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IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. WD 65971
MARK MURRELL,)
 Appellant.)

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

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Mark Murrell appeals the judgment and order of the Honorable Kathleen Forsythe following a jury trial in Jackson County, Missouri, committing Mr. Murrell to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal challenges, inter alia, the constitutionality of Sections 632.480 RSMo, et seq., and jurisdiction therefore lies in the Missouri Supreme Court. Article V, Section 3, Missouri Constitution (as amended 1982). Mr. Murrell has filed contemporaneously with this brief a motion to transfer the appeal to the Supreme Court. If this Court believes that this appeal does not present a real and substantial claim of unconstitutionality of the statute, jurisdiction lies in the Missouri Court of Appeals, Western District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.070, RSMO 2000.

STATEMENT OF FACTS

Mark Murrell's legal troubles began when he was eleven or twelve years old and was arrested for forgery and sent to a juvenile home (Vid.Tr. 60-61).¹ He ran away from that home and stole a car (Tr. 588). By age fifteen, Mr. Murrell had been placed in two juvenile facilities and had an extensive arrest record (Tr. 427-428). In 1978, when he was seventeen years old, he stabbed a man outside a bar in Kansas (Tr. 440, 585, 589-591). Mr. Murrell had been smoking marijuana, ingesting "acid," and drinking whiskey and beer (Tr. 589). While he was on bond pending trial for that incident, he and two other men kidnapped and raped two young women (Tr. 368-379, 440-441). Mr. Murrell pleaded guilty to the rapes and was sentenced to fifteen years in prison (Tr. 442).

Mr. Murrell was paroled in 1991 (Tr. 442). Five months later he was arrested for driving while intoxicated, possession of cocaine and carrying a handgun (L.F. 8, Tr. 442). He again pleaded guilty and was sentenced to four years in prison (Tr. 443). He was paroled in 1994 to a half-way house (Tr. 443).

¹ The record on appeal consists of a legal file (L.F.), a supplemental legal file (Sup. L.F.), trial transcript (Tr.), and a videotape of Dr. Deborah Gunnin's testimony submitted at trial (Respondent's Exhibit 2). A transcript of that videotaped testimony, referred to herein as (Vid.Tr.), is provided to opposing counsel and this Court for convenience.

Mr. Murrell absconded from that placement (Tr. 443-444). He was later found in a drug house and his parole was revoked (Tr. 443-444). He was released from prison in 1995 (Tr. 444). In March of 1996, Mr. Murrell pleaded guilty to child molestation and was sentenced to four years in prison (Tr. 444-445). He fondled the breast of a thirteen year old friend of his girlfriend's daughter (Tr. 602).

Mr. Murrell was scheduled for release from prison on April 4, 2000 (L.F. 2). But on February 28, 2000, the State filed a petition to involuntarily commit Mr. Murrell indefinitely in the Missouri Department of Health (DMH) as a sexually violent predator (SVP) (L.F. 1-4).

Dr. Deborah Gunnin, a forensic psychologist with DMH, was assigned to conduct the sexually violent predator evaluation in 2000 (Vid.Tr. 6). In an evaluation, she looks to see if there is a persistent pattern of sexual offending, the likelihood of that pattern continuing in the future, she makes a psychological determination whether the person has a mental disorder with a functional impairment, then applies her clinical knowledge to the legal question of whether the clinical decision fits the legal definition of a mental abnormality (Vid.Tr. 16-17).

Dr. Gunnin diagnosed Mr. Murrell with antisocial personality disorder (APD), a pervasive pattern of disregard for and violation of the rights of others (Vid.Tr. 19). Mr. Murrell met at least three of the diagnostic criteria: a failure to

conform to social norms regarding lawful behavior, irritability and aggressiveness, and reckless disregard for the safety of others (Vid.Tr. 19).

The presence of APD does not automatically predispose someone to commit sex crimes (Vid.Tr. 21). The diagnosis of APD is based on a pattern of behavior involving committing crimes in general (Vid.Tr. 21-22). Mr. Murrell has committed both sexual and non-sexual crimes (Vid.Tr. 21-22). Based on this history, Dr. Gunnin concluded that the behavior would continue (Vid.Tr. 22). Thus, she concluded that Mr. Murrell is "predisposed toward committing a variety of crimes, including sexual crimes." (Vid.Tr. 22).

Dr. Gunnin found no discernable pattern of arousal to children or any other unusual arousal, and thus she diagnosed no paraphilia (Vid.Tr. 24). She noted that Mr. Murrell "seemed more of an ... opportunistic kind of offender, so pretty much when there was a female around and the opportunity came up and he wanted to offend, then he did." (Vid.Tr. 24). Dr. Gunnin noted that Mr. Murrell had raped an adult and molested a thirteen year old girl, "but there's no pattern" to his sexual offenses (Vid.Tr. 24). Dr. Gunnin concluded in 2000 that Mr. Murrell's APD qualified as a mental abnormality under the law that existed at the time, and that Mr. Murrell qualified as a sexually violent predator (Vid.Tr. 25).

But then the law changed in 2002 regarding how to determine if someone is a sexually violent predator (Vid.Tr. 25-26). Under the new law, the evaluator

has to determine whether the person has serious difficulty controlling his behavior (Vid.Tr. 26). Dr. Gunnin conducted a supplemental evaluation to consider the change in the law (Vid.Tr. 6, 29). The Department of Mental Health presented the changes to the state's forensic examiners at a meeting, and Dr. Gunnin further discussed the issue with colleagues and reviewed additional publications (Vid.Tr. 27-28). She noted that there is a lot of disagreement among mental health professionals about how to determine "serious difficulty controlling behavior" (Vid.Tr. 28). There is no test that can be given to determine the presence of such difficulty or to measure the extent of it (Vid.Tr. 29).

Dr. Gunnin again diagnosed Mr. Murrell with APD, and found no paraphilia (Vid.Tr. 37). However, using the new legal requirement of serious difficulty controlling behavior, Dr. Gunnin could not make a determination whether the APD is a mental abnormality qualifying Mr. Murrell for civil commitment (Vid.Tr. 38). Since there is no test for serious difficulty, she could only look at functional impairments caused by the disorder regarding the person's drive to commit or inhibitions against committing a crime (Vid.Tr. 39). She could not do so with a diagnosis of APD because of the difficulty identifying how it affects drives or inhibitions to commit sexually violent offenses (Vid.Tr. 41).

Dr. Gunnin's difficulty was because "the definition of antisocial personality disorder is really just a description of the behavior. It doesn't involve

the motivation for that behavior.” (Vid.Tr. 41). With APD it is unknown whether the person is missing something from their personality that causes them to engage in the behavior, or if they just choose to engage in it (Vid.Tr. 41-42). The problem for Dr. Gunnin was drawing the line between those who choose to do it and those who are helpless to choose (Vid.Tr. 42). If a person chooses the behavior, the person does not have serious difficulty controlling behavior (Vid.Tr. 43).

Mr. Murrell has APD, but Dr. Gunnin could not determine whether his behavior was a choice or a compulsion to act in a violent way (Vid.Tr. 43). He has repeatedly engaged in inappropriate behavior but his behavior does not indicate whether he has serious difficulty controlling his behavior or just chooses to engage in it (Vid.Tr. 44). Dr. Gunnin does not agree that a history of offending demonstrates serious difficulty controlling behavior (Vid.Tr. 44-45). The person may simply be making a choice about what the behavior and consequences are worth to them (Vid.Tr. 45). Without being able to resolve that issue, Dr. Gunnin could not determine whether Mr. Murrell has a mental abnormality under the new requirements (Vid.Tr. 44).

