

IN THE
SUPREME COURT OF MISSOURI

SC89470

STATE ex rel., STATE OF MISSOURI,

Relator,

v.

THE HONORABLE PAUL PARKINSON,
CICRUIT COURT OF MACON COUNTY,
PROBATE DIVISION,

Respondent.

BRIEF OF RELATOR, STATE OF MISSOURI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

STATEMENT OF FACTS 4

POINTS RELIED ON..... 6

ARGUMENT 9

Introduction..... 9

Standards for prohibition 13

I. Because the only elements required for circuit court jurisdiction – a petition and a finding of probable cause – were present, the circuit court had jurisdiction, regardless of whether there was an omission from the packet of information provided by the Department of Corrections to the attorney general or whether such an omission deprives the attorney general of a condition precedent to filing the petition..... 15

II. The attorney general had authority to file the petition to adjudicate whether Closser is a sexually violent predator..... 19

a. The three statutory prerequisites for filing of a petition by the attorney general – notice

	from the Department, the prosecutor’s review committee finding, and the attorney general’s own conclusion that Closser “may be a sexually violent predator” – were met	19
b.	The attorney general’s authority is not dependent on the content of the packet of information provided by the Department, and thus not on the licensing status of a person who contributed to that packet.....	23
c.	Recent decisions holding that parental rights cannot be terminated absent a post-filing report to the court do not support a claim that the attorney general’s authority is dependent on the author or even the fact of the Department’s pre-filing report to the attorney general.....	30
III.	Because in preparing the required report, Dr. Suire was not engaged in the practice of psychology so as to require a license, his report would fulfill the statutory requirements even if the licensure	

provision of § 632.483.2(3) were a jurisdictional
prerequisite. 33

CONCLUSION..... 37

CERTIFICATE OF SERVICE..... 38

CERTIFICATION OF COMPLIANCE..... 38

APPENDIX..... 39

TABLE OF AUTHORITIES

Cases

<i>Bauer v. Transitional Sch. Dist.</i> , 111 S.W.3d 405 (Mo. banc 2003)	28
<i>Farmers & Merchants Bank & Trust Co. v. Director of Revenue</i> , 896 S.W.2d 30 (Mo. banc 1995)	28
<i>In the Interest of A.H.</i> , 169 S.W.3d 152 (Mo.App. S.D. 2005)	30, 31, 32
<i>In the Interest of C.W.</i> , 211 S.W.3d 93 (Mo. banc 2007)	30, 31, 32
<i>In the Matter of the Care and Treatment of Donaldson v. State</i> , 214 S.W.3d 331 (Mo. banc 2007)	7, 27, 28, 29
<i>In the Matter of the Care and Treatment of Norton v. State</i> , 123 S.W.3d 170 (Mo. banc 2003)	9
<i>In the Matter of the Care and Treatment of Spencer v. State</i> , 103 S.W.3d 407 (Mo.App. S.D. 2003)	29
<i>State ex rel. Chassaing v. Mummert</i> , 887 S.W.2d 573 (Mo. banc 1994)	13
<i>State ex rel. Nixon v. Peterson</i> , 253 S.W.3d 77 (Mo. banc 2008)	passim
<i>State v. Hoover</i> , 719 S.W.2d 812 (Mo.App. W.D. 1988)	28

Statutes

§ 211.455	30, 31
§ 217.831.1	20, 21
§ 337.010	8, 34

§ 337.010(4)	34
§ 337.045.....	34
§ 337.090.....	34
§ 632.005.....	8, 25, 33, 35
§ 632.480.....	9
§ 632.483.....	21, 26, 27
§ 632.483.1.....	passim
§ 632.483.2.....	passim
§ 632.483.2(3)	passim
§ 632.483.4.....	4, 9
§ 632.483.5.....	29
§ 632.484.....	14
§ 632.484.5.....	14
§ 632.486.....	passim
§ 632.489.....	5, 6, 11, 17
§ 632.489.1.....	10, 20
§ 632.489.2.....	10
§ 632.489.4.....	10, 11, 31
§ 632.492.....	11, 29
§ 632.495.....	29
§ 632.495.2.....	29

§ 632.513..... 9

Chapter 337..... 33, 34, 35

STATEMENT OF FACTS

On November 18, 2004, the Missouri Department of Corrections, gave the attorney general and Department's multidisciplinary team (*see* § 632.483.4¹) notice under § 632.483.1 that Richard Closser, then an inmate in the Department's custody, may be a sexually violent predator. Exh. at 14-15, ¶¶ 4 and 7.² Along with the notice, the Department gave the attorney general and the multidisciplinary team the materials listed in § 632.483.2, including a report prepared by a psychologist, Dr. David M. Suire. Exh. at 18-20.

The multidisciplinary team and the prosecutors' review committee met. Exh. at 15, ¶¶ 7 and 8. The prosecutors' review committee determined by majority vote that Closser meets the definition of a sexually violent predator. *Id.*, ¶ 8. The attorney general determined that Closser may be a sexually violent predator and filed a petition for Closser's commitment under the sexually violent predator law, attaching the assessment of the multidisciplinary team, among other things. *Id.*, ¶ 7. After a February 23, 2005,

¹ All statutory citations are to RSMo Supp. 2007.

² "Exh." references the Exhibits in support of the Petition for Writ of Prohibition. We reference them by page number.

hearing, the probate court found probable cause under § 632.489. *See* Exh. at 3.

