMONSTRATE AND THE STATE HAS A RATIONAL BASIS FOR TREATING SEXUALLY VIOLENT PREDATORS DIFFERENT FROM CIVIL DETAINEES BASED ON THE SUBSTANTIALLY DIFFERENT MENTAL CONDITIONS WHICH ARE THE SUBJECT OF SEXUAL PREDATOR COMMITMENT PROCEEDINGS.

Consolidated School Dist. v. Jackson Co., 936 S.W.2d 102 (Mo. banc 1996);

Linton v. Missouri Veterinary Medical Board, 988 S.W.2d 513 (Mo. banc 1999);

State ex rel. Nixon v. Askren, 27 S.W.3d 834 (Mo.App., W.D. 2000).

ARGUMENTS

I.

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT WAS A SEXUALLY VIOLENT PREDATOR AND APPELLANT HAS NOT OVERCOME THE LEGAL PRESUMPTION THAT JUDGE FLYNN FOLLOWED THE LAW IN FINDING APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR. THERE WAS AMPLE EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT HAS SERIOUS DIFFICULTY CONTROLLING HER SEXUALLY VIOLENT BEHAVIOR, INCLUDING TESTIMONY FROM AN EXPERT WITNESS THAT APPELLANT HAS “ABSOLUTELY NO VOLITIONAL CONTROL OVER HER BEHAVIOR,” AND APPELLANT’S FAILURE TO ASK THE COURT FOR SPECIFIC FINDINGS ON THIS ISSUE FORECLOSES HER FROM CHALLENGING THE PROPRIETY OF THE COURT’S VERDICT.

The Appellant argues that this Court should assume that the trial judge did not follow the law and failed to consider the issue of whether Appellant had, as a result of her mental abnormality, serious difficulty in controlling her behavior. The law, however, presumes that in a court-tried case the trial judge did follow the law. And given the substantial evidence that Appellant had no control over her mental abnormality, the trial court’s conclusion was supported by the evidence. In this case, the issue of control, and Appellant’s lack thereof, was litigated extensively by the

parties and it is contrary to well-established law to “assume” the trial court failed to consider the issue of control.

A. SPECIFIC FACTUAL FINDINGS ON A SPECIFIC ISSUE ARE NOT REQUIRED BY MISSOURI LAW.

In this case, Appellant waived her right to a jury and proceeded to trial before the trial judge (Tr. 7). At no time did Appellant request the trial court to make specific findings on any issue.¹ Rule 73.01 requires a party to request “findings on the controverted fact issues specified by the party.” In the absence of such a request: “All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.” *Id.*

The law is well established that “[t]rial judges are presumed to know the law and to apply it in making their decisions.” *Perry v. State*, 11 S.W.3d 854, 861 (Mo.App., S.D.

¹Of some significance is the fact that Appellant’s trial counsel, Ms. Ruess, was also trial counsel for the appellant in *In re Edwards*, 74 S.W.3d 789 (Mo. banc 2002), which was on appeal at the time of Appellant’s trial. Thus, Appellant cannot assert she was unmindful of the issue of control.

2000); *State v. McDonald*, 10 S.W.3d 561, 564 (Mo.App., S.D. 1999); *State v. Feltrop*, 803 S.W.2d 1, (Mo. banc 1991), quoting *Walton v. Arizona*, 110 S.Ct. 3047 (1990).

In *Greeno v. State*, 59 S.W.3d 500 (Mo. banc 2001), this Court reviewed a trial court's determination that Mr. Greeno suffered from a mental disease making him a danger to society. In reviewing that decision, the Court held, consistent with Rule 73.01, that in "the absence of such a request, all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id.* at 504.

Thus, Appellant's premise that this Court should presume that Judge Flynn did not follow the law is in direct conflict with well-established Missouri law. On appeal, "the trial court is presumed to have made findings in accordance with the decree entered." *State v. Kampschroeder*, 985 S.W.2d 396, 398 (Mo.App., E.D. 1999).

B. UNDER THE FACTS AND LAW OF THIS CASE, THERE IS NO BASIS TO DISREGARD THE LEGAL PRESUMPTION THAT JUDGE FLYNN FOLLOWED THE LAW.

The Appellant's argument also fails to recognize that this Court made it clear that its decision in *In re Thomas*, 745 S.W.3d 789 (Mo. banc 2002), was not "new law." The decision by this Court in *Thomas* was that there was instructional error because "the instructions given in these two cases did not define mental abnormality in this essential way." *Id.* at 792. This Court expressly indicated that the United States

Supreme Court’s prior decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), required proof that “the mental abnormality causes the individual ‘serious difficulty in controlling his behavior.’” 74 S.W.3d at 791. The decision simply delineated the proper language required in the verdict directing instruction given to the jury. *Id.* at 792, based in part, on *Hendricks*, which was decided prior to this trial. While *Thomas* did require an additional element be included in the verdict directing instructions, it did not set forth “new law” but merely clarified the law as first expressed by the United States Supreme Court in *Hendricks*. *Thomas* required an additional paragraph in the verdict director to avoid any uncertainty by the jury as to what the law meant. In this case, Missouri not only presumes that Judge Flynn knew what the law was, but also what it meant.

