

IN THE SUPREME COURT OF MISSOURI

SC87804

**In the Matter of the Care
and Treatment of Mark Murrell,**

Appellant,

v.

State of Missouri,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On March 2, 2005, a Jackson County jury determined that Mark Murrell is a Sexually Violent Predator. LF 280.¹ The facts, viewed in the light most favorable to the verdict, are as follows:

Mark Murrell pled guilty to child molestation in the 2nd degree on December 10, 1996. LF 1-2. According to Murrell, he was watching movies with a 13 year old and her 14 year old friend when, during the second movie, he got tired and rested his hand on the “chest” of the victim. He stated that because the victim had not developed breasts, he saw no reason he could not touch her. LF 8.

Sixteen years before Murrell pled guilty to child molestation, in 1980, he was convicted of rape. Murrell approached the victims with a double barrel shotgun and abducted one of the victims from her vehicle. Murrell forced the victim to engage in oral sex and vaginal intercourse. Before releasing the victim, Murrell held the shotgun to her throat and told her – “I know where you live, you have a son, if you finger me, I will kill you.” LF 7. Murrell downplayed the rape as a date rape and indicated that the victim had been inviting men at a party to have intercourse with her. He further stated that he did not believe she was frightened of the shotgun because he carried it with him wherever he went. LF 7. Murrell was sentenced to 15 years. LF 7. Murrell committed the rape only three months after he had been arrested for aggravated battery. LF 6. He was sentenced

¹ The record below consists of a Legal File (LF), Supplemental Legal File (SLF), a Trial Transcript (Tr), and a Video Transcript of Dr. Gunnin’s testimony (Vid. Tr.).

to serve a concurrent 10-year sentence on that charge. LF 6.

At Murrell's pretrial evaluation in September 1979, before he pled guilty to rape, Murrell acknowledged he had problems with drugs and alcohol and wanted to stop using them because he didn't want any more trouble with the law. Tr. 446.

Between the 1980 rape conviction and the 1996 child molestation conviction, Murrell spent little time outside of the Department of Corrections (DOC). In 1991, while under parole for the rape conviction, Murrell was arrested for unlawful use of a weapon and cocaine possession. LF 7-8. Murrell was convicted of these charges and his parole was revoked. LF 8.

Again, at the time he was returned to DOC, Murrell admitted that he has a problem with drugs and alcohol and said he only gets in trouble when he's drinking and that he needs help with drinking. Tr. 447. But Murrell did not complete any programs to help his drinking problem. Tr. 448. In June 1992, Murrell's parole officer reported that Murrell: "Is viewed as having virtually no inner control system. His behavior while on conditional release is viewed by this officer as running wild with no sincere desire to change, no conscious effort on his part to refrain from chemical use." Tr. 451.

During Murrell's subsequent incarceration for child molestation, Murrell indicates in a self-assessment that "[b]ehaviors occur due to instinct and you have no control over them." Tr. 452. Later, in February 2000, after taking some anger management classes and shortly before his scheduled release, Murrell stated that he did not find the classes helpful and that he didn't believe he should change but planned on going back to his old

way of life. Tr. 453.

On January 24, 2000, DOC notified the Attorney General that Murrell may meet the criteria of a sexually violent predator (SVP). LF 1. On February 24, 2000, the Prosecutor's Review Committee met pursuant to Section 632.483 and determined that Murrell meets the definition of an SVP. LF 2, 15. The Attorney General filed a petition to have Murrell committed as an SVP. LF 1-15.

In August 2000, Dr. Deborah Gunnin, a psychologist with the Department of Mental Health (DMH), conducted an SVP evaluation of Murrell. LF 89-99. Dr. Gunnin concluded that: 1) Murrell suffered from Antisocial Personality Disorder (APD) as well as Depressive Disorder and Polysubstance Dependence; and 2) Murrell, based on Dr. Gunnin's calculation of his scores on the Static-99 and MnSOST-R as well as his APD, was more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. LF 98-99.

On the Static-99 actuarial measure Murrell scored a 5, placing him in the "medium-high" risk category for committing another sexual offense. LF 98. Research indicates that 40% of sex offenders with that score were reconvicted of a sexual offense within 15 years of release. LF 98-99.

On the MnSOST-R scale, Murrell's score of 14 placed him in the "very high" risk level range. Individuals scoring over 12 had an 88% risk of being rearrested for a sexual offense within six years of release. LF 99. As Dr. Gunnin noted, both the reconviction rate measured by the Static-99 and the rearrest rate measured by the MnSOST-R are

lower rates than the actual reoffense rate. She concluded that Murrell's likelihood of committing another sexual offense is greater than the 40% reconviction rate predicted by the Static-99 and the 88% rearrest rate predicted by the MnSOST-R. LF 99.

While Murrell's SVP case was pending, the United States Supreme Court decided *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002), and this Court decided *In the Matter of the Care and Treatment of Thomas v. State*, 74 S.W.3d 789 (Mo.banc 2002). Both decisions required a linkage between a person's mental abnormality and that person's difficulty in controlling his behavior. *Id.* at 791 (*citing Crane*, 534 U.S. at 412). The trial court ordered Dr. Gunnin to prepare a supplemental report to determine if Murrell suffered from a mental abnormality that causes him serious difficulty in controlling his behavior. LF 117.

In October 2002, Dr. Gunnin reevaluated Murrell and interviewed him. LF 119. Murrell told Dr. Gunnin that he did not "go to extremes" with his mood due to medications he was taking. LF 119. He also described his desire not to reoffend and stated that his religious beliefs and medications are important factors that will help him refrain from committing future crimes. LF 119. Dr. Gunnin noted that Murrell's scores on the Static-99 and MnSOST-R were unchanged from the previous evaluation. LF 120. Dr. Gunnin also diagnosed Murrell as having APD, as she had before. LF 121. Notably, Dr. Gunnin's report included the following statement: "The disinhibition that results from substance abuse, along with feelings of depression and hopelessness and his antisocial thinking patterns appear to lead the respondent to have difficulty controlling his

sexual offending and other criminal behavior.” LF 120-21. Nevertheless, Dr. Gunnin concluded that there is “inconclusive” evidence to indicate whether Murrell has control of his behavior and chooses to act in a sexually or otherwise violent manner, or whether he has serious difficulty controlling his behavior. LF 121.

