

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE)
CARE AND TREATMENT OF)
RICHARD TYSON,)
 Appellant.)

No. WD 66469

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE KATHLEEN A. FORSYTH, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Richard Tyson appeals the judgment and order of the Honorable Kathleen A. Forsyth following a jury trial in Jackson County, Missouri, committing Mr. Tyson to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and 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

Richard Tyson pleaded guilty to first degree child molestation on April 13, 1998, and was sent to prison (L.F. 2).¹ He was scheduled to be released from prison on September 3, 2004, but on August 31, 2004, the State filed a petition to involuntarily commit Mr. Tyson to the Department of Mental Health (DMH) for secure confinement as a sexually violent predator (L.F. 1-4). It did so at the suggestion of the clinical director of Department of Corrections sex offender services (L.F. 5-7).

The clinical director indicated in the End of Confinement report his impression that Mr. Tyson suffers from pedophilia, exhibitionism, and antisocial personality disorder (L.F. 6). The State's commitment petition alleged that Mr. Tyson has a mental abnormality making him more likely than not to engage in predatory acts of sexual violence, referring to and incorporating the clinical director's End of Confinement report (L.F. 2). The probate court held a hearing to determine whether probable cause existed to believe that Mr. Tyson might be a sexually violent predator (L.F. 67). The clinical director was the State's expert witness at this hearing (L.F. 68). The court entered findings after hearing the evidence (L.F. 67-70). The court found that "the State failed to prove by clear and convincing evidence that the respondent is a pedophile, not because it failed to show that Defendant has an attraction to prepubescents, but because it failed to

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

show that the attraction lasted 6 months.” (L.F. 68). The clinical director testified that he could nonetheless make a provisional diagnosis of pedophilia, but the probate court “reject[ed] the notion that such a provisional diagnosis meets the State’s standard of proof” (L.F. 68). The clinical director’s testimony that Mr. Tyson has a personality disorder allowed the probate court to conclude that Mr. Tyson suffers a qualifying mental abnormality (L.F. 68). The probate court ultimately concluded: “Based on the foregoing facts, this Court finds probable cause to believe that Respondent Richard Tyson suffers from antisocial personality disorder with psychopathic traits, that such disorder is a mental abnormality, ... and that he is a sexually violent predator” (L.F. 69).

The probate court ordered DMH to have Mr. Tyson evaluated to determine whether he is a sexually violent predator under the Missouri statutes (L.F. 69). Dr. Stephen Jackson conducted that evaluation, and reported back to the probate court that in his opinion, Mr. Tyson “does not suffer from a mental abnormality” within the meaning of the statutes (L.F. 76). Dr. Jackson had available to him records from the Jackson County circuit court; the Department of Corrections and Probation and Parole; the Missouri Sexual Offender Treatment Center; and police reports from New Jersey, New York, Texas, California and Kansas City (L.F. 71-72). Dr. Jackson was also aware that Mr. Tyson had been evaluated by the Atascadero State Hospital in California in 1963, but the records from that evaluation were not made available to him (L.F. 74).

Because the court ordered SVP evaluation did not support the State's petition to commit Mr. Tyson, the State hired Kansas psychiatrist Dr. Bradley Grinage to do another evaluation (Tr. 394, 402). The State also sought and received an order releasing to the Attorney General's Office records of the Atascadero State Hospital provided by the State of California to the probate court (L.F. 78-79, 80-81). Dr. Grinage diagnosed Mr. Tyson with pedophilia (Tr. 421).

Mr. Tyson filed a motion to prohibit reliance upon pedophilia as a qualifying mental abnormality under the statute because the probate court specifically rejected the presence of that abnormality following the State's evidence at the probable cause hearing (L.F. 124-127). The court ordered Mr. Tyson to stand trial as a sexually violent predator upon evidence to believe that his antisocial personality disorder was the qualifying mental abnormality (L.F. 125-126). The State countered that it "now" had evidence to support the diagnosis of pedophilia (L.F. 197-201). Of the ten specific records cited by the State only two appear to be related to the Atascadero State Hospital from 1962 and 1963 (L.F. 198). Another record appears to be from a California prison in 1965 (Tr. 198). The remaining records are police reports, probation and parole records, and Jackson County circuit court records (L.F. 199-200). The State argued that its evidence at trial is not limited to the evidence found by the

probate court at the probable cause hearing to be sufficiently clear and convincing (L.F. 197).

The probate court denied Mr. Tyson's motion (Tr. 94). It concluded that the statute only required the court to find probable cause to believe that Mr. Tyson is a sexually violent predator but that the statute does not limit the evidence that comes in at trial (Tr. 95). Mr. Tyson analogized this situation to the holding in a criminal case that the State could only proceed to trial on the one count of a two count information for which the trial court found probable cause, but not on the other count for which the trial court found no probable cause (L.F. 127, 133-137, Tr. 80). The probate court was not persuaded by a criminal case because SVP proceedings are created by statute (Tr. 94).

Dr. Grinage is a psychiatrist for the Menninger's Administrative Center primarily providing long-term treatment of post-traumatic stress disorders for soldiers at a VA hospital (L.F. 394, 396, 473). He also has a private forensic practice (Tr. 394). He has performed one sexually violent predator release evaluation in Kansas, and thirteen SVP commitment evaluations in Missouri, all at the request of the Attorney General's Office (Tr. 401, 479-480). Most of his SVP training occurred during a fellowship program in 2000 and 2001 at the University of Missouri, Kansas City (Tr. 474-475). That training involved a course manual and two videotapes (Tr. 475). One of his fellowship supervisors was Dr. Stephen Jackson, who disagreed with certain points in Dr. Grinage's opinions in Mr.

Tyson's case (Tr. 476). Dr. Grinage acknowledged that in these types of cases it is not unusual for two other doctors to reach conclusions contrary to his (Tr. 478).

Dr. Grinage diagnosed Mr. Tyson with pedophilia, non-exclusive, attracted to females; exhibitionism; and personality disorder, not otherwise specified, with antisocial features (Tr. 421-422).² Mr. Tyson had numerous arrests and convictions for indecent exposure, open lewdness, and indecent conduct from 1959 to 1988 (Tr. 413-416). Dr. Grinage understood indecent conduct required some interaction or attempted engagement of the victim, and he noted that many of Mr. Tyson's incidents involved masturbation in addition to the exposure (Tr. 417). Mr. Tyson was convicted of an attempted sexual assault in Texas in 1990 (Tr. 416). He had exposed himself to a nineteen year old female and she was afraid that he was going to try to open her car door (Tr. 456). Mr. Tyson was charged with two counts of child molestation and one count of sodomy in 1997, and he pleaded guilty to one count of child molestation (Tr. 416). The charges involved ten year old and seven year old girls, and Mr. Tyson pleaded guilty to touching the vagina of the younger girl (Tr. 416, 436-437).