C. THERE WAS OVERWHELMING EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT HAD SERIOUS DIFFICULTY IN CONTROLLING HER BEHAVIOR.

Thus, the only real issue is whether there was sufficient evidence to support the trial court’s verdict.

On appeal, “review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found Appellant [to be a sexually violent predator].” *State v. Crumley*, 971 S.W.2d 368, 372 (Mo.App., S.D. 1998); *State v. Niederstadt*, 66 S.W.3d 12, 14 (Mo. banc 2002), *Russ v. Russ*, 39 S.W.3d 895, 896-7

(Mo.App., E.D. 2001). “The Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences.” *Niederstadt*, 66 S.W.3d at 14. There was substantial evidence to support a finding that Appellant had serious difficulty in controlling her behavior.

In this case, the issue of Appellant’s serious difficulty in controlling her behavior was addressed directly, and substantial evidence was introduced to show that Appellant had serious difficulty controlling her behavior as first required by the United States Supreme Court in 1997 in *Hendricks, supra*.

Dr. Richard Scott, Appellant’s own expert, acknowledged that Appellant was “impulsive” (Tr. 516). He also believed she needed continued treatment (Tr. 500).

Dr. Amy Phenix was more direct and testified that Appellant had “absolutely no volitional control over her behavior which is against the law . . .” (Tr. 360). She also testified that she observed “a crumbling of any kind of volitional control that would tell her this is wrong, stop, don’t do that. In that way she ends up committing sexually violent predator offenses.” (Tr. 360). By definition, volitional capacity refers to when a suspect “because of mental disease [is unable] to resist the impulse to commit the criminal act.” *State v. Jackson*, 142 S.W.2d 45, 49 (Mo. 1940).

To illustrate that this issue was addressed, Appellant’s expert, Dr. Maskel, felt compelled to testify that she was “completely in disagreement with Dr. Phenix that this individual had no volitional control as a result of this disorder.” (Tr. 410). Of course, because her opinion was contrary to the verdict, it must be disregarded on appeal. *State*

v. Niederstadt, 66 S.W.3d at 14; *Chapman v. Lavy*, 20 S.W.3d 610, 612 (Mo.App., E.D. 2000). Nevertheless, this makes it clear that the issue of control was a major issue disputed by the parties.

As will be noted in more detail in Point III, *supra*, there was substantial evidence at trial that Appellant could not control her behavior, regardless of how controlled the setting was or the consequences of her behavior. While free on bond awaiting sentencing, Appellant committed crimes of a sexually predatory nature with a new victim (Tr. 124, 143). While in prison, Appellant had 88 conduct violations (Tr. 353). Appellant could not complete sex offender treatment in prison, even though she knew this would extend her incarceration (Tr. 127). And in anticipation of being released, Appellant requested Depo-Provera for birth control (Tr. 444). These are just some of the factors that indicate Appellant has serious difficulty controlling her behavior.

D. THE ISSUE OF APPELLANT'S LACK OF SERIOUS DIFFICULTY IN CONTROLLING HER SEXUALLY VIOLENT BEHAVIOR WAS EXTENSIVELY LITIGATED AND ADDRESSED.

Appellant cites the State's cross-examination of her expert, Dr. Maskel, as evidence that the State was discounting the need to provide evidence of serious difficulty in Appellant controlling her behavior.

**To the contrary, the fact that the State cross-examined Dr. Maskel on this issue,²
and**

²Dr. Maskel testified that “I don’t think that her borderline personality disorder specifically has substantial impact on her volitional control.” (Tr. 412) (Emphasis added). Contrary to Appellant’s argument, “substantial impact” is not the equivalent of “serious difficulty controlling her behavior.” The State was entitled to emphasize to the trial court, through cross-examination, that Dr. Maskel was creating her own legal standard with no basis for that particular standard—other than the fact that Appellant conveniently did not meet this self-created standard (Tr. 426).

The State also cross-examined Dr. Maskel on her incorrect legal assumption that child molestation in the second degree was not a sexually violent offense (Tr. 451-454).

It is entirely appropriate for the State to demonstrate that Dr. Maskel's bias extended to her inaccurate interpretations of the law.

that Dr. Maskel made a point of disagreeing with the State's expert ("I would be completely in disagreement with Dr. Phenix that this individual had no volitional control as a result of this disorder.") (Tr. 410) (Emphasis added), proves very clearly that the issue of control, or lack thereof, was litigated and addressed in this case.