The probate court set the matter for trial seven times. *Id.* at 3-12. Each time, the case was continued on Closser's motion for continuance or on the probate court's own motion; the matter has never been tried. *See id.*

On May 7, 2008, Closser moved to dismiss the petition on the basis that the Department of Corrections psychologist who prepared a determination for the Department in December 2004 did not have a Missouri-issued psychologist's license. Exh. at 11, 25. Respondent, the probate court judge, concluded that Missouri licensure of a psychologist who makes the determination that is part of the informational packet for the attorney general under § 632.483.2 is mandatory and jurisdictional, granted Closser's motion, and dismissed the petition effective July 28, 2008. App. at A-1 - A-4.

This Court entered a preliminary writ in prohibition, staying the dismissal.

POINTS RELIED ON

I.

Relator is entitled to an order prohibiting Respondent from dismissing for lack of jurisdiction the attorney general's petition to determine whether Richard Closser is a sexually violent predator because the circuit court does have jurisdiction in that the requirements for jurisdiction imposed on the circuit court (petition by the attorney general and a finding of probable cause) were met and the alleged deficiency in the attorney general's authority, even if true, would not deprive the circuit court of jurisdiction.

§ 632.486

§ 632.489

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

II.

Relator is entitled to an order prohibiting Respondent from dismissing for lack of jurisdiction the attorney general's petition to determine whether Closser is a sexually violent predator because the attorney general had authority to file a petition in that he had notice from the Department of Corrections and a finding by the prosecutors' review committee that Closser meets the definition of sexually violent predator, and the attorney general concluded that Closser may be a sexually violent predator.

§ 632.486

In the Matter of the Care and Treatment of Donaldson v. State,
214 S.W.3d 331, 333 (Mo. banc 2007).

III.

Relator is entitled to an order prohibiting Respondent from dismissing for lack of jurisdiction the attorney general's petition to determine whether Closser is a sexually violent predator because the "determination" provided to the attorney general pursuant to § 632.483.2(3) was adequate in that it was made by a qualified psychologist and making such a determination is not a task that requires a Missouri license, *i.e.*, it did not require or include providing services to Closser

§ 632.005

§ 337.010

ARGUMENT

Introduction

We begin by describing the statutory scheme adopted by the General Assembly in §§ 632.480-.513, RSMo, to identify, commit, and treat sexually violent predators – “a statutorily created civil action,” *In the Matter of the Care and Treatment of Norton v. State*, 123 S.W.3d 170, 172 (Mo. banc 2003) – and by setting out the questions before this Court.

The commitment provisions of the sexually violent predator law are triggered in a simple fashion: when “the agency with jurisdiction” – here, and usually, the Department of Corrections – “give[s] written notice...to the attorney general and the multidisciplinary team established” under § 632.483.4 that a person in the agency’s custody “may meet the criteria of a sexually violent predator[.]” § 632.483.1. Various officials then perform certain tasks:

- The Department provides a packet of information to the attorney general and the Department’s multidisciplinary team. § 632.483.2.
- The multidisciplinary team assesses whether the person meets the definition of an SVP and notifies the attorney general of its assessment. § 632.483.4.
- A prosecutors’ review committee makes a similar determination. §§ 632.483.5, 632.486.

If the prosecutors' review committee "determine[s] by a majority vote, that the person meets the definition of a sexually violent predator," and the attorney general determines that it "appears" that the person "may be a sexually violent predator," the attorney general may file a petition for the person's commitment. § 632.486. The attorney general must attach to the petition a copy of the assessment of the multidisciplinary team. *Id.* Otherwise, the statute does not make the filing of the petition dependent upon or require the attachment or filing of any element of the packet listed in § 632.483.2.

Once the petition is filed, the probate court determines whether probable cause exists to believe that the person meets the definition, and if so, the person is taken into custody and transferred to an appropriate secure facility. § 632.489.1. The person is then entitled to a probable cause hearing. § 632.489.2. Again, there is no statutory requirement that the § 632.483.2(3) determination nor any other part of the § 632.483.2 packet be a part of the probable cause analysis.

If the circuit court finds probable cause, the court orders the person placed in an appropriate secure facility and orders examination of the person by a psychologist or psychiatrist. § 632.489.4. The examiner has access to all material provided to and considered by the multidisciplinary team, and to police reports (otherwise usually inaccessible outside law enforcement)

relating to sexual offenses, and may interview the person, the person's family and associates, and victims and witnesses. *Id.* Section 632.489.4 does not mention the § 632.483.2(3) determination, nor any other part of the § 632.483.2 packet.

After completion of the § 632.489 examination, the probate court conducts a trial to determine whether the person is a sexually violent predator. § 632.492. Still, there is no reference to the § 632.483.2(3) determination or any other part of the § 632.483.2 packet.

Here, the circuit court has never decided whether Closser is a sexually violent predator because, long after finding probable cause to believe that Closser is a sexually violent predator and ordering a full evaluation, Respondent ruled that he lacked jurisdiction to even go that far. He based his decision on the fact that the psychologist who made the determination pursuant to § 632.483.2(3), Dr. Suire, did not, at the time he made that determination, hold a Missouri psychologist's license.³ In Respondent's view, Closser must be released because the psychologist who considered Closser's status during the pre-filing process was not licensed by the State of Missouri to provide psychological treatment.

³ He later obtained a license, and ratified his determination. *See* Exh. at 58.

