

IN THE
SUPREME COURT OF MISSOURI

SC89470

STATE ex rel., STATE OF MISSOURI,

Relator,

v.

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

Respondent.

REPLY BRIEF OF RELATOR, STATE OF MISSOURI

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ARGUMENT

It is Respondent's brief, rather than Relator's, that is notable "not [for] what it says, but what it does not say." (Respondent's brief ("Resp. Br.") at 15). The omissions – particularly the gaps in law and logic – undermine Respondent's conclusions.

1. Respondent's decision, of course, was based on his jurisdiction. Yet his brief only reaches that question at the end. He begins, instead, in his Point I with the actions of the Department of Corrections. And on the second page of that Point, he makes his first unjustified leap.

Respondent begins by noting that the Department was the "agency with jurisdiction" (Resp. Br. at 12), and by noting that the legislature assigned to the Department responsibility to notify the attorney general when it concluded that Closser might be a sexually violent predator (Resp. Br. at 13). We absolutely agree that the notice requirement is imposed on the Department, and that it is found in the subsection Respondent cites, § 632.483.1. But in the same sentence in which Relator cites that subsection, he leaps past it, both legally, by moving on to something mentioned only in a different subsection, and factually, by saying something that the record before him would not support – and that is factually inaccurate: "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.” Resp. Br. at 13. In fact, the “end of confinement report” authored by Dr. Suire was not the notice provided to the attorney general regarding Closser pursuant to § 632.483.1, and nothing in the record can be fairly read to support the claim that it was. Rather, the Department provided notice precisely as § 632.483.1 contemplates. (A copy of that notice is attached in the Appendix to this Reply at A1.) The Department attached various things to that notice, including Dr. Suire’s report. Respondent’s claim that the report and the notice were one and the same not only ignores that reality, it ignores the basic structure of the statute.

In fact, Respondent ignores that structure throughout his brief. He consistently treats the packet of information to be provided to the attorney general pursuant to § 632.483.2 as if that subsection was a subset of subsection 1. Presumably he does so because he has no answer to the questions about his construction of the statute that Relator posed in his opening brief: If one element of the packet identified in § 632.483.2 is jurisdictional, then isn’t every element of the packet jurisdictional? And what possible reason could there be for making the other elements of the packet jurisdictional? Respondent is apparently unable to explain why the legislature would make the entire packet – or even a single element of the packet other than the psychologist’s determination – jurisdictional, and

makes no attempt to explain how the court could conclude that one element is jurisdictional but the others are not.

2. Continuing in his Point II, Respondent contests Relator's conclusion that Dr. Suire was exempt from licensure. But what is missing from his argument is any evidence that Dr. Suire was performing any task that required licensure. In his Order (Exhibits at 53, quoted Resp. Br. at 16), Respondent concluded that Dr. Suire did not fit under the exemption for those providing "services or consultations to organizations or institutions" based *solely* on Dr. Suire's title. He made no inquiry and stated no other facts to support his conclusion. In his brief, Respondent takes precisely the same approach with regard to the attorney general's more specific point that Dr. Suire was not required to have a Missouri license in order to review Closser's records and opine as to his status – a task that even Respondent does not suggest could reasonably be characterized as psychological treatment or the supervision of treatment.

Instead of providing any evidence that Dr. Suire was performing or had ever performed any task that required licensure under the licensing law, Respondent cites the rule that an "adverse inference may be drawn from a party's silence in a civil case." Resp. Br. at 17, citing *Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006). But Respondent provides no pertinent authority. The question in *Bernat* – whether he had a right to remain silent,

and avoid an adverse inference being argued to the jury at a commitment trail – is in no way parallel to the argument that Respondent makes here: that the circuit court lacks subject matter jurisdiction.

If there is an inference to be drawn here, it is against Closser’s claim that the court lacks subject matter jurisdiction. After all, it was his burden, not the attorney general’s, to show that the court lacked jurisdiction. *E.g.*, *McGrath v. VRA I Ltd. Partnership*, 244 S.W.3d 220, 224 (Mo.App. E.D. 2008) (“The movant bears the burden of proving the court lacks [subject matter] jurisdiction.”); *Burns v. Employer Health Services, Inc.*, 976 S.W.2d 639, 641 (Mo.App. W.D. 1998) (“The movant bears the burden of showing that the trial court is without subject matter jurisdiction.”). And Closser presented nothing – beyond Dr. Suire’s title and the content of his report, neither of which proves his point – to support his claim that the circuit court lacked jurisdiction due to Dr. Suire’s alleged violation of the licensing laws.

3. Though Respondent claims in his Point II to turn from the packet requirements imposed on the Department to the authority of the attorney general, his argument once again returns to the Department’s alleged omission. And when it does, it again takes a leap past the points made in Relator’s Brief. Respondent returns to the cases involving post-filing reports made in termination of parental rights cases. But he ignores the parallel in the sexually violent predator scheme to the report at issue in those cases: the

post-probable cause evaluation required by § 632.489. Of course, the post-probable-cause evaluation requirement in § 632.489 could not be fulfilled by presenting the circuit court with a pre-probable-cause document – whether it be the determination to be sent to the attorney general as part of the § 632.483.2 packet or something else. The sexually violent predator statute and the juvenile code are both dependent on the current condition of a person rather than on past facts; thus they both logically demand current information. But there is no suggestion that a problem regarding a post-petition report parallel to the one in *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), exists here, in either legal or practical terms.

4. When in his Point III Respondent finally reaches the question of circuit court jurisdiction that he decided, he refers to the petition as if it were required to state a cause of action, and reminds us that “Missouri is a fact pleading state.” Resp. Br. at 27. But the petition here is not the equivalent of a complaint in a typical civil case. The question of whether there is enough evidence to proceed to the next phase – a full psychological evaluation – is assigned not to the attorney general, nor to the Department of Corrections, but to the circuit court. The petition is merely the means whereby the court receives the assignment to make that call, much as an application for a

warrant is the means by which a court is asked to decide whether there is an adequate basis for a search.

But if the typical pleading requirements were pertinent, they were met here. The only required elements are set out in § 632.486: that “the person presently confined may be a sexually violent predator and the prosecutor’s review committee appointed ... has determined by a majority vote, that the person meets the definition of a sexually violent predator.” Section 632.483 does not purport to add to that list. Indeed, the only criterion it imposes on the Department merely duplicates the one it imposes on the attorney general: it must “appear” to the Department “that a person may meet the criteria of a sexually violent predator.” § 632.483.1. The petition included the allegation that Closser may be a sexually violent predator, and nothing in §§ 632.483-486 requires anything more.

CONCLUSION

For the reasons stated above and in Relator's opening brief, 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 24th day of October, 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 1,511 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

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