

IN THE  
MISSOURI SUPREME COURT

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IN THE MATTER OF THE                    )  
CARE AND TREATMENT OF                )     No. SC88914  
JACKIE HOLTCAMP,                        )  
  Appellant.                                )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI  
SEVENTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION  
THE HONORABLE THOMAS CAMPBELL, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## **JURISDICTIONAL STATEMENT**

This appeal is before this Court upon grant of transfer from the Western District Court of Appeals. Article V, Section 10, Missouri Constitution.

## **STATEMENT OF FACTS**

Mr. Holtcamp incorporates the statement of facts set out in pages seven through nine of his initial Substitute Brief.

POINT RELIED ON

The probate court erred in denying Mr. Holtcamp's motion to dismiss the State's petition for involuntary civil commitment, in violation of Mr. Holtcamp'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 the probate court lacked jurisdiction to proceed with the case in that the Sexually Violent Predator law only permits commitment of persons who are then confined for sexually violent offenses as defined by Section 632.480(4), RSMo Cum. Supp. 2005, and at the time the State filed its petition Mr. Holtcamp was confined for an offense not within that definition.

*State v. Owen*, 216 S.W.3d 227 (Mo. App., W.D. 2007);

*Detention of Gonzales*, 658 N.W.2d 102 (Iowa 2003);

*In the Interest of Kochner*, 662 N.W.2d 195 (Neb. 2003);

*State ex rel. Simmons v. White*, 866 S.W.3d 443 (Mo. banc 1993);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.484, RSMo 2000; and

Sections 632.480; 632.483; 632.484, RSMo Cum. Supp. 2005.

## ARGUMENT

**The probate court erred in denying Mr. Holtcamp's motion to dismiss the State's petition for involuntary civil commitment, in violation of Mr. Holtcamp'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 the probate court lacked jurisdiction to proceed with the case in that the Sexually Violent Predator law only permits commitment of persons who are then confined for sexually violent offenses as defined by Section 632.480(4), RSMo Cum. Supp. 2005, and at the time the State filed its petition Mr. Holtcamp was confined for an offense not within that definition.**

The State begins its defense of Mr. Holtcamp's confinement by arguing that its role in the initiation of the involuntary commitment petition is limited to, essentially, just following up on actions previously taken by the "agencies with jurisdiction" and the Prosecutor's Review Committee (Resp. Br. 8-12). This does not permit the Office of the Attorney General to ignore the other provisions of the Sexually Violent Predator law establishing the procedure by which Missouri citizens are deprived by the government of their liberty. Nor does this excuse the exercise of jurisdiction by the trial court if any of those previous actions were in violation of the statutes. The SVP law is a special statutory proceeding which

“erects an elaborate, step-by-step procedure” for involuntary commitment. *In re Salcedo*, 34 S.W.3d 862, 867 (Mo. App., S.D. 2001), *superseded by statute*. All of these steps must be followed.

The State argues that this Court can peer into the minds of the legislators and discern their intent by referring to Brian Garner’s book, THE OXFORD DICTIONARY OF AMERICAN USAGE AND STYLE (Resp. Br. 13, 15-16). Mr. Garner offers no such ability. His book was written to instruct authors how to write precisely and clearly. His book was not written to instruct the reader how to read the mind of the author. This is demonstrated by Mr. Garner’s book.

The State urges this Court to follow Mr. Garner to conclude that the legislature was using the present perfect tense when it wrote the language “has been convicted.” (Resp. Br. 15-16). According to the State, the legislature employed the present perfect tense when it used “the present form of the auxiliary verb ‘has’ with a past participle, as in ‘has been convicted.’” (Resp. Br. 13). But Mr. Garner also instructs in his book that, “The unfailing test for passive voice is this: you must have a *be*-verb plus a past participle (usually a verb ending in *-ed*). Thus, constructs such as these are passive: \*\*\* been served \*\*\*.” So, too, it would seem, the “has been convicted” in the statute is simply written in passive voice. Mr. Garner provides two different usages of the language of the statute before this Court. Which usage did the legislature employ in our statutes? Mr. Garner’s book cannot answer this question.