That view gives dispositive meaning to a few words in a single part of the specifications for a packet that the Department provides to the attorney general. That packet gives the attorney general the basics that he needs at the next step – his first step – in the process:

- (1) The person’s name, identifying factors, anticipated future residence and offense history;
- (2) Documentation of institutional adjustment and any treatment received or refused, including the Missouri sexual offender program [“MOSOP”]; and
- (3) 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.

§ 632.483.2. With regard to Richard Closser, the Department provided the attorney general with the name and other identifying and release information (per (1)), treatment and MOSOP information (per (2)), and a report from a psychologist (per (3)).

Respondent’s decision raises three questions. First, is the Department’s compliance with a specification in § 632.483.2, which sets out information the Department is to provide the attorney general and specifies that the information include a “determination” made by a psychologist in compliance with Missouri licensing, essential to the jurisdiction of the circuit

court? It is not. Second, is the question of such compliance dispositive of the attorney general's authority to file a petition in the circuit court? Again, it is not. And third, did Dr. Closser violate Missouri's psychologist licensing law when, at the direction of his employer, the Department of Corrections, he made the "determination"? He did not.

Standards for prohibition

An order in prohibition lies to remedy the act of a lower court that is taken in clear excess of jurisdiction or constitutes such an abuse of discretion as to exceed the lower court's power, or when no adequate remedy by appeal lies. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). Here, the probate court misread a statute and has ordered dismissal of a petition based on that misreading, an act well in excess of his jurisdiction. No truly adequate remedy by appeal lies, inasmuch as dismissal of the petition will result in the release of Mr. Closser – whom the probate court has already found probable cause to believe qualifies as a sexually

violent predator, in need of care, control, and treatment – from confinement altogether, at the very least during the pendency of any appeal.⁴

Point I.

Relator is entitled to an order prohibiting Respondent from dismissing for lack of jurisdiction the attorney general's petition to determine whether Richard Closser is a sexually violent predator because the circuit court does have jurisdiction in that the requirements for

⁴ Here we address only the route to commitment that begins with a referral to the attorney general from the Departments of Corrections or Mental Health of someone in their custody. Section 632.484 provides an alternative trigger for a commitment petition for someone who is not in custody – as Closser would not be if he is now released. The attorney general cannot proceed down that alternative route requires unless and until the alleged predator commits some “overt act” justifying action. In other words, since Closser is no longer in the custody of the Department, the attorney general could not file a petition as to him unless and until he commits an “act that creates a reasonable apprehension of harm of a sexually violent nature.” § 632.484.5. That route does not provide an adequate remedy at law as to Closser so as to bar prohibition.

jurisdiction imposed on the circuit court (petition by the attorney general and a finding of probable cause) were met and the alleged deficiency in the attorney general's authority, even if true, would not deprive the circuit court of jurisdiction.

I. Because the only elements required for circuit court jurisdiction – a petition and a finding of probable cause – were present, the circuit court had jurisdiction, regardless of whether there was an omission from the packet of information provided by the Department of Corrections to the attorney general or whether such an omission deprives the attorney general of a condition precedent to filing the petition.

The court below dismissed the case for lack of jurisdiction: “[T]his court finds that the specific provision of §632.483.2(3) was violated which deprives this Court of jurisdiction and the petition is dismissed” App. at A-3. There is, however, no direct connection between the probate court’s jurisdiction and the determination to be made pursuant to § 632.483.2(3). And Closser has never explained how – or even suggested that – an omission in the packet of information that the Department is required to assemble and provide to the attorney general could itself affect the jurisdiction of the circuit court.

What Closser seems to be arguing, rather, is that the alleged fault in the Department's packet deprived the attorney general of authority to file a petition seeking to adjudicate whether Closser is a sexually violent predator. We discuss the attorney general's authority in point II. But we first observe that even if the attorney general lacked authority, based on his failure or that of the Department to complete some condition precedent to filing, that would not deprive the probate court of jurisdiction.

That conclusion is compelled by this Court's treatment of an analogous argument in *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77 (Mo. banc 2008). In that Missouri Inmate Reimbursement Act ("MIRA") case, the inmate alleged that the attorney general had not met a condition precedent to filing his petition. This Court expressly rejected the argument that the allegation was a jurisdictional one:

In *Houston*, the court, in finding that offenders can challenge the good cause determination to file the petition, stated that the offender may assert "a claim that the court lacks jurisdiction to hear the petition because the condition precedent to the filing of the action was not met." *State ex rel. Nixon v. Houston*, 249 S.W.3d [210,] 214 (Mo.App. [W.D.] 2008). Although the Court agrees with the conclusion that an offender may challenge the attorney general's finding of good cause, the Court rejects the

assertion that this challenge is related to the jurisdiction of the court to hear the case. Rather, it is a condition precedent which must be met for the attorney general to proceed with the action.

253 S.W.3d at 84 n. 6.

Although Respondent did not articulate his rationale as one based on a condition precedent imposed by the statute on the attorney general similar to the one imposed by MIRA, and Closser has not phrased his argument in quite that way, it seems apparent that is what they are saying. Since this Court has expressly rejected such an argument when directed to jurisdiction, Respondent was wrong.

In fact, there is no dispute here that the elements required for probate court jurisdiction were present. Under the statute, jurisdiction is dependent on just two things: (1) the filing of a petition by the attorney general pursuant to § 632.486; and (2) a finding by the circuit court of probable cause to believe that the person named in the petition is a sexually violent predator, per § 632.489. Closser has never alleged and Respondent did not even hint that the attorney general did not file a petition; he obviously did file. And Closser has not claimed and Respondent has not found any error in the finding of probable cause to believe that Closser is a sexually violent predator. In other words, Closser did not allege and Respondent did not find

or even hint at any omission or inadequacy in the statutory prerequisites to circuit court jurisdiction.