Dr. Gunnin agreed in cross-examination that Mr. Murrell is predisposed to continue committing his past behaviors, and therefore is predisposed to commit sexually violent offenses (Vid.Tr. 59). She agreed that Mr. Murrell has been aggressive and threatening, but she could not determine whether that was

because he has serious difficulty controlling his behavior or just chooses to engage in that behavior (Vid.Tr. 100, 106). If a person chooses to act in a certain way the person is controlling the behavior (Vid.Tr. 115). She told the State, in response to its question, that if Mr. Murrell chose to rape someone if he is released he is not a sexually violent predator within the meaning of the statute (Vid.Tr. 115). Dr. Gunnin said that it would be different if the person is a pedophile and chose to have sex with a child because it is the disorder that causes the drive to offend (Vid.Tr. 115-116). But Mr. Murrell has no disorder causing him to commit his crimes (Vid.Tr. 115-116).

The State began its presentation of evidence to the jurors with the testimony of one of the victims of the 1979 rapes describing her ordeal (Tr. 368-379).

The State hired Dr. Harry Hoberman, a Minnesota psychologist, to conduct an evaluation of Mr. Murrell (Tr. 382, 403-405). He, too, diagnosed APD based on: Mr. Murrell's failure to comport with social norms by repeatedly engaging in acts leading to his arrest, impulsivity, irritability and aggressiveness demonstrated by disciplinary problems in custody and verbal threats, reckless disregard for the safety of others, irresponsibility, and a lack of remorse (Tr. 421-426). Dr. Hoberman said that the APD was a mental abnormality predisposing Mr. Murrell to commit sexually violent crimes (Tr. 420, 429-430). He reached this conclusion based on the specific elements of the disorder; a person with this

disorder disregards the law and social norms, is impulsive and aggressive, is unconcerned with the safety of others and does not feel guilt or regret (Tr. 430).

According to Dr. Hoberman's testimony: "it is that combination of personality traits that makes Mr. Murrell commit sex offenses as well as other violent offenses" because when an opportunity for sexual offending occurs he will offend (Tr. 430). Dr. Hoberman acknowledged that it is "probably" true that some people with APD do not commit sex offenses (Tr. 431). Persons with the disorder engage in a lot of criminal behavior; burglary, assaults, murders, stealing, fraud (Tr. 431). But Dr. Hoberman believed that the APD predisposes Mr. Murrell to commit sexually violent offenses because "he's demonstrated that in my opinion." (Tr. 431).

Dr. Hoberman opined that Mr. Murrell's APD causes him serious difficulty controlling his behavior (Tr. 432). He said that Mr. Murrell's criminal history suggested serious difficulty controlling behavior because it covered an extended period of time with multiple punishments (Tr. 435). Dr. Hoberman pointed to the impulsive, opportunistic nature of Mr. Murrell's sexual offenses (Tr. 436). It was significant to Dr. Hoberman that they were committed in places where Mr. Murrell could be detected (Tr. 436-437). He suggested that abducting people in a public place or molesting a girl while her friend is watching is almost absurd (Tr. 455). He said that Mr. Murrell approached the rape victims with a

shotgun in the parking lot of a convenience store where other persons could see what was happening (Tr. 437).

Although Dr. Hoberman said this was a “significant” factor, it was not how the offense actually occurred. The victim testified at the same trial that she and her friend followed Mr. Murrell and other men to a convenience store where the men purchased beer for the girls (Tr. 369-370). Because a police car pulled into the parking lot of the convenience store, the girls followed the men to a parking lot behind an apartment building to exchange the beer (Tr. 371). It was in the parking lot behind the apartment building, out of the view of others, that Mr. Murrell approached the victims with a shotgun (Tr. 371). Dr. Hoberman acknowledged that Mr. Murrell waited until the thirteen year old girl’s friend had left the room before he molested the girl, but it was apparently “significant” to Dr. Hoberman that Mr. Murrell was not paying attention to whether he was being watched from outside the room (Tr. 437).

Dr. Hoberman also considered Mr. Murrell’s behavior in confined settings to reach his opinion about Mr. Murrell’s ability to control his behavior (Tr. 438). Mr. Murrell had repeated violations for having contraband, a weapon, and using drugs in prison (Tr. 438). He had frequent outbursts of temper and anger in prison (Tr. 438-439). He has been disruptive and threatening at MSOTC (Tr. 456-460). Dr. Hoberman pointed to various statements Mr. Murrell made about wanting help to avoid his bad behavior, but that he completed no treatment

programs and continued to engage in the behavior (Tr. 446-448). He said this showed that Mr. Murrell is "completely insincere, he doesn't mean it or that he just isn't able to put into practice ... what he wants." (Tr. 448). Dr. Hoberman considers it irrelevant to the question of serious difficulty controlling behavior if a person chooses to commit sex offenses in the future after being caught and sanctioned twice (Tr. 454-455). Even if it is true that it was or is a choice to commit the crime, which Dr. Hoberman considered to be likely in Mr. Murrell's case, that does not mean the person does not have serious difficulty controlling behavior because most people generally refrain from doing something against the law (Tr. 454-455). The mere fact that the person breaks the law means, for Dr. Hoberman, that the person has serious difficulty controlling behavior (Tr. 455).

Dr. Hoberman said there are a number of ways to assess risk of future sex offending (Tr. 461). One way is to look at base rates for reoffending (Tr. 461). Dr. Dennis Doren studied rearrest frequency over a twenty-five year period and determined that thirty-nine percent of rapists and fifty-two percent of child molesters will be rearrested within twenty-five years (Tr. 465-466). Based on Mr. Murrell's history alone, Dr. Hoberman opined that he has a thirty-nine to fifty-two percent chance of sexually reoffending in the future (Tr. 467). The doctor also claimed that these percentages underestimate reoffending because it is estimated that ninety percent of child molestation and over sixty percent of rapes go undetected (Tr. 469).

Another method of risk assessment is the use of actuarial instruments (Tr. 469-470). Dr. Hoberman scored Mr. Murrell on the Static-99 and MnSOST-R instruments (Tr. 472). According to the Static-99, a person with Mr. Murrell's characteristics is within the high risk category with a fifty-two percent chance of reconviction within fifteen years (Tr. 476). Dr. Hoberman acknowledged that there is no way to know whether Mr. Murrell would be within the fifty-two percent of the sample group that reoffended, or within the forty-eight percent of the sample group that did not (Tr. 528). The MnSOST-R score placed Mr. Murrell within a group of persons within the highest risk category, with a seventy-two percent chance of rearrest in six years (Tr. 478-479).

Dr. Hoberman again testified that these figures underestimate actual reoffending (Tr. 482). In this regard, Dr. Hoberman testified that there have been studies to provide ways to estimate the true rate of reoffense whether detected or not, "but most of the research is about, is looking at factors associated with either rearrest or reconviction." (Tr. 482). He agreed that reconviction is the most reliable way of knowing if a person really committed the offense because people can be arrested for something they did not do (Tr. 524). He agreed that there is no way to know how many of the rearrests used in the MnSOST-R were false arrests (Tr. 530).

Dr. Hoberman noted the current professional debate over the reliability of the MnSOST-R (Tr. 529-535). The major critic of the instrument, Dr. Richard

Wollert, a clinical psychologist and sex offender treatment provider in Washington and Oregon, has argued that the MnSOST-R greatly over-predicts reoffending (Tr. 532). Another psychologist, Dr. William Grove, has written a manuscript titled, "The Uselessness of the MnSOST-R." (Tr. 534). Even Dr. Doren, a defender of the instrument, has noted that due to the small number of validity studies it is reasonable to be concerned about applying the instrument outside of Minnesota and Ontario, Canada (Tr. 534-535).

Dr. Hoberman said that he does not stop his risk assessment after computing actuarial scores because research shows many other factors to be associated with sexual reoffending (Tr. 482). He applied some of these factors to Mr. Murrell (Tr. 483). Dr. Hanson's meta-analysis suggests that the best predictors of sexual offender recidivism are the same as general criminological factors: young age, failure to complete treatment programs, and the presence of a personality disorder (Tr. 483). Other factors from the meta-analysis Dr. Hoberman applied to Mr. Murrell were stranger victims, early onset, unrelated victims, diverse sex crimes, a criminal history or lifestyle, APD, never married, and treatment drop out (Tr. 489). Most of these are not "other" factors as Dr. Hoberman described, because the Static-99 factors include prior sex offense history, history of general violence, demographics like marriage and age, and victim characteristics such as being a stranger (Tr. 474). Dr. Hansen developed the Static-99 using the data produced in his meta-analysis (Tr. 522).

