

IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

IN THE MATTER OF THE)
CARE AND TREATMENT OF)
JOHN VAN ORDEN ,)
 Appellant.)

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE KENNETH F. THOMPSON, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

John Van Orden appeals the judgment and order of the Honorable Kenneth F. Thompson following a jury trial in Webster County, Missouri, committing Mr. Van Orden to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal was originally filed in the Missouri Court of Appeals, Southern District, because Webster County is within that Court's jurisdiction. Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.060, RSMO 2000.

Mr. Van Orden challenges the constitutionality of a state statute in this appeal, however, and jurisdiction therefore lies in the Missouri Supreme Court. Article V, Section 3, Missouri Constitution. He has filed a motion in the Southern District Court of Appeals for a pre-opinion transfer of this appeal to the Missouri Supreme Court.

STATEMENT OF FACTS

John Van Orden pleaded guilty on February 9, 1999, to first degree child abuse and was sentenced to four years in the Missouri Department of Corrections (L.F. 11, Tr. 250-251).¹ He was paroled to a halfway house in Kansas City, in 2003 (Tr. 373). Mr. Van Orden asked his caseworker and his parole office to be moved to another room because his roommate kept illegal drugs in the room, and Mr. Van Orden did not want to pick up a drug charge (Tr. 373-374). Neither would move him (Tr. 374). He told his parole officer that if she could not help him she should just put him back in prison (Tr. 374). The parole officer told Mr. Van Orden that she could not put him back in prison unless he violated his parole (Tr. 374). Mr. Van Order told his parole officer that he was going to leave the halfway house and go to Ft. Smith, Arkansas, to visit his family, and then he would turn himself in (Tr. 374). He did so (Tr. 374). His parole was revoked upon his return and he was sent back to prison (Tr. 374).

Mr. Van Orden was again released on parole in 2004, this time to a half-way house in Columbia (Tr. 374-375). In May of 2005, Mr. Van Orden was sent to an out-patient substance abuse program (Tr. 346-346). He began on level 2 of the program, a two month program of group and individual sessions (Tr. 347). Mr. Van Orden then transitioned to level 3, which involved only individual counseling (Tr. 348). During his first contact with his counselor on level 3, Mr.

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

Van Orden told her that he had relapsed and needed additional help (Tr. 348). The counselor's plan was to return Mr. Van Orden to level 2 for additional counseling until space opened up for him in the program's residential facility (Tr. 349). His counselor was not able to put that plan into effect because Mr. Van Orden's parole officer revoked his parole (Tr. 349).

Mr. Van Orden's parole officer "discovered" on August 31, 2005, that he had allegedly violated the conditions of his parole by failing to report, consuming alcohol, and being terminated from sex offender treatment (L.F. 115). A parole detainer issued on September 2, 2005, and Mr. Van Orden was arrested on September 6 and returned to the Fulton Reception and Diagnostic Center (L.F. 115). He could be held on this charge no later than October 21, 2005 (L.F. 128).

A sexually violent predator review was conducted by the Department of Corrections (DOC) on September 30 (L.F. 120). DOC provided notice to the Attorney General's Office and the Multidisciplinary Team on October 5, 2005, that Mr. Van Orden may meet the criteria for sexually violent predator commitment (L.F. 116). The Multidisciplinary Team found that Mr. Van Orden met the commitment criteria on October 5 (L.F. 122-124). The Prosecutor's Review Committee reached the same conclusion on October 11 (L.F. 125-126).

The State filed its petition to commit Mr. Van Orden as a sexually violent predator (SVP) on October 14, 2005 (L.F. 10-13).

Mr. Van Orden's parole was revoked by the Board of Probation and Parole on October 20, 2005 (L.F. 127-128).

Mr. Van Orden moved to dismiss the petition as violating his right to due process of law because the petition was filed before his parole was revoked, in violation of the statutory procedures established for the filing of an SVP commitment petition (L.F. 101- 129). This motion was denied by the probate court (Tr. 2-8).

Mr. Van Orden also filed a motion prior to trial to declare unconstitutional Section 632.495 as amended in 2006 to reduce the State's burden of proof from "beyond a reasonable doubt" to "clear and convincing evidence" (L.F. 65-70). He argued that the higher burden of proof beyond a reasonable doubt was required by the due process clauses of the United States Constitution and Missouri Constitution because of the potential loss of liberty inherent in the commitment process (L.F. 65-70). The case was submitted to the jurors upon the clear and convincing evidence standard (L.F. 136, 137).

Dr. Steven Mandracchia, employed by the Department of Mental Health (DMH), evaluated Mr. Van Orden on order of the court (Tr. 240, 244). His search for a statutorily defined mental abnormality begins by looking for a psychological disorder defined by the Diagnostic and Statistical Manual criteria (Tr. 254-255). For Mr. Van Orden, the diagnosis of primary relevance to the commitment criteria was pedophilia (Tr. 256). There were three "verified"

incidents of sexual behavior by Mr. Van Orden with children; a conviction for sexual misconduct with a sixteen year old niece, a conviction for child molestation of his five year old daughter, and termination of his parental rights based also upon sexual abuse of his four year old son (Tr. 251, 258). Mr. Van Orden has also admitted sexual urges, fantasies, and behaviors toward children beginning at age 17 and lasting until the present (Tr. 258-260). Dr. Mandracchia said this condition was either congenital or acquired, because that is all there is, and that by definition the sexual orientation predisposes Mr. Van Orden to engage in pedophilic behaviors (Tr. 263-264).

