

SC88799

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IN THE  
SUPREME COURT OF MISSOURI

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IN THE MATTER OF THE CARE AND TREATMENT OF  
RICHARD TYSON,

Appellant,

v.

STATE OF MISSOURI

Respondent.

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Appeal from the Circuit Court of Jackson County, Missouri  
The Honorable Kathleen A. Forsyth, Judge

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Substitute Brief of Respondent, the State of Missouri

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## Statement of Facts

In 1996, Richard Tyson molested two sisters, ages seven and ten years old. He was charged with two counts of first degree child molestation and one count of sodomy. He pled guilty to one count of first degree child molestation in 1998 and served a seven-year prison term. On August 31, 2005, the State filed a petition to commit Mr. Tyson as a sexually violent predator under MO. REV. STAT. § 632.480, *et seq.*<sup>1</sup> The case was tried to a jury in Jackson County beginning on December 7, 2005, the Honorable Kathleen Forsyth presiding, and the jury unanimously decided he is a sexually violent predator.

### I. Background: Mr. Tyson's history up to 1996

Mr. Tyson was born in 1940. L.F. 216. As a young adult, he lived in California and was arrested numerous times in the 1960s for exhibitionist behavior. Tr. 413-414. In 1962, he exposed himself to several girls ages one to 14. Tr. 636. He reported at that time that he had a live-in sexual relationship with a 13-year old girl and a 15-year old girl, and had fathered a child by one of them. Tr. 749. In 1963, he was evaluated by the California mental health system as a probable sexual psychopath. Tr. 413. In 1964, Mr. Tyson was

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

arrested for exposing himself to three girls, the oldest of whom was 12 years old. Tr. 429.

As a result of his many arrests, Mr. Tyson was again evaluated by several mental health professionals in the California system. One examiner reported that Mr. Tyson had poor behavioral control and poor insight into his sexual deviancy. Tr. 446. Another called him a “menace to the health and safety of minor girls.” Tr. 673. A psychiatrist said, “In my opinion, this inmate is a menace to the public, particularly pre-teen or teenage girls, and though no assault has been evident to date I would see the possibility of serious aggression as being considerable.” Tr. 689.

Mr. Tyson eventually left California. He was arrested in New Jersey in 1973 for exposing himself to several girls ranging in age from 13 to 15. Tr. 432.

By 1981, he was in Kansas City. He asked an eleven-year-old girl to buy him cigarettes, and when she returned to his house with them, he invited her in, stated that he knew she was a good girl and wouldn't tell, and exposed himself to her. Tr. 622.

In 1985, he was arrested after being discovered naked near a high school in Kansas City, waiting for students to be dismissed. A person fitting his description had, earlier in the day, been seen naked near an elementary school in the same neighborhood. Tr. 698-99.

In 1987, he was arrested after exposing himself to a group of girls ranging in age from 11 to 17, fondling his penis, exposing his buttocks, and making gestures for them to come to him. Tr. 627. The victims reported this happened every morning on their way to school. Tr. 626.

In 1990, Mr. Tyson was arrested in Texas, on charges of attempted sexual assault, for exposing himself to a young woman in a car and attempting to open her car door. Tr. 653-657.

Many of Mr. Tyson's arrests for indecent exposure and indecent conduct occurred while Mr. Tyson was on probation for a previous similar offense; at least two occurred while he was out on parole. Tr. 444.

Mr. Tyson also had numerous arrests for non-sexual offenses, including gambling, burglary, possession of a dangerous weapon, assault, and various drug charges. Tr. 463-464.

## **II. 1996 sexually violent offenses**

In 1996, Mr. Tyson was on familiar terms with a family with two young girls, ages seven and ten. One Easter Sunday he was with the family. The older girl felt ill and went to bed after church. Tr. 661. Mr. Tyson went to her bedroom and lifted her nightgown. In the words of the victim, he "acted like" he was feeling her to see if she had a fever and rubbed her buttocks. Tr. 669. The girl later told her mother, who confronted Mr. Tyson. He apologized and said it wouldn't happen again. Tr. 445.

Three weeks later, Mr. Tyson took the girls to McDonald's. The older girl went in to the restaurant and he let the seven-year-old sit on his lap and "drive" his car in the parking lot. Tr. 667. He then lifted her off his lap, pulled her underpants down, felt her vagina, and digitally penetrated her rectum. Tr. 437.

Mr. Tyson was arrested and charged with three crimes: two counts of first degree child molestation and one of statutory sodomy. Tr. 367. Under a plea agreement, he later pled guilty to one count of first degree child molestation and the other two charges were dismissed. Tr. 614. He was sentenced to seven years in prison. L.F. 002.

In 2000, while in prison, Mr. Tyson began the Missouri Sex Offender Treatment Program (MOSOP), but was discharged for failure to complete his assignments. Tr. 465. He was offered MOSOP again in 2001, but declined to participate. Tr. 465-466. Mr. Tyson has never completed MOSOP or any other sex offender treatment program. Tr. 462.

### **III. Civil commitment proceeding under the sexually violent predator law**

#### **A. Probable cause hearing**

Mr. Tyson was scheduled for release from prison in September 2004; in August 2004, the State filed a petition to involuntarily commit him to the Department of Mental Health (DMH) for secure confinement as a sexually violent predator. L.F. 1-4. The State's petition incorporated by reference the

“End of Confinement Report” prepared by the clinical director of sex offender services for the Department of Corrections (DOC), which indicated that Mr. Tyson suffered from pedophilia, exhibitionism, and antisocial personality disorder. L.F. 5-7.