In this case, the trial judge had to decide between two conflicting opinions—Dr. Phenix's testimony that Appellant has "absolutely no volitional control over her behavior" (Tr. 360), or Dr. Maskel's "complete disagreement" with Dr. Phenix on that issue (Tr. 410). The law is quite clear that we presume on appeal that Judge Flynn accepted Dr. Phenix's conclusion. *State v. Anderson*, 79 S.W.3d 420, 433 (Mo. banc 2002). Had he not, Judge Flynn would not have determined that Appellant was a sexually violent predator.

This is also what distinguishes this case from the Southern District's decision in *In re Spencer*, 103 S.W.3d 407 (Mo.App., S.D. 2003), where it remanded a bench trial because the trial court did not make specific findings on the issue of control. First, the Southern District expressly stated that "it did not accept that *Crane* mandated a court to make a separate and specific lack of control determination . . ." *Id.* at 417. Instead, the Court simply remanded the case because "we will not penalize the State for any failure to offer evidence showing that Appellant has serious difficulty in controlling his sexually violent behavior." *Id.* at 416. Thus, in *Spencer*, one could not abide by the legal presumption that the trial court followed the law—because there was no evidence

presented on the issue of serious difficulty with control. Even upon remand, the Southern District did not mandate the trial court to make a specific finding on the issue of control, but merely “encouraged” the trial court to do so. *Id.* at 417.

Thus, the *Spencer* case in no way supports the Appellant’s argument. *Spencer* unequivocally states that a finding on the issue of control is not necessary in a court-tried case, and simply supports the legal and rational presumption that when an issue is litigated and contested by the parties, a verdict in favor of one party means the court found that party’s evidence credible. In *Spencer*, there simply was no evidence presented at trial on the control issue to support any presumption.

The evidence, and well-established and fundamental caselaw, does not allow Appellant to argue for a remand simply to obtain a finding on an issue she never asked the trial court to make. We presume the trial court followed the law and control was a hotly disputed issue; we presume all evidence supporting the verdict; we further assume the trial court rejected Appellant’s evidence that she did not lack complete control over her volitional capacity.

The State made it clear in its closing argument that it was not ignoring the issue of control. To the contrary, the State repeatedly argued what the evidence and experts established—Appellant lacks any control whatsoever:

*And it goes on. And she knows she’s going to get into trouble for it,
but she can’t help it, she’s got to do it anyway*

* * *

[In prison] you can't engage in sexual activity of a promiscuous nature or of any nature. But she can't help herself. She does it anyway. She continues to do it. She continued it.

(Tr. 526).

* * *

And she dropped out of MOSOP knowing that if she dropped out, she was going to spend five years in prison. But she couldn't help herself. She has no control. She couldn't help herself and so she drops out anyway. Not only is that telling—and it shows that she lacks control.

(Tr. 528).

* * *

We have seven years of clear history showing that's exactly what she has done. And in the Department of Corrections, of all places, she can't abide by the rules, one of the places where it ought to be easiest to follow the rules, because the rules are so clear and the consequences are so clear. She couldn't control herself.

(Tr. 529-530).

The issue of control, or lack thereof, was clearly before the trial court. Because there was ample evidence to support the trial court's decision to confine the Appellant as a sexually violent predator, the decision must be affirmed.

II.

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT WAS A SEXUALLY VIOLENT OFFENDER BECAUSE EVIDENCE ESTABLISHED THAT APPELLANT DOES SUFFER FROM THE MENTAL ABNORMALITIES OF ANTI-SOCIAL PERSONALITY DISORDER AND BORDERLINE PERSONALITY DISORDER AND THE APPELLANT WAS NOT PREJUDICED, NOR OBJECTED TO, EVIDENCE OF THESE TWO MENTAL DISORDERS SINCE THOSE WERE THE DIAGNOSES OF APPELLANT'S OWN EXPERT, DR. SCOTT, AND APPELLANT AND HER EXPERTS WERE FULLY PREPARED TO ADDRESS—AND ATTEMPT TO REFUTE—THOSE DIAGNOSES. THUS, TO THE EXTENT THE EVIDENCE DEVIATED FROM THE PLEADINGS, THE PLEADINGS WERE AMENDED BY CONSENT PURSUANT TO RULE 55.33(b).

Appellant makes a perfunctory claim that the State's evidence did not conform to the State's initial pleading. Specifically, Appellant asserts that because the State produced no evidence that the mental abnormality she suffers from included Sexual Sadism and Alcohol Abuse, the trial court's decision must be reversed.

