

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE)
CARE AND TREATMENT OF)
STEPHEN ELLIOTT,)
 Appellant.)

No. WD 65994

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	6
STATEMENT OF FACTS.....	7
POINTS RELIED ON	20
ARGUMENT	
I. The SVP law is unconstitutional	25
II. No basis exists for “expert” testimony on serious difficulty controlling behavior	32
III. Results of actuarial instruments are confusing and misleading	40
CONCLUSION.....	47
APPENDIX	49

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)	26
<i>Barker v. Barker</i> , 98 S.W.3d 532 (Mo. banc 2003)	26
<i>Beasley v. Mollett</i> , 95 S.W.3d 590 (Tex. App., 2002)	29, 30
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)	23, 35, 42
<i>Detention of Selby</i> , 710 N.W.2d 249 (Iowa App., 2005)	29
<i>Dixon v. Attorney General</i> , 325 F.Supp. 966, (M.D.Pa. 1971)	28
<i>Estate of Dean</i> , 967 S.W.2d 219 (Mo. App., W.D. 1998)	41, 42, 43
<i>Foucha v. Louisiana</i> , 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)	20, 26, 27
<i>Hatcher v. Wachtel</i> , 269 S.E.2d 849 (W.Va. 1980)	28
<i>Hubbert v. Superior Court</i> , 969 P.2d 584 (Cal. 1999)	29
<i>Humphrey v. Cady</i> , 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)	27
<i>In re Albright</i> , 836 P.2d 1 (Kan. 1992)	28
<i>In the Matter of the Care and Treatment of Coffel</i> , 117 S.W.3d 116 (Mo. App., E.D. 2003)	33, 34, 35, 38
<i>In the Matter of the Care and Treatment of Goddard</i> , 144 S.W.3d 848 (Mo. App., S.D. 2004)	23, 41, 42, 43

<i>In the Matter of the Care and Treatment of Norton</i> , 123 S.W.3d 170 (Mo. banc 2004)	26
<i>In the Matter of the Care and Treatment of Whitnell</i> , 129 S.W.3d 409 (Mo. App., E.D. 2004)	37, 38, 39
<i>Kansas v. Crane</i> , 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)	36
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)	27, 28, 29
<i>Kumho Tire Co., Ltd. v. Carmichael</i> , 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)	23, 42, 43
<i>Mignone v. Vincent</i> , 411 F.Supp. 1386, (S.D.N.Y., 1976)	28
<i>O'Connor v. Donaldson</i> , 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975)	20, 27, 28
<i>Pifer v. Pifer</i> , 273 S.E.2d 69 (W.Va. 1980)	28
<i>Reno v. Flores</i> , 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)	20, 27
<i>Shelton v. City of Springfield</i> , 130 S.W.3d 30 (Mo. App., S.D. 2004)	23, 41, 43
<i>Stamus v. Leonhardt</i> , 414 F.Supp. 439, (S.D.Iowa 1976)	28
<i>State Board of Registration for the Healing Arts v. McDonagh</i> , 123 S.W.3d 146 (Mo. banc 2003)	22, 33, 35
<i>State v. Faulkner</i> , 103 S.W.3d 346 (Mo. App., S.D. 2003)	22, 39
<i>State v. Hayes</i> , 88 S.W.3d 47 (Mo. App., W.D. 2002)	34
<i>State v. Krol</i> , 344 A.2d 289 (N.J. 1980)	28

State v. Williams, 858 S.W.2d 796 (Mo. App., E.D. 1993) 22, 39

Suzuki v. Yuen, 617 F.2d 173, (9th Cir. 1980) 28

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2002) 20, 22, 30, 31, 33

United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) .. 26

CONSTITUTIONAL PROVISIONS:

United States Constitution, Sixth Amendment..... 23, 24, 40

United States Constitution, Fourteenth Amendment

..... 20, 21, 22, 23, 24, 25, 32, 40

Missouri Constitution, Article 1, Section 10 20, 21, 22, 25, 32, 40

Missouri Constitution, Article 1, Section 18(a) 23, 24, 40

STATUTES:

Section 632.480 RSMo 2000; Cum Supp. 2005 6, 7, 20, 21, 25, 30, 32, 33

Section 490.065, RSMo 2000..... 22, 24, 35, 41, 42, 43

RULES:

Federal Rule of Evidence 702..... 24, 42

JURISDICTIONAL STATEMENT

Stephen Elliott appeals the judgment and order of the Honorable Larry D. Harman following a jury trial in Clay County, Missouri, committing Mr. Elliott to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal challenges, inter alia, the constitutionality of Sections 632.480 RSMo, et seq., and jurisdiction therefore lies in the Missouri Supreme Court. Article V, Section 3, Missouri Constitution (as amended 1982). Mr. Elliott has filed contemporaneously with this brief a motion to transfer the appeal to the Supreme Court. If this Court believes that this appeal does not present a real and substantial claim of unconstitutionality of the statute, jurisdiction lies in the Missouri Court of Appeals, Western District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.070, RSMO 2000.

STATEMENT OF FACTS

Stephen Elliott pleaded guilty in May of 1989 to forcible rape (L.F. 10).¹ He was scheduled for release from confinement on June 24, 2004, but the State filed a petition pursuant to Section 632.480, *et seq.*, on June 15 to civilly commit him indefinitely to the custody of the Department of Mental Health as a sexually violent predator (L.F. 9-12).

Mr. Elliott was evaluated on order of the court by Dr. Jeanette Duncan with the Department of Mental Health (Tr. 284, 288-289). Mr. Elliott's was Dr. Duncan's third sexually violent predator evaluation (Tr. 357-358). She had performed five evaluations by the time of trial, opining in four of them that the person met the criteria for commitment (Tr. 288, 358). Dr. Duncan reviewed available records, but Mr. Elliott refused an interview upon advice of counsel (Tr. 294-295, 360). She noted that an interview is not essential to the evaluation (Tr. 297).

Dr. Duncan diagnosed Mr. Elliott with sexual sadism, a paraphilia involving recurrent and intense, sexually arousing fantasies, urges or behaviors – real, not simulated – in which the psychological or physical suffering, including humiliation of the victim, is sexually exciting to the person (Tr. 301, 304-305). Dr. Duncan relied upon Mr. Elliott's arrest history to make this diagnosis (Tr. 305).