The probate court held a hearing on November 8, 2004, to determine whether probable cause existed to believe that Mr. Tyson might be a sexually violent predator. Tr. 1. Dr. Suire, the DOC clinical director, was the State’s expert witness at the hearing. Tr. 12. Dr. Suire testified that he believed Mr. Tyson suffered from the antisocial personality disorder and pedophilia. Tr. 42-44. Relying on information available at the time, Dr. Suire based his diagnosis of pedophilia on the 1996 offenses with the seven and ten year old girls, and the 1973 offense in which Mr. Tyson exposed himself to a group of girls, two of whom were 13 years old. Tr. 55-56. He noted that in many instances, he did not know the age of the victims comprising Mr. Tyson’s lengthy sexually motivated criminal history. Tr. 35.<sup>2</sup>

The probate court found probable cause to believe that Mr. Tyson suffered from antisocial personality disorder with psychopathic traits, that “such disorder

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<sup>2</sup> Many records concerning those facts and others pertaining to Mr. Tyson’s criminal history were not obtained until after the probable cause hearing. Tr. 632, L.F. 78-81.

is a mental abnormality, as the term is used in [MO. REV. STAT.] § 632.480(2) and that he is a sexually violent predator within the meaning [of] [MO. REV. STAT.] § 632.480(5).” L.F. 69. The court also found that the State “failed to prove by clear and convincing evidence that the respondent is a pedophile, not because it failed to show that the attraction lasted 6 months.” L.F. 68.

After making its findings, the court ordered that Mr. Tyson be evaluated and that the evaluator be provided certain kinds of information – including information that the State had not yet acquired at the time of the probable cause hearing. L.F. 70.

#### **B. Pre-trial**

After the probable cause hearing, the probate court received records from the California Department of Mental Health, L.F. 77, and released those records to the State pursuant to § 632.510, L.F. 80-81. More records from the Kansas City Police Department were also received after the probable cause hearing. Tr. 632. A number of them contained information relevant to the issue of whether Mr. Tyson suffered from pedophilia. L.F. 202-207.

The information included police reports pertaining to L.L., an 11-year-old girl whom Mr. Tyson knew and to whom he exposed his genitals in 1981. L.F. 209, Tr. 620-623. Mr. Tyson invited her “into his home and stated that he knows she is a good girl and won’t tell and that he then opened his bathrobe and exposed [his genitals] to her. [She] then ran out of the house.” L.F. 209.

The information also included Atascadero State Hospital records that included the description of an incident in which Mr. Tyson exposed himself to “three girls, the oldest being twelve years old.” L.F. 206; Tr. 642. And the hospital records disclosed a 1965 diagnosis of “sociopathic personality disturbance with sexual deviation (indecent exposure to teenage and pre-teenage girls) with marked schizoid features.” L.F. 207.

Dr. Bradley Grinage was retained to evaluate Mr. Tyson and was given the information obtained after the probable cause determination. Dr. Grinage’s report, which was provided to Mr. Tyson’s counsel, included a diagnosis of pedophilia. L.F. 126, 216, 225; Tr. 534. Mr. Tyson’s counsel deposed Dr. Grinage. L.F. 476.

Prior to trial, Mr. Tyson filed a “Motion to Prohibit Reliance Upon Pedophilia as Respondent’s Alleged Mental Abnormality,” L.F. 124, which the probate court denied. L.F. 124. The court explained:

In looking at the statute it provides for a probable cause hearing, and the object of that hearing is to determine whether probable cause exists to believe that the person is a sexually violent predator. The court found that Mr. Tyson was, based on evidence of antisocial personality disorder. I don’t see anything that would limit the evidence that comes in at trial to

that finding and ruled that the State would not be limited to evidence available at the probable cause hearing. That is my finding ....

Tr. 95.

### **C. The trial**

Mr. Tyson's case proceeded to trial. Dr. Grinage testified for the State. Dr. Grinage is board-certified in adult psychiatry and in forensic psychiatry. Tr. 395. He has performed 14 sexually violent predator evaluations, 13 for the state of Missouri. Tr. 479. Of the 13 people whom he has evaluated in Missouri, he found fewer than half, that is, six, to qualify as sexually violent predators. Tr. 537.

Dr. Grinage reviewed about "three feet" of records regarding Mr. Tyson, of a type he considered routine and reasonably reliable. Tr. 407-409. He also interviewed Mr. Tyson for two-and-a-half hours. Tr. 407. He diagnosed Mr. Tyson with exhibitionism, pedophilia, and personality disorder not otherwise specified. Tr. 421-422. He testified that Mr. Tyson's pattern was to victimize teenage and pre-teenage girls. Tr. 438-439.

Dr. Grinage defined pedophilia according to the Diagnostic and Statistical Manual IV (DSM-IV). It is characterized by recurring, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with prepubescent children that cause marked distress or interpersonal difficulties, on the part of a

person at least 16 years old and at least five years older than the child who is the object of those fantasies, urges or behaviors. The duration of the fantasies, urges, or behaviors must be at least six months. Tr. 425-426. Dr. Grinage also testified that pedophilia was a congenital or acquired mental condition, Tr. 441, and that it affected Mr. Tyson's volitional capacity and predisposed him to commit sexually violent offenses to such degree that he has serious difficulty controlling his behavior. Tr. 442-449. His opinion was, therefore, "with a reasonable degree of medical and psychological certainty," that Mr. Tyson had a mental abnormality. Tr. 441.