Dr. Hoberman concluded by opining that Mr. Murrell has a mental abnormality causing him serious difficulty controlling his behavior and as a result he is more likely than not to commit future sexually violent offenses (Tr. 497). It is Dr. Hoberman's opinion that APD alone, without an accompanying paraphilia, will qualify as a mental abnormality for civil commitment (Tr. 551).

At the beginning of his testimony, the State set out to establish Dr. Hoberman's expertise in the area of SVP evaluations (Tr. 390). Dr. Hoberman offered his membership in the Association for the Treatment of Sexual Abusers, ATSA, "that is in effect now the international organization whose focus is on the evaluation and treatment of sex offenders in the context of viewing sex offenders as a public health issue." (Tr. 391). He agreed with the State that ATSA is "the principal organization that leaders in this field are members of." (Tr. 391).

Dr. Hoberman testified in cross-examination that he is on the public policy committee of ATSA (Tr. 551). To his knowledge ATSA does not have an official policy concerning whether APD alone can be a qualifying mental abnormality (Tr. 551). Dr. Hoberman was unaware that ATSA filed an amicus brief in the United States Supreme Court which said that APD in and of itself is not sufficient to meet the criteria of sexual predator laws (Tr. 551).² Dr. Hoberman

² The Association for the Treatment of Sexual Abusers ("ATSA"), wrote in its *amicus curiae* brief in Kansas v. Hendricks: "The presence of an antisocial

accepted that that must have been the position of ATSA at the time the amicus brief was filed (Tr. 552). He has no idea whether that position has changed (Tr. 552).

Mr. Murrell's attorneys hired Dr. Gregory Sisk, a clinical psychologist in Kansas City, to conduct a sexually violent predator evaluation of Mr. Murrell (Tr. 710, 735). Dr. Sisk has done eight such evaluations (Tr. 733). He has had contracts with the Division of Family Services since 1981 or 1982 that have presented him with 500 to 600 cases involving victims or perpetrators of sexual abuse (Tr. 724-725, 727). Dr. Sisk provides sexual offender treatment to perpetrators of sexual abuse (Tr. 726). That treatment involves a historical accounting of abuse, acceptance of responsibility, recognition of triggering events and thinking errors, and relapse prevention planning to provide solutions to prevent future abuse (Tr. 726).

Dr. Sisk also diagnosed Mr. Murrell with APD (Tr. 745-746). He found no evidence of a paraphilia (Tr. 746-747). Dr. Sisk testified that APD is not a mental abnormality according to the criteria of the statute (Tr. 750, 752). That disorder

personality disorder in and of itself is not sufficient to meet the criteria for sexual predator laws. The presence of a diagnosis of antisocial personality with paraphilia, though, is well-established as increasing the person's risk of offending and dangerousness." 1996 WL 471027.

contains no predisposition to commit sexually violent offenses (Tr. 752). Mr. Murrell had committed sexual offenses, but there is no evidence that he has an urge to commit sexual offenses (Tr. 752). Dr. Sisk noted that Mr. Murrell has committed about fifteen different crimes, and only two of them were sexual (Tr. 752). Dr. Sisk said that Mr. Murrell's problem is that he commits crimes, and APD describes that problem, but there is nothing in the criteria of that disorder about the propensity to commit sexual offenses (Tr. 752). He looks for patterns to identify a predisposition (Tr. 752). There is no pattern to Mr. Murrell's sexual offending (Tr. 754). The offenses were seventeen years apart (Tr. 754). Two crimes do not establish a pattern (Tr. 754). And the crimes were different, one involving the rape of adults and the other the fondling of a child (Tr. 754). Dr. Sisk could not think of a situation where APD alone could be a mental abnormality under the statute, and he doubted that such a situation exists (Tr. 757). He believes that APD must be associated with a paraphilia to cause a predisposition to sexual violence (Tr. 758).

Nor did Dr. Sisk believe that Mr. Murrell has serious difficulty controlling his behavior (Tr. 759). Everything contained in DOC and MSOTC records involved control over Mr. Murrell's temper (Tr. 762). Dr. Sisk understands the SVP law to require serious difficulty controlling sexual behavior (Tr. 762). There is no evidence of Mr. Murrell acting out sexually in DOC or MSOTC (Tr. 761). Nothing in the criteria for APD has anything to do with control over behavior

(Tr. 766). The diagnosis is just “a description of a set of behaviors,” but it does not indicate where the behaviors come from or any inability to control them (Tr. 767).

Mr. Murrell acknowledged to the jurors that he started on the wrong path at a young age (Tr. 585-586). He admitted that he committed the crimes they heard about (Tr. 588-591, 593, 597, 600, 602). He admitted that after each time in prison he returned to the Kansas City area and returned to his old ways (Tr. 597, 602).

He started using drugs and alcohol to escape from his feelings and the things going on in his life (Tr. 592). He continued to use them to hide the void in his life (Tr. 604). He knew about Christ but did not think he was one of the people Christ had died for (Tr. 604). Mr. Murrell realized how far he had fallen after he molested the thirteen year old girl, and he tried to commit suicide in the county jail by overdosing on medication (Tr. 602). After that suicide attempt he talked to others, including the chaplain who ministered at the jail, and came to realize that he was “the very person Christ came down for,” people who were lost and had no hope (Tr. 604). This realization filled the void in his life (Tr. 604-605). Mr. Murrell admitted that he is not perfect, but he said that he tries every day to be a good Christian (Tr. 606).

Mr. Murrell’s nickname on the street was “Red” (Tr. 596). He said that he gave up that nickname in 1996 after he molested the child (Tr. 596). He accepted

Christ into his life and returned to prison as Mark (Tr. 603). He admitted that "Red" and Mark continued to struggle, between the person he was and the person he can and will be (Tr. 603-604).

Mr. Murrell was baptized in 2000 (Tr. 605). He told the jurors that "baptism is representative of life, death and resurrection, and Red was permanently laid to rest" by the baptism (Tr. 605-606). Mr. Murrell acknowledged that his behavior had been poor at times since then (Tr. 669-697). He admitted that he has always been verbally and physically abusive because he does not know how to communicate appropriately with people (Tr. 613). MSOTC is a frustrating place and he admittedly lashes out at times (Tr. 613-616).

Mr. Murrell told the jurors that he did not want to spend the rest of his life in confinement (Tr. 641). He also told them that he did not want to return to his old ways (Tr. 633). If released, he is going to leave the environment he created for himself in Kansas City, and move to St. Louis to make a new life (Tr. 634, 638). He had contacted a number of organizations in the St. Louis area to help with that transition (Tr. 634). He contacted the Salvation Army regarding the St. Louis Adult Rehabilitation Center, a six-month program of religious services and counseling (Tr. 636). He contacted an organization called Adapt that deals with mental illnesses such as the bipolar disorder he was diagnosed with during his second incarceration, and provides low cost housing and medication (Tr. 636). Mr. Murrell had also contacted a Christian-based housing program (Tr. 637-638).

He believes that he can control his behavior and stop his criminal behavior (Tr. 638-639). He now has faith, and feels that he has been given a second chance at life (Tr. 640).

The jurors returned a verdict finding Mr. Murrell to be a sexually violent predator (L.F. 280). The probate court committed him to the custody of DMH to be held in secure confinement until his mental abnormality has so changed that he is safe to be at large (L.F. 312).

POINTS RELIED ON

I.

The trial court erred when it denied Mr. Murrell's motion to dismiss the State's petition because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, in that the SVP law permits the State to deprive a person of their liberty upon proof that he suffers from a mental abnormality that predisposes him to, and makes it more likely than not, that he will commit sexually violent offenses, but does not require a risk that he is likely to do so in the immediate future. Due process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he poses an imminent risk of harm. Thus, Mr. Murrell was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of due process of law.

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992);

O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975);

Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993);

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

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10; and

Section 632.480, RSMo 2000.