The trial record unequivocally establishes that Appellant knew exactly what the issues at trial would be, including the diagnosis that constituted her mental abnormality. In fact, Appellant had four expert witnesses to rebut the State's evidence. One, Dr. Scott, made the same diagnosis as the State's experts (Tr. 458). Dr. Maskel, the psychiatrist who testified for

Appellant, had reviewed the reports of the State’s experts and was prepared to rebut their opinions (L.F. 152).³

Rule 55.33(b) states: “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” “This means that, when evidence is admitted without objection, we will deem the pleadings to have been amended to conform to the evidence.” *RPM Plumbing v. Jim Plunkett, Inc.*, 46 S.W.3d 60, 63 (Mo.App., W.D. 2001); *Chapman v. Lavy*, 20 S.W.3d 610, 613 (Mo.App., E.D. 2000); *Rudin v. Parkway School District*, 30 S.W.3d 838, 841 (Mo.App., E.D. 2000).

In *In the Matter of Troy Spencer*, 103 S.W.3d 407 (Mo.App., S.D. 2003), the Missouri Court of Appeals, Southern District, concluded that when evidence of a diagnosis not contained

³**Dr. Maskel also seemed to agree that the diagnoses of Borderline Personality Disorder and Anti-Social Personality Disorder had a factual basis. She simply concluded that the additional diagnosis doesn’t “give us any additional information.” (Tr. 417).**

in the original petition is admitted at trial without objection, it is neither erroneous nor prejudicial. *Id.* at 419-20.

Therefore, regardless whether the evidence regarding Appellant's mental abnormality was actually a deviation from the pleadings⁴, this case proceeded to trial with a clear understanding that the State's evidence would be that Appellant suffered from Borderline Personality Disorder and Anti-Social Personality Disorder.

It is very disingenuous, therefore, for Appellant to assert that she is entitled to a new trial based on this claim that the assertion that the diagnoses of Sexual Sadism and Alcohol Abuse were not pursued. Appellant obtained a continuance from an earlier trial setting for the very purpose of deposing the State's expert, Dr. Phenix (L.F. 4). When combined with other

⁴**The statute requires the State to allege, and prove, that Appellant “is a sexually violent predator and stating sufficient facts to support such allegation.” Section 632.486, RSMo. It is by no means obvious that it is required or necessary for the petition to delineate the specific diagnoses constituting Appellant’s “mental abnormality.”**

aspects of the record previously mentioned, there can be no basis for her claim of error in this case.

III.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT WAS A SEXUALLY VIOLENT PREDATOR BECAUSE THERE WAS SUBSTANTIAL AND COMPETENT EVIDENCE THAT APPELLANT SUFFERED FROM A MENTAL ABNORMALITY THAT MADE HER LIKELY TO ENGAGE IN FURTHER SEXUALLY VIOLENT ACTS OF A PREDATORY NATURE, INCLUDING THE OPINION OF DR. AMY PHENIX, AND SUBSTANTIAL EVIDENCE OF ONGOING AND UNCONTROLLED SEXUAL MISCONDUCT BY APPELLANT WHILE IMPRISONED, WHILE ON BOND, AND WHILE AWAITING TRIAL.

Appellant argues that the evidence to support the court's finding that she is a sexually violent predator is insufficient. In actuality, Appellant's argument attempts to persuade this Court to disregard the overwhelming evidence that Appellant continues to suffer from a severe mental abnormality that causes Appellant to act in a sexually violent way.

A. STANDARD OF REVIEW

While a civil case, the State is required to present evidence to support its claim beyond a reasonable doubt. § 632.495, RSMo. In reviewing the sufficiency of the evidence, appellate courts do not weigh the evidence nor determine the reliability or credibility of the witnesses. *State v. Broseman*, 947 S.W.2d 520, 525 (Mo.App., W.D. 1997). Rather, in reviewing the sufficiency of the evidence to support a judgment, a reviewing court views the evidence, together with all reasonable inferences drawn therefrom, in the light most favorable to the State and disregards all evidence and inferences to the contrary. *State v. Silvey*, 894 S.W.2d 662,

673 (Mo. banc 1995). Review is limited to determining whether there is sufficient evidence from which a reasonable juror might have found the Appellant a sexually violent predator beyond a reasonable doubt. *Id.*, *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Circumstantial evidence is afforded the same weight as direct evidence. *Hutchison v. State*, 957 S.W.2d 757, 767 (Mo. banc 1997).

**B. THE EVIDENCE ESTABLISHING THAT APPELLANT
WAS A SEXUALLY VIOLENT OFFENDER LIKELY
TO REOFFEND IS OVERWHELMING.**

In this case, there was substantial and, indeed, overwhelming evidence that Appellant was likely to reoffend: (1) Appellant's Anti-Social Personality Disorder makes her remorseless and unconcerned about the safety of others (Tr. 124, 125); (2) Appellant committed sexually violent acts against a minor while out on bond (Tr. 91); (3) Appellant has refused all offers of treatment (Tr. 123); (4) Appellant uses sex as her way of making friends (Tr. 105); (5) Because of her emotional immaturity, Appellant will seek young minors for "friendship" (Tr. 100, 122, 124); (6) Appellant had 88 conduct violations in prison, many involving sexual misconduct (Tr. 25-26, 55, 65-68, 107, 155, 353); (7) While awaiting the hearing, Appellant engaged in repeated sexual misconduct at the mental health center (Tr. 125, 353); (8) In anticipation of her release, Appellant insisted on receiving birth control (Tr. 156, 444); (9) Appellant's behavior pattern has been consistent and long term since she was nine years old (Tr. 98, 126, 362); and (10) Minors are always the victims of sexual crimes involving female offenders (Tr. 122).