Murrell was tried before a jury March 2005 to determine whether he was an SVP. Tr. I-II. The State called one of Murrell’s rape victims, Kimberly Bramell, to the stand. Tr. 367-68. She testified that Murrell and two other men separated her from her friend Vicky and took them in two separate cars to a house. Tr. 372-73. She testified that Murrell and two other men ordered her and her friend to take their clothes off. Tr. 373-74. She testified that the man referred to as Red (Murrell) had a gun and was pointing it at them. Tr. 371-72, 374. Kimberly said that she and her friend were taken to separate rooms where each of the men “took turns with us.” Tr. 374. She said that Murrell had forced sex with her several times and made her perform oral sex on him. Tr. 375. Kimberly recalled that Murrell threatened to kill her if she told anyone and that, while in the room with Murrell, “he’d grab the side of your hair and smack your head on the floor.” Tr. 376. Finally, she testified that Murrell knew what he was doing and was not intoxicated. Tr. 379.

The State also called a psychologist, Dr. Harry Hoberman, to comment on Murrell’s criminal history, mental abnormality, and conduct while in custody. Dr. Hoberman testified that he reviewed all of Murrell’s law enforcement and DOC files but did not have an opportunity to interview Mr. Murrell. Tr. 404-05. Dr. Hoberman

concluded that Murrell has the characteristics of an SVP. Tr. 418.

He testified that Murrell suffers from APD, a mental abnormality. Tr. 420. He noted that this condition is manifested by a pervasive pattern of disregard for the rights of others and must be a pattern that has occurred since age 15. Dr. Hoberman testified that Murrell fit this pattern. Tr. 420-21. He noted that those with APD act impulsively and that Murrell's crimes, including his sex crimes, appear to be impulsive. Tr. 421-22. Dr. Hoberman further noted that Murrell's behavior is characterized by irritability and aggressiveness. Tr. 423. He believed that both Murrell's criminal record, use of a weapon and his aggressive tendencies while in custody supported this conclusion. Tr. 423-24. Dr. Hoberman characterized Murrell as irresponsible in that he has failed to complete the treatment programs offered to him, even when he has stated that his goal is to change his life. Tr. 425. Finally, Dr. Hoberman concluded that Murrell lacked remorse for his past crimes. Tr. 426. In all, he concluded that Murrell met six of the seven criteria for APD – a person need only meet three criteria to be diagnosed with APD. Tr. 426.

Dr. Hoberman testified that the manner in which Murrell committed his crimes illustrated that his APD caused him serious difficulty in controlling his behavior. In commenting on Murrell's sex offenses, Dr. Hoberman thought it notable that Murrell committed both offenses, the rape and the molestation, multiple times even though the victims protested. Tr. 436. He also noted that Murrell did not seem concerned with his surroundings at the time of his crimes – he abducted the rape victim from outside a

convenience store and touched the breast of a 13 year old girl in full view of her friend.

Tr. 437. Dr. Hoberman stated that the impulsive nature of Murrell's crimes – along with no real attempt to conceal the crime – pointed to Murrell's serious difficulty in controlling his behavior. Tr. 437.

Dr. Hoberman also discussed Murrell's repeated behavior of refusing to take his medication when he is upset, which results in his becoming more out of control. Tr. 439. Dr. Hoberman discussed specific instances where Murrell threatened staff or other residents during his most recent custody. In January 2003, he was angry because his smoking times were shortened and responded by threatening the clinical director of the program. Tr. 456. He was put in protective isolation and kicked the door repeatedly. Murrell threatened to smear feces around the room and challenged one of the staff by saying: "You want a piece of me?" Tr. 456. In June 2003, Murrell again threatened staff, was put in isolation, and then threatened to urinate on the floor. Later, he acknowledged that he "[l]ost his temper and acted somewhat out of control." Tr. 457. He was put in isolation a second time in June 2003 for threatening another resident when he said: "I'll get your ass, punk, when staff is not around." Tr. 457.

Murrell's pattern of threats and intimidation, and his refusal to take medications when he becomes upset continued through 2003. He had three more aggressive episodes in 2004. Tr. 458-59. Finally, in January 2005, just before trial, a medical note said that Murrell's mood and emotions remain labile – they go up and down – and they become worse when things happen that he doesn't like. Tr. 459. After reviewing Murrell's

background, Dr. Hoberman concluded that his mental abnormality, APD, causes him serious difficulty in controlling his behavior. Tr. 459-60.

Dr. Hoberman next testified as to Murrell's scores on the Static-99 and MnSOST-R – tools to determine Murrell's future risk of committing a future sex offense. Tr. 472-486. Dr. Hoberman said that in almost every case, DMH evaluators use at least one of these measures, and typically both, to determine future risk. Tr. 473.

On the Static-99, Dr. Hoberman scored Murrell in the high category – a category associated with a 52% chance of reconviction for a sex offense within a 15-year period. Tr. 476.

Dr. Hoberman also scored Murrell on the MnSOST-R, which measures the risk of a person being arrested for a future sex offense and contains more criteria (16) for making a determination of risk as compared to the Static-99. Tr. 476-77. Dr. Hoberman stated that the MnSOST-R is a less conservative measure of risk because it measures rearrest as opposed to reconviction. Tr. 478. Dr. Hoberman, like Dr. Gunnin, found that Murrell was in the highest risk category under the MnSOST-R and that those offenders in this category, according to the most recent research, had a 72% chance of being rearrested for a sex offense over a six-year period. Tr. 478-79.

Dr. Hoberman testified that, in addition to the factors considered in the actuarial tools, other factors, like sexual arousal, age, personality disorder, and treatment completion are considered to gauge an offender's future risk. Tr. 480-81. While Dr. Hoberman admitted that Murrell's age was not a significant factor because he is older, he

noted that Murrell's personality disorder and failure to complete treatment would make Murrell more likely to reoffend. Tr. 484, 490. Dr. Hoberman then commented on factors that Murrell had stated would help keep him from offending – religion and medication. As for religion, Dr. Hoberman said there is no identifiable factor in the medical literature that indicates the impact of religion on a person's likelihood of reoffending. Tr. 492. Dr. Hoberman testified that Murrell's medications, prescribed to stabilize his moods, would lower his risk to some degree to the extent they soothed him. Tr. 493. But Dr. Hoberman went on to say that Murrell has been repeatedly non-compliant with his medications and that he would not likely be compliant in taking his medications outside a structured setting. Tr. 494.

