

IN THE
MISSOURI SUPREME COURT

STATE ex rel., STATE)	
OF MISSOURI,)	
Relator,)	
v.)	No. SC89470
)	
THE HONORABLE PAUL)	
PARKINSON, CIRCUIT COURT)	
OF MACON CO., PROBATE DIV.,)	
)	
Respondent.)	

BRIEF OF RESPONDENT, THE HONORABLE PAUL PARKINSON

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STATEMENT OF FACTS

The State of Missouri, through the Attorney General's Office, filed a petition in the probate division of the Circuit Court of Macon County, Missouri, to involuntarily commit Mr. Richard Closser as a sexually violent predator pursuant to Section 632.480, RSMo, *et seq.* (Relator's Ex. B).¹ The commitment petition was initiated by notice to the Attorney General's Office from the Department of Corrections as required by Section 632.483.² The State's petition specifically relied upon the End of Confinement Report prepared by David Suire, the Clinical Director of Missouri Sexual Offender Services and the MoSOP Clinical Director for the Department of Corrections (Relator's Ex. B).

Mr. Closser filed a motion to dismiss the State's petition because the State failed to follow the statutory procedure set out in Section 632.483 (Relator's Ex. C). That section requires a determination by a Missouri-licensed psychologist or psychiatrist that a person may meet the criteria of a sexually violent predator before the Attorney General's Office is authorized to file a commitment petition under the Sexually Violent Predator (SVP) law. Section 632.483.2(3). Mr. Closser noted in his motion that Dr. Suire did not possess a Missouri-issued license when he completed the End of Confinement report (Relator's Ex. C).

¹ References will be to the exhibits contained in Relator's Index of Exhibits accompanying its Petition for Writ of Prohibition.

² All statutory citations are to RSMo Supp. 2007.

The Honorable Paul Parkinson, judge of the Macon County probate division, granted Mr. Closser's motion to dismiss the petition (Relator's Ex. G).

The State filed a petition for writ of prohibition in the Western District Court of Appeals to prevent Judge Parkinson from dismissing the commitment petition. WD6985. The Western District Court of Appeals denied the State's petition for a writ of prohibition. WD69895.

The State filed a petition for a writ of prohibition in this Court. A preliminary writ of prohibition issued.

POINTS RELIED ON

I.

The notice sent to the Attorney General's Office from the Department of Corrections pursuant to Section 632.483 was defective in that Dr. Suire, who made the determination that Mr. Closser meets the definition of a sexually violent predator, did not possess a Missouri-issued license to practice psychology as required by Section 632.005.

Bernat v. State, 194 S.W.3d 863 (Mo. banc 2006);

In the Matter of the Care and Treatment of Spencer, 103 S.W.3d 407 (Mo. App.S.D. 2003);

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 407 (Mo. banc 2004);

Section 337.010, RSMo Cum. Supp. 2007;

Section 337.045, RSMo Cum. Supp. 2007;

Section 632.550, RSMo Cum. Supp. 2007;

Section 632.480, RSMo, Cum. Supp. 2007;

Section 632.483, RSMo Cum. Supp. 2007; and,

Section 632.489, RSMo Cum. Supp. 2007.

II.

The Attorney General's commitment petition was defective in that the Attorney General did not have authority under Section 632.483 to file the petition without notice from the Department of Corrections accompanied by a determination of a psychologist as defined in Section 632.005 that Mr. Closser meets the definition of a sexually violent predator.

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

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

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

State ex rel. Nixon v. Peterson, 253 S.W.3d 77 (Mo. banc 2008);

Section 217.831, RSMo 2000; and,

Section 632.483, RSMo Cum. Supp. 2007.

III.

The Attorney General's defective petition deprived Judge Parkinson of jurisdiction to proceed with the cause of action.

Green v. Penn-American Insurance Co., 242 S.W.3d 374 (Mo. App., W.D.

2008);

Luethans v. Wash. Univ., 894 S.W.2d 169 (Mo. banc 1995); and

In re Marriage of Miller and Sumpter, 196 S.W.3d 683 (Mo. App., S.D.