Appellant mockingly claims the State proved only that Appellant is extremely promiscuous (Appellant’s Brief, pp. 66, 72). To the contrary, statistical evidence was presented that female “independent offenders” such as Appellant always offend with minors as their victims (Tr. 122). This is because children are “more easily persuaded or coerced or influenced” and there is less chance that the predator will be rejected (Tr. 122). Appellant will offend in a sexually violent manner if not confined for treatment because “nothing has changed.” (Tr. 123, 362). In fact, the experts noted that Appellant’s behavior has been consistent and unchanged since she was nine years old (Tr. 126, 364).

Appellant remains sexually preoccupied (Tr. 372). The best evidence is that, in anticipation of being released following her trial, Appellant requested and received Depo-Provera shots for birth control (Tr. 156, 444). And while Appellant insisted she was not taking the medication for birth control and that she has no interest in any sexual relationships of any type (Tr. 156-157), Appellant’s own expert testified that Appellant lied when she testified that she took Depo-Provera for stopping menstruation (Tr. 444-45).

Dr. Maskel, Appellant’s psychiatrist, also testified that Appellant continues to suffer from “marked immaturity” (Tr. 415), and will “probably continue to have these problematic kind of relationships.” (Tr. 415). This is not a strong endorsement for the conclusion that Appellant is not likely to reoffend.

**C. CLINICAL JUDGMENTS ARE AN ACCEPTED FORM OF
PSYCHOLOGICAL EVIDENCE REGARDING MENTAL
ABNORMALITIES.**

The Appellant makes an assertion that because there is no statistical or actuarial data establishing the risk of reoffending for female sex offenders, the State’s experts lacked a basis for their opinions. The Eastern District accepted that assertion and then went so far as to conclude that experts in psychology cannot rely on clinical judgments (Opinion, p. 24).

The problem with this argument is two-fold. First, the only evidence to support that conclusion comes from the Appellant’s experts—whose testimony must be disregarded on appeal. *State v. Silvey*, 894 S.W.2d at 673. Thus, the only way to come to such a conclusion would be to ignore or overturn well-established Missouri law requiring acceptance of “all evidence and reasonable inferences that tend to support the trial court’s finding.” *State v. Anderson*, 79 S.W.3d at 420, 433 (Mo. banc 2002).

What is ironic about this argument is that at the trial, the Appellant’s own experts recognized the expertise of the State’s witnesses:

Q: Would you agree that Dr. Amy Phenix is recognized in this field as an expert?

A: Absolutely.

(Tr. 446).⁵

Furthermore, the Appellant’s experts acknowledged that “making a diagnosis doesn’t require a risk or actuarial table” (Tr. 430, 443, 486). Dr. Maskel expressly acknowledged that “in these cases, making the diagnosis doesn’t require a risk or actuarial table” (Tr. 430). Dr. Scott also candidly acknowledged that “if we don’t have [the use of actuarial tables, but] we have

⁵Dr. Maskel was trained by the State’s expert, Dr. Phenix (Tr. 446).

to answer the order of the court, we have to use clinical judgment.” (Tr. 486). Thus, the evidence established in this case, through Appellant’s own experts, was that clinical judgments are a proper basis for an expert opinion even in the absence of actuarial data.

And contrary to the assertion that no one has done any research to identify what factors lead female sexual offenders to reoffend, the State presented the testimony of Dr. Patricia Davin who wrote a book⁶ identifying the characteristics of the “independent female offender” and who identified each of those characteristics in Appellant (Tr. 85-130).

Second, the argument that a trained psychologist cannot make “clinical judgments” absent statistics is contrary to rational thought, and the law. No less authority than the United States Supreme Court acknowledged that a mental health diagnosis “is to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician.” *Addington v. Texas*, 441 U.S. 418, 430, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1979).

Such diagnoses are not limited to the sexually violent predator context. For example, Section 490.065, RSMo, sets forth no requirement that statistics or actuarial tables be used. Thus, in *Fierstein v. DePaul Health Center*, 24 S.W.3d 220, 227 (Mo.App., E.D. 2000), the Court of Appeals permitted expert testimony by a social worker on mental status and causation based, not on any statistics or actuarials, but on a reasonable degree of “clinical certainty.” *Id.* (Emphasis added.) In fact, conclusions about “sanity” by clinicians are universally admitted

⁶Introduced into evidence as Exhibit 24.

based on clinical judgments. *State v. Anderson, supra*. Decisions regarding civil commitment, Section 632.300, RSMo, and even bail, Section 544.457, RSMo, are made without statistical evidence of the type the Appellant wishes to mandate.