Dr. Mandracchia opined that Mr. Van Orden has serious difficulty controlling his behavior, based mostly on the fact that he acted on those urges by engaging in criminal behavior with children (Tr. 265). The doctor also believed that Mr. Van Orden having put himself in jeopardy by being convicted allowed him to presume that Mr. Van Orden has that serious difficulty (Tr. 265-266).

Dr. Mandracchia assesses a person's risk to reoffend if not securely confined by looking at known risk factors that are used in actuarial instruments that observe reconviction rates of persons with certain characteristics (Tr. 270-271). Mr. Van Orden had been scored on the Static-99 actuarial instrument several times previously, and Dr. Mandracchia made his assessment based on the score from that instrument (Tr. 272, 273). Mr. Van Orden was given a score of five, classified on the instrument as "medium-high," which is associated with

reconviction rates among the sample group of 33% in five years, 38% in ten years, and 40% in fifteen years (Tr. 272-273, 293). Dr. Mandracchia agreed with the State that the question at trial is the likelihood of reoffense, not reconviction; but he also agreed with Mr. Van Orden that the ability to track convictions, as compared to charges or allegations, is what “makes them most reliable.” (Tr. 273, 297). The State called upon Dr. Mandracchia to discuss the accepted factors related to risk of recidivism he found present in Mr. Van Orden’s case (Tr. 274-280).

Dr. Mandracchia acknowledged that the results of a Static-99 assessment cannot establish an individual’s risk to be reconvicted (Tr. 290). He was asked: “So the Static doesn’t tell you about Mr. Van Orden the individual?” (Tr. 291). Dr. Mandracchia answered: “That’s correct.” (Tr. 291). The instrument only identifies group characteristics and the evaluator places the subject of the assessment into one of the groups based on the score (Tr. 290). The instrument has no ability to identify whether any particular member of that group will be among the percentage of the group to be reconvicted (Tr. 290). But, having been given the task to assess Mr. Van Orden’s risk to reoffend, Dr. Mandracchia explained: “[T]he only other way I know to do that is, other than flipping a coin or seeing if I like Mr. Van Orden, is to compare him to known people who reoffend.” (Tr. 291).

Dr. Mandracchia acknowledged that a study of high risk offenders, those who scored five or above on the Static-99, published in the Journal of Sexual Offending, Sexual Offender's Civil Commitment, Science and the Law, revealed a reconviction rate of 13.3% in five years (Tr. 301-302). This is nearly twenty percent below that assigned by the Static-99 (Tr. 295). Dr. Mandracchia also considered Mr. Van Orden's prior diagnosis of antisocial personality disorder as combining with his paraphilia to increase his risk of reoffending (Tr. 278). But he acknowledged that the study published in the Journal of Sexual Offending also researched the effect of that combination for high risk offenders and the reconviction rate was 20.6% in five years (Tr. 304). This rate is still below that of the Static-99 (Tr. 295). Dr. Mandracchia considered alcoholism as a factor increasing Mr. Van Orden's risk to reoffend, but acknowledged that the research used to develop the Static-99 reveals that alcohol or substance abuse is not correlated with reconviction (Tr. 300-201). But he added: "There are many studies where these things don't correlate, and there are many studies where they do." (Tr. 301).

Dr. Mandracchia was aware that Mr. Van Orden had completed the Missouri Sexual Offender Program (MOSOP), a sex offender treatment program operated by DOC (Tr. 280). Mr. Van Order started the program in 1992 during his first incarceration, but he was released before he could complete it (Tr. 319). He entered the program again in 2001 and successfully completed the program

that time (Tr. 319). Short of medical or surgical intervention, modern cognitive behavioral therapy of the type used in MOSOP is the most effective treatment of sexual offenders (Tr. 314-315). Dr. Mandracchia considered that Mr. Van Orden completed the MOSOP program; he likes to think that he considers everything in his assessments, but concluded that this treatment did not reduce Mr. Van Orden's risk to reoffend below 51% (Tr. 280-281,293). His explanation was that treatment is only a "smaller moderator variable," and treatment is a "wash" if a large number of offenses are present (Tr. 281). It is Dr. Mandracchia's opinion that if there are a large number of offenses, treatment provides too minor an effect to make much difference in assessed risk (Tr. 282). As an additional matter, Dr. Mandracchia concluded that Mr. Van Orden seems to lack sufficient understanding of treatment and relapse prevention concepts (Tr. 283). While last on parole, Mr. Van Orden consumed alcohol, failed to avoid contact with children, and did not complete out-patient sex offender treatment, suggesting to Dr. Mandracchia that the treatment was not much of a mitigator of Mr. Van Orden's risk (Tr. 286). He suggested in direct examination that he was not sure if failing treatment increases risk or if succeeding in treatment decreases risk (Tr. 286). Dr. Mandracchia acknowledged that the developer of the Static-99 had also researched the effectiveness of treatment in a review of forty-three other studies, and found a 40% reduction in recidivism for persons who had completed treatment (Tr. 314). These results were corroborated by a similar study in

Germany (Tr. 315-316). Dr. Mandracchia said that the “problem” with those studies was that they only looked at whether the person had completed the treatment, not whether the person really understood the treatment (Tr. 316). Mr. Van Orden recognized that drinking, using pornography, and being around children were triggers for his offending, but he had done all of those things while on parole (Tr. 337). But Dr. Mandracchia could not testify how much of the treatment and relapse concepts Mr. Van Orden had or had not grasped (Tr. 336).