Based on all of Murrell's institutional records, Dr. Hoberman concluded that he has APD, that the APD creates serious difficulty for Murrell to control his behavior, and that he is likely to commit future sexually violent offenses. Tr. 497.

Murrell called Dr. Gregory Sisk, a psychologist, as his expert witness. Tr. 709. Like Dr. Hoberman, Dr. Sisk testified that he reviewed Murrell's institutional records. Tr. 736. In addition, Dr. Sisk interviewed Murrell over the course of two days. Tr. 737-38. Dr. Sisk diagnosed Murrell with a major depressive disorder, polysubstance abuse and APD. Tr. 743-46. Dr. Sisk did not believe that Murrell suffered from a mental abnormality because neither APD or the other conditions mention a tendency to commit sexual offenses. Tr. 750-51. Dr. Sisk testified that, because Murrell's sex offense convictions were 17 years apart, there is no pattern to his sex offending. Tr. 754. He also

testified that, unlike other cases he had reviewed, there is no evidence that Murrell attempted to engage in sexual conduct while in custody. Tr. 756. Dr. Sisk testified that Murrell would have to be diagnosed with both APD and a paraphilia in order to be predisposed to commit a sexually violent offense. Tr. 758.

Dr. Sisk also believed that, while Murrell might have some difficulty controlling his behavior, it was not serious difficulty. Tr. 759. Dr. Sisk cited that Murrell had 17 years between the two sex offenses. Tr. 760. He also testified that Murrell, when he committed child molestation, waited until the girl's friend left the room before he touched her, stopped when she asked him to stop, and then, when he touched her again, did so on the outside of her clothing. Dr. Sisk construed that behavior as an example of Murrell's self control. Tr. 760-61. He concluded that, because Murrell's APD was not a mental abnormality and he did not have serious difficulty controlling his APD, Murrell was not an SVP. Tr. 767-68.

On cross-examination, Dr. Sisk admitted that, during his deposition, he said that APD could qualify as a mental abnormality. Tr. 788. He also stated at deposition that APD could predispose a person to commit a sexually violent offense. Tr. 789. Dr. Sisk also admitted that, on his evaluation of Murrell, he stated that APD could meet the statutory definition of mental abnormality and that Murrell **does appear** to be this type. Tr. 809 (emphasis added). Dr. Sisk testified that he omitted the word "not" from his report. Tr. 809.

Murrell also testified at trial. Tr. 585. He testified that he did not remember much

about the night of the rape and initially made an excuse that it was a party that got out of hand. Tr. 593. He testified that, when he was sent to prison in 1996 for child molestation, he accepted Christ and gave up the name Red. Tr. 603. But in response to the next question – ‘You told that to a counselor, there was kind of a struggle between Mark and Red’ – Murrell responded – ‘There is.’ Tr. 603. Murrell said that, when he was baptized in 2000, Red was permanently laid to rest. Tr. 605-06.

Murrell said that, while in prison, he would stop taking his medications from time to time but would always go back to it. Tr. 609. He also admitted to the same pattern of refusing medications while in his current custody. Tr. 611. He cited frustration as the reason for refusing his medications and that he would always start taking them again before they completely left his system. Tr. 611-12. Murrell admitted that he has always been ‘pretty much an aggressive individual, both verbally and physically.’ Tr. 613.

Murrell said that, to make a fresh start, he planned to move to St. Louis. Tr. 634-35. He further testified that he had contacted an agency called Adapt that would help him with medications until he located a doctor. Tr. 636-37. Murrell said that his religion, combined with his medications and a desire to do good, would allow him to break from his past criminal behavior. Tr. 639.

On cross-examination, Murrell denied that there is still a struggle between Mark and Red. Tr. 649-50. Murrell testified that he did not complete the Missouri Sexual Offender Treatment Program (MOSOP) because there was a conflict in one of the groups. Tr. 653. Murrell said that, even though he was a Christian and on medication, he was

verbally aggressive in treatment. Tr. 654.

In a previous deposition in 2003, Murrell said, in response to a question about verbal outbursts or confrontations with staff, that he had just a few problems in 2000. Tr. 662. Murrell testified that he used to communicate in an aggressive manner but that he was learning to communicate with people in the proper way. Tr. 666. But Murrell admitted that, even though he knows that his behavior is being monitored and noted, he has not been able to refrain from cursing at people, refusing to take medication, and making threats. Tr. 667. He explained that he believed by expressing himself he was indicating his desire to get help. Tr. 667.

At the conclusion of the testimony, the jury found Murrell to be an SVP. LF 280. The trial court committed Murrell to the Department of Mental Health for treatment. LF 312. Murrell filed this appeal. LF 316.

ARGUMENT

I. Denial of motion to dismiss which asserted that the SVP law violates due process because it does not require immediate or imminent risk.

Mr. Murrell, in Point I of his brief, suggests that the Sexually Violent Predator law (SVP) violates his due process because it does not require a jury to find that his mental abnormality makes him more likely than not to “commit a sexually violent offense in the immediate future.” App. Br. at 32.² His argument fails because the SVP law satisfies due process – it requires the State to prove Murrell currently suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Standard of Review

This Court reviews issues of law de novo. *Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 840 (Mo.banc 2005). Where a statute is challenged as being unconstitutional, this Court presumes that the statute is constitutional, and the burden of proof to show otherwise rests on the challenger. *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et. al. v. Nixon*, 185 S.W.3d 685, 688 (Mo.banc 2006). “This Court will not invalidate a statute unless it clearly and

² This Court is scheduled to hear oral arguments relating to a similar challenge on September 14, 2006 in the case *In the Matter of the Care and Treatment of Elliott v. State*, SC87746.

undoubtedly contravenes the constitution and plainly and palpably affronts the fundamental law embodied in the constitution.” *Id.*, quoting *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo.banc 2000) (citations omitted).