In *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983), the United States Supreme Court expressly rejected the Eastern District's conclusion:

The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases . . . [I]f it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists . . . should not be permitted to testify.

463 U.S. at 896-7, 103 S.Ct. at 3396. (Emphasis added.) "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean it cannot be made. Indeed, prediction of future criminal conduct is an essential element of the decisions rendered throughout our criminal justice system." *Id.*

There is no doubt that Appellant's status as a female sexual violent predator is rare. This is, to a large extent, because so few women suffer from Anti-Social Personality Disorder (Tr. 220, 225). The fact that female sexual predators are unusual does not equate with the

conclusion they are non-existent. The fact that male pedophiles have a recidivism rate of “only” 12.6 percent does not mean that pedophiles do not reoffend.⁷

Appellant attacks the opinion of Dr. Amy Phenix, stating that there was no evidence to support her conclusion that Appellant’s acts of sodomy against the eleven- and thirteen-year-old boys were predatory. Dr. Phenix testified that those crimes were “sexually motivated” and “involved extreme behavioral impulsivity which is typical of individuals who have anti-social personality disorder.” (Tr. 352). And, in describing the underlying crime, Dr. Phenix testified:

This is, when I look at the description of the actual sexual activity in this incident, what I can see, from what the boys had reported to the police, and that was that it wasn’t kind of a quick couple of minutes of oral copulation, which Ms. Coffel has reported, but in fact, there was a most erotic component to the sexual behavior. She earlier in the evening had apparently taken a bath. They

⁷Appellant’s experts asserted that the recidivism rate for female sex offenders has a low “base rate” (Tr. 422), yet Dr. Scott testified the recidivism rate for pedophiles is “only” 12.6 percent (Tr. 507). The base rate is only used when you know nothing else about the offender (Tr. 502-03).

were able to view her with no clothes on when she was bathing, that she then suggested the game, that she suggested the sexual activity didn't just kind of fall into it, and that there was more sexual activity than just oral copulation. In fact, she was—she had the—well, she had sexual activity with the youngest child first and then had that boy lay on top of her.

(Tr. 367).

In fact, Exhibit number 2, the police report reviewed by all of the experts, contains a fairly graphic and lurid description of the acts of Appellant that are clearly predatory.⁸ The boys indicated that Appellant (called “Angel” by the boys) initiated the oral sex and “enticed” them by bathing in front of them (Exhibit 2). Additionally, of no small consequence is the fact that as part of her review of this case, Dr. Phenix interviewed one of these young boys (Tr. 380). A basis for her opinion was established.

An argument very similar to that made by Appellant was recently rejected by the Washington Supreme Court in *In re the Detention of Thorell*, 72 P.3d 708 (Wash. 2003):

The essence of [appellant's] argument was that the State's expert testimony on dangerousness, which was based on clinical assessment, should have been excluded due to the superiority of actuarial assessment. We disagreed and rejected [appellant's] arguments

⁸**This exhibit has been submitted to the Court through a stipulation by both parties.**

72 P.3d at 725. “[E]xpert predictions of future violence [are] ‘central to the ultimate question.’” 72 P.3d at 726.

The evidence presented by the State was both admissible and sufficient to prove that Appellant was a sexually violent predator.

**D. CRIMES OF SEXUAL VIOLENCE DO NOT REQUIRE
PHYSICAL INJURY.**

A substantial shortcoming in the testimony of Appellant’s experts was their failure to understand that the sexually violent predator statute does not require the violator to be literally “violent.” Crimes against children are, by statutory definition, sexually violent crimes (Tr. 519-20). It is abundantly clear that a major shortcoming in the value of Appellant’s experts’ testimony was their failure to recognize the State’s legitimate right to protect young, adolescent children from sexual predators regardless of the willingness of the victims to engage in this conduct.

Appellant seems to be implying, without explicitly stating, that she is not a sexually violent predator because she was not “violent.” In fact, she seems to be reinforcing the stereotype that these victims are not truly victims, but “got lucky” and suffered no “harm.” Appellant’s experts testified that Appellant had sex with these boys to feel affection and warmth (Tr. 499) and not solely for her own sexual gratification (Tr. 122). It was established that during her deposition, Appellant acknowledged that prior to engaging in sex with the two young boys, Appellant had not, in fact, had any interaction with the boys (Tr. 519-20). They were simply strangers whom Appellant aggressively pursued and enticed into sexually

predatory acts. Appellant's experts were simply unwilling to recognize or acknowledge the predatory nature of Appellant's crimes. Dr. Scott acknowledged that this version of events was different from what Appellant told him and might make her actions more predatory (Tr. 520).