Dr. Mandracchia acknowledged that part of sexual offender treatment is the development of a relapse prevention plan (Tr. 329). It is important to have a support system in place (Tr. 329). In Mr. Van Orden’s case, it would show insight into relapse prevention to have arranged for treatment and a place to live if released (Tr. 330). These things can reduce risk (Tr. 330). Mr. Van Orden had already paid for and been accepted into a sexual offender treatment facility in Ft. Smith, Arkansas if he was released (Tr. 331). Places to live and work were also available in the area (Tr. 331).

Dr. Mandracchia’s ultimate conclusion was that Mr. Van Orden suffers a mental abnormality making him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, and that he is a sexually violent predator (Tr. 287, 289).

Mr. Van Orden acknowledged to the jurors that he sexually assaulted his niece and his daughter, but denied sexual contact with his son (Tr. 370). He told

them that the lowest point of his life was when he offended again and was returned to prison (Tr. 370). He realized that he had to change his life (Tr. 370). Mr. Van Order accepts that he has pedophilia (Tr. 376). He received sexual offender treatment in prison (Tr. 373). Mr. Van Orden told the jurors that he learned how to recognize and deal with his depression and anger, and that he could now talk about his problems (Tr. 372).

Mr. Van Orden told the jurors that he no longer allows sexual thoughts about children enter his mind (Tr. 377). He pushes those thoughts away by thinking about other things; music, his art work, bills, laundry, anything to replace the sexual thoughts (Tr. 377). He said that he no longer has sexual fantasies about children (Tr. 378). Mr. Van Orden also continues to attend AA meetings as the on-going process to sobriety (Tr. 378-379).

Mr. Van Orden also told the jurors that he had been preparing for his release back into the community (Tr. 381). He identified the people in Ft. Smith who made up his support group (Tr. 381). He identified the people he had contacted for assistance finding sexual offender and alcohol treatment programs (Tr. 382-383). He also sought out places to live and work (Tr. 382). Mr. Van Orden had even prepared a calendar prioritizing and scheduling the things he would have to do upon release (Tr. 384-386).

Mr. Van Orden had requested prior to trial that the probate court declare the 2006 amendment to Section 632.495, RSMo, to be unconstitutional because

permitting involuntary commitment upon the standard of proof by clear and convincing evidence violated his right to due process of law (L.F. 64-70). The probate court overruled Mr. Van Orden's motion, and the case was submitted to the jurors on the "clear and convincing evidence" standard (L.F. 136, 137).

During the instruction conference with the court, Mr. Van Orden objected to Instruction No. 5, offered by the State, and offered an alternative instruction (Tr. 428-430). Instruction No. 5 informed the jurors:

In these instructions, you are told that your finding depends upon whether or not you believe certain propositions of fact submitted to you. The burden is upon the petitioner to cause you to believe by clear and convincing evidence that Respondent is a sexually violent predator. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a finding requiring belief of that proposition.

(L.F. 136). The alternative offered by Mr. Van Orden, marked as Instruction No. C, would have informed the jurors:

In these instructions, you are told that your finding depends upon whether or not you believe certain propositions of fact submitted to you. The burden is upon the petitioner to cause you to believe by clear and

convincing evidence that Respondent is a sexually violent predator. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a finding requiring belief of that proposition.

Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence.

For evidence to be clear and convincing it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and your mind is left with an abiding conviction that the evidence is true. If you are not so convinced, you must give the Respondent the benefit of the doubt and find that he is not a sexually violent predator.

(L.F. 143-144). Mr. Van Orden argued that this instruction should be given because the jurors should be given the definition so that they put the term in context, much like in a criminal case where the jury is given the definition of beyond a reasonable doubt. (Tr. 429-430). Whatever objection the State had regarding Instruction No C, it did not make it part of the record; instead, the State relied on whatever it might have argued in an off-the-record instruction

conference (Tr. 427, 430). The probate court submitted Instruction No. 5 to the jurors, and refused to submit Instruction No. C (Tr. 428).

The jurors found Mr. Van Orden to be a sexually violent predator (L.F. 153). The probate court ordered Mr. Van Orden committed to the custody of DMH (L.F. 154-155). This appeal follows (L.F. 176).

POINTS RELIED ON

I.

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

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

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

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

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

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Sections 632.350, 632.355, 632.360 RSMo 2000;

Section 632.483, RSMo Cum. Supp. 2005; and

Section 632.495 RSMo 2006.

II.