In the absence of a basis for Respondent's conclusion that he lacked jurisdiction, the writ compelling Respondent to proceed should be made permanent.

Point II.

Relator is entitled to an order prohibiting Respondent from dismissing for lack of jurisdiction the attorney general's petition to determine whether Closser is a sexually violent predator because the attorney general had authority to file a petition in that he had notice from the Department of Corrections and a finding by the prosecutors' review committee that Closser meets the definition of sexually violent predator, and the attorney general concluded that Closser may be a sexually violent predator.

- II. The attorney general had authority to file the petition to adjudicate whether Closser is a sexually violent predator.
 - a. The three statutory prerequisites for filing of a petition by the attorney general – notice from the Department, the prosecutor’s review committee finding, and the attorney general’s own conclusion that Closser “may be a sexually violent predator” – were met.

As noted above, Respondent’s analysis leaps past the role of the attorney general and directly to the role of the Department of Corrections. But the petition was filed by the attorney general, and if probate court jurisdiction were dependent on someone else’s actions, it would have to be those of the attorney general. So the next question would logically be whether the attorney general had authority to file the petition.

In that respect, the analysis is analogous to that urged by the inmate in *Peterson* (unsuccessfully, as noted above). The question there was whether the attorney general had the statutorily-required basis for filing the MIRA petition – *i.e.*, “good cause” to believe that the inmate had sufficient assets to justify a MIRA proceeding. This Court and the court of appeals have held that circuit courts, in the process of deciding whether an inmate is subject to MIRA, can consider the attorney general’s authority. *E.g. Peterson*, 253 S.W.3d at 85, and cases cited therein. That authority question is analogous

to what Closser asked the circuit court to decide. But the two cases are really quite different because of significant differences between the statutory schemes.

In the MIRA scheme, the attorney general makes the equivalent of a finding of “probable cause” – there, a finding of “good cause.” § 217.831.1. Perhaps it makes sense to test the basis for the attorney general’s finding of “good cause” in a MIRA case where the attorney general decides whether there is a basis for beginning a proceeding, but that is not true here. In the sexually violent predator scheme, the probate court makes that finding. §632.489.1.

There is a parallel in the MIRA to the information packet that the attorney general receives here – but there is no more basis for supposing that some inadequacy in that packet could deprive the attorney general of authority in a MIRA case any more than there is a basis for supposing that an inadequacy in the § 632.483.2 packet could deprive the attorney general of authority here. The MIRA instructs the Department of Corrections when to notify the attorney general about inmate assets and tells the Department what information to provide him: “The director shall forward to the attorney general a report on each offender containing a completed form pursuant to the provisions of section 217.829 together with all other information available on the assets of the offender and an estimate of the total cost of care for that

offender.” § 217.831.1. Unlike § 632.483.1, that statute does not require the Department to itself make a “first cut.” But like § 632.483.2, it does require the Department to provide particular information to the attorney general. Yet for all the litigation heard by courts – including appellate courts – under MIRA, no one has even hinted at the illogical proposition that the omission of something from the information provided to the attorney general deprives the attorney general of authority to file a MIRA petition.

Again, the place where Respondent and Closser find pre-filing error is not in the mandate to the attorney general – a single paragraph that includes just three requirements: (1) that the person be “presently confined”; (2) that the prosecutor’s review committee “determine[] by a majority vote[] that the person meets the definition of a sexually violent predator”; and (3) that it “appear[]” to the attorney general that the person “may be a sexually violent predator.” § 632.486.⁵ And since those are the only requirements that the

⁵ The section reads in full: “When it appears that the person presently confined may be a sexually violent predator and the prosecutor’s review committee appointed as provided in subsection 5 of section 632.483 has determined by a majority vote, that the person meets the definition of a sexually violent predator, the attorney general may file a petition, in the probate division of the circuit court in which the person was convicted.”

statute imposes on the attorney general, they are the only requirements that the probate court can reasonably apply to him, even under *Peterson*, in determining whether he may file.

Those requirements are, of course, significant. For example, the first requirement, “presently confined,” refers back to § 632.483.1, which provides for an “agency with jurisdiction” (here, and usually, the Department of Corrections) to identify those soon to be released from custody who it “appears ... may meet the criteria of a sexually violent predator” (§ 632.483.1). Thus the attorney general is unable to search out, on his own, persons who may be sexually violent predators; the statute restricts his authority to those first identified by the Department.

The section’s second requirement, the decision by the prosecutors’ review committee, relates only to those identified in the first. But it is notably more restrictive. Where the question posed to the Department is merely whether it “*appears*” that a person in custody “*may* meet the criteria of a sexually violent predator” (§ 632.483.1 (emphasis added)), the prosecutors must decide that the person identified by the Department “*meets* the definition of a sexually violent predator” (§ 632.486 (emphasis added)). If the prosecutors’ review committee does not conclude “by majority vote” that the person “meets the definition,” the attorney general cannot file a petition.

The third requirement returns to the looser language: the attorney

general can only file when he determines that it “appears that” the person “may be a sexually violent predator.” § 632.486.

Here, “it appear[ed to the attorney general] that [Closser, a] person presently confined[,] may be a sexually violent predator and the prosecutors’ review committee ... determined by a majority vote, that [Closser] person meets the definition of a sexually violent predator.” Thus the attorney general made those allegations in his petition. And even now, Closser does not dispute that any of the three requirements were met. In effect he concedes that the attorney general has met the statutory requirements for filing the petition that leads to a judicial determination of probable cause and a full psychological evaluation.