The fact that Appellant did not commit acts of physical violence does not mean these acts were not ones the State deems sexually violent. To the contrary, the State has evidenced a compelling interest in preventing Appellant from committing sex acts with 11-, 13-, and 15-year-old boys regardless of what Appellant's intentions may be. Section 632.480, RSMo, does not require proof of vile motive.

Appellant also argues that this was an isolated incident and there was no evidence that she engaged in any other predatory sex acts. To the contrary, while awaiting sentencing for the sodomy cases, the Appellant engaged in a variety of sex acts with fifteen-year-old Timothy Ahrens (Tr. 124, 143, 367, 368) (whom Dr. Phenix also interviewed, Tr. 368). This conduct is a sexually violent offense under § 632.480(4), RSMo. Child molestation in the second degree, § 566.068, RSMo, occurred when Appellant subjected this youth "who is less than seventeen years of age to sexual contact."

The evidence established that female sexual predators don't use violence and don't engage in the predatory sex acts for their own gratification (Tr. 87, 117). They use persuasion and the victims of their persuasion are always children (Tr. 122, 223). Appellant, by her own admission, thinks that sex is the way to make friends (Tr. 105, 158, 171, 495). Dr. Scott admitted that Appellant still uses sex as a means of finding acceptance and affection (Tr. 494-95). Once that mind set is understood, the predatory nature of Appellant's conduct becomes

clear. Appellant's "whole way of interacting with people almost completely is—much of it is sexual." (Tr. 360).

The State presented overwhelming evidence that Appellant will reoffend in a sexually violent manner if not confined for treatment. Her only way of interacting with people is to have sex with them (Tr. 105, 360). Because of her own immaturity, she is drawn towards interacting (*i.e.*, sex) with children (Tr. 122, 124, 365). Appellants mental abnormality remains untreated and unchanged (Tr. 126-127, 360, 362). In preparation for her expected release, Appellant demanded birth control (Tr. 156, 444). There is no reasonable doubt that Appellant remains a sexually violent predator.

IV.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT’S MOTION TO DISMISS BECAUSE THE SEXUALLY VIOLENT PREDATOR LAW DOES NOT VIOLATE APPELLANT’S RIGHT TO EQUAL PROTECTION IN THAT APPELLANT IS NOT SIMILARLY SITUATED TO OTHER CIVIL DETAINEES SINCE THE SEXUAL PREDATOR LAW REQUIRES A SPECIFIC FINDING THAT THE PREDATOR IS SUCH A DANGER THAT HE/SHE MUST BE CONFINED IN A SECURE FACILITY, SEXUAL PREDATORS HAVE A HEIGHTENED PROBABILITY OF DANGEROUSNESS THAT OTHER CIVIL COMMITTEES NEED NOT DEMONSTRATE AND THE STATE HAS A RATIONAL BASIS FOR TREATING SEXUALLY VIOLENT PREDATORS DIFFERENT FROM CIVIL DETAINEES BASED ON THE SUBSTANTIALLY DIFFERENT MENTAL CONDITIONS WHICH ARE THE SUBJECT OF SEXUAL PREDATOR COMMITMENT PROCEEDINGS.

Appellant’s final argument is that the sexual predator law is unconstitutional because it violates her right to equal protection under the law. This argument suggests that she should be placed in the “least restrictive environment” as are “other” mentally ill detainees.

Appellant, and other sexually violent predators, are not, however, “similarly situated” with other civil detainees. First, unlike the civil detention statute, the sexual predator law requires a specific finding that Appellant’s dangerous predatory behavior requires her to be placed in a secure facility. Second, unlike civil detainees, violent sexual predators are those who have already established a heightened probability of dangerousness by having already been

convicted of criminally violent acts. And, third, unlike civil detainees, sexually violent predators must be proven so beyond a reasonable doubt and by a unanimous verdict of a jury.

A. STANDARD OF REVIEW

One attacking the constitutionality of a statute “bears an extremely heavy burden.” *Consolidated School Dist. v. Jackson Co.*, 936 S.W.2d 102 (Mo. banc 1996). In this case, Appellant has the burden to demonstrate that “this legislatively created classification does not have a rational basis.” *Linton v. Missouri Veterinary Medical Board*, 988 S.W.2d 513, 515 (Mo. banc 1999). Appellant must also show that she is treated different from those similarly situated. *McKinley Iron, Inc. v. Director of Revenue*, 888 S.W.2d 705, 709 (Mo. banc 1994); *Bd. of Healing Arts v. Boston*, 72 S.W.3d 260, 264 (Mo.App., W.D. 2002). She cannot.