The probate court erred in denying Mr. Van Orden's motion to dismiss the petition upon the State's failure to follow the statutory procedures set out in the SVP Act for the initiation of such proceedings, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 632.483.1 RSMo, Cum. Supp. 2005, distinguishes those subject to SVP commitment into two groups: those not yet released from prison and those paroled from prison but returned upon a revocation of that parole. Mr. Van Orden had been released on parole prior to the filing of the petition, but his parole had not been revoked prior to that filing.

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

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

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

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

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.483, RSMo Cum. Supp. 2005; and

Section 632.484, RSMo Cum. Supp. 2005.

III.

The probate court abused its discretion in refusing to submit Instruction No. C offered by Mr. Van Orden, and in submitting Instruction No. 5, in violation of Mr. Orden's right to due process of law and a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the offered instruction contained a definition not provided in Instruction No. 5 of the legal term "clear and convincing evidence," to provide the jurors the context in which to determine whether the State had carried its burden of proof that Mr. Van Orden is subject to commitment as a sexually violent predator.

Miller v. Fireman's Ins. Co., 229 S.W.2d 261 (St. L. Ct. App., 1921);

Nelson v. Taylor, 265 S.W.2d 409 (Mo. Div. 1, 1954);

Lee v. Hiller, 141 S.W.3d 517 (Mo. App., S.D. 2004);

In the Marriage of A.S.A., 931 S.W.2d 218 (Mo. App., S.D. 1996);

United States Constitution, Fourteenth Amendment; and

Missouri Constitution, Article I, Sections 10, 18(a).

IV.

The trial court abused its discretion in admitting Dr. Mandracchia's testimony, over Mr. Van Orden's objection, on the results of the Static-99 actuarial instrument applied to him by Dr. Mandracchia, in violation of Mr. Van Orden's right to due process of law and a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that the results were logically and legally irrelevant since the instrument does not address the specific question at issue - whether Mr. Van Orden is more likely than not to reoffend - and it confuses the issue and misleads the jurors because the instrument reflects only the results of group analysis, the group results do not distinguish who among the group will or will not offend, nor can they predict the behavior of any specific individual.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786,

125 L.Ed.2d 469 (1993);

Estate of Dean, 967 S.W.2d 219 (Mo. App., W.D. 1998);

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143

L.Ed.2d 238 (1999);

Shelton v. City of Springfield, 130 S.W.3d 30 (Mo. App., S.D. 2004);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10; and

Section 490.065 RSMo 2000.

ARGUMENT

I.

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

The SVP Act implicates a citizen's constitutional right to liberty. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. banc 2004). The Missouri legislature amended Section 632.495 in 2006 to reduce the burden on the State to deprive citizens of their liberty under the SVP Act from proof beyond a reasonable doubt to proof by clear and convincing evidence. Mr. Van Orden requested the probate court to declare this amendment unconstitutional as depriving him of his liberty without due process of law (L.F. 64-70). The probate court denied Mr. Van Orden's motion and the case was submitted to the jurors upon the reduced standard of proof (L.F. 136, 137).

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

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

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

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

² Not reported in A.2d.

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

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

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

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

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

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

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

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

632.355, RSMo 2000. No order for civil detention under chapter 632 may exceed one year for an inpatient detention period. Section 632.360. Upon expiration of the detention period, the person is discharged unless a petition for further detention period is filed. *Id.* Commitment under the SVP law is indefinite, and may be for life. Once the person is committed, he remains committed until he files a petition for discharge, convinces the probate court that his mental abnormality has changed, and is discharged upon a jury verdict that his mental abnormality has so changed that he is safe to be at large. These additional burdens imposed upon Mr. Van Orden, and others committed under the SVP law, must bring with them the additional protection of requiring the State to prove its allegations by proof beyond a reasonable doubt.

The probate court erred in failing to the declare unconstitutional the 2006 amendment to Section 632.495, RSMo, and in subjecting Mr. Van Orden to indefinite involuntary commitment upon a standard of proof too low to assure Mr. Van Orden due process of law. The judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial under the proper standard of proof.

II.

The probate court erred in denying Mr. Van Orden's motion to dismiss the petition upon the State's failure to follow the statutory procedures set out in the SVP Act for the initiation of such proceedings, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 632.483.1 RSMo, Cum. Supp. 2005 distinguishes those subject to SVP commitment into two groups: those not yet released from prison and those paroled from prison but returned upon a revocation of that parole, and Mr. Van Orden had been released on parole prior to the filing of the petition, but his parole had not been revoked prior to that filing.

Mr. Van Orden pleaded guilty on February 9, 1999, to first degree child abuse and was sentenced to four years in the Missouri Department of Corrections (L.F. 11, Tr. 250-251). His parole was revoked and he was sent back to prison (Tr. 374). Mr. Van Orden was again released on parole in 2004 (Tr. 374-375). A parole detainer issued on September 2, 2005, and Mr. Van Orden was arrested on September 6 and returned to the Fulton Reception and Diagnostic Center (L.F. 115). He could be held on this charge no later than October 21, 2005 (L.F. 128).

A sexually violent predator review was conducted by the Department of Corrections (DOC) on September 30 (L.F. 120). DOC provided notice to the Attorney General's Office and the Multidisciplinary Team on October 5, 2005, that Mr. Van Orden may meet the criteria for sexually violent predator commitment (L.F. 116). The Multidisciplinary Team found that Mr. Van Orden met the commitment criteria on October 5 (L.F. 122-124). The Prosecutor's Review Committee reached the same conclusion on October 11 (L.F. 125-126).