2006).

IV.

Judge Parkinson correctly dismissed the attorney general's defective petition, whether or not a lack of jurisdiction was the correct basis for doing so.

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

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

State ex rel. Nixon v. Peterson, 253 S.W.3d 77 (Mo. banc 2008).

ARGUMENT

I.

The notice sent to the Attorney General's Office from the Department of Corrections pursuant to Section 632.483 was defective in that Dr. Suire, who made the determination that Mr. Closser meets the definition of a sexually violent predator, did not possess a Missouri-issued license to practice psychology as required by Section 632.005.

This point responds to Point III of Relator's brief. Relator's argument begins with the conclusion it seeks, and works its way backward through the statutory procedures necessary to reach a conclusion in this matter. Doing so obfuscates and minimizes the errors which undermine Relator's conclusion.

Judge Parkinson will address the issue in this case from the beginning of the statutory process, and in doing so will demonstrate how the errors committed by the State in this process compel a different conclusion than that argued by Relator.

"When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection 4 of this section." Section 632.483.1. In this case, the Department of Corrections (DOC) was the agency with jurisdiction. Section 632.480(1). "The agency with

jurisdiction shall provide the attorney general and the multidisciplinary team ... with the following: [a] determination by either a psychiatrist or a psychologist as defined in section 632.005 as to whether the person meets the definition of a sexually violent predator.” Section 632.483.2(3).

The “notice” to the attorney general required by Section 632.483.1 was provided by Dr. Suire’s End of Confinement report prepared in DOC near the end of Mr. Closser’s sentence. Relator pleaded in its commitment petition: “By notice received on November 18, 2004, ... the Missouri Department of Corrections, an agency with jurisdiction, has certified that respondent, Richard Closser, may meet the criteria of a sexually violent predator as defined by statute, specifically: *** (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. See Exhibit A, attached hereto and incorporated by reference.” (Relator’s Ex. B, p. 1-2). Exhibit A, attached and incorporated into Relator’s petition, was Dr. Suire’s End of Confinement report. (Relator’s Ex. B, p 5-8).

The statutorily required notice from the agency with jurisdiction was defective because it failed to provide the attorney general “a determination by a ... psychologist as defined in section 632.005 as to whether [Mr. Closser] meets the definition of a sexually violent predator.” Section 632.483.2(3). Respondent concedes that Dr. Suire did not possess a license to practice psychology issued by

the State of Missouri when he prepared Mr. Closser's End of Confinement report. Rather, Respondent suggests that Dr. Suire did not have to possess a Missouri-issued license to meet the requirements of Section 632.483.2(3). This is not true.

Section 632.005 defines a psychologist as "a person licensed to practice psychology under chapter 337...." Section 632.005(19). Under Chapter 337, a licensed psychologist is "any person who offers to render psychological services to individuals, groups, organizations, institutions, corporations, schools, government agencies or the general public for a fee, monetary or otherwise, implying that such person is trained, experienced and licensed to practice psychology *and who holds a current and valid, whether temporary, provisional or permanent, license in this state to practice psychology.*" Section 337.010 (4) (emphasis added). Again, Relator concedes that Dr. Suire did not "hold[] a current and valid ... license in this state to practice psychology" when he expressed the determination in his notice to the attorney general that Mr. Closser meets the qualifications of a sexually violent predator.

Relator seeks to escape from this defect by claiming that Dr. Suire is exempt from licensure by the State of Missouri under Section 337.045(7). This Section permits the practice of psychology without a Missouri license for "the provision of psychological services or consultations to organizations or institutions, provided that such ... service does not involve the delivery or supervision of direct psychological services to individuals or groups of

individuals.” (Relator’s Suggestions in Support, p. 7-8). Relator maintains that: “The key language here is ‘direct psychological services,’ *i.e.*, the statute’s exclusion of someone who does not provide services to those persons who need them, but instead is a step removed from clients, such as a psychologist operating in a managerial, consulting, or teaching capacity.” (Relator’s Brief p. 35). According to Relator, Dr. Suire was exempt under 337.045(7) because he did not provide any psychological services or consultation to Mr. Closser, but only to the Missouri Department of Corrections.