Analysis

Murrell’s due process argument appears to hinge on the first part of the definition of “sexually violent predator” at Section 632.480(5)³:

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 . . .

The language is clear. The State must prove, and the jury must find, that Murrell now: 1) **suffers** from a mental abnormality; and 2) such abnormality **makes** him more likely than not to engage in predatory sexual acts. Murrell’s argument that the court must find that such future act is more likely than not to occur in the immediate future adds words to the statute that he implicitly concedes are not there.

And they were omitted with good reason. While there have been great strides in predicting future behavior of sex offenders, there is no mental health tool that can conclusively predict whether Murrell will commit another sexually violent offense next week, next month or next year. When it wrote the statute, the legislature recognized that to draft a higher level of certainty into the law would emasculate its purpose: to provide

³ All statutory references are to RSMo Supp. 2005 unless otherwise noted.

appropriate custody and treatment for those sex offenders that are more likely than not to commit future sex offenses.

Murrell argues that due process requires that immediacy be read into the law. His is certainly an upstream battle; courts in at least five other states have considered, and rejected, similar due process challenges to the one Murrell makes here.

In *Hubbart v. Superior Court*, 969 P.2d 584 (Ca. 1999), Hubbart challenged the California SVP law in that it permitted civil commitment of a sex offender based on the “mere likelihood” that the offender might commit similar crimes “at some unspecified time in the future.” *Id.* at 599. Hubbart argued that such a remote or speculative threat of harm violated due process. *Id.* The court rejected his claim. It held that the California statute contained adequate due process requirements in that it defined an SVP as a convicted sex offender who “*has* a diagnosed mental disorder that *makes* the person a danger to the health and safety of others in that it *is* likely that he or she will engage in sexually violent criminal behavior.” *Id.* (citing Cal. Welf. & Inst. Code, Section 6600, subdivision (a) Cal. Rev. St.) (emphasis added). The court found this language to clearly require the trier of fact to find that an SVP is dangerous at the time of commitment. *Id.*

Like California law, Missouri’s SVP law requires proof of current dangerousness to distinguish Murrell from other sex offenders. The person must suffer from a mental abnormality that predisposes the person to commit sexually violent offenses **in a degree** constituting such person a menace to the health and safety of others. Section 632.480(2). Further, it requires that this mental abnormality makes the person “more likely than not”

to engage in future predatory acts if not otherwise confined in a secure facility. Section 632.480(5).

When faced with similar due process claims, other states have adopted the *Hubbart* holding: *Martin v. Reinstein*, 987 P.2d 779, 801 (Arizona 1999); *Hudson v. State*, 825 So.2d 460, 467 (Florida 2002); *Beasley v. Mollett*, 95 S.W.3d 590, 599 (Texas 2002); *In re the Detention of Selby*, 710 S.W.3d 249 (Iowa 2005).⁴

In *Beasley*, a group of sex offenders committed at trial argued that Texas' SVP law violated due process because it did not require that the likelihood of future predatory acts of sexual violence be "imminent" or "substantial." *Id.* at 599. They relied in part on *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979). *Beasley*, 955 S.W.3d at 600. In *Addington*, the court held that a requirement that the State prove, by clear and convincing evidence, the grounds for committing a person for mental health purposes satisfied due process. *Id.* (citing *Addington* at 441 U.S. 433).

The court noted that under the Texas SVP law, the State had to prove the person was a predator beyond a reasonable doubt – a higher burden than articulated in *Addington*. The court also focused on the language in Texas' law, very similar to Missouri's statute, requiring that the person's mental condition predisposes him to commit sexually violent offenses to the extent the person becomes a "menace" to the

⁴ For comparison, the text of California's SVP definition and those of Arizona, Florida, Iowa and Texas are included in the Appendix.

health and safety of another person. *Id.* (citing Tx. Rev. St. 841.002(2)). The court recognized that the term “menace” means a threat or imminent danger. *Id.* at 599, 600. In upholding Texas’ statute, the court found, by the statute’s own terms, the state must prove a substantial threat or imminent risk of future harm if the person is released. *Id.* Such a burden satisfies due process and the court rejected adding an additional burden to the statute. *Id.* at 601.

Facts

Aside from the actuarial evidence that Murrell cites in his brief (App. Br. 38) the court considered evidence regarding Murrell’s risk of committing future sex offenses based on his own criminal history. Some of the most striking testimony highlighted Murrell’s repeated pattern of committing new offenses – including sex offenses – shortly after release from prison and while still under supervision. Dr. Hoberman testified regarding this pattern.

Murrell was arrested and charged with stabbing in December 1978. Tr. 440. Just four months later, while on conditional release, he was charged with rape. LF 7. He plead guilty to both crimes and was sentenced to 15 years for the rape and 10 years concurrent for the stabbing. LF 6-7, Tr. 442. In June 1991, Murrell was released. Tr. 442. But only five months later, while still on parole, he was arrested for driving while intoxicated and carrying a concealed weapon. LF 8, Tr. 442. Murrell was sent back to prison in January 2002. Tr. 443. Murrell violated parole again, three months after release, when he left a halfway house without permission. Tr. 444. He was sent back to

prison to serve the rest of his sentence. Tr. 444. Only months after his release in 1995, Murrell was arrested for child molestation in April 1996 and later convicted. LF 8.

Murrell has consistently reoffended within months after release. This history, combined with the impulsiveness of his crimes (Tr. 455) shows that, whenever Murrell has had a window of freedom, he has committed serious offenses, sexual and otherwise.

Missouri's statute requires a present showing of dangerousness in that the state must prove that the person have an existing mental condition predisposing the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. Section 632.480(2). This mental abnormality must make the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. Section 632.480(5). The state must prove this beyond a reasonable doubt. Section 632.495. Missouri's SVP statute satisfies due process and Murrell's challenge on this point should be denied.

II. Admission of evidence of the Static-99 and MnSOST-R actuarial instruments.

Murrell argues in Point IV of his brief that the trial court abused its discretion in admitting Murrell's scores on the Static-99 and MnSOST-R. He claims those scores are prejudicial because they represent an estimate of future risk of offenders like Murrell but do nothing to establish Murrell's individual risk of reoffense if released. App. Br. 61-62.