Dr. Grinage also diagnosed Mr. Tyson with personality disorder not otherwise specified, or PDNOS. Tr. 452. This disorder is similar to antisocial personality disorder, except that one of the criteria for the latter diagnosis is that it has to be present before age 15. Tr. 449. A personality disorder is a pattern of behaviors and experiences that is manifested in the ability to relate to people. *Id.* It affects a person's thinking and moods and impulse control. Tr. 450. The diagnostic criteria for PDNOS include the presence of three or more of the following factors:

- failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;

- deceitfulness, as indicated by repeated lying, use of aliases or conning of others for personal profit or pleasure; impulsivity or failing to plan ahead;
- aggressiveness as indicated by repeated physical fights or assaults; reckless disregard for the safety of others;
- consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior; and
- lack of remorse, as indicated by indifference to or rationalizing having hurt, mistreated, or stolen from another.

*Id.*

Dr. Grinage singled out Mr. Tyson's numerous other arrests and convictions for non-sexual offenses, as well as his lying and lack of remorse, as particularly influential on the diagnosis of PDNOS. Tr. 453. Dr. Grinage opined that Mr. Tyson's PDNOS exacerbated his pedophilia, and predisposed him to sexually violent crimes. Tr. 453-454.

Dr. Grinage noted that Mr. Tyson's criminal history had progressed from exhibitionism only, to public masturbation, to exhibitionism plus interaction with the victim, to touching. Tr. 455. He also noted that previous psychiatrists had expressed concern that Mr. Tyson's sexual conduct had become increasingly blatant. Tr. 455-456.

Dr. Grinage testified that Mr. Tyson scored an 8 on the Static-99, Tr. 459, and a 17 on the MnSOST-R, Tr. 460. Both scores fall within the high category on those actuarial instruments. Tr. 469-471.

Mr. Tyson had other risk factors that factored into the expert's opinion. His failure to complete sex offender treatment was especially compelling. Tr. 462. Mr. Tyson's history of non-sexual criminal behavior, Tr. 463-464; his own opinion, as expressed to Dr. Grinage, that he didn't think he had a problem, Tr. 466; and his history of drug and alcohol abuse, Tr. 468, were also factors that exacerbated his risk to reoffend.

Finally, Dr. Grinage also cited Mr. Tyson's poor impulse control, poor judgment, lack of insight, and conviction for child molestation to support his opinion that Mr. Tyson suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. Tr. 469-470.

Two psychiatrists testified on Mr. Tyson's behalf. The first was Dr. Stephen Jackson, the doctor assigned by DMH to evaluate Mr. Tyson after the probable cause hearing. Tr. 548. Dr. Jackson diagnosed Mr. Tyson with exhibitionism and PDNOS, but not pedophilia, because he believed Mr. Tyson's sexual focus is on women from age 18 to early twenties. Tr. 553, 555, and 557-559. He stated that if he were treating Mr. Tyson, he would consider pedophilia a "rule-out" diagnosis – one that should be considered. Tr. 560. Dr. Jackson

considered both the 1990 attempted sexual assault and the 1996 contact offenses as “anomalies.” Tr. 565-566.

On cross-examination, Dr. Jackson admitted that when he wrote his report, dated January 21, 2005, L.F. 71, he did not have records from the California Corrections and Mental Health systems from 1959 through the mid-1960s that document several other incidents in which Mr. Tyson exposed himself to, and had sexual conduct with, young girls. Tr. 632. He also did not have certain records from the Kansas City Police Department. *Id.* Nor did he have the report of the California doctor who wrote that “[Mr. Tyson] is a probable sexual psychopath because he can be a menace to the health and safety of minor girls.” Tr. 673.

Dr. William Logan also testified for Mr. Tyson. He too diagnosed Mr. Tyson with exhibitionism and PDNOS. Tr. 723-724. And he diagnosed Mr. Tyson with a substance abuse disorder. Tr. 725. He agreed that Mr. Tyson had some “pedophilic interest,” Tr. 728, but did not diagnose Mr. Tyson with pedophilia because he believed Mr. Tyson exposed himself more often to post-pubescent than to prepubescent girls. Tr. 729. Dr. Logan admitted that if he knew that Mr. Tyson had exposed himself near an elementary school, that fact would “tip the balance toward pedophilia,” Tr. 735, and that “[i]n this case I think with the diagnosis of pedophilia you would be criticized if you made the diagnosis, you can be criticized if you don’t make the diagnosis. There are

certainly points that lean for and against.” Tr. 732. The doctor agreed there was no question that Mr. Tyson had a sexual attraction to girls “in the 13 to 17 year old age range.” Tr. 751.

After hearing all the evidence, the jury unanimously found that Mr. Tyson is a sexually violent predator. L.F. 285; Tr. 841.

**D. The Western District’s opinion of July 10, 2007**

Mr. Tyson appealed to the Missouri Court of Appeals, Western District, which reversed and remanded for a new trial, based on the argument that Mr. Tyson made in his first point relied on. The Western District concluded that the State was prohibited from relying at trial on the diagnosis of pedophilia for the predicate mental abnormality, because the probate court had earlier found that it had insufficient evidence of pedophilia at the probable cause stage. App. A-12 – A-13. The Western District did not address Mr. Tyson’s second and third points.

The Western District denied rehearing or transfer. This Court granted the State’s application for transfer.

## Argument

### I. Evidence of Mr. Tyson's pedophilia was properly allowed at trial.

#### [Responds to the Appellant's Point Relied On I.]

A sexually violent predator commitment is a special statutory proceeding, with explicit procedures and standards that apply to each phase. When the State files its petition for commitment, the law requires that the State plead that the subject has a mental abnormality, not that the State plead or prove any particular diagnosis. Concomitantly, no statutory mechanism provides for a psychological evaluation by a qualifying mental health professional before or at the probable cause stage. Instead, the law provides for such an evaluation after probable cause, and before trial, and for the subject to have full opportunity for discovery. And at trial, the State is required to prove, among other things, that the subject is currently dangerous.