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

Mr. Elliott was arrested for two rapes in 1975 (Tr. 306). One victim, a woman in her twenties, reported that Mr. Elliott raped her vaginally and anally several times in his apartment, using force against her and hitting her (Tr. 306-307). Dr. Duncan said this met the diagnostic criteria of humiliation and suffering (Tr. 307). As this woman was leaving Mr. Elliott's apartment, he grabbed a thirteen year old girl in the hallway, dragged her into his apartment, and vaginally raped her (Tr. 309). Mr. Elliott reportedly twisted her arm, choked her, and told her to be quiet (Tr. 309). Dr. Duncan said this met the diagnostic criteria of putting the victim in fear (Tr. 309).

Mr. Elliott was arrested in 1977 for raping a twelve year old girl (Tr. 310). It was significant to Dr. Duncan's diagnosis that Mr. Elliott grabbed her while she was sleeping and raped her (Tr. 310). The girl received bruises, bites and scratches (Tr. 311). She was crying when the police took her to the hospital, and she reported that Mr. Elliott was laughing and smiling, and told her not to be mad (Tr. 312).

The next incident significant to Dr. Duncan's diagnosis was a kidnapping and attempted rape in California (Tr. 312). Mr. Elliott followed a woman he met in a bar and tried to convince her to leave with him (Tr. 312-313). He then forced her into a car and choked her into unconsciousness while kissing her (Tr. 313). When she awoke, Mr. Elliott was driving the car (Tr. 313). The woman reported that Mr. Elliott said that he could have killed her, and that he had raped in the

past, but was going to kill her rather than rape her (Tr. 314). He also made some reference to the Hillside Strangler (Tr. 313). When Mr. Elliott pulled into a secluded area, the woman jumped from the car and escaped (Tr. 314). Dr. Duncan said that this incident was significant to her diagnosis because while there was no rape, Mr. Elliott choked the victim while kissing her (Tr. 314). Also, telling the woman that he had raped before, that he could kill her, and that he was going to kill her, was psychological trauma to place her in fear (Tr. 314-315).

Mr. Elliott was arrested for vaginally and anally raping a woman in 1980 (Tr. 315).² Dr. Duncan found evidence of sexual sadism because Mr. Elliott put the woman's legs over his shoulders, giving him a position of dominance (Tr. 315). He made the woman hold a flashlight and watch as he anally raped her, causing her humiliation (Tr. 316). He was also physically violent (Tr. 316-317). Dr. Duncan also said it was significant to her diagnosis that Mr. Elliott would not let the woman leave (Tr. 317).

Mr. Elliott was arrested in 1981 for vaginally and anally raping another woman (Tr. 318). Mr. Elliott struck the woman, causing her to suffer (Tr. 318). He told the woman that he wanted to take her into the mountains and live with

² Dr. Duncan testified that this occurred in 1990, but that must have been a misstatement since Mr. Elliott was in prison from the time of his guilty plea in 1989 until he was transferred to MSOTC in 2004.

her, which Dr. Duncan said was significant to her diagnosis because that could cause the woman to think that she could be kidnapped and repeatedly brutalized (Tr. 318).

Mr. Elliott was convicted and incarcerated for the rapes of these last two women (Tr. 318-319). Dr. Duncan considered it significant to her diagnosis that after Mr. Elliott was paroled he was arrested for raping another woman (Tr. 319). He told the woman to remove her clothes and masturbate, causing her humiliation (Tr. 320). He held her down in a position of dominance (Tr. 320). The woman was placed in fear that Mr. Elliott would hurt her (Tr. 320). It was for this rape that Mr. Elliott was incarcerated in 1989 (Tr. 241-242).

Dr. Duncan referred to other information that came out in Mr. Elliott's plea bargain in 1989 (Tr. (Tr. 322)). Just a few minutes before raping the woman for whom he was convicted, Mr. Elliott had allegedly raped another woman (Tr. 322). Dr. Duncan said this rape met the criteria of her diagnosis because it involved force, humiliation and domination (Tr. 322-323). Mr. Elliott ejaculated during this rape, even though the woman asked him not to, which Dr. Duncan said met the criteria because it further humiliated the woman by causing her to be concerned that she might become pregnant from a rape (Tr. 323-324). Also significant to Dr. Duncan's diagnosis was Mr. Elliott's threat that if the woman reported the rape he would take her away, lock her up, and rape her every night (Tr. 324).

Dr. Duncan said that her diagnosis of sexual sadism was based on two common threads in all the incidents (Tr. 326-327). The first was that all involved humiliation, psychological victimization, physical suffering, and force beyond what was necessary to achieve compliance (Tr. 326). The second thread was Mr. Elliott's positioning over his victims which provided him the ability to see their facial expressions and to see their fear, pain and humiliation (Tr. 327).

Dr. Duncan admitted that the commission of forcible rape does not make a person a sexual sadist (Tr. 365). Probably only five to ten percent of rapists can be classified as sexual sadists (Tr. 365). Dr. Duncan has worked with three other rapists, and she has never made a diagnosis of sexual sadism (Tr. 359, 365-366). Mr. Elliott's is the only diagnosis of sexual sadism she has made in her professional career (Tr. 359). An evaluation must begin with the larger group of rapists, and then look for information identifying the smaller group of sexual sadists (Tr. 366). The number of rapes does not place a person in the smaller group (Tr. 367). All rapes involve force, humiliation, fear and intimidation (Tr. 369). Even "excessive" force does not make a rapist a sexual sadist (Tr. 370). The ability to achieve orgasm in conjunction with the force, humiliation, fear or intimidation is not enough to qualify a person as a sexual sadist (Tr. 369-370). The real test is "what it is that they are deriving sexual pleasure from." (Tr. 367). If a person is sexually aroused by the actual intercourse, they are not a sexual sadist (Tr. 368). They must be sexually aroused by the physical or psychological

suffering (Tr. 368-369). Asked how she knew that it was the intimidation and humiliation involved in the rapes which was sexually arousing to Mr. Elliott, Dr. Duncan replied, "Aside from him achieving orgasm and repeating the, doing it with similar victims, to me that's how I'm, I know." (Tr. 370). She then simply expressed her opinion: "It is my opinion that he was achieving, he was getting sexual excitement from having this happen." (Tr. 370-371).