A diagnosis of pedophilia requires a sexual attraction to prepubescent children, assumed for psychiatric purposes to be children under the age of

² Mr. Tyson renewed his objection to evidence of the pedophilia diagnosis (Tr. 418-419).

thirteen years (Tr. 424-425). Dr. Grinage acknowledged that many of the records he reviewed did not include the ages of the victims, and he also acknowledged that many of the incidents involved Mr. Tyson exposing himself to groups of females, including girls above and below the age of thirteen (Tr. 428, 429, 431-432, 432-433, 434-435). Dr. Grinage said that while Mr. Tyson has exposed himself to adult females and males, he had a pretty specific pattern of exposing himself to pre-teen and teenage girls (Tr. 439).

Dr. Grinage admitted that it did not matter to him whether Mr. Tyson was specifically exposing himself to the pre-teen, teenage, or adult women who were present, because since pre-pubescent children were also present he considers the exposure to be a pedophilic act (Tr. 481-482). He noted that in one incident Mr. Tyson was specifically exposing himself to a group of girls aged fifteen to eighteen, but there were girls fourteen years old and younger also present in the area (Tr. 484). The records indicate that in five incidents Mr. Tyson has exposed himself to ten girls thirteen years old and younger, and in twelve incidents he exposed himself to eighteen girls and women fourteen years old and older (Tr. 491). Dr. Grinage claimed that he cannot clinically separate pre- and post-pubescent victims because pedophiles are often attracted to adults as well (Tr. 493). He agreed that he could "stretch" the diagnostic criteria in a clinical setting where he was providing treatment, but acknowledged that the technical requirements of the diagnostic criteria must be followed in a forensic setting

where someone's liberty is at stake (Tr. 486). He agreed that exposure to teenage girls did not fit the diagnostic criteria of pedophilia, but he asserted that such exposure was "clinically relevant," and then went on to claim that what was clinically relevant was forensically relevant (Tr. 493).

Dr. Grinage expressed his opinion that Mr. Tyson's pedophilia was a mental abnormality under Missouri statutes (Tr. 440-441). The Diagnostic and Statistical Manual, from which Dr. Grinage derives his diagnoses, indicates that exposure or masturbation alone in front of a child can be considered paraphilic behavior (Tr. 426). Dr. Grinage's diagnosis of exhibitionism would not qualify Mr. Tyson for commitment as a sexually violent predator (Tr. 532). The only contact offenses Mr. Tyson has committed were the incidents in 1997, three weeks apart (Tr. 436, 532).³ Dr. Grinage expressed his further opinion that the pedophilia he diagnosed predisposed Mr. Tyson to commit sexually violent offenses because it caused him to touch the girls in 1997 for sexual gratification (Tr. 442). He believed that Mr. Tyson's behavior had progressed from mere exposure to conduct - masturbating and calling out to girls - to actual touching of the two girls in 1997 (Tr. 455-456).

³ These incidents alone would not support a diagnosis of pedophilia because the behavior must be manifested for a period of at least six months (Tr. 423).

Dr. Grinage also opined that the pedophilia he diagnosed caused Mr. Tyson serious difficulty controlling his behavior and made it more likely than not that he would engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 444-446, 454-456, 470). Repetition of behavior and engaging in the behavior after adverse consequences suggests difficulty controlling it (Tr. 443-445). Dr. Grinage also found more “subtle” signs of serious difficulty controlling behavior in Mr. Tyson’s reported lack of insight into his behavior (Tr. 445), his antisocial personality (Tr. 450), and non-sexual offending (Tr. 454).

Dr. Grinage said that Mr. Tyson is more likely than not to engage in future predatory acts of sexual violence because he perceived Mr. Tyson’s behavior as becoming more aggressive and blatant (Tr. 455-456). He also relied upon the results of the Static-99 and MnSOST-R actuarial instruments (Tr. 458). Neither instrument can predict what an individual will do; they only place an individual within a particular risk category (Tr. 458). The Static-99 classified Mr. Tyson as “high risk,” and assessed his risk for reconviction from thirty-nine percent in five years to fifty-two percent in fifteen years (Tr. 459-460). The results of the MnSOST-R classified Mr. Tyson in the highest risk category for rearrest, assessing that risk at eighty-eight percent within six years (Tr. 460). Dr. Grinage answered the State that the issue before the jurors was whether Mr. Tyson would engage in sexually violent acts in the future, not whether he would be arrested or convicted, and thus both instruments underestimate the risk of re-offending (Tr.

459, 460-461). He acknowledged that the actuarial instruments do not distinguish between non-violent sexual offenses and sexually violent offenses (Tr. 526-527). He concluded his evaluation of Mr. Tyson by opining that Mr. Tyson has a very high risk to engage in sexual offenses – exposing himself and masturbating – that are not considered sexually violent, but further asserted at trial that it “creates a risk of other kinds of sexual offending.” (Tr. 534-535). Dr. Grinage asserted at trial that in his opinion, Mr. Tyson is more likely than not to engage in predatory acts of sexual violence in the future if not confined in a secure facility (Tr. 470).

Dr. Jackson is a forensic examiner with DMH, primarily conducting pre-trial and SVP evaluations on court order (Tr. 544-546, 548). He has been conducting SVP evaluations since shortly after the SVP statutes were passed, and has conducted approximately twenty-five evaluations (Tr. 547). After his evaluation, he concluded that Mr. Tyson does not qualify for commitment as an SVP (Tr. 552).

Dr. Jackson diagnosed Mr. Tyson with exhibitionism and personality disorder NOS, but not with pedophilia (Tr. 553, 555). He did not diagnose pedophilia because he saw no evidence of a pattern of focus on or sexual interest in prepubescent children (Tr. 557). The available records demonstrated that many of the victims of Mr. Tyson’s exposure were post-pubescent (Tr. 557-558). Dr. Jackson concluded that the presence of prepubescent children was more

“parenthetical” than the focus of Mr. Tyson’s sexual interest (Tr. 557-558). There were more instances of Mr. Tyson exposing himself to post-pubescent females (Tr. 559). Mr. Tyson’s sexual interest appeared to be focused on young women, eighteen to twenty years old (Tr. 558). The Diagnostic and Statistical Manual requires the sexual focus to be on prepubescent children in order to make a diagnosis of pedophilia (Tr. 559).

Dr. Jackson acknowledged that if he was treating Mr. Tyson in a clinical setting he might make a “rule out” diagnosis of pedophilia, meaning that the condition might be present but more information is needed to make a definitive diagnosis (Tr. 560). But he would not use a “rule out” diagnosis in a forensic setting because he has to follow the narrow definition of a mental abnormality (Tr. 561). He has to be able to say in court that the condition does exist; that the condition is “probably” present is not good enough in a courtroom setting (Tr. 561).