Standard of Review

“A trial court has considerable discretion in determining whether evidence should be admitted or excluded.” *In the Matter of the Care and Treatment of Cokes*, 183 S.W.3d 281, 285 (Mo. App. W.D. 2005), *citing Lewis v. State*, 152 S.W.3d 325, 330 (Mo. App. W.D. 2004). A court abuses its discretion “only when the exclusion of evidence shocks the sense of justice or indicates an absence of careful consideration.” *Cokes*, 183 S.W.3d at 285. “Even then, we will not reverse unless the error had a material effect on the merits of the action.” *Id.*

Applicable Laws of Evidence

Evidence must be relevant to be admissible. *Eltiste v. Ford Motor Company*, 167 S.W.3d 742, 747 (Mo. App. E.D. 2005). Expert testimony, pursuant to Section 490.065, must be supported by evidence upon which experts in that field reasonably rely. *Koontz v. Ferber*, 870 S.W.2d. 885, 892 (Mo. App. W.D. 1993). Murrell thinks that actuarial evidence measuring recidivism rates of sex offenders is irrelevant because it represents conduct of others and not him. The court should reject this argument: In trying to predict future behavior of individuals in a certain class – like sex offenders – actuarials are

widely accepted by those psychologists who analyze sex offenders. The court exercised sound discretion in allowing this evidence.

In fact, Murrell acknowledges that the Court of Appeals, Southern District, held the Static-99 and MnSOST-R studies admissible in SVP proceedings pursuant to Section 490.065. App. Br. 581. *In the Matter of the Care and Treatment of Goddard*, 144 S.W.3d 848, 851 (Mo. App. S.D. 2004). Goddard challenged the admissibility of these actuarial instruments – he argued that the State did not show that these tools were “reasonably relied upon by experts in the field in forming opinions” or were “otherwise reasonably reliable.” *Id.*

The Southern District rejected Goddard’s challenge, noting that testimony at trial showed: 1) the instruments are widely used among experts in the field of sex offender diagnosis and treatment; 2) the State offered textbooks demonstrating the validity of these instruments; and 3) these instruments had been subject to peer review and publication. *Id.* at 853. The Court noted that, while Goddard had attempted to attack the admissibility of the actuarial evidence under Section 490.065.3, it took the view that Section 490.065.1 was the more appropriate provision to measure admissibility because actuarial instruments are a type of “scientific evidence.” *Id.* at 852. It also noted, however, that both provisions must be considered in determining admissibility and “[i]n some cases, the line distinguishing the two can be difficult to ascertain and may involve similar questions.” *Id.* at 855.

Murrell, acknowledging that *Goddard* allows scientific evidence like the Static-99

and MnSOST-R to be admitted in SVP cases, nevertheless claims the prejudicial impact of this evidence outweighs any probative value. In essence, Murrell argues that, regardless of how he scored on the Static-99 and MnSOST-R scales, this evidence – based as it is on the reoffense history of other sex offenders – should not have been admitted in his case. App. Br. 61.

Murrell argues that, while individual factors have been shown by research “to be significant to reoffense” (App. Br. 61), that “[a] classification based upon the success or failure of a sample group does not have the same consequence” when evaluating individual risk. App. Br. 61.

The State agrees that a classification as determined by an actuarial tool like the Static-99 or the MnSOST-R does not have the “same consequence” as looking at the individual factors in isolation – it has **more** consequence. Such a tool takes the totality of an individual’s risk factors into account to determine the likelihood of that individual reoffending.

At trial, the State called Dr. Harry Hoberman to discuss the methodologies of the Static-99 and MnSOST-R actuarial studies. The following is a portion of Dr. Hoberman’s testimony on the Static-99 as applied to Mr. Murrell:

Q. Describe to the jury what the Static-99 is.

A. Static-99 is a ten-item measure that was developed by looking at the characteristics of approximately 4,000 sex offenders in four different samples and looking to see which characteristics were associated with their

likelihood of reoffending as defined by reconviction, so in effect, the most conservative measure of sex offense reoffending actually getting convicted. And those people - - and in that study, in the original study I should say, people were followed, they were able to follow people up for 15 years. They have data on reconviction rates for up to 15 years.

Q. What kind of characteristic did they find indicated a person had an increased risk for violence that are accounted for on that particular instrument?

A. The items that make up the Static-99 would be things like prior sex offense history as measured by arrests or convictions; that carries the strongest rate, if you will; a history of general violence. So, that also are two of the items, the number of prior sentencing occasions is a measure of the general criminal history if a person has been sentenced and the demographics, like marital status and age. And lastly, what are victim characteristics; was the victim a stranger, unrelated male, was it - - basically the ten items of that Static-99.

Tr. 473-74.

Later, Dr. Hoberman testified as to what Murrell's Static-99 score indicated as to his risk for reoffense:

Q. As a result of the Static-99 instrument that you did, after you've accounted for all of Murrell's information and added it up, what did the instrument tell

you about Mr. Murrell's risk?

A. It tells me a person with Mr. Murrell's characteristics falls into the high category of the Static-99.

Q. And what are the other categories, just generally speaking?

A. Generally speaking, low, low medium, medium high, and then high.

Q. And according to that instrument, he is in the high?

A. As I scored the instrument, he is in the high category.

Tr. 475-76.

Not only did Dr. Hoberman thoroughly explain the methodology of these instruments, he also testified as to their general acceptance in the field of sex offender evaluation (Tr. 485), cited to an authoritative text, "Evaluating Sex Offenders," that advocates the use of the Static-99 and the MnSOST-R (Tr. 485-86), stated that 15 of the 17 states that have civil commitment laws use the Static-99 instrument (Tr. 521), and that there have been 22 cross validation studies of the Static-99. Tr. 523. Each of these pieces of testimony go toward establishing the legitimacy of these actuarial studies in assessing sex offender risk and, therefore, the reliability of such studies. *In the Matter of the Care and Treatment of Goddard*, 144 S.W.3d at 853.

