

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. SC89224
JOHN VAN ORDEN,)
 Appellant.)

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

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

This cause was transferred to this Court from the Southern District Court of Appeals prior to opinion because the constitutionality of a statute is involved.

STATEMENT OF FACTS

Mr. Van Orden incorporates the statement of facts set out in pages 7 through 18 of his opening brief.

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.

Addington v. Texas, 441 U.S. 418 (1979);

State v. Ciarelli, 366 S.W.2d 63 (Mo. App., K.C.D. 1963);

State v. Bromley, 840 S.W.2d 288 (Mo. App., W.D. 1992);

Kansas v. Hendricks, 521 U.S. 346 (1997);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Sections 556.016, RSMo 2000;

Section 632.495, RSMo Cum. Supp. 2006; and

Section 632.505 RSMo Cum. Supp. 2007.

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 Van Orden had been released on parole prior to the filing of the petition, but his parole had not been revoked prior to that filing.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 Order is subject to commitment as a sexually violent predator.

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

Grissum v. Reesman, 505 S.W.2d 81 (Mo. 1974);

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);

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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.

Careful analysis of the reasoning of the United States Supreme Court supporting its decision in *Addington v. Texas*, 441 U.S. 418 (1979), demonstrates why its decision that the clear and convincing evidence standard of proof was sufficient in that case does not control the question before this Court.

The United States Supreme Court accepted the clear and convincing standard for involuntary, indefinite civil commitment of the mentally ill in *Addington* for the following reasons:

- 1) state power is not exercised in the punitive sense in civil commitments;

- 2) proof beyond a reasonable doubt had been historically reserved for criminal cases;
- 3) review of the committed person's mental condition provides opportunities to correct an erroneous commitment;
- 4) the lack of certainty and the fallibility of psychiatric diagnoses raises a question whether a state could ever prove its case beyond a reasonable doubt.

441 U.S. at 428-429.

State's power not exercised in a punitive sense

Mr. Van Orden recognizes that SVP commitments are not considered punitive. The United States Supreme Court noted in *Addington* that civil commitments rest on two distinct powers of the government: its *parens patriae* power to care for its citizens who cannot care for themselves, and its police power to protect the public. 441 U.S. at 426. While the former power is certainly not punitive, the exercise of police power over the actions of a citizen certainly comes closer. The United States Supreme Court focused its attention in *Addington* on the *parens patriae* power rather than the government's exercise of its police power.

In discussing the third basis of its holding, the United States Supreme Court focused on the ill effect on the individual's ability to care for himself as a

basis for putting a greater risk of an erroneous commitment on the individual:
“it is not true that the release of a genuinely mentally ill person is no worse than the failure to convict the guilty. One who is suffering a debilitating mental illness and in need of treatment is neither wholly at liberty nor free from stigma.
*** It cannot be said therefore that it is much better for a mentally ill person to ‘go free’ than for a mentally normal person to be committed.” 441 U.S. at 429.
This focus is on the exercise of *parens patriae* power to provide care for the state’s mentally ill. It is not focused on the police power to protect the public.

Proof beyond a reasonable doubt is historically applied to criminal law

This basis, of course, no longer applies after the United States Supreme Court accepted the proof beyond a reasonable doubt standard for involuntary civil commitment of sexually violent persons in *Kansas v. Hendricks*, 521 U.S. 346 (1997). Proof beyond a reasonable doubt is the standard applied in the vast majority of states with sexually violent person commitment statutes. It was the standard of proof required by the SVP Act for the first seven years of its history.

*Review of the committed person’s mental condition provides
opportunities to correct an erroneous commitment*

This factor is premised upon the United States Supreme Court’s analysis of the appropriate manner in which to allocate the risk of an erroneous decision

between the parties which is the purpose of the burden of proof. 441 U.S. at 423-424. The United States Supreme Court accepted placing more of that risk on the individual assuming that “the layers of professional review and observation of the patient’s condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected.” 441 U.S. at 428-429.