Mr. Tyson argued on appeal to the Western District that the probate court erred in permitting the State to present evidence of his pedophilia at trial, because earlier, at probable cause, the probate court had found that the evidence of pedophilia was insufficient. Appellant's Brief, pp. 33-43. In essence, he asserts that if the State does not "prove" a particular diagnosis at the probable cause stage – *before* the alleged predator is examined and *before* the State gains access to all the relevant records that it can – then the State cannot use that

diagnosis as a basis for proving that the person presently qualifies as a sexually violent predator.

His argument cannot be reconciled with the purpose of the probable cause hearing, or the plain language of Missouri's sexually violent predator law, and the Western District should have rejected it out of hand.

**A. Standard of review**

Whether a trial court properly allowed an expert opinion into evidence is a ruling that is reviewed for abuse of discretion. *In the Matter of the Care and Treatment of Elliott v. State*, 215 S.W.3d 88, 92-93 (Mo. banc 2007). “A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id.*

Moreover, the wide range of discretion afforded a trial judge with regard to evidentiary rulings permits a judge “the opportunity to reconsider ... prior rulings against the backdrop of the evidence actually adduced and in light of the circumstances that exist when the questioned evidence is actually proffered.” *State v. Mickle*, 164 S.W.3d 33, 54-55 (Mo. App. W.D. 2005).

**B. Commencement of the commitment proceeding and Mr. Tyson's diagnosis of pedophilia**

Sexually violent predator proceedings begin with two steps.<sup>3</sup> First, the Attorney General initiates the proceeding by filing a petition to adjudicate whether a person is a sexually violent predator, per § 632.486. Second, the probate judge determines whether there is a basis to begin such adjudication, per § 632.489, *i.e.*, whether the Attorney General's petition provides probable cause to believe that the person is an SVP. The complication that led to the issue presented here occurred at the probable cause stage, before the next two steps: custody pending evaluation and the psychological evaluation also specified in § 632.489.

At the probable cause stage, the sole question before the probate court is “whether probable cause exists to believe that the person named in the petition is a sexually violent predator,” § 632.489, here, whether the petition and attached affidavits and other materials were sufficient to demonstrate probable cause to believe that Mr. Tyson “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. The probate court found probable

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<sup>3</sup> The prerequisites to the Attorney General's filings, found in §§ 632.483 and 632.486 (Supp. 2005), are not at issue here.

cause to believe that Mr. Tyson was a sexually violent predator, L.F. 69, and thus ordered the next step in the proceeding: that Tyson be evaluated under § 632.489.4.

In that respect, the probate court's action was typical to that point – and in no way problematic. The issue here arises because in addition to finding probable cause, the probate court made specific comments about the basis for that decision. L.F. 68. The probate court pointed out that the record then before it was inadequate to demonstrate pedophilia under a “clear and convincing” standard. *Id.* But that did not prevent the probate court from finding probable cause and ordering that Mr. Tyson be held in custody and evaluated; the court did find probable cause. Nor did it prevent the court from ordering that the evaluator have certain kinds of records – including ones that the State had not acquired at the time of the probable cause hearing; the court so ordered. L.F. 70.

Records obtained after the probable cause hearing included information directly relevant to pedophilia. They included police reports pertaining to L.L., an 11-year-old girl whom Mr. Tyson knew and to whom he exposed his genitals in 1981. L.F. 209; Tr. 620-623. Mr. Tyson invited her “into his home and stated that he knows she is a good girl and won't tell and that he then opened his bathrobe and exposed [his genitals] to her. [She] then ran out of the house.” L.F. 209. The records also included ones from Atascadero State Hospital that

included the description of an incident of Mr. Tyson exposing himself to “three girls, the oldest being twelve years old.” L.F. 206; Tr. 642. The hospital records also disclosed a 1965 diagnosis of “Sociopathic personality disturbance with sexual deviation (indecent exposure to teenage and pre-teenage girls) with marked schizoid features.” L.F. 207.

Dr. Bradley Grinage evaluated Mr. Tyson pursuant to § 632.489 and the probate court’s order. As the court required – and as the statute expressly contemplates – Dr. Grinage was given the records obtained after the probable cause determination. His report included his diagnosis of pedophilia. L.F. 225.

On November 28, 2005, Mr. Tyson filed his “Motion to Prohibit Reliance Upon Pedophilia as Respondent’s Alleged Mental Abnormality.” L.F. 124. The probate court denied Mr. Tyson’s motion. L.F. 124. In denying the motion, the probate court addressed its ruling regarding probable cause:

In looking at the statute it provides for a probable cause hearing, and the object of that hearing is to determine whether probable cause exists to believe that the person is a sexually violent predator. The court found that Mr. Tyson was, based on evidence of antisocial personality disorder. I don’t see anything that would limit the evidence that comes in at trial to that finding and ruled that the State would not be

limited to evidence available at the probable cause hearing. That is my finding ....

Tr. 95.

The case proceeded to trial, where Dr. Grinage was allowed to offer the pedophilia diagnosis, and the jury unanimously found beyond a reasonable doubt that Mr. Tyson is a sexually violent predator. L.F. 285; Tr. 841.