In rebutting this testimony, Murrell cites to Hoberman's responses on cross examination that there is no way to know if Murrell will reoffend (App. Br. 61, Tr. 498), and that he was offering no more than possibilities or probabilities of whether Murrell would reoffend. App. Br. 61, Tr. 499. From this testimony, Murrell concludes that the

actuarial evidence “becomes confusing and misleading” (App. Br. 62) and that the trial court abused its discretion in admitting the evidence over his objection.

This type of concern has been addressed by the Iowa Supreme Court. *In Re Detention of Holtz*, 653 N.W.2d 613 (Iowa 2004). At Holtz’ SVP trial, the State called an expert witness, Dr. Caton Roberts, who conducted actuarial studies (including the Static-99 and MnSOST-R) which, along with a full clinical evaluation of Holtz, led him to conclude that Holtz was “more likely than not to engage in” future sex offenses. *Id.* at 616-17.

The court then considered the testimony of the two expert witnesses for Mr. Holtz, both of whom acknowledged their approval of these actuarial instruments as long as they were not the sole basis for the expert’s assessment. One expert, on direct examination, also conceded that if the actuarials are used to make predictions, then it is acceptable to use them in combination with other clinical observations. *Id.* at 618.

The court, upheld the trial court’s decision to admit this evidence over the objection of Holtz and cited the trial court’s rationale:

I agree that it’s very important that once those measuring tools are discussed and introduced into a case that full and complete cross-examination and disclosure about limitations of those tests be disclosed to the jury. That happened here. It was very clearly explained to the jury that the inquiry needs to go farther than simply a reliance on those measuring tools.

Id. As in *Holtz*, there was extensive testimony from Dr. Hoberman, both on direct and

cross-examination, regarding: 1) the importance of using the actuarial tool as a complement to a direct clinical review; and 2) the limitations of the actuarial tool in making firm conclusions.

On direct examination, Dr. Hoberman first testified regarding Murrell's offense history and personal characteristics and how those factors guided his conclusion that Murrell has a mental abnormality (Tr. 460) and that, based on this abnormality, he is more likely than not to reoffend if not committed. Tr. 460. It is only subsequent to providing these conclusions, based on the clinical assessment, that Dr. Hoberman testified regarding the actuarial tools and how they corroborate his clinical assessment. Tr. 463-497. Along the way, Dr. Hoberman acknowledged that the actuarial tools cannot measure all variables – for example sexual arousal and completion of treatment (Tr. 480-81) – this type of testimony decreases the likelihood Murrell was prejudiced by Dr. Hoberman's testimony regarding the actuarial studies.

Ultimately, the court in *Holtz* agreed with the lower court's conclusion that the actuarial evidence, when used in the context of all the evidence presented, goes to the weight of that evidence rather than its admissibility. *Id.* at 619. As in *Holtz*, the trial below examined the background of these actuarial tests, their application and general acceptance among experts who evaluate sex offenders for future risk, and their limitations. As such, the court was correct in admitting the evidence.

Murrell's claim that the trial court erred in admitting this evidence should likewise be denied.

III. Admission of evidence of Antisocial Personality Disorder (APD) as a mental abnormality.

In Murrell's Points II and III, he challenges the admission of expert testimony that he suffers from antisocial personality disorder (APD) (Point III, App. Br. 57) and further argues that, even if admissible, APD is an "insufficiently precise" diagnosis because such a diagnosis is not limited to those offenders with a propensity to commit sex crimes.

Point II, App. Br. at 39. As both points relate to the same topic – Murrell's APD – Respondent will address both here.

Standard of Review – Admissibility of APD Diagnosis

When reviewing a court's decision to admit evidence over objection, appellate courts should defer to the trial court's judgment absent an abuse of discretion. *In the Matter of the Care and Treatment of Cokes* 183 S.W.3d 281, 285 (Mo. App. W.D. 2005).

Admission of Murrell's APD Diagnosis

Murrell attempted, through a Motion in Limine before trial (LF 193 -200), and a motion at trial (Tr. 419) to exclude Dr. Hoberman's testimony that Murrell suffers from APD and his later testimony that Murrell's APD causes him serious difficulty controlling his behavior. Tr. 432-434. The trial judge denied Murrell's objections both before and at trial. LF 193; Tr. 434.

Dr. Hoberman testified regarding his basis for diagnosing Murrell with APD. He cited the Diagnostic and Statistical Manual (DSM-IV-TR), which sets out the criteria for APD. Tr. 419-20. The criteria include but are not limited to: 1) a pervasive pattern of

disregard for the rights of others (Tr. 419); 2) such pattern has occurred since age 15 (Tr. 420); 3) impulsivity or failure to plan ahead (Tr. 421); 4) irritability and aggressiveness (Tr. 423); and 5) lack of remorse. Tr. 426.

In determining that Murrell met the criteria for APD, Dr. Hoberman testified that: 1) Murrell demonstrated a pattern of disregarding the rights of others in terms of both his criminal conduct and repeated threats he has made while incarcerated (Tr. 424); 2) Murrell's pattern of disregarding these rights manifested by age 15 in that his arrest record goes back to age 12 (Tr. 421, 427); 3) Murrell's crimes involved impulse rather than premeditation or planning (Tr. 421-22); 4) Murrell's offense history and threats while incarcerated demonstrate aggressiveness (Tr. 423); and 5) Murrell has shown little, if any remorse toward his victims. Tr. 426. Finally, both Dr. Gunnin, the DMH psychologist, and Dr. Sisk, Murrell's expert, also diagnosed Murrell with APD. Tr. 429; Vid. Tr. 19, 37; Tr. 746.

Legal Analysis

Murrell's objection to admission of his APD diagnosis is that this diagnosis is "too imprecise" because it does not distinguish offenders whose sexually violent conduct stems from that abnormality from those offenders who, "by virtue of their deviant conduct may be described as abnormal but whose abnormality only traces, in circular fashion, back to their conduct." App. Br. 54 citing *Hubbart v. Superior Court*, 969 P.2d 584, 611 (Cal. 1999) (concurring opinion from J. Werdegar, Jr.).