- b. The attorney general’s authority is not dependent on the content of the packet of information provided by the Department, and thus not on the licensing status of a person who contributed to that packet.**

Since the attorney general met the only three requirements that the statute imposes on him, both before filing and in the petition, Closser’s argument and Respondent’s conclusion, despite their focus on probate court jurisdiction, necessarily take a step even further away from any statute regulating probate court jurisdiction, to what the statute says about the

Department of Corrections.

The sexually violent predator statute assigns just one decision to the Department: it must determine, “[w]ithin three hundred sixty days prior to the anticipated release from a correctional center of the department of corrections of a person who has been convicted of a sexually violent offense,” whether “it appears that a person may meet the criteria of a sexually violent predator.” § 632.483.1. But neither Closser nor Respondent has ever suggested that the Department erred in determining that it appeared that Closser may meet the requirements of the sexually violent predator definition. (Indeed, the probate court’s subsequent probable cause finding would make such an argument seem ludicrous.)

Closser’s argument and Respondent’s conclusion do not arise from the section of the statute assigning a decision to the Department, but solely from the subsequent subsection, one that instructs the Department to provide to the attorney general a packet containing certain information. § 632.483.2. But nothing in the language of that subsection or in the structure of the sexually violent predator statute supports the conclusion that the content of the packet could be jurisdictional – *i.e.*, that the Department could deprive the attorney general of authority to file a petition and the circuit court of jurisdiction to adjudicate merely by omitting some item from the packet.

Again, § 632.483.2 lists three items to be included in the packet

sent to the attorney general: (1) identifying factors, residence, and offenses; (2) Closser's argument goes only to the third – and then only to the cross-reference in that item to § 632.005. But Closser's myopic focus on that cross-reference ignores three important aspects of § 632.483.2.

First, the section includes three items, not one. And Closser cannot logically argue that just one of the three items is jurisdictional; his argument must be that all three are, since the statute gives no basis for prioritizing among them. Thus his argument must necessarily be that the attorney general lacks authority to file a petition as to someone that he and the Department both determine may be a sexually violent predator – and the prosecutor's review committee determines is a sexually violent predator – if the Department did any one of a number of things, *e.g.*: gave the wrong name for the alleged predator; erroneously reported some identifying factor; misstated (or perhaps even was unable to state) the alleged predator's anticipated future residence; bypassed some element of the alleged predator's criminal history; or failed to include something from the alleged predator's history of discipline while in confinement. Closser has never even hinted, much less explained, that it could be proper to read the statute to require precise compliance with § 632.483.2(3) but not with subdivisions (1) and (2). So logically, his argument must be that even the least deviation from

§ 632.483.2 deprives the attorney general of the authority to act.

Second, Closser's argument gives the psychological report undue weight by assuming, apparently, something the statute does not say: that the "determination" must be a positive one. Indeed, by posing to the psychologist a question ("whether the person meets the definition of a sexually violent predator") that is more definitive than the one posed to the Department ("appears" that the inmate "may meet the criteria of a sexually violent predator"), § 632.483 gives the Department room to conclude that the "determination" of the psychologist doesn't definitively resolve the issue – *i.e.*, the Department can conclude that it "appears" that a person "may" be a sexually violent predator even if the psychologist concludes that the evidence does not prove that he is a predator. After all, the Department's role at the pre-petition stage – just like the attorney general's role – is to identify those who should be subject to further evaluation, not to decide who actually qualifies for commitment.

Third, Closser argues and Respondent ruled as if the statute specified that the psychologist's determination necessarily precedes the Department's decision. As a factual matter that may be true. But the statute certainly doesn't require it. In fact, the statutory structure leaves room for – perhaps even implies – the contrary. It first instructs the Department to decide whether the person "may meet the criteria of a sexually violent predator" and

so notify the attorney general. Only then does it set out the list of items that the Department must compile and provide to the attorney general. And the “determination” instruction appears only in that list, not in the subsection instructing the Department what it is to decide, and when and how.

In terms of legislative intent, the structure of § 632.483 and the contents of § 632.483.2 lead to one conclusion: that the purpose of the packet is merely to give the attorney general (and the multidisciplinary team) basic materials relevant to the decisions the statute assigns them to make. And the licensing status of the psychologist or psychiatrist, though it has value, cannot reasonably be said to be essential to that purpose. Thus even Respondent was willing to minimize the practical significance of the problem, acknowledging that the Department’s failure to provide the attorney general with a determination by one who met the licensing requirement could be called a “technical” error. App. at A-2.

The purpose of not just § 632.483.2 but of the entire sexually violent predator statute is critical to the analysis. “In construing statutes, a court ascertains the intent of the legislature from the language used and gives effect to that intent.” *In the Matter of the Care and Treatment of Donaldson v. State*, 214 S.W.3d 331, 333 (Mo. banc 2007). And even if the specific meaning of § 632.483.2(3) can be resolved by looking at its language in

splendid isolation from the statutory scheme, that language is not such a clear mandate as to justify releasing Closser and others into the community.⁶

The subsection does use the word “shall.” But even that word choice is not enough to make fatal the use of a psychologist not yet licensed in Missouri. “Whether the statutory word ‘shall’ is mandatory or directory is a function of context. Where the legislature fails to include a sanction for failure to do that which ‘shall’ be done ... ‘shall’ is directory, not mandatory.” *Farmers & Merchants Bank & Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995). *See also Bauer v. Transitional Sch. Dist.*, 111 S.W.3d 405, 408 (Mo. banc 2003) (emphasizing that whether “shall” is mandatory or directory is primarily a function of context and legislative intent). Further, “a [statutory] provision enacted with a view merely to the proper, orderly and prompt conduct of business by a public official is directory, not mandatory.” *State v. Hoover*, 719 S.W.2d 812, 816 (Mo.App. W.D. 1988)(quotations and citations omitted).