**C. The probable cause stage is simply a gate to further fact finding.**

An involuntary commitment under Missouri's sexually violent predator law is a special statutory proceeding and the mechanisms established therein control. *In the Matter of the Care and Treatment of Salcedo v. State*, 34 S.W.3d 862, 867 (Mo. App. S.D. 2001). The language of § 632.489.2 sets out the significance of the probable cause stage of the proceeding: it is a gate to further fact finding. That stage ends upon a determination of whether there is probable cause to believe a person is an SVP, *i.e.*, upon finding that there is a sufficient basis to hold the person in custody and evaluate the evidence, including evidence yet to be acquired, to determine whether the person qualifies under the law. There is, quite simply, nothing in the sexually violent predator law that can be logically read to suggest that if the Attorney General gets through the probable cause gate with evidence sufficient to show probable cause, and then in the process of evaluation obtains evidence sufficient to prove another mental condition, the Attorney General is barred from presenting that evidence. Nor

can anything in the law be logically read to bar a jury from considering all aspects of the alleged SVP's current condition and how those aspects affect the determination of whether he poses a threat to the public.

Specifically, Missouri's sexually violent predator law requires a probate court to find probable cause that the person named in the petition is a sexually violent predator. § 632.489.1. Thus, the court must find probable cause to believe that, in addition to the requisite sexually violent offense, the person "suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not secured in a secure facility." § 632.480(5). Section 632.489.2 provides that the person shall have an opportunity to appear at a hearing to contest probable cause "within seventy-two hours after a person is taken into custody[.]"

Section § 632.489.4 directs that after probable cause, the full-blown evaluation process shall commence, by requiring that the person be detained in an appropriate secure facility for "evaluation as to whether the person is a sexually violent predator." Section 632.489.4 further provides that the person shall be examined by a DMH psychiatrist or psychologist, and may be examined by a psychologist or psychiatrist of his own choice. It also specifies that family members, associates, victims and witnesses may be interviewed, and that the psychiatrist or psychologist shall have access to "any police reports related to sexual offenses committed by the person being examined." § 632.489.4.

But § 632.489 does not stand alone. “The doctrine of *in pari materia* requires [a court] to interpret and apply statutory provisions with reference to each other in order to determine legislative intent from the entire statutory enactment.” *Phillips v. American Motorist Ins. Co.*, 996 S.W.2d 584, 587-588 (Mo. App. W.D. 1999). In addition to § 632.489, the sexually violent predator scheme elsewhere explicitly contemplates that once probable cause is determined and the parties prepare to proceed to trial, probable cause issues fall away. For example, parties may have factual determinations made by the trier of fact. §§ 632.492 and 632.495 (Supp. 2005). The legislature also broadly established in § 632.510 that “to protect the public,” relevant information and records should be made available to the State for the purpose, among other things, of “determining whether a person is or continues to be a sexually violent predator.”

Reading § 632.489 together with other provisions of the sexually violent predator law demonstrates no restriction of evidence at trial, based on what was available at the probable cause proceedings. To the contrary, the provisions of the law demonstrate that information gathering should proceed, to protect the public and to obtain an accurate, current picture of the person who is the subject of a commitment proceeding. The civil rules of discovery also apply to these, and other, cases in probate. Mo. S. Ct. Rule 41.01(b). Indeed, thorough information-gathering is also in keeping with what this Court has recognized as the State’s

“compelling interest in ensuring that the” trier of fact “makes a reliable determination of whether the person sought to be committed is an SVP.” *In the Matter of the Care and Treatment of Bernat v. State*, 194 S.W.3d 863 (Mo. banc 2006).

Mr. Tyson ignores other canons of construction, *i.e.*, that remedial legislation, such as the sexually violent predator law, must be broadly construed to effect its plain purpose. *Scheble v. Missouri Clean Water Com’n*, 734 S.W.2d 541, 556 (Mo. App. E.D. 1987). He also ignore that a “statute should not be interpreted to produce an absurd result.” *State ex rel. ISC Financial Corp. v. Kinder*, 684 S.W.2d 910, 914 (Mo. App. W.D. 1985). Mr. Tyson’s interpretation is not only impermissibly narrow and in keeping with neither the plain language nor the law’s remedial purpose, it also arbitrary and produces absurd results: Although the trier of fact is charged with determining an alleged predator’s current mental state, he would deprive the trier of information relevant to precisely that issue, if it was developed after probable cause, but before trial. Earlier this year, this Court emphasized that the sexually violent predator law is replete with present-tense references to the person’s mental condition and that the fact-finder must find that the person presently poses a danger to pass constitutional muster. *In the Matter of the Care and Treatment of Murrell*, 215 S.W.3d 96, 104 (Mo. banc 2007).

This Court has examined the scope of a probable cause proceeding in a related SVP context, *i.e.*, when an already committed predator petitions for release under MO. REV. STAT. § 632.498 (Supp. 2005).<sup>4</sup> *In the Matter of the Care and Treatment of Schottel v. State*, 159 S.W.3d 836 (Mo. banc 2005). There, the Court acknowledged that the scope of probable cause is limited.

In *Schottel*, the predator claimed that the probate court erred in making a no-probable cause determination and denying him a full hearing on his petition for release. *Id.* at 842-843. The Court explained that at the initial hearing on a petition for release, the probate judge merely performs the role of a “gatekeeper” who determines whether “probable cause exists to believe” that the predator’s condition has changed; the probate judge does not make a final decision as to whether the predator’s condition has in fact changed. *Id.* at 842 and 845.

In support of probable cause, Mr. Schottel presented the opinions of two experts, who opined that his risk of re-offense was low. *Id.* at 843-844. The State presented two contrary expert opinions. *Id.* This Court held that Mr.

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<sup>4</sup> Section 632.498 provides: “If the court at [the initial] hearing determines that probable cause exists to believe that the person’s mental abnormality has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue.”