II.

The probate court erred in committing Mr. Murrell to indefinite secure confinement in the custody of the Department of Mental Health, in violation of Mr. Murrell's right to due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Murrell is more likely than not to engage in predatory acts of sexual violence in the future - if not securely confined - as a result of the diagnosis of antisocial personality disorder because this condition is insufficiently precise to identify a mental abnormality limited to future risk of sexual offending, but rather suggests only a propensity to criminality, rendering the commitment a "mechanism for retribution or general deterrence," functions properly those of criminal law, not civil commitment.

In the Matter of the Care and Treatment of Coffel, 117 S.W.3d 116 (Mo.

App., E.D. 2003);

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 138 L.Ed.2d 501 (1997);

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002);

Hubbart v. Superior Court, 969 P.2d 584 (Cal. 1999);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10.

III.

The probate court abused its discretion in admitting evidence that Mr. Murrell suffers antisocial personality disorder, in violation of his rights to due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that a personality disorder cannot satisfy the statutory requirement of a “mental abnormality” because it fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal or unacceptable conduct in general, subjecting Mr. Murrell to involuntary civil confinement outside the narrow authority granted to the government.

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002);

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 138 L.Ed.2d 501 (1997);

Hubbart v. Superior Court, 969 P.2d 584 (Cal. 1999);

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 10 and 18(a);

Section 632.480, RSMo Cum. Supp. 2002.

IV.

The trial court abused its discretion in admitting Dr. Hoberman's testimony, over Mr. Murrell's objection, on the results of the Static-99 and MnSOST-R actuarial instruments applied to him by Dr. Hoberman, in violation of Mr. Murrell's right to due process of law and a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that the results were logically and legally irrelevant since they do not address the specific question at issue whether - Mr. Murrell is more likely than not to reoffend - and they confuse the issue and mislead the jurors because the actuarial instruments reflect only the results of group analysis, the similarities between the sample group and Mr. Murrell or any other individual is unknown, and the group results cannot predict the behavior of any specific individual.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993);

In the Matter of the Care and Treatment of Goddard, 144 S.W.3d 848 (Mo. App., S.D. 2004);

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999);

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

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a);

Section 490.065, RSMo 2000; and

Federal Rule of Evidence 702.

ARGUMENT

I.

The trial court erred when it denied Mr. Murrell's motion to dismiss the State's petition because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, in that the SVP law permits the State to deprive a person of their liberty upon proof that he suffers from a mental abnormality that predisposes him to, and makes it more likely than not, that he will commit sexually violent offenses, but does not require a risk that he is likely to do so in the immediate future. Due process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he poses an imminent risk of harm. Thus, Mr. Murrell was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of due process of law.

Prior to trial, Mr. Murrell filed a motion to dismiss the petition against him because the sexually violent predator statutes are unconstitutional in that they do not require a finding that his mental abnormality, if any, makes him more likely than not to commit a sexually violent offense in the immediate future (L.F. 185-192). Rather, the statutes permit commitment upon a finding that he may

commit such an offense over the course of his lifetime (L.F. 185-192). The trial court denied this motion. This Court's standard of review for constitutional challenges to a statute is *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

The United States Supreme Court has recognized that an involuntary civil commitment “for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979). Commitment to a mental institution impinges upon the “[f]reedom from bodily restraint [that] has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha v. Louisiana*, 504 U.S. 71, 81, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992). The Supreme Court has “always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty.” *Id.*, quoting *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). These principles were recognized as well by the Missouri Supreme Court in *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2004).

Not only must the procedural safeguards involved in a commitment proceeding satisfy the demands of the Due Process Clause, but the substantive basis for the commitment must also pass Constitutional scrutiny. *Foucha*, 504 U.S., at 79-81, 112 S.Ct. at 1784-85. “[T]he Due Process Clause contains a

substantive component that bars certain arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them.” 504 U.S. at 81, 112 S.Ct. at 1785. In order to involuntarily confine someone to a mental institution, the State must show “by clear and convincing evidence that the individual is mentally ill and dangerous.” 504 U.S. at 81, 112 S.Ct. at 1786 (internal quotes omitted). To satisfy due process, a statute depriving a person of liberty must be narrowly tailored. *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993). The State must demonstrate that a person’s potential for doing harm is “great enough to justify such a massive curtailment of liberty.” *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972).

The Kansas statute, which is similar to Missouri’s, was upheld by the United States Supreme Court against a due process challenge in *Kansas v. Hendricks*, 521 U.S. 346, 358-360, 117 S.Ct. 2072, 2079-2081, 138 L.Ed.2d 501 (1997). The Court held that the Kansas statute comports with due process because it “requires a finding of future dangerousness and then links that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior.” 521 U.S. at 358, 117 S.Ct. at 2080. This leaves open the question of when, in the future, the danger must present itself.

That question was answered in *O'Connor v. Donaldson*, 422 U.S. 563, 574-575, 95 S.Ct. 2486, 2493, 45 L.Ed.2d 396 (1975): that the person must be dangerous at the time of the commitment.

This requirement of immediacy of the danger has been expressed in a number of ways. The Court in *Stamus v. Leonhardt*, 414 F.Supp. 439, 450-451 (S.D.Iowa 1976) held that the danger must be evidenced by a recent act or threat. In *Mignone v. Vincent*, 411 F.Supp. 1386, 1389 (S.D.N.Y., 1976), the Court held that an immediate harm or threat of harm is required. A present threat of harm was required by the Court in *Dixon v. Attorney General*, 325 F.Supp. 966, 974 (M.D.Pa. 1971). Eminent danger was required in *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980).

Some courts take a more liberal view of the imminence of the danger necessary to involuntarily commit someone, eschewing immediate danger for danger in the reasonably foreseeable future. *In re Albright*, 836 P.2d 1, 5 (Kan. 1992); *State v. Krol*, 344 A.2d 289, 302 (N.J. 1980); *Hatcher v. Wachtel*, 269 S.E.2d 849, 852 (W.Va. 1980); *Pifer v. Pifer*, 273 S.E.2d 69, 71 (W.Va. 1980).

These temporal requirements give context to the holding of the United States Supreme Court in *Hendricks*. The *Hendricks* Court upheld the Kansas law because proof of dangerousness is required, but it did not specifically express how immediate or imminent that danger must be. The body of existing case law preceding the *Hendricks* opinion required either immediate danger or very

proximate danger in the reasonably foreseeable future to involuntarily commit someone. This history gives meaning to the *Hendricks* opinion, and suggests that the United States Supreme Court likewise expected the danger to be immediate or reasonably imminent.

Foreign jurisdictions have interpreted the language of their sexually violent predator statutes, which are much like Missouri's, to require sufficient proof of current danger to satisfy the requirements of due process discussed above. The California Supreme Court concluded in *Hubbart v. Superior Court*, 969 P.2d 584, 599 (Cal. 1999), that the statute required a finding that the person is dangerous at the time of commitment because of the present tense of the language used in the statute: that the person "currently" suffers a mental disorder which "makes" him dangerous and "likely" to reoffend. The Texas appellate court in *Beasley v. Mollett*, 95 S.W.3d 590, 600 (Tex. App., 2002), held that the statute met the due process requirement of "imminent" danger because it required that the mental abnormality must predispose the person to commit sexually violent offenses to a degree that the person is a menace to society. The Texas court noted that "menace" is by definition an imminent danger or threat of danger. *Id.* The Iowa appellate court reached the same conclusion in *Detention of Selby*, 710 N.W.2d 249, 252-253 (Iowa App., 2005). The Iowa statute uses language of present tense: the person must "suffer" a mental abnormality that "makes" the person likely to engage in sexually violent predatory acts. *Id.* at 253.

The court relied upon the holding of the *Beasley* court that “menace” means an imminent danger to conclude that the Iowa statute required proof that the person was dangerous at the time of commitment. *Id.*

These cases do not support the conclusion that the Missouri statutes comport with due process by requirement of current or immediate or imminent danger for commitment. Section 632.480(2), RSMo Cum. Supp.2005, defines a “mental abnormality” as a condition affecting emotional or volitional capacity which predisposes the person to commit sexually violent offenses “in a degree constituting such person a menace to the health and safety of others.”