The United States Supreme Court cases cited by the State demonstrate how the legislative intent regarding verb tenses can be determined: by finding within the statutory language a clear demonstration of accurate and precise usage of differing tenses. In *Barrett v. United States*, 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976), the United States Supreme Court had to determine the meaning of language contained in the Gun Control Act amendment to Title IV of the Omnibus Crime Control Act. The Act made it unlawful for any person who, *inter alia*, has been convicted of a felony “to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 423 U.S. at 213, 96 S.Ct. at 499. The United States Supreme Court held that the expression “has been shipped or transported” was intentionally drafted in the present perfect tense and applied to shipment or transportation at any time, even if unrelated to the time of the persons’ receipt of the firearm or ammunition. 423 U.S. at 216-217, 96 S.Ct. at 501. But this Court must consider how the United States Supreme Court reached that conclusion in order to accurately consider the present appeal.

The United States Supreme Court concluded that “Congress knew the significance and meaning of the language it employed” because Congress used both present tense and present perfect tense in different portions of Title IV. 423 U.S. at 216-217, 96 S.Ct. at 501. In fact, the very provision under review used both tenses: it prohibited “to receive” any firearm, written in the present tense,

that “has been” shipped in interstate commerce, written in the present perfect tense. *Id.*

There is no similar demonstration of the Missouri Legislature’s awareness of the significance and meaning of the language contained in the SVP Act. In fact, the State tries to persuade this Court to reach the same conclusion under opposite circumstances when it argues that the legislature’s intent can be found from its use in three other sections of “that same tense ... in a somewhat parallel or related way.” (Resp. Br. 13). The United States Supreme Court found evidence of Congress’ awareness of the “significance and meaning” of the language it used because of the different tenses employed in the several provisions of Title IV. But the State urges this Court to find the same awareness in the Missouri Legislature’s repeated use of the same tense form in the several provisions of the SVP Act.

There is another significant distinction between the language of Title IV and the SVP Act that rejects the State’s conclusion. The United States Supreme Court noted that the provision of Title IV “contains no limitation to a receipt which itself is part of the interstate movement.” 423 U.S. at 216, 96 S.Ct. at 501. Title IV prohibited a felon “to receive any firearm which has been shipped in interstate commerce.” In contrast, the SVP Act does impose a limitation between the confinement of the individual and the conviction of a sexually violent offense. Section 632.483.1(1), the provision of the SVP Act under which the State

brought its commitment petition, directs the Department of Corrections to initiate the process by sending notice to the Attorney General's Office "*prior to the anticipated release ... of a person who has been convicted of a sexually violent offense.*" (emphasis added). The emphasized language of this statute imposes a limitation between the anticipated release and custody for a sexually violent offense not found in the language of Title IV under review by the United States Supreme Court.

The State directs this Court's attention to *Scarborough v. United States*, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d (1977), but only for the purpose that the United States Supreme Court noted in *Scarborough* their holding that the language under consideration in *Barrett* demonstrated an intention to use present perfect tense denoting an act that has been completed (Resp. Br. 17). Further review of *Scarborough* demonstrates why the State's reliance on *Barrett* is misplaced as Mr. Holtcamp discussed above.

Much in the same manner as the State does here, the appellant in *Scarborough* relied upon *Barrett* to establish legislative intent from the language used in the statute under which he was prosecuted. 431 U.S. at 569, 97 S.Ct. at 1966. He tried to contrast the language of Title VII of the Omnibus Crime Control Act with the language of Title IV of that Act considered in *Barrett*, to establish that because the *Barrett* Court concluded that Congress was aware of the meaning of the language it used, the use of different language in Title VII

supported his position. *Id.* The United States Supreme Court rejected the argument because:

The essential difficulty with this argument is that it is not very meaningful to compare Title VII with Title IV. Title VII was a last-minute amendment to the Omnibus Crime Control Act enacted hastily with little discussion and no hearings. \*\*\* Title IV, on the other hand, is a carefully constructed package of gun control legislation. It is obvious that the tenses used throughout Title IV were chosen with care.