Missouri’s SVP practice demonstrates that this assumption may be misplaced. Since the SVP Act went into effect in 1999, no one has been released under this review process. This Court now has pending before it a case where the jurors continued the individual’s commitment even though the director of the treatment center, a doctor from the Department of Mental Health, and a doctor privately retained by the State all agreed that the person no longer meets the criteria for commitment. See *In the Matter of the Care and Treatment of Wilbur Schottel*, SC89171. Justice Kennedy wrote in his concurring opinion in *Hendricks* of his concern that the “practical effect of the Kansas law may be to impose confinement for life. At this stage of medical knowledge, although future treatments cannot be predicted, psychiatrists or other professionals engaged in treated pedophilia may be reluctant to find measurable success in treatment even after a long period and may be unable to predict that no serious danger will come from release of the detainee.” 521 U.S. at 372 (Kennedy, J., concurring). And it must be remembered, that in *Hendricks*, the United States Supreme Court

was reviewing a case where the risk of an erroneous commitment was placed almost exclusively upon the state by the reasonable doubt burden of proof. The United States Supreme Court did not have to decide if placing greater risk on the individual satisfied due process of law.

These concerns become even more significant because the State of Missouri added Section 632.505, RSMo Cum. Supp. 2007, to the SVP Act to provide for lifetime commitment of the sexually violent predator to the Department of Mental Health. This statute created the possibility that a sexually violent predator may be released from secure confinement on conditions if found safe to be at large, but the person remains committed to the custody of DMH subject to return to secure confinement upon a finding by the trial court by a preponderance of the evidence that the person has violated a condition of release.

The apparent difficulty of the committed person to secure his release from confinement as a sexually violent predator in an annual review argues against applying the lower standard of proof in these cases than in criminal cases. The beyond a reasonable doubt burden of proof is required even in misdemeanor cases where the confinement cannot exceed one year. Section 556.016, RSMo 2000. Proof beyond a reasonable doubt was required before sentencing the defendant to a five hundred dollar fine and six months in jail in *State v. Ciarelli*, 366 S.W.2d 63, (Mo. App., K.C.D. 1963), and before imposing a seventy-five

dollar fine for speeding in *State v. Bromley*, 840 S.W.2d 288 (Mo. App., W.D. 1992). How can the State of Missouri require Mr. Van Orden to bear a greater risk of an erroneous commitment than it can require of a defendant for a seventy-five dollar fine?

The state may not be able to prove its case beyond a reasonable doubt.

The State of Missouri was able to meet this burden from 1999 when the statute took effect until 2006 when the State lowered the burden of proof it must meet. At least thirteen other states have been able to meet this burden of proof. The State of Kansas did so in *Hendricks*. This judicial history rejects this concern as a legitimate reason to lower the State's burden of proof.

Conclusion

The probate court erred in failing to 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 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. 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 will rely upon the argument he presented in his initial brief on this Point.

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.

The State relied upon *State Farm Mutual Automobile Insurance Co. v. DeCaigney*, 927 S.W.2d 907 (Mo. App., W.D. 1996), to argue generally that commonly understood words do not have to be defined and that attempting to define them may cause confusion (Resp. Br. 41). The insurance company's defense in that case was that the plaintiff was not living in the home as required by the policy. *Id.* at 909. The company offered an instruction to define the term "live." *Id.* The Western District affirmed the refusal of the instruction because the terms "living with" and "living in the same household" were commonly understood. *Id.* at 910.

But the instruction in *State Farm* sought to define terms contained within the insurance policy. The instruction did nothing to help the jurors understand the burden of proof necessary to return a verdict in the case, as is the issue in Mr. Van Orden's appeal. The holding in *State Farm* is completely irrelevant to the purpose of a burden of proof instruction, which is to inform the jurors which party has the burden, to provide a clear definition of the applicable burden, and to inform the jury what is meant thereby. *Nelson v. Taylor*, 265 S.W.2d 409, 413 (Mo. 1954).

The State cited a couple of Illinois cases that held that "clear and convincing evidence" does not have to be defined, *In re R.W.*, 775 N.E.2d 602 (Ill. App., 5th Dist. 2002), and that the term is best left undefined. *Estate of Casey*, 507 N.E.2d 962 (Ill. App., 4th Dist. 1987). (Resp. Br. 42). Both of these cases were decided on the fact that the Illinois courts had been defining the clear and convincing evidence standard with the term "reasonable doubt," leading the Courts to conclude that the definitions could be causing the jurors to confuse the "clear and convincing" burden in civil cases with the "beyond a reasonable doubt" burden in criminal cases. *In re R.W.*, 775 N.E.2d at 906-907; *Estate of Casey*, 507 N.E.2d at 966-967. These concerns are simply not present in Instruction No. C offered by Mr. Van Orden, which did not include the term "reasonable doubt." And these concerns were eliminated by the State during its

voir dire of the venire panel when the Assistant Attorney General advised the panel members:

This is a – a civil case. The burden of proof is clear and convincing, proof by clear and convincing evidence. It’s not a criminal case. Proof beyond a reasonable doubt, that’s not the burden in this case. It’s proof by clear and convincing in a civil case. And does everyone understand that, that this is not a criminal case and the burden is going to be clear and convincing evidence? Anyone not understand that? I don’t see any hands.