What is telling in the argument of the Attorney General’s Office is not what it says, but what it does not say. It must be noted that this argument was not raised before Judge Parkinson. Relator argued before Judge Parkinson: “Section 337.045, RSMo, states, ‘[n]othing in sections 337.010 to 337.090 shall in any way limit ... (7) The teaching of psychology, the conduct of psychological research, **or the provision of psychological services or consultations to organizations or institutions....**’ (emphasis added).” (Relator’s Exhibit D, p. 3). Relator then argued that Dr. Suire was simply providing psychological services and consultations to the Department of Corrections. (Relator’s Exhibit D, p. 3). Judge Parkinson pointed out that the Attorney General’s Office “did not mention the last phrase which reads: ‘*provided that such teaching, research, or services does not involve the delivery or supervision of direct psychological services to*

individuals or groups of individuals.’’ (Relator’s Ex. G) (emphasis in Judge Parkinson’s order). Judge Parkinson noted:

Dr. Suire’s End of Confinement Report shows his title as “MoSOP Clinical Director”. This clearly does not fit within the consulting portion of 337.045(7) but appears to involve the “delivery or supervision of direct psychological services.” The Court concludes that Dr. Suire does not fit under that exemption.

(Relator’s Ex. G, Index of Exhibits, p. 53).

Relator has abandoned its earlier argument and is not attempting to parse the language of Section 337.045(7) as it did before Judge Parkinson. But it nonetheless is continuing to parse the language of the statute. Having acknowledged that Dr. Suire is the “Clinical Director for the Missouri Department of Corrections, Sex Offender Services, Farmington Correctional Center,” the Attorney General’s Office now limits its argument to whether or not Dr. Suire consulted directly with Mr. Closser when Dr. Suire prepared Mr. Closser’s End of Confinement report. But Dr. Suire identified himself in the End of Confinement Report as the “MoSOP Clinical Director,” (Relator’s Ex. B, p. 18), and as the “Clinical Director, Missouri Sex Offender Services,” (Relator’s Ex. B, p. 20). Dr. Suire appears to be providing “supervision of direct psychological services to individuals or groups of individuals,” *i.e.*, all sex offenders placed in the MOSOP program while in DOC. Section 337.045(7) specifically removes this

function from the licensure exemption. And yet, in spite of this statutory language, Relator argues that the statute exempts psychologists “operating in a managerial ... capacity.” (Relator’s Brief, p. 35).

Relator has made no attempt to demonstrate that the duties of the “MoSOP Clinical Director” or of the “Clinical Director of Sexual Offender Services” for DOC are limited to preparing End of Confinement reports. Relator’s failure to address this issue after it was clearly pointed out by Judge Parkinson below suggests that it is unable to establish that Dr. Suire was not providing direct services as well as supervision of others who provide psychological service. An adverse inference may be drawn from a party’s silence in a civil case. *Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006).

The fallacy of Relator’s argument is demonstrated by actions the attorney general’s office takes pursuant to another statute contained in the SVP Act; Section 632.489.4. That statute permits the Attorney General’s Office to retain private psychiatrists or psychologists to conduct an evaluation in an individual commitment case. *In the Matter of the Care and Treatment of Spencer*, 103 S.W.3d 407, 418-419 (Mo. App., S.D. 2003). If a probate court finds probable cause to believe that a person may be a sexually violent predator, the court directs the Director of DMH to have the person examined by a DMH psychiatrist or psychologist “as defined in section 632.005.” Section 632.489.4. That statute goes on to permit either party to secure one or more additional evaluations at the

party's expense. *Id.* This Court is well aware that when the DMH psychologist concludes that the person does not meet the qualifications for commitment, the attorney general's office will retain a private psychiatrist or psychologist, often from another state, for another evaluation to conclude that the person does meet the qualifications for commitment. "If the state psychiatrist cannot confidently state that an offender is a 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). The exemption from Missouri-licensure provided in Section 337.045(7) for psychiatrists or psychologists providing "psychological services or consultations to organizations or institutions" is what enables the Attorney General's Office to retain out-of-state, not Missouri-licensed psychologists to conduct individual evaluations and testify in individual commitment trials. This is not what Dr. Suire does as the "MoSOP Clinical Director," or the "Clinical Director [of] Missouri Sex Offender Services." He does not come within the exemption.