Dr. Jackson noted that exhibitionism cannot be a mental abnormality because non-contact offenses are not sexually violent (Tr. 562). He was aware of Dr. Grinage’s theory that Mr. Tyson’s behavior had progressed from exposure to masturbation to enticing victims to actual touching (Tr. 566). But Dr. Jackson disagreed with that theory because Mr. Tyson’s history included only exposure without touching until the 1997 incident (Tr. 566). He particularly noted that the information regarding the 1990 incident in Texas were unclear regarding how

close Mr. Tyson got to the nineteen year old and what part of her car he came into contact with (Tr. 565-566). The nineteen year old only said that she was afraid that Mr. Tyson might try to get into her car; she did not say that he did try to get into it (Tr. 565-566). Dr. Jackson therefore considered it only an incident of exhibitionism (Tr. 567-568). He did not see a pattern developing from that to an actual touching six years later (Tr. 568). For such a pattern to exist, Dr. Jackson would expect to find records of similar conduct between those events (Tr. 568). He did not agree with Dr. Jackson that the beckoning or “enticement” of victims was that in-between step (Tr. 568). Dr. Jackson believed that Mr. Tyson may well continue to expose himself and masturbate, but there still remains only the one contact offense (Tr. 569). When trying to figure out what someone is likely to do in the future you have to look at patterns in the past (Tr. 570).

Dr. Jackson told the jurors that he believed that Mr. Tyson was at high risk to expose himself and masturbate in the future, but that Mr. Tyson was not at high risk to commit another sexually violent offense because there was no pattern or frequency of such behavior (Tr. 571).

The State sought leave of the probate court to inquire of Dr. Jackson regarding “common-law” marriages Mr. Tyson reportedly had in California in the late 1950’s or early 1960’s, when Mr. Tyson was in his late teens or early twenties, with a thirteen year old girl and a fifteen year old girl (Tr. 583-584, 748). The State argued that it should be allowed to do so because Dr. Jackson said that

Mr. Tyson's sexual attraction is to young women eighteen years old and older (Tr. 584-585, 587). Mr. Tyson noted that Dr. Jackson made this statement while explaining why he did not diagnose pedophilia, distinguishing pre- and post-pubescence (Tr. 588). The probate court was aware of these incidents prior to trial, and excluded them because they did not address the issue of whether Mr. Tyson suffers pedophilia (Tr. 585). The State argued that Mr. Tyson's mental abnormalities are not important, what is important is the focus of Mr. Tyson's interests and "what lines were crossed." (Tr. 600-601). The State asserted that Dr. Jackson misled the jurors by testifying that Mr. Tyson would not engage in sexual contact with children because his sexual focus is on females eighteen years old and older (Tr. 589-590, 595). From this, according to the State, Mr. Tyson's sexual contact with thirteen and fifteen year old girls was relevant to show that Mr. Tyson will "cross that line" and have contact with children thirteen to sixteen years old (Tr. 589-590). The probate court agreed that the evidence did not go to whether Mr. Tyson has pedophilia, but it overruled its earlier exclusion and permitted to State to present the evidence on the issue of Dr. Jackson's view that Mr. Tyson's sexual focus is on older women (Tr. 599, 601-602).

Dr. Jackson did not testify that he did not think that Mr. Tyson would "cross the line" between eighteen year olds and thirteen to sixteen year olds because his focus was on the older females (Tr. 568-569). He testified that he did not think that Mr. Tyson would cross the line between non-contact and contact

offenses because in the records covering four or five decades, Mr. Tyson had only the brief contact offenses in 1996 (Tr. 568-569). Defense counsel had been inquiring of Dr. Jackson whether he agreed that Mr. Tyson's behavior had progressed from non-contact to contact offenses as Dr. Grinage had opined (Tr. 567-568). After that examination, defense counsel engaged Dr. Jackson in the following colloquy:

Q: Having crossed that line to touching somebody, Doctor Jackson, do you think Mr. Tyson will again cross that line into touching?

A. No, I don't think so.

Q: Why not?

A: As I started to say before, I think it's an anomaly. I think one of the things that Doctor Grinage and I probably would agree on is that there's a risk that he may expose himself and masturbate in public again, I don't think there is anybody that will necessarily disagree with that. For him to commit another contact sex offense, I just don't see it as a problem.

Q: Why not?

A: We've only got one, at least in my review of the records we've only got one incident of that.

(Tr. 569).

The State had Dr. Jackson confirm in cross-examination that under Missouri law sexual contact with a child under age fourteen is first degree child

molestation, that sexual contact with a child under age seventeen is second degree child molestation, and that both are defined in the SVP law as sexually violent offenses (Tr. 609-611). The State then suggested to Dr. Jackson that the age of thirteen being the distinction between pre- and post-pubescence was irrelevant to finding Mr. Tyson a sexually violent predator, the real issue being whether any victim is under age seventeen, making the offense sexually violent:

So we've talked about over 13, and under 13 and prepubescent and pubescent, but really in terms of sexual contact under 13 and over 15 is of little consequence, it's just if they're 16 or under, for sexual contact?

We're talking about whether Mr. Tyson is more likely than not to commit, so I'm asking when we talk about touching a child it doesn't really matter whether the sexual contact is on a 12 year old or a 15 year old, because both of them would be a sexually violent offense, correct? (Tr. 611). Dr. Jackson agreed that sexual contact with a twelve year old or a fifteen year old would be a sexually violent offense (Tr. 611).

The State then had Dr. Jackson confirm that the offense to which Mr. Tyson pleaded guilty, and the offenses for which he was charged but were dropped, involving seven and ten year old girls were sexually violent offenses (Tr. 612, 614, 615, 617-618). It had Dr. Jackson confirm that the conduct in the 1990 Texas incident would have been a sexually violent act under Missouri law

(Tr. 614). The State then questioned Dr. Jackson regarding why he did not diagnose pedophilia even though the records contained incidents involving ten, eleven, fourteen and seventeen year olds (Tr. 617-628). The State questioned Dr. Jackson why he did not diagnose paraphilia Not Otherwise Specified because pedophilia is a specified diagnosis based on a specific age, but the DSM definition of paraphilia only uses the word “children” (Tr. 629-632).

The State confronted Dr. Jackson with the statements of another doctor in a 1967 evaluation that Mr. Tyson’s masturbation had been a nuisance, but that he had the potential for sexual aggression beyond exhibitionism (Tr. 689, 694). Dr. Jackson replied that the other doctor’s conclusion was drawn from a test that many psychologists no longer use (Tr. 689). Dr. Jackson would not agree that the other doctor’s opinion had been proven true by the 1996 incidents (Tr. 690). He also noted that the previous doctor did not have access to more recent research indicating that very few exhibitionists cross the line into sexual violence (Tr. 694-695). But the State noted, and Dr. Jackson agreed, that Mr. Tyson crossed that line with the 1996 incidents (Tr. 695). The State reminded Dr. Jackson of another DMH evaluation in 1985 that stated that Mr. Tyson was not harmful to himself or others, and asked Dr. Jackson if that was essentially his position now, “after [Mr. Tyson] committed a sexually violent offense” (Tr. 697). Dr. Jackson replied that he had taken those acts into account in reaching his opinion (Tr. 697).