The State filed its petition to commit Mr. Van Orden as a sexually violent predator (SVP) on October 14, 2005 (L.F. 10-13).

Mr. Van Orden's parole was revoked by the Board of Probation and Parole on October 20, 2005 (L.F. 127-128).

Mr. Van Orden moved to dismiss the petition as violating his right to due process of law because the petition was filed before his parole was revoked, in violation of the statutory procedures established for the filing of an SVP commitment petition (L.F. 101- 129). This motion was denied by the probate court (Tr. 2-8).

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

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

Section 632.483, RSMo, Cum. Supp. 2005, reads in relevant part:

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

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

There is a separate provision establishing the notice procedure when the person is not in the custody of DOC. In that circumstance, notice is given to the attorney general when a person "who is not presently in the physical custody of an

agency with jurisdiction ... has committed a recent overt act” Section 632.484, RSMo Cum. Supp. 2005.

Section 632.483 applies to persons in two different circumstances. It first applies to those persons who have not yet been released from prison but are nearing the end of their sentence. The second circumstance is where the person has been released on parole but that parole has been revoked and they are returned to prison near the end of their sentence. Section 632.484 applies to those persons not physically in the custody of the prison system. None of these circumstances applied to Mr. Van Orden when the State filed its commitment petition. He had been released from prison on parole. He was detained in the physical custody of DOC on a parole warrant, but his parole - postrelease supervision - had not yet been revoked. He obviously was no longer in the community when the petition was filed.

The State filed its petition too soon. It should have waited for a determination by the parole board whether or not to revoke Mr. Van Orden’s parole before filing the petition. Such determination would dictate whether the Attorney General’s Office could have filed the petition under Section 632.483 or 632.484.

The United States Supreme Court recognized in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the due process requires particular

procedures before the government can revoke a person's parole. The Court held that the minimal due process requirements include:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the factfinders as to the evidence relied upon and the reasons for revoking parole.

408 U.S. at 489. The Missouri Supreme Court acknowledged and adopted these standards in *Mack v. Purkett*, 825 S.W.2d 851 (Mo. banc 1992), and again in *Aziz v. McCondichie*, 132 S.W.3d 238 (Mo. banc 2004).

The importance of these decisions to Mr. Van Orden's case is not so much the procedures that were enumerated by the Supreme Court, but more so the fact that the Court recognized the due process requirement of such procedures. The United States Supreme Court acknowledged that precautions and procedures must be taken before the government can deprive someone *on parole* of their liberty interest. It should be assumed that the legislature, in crafting Section 632.483, was attempting to recognize the constitutional rights of a parolee before allowing the attorney general to move forward with a sexually violent predator petition.

This concept is emphasized by the Missouri Supreme Court's decision in *Aziz*. The Court in that case recognized the *Morrissey* and *Mack* requirements, but noted a difference when the parole board's actions fall short of revocation. *Aziz*, 132 S.W.3d 238. The Court held that if the board does not revoke the person's parole, and the parolee is simply released back into the community with greater supervision, then the *Morrissey* and *Mack* requirements are not necessary. *Id.* This distinction between the cases emphasises the importance that the Court places on a parolee's liberty interest. If a parolee is not facing confinement, the due process concerns are not necessary. Clearly, in Mr. Van Orden's case, we are dealing with the ultimate liberty interest.

Given the *Aziz* decision, it makes sense that the legislature would craft Section 632.483 RSMo in a similar manner. The legislature recognized that a decision by the parole board is necessary before the statute can distinguish between parolees and inmates, before the attorney general can determine whether to proceed under Section 632.483 or Section 632.484.

One may be tempted to not hold the state to such a strict interpretation of Section 632.483. However, after considering the Missouri Supreme Court and the Southern District Court of Appeals decisions on a similar issue, there is little room for looser interpretation. In *In the Interest of A.H.*, 169 S.W.3d 152 (Mo. App. S.D. 2005), the Court discussed proper procedure required by the Juvenile Code:

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

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

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

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

Much like the Juvenile Code, The Sexually Violent Predators Statute is a complete code within itself. The SVP law is a special statutory proceeding which "erects an elaborate, step-by-step procedure" for involuntary commitment. *In re Salcedo*, 34 S.W.3d 862, 867 (Mo. App., S.D. 2001), *superseded by statute*. It outlines the process to be followed from initiating a petition to conclusion of a case. Therefore, the parties involved in Mr. Van Orden's case should be held to the same strict standard of statutory interpretation. If severance of the parent-child relationship by act of law is "an exercise of awesome power" demanding "strict and literal compliance", then deprivation of someone's personal liberty

would also require such compliance. Given the backdrop of the Supreme Court's decision in *Morrissey*, "strict and literal compliance" with section 632.483 RSMo should prohibit the attorney general from filing a petition against someone in Mr. Van Orden's position until the parole board has determined whether or not to revoke that person's parole. The legislature has recognized the importance of allowing the parole board to make a determination, through due process of law, as to whether or not a parolee has violated his parole and should be revoked and remanded to the Missouri Department of Corrections. Once that determination has been made, then the attorney general can proceed under Section 632.483 without the need to show an "overt act" has occurred or Section 632.484 asserting, among other things, that the parolee has engaged in an "overt act".