\*\*\*

In the present case, by contrast, Congress' choice of language was ambiguous at best. While it is true that Congress did not choose the precise language used in s 922(h) [of Title IV] to indicate that a present nexus with commerce is not required, neither did it use the language of s 922(j) [of Title IV] to indicate that the gun must have a contemporaneous connection with commerce at the time of the offense. *Thus, while petitioner is correct in noting that Congress has the skills to be precise, the fact that it did not employ those skills here helps us not at all.*

431 U.S. at 569-570, 97 S.Ct. at 1966-1967. (emphasis added).

As Mr. Holtcamp pointed out in the discussion of *Barrett*, unlike the language of Title IV, nothing in the language of the SVP Act unambiguously demonstrates the Missouri Legislature's skill to precisely employ differing verb

tenses. Or if the legislature has such skills, nothing in the SVP Act demonstrates unambiguously that it was putting such skills to use. These things being so, whether or not the Missouri Legislature has those skills, their failure to employ them in the SVP Act “helps [this Court] not at all.”

The State also included *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), among the cases it cites in support of its argument (Resp. Br. 17). Careful analysis of the case demonstrates that it provides more support to Mr. Holtcamp’s argument than to the State’s. The license of a gun store was revoked under Title IV of the Gun Control Act amendment to Title IV of the Omnibus Crime Control Act because one of the business’ owners had been convicted of a gun crime. *Id.* The conviction against the owner had been expunged upon successful completion of probation. 460 U.S. at 108, 103 S.Ct. at 989. The question before the United States Supreme Court was whether the prohibition against ownership by anyone “who has been convicted” of a gun crime applied after the conviction was expunged. The United States Supreme Court cited an earlier opinion where it found that “[n]o modifier is present, and nothing suggest any restriction on the scope of the term ‘convicted’” contained in the language of Title VII. 460 U.S. at 111, 103 S.Ct. at 991.

As Mr. Holtcamp discussed above regarding the language of Title IV, the language of Section 632.483 does include a modifier or limitation. That provision

of the SVP Act directs the Department of Corrections to initiate the process by sending notice to the Attorney General's Office "*prior to the anticipated release ... of a person who has been convicted of a sexually violent offense.*" (emphasis added). The language of the anticipated release limits and modifies the language of the conviction of a sexually violent offense.

In *State v. Owen*, 216 S.W.3d 227, 229 (Mo. App., W.D. 2007), the Western District Court of Appeals interpreted the language used in Section 577.054 regulating expungement of an alcohol related offense from driver's license records as indicating the legislature's intent to use present perfect tense. The statute stated that "[t]he provisions of this section shall not apply to any individual who *has been issued* a commercial driver's license...." *Id.* at 228-229. This case does not support the State's argument for two reasons.

First, as with the cases cited above involving Titles IV and Title VII, the language of the expungement statute had no modifier or limitation between the issuance of the license and the exclusion from expungement. The Court held: "Once the issuing has occurred, there is no other statutory requirement to make the person ineligible for expungement." *Id.* at 229. In contrast, Section 632.483 modifies and limits "has been convicted of a sexually violent offense" with the "anticipated release" of the person from custody contained in the very same sentence.

The second reason *Owen* does not advance the State's argument is that the Western District found that its interpretation of the statute was necessary to prevent the individual from manipulating the law to his advantage. Owen held a commercial driver's license but surrendered it shortly before invoking the statute to expunge an alcohol-related conviction. *Id.* at 228. The Court concluded that its interpretation of the statute was necessary because, "it is clear that it would defeat the purpose of the statutory exceptions if a driver having a commercial driver's license could surrender that license in order to obtain expungement and then, immediately thereafter, apply for and obtain another commercial license." *Id.* at 230.

It is clear that Mr. Holtcamp, nor anyone else with a prior sexually violent conviction, can manipulate the SVP Act in a similar manner. He is unaware of any means by which to expunge his 1983 conviction to avoid application of the SVP Act. It is unnecessary to reach the same conclusion here as the Western District Court of Appeals reached in *Owen* in order to prevent the individual from manipulating the provisions of the statute to his advantage. It is, in fact, the State that is manipulating Mr. Holtcamp's 1983 conviction to invoke the SVP Act to its advantage beyond that expressed by the statutory language.

*Offenbacher v. Sadowsky*, 499 2d 421 (Mo. Div. 2, 1973), is woefully inadequate to justify the State's deprivation of Mr. Holtcamp's liberty in this proceeding. Division 2 of this Court was considering the use of language in a

jury instruction in a civil tort claim. *Id.* at 424. This Court was not interpreting the legislative intent in the drafting of a statute with the potential to deprive individuals of their constitutionally protected liberty interest.