Dr. Duncan opined that sexual sadism predisposes a person to commit acts of sexual violence because the nature of the arousing fantasies and urges are violent, the desire to see someone suffering or humiliated (Tr. 329). She further opined this was true for Mr. Elliott given the arousal she identified to the psychological or physical suffering of his victims (Tr. 329). Dr. Duncan believed that sexual sadism predisposed Mr. Elliott to commit the acts he did from 1975 to 1988 (Tr. 329).

Dr. Duncan opined, over Mr. Elliott's objection, that the sexual sadism caused him serious difficulty controlling his behavior (Tr. 330). She identified three "prongs" she evaluated; the desire to commit the acts, mediation of that desire, and the resulting behavior (Tr. 331). Dr. Duncan said that Mr. Elliott has the desire to humiliate his victims, he has an impairment of his self-regulation to avoid those acts, and he has acted on his desire with non-consenting persons (Tr. 331). He did so in spite of having been incarcerated and on probation (Tr. 332). The pattern continued after incarceration (Tr. 332). Mr. Elliott continued to

offend even though he was aware of the consequences of his offending, so the threat of prison was not a deterrent (Tr. 332). Dr. Duncan also got to examine responses given by Mr. Elliott to a “true-false” questionnaire while incarcerated in 1999 and 2000, and noted that he identified as true the statement that several times a week he feels like something dreadful is going to happen (Tr. 334-335).

Dr. Duncan acknowledged that not all persons who commit sex crimes, nor all persons who have a paraphilia have serious difficulty controlling their behavior (Tr. 375-376). The DSM specifically notes that a diagnosis has no implication to the person’s ability to control behavior (Tr. 377). Dr. Duncan agreed that the term “serious difficulty” is arbitrary, with no way to quantify it and no test to determine it (Tr. 378). She agreed that everyone may measure it differently (Tr. 378-379). Dr. Duncan noted that there is a difference between difficulty controlling behavior and serious difficulty controlling behavior, and only the latter subjects a person to SVP commitment (Tr. 379, 380). Dr. Duncan acknowledged that she had previously told Mr. Elliott’s attorney that it was hard to describe the difference between the two, and that she was unable to do so (Tr. 380). She claimed at trial that having thought about the difference, she could now explain it (Tr. 381). But she did not explain that difference at trial, and admitted that she had not thought about the difference when she performed her evaluation of Mr. Elliott (Tr. 381). When she wrote her report she simply believed that Mr. Elliott had serious difficulty controlling his behavior (Tr. 381).

Dr. Duncan acknowledged that the relevant question was whether Mr. Elliott currently has serious difficulty controlling his behavior, not whether he had serious difficulty in the past (Tr. 376). Relevant to this question is Mr. Elliott's behavior over the past sixteen years while incarcerated (Tr. 381-382). During that time there was no evidence of physical or verbal aggression (Tr. 382-384). There are certainly opportunities for people in custody to act out in that fashion against other inmates or male or female staff (Tr. 385). There was no record of Mr. Elliott acting in a sexually offensive way, or possessing sexually inappropriate or sadistic material (Tr. 385-386). Sexually inappropriate behavior, including rapes, can occur in prison (Tr. 393). Mr. Elliott had no violations in prison for sexually inappropriate behavior (Tr. 388-389). He was pleasant with peers and staff (Tr. 387-388). His adjustment in prison was appropriate, as has been his behavior in the Missouri Sexual Offender Treatment Center (MSOTC) (Tr. 386).

Dr. Duncan begins her assessment of risk to reoffend by using actuarial instruments commonly used in sexually violent predator evaluations (Tr. 338). She then turns to individual factors that may increase or decrease risk (Tr. 338). Dr. Duncan scored Mr. Elliott on the Static-99 actuarial instrument, the one most commonly used (Tr. 339-340). Mr. Elliott's score place him in the "high risk" category, among which fifty-two percent of the persons are reconvicted in fifteen years (Tr. 340-341, 426). Dr. Duncan admitted that she could not say whether Mr.

Duncan fell within that group, or the forty-eight percent of the group which was not reconvicted (Tr. 426-427).

Dr. Duncan said that she then turned to other factors that may cause an increase risk to reoffend, which involves the application of her “clinical judgment” (Tr. 344). She opined that Mr. Elliott’s risk was increased because he continued to offend in spite of incarceration and supervision (Tr. 345). She said that a sexual deviancy, such as sexual sadism, increases risk (Tr. 345). Alcohol or other substances were involved in Mr. Elliott’s offending, and if he returned to drinking that might reduce his inhibitions to where he would offend again, which Dr. Duncan listed as a factor increasing his risk (Tr. 350-351). She also opined that the length of his offending affected his risk (Tr. 352).

Dr. Duncan noted that Mr. Elliott had been terminated from sex offender treatment (MOSOP) (Tr. 345-346). Completion of treatment reduces risk, and so Dr. Duncan opined that lack of a relapse prevention plan increased Mr. Elliott’s risk to reoffend (Tr. 349-350). Mr. Elliott completed phase I of MOSOP and began phase II at the end of October, 1999 (Tr. 395). Through April of 2000, treatment records indicated that Mr. Elliott was making satisfactory progress and was gaining understanding of his offending behavior (Tr. 396-399). But treatment staff discovered that Mr. Elliott was not completely disclosing his sexual history, and in June of 2000 he was terminated from treatment due to his inability, in the staff’s opinion, to fully disclose his offending behavior (Tr. 399).

Dr. Duncan agreed that disclosure is only one concept covered in treatment (Tr. 400). Treatment also covers risk factors, deviant cycles, offense triggers, thinking errors, and relapse prevention (Tr. 400-401). Mr. Elliott's only problem was with disclosure of his sexual history (Tr. 401). Dr. Duncan was aware of the research of Dr. Hanson, one of the leaders in sex offender research and therapy, showing that offenders who deny their offenses are at no higher risk to reoffend than any other offender (Tr. 401-402). That research also showed that low motivation for treatment does not correlate with higher risk to reoffend (Tr. 403).