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

III.

The probate court abused its discretion in refusing to submit Instruction No. C offered by Mr. Van Orden, and in submitting Instruction No. 5, in violation of Mr. Orden's right to due process of law and a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the offered instruction contained a definition not provided in Instruction No. 5 of the legal term "clear and convincing evidence," to provide the jurors the context in which to determine whether the State had carried its burden of proof that Mr. Van Order is subject to commitment as a sexually violent predator.

Instruction No. 5, offered by the State and submitted to the jurors by the probate court informed the jurors:

In these instructions, you are told that your finding depends upon whether or not you believe certain propositions of fact submitted to you. The burden is upon the petitioner to cause you to believe by clear and convincing evidence that Respondent is a sexually violent predator. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a

particular proposition submitted, then you cannot return a finding requiring belief of that proposition.

(L.F. 136). Mr. Van Orden objected to Instruction No. 5 and offered an alternative instruction (Tr. 428-430). The alternative offered by Mr. Van Orden, marked as Instruction No. C would have informed the jurors:

In these instructions, you are told that your finding depends upon whether or not you believe certain propositions of fact submitted to you. The burden is upon the petitioner to cause you to believe by clear and convincing evidence that Respondent is a sexually violent predator. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a finding requiring belief of that proposition.

Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence.

For evidence to be clear and convincing it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and your mind is left with an abiding conviction that the evidence is true.

If you are not so convinced, you must give the Respondent the benefit of the doubt and find that he is not a sexually violent predator.

(L.F. 143-144). Mr. Van Orden argued that this instruction should be given because the jurors should be given the definition so that they put the term “clear and convincing evidence” in context, much like in a criminal case where the jury is given the definition of beyond a reasonable doubt. (Tr. 429-430).

The decision to submit a definitional instruction is within the trial court’s discretion, and this Court reviews the decision for an abuse of that discretion. *Chism v. Steffens*, 797 S.W.2d 553, 560 (Mo. App., W.D. 1990).

Any review of an instruction in a sexually violent predator case must begin with the understanding that there are no instructions for such proceedings approved by the Missouri Supreme Court. All instructions in such proceedings are non-MAI modifications of other approved instructions, or instructions originally written based upon language contained in the SVP statutes or court opinions.

Both Instruction No. 5 and Instruction No. C were modifications of the approved MAI 3.07 (L.F. 136, 143-144). MAI 3.07 is the approved instruction for submitting the burden of proof, “clear and convincing evidence,” applicable to commitment for mental illness:

In these instructions, you are told that your finding depends on whether or not you believe certain propositions of fact submitted to you.

The burden is upon the petitioner to cause you to believe by clear and convincing evidence that respondent is mentally ill and, as a result, presents a likelihood or serious physical harm to himself or others. In determining whether or not you believe any such proposition, you must consider only the evidence and reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a finding requiring belief of that proposition.

This instruction does not define the legal term used to identify the applicable burden of proof, “clear and convincing evidence.”

There are three commonly used legal terms describing the level of proof required in particular legal circumstances: “preponderance of the evidence,” “clear and convincing evidence,” and “proof beyond a reasonable doubt.” Civil cases generally employ the “preponderance of the evidence” standard. *See* MAI 3.01. The “clear and convincing evidence” standard is applied in certain civil cases; *e.g.* involuntary commitment, libel or slander, punitive damages. “Proof beyond a reasonable doubt” is required in criminal cases.³

³ Mr. Van Orden argues in Point I, *supra*, that this standard should also be required in sexually violent commitment cases.

Before the State's burden of proof to commit a person as a sexually violent predator was reduced by the 2006 amendment to Section 632.495, the State had to prove its case by "proof beyond a reasonable doubt." In those cases, the State would offer and the trial court would submit a modification of MAI-CR 302.04, the approved criminal burden of proof instruction. These instructions always included the definition of "proof beyond a reasonable doubt" contained in the approved form of the instruction. This definition assists the jurors to understand the legal standard of proof and to apply the evidence to the requirements of law. The purpose of a jury instruction is to "direct the jury as to the law" involved in the case. *Miller v. Fireman's Ins. Co.*, 229 S.W.2d 261, 264 (St. L. Ct. App., 1921). It was this same assistance and understanding that Mr. Van Orden sought to provide to the jurors in his Instruction No. C. It was also in his own interest that the jurors be aware of how the facts presented at trial applied to the controlling law.

In *Nelson v. Taylor*, 265 S.W.2d 409, 413 (Mo. 1954), the trial court had granted a motion for new trial, finding that it erred by submitting an instruction that failed to define the legal term "preponderance of the evidence." The Missouri Supreme Court reversed the trial court finding that the several instructions read together adequately advised the jurors of the controlling law. *Id.* at 414. But in reaching this decision, the Court acknowledged that "[s]tanding alone, the omission complained of could, and probably would, have

been misleading.” *Id.* And during its analysis of the case, the Supreme Court noted its previous statement in an earlier case regarding instructions defining the burden of proof:

Certainly all that ought to be required, in addition to such a statement as to which party has this burden, should be a clear definition of preponderance of evidence, informing the jury that what is meant thereby is evidence which is more convincing to them as worthy of belief than that which is offered in opposition thereto.