But that is not the complete basis upon which the Missouri statute authorizes involuntary commitment under the SVP act. Section 632.480(5) requires the presence of such mental abnormality *and* proof that the person “is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.” It is upon this additional element, which must also be proven beyond a reasonable doubt, *Thomas v. State*, 74 S.W.3d 789 (Mo. banc 2002), that the State uses clinical judgment and actuarial instruments to assess risk fifteen years in the future and beyond to suggest that immediate confinement is permissible for a lifetime, based solely on risk that the person is more likely than not to reoffend in some indefinite future.

The State had Dr. Hoberman opine that Mr. Murrell met the three separate elements; the presence of a mental abnormality (Tr. 420, 429-430), that it causes

serious difficulty controlling behavior (Tr. 432), and that Mr. Murrell is more likely than not to commit sexually violent acts if not confined to a secure facility (Tr. 497).

Dr. Hoberman began his opinion that Mr. Murrell is more likely than not to reoffend by referring to so-called base rates of reoffense by rapists and child molesters over twenty-five years (Tr. 465-466). He then turned to the Static-99 to estimate a risk of reoffense of fifty-two percent over fifteen years (Tr. 476). The most immediate or imminent estimation he could provide was the result of the MnSOST-R that placed the risk six years in the future (Tr. 478-479). The current or imminent danger required for civil commitment is converted by this evidence to lifetime danger, no matter how far into the future the person's lifetime may reach. The due process requirement of imminent danger has been removed from the statute, rendering it unconstitutional.

Because the SVP act violates due process of law by not requiring proof of current, immediate, or imminent danger to involuntarily commit the person, it is unconstitutional. The trial court erred in denying Mr. Murrell's motion to find the statutes unconstitutional and to dismiss the petition against him. Mr. Murrell's commitment must be reversed and he must be released.

II.

The probate court erred in committing Mr. Murrell to indefinite secure confinement in the custody of the Department of Mental Health, in violation of Mr. Murrell's right to due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Murrell is more likely than not to engage in predatory acts of sexual violence in the future - if not securely confined - as a result of the diagnosis of antisocial personality disorder because this condition is insufficiently precise to identify a mental abnormality limited to future risk of sexual offending, but rather suggests only a propensity to criminality, rendering the commitment a "mechanism for retribution or general deterrence," functions properly those of criminal law, not civil commitment.

To commit Mr. Murrell to indefinite, secure confinement in the Department of Mental Health as a sexually violent predator, the State must prove beyond a reasonable doubt that he (1) has a congenital or acquired condition affecting his emotional or volitional capacity that predisposes him to commit sexually violent offenses to a degree that causes him serious difficulty controlling his behavior, and (2) that he is more likely than not to engage in predatory acts of

sexual violence if not confined in a secure facility. *Thomas v. State*, 74 S.W.3d 789, 791-792 (Mo. banc 2002); *In the Matter of the Care and Treatment of Coffel*, 117 S.W.3d 116, 121 (Mo. App., E.D. 2003). The same evidentiary standard in criminal cases is used for commitment of sexually violent predators. *Amonette v. State*, 98 S.W.3d 593, 600 (Mo. App., E.D. 2003).

Forcible civil commitment is permitted of persons who have a mental abnormality, are unable to control their behavior, and thereby pose a danger to the public health and safety. *Kansas v. Hendricks*, 521 U.S. 346, 357, 117 S.Ct. 2072, 2079 138 L.Ed.2d 501 (1997). But it is only permissible to confine those persons “who, by reason of a mental disease or abnormality, constitute a real, continuing, and serious danger to society.” *Id.* 521 U.S. at 372, 117 S.Ct. at 2087 (Justice Kennedy, concurring).

The State of Missouri is not authorized to civilly commit Mr. Murrell, or anyone else, as a sexually violent predator due to a mental condition that may lead him to commit crimes in general. In *Kansas v. Crane*, 534 U.S. 407, 412, 122 S.Ct. 867, 870, 151 L.Ed.2d 856 (2002), the United States Supreme Court explained and reiterated its holding in *Kansas v. Hendricks*.

Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. That distinction is necessary

lest “civil commitment” becomes a “mechanism for retribution or general deterrence,” – functions properly those of criminal law, not civil commitment.

The United States Supreme Court continued:

[P]roof of serious difficulty controlling behavior ... must be sufficient to distinguish the dangerous sexual offender whose serious illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Crane, 122 S.Ct. at 870.

Hendricks was diagnosed with pedophilia. 117 S.Ct. 2078-2079. This is a sexually-related mental abnormality (Tr. 117-118). He had a history of arrests and convictions for at least nine child sex offenses from 1955 to 1972, interspersed with hospital commitments and criminal incarcerations. *Id.* at 2078. As Justice Breyer noted in his dissenting opinion, “Hendricks’ abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions.” *Id.* at 2088-2089.

The very premise upon which all SVP laws are based is that sexually violent predators present a specific and more dangerous threat to the safety of others than typical offenders or other persons with more typical mental illnesses or abnormalities. *In re the Detention of Thorell*, 72 P.3d 708 (Wash. 2003)

(providing treatment specific to SVPs and protecting society from the heightened risk of sexual violence they present are legitimate state objectives); *Martin v. Reinstein*, 987 P.2d 779 (Ariz. App., 1999) (differences in treatment bear a rational relationship to the differences between classes); *Westerheide v. Florida*, 831 So.2d 93 (Fla. 2002) (“We conclude that the specialized treatment needs of sexually violent predators and the high risk that they pose to the public if not committed for long-term control, care and treatment justify the Legislature’s separate classification scheme”). Involuntary civil commitment under SVP laws, including Missouri’s, requires a mental abnormality specifically predisposing the person to commit sexually violent offenses, not just to commit crimes in general.

This unique predisposition to commit sexually violent crimes specifically is apparent from the context of the *Hendricks* decision. The only mention of a “personality disorder” serving as a basis for civil commitment under the SVP law came when the United States Supreme Court was discussing whether the statute was punitive. 117 S.Ct. at 2082. The Court upheld Hendricks’ commitment because he was diagnosed with pedophilia. *Id.* at 2081. Hendrick’s admission that he cannot “control the urge” to molest children coupled with a prediction of future dangerousness “adequately distinguishes Hendricks from other dangerous persons who are more properly dealt with exclusively through criminal proceedings.” *Id.* The Court accepted that the diagnosis of pedophilia,

a specific and unusual sexual deviancy, qualified as a mental abnormality under the act. *Id.*

Justice Kennedy's concurrence points out that that the Court intended to limit commitment to only those unique and specific mental conditions predisposing the person to commit sexually violent crimes, not just to commit crimes in general. He, too, noted the diagnosis of a recognized sexual deviancy, pedophilia. *Id.* at 2087. But Justice Kennedy added: "if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding civil detention is justified, our precedents would not suffice to validate it." *Id.* It is clear from the holdings of the Court that a mental abnormality sufficient to validate civil commitment must cause a unique and specific danger of a certain type of crime, a sexually violent offense. A mental condition that predisposes a person to commit crimes generally, including sexual offenses, is insufficient to distinguish a sexually violent predator from a typical, albeit dangerous, criminal.

The evidence in Mr. Murrell's case, particularly the testimony of Dr. Hoberman, fails to establish this necessary distinction. Dr. Hoberman espoused the opinion that Mr. Murrell's APD predisposed him to commit sexually violent crimes because the elements of the disorder, disregard for the law and social norms, impulsiveness and aggressiveness, unconcern for the safety of others, and lack of guilt or regret, are a "combination of personality traits that make Mr.