Dr. Duncan acknowledged that advanced age lowers the risk to reoffend (Tr. 352). Dr. Hanson has also done research on the affect of age on recidivism (Tr. 429-430). His research shows that recidivism for rapists begins to decline significantly at age fifty, dropping to nearly zero by age sixty (Tr. 433-434). Mr. Elliott was fifty-six at the time of trial (Tr. 434). Follow-up research by two other doctors demonstrated a similar linear decrease in recidivism by age (Tr. 435). Dr. Duncan opined, however, that while Mr. Elliott's age reduced his risk to reoffend, it did not reduce his risk to the extent that he was not more likely than not to reoffend (Tr. 353). The State directed to Dr. Duncan to some "literature" that suggests that the reduction for age does not apply to high-risk offenders (Tr. 449-450). But Dr. Duncan was also aware that one of the age studies found that because the actuarial instruments were validated on primarily younger offenders they tend to over-estimate the risk of reoffense for older men (Tr. 435-436). Dr.

Duncan was unaware that the doctor responsible for that research has advised, for this reason, that the actuarial instruments should not be used to assess risk in persons over the age of forty (Tr. 436).

Dr. Duncan also noted that Mr. Elliott has had three heart attacks in 1996, 1997, and 2000, resulting in angioplasties and insertion of stints, he has high blood pressure and mild congestive heart failure, and a hip fracture and ruptured lumbar disc causing him to walk with a cane since 1997 (Tr. 353-354, 420-422). These physical infirmities can lower risk to commit future rapes (Tr. 354). Dr. Duncan suggested, however, that she might say that these infirmities make Mr. Elliott less likely to reoffend if he had to run his victims down, but his crimes usually involved someone close by who he could grab and subdue (Tr. 354). She acknowledged that Mr. Elliott has said that his outlook on life has changed after three heart attacks, and he is now just happy to be alive (Tr. 404-405). Mr. Elliott was "born again" religiously after his first heart attack, and believes that his faith will keep him on the straight and narrow (Tr. 405-406). He gains strength from his family, his children and grandchildren, and is motivated by his contact with them (Tr. 405). The institutional records indicate that Mr. Elliott has kept in contact with his family (Tr. 406).

Dr. Duncan said that Mr. Elliott's conduct within the Department of Corrections was relevant to determining whether he meets the criteria of a sexually violent predator (Tr. 409). Mr. Elliott received forty-six college credits

through community colleges (Tr. 417-418). He tutored other inmates from 1997 to 2002 (Tr. 418-419).

Mr. Elliott helped establish a chapter of the Vietnam Veterans of America in the Moberly Correctional Center where he was incarcerated (Tr. 416). He participated with the chapter's color guard, described by the VVA chairman of the Incarcerated Veterans Committee as one of the most disciplined he has ever seen, including active military units, until his inability to walk without a cane prevented his participation (Tr. 456-457, 465-466, 482). The VVA chapters inside prisons are operated in a manner to teach discipline because many veterans ended up in prison because they could not control themselves (Tr. 468). The chairman of the Incarcerated Veterans Committee said that one of the best things member get out of participation is self-discipline (Tr. 469). The members are required to show respect for one another (Tr. 469). He said that he has seen that sort of respect from Mr. Elliott (Tr. 469).

The Moberly Correctional Center chapter of the VVA operates a pre-release, pre-employment program to help prepare inmates for reintegration into society upon release (Tr. 461, 463). Mr. Elliott was involved in the implementation of this program, and he led group sessions on occasion (Tr. 464). In one session, he asked the group members to write their obituaries and bring them to the next session (Tr. 484). After the group members read their obituaries at the next meeting, Mr. Elliott noted that none of them wrote that they wanted

to die in prison or on the streets on drugs (Tr. 485). He admonished the group members to keep those obituaries with them after they were released, and to read them if they got to thinking about getting into trouble to remind themselves that they did not want to die in prison (Tr. 485). A social worker with a Lutheran ministry attending the meetings was very impressed with Mr. Elliott's approach, and she has since incorporated it into her work with her own clients (Tr. 485-486).

Dr. Duncan expressed the opinion at trial that Mr. Elliott has a mental abnormality, sexual sadism, which makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility (Tr. 355). The jurors returned a verdict finding that Mr. Elliott is a sexually violent predator (L.F. 175). The probate court committed Mr. Elliott to the custody of DMH to be held in a secure facility until his mental condition has so changed that he is safe to be at large (L.F. 194).

POINTS RELIED ON

I.

The trial court erred when it denied appellant's motion to dismiss the State's petition because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The SVP law violates the guarantees of due process because it permits the State to deprive a person of their liberty upon proof that he suffers from a mental abnormality that predisposes him and makes it more likely than not that he will commit sexually violent offenses, but does not require a risk that he is likely to do so in the immediate future. Due process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he poses an imminent risk of harm. Thus, appellant was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of due process of law.

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992);

O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975);

Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993);

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2002);

United States Constitution, 14th Amendment;
Missouri Constitution, Article I, Section 10; and
Section 632.480, RSMo 2000.

II.

The probate court abused its discretion in denying Mr. Elliott's motion to exclude expert testimony on the necessary element of serious difficulty controlling behavior and in permitting Dr. Duncan to testify that in her opinion Mr. Elliott has serious difficulty controlling his behavior, in violation of Mr. Elliott's right to 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 there was an insufficient foundation for the admission of Dr. Duncans's testimony in that there is no reasonably reliable basis or methodology upon which psychologists can determine an individual's ability to control behavior.

State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. banc 2003);

State v. Faulkner, 103 S.W.3d 346 (Mo. App., S.D. 2003);

State v. Williams, 858 S.W.2d 796 (Mo. App., E.D. 1993);

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2002);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10; and

Section 490.065, RSMo 2000.

III.