The State claims support for its position in the requirement of the statute that notice must be given to the Attorney General's Office within 360 days of the anticipated release of the person confined (Resp. Br. 19).<sup>1</sup> It claims that this provision is designed to prevent premature notice in order to assure that "the object of a sexually violent predator proceeding is to protect the public from current, not past threats." (Resp. Br. 19). It suggests that for this reason the legislature decided to defer notice until near the end of the person's sentence (Resp. Br. 19).

These suggestions actually undermine the State's argument, and advance Mr. Holtcamp's argument. The assurance of current qualification for commitment is enhanced by limiting commitment of "sexually violent predators" to the most recent act of sexual violence. Section 632.484.1(1) specifically requires a "recent overt act" of sexual violence to authorize the State to proceed when the person is not in custody. When the person is in custody on a sexually violent offense that offense is the most recent overt act for purposes of

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<sup>1</sup> This is twice as long as the original version of the statute passed by the legislature provided. Section 632.483, RSMo 2000.

the statute. *Detention of Gonzales*, 658 N.W.2d 102, 105 (Iowa 2003); *In the Interest of Kochner*, 662 N.W.2d 195, 198 (Neb. 2003). By demanding a recent overt act of sexual violence the law assures the focus truly is on “current, not past threats.” (Resp. Br. 19). To permit commitment upon some remote act of sexual violence, the State may win this appeal, but it destroys the element of currency it is claiming to defend.

This situation addresses the legitimate concern raised by the State’s hypothetical of someone convicted of a sexually violent offense and another offense for which the person receives either a longer sentence or a consecutive sentence (Resp. Br. 20). Under this scenario, it is possible for the person to have “served” the sentence for the sexually violent offense but still be in the custody of DOC on the other offense. But in this situation, the person has at least remained continuously in the custody of DOC, and the most recent available act of sexual violence remains the offense for which the person was last sentenced prior to the filing of the commitment petition. *Gonzales, supra., Kochner, supra.* This continues the focus on current, rather than past, conditions.

The State questions Mr. Holtcamp’s ability to bring this argument by twice referring to the stipulation he made in the probate court, which included the acknowledgment that the 1983 conviction for which he had previously been released from custody was included in the definition of sexually violent offenses (Resp. Br. 18-19). But his argument is and always has been that that offense does

not give either the Department of Corrections or the Attorney General's Office the authority to invoke the procedures of the SVP Act, or the probate court jurisdiction to hear the petition. An Assistant Attorney General also signed the Stipulation in which the parties agreed that Mr. Holtcamp "does not hereby waive any issues preserved in any motions earlier filed on his behalf in this matter, including specifically, but without limitation, his Motion to Dismiss filed herein September 7, 2004, [that his 1983 conviction of a sexually violent offense does not make him eligible for commitment as a 'sexually violent predator'], the denial of which Motion the Respondent contemplates will be the subject of immediate appeal by respondent Holtcamp upon this court's order committing him to the Department of Mental Health..." (L.F. 52-55). Mr. Holtcamp's Stipulation no more undermines his argument here than does a guilty plea in a criminal case undermine the defendant's ability to challenge in a direct appeal the jurisdiction of the trial court to accept his guilty plea and impose sentence. *See State ex rel. Simmons v. White*, 866 S.W.2d 443 446 (Mo. banc 1993).

The State goes off on a diversion from the issue before this Court by arguing that the conviction for which Mr. Holtcamp was incarcerated at the time it filed its commitment petition was only "slightly below the 'violent' threshold" and the legislature did not intend for him to escape commitment because the crime was not defined as sexually violent (Resp. Br. 21-22). This is an obfuscation of the issue before this Court, not a demonstration of the meaning of

the statutory language actually used by the legislature. This argument tells the Court what the Attorney General's Office thinks the statute should say, rather than establishing what the legislature did say. The State claims that "there is no basis in the statute on which to suggest that the General Assembly intended" for an individual to avoid commitment as a sexually violent predator just because his latest crime was not a sexually violent offense (Resp. Br. 21-22).