B. SEXUAL PREDATORS ARE NOT A SUSPECT CLASS.

In *State ex rel. Nixon v. Askren*, 27 S.W.3d 834 (Mo.App., W.D. 2000), the Western District Court established that the sexual predator law does not violate equal protection. “Sexually violent predators do not compose a suspect class.” *Id.* at 842. In *Askren*, the sexually violent predator asserted that he was denied equal protection because the sexual predator law gave the State the right to a jury trial—unlike other civil commitment proceedings where the right belonged only to the respondent. *Id.* at 841. Thus, the appellant in *Askren*, like Appellant in this case, used the same group (other civil detainees) as the alleged “similarly situated” group. The Court rejected this claim.

In fact, the Court expressly noted that: “The premise of the SVPA is that sexually violent predators suffer from a mental condition that differs substantially from the mental conditions which are the subjects of the usual civil commitment proceedings.” *Id.* at 842.

The Western District also noted that no “constitutional right is violated when persons who suffer from severe disorders . . . are treated differently from persons with less serious conditions.” *Id.*, quoting *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991).

The sexual predator law does not merely require a finding that Appellant has a mental abnormality that makes her a danger to herself or others, as does the civil commitment statute. § 632.350.3, RSMo.⁹ Under the sexual predator law, the State must prove that Appellant “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 . . .” § 632.480(5), RSMo (Emphasis added).

Thus, as the Western District noted in *Askren*, the very level of dangerousness is significantly different. By definition, Appellant is a sexual predator because of her likelihood of reoffending if not placed in a secure facility. The common civil detainee is not committed based on such a showing and is not, therefore, similarly situated.

⁹**That is, in fact, the only issue a jury must decide under the civil commitment statute.**

Additionally, unlike civil detainees, sexual predators have already established a heightened danger to the public based on their previous conviction for a “sexually violent offense.” § 632.480(4), RSMo.

In *State ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), the United States Supreme Court upheld the confinement of Mr. Pearson under Minnesota’s “psychopathic personality” law and rejected Pearson’s equal protection claim, stating:

The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question.

The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may 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 overthrown because there are other instances to which it might have been applied.”

***Id.* at 274-75, 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.

Appellant’s reliance on *Baxtrom v. Herald*, 383 U.S. 107, 86 S.Ct. 760 (1966) does not offer any support to her claim. *Baxtrom* simply stated that the equal protection clause was violated in New York because the statute did not provide 1) for a jury and 2) for a judicial determination of dangerousness. 86 S.Ct. at 762. The New York law allowed for the continued confinement in a Corrections mental hospital at the completion of incarceration based on a mere finding that the detainee “may require care and treatment in an institution for the mentally ill.” 86 S.Ct. at 763. All other individuals going to a Corrections mental hospital were confined only upon a showing of being a danger. Thus, equal protection was violated because Pearson was confined based on a lesser standard with fewer procedural safeguards.

Appellant, on the other hand, was entitled to greater procedural safeguards based on the allegation that she is a sexually violent predator. The burden of proof for a civil detainee is “by clear and convincing evidence.” § 632.350.2, RSMo. In Appellant’s trial, the State had to prove its case beyond a reasonable doubt. § 632.495, RSMo. A jury verdict in a sexually violent

predator case must be unanimous, § 632.495, RSMo; a jury verdict in a civil commitment case requires only three-fourths of the jury. Article I, Section 22(a) Missouri Constitution. Appellant does not, of course, challenge the fact that she receives greater procedural safeguards than civil detainees.

Appellant is not similarly situated to other civil detainees and the State has “a rational basis to justify the difference in treatment in question.” *Askren*, 27 S.W.3d at 842. Sexual predators are not merely individuals who suffer a mental abnormality. They also have a history of sexually violent behavior, they have serious difficulty in controlling their sexually violent behavior, and they are likely to reoffend in a sexually violent manner “if not confined in a secure facility.”

Identical challenges to sexual predator laws have been uniformly rejected by every court that addressed the issue. *In re the Detention of Thorell*, 72 P.3d 708, 722 (Wash. 2003) (“providing treatment specific to SVPs and protecting society from the heightened risk of sexual violence they present are legitimate state objectives.”); *Martin v. Reinstein*, 987 P.2d 779, 797 (Ariz. App., 1999) (Differences “bear a rational relationship to the differences between the classes.”); *Westerheide v. Florida*, 831 So.2d 93, 112 (Fla. 2002) (“We conclude that the specialized treatment needs of sexually violent predators and the high risk that they pose to the public if not committed for long-term control, care and treatment justify the Legislatures’ separate classification and treatment scheme.”).

The sexual predator statute does not violate the equal protection provisions of the United States or Missouri Constitutions.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and (c) of this Court and contains 9,201 words, excluding the cover, and this certification, as determined by WordPerfect 9 software; and
2. That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this 22nd day of September, 2003, to:

Emmett D. Queener
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Columbia, MO 65201-3722

THEODORE A. BRUCE

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