The trial court abused its discretion in admitting Dr. Duncan's testimony, over Mr. Elliott's objection, on the results of the Static-99 actuarial instrument applied to him by Dr. Duncan, in violation of Mr. Elliott'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 they do not address the specific question at issue whether Mr. Elliott is more likely than not to reoffend but confuse the issue and mislead the jurors because the actuarial instruments reflect only the results of group analysis, the similarities between the sample group and Mr. Elliott or any other individual is unknown, and the group results cannot 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);

In the Matter of the Care and Treatment of Goddard, 144 S.W.3d 848 (Mo. App., S.D. 2004);

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, Sixth and Fourteenth Amendments;

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

Section 490.065, RSMo 2000; and

Federal Rule of Evidence 702.

ARGUMENT

I.

The trial court erred when it denied appellant's motion to dismiss the State's petition because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The SVP law violates the guarantees of Due Process because it permits the State to deprive a person of their liberty upon proof that he suffers from a mental abnormality that predisposes him and makes it more likely than not that he will commit sexually violent offenses, but does not require a risk that he is likely to do so in the immediate future. Due Process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he poses an imminent risk of harm. Thus, appellant was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of Due Process of law.

Prior to trial, Mr. Elliott filed a motion to dismiss the petition against him because the sexually violent predator statutes are unconstitutional in that they do not require a finding that his mental abnormality, if any, makes him more likely than not to commit a sexually violent offense in the immediate future (L.F. 32-39). Rather, the statutes permit commitment upon a finding that he may commit

such an offense over the course of his lifetime (L.F. 32). The trial court denied this motion. This Court's standard of review for constitutional challenges to a statute is *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

The United States Supreme Court has recognized that an involuntary civil commitment “for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979). Commitment to a mental institution impinges upon the “[f]reedom from bodily restraint [that] has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha v. Louisiana*, 504 U.S. 71, 81, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992). The Supreme Court has “always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty.” *Id.*, quoting *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). These principles were recognized as well by the Missouri Supreme Court in *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2004).

Not only must the procedural safeguards involved in a commitment proceeding satisfy the demands of the Due Process Clause, but the substantive basis for the commitment must also pass Constitutional scrutiny. *Foucha*, 504 U.S., at 79-81, 112 S.Ct. at 1784-85. “[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful governmental

actions regardless of the fairness of the procedures used to implement them.” 504 U.S. at 81, 112 S.Ct. at 1785. In order to involuntarily confine someone to a mental institution, the State must show “by clear and convincing evidence that the individual is mentally ill and dangerous.” 504 U.S. at 81, 112 S.Ct. at 1786 (internal quotes omitted). To satisfy due process, a statute depriving a person of liberty must be narrowly tailored. *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993). The State must demonstrate that a person’s potential for doing harm is “great enough to justify such a massive curtailment of liberty.” *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972).

The Kansas statute, which is similar to Missouri’s, was upheld by the United States Supreme Court against a due process challenge in *Kansas v. Hendricks*, 521 U.S. 346, 358-360, 117 S.Ct. 2072, 2079-2081, 138 L.Ed.2d 501 (1997). The Court held that the Kansas statute comports with due process because it “requires a finding of future dangerousness and then links that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior.” 521 U.S. at 358, 117 S.Ct. at 2080. This leaves open the question of when, in the future, the danger must present itself.

The United States Supreme Court answered in *O’Connor v. Donaldson*, 422 U.S. 563, 574-575, 95 S.Ct. 2486, 2493, 45 L.Ed.2d 396 (1975), that the person

must be dangerous at the time of the commitment. This immediacy of the danger has been expressed in a number of ways. The Court in *Stamus v. Leonhardt*, 414 F.Supp. 439, 450-451 (S.D.Iowa 1976) held that the danger must be evidenced by a recent act or threat. In *Mignone v. Vincent*, 411 F.Supp. 1386, 1389 (S.D.N.Y., 1976), the Court held that an immediate harm or threat of harm is required. A present threat of harm was required by the Court in *Dixon v. Attorney General*, 325 F.Supp. 966, 974 (M.D.Pa. 1971). Eminent danger was required in *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980).

Some cases take a more liberal view of the imminence of the danger necessary to involuntarily commit someone, eschewing immediate danger for danger in the reasonably foreseeable future. *In re Albright*, 836 P.2d 1, 5 (Kan. 1992); *State v. Krol*, 344 A.2d 289, 302 (N.J. 1980); *Hatcher v. Wachtel*, 269 S.E.2d 849, 852 (W.Va. 1980); *Pifer v. Pifer*, 273 S.E.2d 69, 71 (W.Va. 1980).

Mr. Elliott believes these temporal requirements give context to the holding of the United States Supreme Court in *Hendricks*. The *Hendricks* Court upheld the Kansas law because proof of dangerousness is required, but it did not specifically express how immediate or eminent that danger must be. The body of existing case law preceding the *Hendricks* opinion required either immediate danger or very proximate danger in the reasonably foreseeable future to involuntarily commit someone. Mr. Elliott believes this history gives meaning to

the *Hendricks* opinion, and suggests that the United States Supreme Court likewise expected the danger to be immediate or reasonably eminent.

Foreign jurisdictions have interpreted the language of their sexually violent predator statutes, which are much like Missouri's, to sufficiently require current danger to satisfy the requirements of due process discussed above. The California Supreme Court concluded in *Hubbert v. Superior Court*, 969 P.2d 584, 599 (Cal. 1999), that the statute required a finding that the person is dangerous at the time of commitment because of the present tense of the language used in the statute: that the person "currently" suffers a mental disorder which "makes" him dangerous and "likely" to reoffend. The Texas appellate court in *Beasley v. Mollett*, 95 S.W.3d 590, 600 (Tex. App., 2002), held that the statute met the due process requirement of "imminent" danger because it required that the mental abnormality must predispose the person to commit sexually violent offenses to a degree that the person is a menace to society. The Texas court noted that "menace" is by definition an imminent danger or threat of danger. *Id.* The Iowa appellate court reached the same conclusion in *Detention of Selby*, 710 N.W.2d 249, 252-253 (Iowa App., 2005). The Iowa statute uses language of present tense: the person must "suffer" a mental abnormality that "makes" the person likely to engage in sexually violent predatory acts. *Id.* at 253. The court relied upon the holding of the *Beasley* court that "menace" means an imminent danger to

conclude that the Iowa statute required proof that the person was dangerous at the time of commitment. *Id.*