Murrell commit sex offenses *as well as other violent offenses*" (Tr. 430) (emphasis added). Where is the distinction between a unique and specific propensity to sexually violent crimes and the propensity to commit crimes in general? There is none. Dr. Hoberman made this quite clear. He said that Mr. Murrell's sex offenses were purely opportunistic, not the result of a specific compulsion toward them (Tr. 430, 436). He admitted that APD leads persons to commit crimes in general; burglary, assault, murder, stealing, fraud (Tr. 431). That two of the fifteen crimes Mr. Murrell has committed were sexual in nature does not suffice to establish a predisposition to a unique and specific type of crime, and the unique and specific basis to substitute civil commitment for criminal prosecution is absent.

The other experts reiterated this fact. Dr. Gunnin noted that the diagnosis of APD is based on a pattern of behavior involving committing crimes in general (Vid.Tr. 21-22). She found no discernable pattern of unusual or deviant sexual arousal in Mr. Murrell's offending (Vid.Tr. 24). He molested a thirteen year old girl and raped two young women (Vid.Tr. 24). Dr. Gunnin also described Mr. Murrell's sexual offenses as simply opportunistic rather than the result of some specific predisposition toward them (Vid.Tr. 24). Dr. Sisk said that APD is not a mental abnormality because it contains no predisposition to commit sexually violent offenses (Tr. 752).

There was no evidence that Mr. Murrell's two sex offenses among fifteen criminal offenses motivated by a sexual urge (Tr. 752). There was no pattern to the sexual offenses to demonstrate a sexual predisposition (Tr. 752, 754). Even the Association for the Treatment of Sexual Abusers, membership in which the State and Dr. Hoberman touted as evidence of his expertise, wrote in its *amicus* brief in *Hendricks* that "the presence of an antisocial personality disorder in and of itself is not sufficient to meet the criteria for sexual predator laws. The presence of a diagnosis of antisocial personality with paraphilia, though, is well-established as increasing the person's risk of offending and dangerousness." (Tr. 391, 551). It was Hendricks' paraphilia, his pedophilia, that led the United States Supreme Court to uphold his civil commitment. Mr. Murrell's commitment because he may be predisposed to commit any number of crimes - which may include sexual offenses - in the future serves nothing more than the impermissible purpose of preventive detention.

The opinion of the California Supreme Court in *Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999), is instructive on this question as well. The State of California sought Hubbart's civil commitment following completion of his prison term under that state's SVP law. *Id.* at 591-592. Two doctors diagnosed him with paraphilia, not otherwise specified. *Id.* at 592. One doctor added an Axis II diagnosis of personality disorder, not otherwise specified, with antisocial traits. *Id.*

Hubbart argued on appeal that involuntary commitment was limited to mental illness, a “serious cognitive, perceptual or affective disfunction,” and could not be supported by “mental disorders characterized primarily by an inability to control sexually violent impulses and behavior.” *Id.* at 543. The California Supreme Court disagreed. The Court held that *Hendricks* noted the authority of legislatures to define the mental condition necessary for commitment, and precise medical terminology is not required. *Id.* at 593-597. The Court also rejected an argument that APD could never be used as a basis for civil commitment under *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). *Hubbart, supra.* at 597. The Court distinguished *Foucha*, concluding that the missing element in that case was *present danger*, and thus did not specifically hold that APD was an insufficient basis for a civil commitment. *Id.* at 599. The *Hubbart* Court found that *Foucha* did not limit the range of mental impairments that may permissibly lead to civil confinement. *Id.*

Judge Werdegar, Jr. of the California Supreme Court wrote a separate concurrence. *Id.* at 611. He agreed that *Hendricks* required the majority’s outcome on the facts present in the case before them. *Id.* Hubbart’s criminal history of sexually violent offenses and diagnosis of paraphilia, a sexually-related condition, made the SVP law applicable to him. *Id.* But Judge Werdegar cautioned that, “[d]espite its availability in the present situation, however, the Act must not be stretched beyond its constitutional limits.” *Id.* He quoted

Justice Kennedy in *Hendricks*: “If ... civil confinement were to become a mechanism for general retribution or general deterrence, or if it were shown that the mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Id.* Judge Werdegar described how a mental disorder is determined to be too imprecise:

One way in which a “diagnosed mental disorder” ... may come to be recognized as “too imprecise a category” is if such diagnoses cease to distinguish meaningfully between ... offenders whose violent predatory conduct stems in some way from an abnormality of thought, perception or affect, and ... all remaining offenders, who by virtue of their deviant conduct may properly be described as abnormal but whose abnormality only traces, in circular fashion, back to their conduct.

Id. The United States Supreme Court noted in *Foucha* that to permit the State to hold Foucha indefinitely because of his past crimes and present APD would also permit the State to hold indefinitely a convicted criminal if it could be shown that he had a personality disorder that may lead to criminal conduct. *Foucha*, 112 S.Ct. at 1780. The *Foucha* Court cautioned that such a procedure could substitute civil commitment based on danger for a conviction for a proven crime or for mental illness. *Id.*

Judge Werdegar noted that a diagnosis of APD is founded on behavioral criteria, including a history of criminality. *Hubbart*, 969 P.2d at 612. He cautioned: "To the extent the diagnosis simply places a psychiatric label on a particular character structure or a generalized propensity to do ill, *Foucha's* warnings assume more immediate constitutional significance." *Id.*

This was precisely the evidence presented in Mr. Murrell's case. "[T]he definition of antisocial personality disorder is really just a description of the behavior. It doesn't involve the motivation for that behavior." (Vid.Tr. 41). APD is a description of "personality traits" (Tr. 430). The diagnosis simply describes the problematic behavior (Tr. 752). APD is just "a description of a set of behaviors" (Tr. 767). It is simply the "psychiatric label on a particular character structure or a generalized propensity to do ill" described by Judge Werdegar in *Hubbart*, of "deviant conduct ... properly ... described as abnormal but [which] only traces, in circular fashion, back to [that] conduct." APD is simply the diagnosis for what Justice Breyer described as "simply ... a long course of antisocial behavior," rather than "a specific, serious, and highly unusual inability to control his actions." It is, as Justice Kennedy described, "too imprecise a category to offer a solid basis" to substitute preventive detention for criminal proceedings in response to a crime.

The State will, of course, turn to the same cases in this appeal that it relied upon below to argue that personality disorders qualify as mental abnormalities.

The first of those cases is *In the Matter of the Care and Treatment of Pate*, 137 S.W.3d 492 (Mo. App., E.D. 2004). The Eastern District Court of Appeals held the evidence sufficient in *Pate* to qualify narcissistic personality disorder with antisocial features as a mental abnormality. *Id.* at 497-498. Of significance in that case was an expert opinion that “this disorder manifested itself through a *pattern of sexual aggression targeted at women* when Pate feels as though a woman has mistreated him.” *Id.* at 497 (emphasis added). This pattern included four rapes or attempted rapes of teenage or preteen girls over eleven years, and an alleged attempted rape of another woman after Pate was released on parole. *Id.* at 494.

No such pattern exists in Mr. Murrell’s case. He forcibly raped two young women, then seventeen years later fondled a thirteen year old girl. Dr. Sisk looked for a pattern of behavior to demonstrate a predisposition toward sexual crimes and found none (Tr. 752, 754). Dr. Hoberman simply concluded that Mr. Murrell’s history reflected the commission of “sex offenses as well as other violent offenses” (Tr. 430). He recognized that the sexual offenses were simply opportunistic, the opportunity to commit the crimes arose and Mr. Murrell took it (Tr. 430, 436). This is a far cry from the “*pattern of sexual aggression targeted*” in response to specific stimuli found in *Pate*. Dr. Gunnin found no discernable pattern of deviant sexual arousal. The Eastern District upheld the commitment in *Pate* because the testimony “in this *particular* case” met the statutory definition of a mental abnormality. *Id.* at 498 (emphasis added). There is no similar

evidence in Mr. Murrell's case that his APD predisposes him to commit sexually violent acts as required by the statute.

The Eastern District held in *In the Matter of the Care and Treatment of Boone*, 147 S.W.3d 801, 807 (Mo. App., E.D. 2004), that evidence of APD was admissible at trial. Boone argued that the evidence was inadmissible because it was insufficient to qualify as a mental abnormality under the statute because it fails to distinguish a specific predisposition toward sexually violent acts from typical, dangerous criminal behavior. *Id.* The Eastern District rejected this argument without opinion. *Id.* At best, the case stands for nothing more than that evidence of APD may be admissible at trial when appropriate. It does not hold that APD, alone, is always sufficient to justify a civil commitment.