Then, at the conclusion of its cross-examination, the State asked Dr. Jackson to confirm that the records contained information that Mr. Tyson had sexual intercourse with a thirteen year old girl and a fifteen year old girl (Tr. 701). Dr. Jackson also agreed that these acts are defined as sexually violent in Missouri (Tr. 701).

Defense counsel also retained a psychiatrist for another evaluation, Dr. William Logan in Kansas City, Missouri (Tr. 706, 715-716). About half of Dr. Logan's practice is general psychiatry treating patients, the other half is forensic psychiatry (Tr. 708). Dr. Logan treated sex offenders many years before the SVP laws were passed (Tr. 708-709). He testified at the trial of the case in which the United States Supreme Court upheld the validity of the laws (Tr. 708-709). He has testified for both the state and for the defense many times since then in Kansas, Missouri, Iowa and Texas (Tr. 711). He has conducted about sixty-five SVP evaluations (Tr. 711). Dr. Logan trained the Texas evaluators when Texas passed its SVP law (Tr. 712-713).

Dr. Logan has treated several exhibitionists (Tr. 714). He once ran an out-patient clinic for exhibitionists at the Menninger Clinic, but the group had to disband because there was too much recidivism (Tr. 714). He told the jurors: "Exhibitionism has a really high rate of reoffense, as opposed to some other types of sexual offenses." (Tr. 714).

Dr. Logan diagnosed Mr. Tyson with exhibitionism and personality disorder NOS (Tr. 722-724). He could not definitively diagnose any other sexual disorder (Tr. 726). He recognized that clinicians have gone back and forth in recent years whether Mr. Tyson qualifies for a diagnosis of pedophilia (Tr. 726). There is no question that Mr. Tyson has exposed himself to prepubescent children (Tr. 726). But there is ambiguity and uncertainty in many of the records about who was the target of that behavior (Tr. 728). A typical example is Mr. Tyson's exposure to a group of girls ranging from fifteen to seventeen years of age (Tr. 728). Another incident involved an adult woman and her eight year old daughter, but there was no indication in the record whether Mr. Tyson was particularly exposing himself to either one or both (Tr. 733). In one instance Mr. Tyson may have been exposing himself near an elementary school, but later in the day was exposing himself near a high school (Tr. 733).

Dr. Logan found information that leaned in favor of and against a diagnosis of pedophilia (Tr. 732). But he noted that the greater weight of Mr. Tyson's offending involved post-pubescent females (Tr. 729). He would treat Mr. Tyson in therapy as if pedophilia was present, but he would not make a definitive diagnosis of that condition in a forensic setting (Tr. 732). An evaluator must be more conservative in a forensic setting because these are not just treatment decisions, but decisions that can result in someone being locked up for

many years (Tr. 729). Dr. Logan demands something more definitive than a presupposition based on remote records (Tr. 728-729).

Dr. Logan told the jurors that even assuming that Mr. Tyson is a pedophile, he cannot say that he will reoffend in a sexual way (Tr. 736). Nor is it possible to make the leap from a diagnosis of pedophilia to the conclusion that Mr. Tyson will commit another touching offense (Tr. 737). Research reveals that the overall rate of recidivism among pedophiles released from prison is twenty percent (Tr. 737). It is for this reason, according to Dr. Logan, that SVP proceedings are not usually filed against someone with one or two offenses (Tr. 737).

Dr. Logan told the jurors that he has seen only one instance of pedophilic exhibitionism, where the person exposed himself exclusively to children (Tr. 738). And Mr. Tyson is the only person Dr. Logan has seen to expose himself across such a wide age range (Tr. 738). Most exhibitionists are more selective to whom they expose themselves (Tr. 738). He agreed with the description of a former doctor who described Mr. Tyson as an indiscriminate exhibitionist (Tr. 738).

Dr. Logan agreed that there is a greater than fifty percent chance that Mr. Tyson will expose himself again (Tr. 745). But he told the jurors that he could not say that there was a better than fifty percent chance that Mr. Tyson would commit another contact offense (Tr. 745). Mr. Tyson's contact offenses were

against two sisters in one month and they stand alone from the rest of Mr. Tyson's offenses (Tr. 745). The records indicate that Mr. Tyson lived with another woman with daughters about the same age as the 1996 victims and there were no allegations that he did anything to them (Tr. 746). So, in Dr. Logan's opinion, there is not enough evidence to say that Mr. Tyson will commit another touching offense (Tr. 746). Touching offenses are outside of his pattern (Tr. 746-747).

Dr. Logan also saw the records of Mr. Tyson's reported relationship with a thirteen and fifteen year old girl in California (Tr. 748). He noted that the records were ambiguous whether there were two different girls or whether the reports involved the same girl at different times (Tr. 750). Mr. Tyson was seventeen or eighteen, maybe twenty years old (Tr. 750). Dr. Logan also noted that that relationship was nothing at all like the 1996 incident (Tr. 748). Regardless of her (or their) age (or ages), she (or they) was (or were) sexually mature so it does not amount to pedophilic attraction (Tr. 750-751). It was described as a "shack-up" type of relationship (Tr. 748). Dr. Logan noted that at the time it apparently was not seen as a criminal offense, and that culturally men in their late teens often have sex with girls in their early teens (Tr. 751). He did agree that Mr. Tyson has a sexual attraction to girls thirteen to seventeen years old (Tr. 751). The State agreed that the incidents would not support a diagnosis of pedophilia, but called

upon Dr. Logan to acknowledge that under Missouri law they would be considered sexually violent offenses (Tr. 768-769).

Dr. Logan told the State that he did not use any actuarial instruments in this case because the instruments do not distinguish between all sexual offenses and sexually violent offenses (Tr. 773). That created a problem in this case because the question to be decided was whether Mr. Tyson would more likely than not commit a sexually violent offense in the future, not just any sexual offense (Tr. 773).

Dr. Logan saw no evidence of a progression in Mr. Tyson's behavior from exposure to action to contact asserted by Dr. Grinage (Tr. 752). The masturbation was mingled among all of the exposures; it did not "progress" from one to the other (Tr. 752). The "attempted grabbing" of a nineteen year old in Texas is unclear regarding Mr. Tyson's actual intention, and it was markedly different from the 1996 incidents involving seven and ten year old girls (Tr. 752). Dr. Logan agreed with the State that a percentage of exhibitionists progress to hands-on offenses (Tr. 758). But he explained that the progression typically involves offenses against strangers, not against children the person knows (Tr. 758-759). Mr. Tyson knew the seven and ten year old girls he offended against in 1996 and their mother (Tr. 746). Mr. Tyson was babysitting the girls at the time of the offense (Tr. 760). The typical "progression" for an exhibitionist from exposure to contact involves enticing strangers into situations where the person can offend

against them (Tr. 762). The formation of relationships within a family by a pedophile for the purpose of offending is an entirely different type of pattern (Tr. 762-763).