These cases do not support the conclusion that the Missouri statutes comport with due process by requiring current or immediate or imminent danger for commitment. Section 632.480(2), RSMo Cum. Supp.2005, defines a “mental abnormality” as a condition affecting emotional or volitional capacity which predisposes the person to commit sexually violent offenses “in a degree constituting such person a menace to the health and safety of others.” But that is not the complete basis upon which the Missouri statute authorizes involuntary commitment under the SVP act. Section 632.480(5) requires the presence of such mental abnormality *and* proof that the person “is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.” It is upon this additional element, which must also be proven beyond a reasonable doubt, *Thomas v. State*, 74 S.W.3d 789 (Mo. banc 2002), that the State uses clinical judgment and actuarial instruments to assess risk fifteen years in the future and beyond to suggest that immediate confinement is permissible for a lifetime of risk that the person is more likely than not to reoffend in some indefinite future. The State had Dr. Duncan opine that Mr. Elliott met the three separate elements; the presence of a mental abnormality (Tr. 327), that it causes serious difficulty controlling behavior (Tr. 330), and that Mr. Elliott is more likely than not to commit sexually violent acts if not confined to a secure facility (Tr. 355). She

began her opinion that Mr. Elliott is more likely than not to reoffend by noting that the Static-99 score placed him in the “high risk” category for recidivism (Tr. 340-341). Mr. Elliott demonstrated in cross-examination that the 52% recidivism rate assigned by the Static-99, indicative of risk “more likely than not,” occurred fifteen years in the future (Tr. 426). Mr. Elliott will be seventy-one years old by that time, if he lives that long after three heart attacks and persistent congestive heart failure. The current or imminent danger is converted to lifetime danger, no matter how far into the future the person’s lifetime may reach. The due process requirement of imminent danger has been removed from the statute, rendering it unconstitutional.

Because the SVP act violates due process of law by not requiring proof of current, immediate, or imminent danger to involuntarily commit the person, it is unconstitutional. The trial court erred in denying Mr. Elliott’s motion to find the statutes unconstitutional and to dismiss the petition against him. Mr. Elliott’s commitment must be reversed and he must be released.

II.

The probate court abused its discretion in denying Mr. Elliott's motion to exclude expert testimony on the necessary element of serious difficulty controlling behavior and in permitting Dr. Duncan to testify that in her opinion Mr. Elliott has serious difficulty controlling his behavior, in violation of Mr. Elliott's right to 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 there was an insufficient foundation for the admission of Dr. Duncans's testimony in that there is no reasonably reliable basis or methodology upon which psychologists can determine an individual's ability to control behavior.

A sexually violent predator is "any person who 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 and who: [h]as pled guilty or been found guilty ... of a sexually violent offense." Section 632.480(5), RSMo Cum. Supp. 2005. A mental abnormality is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person

as a menace to the health and safety of others.” Section 632.480(2).³ This definition of a mental abnormality was “explained” by the Missouri Supreme Court in *Thomas v. State*, 74 S.W.3d 789 (Mo. banc 2002), to mean a congenital or acquired condition affecting emotional or volitional capacity that predisposes the person to commit sexually violent offenses to a degree that causes serious difficulty in controlling behavior.

Mr. Elliott filed a motion prior to trial to exclude “expert” testimony regarding whether he has serious difficulty controlling his behavior (L.F. 25-31). Mr. Elliott noted that no recognized scientific research exists to assist experts to determine difficulty controlling behavior (Tr.26-30). Mr. Elliott supported his arguments with the requirement of *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), that the trial judge act as a gatekeeper to exclude expert testimony not based on reliable data or reliable methodology; and on the holding in *In the Matter of the Care and Treatment of Coffel*, 117 S.W.3d 116 (Mo. App., E.D. 2003), that expert opinions not based on reliable science or research are inadmissible (Tr.290-291).

³ Section 632.480 was amended in 2001 to modify the definition of the term “predatory,” but the definitions of a “sexually violent predator” and a “mental abnormality” remained the same. Section 632.480, RSMo Cum. Supp. 2005.

It is generally within the trial court's discretion to admit or exclude an expert's testimony. *State v. Hayes*, 88 S.W.3d 47, 61 (Mo. App., W.D. 2002). The decision of the trial court will not be overturned on appeal absent an abuse of that discretion. *Id.* This discretion is abused when the ruling is clearly against the logic of the circumstances, or when it is arbitrary and unreasonable. *Id.* Mr. Elliott renewed his objections in the motion at trial (Tr. 327), and in his motion for a new trial (L.F. 185), thus preserving it for appeal.

The *Coffel* Court noted that the factors upon which the State's expert reached her opinion were nothing more than:

her own private, subjective and untested theories, unsupported by any scientific research whatsoever. This is because, to date, no one in the psychological community has ever performed any research to identify what factors lead female sexual offenders to reoffend sexually.

117 S.W.3d at 128. The Court stated, "it is clear that Dr. Phenix's opinion as to the likelihood that Angela would reoffend sexually *would not be admissible over proper objection.*" *Id.* at 129 (emphasis added). This conclusion is not limited to risk factors for female sexual recidivism rather than any other type of expert opinion. The doctor's opinion was inadmissible "because expert testimony must be based on scientific principles generally accepted in the relevant scientific community." *Id.* Because the doctor's testimony was based solely upon her

“clinical expertise” rather than accepted scientific research or principles, it was “not competent evidence.” *Id.*

The *Coffel* Court was following established legal principles generally applicable to expert testimony, not establishing a new standard applicable only to an issue of recidivism by female sex offenders. The same legal principles apply in this case. Because Dr. Duncan’s clinical judgment whether Mr. Elliott has serious difficulty controlling his behavior is not based on accepted scientific research, it was not competent evidence and was not admissible.