Murrell's reasoning, citing to one judge's concurring opinion, is off base. The

statute does not require every offender suffering from APD, or any other mental abnormality, be classified as an SVP. Rather, it only classifies as an SVP a person “who suffers from a mental abnormality” making that person “more likely than not” to engage in predatory acts of sexual violence if not confined in a secure facility. Section 632.480(5). To determine this issue, the court must look to the diagnosis in combination with the facts of that offender’s background.

Missouri courts have held that APD is a mental abnormality that can support an ultimate finding that a person is an SVP. *In the Matter of the Care and Treatment of Pate*, 137 S.W.3d 492 (Mo. App. E.D. 2004); *In the Matter of the Care and Treatment of Heikes*, 170 S.W.3d 482 (Mo. App. W.D. 2005).

Both the Eastern and Western Districts of the Court of Appeals held that APD can constitute a mental abnormality if three statutory elements are met: 1) the disorder is a “congenital or acquired condition”; 2) the disorder impacts “emotional or volitional capacity which predisposes the person to commit sexually violent offenses”; and 3) the person has serious difficulty controlling his behavior. *Heikes* 170 S.W.3d 486 (citing *Pate*, 137 S.W.3d 497-98). In both cases, the court concluded that the person’s APD was a mental abnormality. *Heikes*, 170 S.W.3d at 486; *Pate*, 137 S.W.3d at 497-98. That conclusion is consistent with a recent decision by the United States Court of Appeals for the Eighth Circuit addressing whether there was sufficient evidence to determine a sex offender diagnosed with APD lacked adequate control over his impulses. *Linehan v. Milczark*, 315 F.3d 920, 929 (8th Cir. 2003).

Linehan has a complex history. Beginning in 1956, Linehan committed a number of sex crimes and was incarcerated in 1965 for kidnaping. *Id.* at 922. After escaping from confinement in 1975, Linehan sexually assaulted a 12 year old girl. *Id.* Before his scheduled release, the State of Minnesota petitioned for civil commitment under the Minnesota Psychopathic Personality Act and the trial court committed him as a psychopathic personality. *Id.*

The Minnesota Supreme Court vacated Linehan's commitment, concluding that the state had failed to prove that Linehan exhibited "utter lack of power to control" his sexual impulses as required under the Psychopathic Personality Act. *Id.* The Minnesota legislature then enacted the Sexually Dangerous Persons Act, authorizing civil commitment if the state can show: 1) past sexual violence; 2) present mental, personality, or sexual disorder or dysfunction; and 3) resultant likelihood of future sexually dangerous behavior. The state proceeded to seek Linehan's commitment under the new act. *Id.* at 923.

The Minnesota Supreme Court upheld the constitutionality of the new law but the U.S. Supreme Court granted certiorari, vacated the judgment and remanded the case for further consideration in light of its decision in *Hendricks v. Kansas*, 521 U.S. 346, 117 S.Ct. 2072 (1997). *Id.* On remand and in light of *Hendricks*, the Minnesota Supreme Court construed the Sexually Dangerous Persons Act to require that the state prove that those civilly committed be:

sexually dangerous persons who have engaged in a prior course of sexually

harmful behavior and whose present disorder or dysfunction does not allow them to adequately control their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future.

Id. at 924 (citing *In Re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999)). The court concluded that Linehan’s “lack of adequate control” was sufficiently established during his commitment proceedings. *Id.*

Linehan ultimately filed a petition for a writ of habeas corpus, challenging the constitutionality of the Minnesota law and seeking release from confinement. The United States District Court recommended denial of the petition and Linehan subsequently appealed to the Eighth Circuit for review. *Id.*

On appeal, Linehan argued that the Minnesota law did not meet substantive due process because it required less proof of volitional impairment than required by *Hendricks* as later clarified by *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002). *Id.* The Eighth Circuit held that Minnesota’s standard that the state prove “a lack of adequate control” associated with the mental abnormality, along with the required findings of past sexual violence and likelihood of future sexually dangerous behavior:

. . . will adequately distinguish an offender subject to civil commitment, who has difficulty controlling his behavior because of a disorder or dysfunction, from the more typical offender with behavioral problems, who is best dealt with in the criminal system

Id. at 927.

The reasoning of the Eighth Circuit also applies to Mr. Murrell. His mental abnormality, APD, is the reason for his serious difficulty controlling his behavior. The state presented sufficient evidence that Murrell's condition, combined with his past history of sex offenses and continuing difficulty in controlling his behavior – even while in treatment – distinguishes Murrell from other sex offenders and qualifies him as an SVP.

Facts of this Case

The record below provides adequate evidence that Murrell's APD was a mental abnormality. The disorder manifest at an early age – Dr. Hoberman testified that Murrell was placed in a juvenile facility twice before age 15 for forgery and stealing a car. Tr. 427-428. Murrell himself confirmed this. Tr. 588. Further, Murrell continued to commit additional crimes as he reached adulthood; the record shows that Murrell was incapable of following the law and that he had substantial difficulty controlling his behavior.

In December 1978, he was arrested for a stabbing and released on bond. Tr. 440-41. In March 1979, while on conditional release, he was arrested for rape. Tr. 441. In 1980 he plead guilty to rape and began serving a 15 year sentence. Tr. 442. Shortly after that sentence began, he plead guilty to aggravated battery for the 1978 stabbing. Tr. 440, 442.

After being paroled in June 1991, Murrell was arrested in November 1991 for DWI, carrying a concealed weapon and cocaine possession. Tr. 442-43. Based on these offenses, Murrell was sentenced to serve four years starting in January 1992. Tr. 443.

In July 1994, Murrell was paroled a second time. But in October 1994 he violated parole by leaving a halfway house without permission. Tr. 444. He was arrested for being intoxicated at a known drug house and returned to prison. Tr. 444. He completed the underlying sentence in 1995. Tr. 444.

Then, about four months after his release, in March 1996, he was arrested for child molestation and sentenced to four years. Tr. 444-45.