Consistent with those tenets of statutory construction, the Missouri Supreme Court in *Donaldson* rejected the argument that a probate court’s

⁶ A list of the other persons as to whom Dr. Suire made the § 632.483.2(3) determination before he obtained a Missouri license is attached in the Appendix at A-16.

failure to comply with a 90-day time limit for trial settings after continuance, or mistrial under §§ 632.492 and 632.495 of the SVP law, required dismissal. 214 S.W.3d at 333. The Court held that had the legislature intended to require dismissal, it could have explicitly provided for it in the statutes, but did not, and the Court would not read them as requiring dismissal if the 90-day limit was not complied with. *Id.*

The intent of the sexually violent predator scheme and the context of § 632.483.2(3) dictate that any failure of technical compliance with § 632.483.2(3), like the failure to provide anything else on the § 632.483.2 list, is just that, technical, and does not require dismissal of a petition. The scheme does not even hint at some penalty for lack of compliance. Rather, the pre-filing portion of the scheme at issue here is drafted to accomplish a single goal: to promptly identify persons who may need of care, control, and treatment (*see* § 632.495.2) – a goal that Respondent’s ruling subverts, not serves.

Here, as in other cases, the Court should interpret and apply the sexually violent predator law in a way that serves the statute’s goal. *See In the Matter of the Care and Treatment of Spencer v. State*, 103 S.W.3d 407, 420 (Mo.App. S.D. 2003) (rejecting technical argument that prosecutors’ review committee was improperly composed under § 632.483.5 when an assistant prosecutor attended rather than the prosecutor; the prosecutor was

the respondent's former public defender, and in the totality of the circumstances, the respondent was not prejudiced). And depriving the attorney general of authority to initiate a sexually violent predator proceeding because the Department of Corrections made an error (if indeed it did) in the informational packet cannot be reconciled with that goal.

- c. **Recent decisions holding that parental rights cannot be terminated absent a post-filing report to the court do not support a claim that the attorney general's authority is dependent on the author or even the fact of the Department's pre-filing report to the attorney general.**

In giving the Department's alleged error dispositive, jurisdictional weight, Respondent cited two recent decisions dealing with a statutory report requirement: *In the Interest of A.H.*, 169 S.W.3d 152 (Mo.App. S.D. 2005), and *In the Interest of C.W.*, 211 S.W.3d 93 (Mo. banc 2007). Both cases arose from § 211.455, part of the termination of parental rights statute. That section and § 632.483.2(3) do bear a superficial resemblance: both require some kind of report or determination. But they differ in a critical, indeed dispositive, ways.

The report here is prepared as part of the process within the executive to decide whether to ask a circuit court to decide whether there is probable

cause to believe that a person is a sexually violent predator. Thus the Department gives the § 632.483.2(3) determination to the attorney general. The sexually violent predator statute demands a later, more comprehensive, judicially-directed report before trial on the real question, *i.e.*, whether Closser is a sexually violent predator who will be committed for treatment. § 632.489.4.

The report at issue in *A.H.* and *C.W.*, by contrast, is a report to the court, required after the petition is filed but before parental rights are terminated. That report is thus similar not to the § 632.483.2(3) determination, but to the post-probable-cause, full evaluation report in the sexually violent predator statute. Under the holdings in *A.H.* and *C.W.*, it would be logical to conclude that the requirement for a post-probable-cause evaluation per § 632.489.4 could not be fulfilled by a pre-petition report, whether the determination specified in §632.483.2(3) or some other report. But there simply is no counterpart in § 211.455 – nor elsewhere in the scheme of which that provision is part – to the pre-filing report sent to the attorney general per § 632.483.2(3).

Nor is there any logical connection between the issues in the two cases. The timing of the report required in § 211.455 ensures that the circuit court has a report that is more nearly contemporaneous with the ultimate decision regarding parental rights than a pre-petition report could be. Here, that

purpose is fulfilled by the post-probable evaluation report, not by a pre-petition report.

To read § 632.483.2(3) as a mandatory provision of jurisdictional moment is to read that provision not just well beyond the scope of the *A.H.-C.W.* logic, but well beyond the apparent legislative intent of the statutory scheme for determining first who may be and then who actually is a sexually violent predator. The cross-reference to the licensing law found in that section simply cannot be read as a legislative limitation on the attorney general's authority nor on the circuit court's jurisdiction.

Point III.

Relator is entitled to an order prohibiting Respondent from dismissing for lack of jurisdiction the attorney general's petition to determine whether Closser is a sexually violent predator because the "determination" provided to the attorney general pursuant to § 632.483.2(3) was adequate in that it was made by a qualified psychologist and making such a determination is not a task that requires a Missouri license, *i.e.*, it did not require or include providing services to Closser.

III. Because in preparing the required report, Dr. Suire was not engaged in the practice of psychology so as to require a license, his report would fulfill the statutory requirements even if the licensure provision of § 632.483.2(3) were a jurisdictional prerequisite.