This follows as well from the more recent opinion of the Missouri Supreme Court in *McDonagh, supra*. The Missouri Supreme Court in *McDonagh* clarified that the *Frye* and *Daubert* tests are inapplicable to civil practice in Missouri. *Id.* 156-157. Admission of expert testimony in civil cases is controlled by Section 490.065, RSMo 2000. *Id.* To this extent, admission is not controlled by general acceptance of a principle in the applicable scientific community. *Id.* at 157. Under the statute expert testimony is limited to “scientific, technical, or other specialized knowledge.” Section 490.065.1. As Mr. Elliott pointed out, and the State did not challenge, there is no scientific, technical, or other specialized knowledge contained in scientific research or by psychologists how to measure a person’s ability to control their behavior (L.F.141-147, Tr. 22-25). And while the Missouri Supreme Court held that controlled studies are not required to admit expert opinion testimony, the lack of such studies is relevant to a judicial

determination of whether the expert's opinion rests on reasonably reliable data and is therefore admissible. *Id.* at 157.

The United States Supreme Court reminded the reader in *Kansas v. Crane*, 534 U.S. 407, 413-414, 122 S.Ct. 867, 870, 151 L.Ed.2d 856 (2002), that the science of psychiatry does not even attempt to "precisely mirror" the requirements of law, and that the DSM recognizes the imperfect fit between the requirements of law and the information contained within its clinical diagnoses. Dr. Duncan agreed that a clinical diagnosis according to the DSM proves nothing about a person's ability to control their behavior (Tr. 377).

Dr. Duncan acknowledged that the term "serious difficulty controlling behavior" can be arbitrary and everyone may interpret it differently (Tr. 378-379). She agreed that there is no way to measure it, and no test to determine it (Tr. 378). Dr. Duncan admitted that she had previously stated in Mr. Elliott's case that it is hard to describe the difference between difficulty controlling behavior and the required serious difficulty, and that she was unable to do so (Tr. 380). She had not thought about that difference when she prepared the evaluation of Mr. Elliott, she simply believed that he has serious difficulty controlling his behavior (Tr. 381). Dr. Duncan told the State that she formed her opinion by considering the urge to commit the acts inherent in the diagnosis, that Mr. Elliott lacked the self-control not to act on the urges, and that he had acted

on them. In other words, she considered nothing more than that he has a condition diagnosable under the DSM and he committed the acts.

In the case below, the State relied on *In the Matter of the Care and Treatment of Whitnell*, 129 S.W.3d 409 (Mo. App., E.D. 2004), to cause the trial court to overrule Mr. Elliott's objection and admit Dr. Duncan's testimony (L.F. 90-92). The *Whitnell* Court did, indeed, reject the argument that Mr. Elliott makes here. Mr. Elliott believes that the facts in the *Whitnell* case are distinguishable from those presented in this appeal, and that the *Whitnell* opinion is legally flawed in several respects and should not be followed.

The *Whitnell* Court began by describing "expert" qualifications: "by reason of specialized experience or education the witness possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or reaching correct conclusions. 129 S.W.3d at 413. This sounds impressive. But the Eastern District tarnished that sheen when it said in the next sentence, "if the witness has *some* qualifications, the testimony may be permitted." *Id.* "Some" qualification seems significantly less than "specialized experience or education" and "superior knowledge" without which accurate opinions or correct conclusions are impossible. Dr. Duncan seems to have "at least some qualifications" similar to those found sufficient in *Whitnell*, she had done "hundreds" of forensic evaluations that involve questions of harm or risk, and she had done five SVP

evaluations (Tr. 287-288), 129 S.W.3d at 415. The *Whitnell* Court held that any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility. *Id.* at 414. This is somewhat at odds with the Eastern District Court of Appeals decision in *Coffel, supra*.

The State's primary expert witness in *Coffel* was Dr. Amy Phenix, a clinical psychologist in California who spent ninety percent of her time evaluating sexual offenders. 117 S.W.3d at 123. She had performed about 175 SVP evaluations. *Id.* But the evidence in *Coffel* demonstrated that there is essentially no research on female sex offender recidivism. *Id.* at 128. Thus, as experienced as Dr. Phenix was in evaluating sexually violent predators, there was no research to support her opinion of Ms. Coffel's risk to reoffend. *Id.* at 129. Expert testimony must be based on generally accepted scientific principles and because Dr. Phenix's testimony was not, her "opinion as to the likelihood that Angela would reoffend sexually *would not have been admissible over proper objection.*" *Id.* (emphasis added). The lack of supporting research did not simply go to the weight of an otherwise experienced expert's testimony, it rendered it inadmissible.

Both in *Whitnell* and in the case below, the evidence was that there is no test, no research, and no generally accepted scientific principles upon which to base an opinion whether a person has serious difficulty controlling behavior. 129 S.W.3d at 414, (Tr. 378). *Coffel* controls this issue, not *Whitnell*.

Dr. Duncan's testimony devoid of any scientific basis diverted the jurors' attention from the decision on serious difficulty controlling behavior that they were to make by encouraging them to simply accept Dr. Duncan's conclusion as if her status as an "expert" gave her some special insight into the matter. Clearly, she had no such insight beyond that of any lay person. "Expert testimony presents the danger that jurors may be over-awed by the evidence, or may defer too quickly to the expert's opinion." *State v. Williams*, 858 S.W.2d 796, 800 (Mo. App., E.D. 1993); *State v. Faulkner*, 103 S.W.3d 346, 361 (Mo. App., S.D. 2003). The holding of the *Whitnell* Court, that shortcomings in the witness' qualifications go to weight, not admissibility, condones and exacerbates this danger.

Because the probate court abused its discretion in overruling Mr. Elliott's objection and permitting Dr. Duncan to express an expert opinion on whether Mr. Elliott has serious difficulty controlling his behavior, the judgment of the probate court committing Mr. Elliott to the custody of DMH must be reversed and the cause remanded for a new trial.

III.

The trial court abused its discretion in admitting Dr. Duncan's testimony, over Mr. Elliott's objection, on the results of the Static-99 actuarial instrument applied to him by Dr. Duncan, in violation of Mr. Elliott'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 they do not address the specific question at issue whether Mr. Elliott is more likely than not to reoffend but confuse the issues and mislead the jurors because the actuarial instruments reflect only the results of group analysis, the similarities between the sample group and Mr. Elliott or any other individual is unknown, and the group results cannot predict the behavior of any specific individual.