The other case referred to by the State is *Linehan v. Milczark*, 315 F.3d 920 (8th Cir. 2003). Linehan argued that the diagnosis of APD did not distinguish him from other dangerous persons subject to criminal proceedings because forty to sixty percent of inmates can be diagnosed with that disorder. *Id.* at 928. The Eighth Circuit disagreed. But the reason for its disagreement is significant to Mr. Murrell's appeal. The Eighth Circuit noted that the trial court found from the evidence that Linehan had revealed "a degree of impulsivity and lack of control *in connection with sexual impulses*," and the Minnesota Supreme Court reviewing the case found evidence supporting the conclusion that Linehan "lacks adequate control *over his sexual behavior*," and found "substantial evidence that [Linehan]

continued to engage in *impulsive sexual behavior* and lacks adequate control over his *harmful sexual impulses.*" *Id.* (emphasis added).

This evidence came not from his propensity to commit crimes defined by the diagnoses of APD, but from the pattern of his sexual offending and sexual behavior. In 1956 Linehan took indecent liberties with a four year old girl, in 1960 he had sex with a thirteen year old girl when he was nineteen years old, in 1964 he killed a fourteen year old girl when she attempted to fight off his sexual advances, and while awaiting trial for that charge he raped a twenty-two year old woman and sexually molested an eleven year old girl and her twelve year old sister. *Id.* at 922. Linehan escaped from prison in 1975 and eleven days later sexually assaulted a twelve year old girl. *Id.* And while detained pending his SVP trial, he was twice seen masturbating after playing with his eight year old step-daughter during family visits. *Id.* This, of course, is the sort of pattern Dr. Sisk was looking for to establish a predisposition to sexually violent offenses. It is also the same sort of pattern that neither he nor any of the other experts could find in Mr. Murrell's history. The opinion of the Eighth Circuit Court of Appeals in Linehan does not justify Mr. Murrell's commitment.

Because the diagnosed antisocial personality disorder fails to distinguish the dangerous sexual offender whose serious illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case, the evidence was insufficient to support

Mr. Murrell's civil commitment, and the probate court's judgment and order must be reversed and Mr. Murrell must be released.

III.

The probate court abused its discretion in admitting evidence that Mr. Murrell suffers antisocial personality disorder, in violation of his rights to due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that a personality disorder cannot satisfy the statutory requirement of a “mental abnormality” because it fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal or unacceptable conduct in general, subjecting Mr. Murrell to involuntary civil confinement outside the narrow authority granted to the government.

Mr. Murrell filed a pretrial motion to exclude evidence of a personality disorder (L.F. 193-200). He argued in favor of this motion just prior to trial (Tr. 56-57), objected to the testimony when the State sought to introduce it through Dr. Hoberman (Tr. 419), and included the issue in his motion for new trial (L.F. 291-292), thus preserving it for appeal. Trial courts have broad discretion in determining the admissibility of evidence. *Koontz v. Ferber*, 870 S.W.2d 855, 891 (Mo. App., W.D. 1993). This Court reviews for an abuse of that discretion. *Id.*

Mr. Murrell’s motion to exclude the evidence was substantially based upon the argument set out in Point I, above, that APD fails to distinguish

between a typical recidivist and a sexually violent predator with a specific and unique mental condition predisposing him to a specific type of criminal behavior, sexually violent offenses (L.F. 193-200). He will not reiterate that argument here at length. Suffice it to say that a mental abnormality justifying involuntary civil commitment must distinguish a person with a unique and specific predisposition to sexually violent offenses from a dangerous but typical criminal recidivist. *Kansas v. Crane*, 534 U.S. 407, 412, 122 S.Ct. 867, 870, 151 L.Ed.2d 856 (2002). If the offered "mental abnormality" is "too imprecise a category to offer a solid basis for concluding that civil detention is justified," the law will not validate the commitment. *Hendricks*, 117 S.Ct. at 2087 (J. Kennedy concurring).

A mental abnormality is "too imprecise" when "such diagnoses cease to distinguish meaningfully between ... offenders whose violent predatory conduct stems in some way from an abnormality of thought, perception or effect, and ... all remaining offenders, who by virtue of their deviant conduct may be properly described as abnormal but whose abnormality only traces, in circular fashion, back to their conduct." *Hubbart v. Superior Court*, 969 P.2d 584, 611 (Cal. 1999) (J. Werdegar, Jr. concurring). A diagnosis of APD "simply places a psychiatric label on a particular character structure or a generalized propensity to do ill." *Id.* at 612).

This was the evidence presented below. Dr. Hoberman described APD as a diagnosis based on personality traits exhibited by the person and essentially identifies someone who fails to comport with social norms and comply with the law (Tr. 421, 430). Dr. Gunnin said the diagnosis is based on a pattern of behavior involving committing crimes in general (Vid.Tr. 21-22). She said that “the definition of antisocial personality disorder is really just a description of behavior. It doesn’t involve the motivation for that behavior.” (Vid.Tr. 41). Dr. Sisk said that a diagnosis of APD is just “a description of a set of behaviors” (Tr. 767).

Again, Mr. Murrell needs to discuss *In the Matter of the Care and Treatment of Pate*, 137 S.W.3d 492 (Mo. App., E.D. 2004) and *In the Matter of the Care and Treatment of Boone*, 147 S.W.3d 801 (Mo. App., E.D. 2004), as this issue was raised in those cases. Although the issue was raised in *Pate*, it had not been preserved with an objection at trial and the Court therefore denied it without review. *Pate*, 137 S.W.3d at 496. The issue was preserved in *Boone*, but the Court denied it without a written opinion pursuant to Rule 84.16(b). *Boone*, 147 S.W.3d at 806-807. Mr. Murrell therefore cannot point specifically to any error in the Court’s reasoning. He can only suggest to this Court that based on the argument above, the opinion of the Eastern District of the Court of Appeals was wrong.

Because, a diagnosis of APD fails to qualify as a mental abnormality sufficient to support involuntary commitment as a sexually violent predator, evidence of that diagnosis is not admissible on that issue. The probate court abused its discretion in permitting the State to offer that diagnosis to the jurors as a basis for Mr. Murrell's commitment. The remedy most generally appropriate for admission of improper evidence would be a retrial without that evidence. But since the State's sole basis for Mr. Murrell's civil commitment as a sexually violent predator was the presence of APD, without that evidence the State's evidence is insufficient. The appropriate remedy in Mr. Murrell's case is his discharge from custody.

IV.

The trial court abused its discretion in admitting Dr. Hoberman's testimony, over Mr. Murrell's objection, on the results of the Static-99 and MnSOST-R actuarial instruments applied to him by Dr. Hoberman, in violation of Mr. Murrell's right to due process of law and a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that the results were logically and legally irrelevant since they do not address the specific question at issue whether - Mr. Murrell is more likely than not to reoffend - and they confuse the issue and mislead the jurors because the actuarial instruments reflect only the results of group analysis, the similarities between the sample group and Mr. Murrell or any other individual is unknown, and the group results cannot predict the behavior of any specific individual.

Mr. Murrell filed a pre-trial motion in limine to exclude any evidence regarding his risk to reoffend based on the Static-99 and MnSOST-R actuarial instruments because those results are not relevant to whether he, individually, is a sexually violent predator under the meaning of the statute (Sup. L.F. 1-4). He pointed out in his motion that the instruments do not purport to predict how he,

as opposed to the sample group used in the instruments, is more likely than not to engage in predatory acts of sexual violence in the future (Sup. L.F. 1-4).

Mr. Murrell objected at trial to Dr. Hoberman's testimony regarding the results of the Static-99 and MnSOST-R calculations he made for him, but the trial court overruled the objection and permitted the testimony (Tr. 471-472). Mr. Murrell renewed this objection in his motion for new trial (L.F. 294-295), preserving the issue for review.