Relator's argument before this Court would repeal the legislative intent that is clear from the language the legislature used in the SVP law. The legislature clearly expressed its intention that the psychologists and psychiatrists employed by the several State agencies involved in the SVP process be Missouri-licensed. The legislature not only required in Section 632.483.2(3) that the "agency with jurisdiction" provide a determination by a "psychiatrist or

psychologist as defined in section 632.005” that the person meets the criteria of a sexually violent predator, but it imposed the same requirement in Section 632.489 upon the Department of Mental Health following a judicial finding of probable cause to believe that the person may be a sexually violent predator. “If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility ... for an evaluation as to whether the person is a sexually violent predator. *** The court shall direct the director of the department of mental health to have the person examined by *a psychiatrist or psychologist as defined in section 632.005*” (emphasis added) Section 632.489.4.

Relator’s argument that a psychologist only conducting an evaluation for the State, but not providing psychological services to the individual, would also exempt from having a Missouri-issued license the psychologist conducting the evaluation by DMH on court order pursuant to Section 632.489.4. If it had truly been the intention of the legislature that these psychologists or psychiatrists were exempted from Missouri-licensure by Section 337.045(7), there would have been no reason for the legislature to require in Section 632.483.2(3) and 632.489.4 that they be licensed as defined in Section 632.005. Respondent’s argument suggests that the legislature followed an absurd path to an exemption through a requirement it seemingly imposed.

It is unlikely that the legislature intended such an absurd result. The legislature required psychologists or psychiatrists for either an agency with jurisdiction or the Department of Mental Health to determine whether the person meets the criteria of a sexually violent predator. One of those criteria is that the person has a “mental abnormality.” Section 632.480(2). In SVP practice, this means that the psychologist or psychiatrist will determine whether the person has a mental condition diagnosable according to the Diagnostic and Statistical Manual of Mental Disorders. This requires psychological or psychiatric expertise. The psychologist or psychiatrist is always qualified at trial as an “expert” witness. By including Section 632.005 within Section 632.483.2(3) and 632.489.4, the legislature has made clear that it expects the “expertise” of these psychologists or psychiatrists to comply with the requirements imposed by the State of Missouri.

Relator footnotes that Dr. Suire obtained a Missouri-issued license after preparation of Mr. Closser’s End of Confinement report, “and ratified his determination” that Mr. Closser is a sexually violent predator. (Relator’s Brief, p. 11, fn 3). Perhaps Relator is suggesting that this issue is now moot. What Relator fails to acknowledge in its brief is that when Dr. Suire “ratified” his previously defective determination, he again did not possess a Missouri-issued psychologist’s license. In his “ratification,” Dr. Suire indicated that he obtained his Missouri license on March 11, 2005. His “ratification” was written on July 16,

2008. But the license he obtained from the State of Missouri expired on January 31, 2008, nearly six months prior to his ratification. (Relator's Ex. C, p. 11). Thus, Dr. Suire, again, lacked a Missouri-issued license when he expressed his "ratified" determination. According to the Missouri Division of Professional Registration, Committee of Psychologists, Dr. Suire allowed his Missouri license to go on "inactive status" on March 20, 2008. (See Appendix, A-16). Both of Dr. Suire's determinations, that of 2005 and of 2008 were made when he failed to possess a Missouri-issued license, and he lacks such a license to this day.

The notice provided to the attorney general's office was defective because Dr. Suire was not licensed in accordance with 632.005.