Mr. Elliott filed a pre-trial motion in limine to exclude any evidence regarding his risk to reoffend based on the Static-99 actuarial instrument because those results are not relevant to whether he, individually, is a sexually violent predator under the meaning of the statute (L.F. 62-65). He pointed out in his motion that the instrument does not purport to predict how he, as opposed to the sample group used in the instrument, is more likely than not to engage in predatory acts of sexual violence in the future (L.F. 64). Mr. Elliott objected at

trial to Dr. Duncan's testimony regarding the results of the Static-99 calculations she made for him, but the trial court overruled the objection and permitted the testimony (Tr. 337, 338-344). Mr. Elliott renewed this objection in his motion for new trial (L.F. 186), preserving the issue for review. The determination whether to admit evidence rests in the sound discretion of the trial court. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App., S.D. 2004). 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. *Estate of Dean*, 967 S.W.2d 219, 224 (Mo. App., W.D. 1998).

Mr. Elliott recognizes that the actuarial instruments were found to be admissible in sexually violent predator proceedings pursuant to Section 490.065, RSMo 2000, in *In the Matter of the Care and Treatment of Goddard*, 144 S.W.3d 848, 851 (Mo. App., S.D. 2004). Section 490.065.1 provides that 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. The Southern District Court of Appeals held that the actuarial instruments are this sort of scientific evidence. 144 S.W.3d at 852.

But *Goddard* is not a complete answer to the objection raised by Mr. Elliott. Section 490.065.1 is essentially the same as Federal Rule of Evidence 702, and FRE 702 is interpreted as “impos[ing] a special obligation upon a trial judge to ‘ensure that any and all scientific testimony ... is not only *relevant*, but *reliable*.’” 144 S.W.3d at 852-853. (emphasis added). The *Goddard* opinion addressed the question of reliability, or scientific validity, of the actuarial instruments. *Id.* at 853. Mr. Elliott’s objection goes to the relevancy of the evidence. By its terms, evidence is admissible under Section 490.065 only if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Evidence is not admissible simply because it is scientifically valid, it must also be relevant to the case.

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. The *Goddard* Court quoted *Kumho Tire*. 144 S.W.3d at 853. 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 at 224. 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*, 130 S.W.3d at 37. 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 its probative value 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.*

The State made an effort to establish the logical evidence of the actuarial instruments. It had Dr. Duncan testify that actuarial instruments are commonly used for risk assessments in SVP evaluations, and that the Static-99 is the most commonly used instrument (Tr. 338, 340). The instrument is comprised of a number of items shown by research to be statistically significant to risk of reoffense (Tr. 339). The problem with this proof is that it is the individual factors, not the actuarial instrument assessment, that is shown by research to be

significant to reoffense. It is the presence of the factors, and the significance of each on the potential risk, that may be of consequence in determining Mr. Elliott's risk to reoffend. A classification based upon the success or failure of a sample group does not have the same consequence. There is little probative value in the instrument as it relates to any individual. Dr. Duncan admitted as much at trial. She acknowledged that not much is known about many of the characteristics of the sample group, or the extent to which Mr. Elliott and the members of the sample group shared those characteristics (Tr. 427-428). The instrument essentially included only characteristics that would indicate that he was risk to reoffend, but not characteristics which would tend to show that he would not reoffend, such as his age or physical disabilities (Tr. 427-428). Dr. Duncan admitted that the Static-99 cannot identify who will reoffend (Tr. 424). She admitted that the assessment from the instrument showed that 52% of the sample group reoffended within fifteen years, meaning that 48% of the sample group did not, and neither she nor the instrument could identify which group Mr. Elliott would be in (Tr. 427).

Outweighing this limited probative value was the excessive cost associated with the admission of the evidence. It was the starting point for Dr. Duncan's risk assessment (Tr. 336). She gave it an authoritative imprimatur by saying that it is the most commonly used instrument in the common practice of risk assessment by actuarial instruments (Tr. 338). She said it put Mr. Elliott in the

“high risk” category to reoffend (Tr. 341). The State picked up on this theme when it argued to the jurors in closing:

Dr. Duncan talked to you about her risk analysis. She starts off with what is called the Static 99, an actuarial instrument.

Mr. Elliott doesn't score low on the Static 99. He doesn't score a medium on the Static 99. He scores high. High. Six or more is high risk. He scores seven. He's off the charts. Her analysis starts with the very clear, there's a very clear understanding, Mr. Elliott falls within that group that is high risk to re-offend.

(Tr. 526). Of course, this last statement is untrue. Dr. Duncan specifically said that persons within the sample group with a particular score reoffended at a rate of 52%, but she could not say whether Mr. Elliott would be within that portion of the sample group or the other portion of the group which did not reoffend (Tr. 427).

So, this evidence becomes confusing and misleading. It confuses individual risk with group risk, and it is misleading because it causes the jurors to substitute the behavior of unknown members of a sample group for that of Mr. Elliott. Even if the evidence has some logical relevancy, and Mr. Elliott believes that if it has any at all it is minimal at best, its prejudicial effect grossly

outweighs its logical relevance. The trial court abused its discretion in admitting the evidence over Mr. Elliott's objection.

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

CONCLUSION

Because the SVP act violates Due Process of law by not requiring proof of current, immediate, or imminent danger to involuntarily commit the person, it is unconstitutional and the trial court erred failing to dismiss the petition against Mr. Elliott, as set out in Point I, and Mr. Elliott's commitment must be reversed and he must be released. Because the probate court abused its discretion in overruling Mr. Elliott's objection and permitting Dr. Duncan to express an expert opinion on whether Mr. Elliott has serious difficulty controlling his behavior, as set out in Point II, the judgment of the probate court committing Mr. Elliott to the custody of DMH must be reversed and the cause remanded for a new trial.

Because the probate court abused its discretion in permitting evidence regarding the Static-99 over Mr. Elliott's objection, as set out in Point III, the judgment of the probate court committing Mr. Elliott to the custody of DMH 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 9,319 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in May, 2006. 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 May, 2006, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

TABLE OF CONTENTS TO APPENDIX

	<u>Page</u>
Judgment and Order	A-1