Solely for purposes of this Point, we assume that the licensing language of § 632.483.2(3) is a mandatory requirement for the Department, and that failure to comply invalidates the Department's notice to the attorney general and thus deprives the attorney general of authority to file a petition or the probate court of jurisdiction. If all that were true, the next question would be whether Dr. Suire had to have a Missouri license in order for the requirement of § 632.483.2 to be met. The answer is "no."

Under § 632.005, a "psychologist" is a person licensed to practice psychology under chapter 337, RSMo, with a minimum of one year training or experience in providing treatment or services to mentally disordered or mentally ill individuals[.]

Chapter 337 does not track § 632.005 by defining "psychologist." Section 337.010(4) does define "licensed psychologist":

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.

But Chapter 337 does not require a Missouri license even for all those who “offer psychological services.” Rather, § 337.045 provides that “nothing in” § 337.010 to § 337.090 – including § 337.010(4) – shall limit the practice of psychology, without a Missouri license, in nine scenarios, including:

(7) 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[.]

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.

The only evidence in the record here regarding what Dr. Suire actually did is the report he prepared regarding Closser, Exh. at 18-20. And nothing

there suggests that Dr. Suire “deliver[ed] ... direct psychological services” to Closser, nor to anyone else in Missouri, prior to becoming licensed here. That does not mean that no one thought he did. Complaints were filed, alleging that Dr. Suire was providing services that can only be provided by one with a license, but the Board of Psychologists twice refused discipline. *See* Exh. at 50-51. In fact, in his work at the Department, Dr. Suire was legally practicing psychology as authorized by law in December 2004, even before he obtained the license required to provide direct psychological services.

And that is the most that § 632.483.2(3) requires. Had the legislature intended that the subcategory of psychologists holding Missouri licenses be the only psychologists authorized to make the determination under § 632.483.2(3), the legislature could have tracked the “licensed psychologist” phrase from Chapter 337. It did not. And given that Chapter 337 contains a laundry list of explicit exemptions from licensure for a variety of psychological services, the legislature’s use of the word “licensed” in the phrase “licensed to practice psychology under chapter 337, RSMo” in § 632.005 simply appears to have been employed in the looser sense of “authorized” or “permitted.” Otherwise, the reference to the entirety of “chapter 337, RSMo” – which contains numerous explicit exemptions from licensure – in § 632.005 is superfluous.

The probate court misread § 632.483.2(3). At most, that statute requires that the psychologist who makes the “determination” that the Department must forward to the attorney general be in compliance with Missouri’s licensing law. And Dr. Suire was.

CONCLUSION

For the reasons stated above, the writ of prohibition should be made permanent and the question of whether Closser is a sexually violent predator should proceed to trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief was mailed, postage prepaid, via United States mail, on this 25th day of September, 2008, to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,700 words.

The undersigned further certifies that the labeled disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

JAMES R. LAYTON
State Solicitor

APPENDIX

TABLE OF CONTENTS

July 16, 2008 Order on Motion to Dismiss Due to Violation of

RSMO § 632.483.2(3)..... A-1

§ 337.010 A-5

§ 337.045 A-6

§ 632.005 A-8

§ 632.480 A-9

§ 632.483 A-10

§ 632.486 A-13

§ 632.489 A-14

Cases in which Dr. Suire made the § 632.483.2(3) determination
prior to being licensed to provide psychological services in
Missouri A-16

§ 337.010

As used in sections 337.010 to 337.090 the following terms mean:

...

(4) “Licensed psychologist”, 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; ...

§ 337.045

Nothing in sections 337.010 to 337.090 shall in any way limit:

...

(2) The activities, services, or use of official title on the part of any person in the employ of a governmental agency, or of a duly chartered educational institution, or of a corporation primarily engaged in research, insofar as such activities or services are part of the duties of his or her employment, except that any person hired after August 28, 1996, shall be in the process of either meeting the requirements to become licensed, including pursuant to a doctoral degree in psychology or the supervised professional experience requirements or shall be a licensed psychologist; or

...

(4) The use of psychological techniques by government institutions, commercial organizations or individuals for employment, evaluation, promotion or job adjustment of their own employees or employee-applicants, or by employment agencies for evaluation of their own clients prior to recommendation for employment; ... or

(5) The practice of psychology in the state of Missouri for a temporary period by a person who resides outside the state of Missouri, and who is licensed or certified to practice psychology in another state and conducts the major part

of his or her practice outside the state. The temporary period shall not exceed ten consecutive business days in any period of ninety days, nor in the aggregate exceed fifteen business days in any nine-month period; or

...

(7) The teaching of psychology, the conduct of psychological research, or the provision of psychological services or consultations to organizations or institutions, provided that such teaching, research, or service does not involve the delivery or supervision of direct psychological services to individuals or groups of individuals; ...

§ 632.005

As used in chapter 631, RSMo, and this chapter, unless the context clearly requires otherwise, the following terms shall mean:

...

(19) "Psychologist", a person licensed to practice psychology under chapter 337, RSMo, with a minimum of one year training or experience in providing treatment or services to mentally disordered or mentally ill individuals;

§ 632.480

As used in sections 632.480 to 632.513, the following terms mean:

(1) "Agency with jurisdiction", the department of corrections or the department of mental health;

...