Mr. Holtcamp has quite clearly demonstrated that basis. The statute requires notice from DOC "prior to the anticipated release ... of a person who has been convicted of a sexually violent offense." The legislature did not direct notice to be given prior to the release of a person in custody, or prior to the release of a person who might be a sexually violent predator as defined in Section 632.480(5), which includes a conviction for a sexually violent offense. The legislature limited and modified the authority of the agencies with jurisdiction to the anticipated release of a person confined for a sexually violent offense. This limitation or qualifier established by the legislature must be given effect. By the same token, the legislature's exclusion of the offense for which Mr. Holtcamp was confined from the definition of sexually violent offenses must also be given effect. The State is not asking this Court to interpret the language of the statute, it is asking this Court to agree with what the Attorney General's Office thinks the statute should encompass, and to give the statute that reach by construction.

The State urges this Court to follow the Florida, New Jersey and Arizona courts by arguing that the Iowa and Massachusetts courts “judicially add[ed] a qualification the legislature omitted” (Resp. Br. 22-23). In doing so, the State asks this Court to only follow the results which the Attorney General’s Office thinks is correct, while joining the State in ignoring the analysis by which those courts reached the decisions they did. The Florida, New Jersey and Arizona courts found that confinement for a sexually violent offense at the time the commitment petition is filed was not required because the legislatures of those states permitted the commitment proceedings to be initiated upon foreign convictions. This demonstrated specific legislative intent to permit the proceeding even if the person was not in custody in those states for a conviction of that state’s sexually violent offenses. No such intention was found in the Iowa and Massachusetts statutes, and therefore the courts of those states could not find a legislative intention to proceed in circumstances not specifically contained in the statutory language. The Iowa and Massachusetts courts did not add any language to the statutes; neither “presently incarcerated” nor “previously incarcerated.” Those courts looked for a specific legislative intention to permit the deprivation of liberty upon a previous incarceration, and finding none, they protected the individual’s liberty interest against usurpation by the state without specific legislative authorization to do so. This Court is in the same position as the Iowa and Massachusetts courts.

Much of the State's displeasure with the Iowa and Massachusetts decisions seems to be that those courts do not share the priorities favored by the Attorney General's Office. Those decisions undermine the position of the Attorney General's Office that the law should be given whatever judicial gloss is necessary to permit the State to protect the public by any means it chooses (Resp. Br. 23-24). This has always been the State's trump card. The State is consistently blind to the fact that its exercise of authority under the SVP Act deprives its citizens of their constitutional right to liberty. Essentially, the State chooses the public good over individual rights. The Iowa and Massachusetts courts chose to protect individual liberty against deprivation not expressly authorized by law over extending that deprivation by construction under the banner of "public good."

The decisions of the Iowa and Massachusetts courts are consistent with the canons of construction that strictly construe statutes in derogation of liberty as discussed in Mr. Holtcamp's initial brief. Neither of those courts would expand the language of the deprivation by construction beyond what was specifically authorized. They favored liberty over protection. The Attorney General's Office chooses the State's police power over individual constitutional rights. Criminal laws protect the public, but the Attorney General's Office would never claim, nor would it be allowed, the authority to expand statutory language by construction to provide for incarceration beyond that specifically authorized by the legislature, simply on the basis that doing so enhances public protection. The

position of the Attorney General's Office of what the law should cover must be expressed to the legislature for its clear determination of what conditions serve to deprive Missouri citizens of their liberty. The argument of the Attorney General's Office in this appeal is limited to what deprivation is authorized by the language of the statute as it is currently written. The Attorney General's Office is arguing its case to the wrong branch of government.

The State lacked jurisdiction to petition for Mr. Holtcamp's involuntary confinement under circumstances not expressly provided for by the legislature. The probate court lacked jurisdiction to enter a judgment and order committing Mr. Holtcamp to involuntary commitment under the SVP law. The probate court's judgment and order must be vacated and Mr. Holtcamp must be released from commitment.

## CONCLUSION

Because the probate court lacked jurisdiction to enter a judgment and order committing Mr. Holtcamp to involuntary civil commitment under the SVP law, the judgment and order of the probate court must be vacated and Mr. Holtcamp must be released from commitment.

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 \_\_\_\_\_ words, which does not exceed the 7,750 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 \_\_\_\_, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this \_\_\_ day of \_\_\_\_\_, 2007, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

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Emmett D. Queener

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