Schottel had presented sufficient evidence to establish probable cause and was entitled to a hearing on the merits of his petition:

Clearly, a question of fact was presented by this evidence as to whether Mr. Schottel was still an SVP. At hearing on the merits, a jury or judge may find that the State has proved beyond a reasonable doubt that he is. But, that is not the issue on this appeal. This appeal concerns whether Mr. Schottel has made an initial *probable cause* showing that he is no longer an SVP. While the State's experts thought he was still an SVP, whether or not they, rather than Mr. Schottel's experts, are correct presents a triable issue of fact. Mr. Schottel's showing, therefore, was sufficient to constitute the probable cause necessary to entitle him to a...merits hearing[.]

*Id.* at 843-844 (emphasis in original).

The Court also emphasized the limited scope of the probable cause inquiry: "*If credibility or a weighing of evidence is required*, then a triable issue exists and the court should set the evidentiary hearing[]" on the merits of the petition. *Id.* at 845 (emphasis added). "It [is] incumbent upon the trial court *not*

*to make* credibility determinations or to weigh and balance...expert testimony” offered by the respective parties at the probable cause stage. *Id.* (emphasis added). To do so is error. *Id.*

Recently, the Southern District addressed the argument in an SVP case that the probate court had erred in finding probable cause and proceeding to trial on the merits, where two experts at the probable cause stage could not say the person was more likely than not to offend if not confined in a secure facility. *In the Matter of the Care and Treatment of Martineau v. State*, 2007 WL3345343 \*3 (Mo. App. S.D. Nov. 13, 2007). The Southern District, like this Court, concluded that a probable cause proceeding is limited in scope. “[W]hile the SVP law does not define ‘probable cause,’ it seems well-settled that the trial court does not weigh evidence or make credibility determinations at preliminary hearings thereunder...Rather, the court acts as a gatekeeper merely to determine if the State’s evidence raises a triable issue of fact.” *Id.* And, the Southern District concluded, the probate court did not err in finding probable cause and proceeding to trial. *Id.* *C.f. Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (preliminary hearing “is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial”).

To support his argument that the limited probable cause finding restricted

subsequent proof, Mr. Tyson relied on, and the Western District cited, *State ex rel. Buresh v. Adams*, 468 S.W.2d 18 (Mo. banc 1971). Appellant’s Brief, p. 39; App. A-9 – A-10. The case is inapposite. The “sole issue” in that criminal case was “whether [the defendant] was accorded a preliminary hearing as required by Sup. Ct. Rule 23.02 and [Mo. Rev. Stat.] § 544.250, on the charge contained in the information.” *Id.* at 20. Proceedings to commit sexually violent predators are not, of course, criminal but civil proceedings.<sup>5</sup> And neither the rule nor the statute at issue in *Buresh* apply to SVP commitment proceedings.

**D. The law should not be construed to hobble experts.**

Because the question at trial in an SVP case is the subject’s current mental condition, expert testimony is critical. That makes particularly problematic the impact of the Western District’s decision on expert evaluation

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<sup>5</sup> To be sure, a proceeding for commitment under Missouri’s sexually violent predator law is civil in nature. *Elliott*, 215 S.W.3d at 93. But even in a criminal proceeding, in which the defendant’s constitutional rights are at their zenith, the “defendant’s substantive rights are not affected by a preliminary hearing[; ...] such a hearing is not even a part of the constitutional right to due process.” *State v. Menteer*, 845 S.W.2d 581, 584 (Mo. App. E.D. 1992), *citing State v. Blackmon*, 664 S.W.2d 644, 649 (Mo. App. S.D. 1984).

and testimony.

“Admission of expert testimony in civil cases is governed by section 490.065. *State Board of Registration for the Healing Arts v. Edward W. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003).” *Murrell*, 215 S.W.3d at 110. As discussed above, the State has an acknowledged right under § 632.489.4 to have a consenting psychiatrist or psychologist conduct an evaluation (after the DMH evaluation) as to whether the person is an SVP. *Spencer*, 103 S.W.3d at 419. And absent the Western District’s decision, the standard way to attack the admissibility of a diagnosis of an alleged SVP is under MO. REV. STAT. § 490.065. *Murrell*, 215 S.W.3d at 110-111.<sup>6</sup> It is only in those cases where the source upon

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<sup>6</sup> Section 490.065 provides, in relevant part:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

...

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those

which the expert relies for opinion is so slight as to be found unsupported, that the fact finder may not receive the opinion. *In the Matter of the Care and Treatment of Goddard v. State*, 144 S.W.3d 848, 854 (Mo. App. S.D. 2004).

But the Western District came up with a new, troubling method of excluding a large portion of the testimony of Dr. Grinage – his opinion regarding pedophilia.

Mr. Tyson cannot seriously contend that Dr. Grinage’s opinion does not meet § 490.065. The specialized knowledge that the expert offered aided “the trier of fact to understand the evidence or to determine a fact in issue,” and Dr. Grinage was qualified as an expert. § 490.065.1. And “the facts or data” upon which he based his opinion were “made known to him at or before the hearing”; were “of a type reasonably relied upon by experts in the field in forming opinions ... upon the subject”; and were “otherwise reasonably reliable.” § 490.065.3. Again, Mr. Tyson does not seriously argue to the contrary.

Indeed, Dr. Jackson, whom Mr. Tyson called, testified that he did not have

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perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

the details of Mr. Tyson's offenses when he conducted his evaluation, but acknowledged that a wealth of detailed information from both the Kansas City Police Department and the State of California came in after he completed it. Tr. 632-633. He testified that if he were treating Mr. Tyson, pedophilia was a diagnosis that should be considered and that more information would be gathered. Tr. 560.

And Dr. Logan, Mr. Tyson's retained expert, conceded that there were factors for and against a diagnosis of pedophilia, Tr. 732, and that in a treatment setting, it was a diagnosis to rule out, Tr. 729 and 735.