Id. at 414-415.

This brings us to an interesting point regarding the general civil burden of proof instruction, MAI 3.01. Unlike MAI 3.07 and MAI-CR 302.04, the general burden of proof instruction approved in MAI 3.01 does not include the legal term attorneys and judges use to describe the applicable burden of proof. MAI 3.01 does not use the term “preponderance of the evidence.” Instead, it does what the Missouri Supreme Court required in *Nelson v. Taylor* and its other cases; it defines the term for the jurors:

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. [provisions specifically relating to punitive damages]. (T)he burden is upon the party who relies upon any such proposition *to cause you to believe that such proposition is more likely true than not.*

MAI 3.01 (emphasis added). Evidence causing the jurors to believe that a proposition is more likely true than not is similar to the language in *Nelson v. Taylor*, that the evidence “is more convincing to them as worthy of belief than that which is offered in opposition thereto.” It is also similar to other definitions of the term established in other cases, such as “more convincing than the evidence which is offered in opposition to it” or “which as a whole shows the fact to be proved to be more probable than not.” *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

Rather than approving an instruction for general civil cases using the legal term “preponderance of the evidence,” the approved instruction uses a definition essentially drawn from the case law defining that term. There is no definition of the term “clear and convincing evidence” to be found in the instructions approved for civil cases. For that reason, Mr. Van Orden, like the Missouri Supreme Court and the appellate courts, turned to case law to define that term in his offered instruction. The definition in his Instruction No. C was derived from *Lee v. Hiller*, 141 S.W.3d 517, 523 (Mo. App., S.D. 2004), “the court should be clearly convinced of the affirmative of the proposition to be proved. [t]his does not mean that there may not be contrary evidence,” and *In the Marriage of A.S.A.*, 931 S.W.2d 218, 221 (Mo. App., S.D. 1996), “[f]or evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed

against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." (L.F. 143-144).

The instructions approved for use in Missouri provide the jurors with a definition for two of the three legally established burdens of proof. It is only the legal term "clear and convincing evidence" for which no definition has been included in approved instructions. Given the substantial interest involved in a sexually violent predator civil commitment case - indefinite loss of liberty - due process must require that the applicable burden of proof also be defined for the jurors so that they may understand the issues before them and the law that must be applied to the case.

Because the trial court abused its discretion in refusing to submit Mr. Van Orden's Instruction No. C, the probate court's judgment and commitment order must be set aside and the case remanded for a new trial before a properly instructed jury.

IV.

The trial court abused its discretion in admitting Dr. Mandracchia's testimony, over Mr. Van Orden's objection, on the results of the Static-99 actuarial instrument applied to him by Dr. Mandraccha, in violation of Mr. Van Orden's right to due process of law and a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that the results were logically and legally irrelevant since the instrument does not address the specific question at issue whether - Mr. Van Orden is more likely than not to reoffend - and it confuses the issue and misleads the jurors because the instrument reflects only the results of group analysis, the group results do not distinguish who among the group will or will not offend, nor can they predict the behavior of any specific individual.

Mr. Van Orden understands that this argument has been rejected by the Missouri Supreme Court. *In the Matter of the Care and Treatment of Murrell*, 215 S.W.3d 96 (Mo. banc 2007). He does, however, have the right to seek a change in the law. Based on the law previously advanced in support of this argument, plus the testimony presented by Dr. Mandracchia in this trial regarding the capabilities of this instrument, Mr. Van Orden believes *Murrell* should be reversed and no longer followed.

Mr. Van Orden filed a pre-trial motion in limine to exclude any evidence regarding his risk to reoffend based on the Static-99 actuarial instrument because the results derived from that instrument are not relevant to whether he, individually, is a sexually violent predator under the meaning of the statute (L.F. 60-63). He objected at trial to Dr. Mandracchia's testimony regarding the results of the Static-99 but the trial court overruled the objection and permitted the testimony (Tr. 271). Mr. Van Orden renewed this objection in his motion for new trial (L.F. 163-164), preserving the issue for review.

The determination whether to admit evidence rests in the sound discretion of the trial court. *Murrell*, 215 S.W.3d at 109. An abuse of that discretion occurs when the trial court's ruling is so arbitrary and unreasonable that it shocks the sense of justice and is clearly against the logic of the surrounding circumstances. *Id.*

Admissibility of actuarial instruments is controlled by Section 490.065, RSMo 2000. *Murrell*, 215 S.W.3d at 110. That statute sets out two distinct foundations upon which expert testimony must rest in order to be admissible. The first foundation is that the "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...." Section 490.065.1. The second foundation is that the facts or data upon which the expert relies in forming his opinion "must be the type

reasonably relied upon by experts in the field in forming opinions upon the subject and must be otherwise reasonably reliable.” Section 490.065.3.

The Missouri Supreme Court held in *Murrell* that if an expert reasonably relies upon particular data in forming an opinion on the matter at issue, the Subsection 3 foundation, the same data “will necessarily be relevant to the case,” the Subsection 1 foundation. 215 S.W.3d at 110. Dr. Mandracchia’s testimony regarding the capabilities of this instrument demonstrates that this *a fortiori* presumption is misplaced.