II.

The Attorney General's commitment petition was defective in that the Attorney General did not have authority under Section 632.483 to file the petition without notice from the Department of Corrections accompanied by a determination of a psychologist as defined in Section 632.005 that Mr. Closser meets the definition of a sexually violent predator.

The SVP law is a complete code within itself. The law creates 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), *supreceded by statute*. It establishes the process to be followed from initiation of a petition to the conclusion of a case.

Relator suggests that the only "authority" it needs from the agency with jurisdiction to file a commitment petition is notice that the agency determined that the person is a sexually violent predator. But this suggestion ignores that the specific procedure established by the SVP law for filing the petition requires that the agency's notice be accompanied with a determination made by a Missouri-licensed psychologist or psychiatrist that the person is a sexually violent predator. *Salcedo, supra*; Section 632.483.2(3). The attorney general's office did not have such notice with a proper determination in Mr. Closser's case.

Relator argues in its brief: “The intent of the sexually violent predator scheme and the contest of Section 632.483.2(3) dictate that any failure of technical compliance with Section 632.483.2(3), like the failure to provide anything else on the Section 632.483.2 list, is just that, technical, and does not require dismissal of a petition.” (Relator’s Brief, p. 29). This Court and the Southern District Court of Appeals have already rejected a similar argument.

This Court, and the Southern District Court of Appeals, have decided a similar issue involving a special statutory procedure, that in place for termination of parental rights. In *In the Interest of A.H.*, 169 S.W.3d 152 (Mo. App. S.D. 2005), the Southern District Court of Appeals discussed the proper procedure required by the Juvenile Code:

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

169 S.W.3d at 157. The Court of Appeals was determining whether a trial court had violated a mother's constitutional right to due process by accepting an Investigation and Social Study submitted in violation of the Juvenile Code's

procedure. Section 211.455 requires that "[w]ithin thirty days after the filing of the petition, the juvenile officer shall meet with the court in order to determine that all parties have been served with the summons and to request that the court order the Investigation and Social Study." The Court, noting that the Investigation and Social Study was filed contemporaneously with (not after) the petition, reversed the lower court's judgment.

This Court found that a violation of the same procedure required reversal of the lower court's judgment in *In the Interest of C.W.*, 211 S.W.3d 93 (Mo. banc 2007). In the case of *C.W.*, the Children's Division submitted an Investigation and Social Study before the petition to terminate parental rights was even filed. In concluding that the case had to be reversed, the Court first noted that "[a]lthough the statute is phrased in part as a directive to the juvenile officer, use of the term "shall" also imposes an obligation upon the circuit court to meet with the juvenile officer after the petition is filed." *Id.* at 97. The Court went on to affirm and adopt the Southern District Court of Appeals' decision in *In the Interest of A.H.* "The reasoning in *A.H.* is consistent with the language of the statute." *In the Interest of C.W.*, 211 S.W.3d at 97. "Therefore, this Court holds that section 211.455 requires the circuit court to order the mandatory investigation and social study after the petition is filed." *Id.* The Court held that "[g]iven the fundamental interests involved, there must be strict and literal compliance with the statutes authorizing the State to terminate the parent-child

relationship." *Id.* at 98, citing *In re K.A.W.*, 133 S.W.3d 1, 16 (Mo. banc 2004).

"Failure to strictly comply with section 211.455 is reversible error." *In the Interest of C.W.*, 211 S.W.3d at 97.

Relator attempts to avoid this rule of law by directing this Court to a case involving the Missouri Inmate Reimbursement Act (MIRA), *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77 (Mo. banc 2008). Pursuant to MIRA, the Department of Corrections provides information to the attorney general on all DOC inmates regarding the inmate's available financial assets and the estimated costs of the inmate's care. Section 217.831.1. If the attorney general concludes that there is good cause to believe that the offender has sufficient assets to recover not less than ten percent of the estimated cost of the the inmate's care, then the attorney general may file a petition to secure reimbursement of that cost. *Id.* Relator then equates its opinion under MIRA that good cause exists for it to believe that sufficient assets are available for recovery of costs with the probable cause finding of the probate court under Section 632.489 that the person may be a sexually violent predator. The procedure under MIRA is in no way similar to the procedure under the SVP Act, and Relator's argument is misplaced and irrelevant.