(5) "Sexually violent predator", any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:

(a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, RSMo, of a sexually violent offense;

§ 632.483

1. 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. Written notice shall be given:

(1) Within three hundred sixty days prior to the anticipated release from a correctional center of the department of corrections of a person who has been convicted of a sexually violent offense ... written notice shall be given as soon as practicable following the person's readmission to prison; ...

2. The agency with jurisdiction shall provide the attorney general and the multidisciplinary team established in subsection 4 of this section with the following:

(1) The person's name, identifying factors, anticipated future residence and offense history;

(2) Documentation of institutional adjustment and any treatment received or refused, including the Missouri sexual offender program; and

(3) 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.

...

4. The director of the department of mental health and the director of the department of corrections shall establish a multidisciplinary team consisting of no more than seven members, at least one from the department of corrections and the department of mental health, and which may include individuals from other state agencies to review available records of each person referred to such team pursuant to subsection 1 of this section. The team, within thirty days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator. The team shall notify the attorney general of its assessment.

5. The prosecutors coordinators training council established pursuant to section 56.760, RSMo, shall appoint a five-member prosecutors' review committee The committee shall review the records of each person referred to the attorney general pursuant to subsection 1 of this section. The prosecutors' review committee shall make a determination of whether or not the person meets the definition of a sexually violent predator. ... The

assessment of the multidisciplinary team shall be made available to the attorney general and the prosecutors' review committee.

§ 632.486

When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection 5 of section 632.483 has determined by a majority vote, that the person meets the definition of a sexually violent predator, the attorney general may file a petition, in the probate division of the circuit court in which the person was convicted, or committed pursuant to chapter 552, RSMo, within forty-five days of the date the attorney general received the written notice by the agency with jurisdiction as provided in subsection 1 of section 632.483, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation. A copy of the assessment of the multidisciplinary team must be filed with the petition.

§ 632.489

1. Upon filing a petition pursuant to section 632.484 or 632.486, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such probable cause determination is made, the judge shall direct that person be taken into custody and direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail. If the person is ordered to the department of mental health, the director of the department of mental health shall determine the appropriate secure facility to house the person under the provisions of section 632.495.

4. If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. If the person is ordered to the department of mental health, the director of the department of mental health shall determine the appropriate secure facility to house the person. 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 who was not a member of the multidisciplinary team that previously reviewed the person's records. In addition, such person may be examined by a consenting

psychiatrist or psychologist of the person's choice at the person's own expense. Any examination shall be conducted in the facility in which the person is confined. Any examinations ordered shall be made at such time and under such conditions as the court deems proper; except that, if the order directs the director of the department of mental health to have the person examined, the director shall determine the time, place and conditions under which the examination shall be conducted. The psychiatrist or psychologist conducting such an examination shall be authorized to interview family and associates of the person being examined, as well as victims and witnesses of the person's offense or offenses, for use in the examination unless the court for good cause orders otherwise. The psychiatrist or psychologist shall have access to all materials provided to and considered by the multidisciplinary team and to any police reports related to sexual offenses committed by the person being examined. Any examination performed pursuant to this section shall be completed and filed with the court within sixty days of the date the order is received by the director or other evaluator unless the court for good cause orders otherwise. One examination shall be provided at no charge by the department. All costs of any subsequent evaluations shall be assessed to the party requesting the evaluation.

Cases in which Dr. Suire made the § 632.483.2(3) determination
prior to being licensed to provide psychological services in Missouri

	County	Case No.	Date Case Filed	Date Committed	Appeal No.
Allison, Michael	St. Charles	04PR124569	08/13/2004	05/17/2006	ED 89274
Berg, Richard	Greene	CV205-88	02/16/2005	NA	
Closser, Richard	Macon	04M7-PR00071	12/06/2004	NA	
Dunivan, Donnie	Butler	CV204-29MH	09/20/2004	03/23/2007	SD 28462
Ellis, James	Warren	04A8-PR00101	12/16/2004	01/02/2007	ED 88998
Evans, George	Andrew	04PR72330	09/28/2004	09/13/2005	WD 66188
Fleming, Darrell	Jackson	191603	10/14/2004	03/02/2007	WD 68158 WD 67297
Fogle, Michael	Jackson	191332	10/14/2004	04/25/2008	WD 69618
Ginnery, Theodore	Jasper	04PR679451	11/09/2004	07/17/2008	SD 29340
Holtcamp, Jackie	Cass	CV205-13P (17P020500013)	08/20/2004	01/11/2006	WD 65452 SC 86905 WD 66661
Martineau, Lou	Newton	05NW-PR00096	06/01/2005	05/24/2006	SC 89004 SD 27928
Nelson, Timothy	Barry	CV0204-213P	12/06/2004	NA	

	County	Case No.	Date Case Filed	Date Committed	Appeal No.
Overstreet, Theodore	Jackson	191373	09/02/2004	11/15/2007	WD 67300 WD 69125
Richardson, Steven	St. Louis	06PS-PR00236	01/25/2006	11/17/2007	
Suter, Karl	Clay	CV204-570P	11/22/2004	NA	
Timms, Robert	Reynolds	04PR834223	10/05/2004	01/18/2007	
Turner, Harry	Greene	CV205-157	03/16/2005	NA	
Tyree, Chance	Cole	05AC-PR00063	03/18/2005	06/19/2008	WD 69946
Tyson, Richard	Jackson	191361	08/30/2004	12/09/2005	WD 66469 SC 88799
Warren, Duewey	Greene	CV205-134	03/04/2005	06/06/2007	SD 27885
Whitfield, Stacy	Jackson	192020	01/04/2005	03/30/2006	WD 66775