Section 490.065.1 is essentially the same as Federal Rule of Evidence 702. *In the Matter of the Care and Treatment of Goddard*, 144 S.W.3d 848, 852-853 (Mo. App.S.D. 2004). FRE 702 uses the same language of assistance to the trier of fact to understand the evidence or determine a fact in issue. This condition of the rule goes primarily to relevance. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993). “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” *Id.* (citation omitted). In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999), the United States Supreme Court explained that *Daubert* held that FRE 702 imposes a special obligation on the trial court to ensure that scientific evidence was not only relevant, but also reliable. Thus, these two foundations for admission are quite distinct. A trial court is authorized to exclude evidence offered under Section 490.065 which is

irrelevant, immaterial or collateral to the proceeding. *Estate of Dean*, 967 S.W.2d 219, 224 (Mo. App., W.D. 1998). Indeed, it must do so.

Fundamental to the Missouri law of evidence is the rule that evidence must be both logically and legally relevant. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App.S.D. 2004). Evidence is inadmissible if it fails to satisfy either prong of this bifurcated standard. *Id.* Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Id.* Legal relevance balances the probative value of the proffered evidence against its prejudicial effect on the jury. *Id.* Legal relevance is determined by weighing the probative value of evidence against its costs, including unfair prejudice, confusion of the issues, and misleading the jurors. *Id.* Even if logically relevant, evidence will be excluded if its costs outweigh its benefits. *Id.*

It is certainly true that Dr. Mandracchia spoke to the matter at issue – Mr. Van Orden’s risk to reoffend – but the instrument upon which he testified, and relied, is simply incapable of assisting the jurors in the resolution of that matter. Dr. Mandracchia acknowledged that the results of a Static-99 assessment cannot establish an individual’s risk to be reconvicted (Tr. 290). He was asked: “So the Static doesn’t tell you about Mr. Van Orden the individual?” (Tr. 291). Dr. Mandracchia answered: “That’s correct.” (Tr. 291). The instrument only

identifies group characteristics and the evaluator places the subject of the assessment into one of the groups based on the score (Tr. 290). The instrument has no ability to identify whether any particular member of that group will be among the percentage of the group to be reconvicted (Tr. 290). But, having been given the task to assess Mr. Van Orden's risk to reoffend, Dr. Mandracchia explained: "[T]he only other way I know to do that is, other than flipping a coin or seeing if I like Mr. Van Orden, is to compare him to known people who reoffend." (Tr. 291). Dr. Mandracchia acknowledged that a study of high risk offenders, those who scored five or above on the Static-99, published in the Journal of Sexual Offending, Sexual Offender's Civil Commitment, Science and the Law, revealed a reconviction rate of 13.3% in five years (Tr. 301-302). This is nearly twenty percent below that assigned by the Static-99 (Tr. 295).

The instrument provides only a ratio of group success and failure. It cannot distinguish between the members of the same group with the same characteristics who do and who do not reoffend. It fails to distinguish between members of the sample group. It does not identify individual risk among the sample group members, and it cannot address individual risk of someone outside of the group. Additional research indicates that the risk assessment of the instrument may overestimate actual reoffense.

The ubiquity of its use by forensic examiners does not validate its ability to identify *individual* risk. Dr. Mandracchia acknowledged as much. The

instrument and opinions drawn from it are admissible only if they assist the jurors in deciding a matter at issue, not because the instrument is popular among forensic examiners. In essence, forensic examiners rely upon it because it is the only resource they have. That is not a basis for its admission into evidence if it will not assist the jurors in deciding a matter in issue.

So, this evidence becomes confusing and misleading. It confuses individual risk with group risk. It is misleading because, in spite of its recognized inability to identify Mr. Van Orden's individual risk, it provides a cache of "scientific evidence" which jurors may erroneously believe justifies their commitment of the individual before them. The trial court abused its discretion in admitting the evidence over Mr. Van Orden's objection.

Because the probate court abused its discretion in permitting evidence regarding the Static-99 over Mr. Van Orden's objection, his commitment must be reversed and the cause remanded for a new trial.

CONCLUSION

The probate court erred in failing to the declare the 2006 amendment to Section 632.495, RSMo, unconstitutional, and in subjecting Mr. Van Orden to indefinite involuntary commitment upon a standard of proof too low to assure Mr. Van Orden due process of law, as set out in Point I, and the judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial under the proper standard of proof. The probate court erred in denying Mr. Van Orden's motion to dismiss the petition for the State's failure to follow the procedure established by the statute, as set out in Point II, and the judgment and commitment order of the probate court must be vacated and Mr. Van Orden must be discharged from custody. Because the trial court abused its discretion in refusing to submit Mr. Van Orden's Instruction No. C, as set out in Point III, the probate court's judgment and commitment order must be set aside and the case remanded for a new trial before a properly instructed jury. Because the probate court abused its discretion in permitting evidence regarding the Static-99 over Mr. Van Orden's objection, his commitment must be reversed and the cause remanded for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,453 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 4th day of March, 2008, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

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