It was Dr. Logan's opinion that Mr. Tyson does not qualify for commitment as an SVP (Tr. 757).

The jurors returned a verdict that Mr. Tyson is a sexually violent predator (Tr. 841). The probate court committed Mr. Tyson to the custody of DMH to be held in secure confinement until his mental abnormality has so changed that he is safe to be at large (L.F. 285).

POINTS RELIED ON

I.

The probate court erred in permitting the State to seek and gain Mr. Tyson's commitment on the "mental abnormality" of pedophilia, in violation of Mr. Tyson's 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 the State and the probate court were deprived of jurisdiction to proceed on that allegation because the State presented that opinion, and evidence supporting it, at the hearing to determine whether there was probable cause to believe that Mr. Tyson is a sexually violent predator, after which the probate court held that the State's evidence failed to establish probable cause to believe that Mr. Tyson suffers the "mental abnormality" of pedophilia.

In the Matter of the Care and Treatment of Johnson, 161 S.W.3d 873 (Mo.

App. S.D. 2005);

In the Matter of the Care and Treatment of Spencer, 103 S.W.3d 407 (Mo.

App., S.D. 2003);

Mo. Soybean Association v. Mo. Clean Water Commission, 102 S.W.3d 10

(Mo. banc 2003);

State ex rel. Buresh v. Adams, 468 S.W.2d 18 (Mo. banc 1971) (L.F. 95);

United States Constitution, Fourteenth Amendment;
Missouri Constitution, Article I, Section 10; and
Sections 632.486 and 632.489, RSMo 2000.

II.

The probate court abused its discretion in admitting, over Mr. Tyson's objection, that he had sexual relations in the late 1950's or early 1960's when he was seventeen to twenty years old, with one or two girls thirteen to fifteen years old, in violation of Mr. Tyson's 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 the evidence was more prejudicial than probative because the probate court excluded the evidence prior to trial because it did not establish the presence of pedophilia, but the State successfully argued for its admission at trial as impeachment of Mr. Tyson's expert that he would not commit a contact offense against a thirteen to seventeen year old female because his sexual interest is in females eighteen years old and older, but Dr. Jackson made no such assertion during his testimony.

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

In the Matter of the Care and Treatment of Coffel, 117 S.W.3d 116 (Mo. App., E.D. 2003);

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

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

United States Constitution, Fourteenth Amendment;
Missouri Constitution, Article I, Section 10; and
Section 632.480, RSMo Cum. Supp. 2004.

III.

The trial court abused its discretion in admitting Dr. Grinage's testimony, over Mr. Tyson's objection, on the results of the Static-99 and MnSOST-R actuarial instruments applied to him by Dr. Grinage, in violation of Mr. Tyson'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. Tyson is more likely than not to reoffend - and they 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. Tyson or any other individual is unknown, the group results cannot predict the behavior of any specific individual, and the instruments do not distinguish between non-sexually violent and sexually violent offenses.

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, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10; and

Section 490.065, RSMo 2000.

ARGUMENT

I.

The probate court erred in permitting the State to seek and gain Mr. Tyson's commitment on the "mental abnormality" of pedophilia, in violation of Mr. Tyson's 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 the State and the probate court were deprived of jurisdiction to proceed on that allegation because the State presented that opinion, and evidence supporting it, at the hearing to determine whether there was probable cause to believe that Mr. Tyson is a sexually violent predator, after which the probate court held that the State's evidence failed to establish probable cause to believe that Mr. Tyson suffers the "mental abnormality" of pedophilia.

The State filed a petition seeking to involuntarily commit Mr. Tyson to DMH as a sexually violent predator upon his anticipated release from prison (L.F. 1-4). It alleged in its petition that "the Missouri Department of Corrections, and agency with jurisdiction, has certified that respondent, Richard Tyson, may meet the criteria of a sexually violent predator as defined by statute" (L.F. 1). The State made the following assertions as specifically supporting its allegation against Mr. Tyson: a) that Mr. Tyson pleaded guilty to first degree child

molestation, a sexually violent offense, b) “[t]hat respondent is suffering from a mental abnormality which makes him more likely than not to engage in predatory acts of sexual violence if released,” and c) “that sufficient evidence exists to determine whether respondent suffers from a mental abnormality which makes him more likely than not to engage in predatory acts of sexual violence.” (L.F. 1-2). In support of these assertions, the State referred the probate court to the End of Confinement report attached to and incorporated in the State’s petition (L.F. 2). The DOC clinical director who prepared the End of Confinement report stated his diagnostic impressions supporting his conclusion that Mr. Tyson meets the definition of a sexually violent predator (L.F. 5-7). These diagnostic impressions were the presence of pedophilia, exhibitionism, and antisocial personality disorder with psychopathic traits (L.F. 6).

The probate court held a hearing as required by Section 632.489, RSMo 2000, to “determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator.” The clinical director was the State’s expert witness at this hearing (L.F. 68). After hearing the State’s evidence, the probate court found that “the State failed to prove by clear and convincing evidence that the respondent is a pedophile, not because it failed to show that Defendant has an attraction to prepubescents, but because it failed to show that the attraction lasted 6 months.” (L.F. 68). The clinical director testified that he could nonetheless make a provisional diagnosis of pedophilia, but the

probate court “reject[ed] the notion that such a provisional diagnosis meets the State’s standard of proof” (L.F. 68). The probate court ultimately concluded: “Based on the foregoing facts, this Court finds probable cause to believe that Respondent Richard Tyson suffers from antisocial personality disorder with psychopathic traits, that such disorder is a mental abnormality, ... and that he is a sexually violent predator” (L.F. 69).

Dr. Jackson of DMH performed the court-ordered SVP evaluation after the probate court found probable cause (L.F. 69, 71-76). After reviewing the records from the Jackson County circuit court, the Department of Corrections, Probation and Parole, the Missouri Sexual Offender Treatment Center, and police reports from Kansas City, New Jersey, Texas and California, Dr. Jackson rejected the diagnosis of pedophilia because there was no evidence of a pattern of focus on or sexual interest in prepubescent children (L.F. 71-72, 557, Tr. 557). And while he diagnosed exhibitionism and personality disorder Not Otherwise Specified, Dr. Jackson expressed his expert opinion that Mr. Tyson is not a sexually violent predator (L.F. 76).

The State hired its own expert (Tr. 394, 402).⁴ The State’s retained expert added a diagnosis of pedophilia against Mr. Tyson (L.F. 421). He identified that

⁴ “Once the state decides to proceed to commit one of these offenders, it can hardly lose. If the state psychiatrist cannot confidently state that the offender is a

condition as the mental abnormality qualifying Mr. Tyson for commitment (Tr. 440-441). He acknowledged that the diagnoses of exhibitionism and personality disorder NOS would not be enough for the State to succeed in its efforts to commit Mr. Tyson as a sexually violent predator (Tr. 532).