The Department of Corrections expresses no opinion under MIRA whether any inmate has sufficient assets to cover the costs of incarceration. Whether or not those assets and costs warrant a petition for recovery of costs lies with the

attorney general. To the contrary, under the SVP Act, the Department of Corrections makes the initial determination that the inmate may be a sexually violent predator under the criteria of the SVP Act, and must support that conclusion with a determination by a legally qualified psychologist or psychiatrist that the inmate is a sexually violent predator under the legal criteria of the SVP Act. Under MIRA, the Department of Corrections only provides the attorney general with financial information, and the attorney general makes the determination whether a petition to recover assets is warranted according to the statutory criteria. Under the SVP act, the Department of Corrections makes the initial determination according to the statutory criteria that the inmate may be a sexually violent predator to authorize the attorney general to file a petition. The challenge in *Peterson* was to the merits of the attorney general's opinion that sufficient assets were available in the inmate's account to make a petition to recover costs warranted. The challenge raised by Mr. Closser in this case is whether the conclusion of the Department of Corrections based upon its employee's evaluation legally authorized the filing of the commitment petition in compliance with the special statutory procedure established by the legislature. These questions are not the same, and *Peterson* does not help Relator in this case.

The attorney general's petition was defective because the defective notice from DOC deprived the attorney general's office of the authority to file the petition.

III.

The Attorney General's defective petition deprived Judge Parkinson of jurisdiction to proceed with the cause of action.

Subject matter jurisdiction is composed of two parts. *Green v. Penn-American Insurance Co.*, 242 S.W.3d 374, 379 (Mo. App., W.D. 2008). First, it assumes the power of the court to consider the matter brought before it. *Id.* Judge Parkinson, as the judge of the Probate Division of the Macon County Circuit Court, has the power to consider petitions for involuntary civil commitment of persons alleged to be sexually violent predators. Section 632.486.

Second, subject matter jurisdiction must include the ability of the court to grant the relief requested by the person seeking relief. *Green*, 242 S.W.3d at 379. As to this requirement, "if a petition wholly fails to state a cause of action, the defect is jurisdictional." *Id.*

Missouri is a fact-pleading state. *Luethans v. Wash. Univ.*, 894 S.W.2d 169, 171 (Mo. banc 1995). Fact pleading demands a relatively rigorous level of factual detail. *Green*, 242 S.W.2d at 379. The petition must describe ultimate facts demonstrating entitlement to the relief sought. *Id.*

This is where the distinction between *Peterson*, upon which Relator relies, and the statutory requirements of the SVP Act become critical. The SVP Act requires the presence of a mental abnormality in order to deprive the citizen of

his liberty. This requires the expertise of a psychologist or psychiatrist. Unlike the accounting performed by the attorney general's office in *Peterson* to authorize a petition, this expertise is not possessed by the attorney general's office. The legislature recognized this when it required the statutory "notice" to include the determination of that issue by a Missouri-licensed psychologist or psychiatrist. It is here that the attorney general's petition failed to allege ultimate facts in compliance with the substantive law. Having failed to allege ultimate facts, the attorney general's petition failed to demonstrate its entitlement to relief, and failed to state a cause of action. This defect was jurisdictional.

Relator argues that the jurisdiction of the probate court over a sexually violent predator commitment petition is derived from both the filing of a petition and a finding of probable cause by the probate court to believe that the person is a sexually violent predator. This argument does not make any sense.