Dr. Grinage's opinion demonstrates the import of the Western District's novel focus on the probable cause stage. At that point, the probate court heard not from Dr. Grinage – who became involved only afterwards, as § 632.489 contemplates – but from Dr. Suire. Dr. Suire's diagnoses were contained in his "End of Confinement Report," which was done, obviously, prior to the commencement of the sexually violent predator proceedings and this prior to the statutorily mandated evaluation. *See In the Matter of the Care and Treatment of Norton v. State*, 123 S.W.3d 170, 172-173 (Mo. banc 2004). Yet under the Western District's interpretation, that preliminary report dictates the parameters of all future evaluations and proceedings, thus barring any other expert – with access to additional relevant information – from providing a complete, accurate opinion.

Mr. Tyson's first point should have been rejected out of hand by the Western District and this Court should reject it now. The novel rule that the Western District establishes is not in keeping with the plain language of the law, or the law's purpose, and hobbles experts.

**II. The trial court properly allowed cross-examination of Mr. Tyson’s expert regarding his sexual relations with 13- and 15-year old girls. [Responds to the Appellant’s Point Relied On II.]**

Dr. Jackson, one of Mr. Tyson’s experts, testified on direct that the focus of Mr. Tyson’s sexual interest was women, Tr. 558, not girls. Mr. Tyson argued on appeal that the trial court abused its discretion in admitting evidence, over his objection, that he had sexual relations with a 13-year old girl and a 15-year old girl when he was around 20. Mr. Tyson argues that the evidence was more prejudicial than probative, so it was an abuse of discretion to permit cross-examination of his witness on this point.

The admission of expert testimony is within the trial court’s discretion and disturbed only for abuse of that discretion. *Elliott*, 215 S.W.3d at 92-93. The trial court abuses its discretion only when its ruling “is so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration.” *Id.*

Generally, to be admissible, evidence must be both legally and logically relevant. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App. S.D. 2004). It is logically relevant if it “tends to prove or disprove a fact in issue or corroborate other evidence.” *Guess v. Escobar*, 26 S.W.3d 235, 242 (Mo. App. W.D. 2000). It is legally relevant when its probative value, or usefulness, outweighs its prejudicial effect. *Id.*

At a minimum, the issue of Mr. Tyson's sexual relations with girls ages 13 and 15 was the proper subject of cross-examination of his expert. "It is well settled that the extent and scope of cross-examination in a civil action is within the discretion of the trial court and 'will not be disturbed unless an abuse of discretion is clearly shown.'" *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 868-869 (Mo. banc 1993). "This is especially true for cross-examination of expert witnesses. There is wide latitude 'to test qualifications, credibility, skill or knowledge, and value and accuracy of opinion.'" *Id.* at 869. A witness may be cross-examined about matters to which he testifies on direct. *Louis Steinbaum Real Estate Co. v. Maltz*, 247 S.W.2d 652, 655 (Mo. 1952).

Mr. Tyson's trial counsel introduced the issue of the focus of Mr. Tyson's sexual interest on direct examination of Dr. Jackson, one of his experts:

Q. What do you think is the focus of his sexual interest?

A. I think the focus is – and some of this is borne out in the records – young women, women primarily from the age 18 through early 20s or at least this was the focus.

Tr. 558.

On the State's cross-examination, the following exchange occurred:

Q. Doctor, I'm finishing up and I want to get us back to sexually violent offenses. We kind of started with sexual contact.

A. Correct.

Q. And we talked about how the law is concerned about child molestation in the first degree and child molestation in the second degree?

A. Correct.

Q. And the only distinction is ages; right?

A. Correct.

Q. And you saw in the records that Mr. Tyson had sexual relations with a 13 year old; correct?

A. That's correct.

Q. And you saw in the record that Mr. Tyson had had sexual relations – and by that I mean intercourse –

A. That's correct.

Q. -- with not only a 13 but a 15 year old.

A. Yes. I think this also came up in deposition and I think I told you it was an error because I thought that he was talking about the same person.

Q. Thirteen year old and a 15 year old; right?

A. That's correct.

Q. And if you have sexual intercourse with a 13 or 15 year old in the State of Missouri, that's a sexually violent offense, correct?

A. By definition would be, yes.

Q. And we know Mr. Tyson has done that, correct?

A. Correct.

Tr. 700-701.

The line of questioning on cross was legally and logically relevant to Dr. Jackson's testimony on direct about the focus of Mr. Tyson's sexual interest, testing the value and accuracy of the expert's opinion, at a minimum.

The evidence was also legally and logically relevant to a central issue in the case, that is, whether Mr. Tyson is more likely than not to engage in predatory acts of sexual violence if not confined. Sexual contact with girls under 17, even if they are not prepubescent, is an act of sexual violence under Missouri law. § 632.480(4) (including statutory rape, statutory sodomy, child molestation, sexual abuse, and abuse of a child as sexually violent offenses); and §§ 566.032, 566.034, 566.062, 566.064, 566.067, and 566.068 (all defining sexual offenses in part by the age of the victim). Mr. Tyson's history of sexual relations with girls

age 13 and 15 was relevant to the issue of whether he was more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

The court did not at all abuse its discretion in allowing Dr. Jackson to be cross-examined as to Mr. Tyson's sexual relationships with 13- and 15-year old girls, and Mr. Tyson's second point should be rejected.

**III. The trial court did not abuse its discretion in allowing testimony regarding actuarial measures and Mr. Tyson’s results. [Responds to the Appellant’s Point Relied On III.]**

In his final point, Mr. Tyson argues that the trial court erred in admitting Dr. Grinage’s testimony concerning Mr. Tyson’s scores on the Static-99 and the MnSOST-R, two actuarial instruments. He contends that the results of these actuarial instruments were irrelevant because they do not address the specific question of whether any individual is more likely than not to reoffend, and because the instruments do not distinguish between sexually violent offenses and other sexual offenses. He did not preserve at least parts of the argument and it lacks merit altogether in any event.