Mr. Tyson filed a motion to prohibit the State from seeking his commitment on the “mental abnormality” of pedophilia because the probate court specifically found no probable cause to believe that he was a sexually violent predator upon that basis (L.F. 124-127). The probate court found probable cause to proceed to trial only on the “mental abnormalities” of antisocial personality disorder (L.F. 69). The State argued against the motion by claiming that it “now” had evidence to support that diagnosis 197-201). It may have been more accurate for the State to have noted that it “now” had someone willing to definitively diagnose the condition, a witness that it did not have before. The State offered records to support its claim of “new” evidence, but none of the information in those records was unavailable for the court-ordered DMH evaluation. Most of the records cited were police reports, probation and parole records and Jackson County court records, items Dr. Jackson noted were

sexually violent predator, the state may shop around for an expert, even from another state.” *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 178 (Mo. banc 2004) (J. Wolff, concurring).

available for his review during the evaluation (L.F. 71-72, 198-200). The only apparently “new” records were two from Atascadero State Hospital in California and one from the California Department of Corrections (L.F. 198). One Atascadero record noted Mr. Tyson’s exposure to an adult woman and her eight year old daughter (L.F. 198). The other two records simply indicate that Mr. Tyson exposed himself to teenage and pre-teen girls (L.F. 198).

Dr. Jackson told the State during cross-examination that while he did not have the records from California when he did his evaluation, he did have information regarding all of those offenses, charges, and convictions (Tr. 632). It is not only interesting, but Mr. Tyson believes quite significant, that while Dr. Jackson’s evaluation was prepared on January 21, 2005, on February 15, 2005, the probate court sealed on its own motion the records received by the probate court from Atascadero State Hospital (L.F. 71, 77). If the probate court received the records on or before February 15, 2005, obviously sometime before that the State of Missouri must have sought them out and requested them. But the State apparently made no effort to get them to Dr. Jackson before he reported his conclusions from the evaluation. The State did seek, and received the release of those records on February 22, 2005, so that it could give them to its retained expert in the State’s efforts to secure an opinion supporting its petition to commit Mr. Tyson (L.F. 78-79, 80-81).

The probate court overruled Mr. Tyson's motion (Tr. 94). The court did not make this decision in any way based on newly existing evidence of pedophilia not previously available to the State. It overruled Mr. Tyson's motion because the language of the statute only requires it to simply conclude that probable cause exists to believe the person is an SVP without limitation, and it did so based on the presence of a personality disorder (Tr. 94).⁵ This was error.

Mr. Tyson objected at trial to the introduction of the diagnosis of pedophilia and evidence of that condition (Tr. 418-419), and he included the allegation of error in his motion for new trial (L.F. 295-296), thus preserving the issue for appeal.

Generally, the existence or absence of subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court. *Mo. Soybean Association v. Mo. Clean Water Commission*, 102 S.W.3d 10, 22 (Mo. banc 2003). However, when the facts are uncontested, the question of subject-matter jurisdiction is purely one of law, which is reviewed *de novo*. *Id.* The facts are not in question here. The State presented the presence of pedophilia as a qualifying mental abnormality at the probable cause hearing and the probate court found

⁵ The State's retained expert testified at trial that the personality disorder would not meet the statutory requirements to commit Mr. Tyson as a sexually violent predator (Tr. 532).

that probable cause to believe the existence of that mental abnormality did not exist. This Court reviews *de novo* the probate court's denial of Mr. Tyson's motion to preclude his commitment on the alleged mental abnormality of pedophilia.

Mr. Tyson supported his motion to preclude his commitment on the "mental abnormality" of pedophilia after the probate court found no probable cause to believe that he had that condition qualifying him for commitment by analogizing his situation to that in *State ex rel. Buresh v. Adams*, 468 S.W.2d 18 (Mo. banc 1971) (L.F. 95). In *Buresh*, the State filed a two count complaint, one count alleging embezzlement of money, the second count alleging theft of electricity. *Id.* at 20. The trial court bound Buresh over for trial after preliminary hearing, but only on the first count of embezzlement. *Id.* Prior to trial, however, the State filed a substitute information that charged in a single count both embezzlement and stealing electricity. *Id.* at 21. The Missouri Supreme Court recognized that "[w]hatever it is that the prosecutor intends to include in an information charging a violation ... must be the subject of a complaint upon which the accused is accorded a preliminary hearing and is bound over for trial." *Id.* The Court reversed the convictions for stealing electricity for which Buresh was not bound over for trial following the preliminary hearing because the discharge of Buresh on that count by the court at the preliminary hearing deprived the prosecutor the authority to proceed to trial on those allegations. *Id.*

The probate court rejected Mr. Tyson's argument simply because it did not feel bound to follow a decision reached in a criminal case (Tr. 94). The court erred.

This precise issue has not been addressed in Missouri in a sexually violent predator case. Two Missouri cases have addressed the issue of submitting a case to a jury on a mental abnormality not pleaded in the petition on which the probate court found probable cause to proceed to trial.

The petition in *In the Matter of the Care and Treatment of Spencer*, 103 S.W.3d 407, 419-420 (Mo. App., S.D. 2003), alleged the mental abnormality of pedophilia. At trial, the State also produced evidence of the mental abnormality of narcissistic personality disorder. *Id.* Spencer challenged on appeal the admission of the personality disorder diagnosis, but the Southern District Court of Appeals denied that claim because Spencer did not object to the evidence at trial. *Id.* at 419. If a party does not object to evidence on an issue beyond the scope of the pleadings, the pleadings are automatically amended to conform to the evidence. *Id.*

The Southern District Court of Appeals followed *Spencer* in *In the Matter of the Care and Treatment of Johnson*, 161 S.W.3d 873 (Mo. App.S.D. 2005). The State's petition in *Johnson* alleged mental abnormalities of antisocial personality disorder and sexual abuse of a child disorder. *Id.* at 881. The State's evidence at trial was that Johnson suffered the mental abnormalities of paraphilia Not

Otherwise Specified and Personality Disorder Not Otherwise Specified. *Id.* But again, Johnson did not object to the evidence at trial, and the Court held that the allegations of the petition were amended to conform to the evidence in the absence of an objection. *Id.* 881-882.

The holdings in *Spencer* and *Johnson* clearly suggest that if those men had objected to the admission of evidence beyond the scope of the pleadings the evidence would not have been admissible. When the probate court found no probable cause to believe that Mr. Tyson suffered the mental abnormality of pedophilia, that condition was no longer within the scope of the pleading. Mr. Tyson both filed a pre-trial motion to preclude his commitment based on that condition (L.F. 124-127), and renewed his objection at trial (Tr. 418-419). The evidence was not outside the scope of the state's petition.