The determination whether to admit evidence rests in the sound discretion of the trial court. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App., S.D. 2004). An abuse of that discretion occurs when the trial court's ruling is so arbitrary and unreasonable that it shocks the sense of justice and is clearly against the logic of the surrounding circumstances. *Estate of Dean*, 967 S.W.2d 219, 224 (Mo. App., W.D. 1998).

Mr. Murrell recognizes that the actuarial instruments were found to be admissible in sexually violent predator proceedings pursuant to Section 490.065, RSMo 2000, in *In the Matter of the Care and Treatment of Goddard*, 144 S.W.3d 848, 851 (Mo. App., S.D. 2004). Section 490.065.1 provides that in any civil action, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. The Southern District Court of

Appeals held that the actuarial instruments are this sort of scientific evidence. 144 S.W.3d at 852.

But *Goddard* is not a complete answer to the objection raised by Mr. Murrell. Section 490.065.1 is essentially the same as Federal Rule of Evidence 702, and FRE 702 is interpreted as “impos[ing] a special obligation upon a trial judge to ‘ensure that any and all scientific testimony ... is not only *relevant*, but *reliable*.” 144 S.W.3d at 852-853. (emphasis added). The *Goddard* opinion addressed the question of reliability, or scientific validity, of the actuarial instruments. *Id.* at 853. Mr. Murrell’s objection goes to the relevancy of the evidence. By its terms, evidence is admissible under Section 490.065 only if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Evidence is not admissible simply because it is scientifically valid, it must also be relevant to the case.

FRE 702 uses the same language of assistance to the trier of fact to understand the evidence or determine a fact in issue. This condition of the rule goes primarily to relevance. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993). “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” *Id.* (citation omitted). In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999), the United States Supreme Court explained that *Daubert* held that FRE 702 imposes a special obligation on

the trial court to ensure that scientific evidence was not only relevant, but also reliable. The *Goddard* Court quoted *Kumho Tire*. 144 S.W.3d at 853. A trial court is authorized to exclude evidence offered under Section 490.065 which is irrelevant, immaterial or collateral to the proceeding. *Estate of Dean*, 967 S.W.2d at 224. Indeed, it must do so.

Fundamental to the Missouri law of evidence is the rule that evidence must be both logically and legally relevant. *Shelton*, 130 S.W.3d at 37. Evidence is inadmissible if it fails to satisfy either prong of this bifurcated standard. *Id.* Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Id.* Legal relevance balances the probative value of the proffered evidence against its prejudicial effect on the jury. *Id.* Legal relevance is determined by weighing the probative value of evidence against its costs, including unfair prejudice, confusion of the issues, and misleading the jurors. *Id.* Even if logically relevant, evidence will be excluded if its costs outweigh its benefits. *Id.*

The State made an effort to establish the logical evidence of the actuarial instruments. It had Dr. Hoberman testify that the Static-99 and MnSOST-R are recommended by the authors of a couple of authoritative texts (Tr. 485-486), that they are used by the Missouri Department of Mental Health (Tr. 472-473), that the Static-99 is used in fifteen of the seventeen states with civil commitment laws

for sexually violent predators (Tr. 521) and the MnSOST-R is used in fourteen of those seventeen states (Tr. 555). The instruments are comprised of a number of items shown by research to be statistically significant to risk of reoffense (Tr. 521-522, 476-478).

The problem with this proof is that it is the individual factors, not the actuarial instrument assessment, which are shown by research to be significant to reoffense. It is the presence of those factors, and the significance of each on the potential risk, that may be of consequence in determining Mr. Murrell's risk to reoffend. A classification based upon the success or failure of a sample group does not have the same consequence. There is little probative value in the instrument as it relates to any individual.

Dr. Hoberman admitted as much at trial. He said that there is no way to tell if Mr. Murrell really will commit another sexually violent offense if released (Tr. 498).³ Dr. Hoberman admitted that he was offering nothing more than possibilities and probabilities (Tr. 499). He admitted that he did not know if the persons in the Static-99 sample group had a paraphilia, or APD, or serious difficulty controlling behavior (Tr. 527). Dr. Hoberman admitted that there was

³ Actually, there is a way to determine that. Release him. Dr. Hoberman can never be proven wrong as long as jurors commit the individual to secure confinement.

no way to tell whether Mr. Murrell would have been in the fifty-two percent of the sample group that reoffended or within the forty-eight percent of the sample group that did not (Tr. 528).

While Dr. Hoberman was not specifically asked below, Mr. Murrell believes these same uncertainties apply to the MnSOST-R. In fact, it is based on a sample group of about 1,000 people rather than the sample group of 30,000 that formed the basis of the Static-99 (Tr. 522-523, 530). It would seem to have even less relevance to a single individual.

So, this evidence becomes confusing and misleading. It confuses individual risk with group risk, and it misleads jurors by causing them to substitute the behavior of unknown members of a sample group for that of Mr. Murrell. Even if the evidence has some logical relevance, which would be minimal at best, its prejudicial effect grossly outweighs its logical relevance. The trial court abused its discretion in admitting the evidence over Mr. Murrell's objection.

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

CONCLUSION

Because the SVP act violates due process of law by not requiring proof of current, immediate, or imminent danger to involuntarily commit the person, as set out in Point I, it is unconstitutional. The trial court erred in denying Mr. Murrell's motion to find the statutes unconstitutional and to dismiss the petition against him and Mr. Murrell's commitment must be reversed and he must be released. Because the diagnosed antisocial personality disorder fails to distinguish the dangerous sexual offender whose serious illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case, as set out in Point II, the evidence was insufficient to support Mr. Murrell's civil commitment, and the probate court's judgment and order must be reversed and Mr. Murrell must be released. Because the probate court abused its discretion in permitting evidence of the diagnosis of APD, as set out in Point III, and because it was the sole basis for Mr. Murrell's civil commitment as a sexually violent predator, the judgment of the probate court must be reversed and Mr. Murrell must be released. Because the probate court abused its discretion in permitting evidence regarding the Static-99 and MnSOST-R over Mr. Murrell's objection, as set out in Point IV, his commitment must be reversed and the cause remanded for a new trial.

Respectfully submitted,



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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
PROBATE DIVISION

FILED
MAR 03 2005
PROBATE CLERK, MO. J.C.C.

IN THE MATTER OF THE CARE)
AND TREATMENT OF)
MARK A. MURRELL,)
Respondent.)

Case No. 181550

Pursuant to Missouri Statutes Annotated)
§632.480 through §632.513 (Supp. 1999))
Sexually Violent Predators, Civil)
Commitment.)

JUDGMENT AND COMMITMENT ORDER

Respondent has been found, beyond a reasonable doubt, to be a sexually violent predator under Mo. Rev. Stat. §632.480, by a unanimous jury verdict on the 3rd day of March, 2005.

IT IS THEREFORE ORDERED AND ADJUDGED that Respondent is a sexually violent predator and, as such, is committed to the custody of the director of the Department of Mental Health for control, care and treatment until such time as Respondent's mental abnormality has so changed that he is safe to be at large.

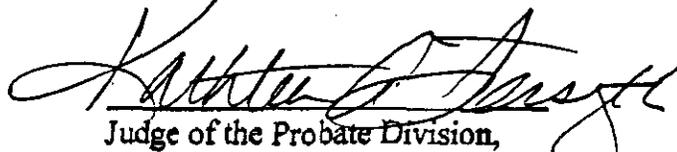
IT IS THEREFORE ORDERED that Respondent shall be kept in a secure facility.

IT IS FURTHER ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff of Jackson County, who shall forthwith execute these orders.

IT IS FURTHER ORDERED that the Sheriff of Jackson County shall deliver Respondent into the custody of the Department of Mental Health located at the Missouri Sex Offender Treatment Center, Farmington, Missouri.

IT IS SO ORDERED AND ADJUDGED.

Dated this 3rd day of March, 2005.


Judge of the Probate Division,
Circuit Court, Jackson County, Missouri