The admission of expert testimony is within the trial court’s discretion and disturbed only for abuse of that discretion. *Elliott*, 215 S.W.3d at 92-93. The trial court abuses its discretion only when its ruling “is so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration.” *Id.* “Even then, we will not reverse unless the error had a material effect on the merits of the action.” *In the Matter of the Care and Treatment of Cokes*, 183 S.W.3d 281, 285 (Mo. App. W.D. 2005)

Mr. Tyson’s argument that the Static-99 and the MnSOST-R are not legally relevant fails to the same reason that this Court rejected the same argument in *Murrell*:

In the past two years, reported cases in at least twelve states have recognized experts' reliance on the Static-99 as a risk-assessment tool in cases involving sexually violent predators.... At least five Missouri cases in the past three years reference the admission of the Static-99.... Actuarial instruments are not only relied upon by the states in their cases against alleged SVPs, but also by experts for sex offenders as well.... It is clear that actuarial instruments are reasonably relied upon by experts in evaluating a sexually violent predator's risk of reoffense.

215 S.W.3d at 111 (footnotes and citations omitted).

Like Mr. Murrell, Mr. Tyson attacks the admissibility of the testimony regarding the actuarial instruments, but does not show that the facts and data are not the type reasonably relied upon by experts in the field, the standard for admissibility of expert testimony under § 490.065.3. Thus, his argument, like Mr. Murrell's, fails.

Moreover, to the extent that Mr. Tyson suggests that his individual characteristics were not adequately considered or captured in the Static-99, App. Br. 54, Mr. Tyson ignores the balance of Dr. Grinage's testimony. Dr. Grinage testified in considerable detail about how he assessed Mr. Tyson's risk to

reoffend, based on Mr. Tyson's failure to finish a sex offender treatment program, his history of sexual and non-sexual criminality, his history of drug and alcohol abuse, as well as his diagnosis of pedophilia and PDNOS. Tr. 461-468.

Mr. Tyson also argues that the testimony should have been excluded because the tests do not distinguish between sexually violent offenses and other sex offenses. App. Br. 55. But he did not make that objection at trial and thus, the argument fails because he did not preserve it. A point on appeal may not expand or change the objection voiced at trial. *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 135 (Mo. App. W.D. 2006), *citing Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 387 (Mo. App. E.D. 2000). The theory of the point on appeal must be the same as that of the trial objection. *Id.*

At the trial, Mr. Tyson's objection regarding actuarial evidence was limited to:

We object to any mention regarding certain actuarial instruments that may state what Mr. Tyson's risk of reoffense is. We object to any testimony or mention of the fact that actuarial instruments underestimate the amount of recidivism that a particular offender may commit.

Tr. 363.

When an issue is not properly preserved for appeal, only plain error review is available, and then, under limited circumstances. Mo. S. Ct. Rule 84.13(c). The reviewing court may, in its discretion, review errors affecting substantial rights, though not preserved for appeal, when the court finds that manifest injustice will result from no review. But plain error review should seldom be granted in civil cases and it may not be used to cure a party's mere failure to make a proper and timely objection below. *Guess v. Escobar*, 26 S.W.3d 235, 241 (Mo. App. W.D. 2000). Furthermore, the plain error exception for failure to preserve an issue for appeal below does not justify review of every alleged error below that was not properly preserved for appellate review. *Messina v. Prather*, 42 S.W.3d 753, 763 (Mo. App. W.D. 2001).

Mr. Tyson cannot demonstrate plain error because the Missouri courts have already decided that actuarial evidence of this type meets the standards of § 490.065.3. *E.g. Murrell*, 215 S.W.3d at 111-113. And clearly, if this Court decides to consider Mr. Tyson's argument that evidence from actuarial instruments should not have been admitted because such tests do not distinguish between sexually violent and non-violent offenses, it may at most review such point for plain error only if manifest injustice results without such a review.

But there can be no finding of manifest injustice here, because all three experts at trial were subjected to questioning on that very point. The jury heard

considerable discussion on the limitations of the actuarial tests, including that their predictive capability did not distinguish between sexually violent and non-violent offenses. Dr. Grinage, in particular, expanded on that point and went further to explain how he used the actuarial results:

Q. Both of those instruments that you used rate Mr. Tyson at high risk to reoffend sexually?

A. Yes, sir.

Q. Do they [sic] tell us whether he's going to reoffend in a nonviolent sexual way or a violent sexual way?

A. I think that's a good point. Those actuarials, when you add them up, will tell you whether he's going to reoffend sexually, it does not discriminate between violent and non-violent.

Q. So they don't really tell us Mr. Tyson is at high risk to reoffend in a sexually-violent way?

A. Again, it's a piece of information that I use in my clinical evaluation, but they don't specifically target sexually-violent offenses, but sexual offenses versus reconviction on the Static 99 or rearrests on the MnSOST-R.

Tr. 526-527.

The trial court properly allowed the evidence concerning the actuarial instruments. Mr. Tyson's argument also fails under plain error review.

## Conclusion

The trial court's judgment should be affirmed.

Respectfully submitted,

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

The undersigned hereby certifies that on this 14<sup>th</sup> day of December, 2007, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,001 words.

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

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Assistant Attorney General

**Appendix**

1. Slip Opinion, *In the Matter of the Care and Treatment of Tyson v. State*, Mo. Ct. App., Western District, Case No. WD66469 (July 10, 2007) ..... A1-A13