Indeed, this necessary conclusion from *Spencer* and *Johnson* may explain why the State no longer makes a factual allegation of a specific mental condition in its petitions. If it makes no specific factual allegation, there is no limit to the scope of the petition, and it runs no risk of an objection to, and exclusion of, evidence outside the pleading. The State alleged only a bare legal conclusion against Mr. Tyson, that he "has a mental abnormality making him more likely than not to engage in predatory acts of sexual violence." (L.F. 2). Section 632.486, RSMo 2000, requires that the attorney general file a petition alleging that the person is a sexually violent predator "stating sufficient facts to support such

allegation.” While the State did incorporate the End of Confinement report in its petition, the probate court treated that as if it was irrelevant to the purpose of the probable cause hearing. The probate court found that the State failed to prove probable cause to believe that Mr. Tyson suffers the mental abnormality of pedophilia, but it denied Mr. Tyson’s motion because it only had to find probable cause to believe that Mr. Tyson is a sexually violent predator and that general conclusion imposes no limits on the specific evidence the State may present at trial (Tr. 95).

The deprivation of due process of law in this procedure is patent. It does not matter what the State alleges in its petition. It does not matter what evidence it produces at trial. As long as the court or jurors are persuaded to rule in favor of the State at the various steps of the process, the State wins and the individual ends up in secure confinement. The commitment process becomes a wide-open free-for-all for the State. The State alleged only a bare legal conclusion against Mr. Tyson in its petition. The probate court found that the State had not demonstrated probable cause to believe that the bare legal conclusion was supported by pedophilia, but that it was supported by the presence of exhibitionism and held Mr. Tyson for trial. At trial, the State’s expert rejected exhibitionism as a basis for commitment, but Mr. Tyson ended up committed on pedophilia. This is a travesty. The Missouri Supreme Court stated in *State ex rel. McCutchan v. Cooley*, 12 S.W.2d 466, 468 (Mo. banc 1928), that the purpose

of a criminal preliminary hearing “is to safeguard them (the accused) from groundless and vindictive prosecutions.” Surely the purpose of a probable cause hearing in an SVP proceeding is to safeguard Missouri citizens from a complete free-for-all in the State’s favor that results in the loss of the person’s liberty. The probable cause hearing cannot be simply the mere formality the probate court permitted it to be in Mr. Tyson’s case. If the requirements of the probable cause hearing are to have meaning, this Court must make that clear in this case.

Because the State and probate court lacked jurisdiction to proceed to trial on evidence of the presence of pedophilia, the judgment of the probate court must be reversed and Mr. Tyson must be discharged. Remand for a new trial without evidence of pedophilia is inappropriate in this case because the State’s expert testified that the other existing conditions, exhibitionism and personality disorder NOS, were insufficient to support Mr. Tyson’s commitment.

II.

The probate court abused its discretion in admitting, over Mr. Tyson's objection, that he had sexual relations in the late 1950's or early 1960's when he was seventeen to twenty years old, with one or two girls thirteen to fifteen years old, in violation of Mr. Tyson's 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 the evidence was more prejudicial than probative because the probate court excluded the evidence prior to trial because it did not establish the presence of pedophilia, but the State successfully argued for its admission at trial as impeachment of Mr. Tyson's expert that he would not commit a contact offense against a thirteen to seventeen year old female because his sexual interest is in females eighteen years old and older, but Dr. Jackson made no such assertion during his testimony.

The State sought leave of the probate court to cross-examine Dr. Jackson Mr. Tyson's expert, regarding "common-law" marriages Mr. Tyson reportedly had in California in the late 1950's or early 1960's, when Mr. Tyson was in his late teens or early twenties, with a thirteen year old girl and a fifteen year old girl (Tr. 583-584, 748).⁶ The State argued that it should be allowed to do so because Dr.

⁶ Or the same girl simply reported in the records at different times (Tr. 750).

Jackson said that Mr. Tyson's sexual attraction is to young women eighteen years old and older (Tr. 584-585, 587). Mr. Tyson noted that Dr. Jackson made this statement while explaining why he did not diagnose pedophilia, distinguishing pre- and post-pubescence (Tr. 588). The probate court was aware of these incidents prior to trial, and excluded them because they did not address the issue of whether Mr. Tyson suffers pedophilia (Tr. 585). The State argued that Mr. Tyson's mental abnormalities are not important, what is important is the focus of Mr. Tyson's interests and "what lines were crossed." (Tr. 600-601). The State asserted that Dr. Jackson misled the jurors by testifying that Mr. Tyson would not engage in sexual contact with children because his sexual focus is on females eighteen years old and older (Tr. 589-590, 595). From this, according to the State, Mr. Tyson's sexual contact with thirteen and fifteen year old girls was relevant to show that Mr. Tyson will "cross that line" and have contact with children thirteen to sixteen years old (Tr. 589-590). The probate court agreed that the evidence did not go to whether Mr. Tyson has pedophilia, but it overruled its earlier exclusion and permitted to State to present the evidence on the issue of Dr. Jackson's view that Mr. Tyson's sexual focus is on older women (Tr. 599, 601-602).

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).

The probate court's ruling was clearly contrary to the surrounding circumstances presented by Dr. Jackson's testimony, and is so unreasonable that it shocks the sense of justice. It was not Dr. Jackson who was misleading the jurors; it was the Assistant Attorney General who was misleading the probate court regarding Dr. Jackson's testimony. Contrary to the State's argument and the probate court's ruling, Dr. Jackson did not testify that he did not think that Mr. Tyson would "cross the line" between eighteen year olds and thirteen to sixteen year olds because his focus was on the older females (Tr. 568-569). He testified that he did not think that Mr. Tyson would cross the line between non-contact and contact offenses because in the records covering four or five decades, Mr. Tyson had only the brief contact offenses in 1996 (Tr. 568-569). Defense counsel had been inquiring of Dr. Jackson whether he agreed that Mr. Tyson's behavior had progressed from non-contact to contact offenses as Dr. Grinage had opined (Tr. 567-568). After that examination, defense counsel engaged Dr. Jackson in the following colloquy:

Q: Having crossed that line to touching somebody, Doctor Jackson, do you think Mr. Tyson will again cross that line into touching?

A. No, I don't think so.

Q: Why not?

A: As I started to say before, I think it's an anomaly. I think one of the things that Doctor Grinage and I probably would agree on is that there's a risk that he may expose himself and masturbate in public again, I don't think there is anybody that will necessarily disagree with that. For him to commit another contact sex offense, I just don't see it as a problem.

Q: Why not?

A: We've only got one, at least in my review of the records we've only got one incident of that.

(Tr. 569).