(Tr. 38). This *voir dire* and the language of Instruction No. C eliminates the possible confusion between the civil burden of proof and criminal burden of proof which concerned the Illinois appellate courts. But the Assistant Attorney General’s *voir dire* weighs in favor of defining the applicable burden of proof to the jurors.

The Supreme Judicial Court of Maine certainly did find the instruction given in *Laliberte v. Mead*, 628 A.2d 1050 (Me. 1993), to be confusing, as the State points out in its brief (Resp. Br. 43). But that case hardly seems relevant at all to the issue before this Court. The instruction in that case “defined” clear and convincing evidence by defining preponderance of the evidence and beyond a reasonable doubt, and then describing clear and convincing evidence as “halfway between the two.” 628 A.2d at 1052. The Court clearly recognized; “That instruction is not even remotely suggestive of our definition of clear and

convincing evidence as evidence that ‘place[s] in the ultimate factfinder an abiding conviction that the truth of [the] factual contentions are “highly probable.”’” *Id.* What this case does show is that Maine has a recognized definition of clear and convincing evidence, but that definition is not “halfway” between a preponderance of the evidence and beyond a reasonable doubt. Instruction No. C included the “abiding conviction” language that the Maine Court recognized is part of that state’s definition of clear and convincing evidence. Mr. Van Orden’s offered instruction was based on the judicial definition of clear and convincing evidence in Missouri. That is what the Maine court found missing in the instruction under that court’s review.

The State noted that the Maryland Court of Special Appeals approved the giving of a jury instruction defining for the jurors the term “clear and convincing evidence” in *Genie & Company, Inc. v. Comptroller of the Treasury*, 668 A.2d 1013 (M.D. Ct. Spec. App., 1995). The State suggests that the instruction did nothing more than track the common understanding of the words, but the fact remains that the definitional instruction suggested by the Committee on Civil Pattern Jury Instructions of the Bar Association to inform the jury of the meaning of the legal term had also been approved by other courts, and was again found to be beneficial to the jurors deciding the case. Mr. Van Orden agrees that the term should be defined for the jurors and that is all he requested in the probate court below.

The State pointed out that this Court defined the term “clear and convincing evidence” in *Grissum v. Reesman*, 505 S.W.2d 81 (Mo. 1974) (Resp. Br. 45-46). The State argued that Mr. Van Orden offered no reason to chose the definition of that term in *Marriage of A.S.A.*, 931 S.W.2d 218 (Mo. App., S.D. 1996), rather than the definition in *Grissum* (Resp. Br. 46). The State cited a number of other cases that have applied the *Grissum* definition (Resp. Br. 45-46).

In fact, Mr. Van Orden’s Instruction No. C did include the *Grissum* definition. Mr. Van Orden supported his offered instruction with *Lee v. Hiler*, 141 S.W.3d 517 (Mo. App., S.D. 2004). The definition set out in *Lee* is the *Grissum* definition. 141 S.W.3d at 523. Mr. Van Orden did include an additional definition of the legal term, derived from *Marriage of A.S.A.* The Southern District Court of Appeals began with the *Grissum* definition, and then noted that other appellate courts had defined clear and convincing evidence to mean “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.” *Marriage of A.S.A.*, 931 S.W.2d at 222. The Southern District noted this definition was used in *Matter of O’Brien*, 600 S.W.2d 695 (Mo. App., W.D. 1980), *In the Interest of J.A.J.*, 652 S.W.2d 745 (Mo. App., E.D. 1983), *In the Interest of M.N.M.*, 681 S.W.2d 457 (Mo. App., W.D. 1984), and *In re J.D.K.*, 685 S.W.2d 876 (Mo. App., W.D. 1984).

Rather than suggesting that a definition of the legal term “clear and convincing evidence” should not be given to the jurors, this really raises the question of *what* definition should be given. If necessary, this Court can answer that question and return this case for a new trial with the definition this Court deems appropriate.

Because the probate 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. 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.

Mr. Van Orden will rely upon the argument he presented in his initial brief on this Point.

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 of the initial brief and this reply brief, 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 of the initial brief, 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 of the initial brief and this reply brief, 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, as set out in Point IV of the initial brief, 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 4,295 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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

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

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