Jurisdiction either exists or not based upon the petition at the time it is filed. A probable cause finding has nothing to do with this. In fact, the probate court must have jurisdiction over the cause, based solely on the petition filed, in order to make the probable cause finding. The probable cause finding by the probate court is not that the attorney general's office properly filed the petition, but only that there appears to be sufficient evidence to allow the petition to proceed to trial. Certainly, once the probate court finds probable cause to proceed, the individual is referred to DMH for another evaluation. But as both

this Court and Relator are aware, a finding by the DMH psychologist or psychiatrist following a probable cause finding that the individual does not meet the criteria for commitment will not compel the probate court to dismiss the attorney general's petition. The attorney general simply shops around for the evidence it needs to present at trial.

Judge Parkinson recognized that his jurisdiction did not rely upon the probable cause finding. He found that his court lacked jurisdiction over the petition long after finding probable cause. This conclusion was correct because jurisdiction can be challenged and determined at any time, including for the first time on appeal after completion of the case in the circuit court. *In re Marriage of Miller and Sumpter*, 196 S.W.3d 683, 689 (Mo. App., S.D. 2006).

Because the attorney general's petition was defective, Judge Parkinson lacked jurisdiction to proceed with the case.

IV.

Judge Parkinson correctly dismissed the attorney general's defective petition, whether or not a lack of jurisdiction was the correct basis for doing so.

If this Court disagrees with Judge Parkinson that the attorney general's petition should have been dismissed for a lack of jurisdiction, the petition was, nonetheless, correctly dismissed because of the State's failure to strictly observe the procedural requirements of the SVP Act. This is the very least required by *Peterson; In the Interest of A.H.*; and, *In the Interest of C.W.*

Accepting only for the sake of argument that *Peterson* is applicable to this situation, and that the defect in the attorney general's petition was not jurisdictional, the correct remedy for the defect remains dismissal of the petition. This Court recognized in *Peterson* that the inmate had the right to challenge the determination of the attorney general's office that sufficient assets were available to warrant a petition according to the statutory requirements. This Court remanded that case back to the circuit court for that court to hear that challenge and make the determination whether the attorney general's petition was in compliance with the statutory requirements. Implicit in this remand was the authority of the trial court to dismiss the petition if it failed to meet the statutory requirements. This Court's holding in a footnote that this was not a

jurisdictional question did not alter the authority of the trial court to determine whether the petition met the statutory requirements, and to dismiss the petition if it failed to do so. This Court held that the attorney general's failure to plead good cause was not a jurisdictional defect, it was a condition precedent which must be met before the petition could be filed.

This Court and the Southern District Court of Appeals held that the failure to comply with the statutory requirements in the termination of parental rights cases required reversal of the orders of the trial court terminating the parent's rights. Again, whether or not the defect was jurisdictional, the State's actions in terminating the parent's fundamental rights were not allowed to stand because the procedure failed to strictly comport with the required process.

So, too, the failure of the State here, through the actions of DOC and the attorney general's office, to comply with the mandated statutory procedures require that the State be precluded from going forward with its efforts to deprive Mr. Closser of his fundamental right to liberty. This is required whether or not those failures affect Judge Parkinson's jurisdiction over the petition.

The most this Court should do in this case is to limit its writ, if it issues, to instructing Judge Parkinson to remove the jurisdictional basis from his order dismissing the attorney general's petition. Judge Parkinson's dismissal of the attorney general's petition should otherwise be affirmed.

CONCLUSION

The notice from DOC that Mr. Closser may be a sexually violent predator was defective, thereby depriving the attorney general of the authority to file the commitment petition. Because the attorney general lacked authority to file the commitment petition due to the defective notice, the petition was defective. Because the petition was defective, it deprived Judge Parkinson of jurisdiction over the matter. This Court should not issue a permanent writ, and should recall its preliminary writ and discharge Mr. Closser from detention.

If this Court issues a permanent writ precluding Judge Parkinson from dismissing the attorney general's petition on jurisdictional grounds, it should limit its writ to that issue only. This Court should instruct Judge Parkinson to remove the jurisdictional basis from his order of dismissal, but affirm the dismissal in all other respects.

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 5,649 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 October, 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 October, 2008, to James R. Layton, State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

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