But Dr. Jackson did not testify that Mr. Tyson would "cross the line" between females below and above age eighteen. Dr. Jackson's direct examination testimony was that Mr. Tyson would not "cross the line" between non-contact and contact offenses. The State's cross-examination about thirteen and fifteen year old girls was irrelevant to impeach Dr. Jackson's testimony.

The evidence was not relevant, but it was prejudicial. The evidence permitted the State to exacerbate the jurors' fear of Mr. Tyson by making additional references to "sexually violent offenses." The State had Dr. Jackson confirm in cross-examination that under Missouri law sexual contact with a child under age fourteen is first degree child molestation, that sexual contact with a child under age seventeen is second degree child molestation, and that both are

defined in the SVP law as sexually violent offenses (Tr. 609-611). The State then suggested to Dr. Jackson that the age of thirteen being the distinction between pre- and post-pubescence was irrelevant to finding Mr. Tyson a sexually violent predator, the real issue being whether any victim is under age seventeen, making the offense sexually violent:

So we've talked about over 13, and under 13 and prepubescent and pubescent, but really in terms of sexual contact under 13 and over 15 is of little consequence, it's just if they're 16 or under, for sexual contact?

We're talking about whether Mr. Tyson is more likely than not to commit, so I'm asking when we talk about touching a child it doesn't really matter whether the sexual contact is on a 12 year old or a 15 year old, because both of them would be a sexually violent offense, correct? (Tr. 611). Dr. Jackson agreed that sexual contact with a twelve year old or a fifteen year old would be a sexually violent offense (Tr. 611).

To commit anyone as a sexually violent predator it must prove beyond a reasonable doubt that the person has a congenital or acquired condition affecting his emotional or volitional capacity *that predisposes him to* commit sexually violent offenses to a degree that causes serious difficulty controlling behavior and making him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. *Thomas v. State*, 74 S.W.3d 789, 791-792 (Mo.

banc 2002); *In the Matter of the Care and Treatment of Coffel*, 117 S.W.3d 116, 121 (Mo. App., E.D. 2003). The condition must cause the offending. It is not enough for the State to prove a mental condition and an unrelated danger of sexually violent offending. Only by linking the two as cause and effect may a person be deprived of his liberty in a civil commitment proceeding.

The State made no effort to prove that the congenital or acquired condition, pedophilia - a sexual attraction to children under 13 - predisposed Mr. Tyson to engage in sexually violent offenses. In fact, the State conceded that the acts it was putting before the jurors, offenses against children thirteen to seventeen years old, were irrelevant to pedophilia, they were simply sexually violent. They were simply frightening and prejudicial. The State injected this prejudice even though it was totally unrelated to whether the mental abnormality it presented, pedophilia, was the condition predisposing Mr. Tyson to engage in the acts. The probate court abused its discretion in permitting the State to engage in this conduct.

Because the probate court abused its discretion in permitting the State to present prejudicial evidence of danger unrelated to the acquired condition it presented as a mental abnormality, the judgment of the probate court must be reversed and the cause remanded for a new trial.

III.

The trial court abused its discretion in admitting Dr. Grinage's testimony, over Mr. Tyson's objection, on the results of the Static-99 and MnSOST-R actuarial instruments applied to him by Dr. Grinage, in violation of Mr. Tyson'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. Tyson is more likely than not to reoffend - and they 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. Tyson or any other individual is unknown, and the group results cannot predict the behavior of any specific individual, and the instruments do not distinguish between non-sexually violent and sexually violent offenses.

Mr. Tyson filed a pre-trial motion in limine to exclude any evidence regarding his risk to reoffend based on the Static-99 and MnSOST-R actuarial instruments because those results are not relevant to whether he, individually, is a sexually violent predator under the meaning of the statute (L.F. 120-123). He pointed out in his motion that the instruments do not purport to predict how he,

as opposed to the sample group used in the instruments, is more likely than not to engage in predatory acts of sexual violence in the future (Sup. L.F. 121-122).

Mr. Tyson objected at trial to Dr. Grinages's testimony regarding the results of the Static-99 and MnSOST-R calculations he made for him, but the trial court overruled the objection and permitted the testimony (Tr. 457). Mr. Tyson renewed this objection in his motion for new trial (L.F. 297), 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. Tyson 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. Tyson. 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. Tyson’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 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.*

The State was permitted to present evidence to the jurors that the Static-99 classified Mr. Tyson as “high risk,” with a fifty-two percent chance of reconviction in fifteen years; and the MnSOST-R classified him in the “highest risk” category with an eighty-eight percent chance of rearrest in six years (Tr. 459-460). Dr. Grinage then informed the jurors that the instruments

underestimated Mr. Tyson's risk of reoffending (Tr. 459-460-461). This evidence was extremely prejudicial.

Balanced against this substantial prejudice is the fact that the instruments have little relevance to Mr. Tyson. The irrelevance of the instruments is that it is the individual factors they contain, not the actuarial instrument assessment, which are shown by research to be significant to reoffense. It is the presence of those factors, and the significance of each on the potential risk, that may be of consequence in determining Mr. Tyson's risk to reoffend. A classification based upon the success or failure of a sample group does not have the same consequence. Dr. Grinage admitted as much: "it's not really prediction, it's placing people in a risk category, because we don't have the ability to know exactly what's going to happen in the future but we can place a person in a risk category." (Tr. 458).

So, this evidence becomes confusing and misleading. It confuses individual risk with group risk, and it misleads jurors by causing them to substitute the behavior of unknown members of a sample group for that of Mr. Tyson. The instruments are even less relevant in Mr. Tyson's case than other SVP cases. None of the witnesses doubted that Mr. Tyson will most likely expose himself or publicly masturbate in the future (Tr. 534-535, 571, 745). Such behavior may result in arrest and prosecution for a sexual offense, but these are not sexually violent offenses, and will not qualify Mr. Tyson for commitment (Tr.

532, 562). Dr. Grinage and Dr. Logan testified that the actuarial instruments combine all sexual offenses without distinguishing between sexually violent offenses and sex offenses not considered violent (Tr. 526-527, 773). Thus, there is very little probative value to the actuarial results, which are grossly outweighed by their prejudicial effect. The trial court abused its discretion in admitting the evidence over Mr. Tyson's objection.

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

CONCLUSION

Because the State and probate court lacked jurisdiction to proceed to trial on evidence of the presence of pedophilia, as set out in Point I, the judgment of the probate court must be reversed and Mr. Tyson must be discharged. Remand for a new trial without evidence of pedophilia is inappropriate in this case because the State's expert testified that the other existing conditions, exhibitionism and personality disorder NOS, were insufficient to support Mr. Tyson's commitment. Because the probate court abused its discretion in permitting the State to present prejudicial evidence of danger unrelated to the acquired condition it presented as a mental abnormality, as set out in Point II, the judgment of the probate court 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 and MnSOST-R, as set out in Point III, Mr. Tyson's 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 11,712 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, 2007. 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 25th day of January, 2007, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

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