While Murrell's criminal behavior indicates serious difficulty in controlling his behavior, Murrell dismisses the APD diagnosis as one that merely shows that Murrell fails to comport with social norms and comply with the law. He also relies on testimony from Dr. Gunnin, the DMH psychologist who initially concluded that Murrell's APD qualified him as a sexually violent predator but, on her second review, said she could not determine whether that diagnosis meant that he had serious difficulty controlling his behavior. Vid. Tr. 45.⁵ The essence of Dr. Gunnin's videotaped testimony is that, under the "serious difficulty" prong, she could not determine whether Murrell simply chose to engage in antisocial behavior or whether his APD diagnosis made it seriously difficult to control that behavior.

Despite Dr. Gunnin's change in her conclusion, there was ample evidence put

⁵ Her analysis of Murrell on the 2nd evaluation was conducted after the Supreme Court decided *Crane*, which required the judge or jury to find that a person had serious difficulty controlling his behavior as a result of his mental abnormality.

before the trial court that, even when in custody, Murrell had serious difficulty controlling his behavior. This evidence focused on: 1) his spoken need for treatment but failure to follow through; and 2) his aggressive, threatening behavior even while in custody.

Failure to Obtain Treatment

Dr. Hoberman testified regarding Murrell's failure to follow through on treatment offered to him while in Department of Corrections. In 1979, he acknowledged that he had a drug problem and wanted to stop. Tr. 446. Murrell repeated this concern 12 years later, in 1991, when he admitted that he had a problem with drugs and alcohol and needed help with drinking. Tr. 447. But he did not complete any programs to deal with the problem. Tr. 448. As a result, Murrell did not obtain the necessary treatment in prison to transition back into the community. Dr. Hoberman testified that Murrell's parole officer viewed Murrell "as having virtually no inner control system. His behavior while on conditional release is viewed by this officer as running wild with no sincere desire to change, no conscious effort on his part to refrain from chemical use." Tr. 451.

Dr. Hoberman testified about Murrell's continuing struggles to maintain control over his behavior after he was convicted of child molestation. In 1997, Murrell indicated that when he gets depressed it feels like someone else takes over – he identifies that person as 'Red' – and he also notes in a self-assessment that "[b]ehaviors occur due to instinct and you have no control over them." Tr. 452.

In 2000, Murrell indicated the anger management group was not helpful and he expressed the belief that he doesn't believe that he should change his plans on going back

to his old way of life. Tr. 453.

Murrell never completed the sex offender treatment program offered by the Department of Corrections. Tr. 653-54.

Aggressive, Threatening Behavior While in Custody

There was evidence that Murrell, even during his most recent custody, was unable to control his behavior. As Dr. Hoberman testified, Murrell had substantial problems “with periods of irritability and at least verbal aggression”. Tr. 423. Dr. Hoberman recounted that in January 2003, Murrell threatened the clinical director because the smoking times had been shortened. Tr. 456. As a result, he was placed in protective isolation – but, even then, he repeatedly kicked the door of the cell, threatened to smear feces around the room, and challenged one of the staff by saying: “You want to have a piece of me?” Tr. 456.

In June 2003, Murrell made another threat to staff and was placed in isolation. Tr. 457. Later, Murrell acknowledged that he “[l]ost his temper and acted somewhat out of control”. Tr. 457.

According to Dr. Hoberman, based on his review of Murrell’s file, Murrell had subsequent aggressive outbursts in October 2003 and May 2004, and, in November 2004, decided not to take medications from a nurse because he was angry the nurse brushed up against him. Tr. 458. In December 2004, he responded to someone who asks whether he will be involved in the Christmas program by saying: “Fuck that faggot shit”. Tr. 458-59. Finally, in January 2005, a month or so before his trial, a medical note on Murrell

stated that his mood and emotions go up and down and become worse when things happen he doesn't like. Tr. 459.

Based on the evidence of Murrell's outbursts and his failure to follow up on his stated desire for treatment – especially in light of his criminal history – Dr. Hoberman concluded that Murrell's APD is a mental abnormality causing serious difficulty in controlling his behavior and that he is an SVP. Tr. 459-60.

Comparing Linehan with Murrell

Murrell argues that *Linehan* is distinguishable because the Minnesota court held that Linehan lacked adequate control over his “sexual behavior.” App. Br. 50-51; *Linehan*, 315 F.3d at 928 (citing *In Re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999)). Murrell's argument is based on a false premise: that the state must show that his serious difficulty in controlling behavior is limited to difficulty in controlling sexual behavior. That is not the lesson of *Kansas v. Crane*, 534 U.S. 407 (122 S.Ct. 867 (2002)), and this Court should not accept Murrell's invitation to narrow the *Crane* standard further.

In *Crane*, the court held that the state is not required to prove that an SVP have absolutely no control over his dangerous behavior. *Id.* at 870. Rather, the Court, reflecting on its decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 (1997):

recognize[d] that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision.

It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features

of the case as the nature of psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Crane 534 U.S. 413 (citing *Hendricks*, 521 U.S. at 357-57).

In reviewing the record, there is ample evidence that Murrell's APD triggered acts against others, as reflected by his convictions as well as his unpredictable conduct while in custody, that distinguished him from the typical recidivist.

Beyond the testimony of the experts, Murrell's own testimony is enlightening in understanding that his APD is unchanged and that he has difficulty controlling his behavior. Even at trial, on direct examination, Murrell was unable to take full responsibility or express remorse for the rapes he committed 25 years before:

Q. Now, tell me what happened. What happened that night?

A. I really don't remember too much about that night, but I accept what the girls said happened.

...

Q. And I know maybe initially you denied anything had happened; you said it was just a party that got out of hand, right?

A. Initially I did make an excuse. After talking to Terry and Donny, it was an extremely rough situation and - - excuse me, that's a

polite way - - I basically lied to cover what **might** have happened.

Tr. 593-94 (emphasis added).

Later, Murrell was questioned about whether he can truly control his behavior now and why the jury should believe him. Murrell answered that his religion, medication and “self-desire to do good” – all working together – will allow him to change. Tr. 639. But on cross-examination, Murrell admitted that he has, at times, refused to take his medications that help control his behavior and those are times when he gets angry or frustrated with staff:

Q. You said, one thing you said in response to Mr. Locke was there were times when you have refused to take your medication, right?

A. Yes, sir, there has been.

Q. And you’ve generally done that when you’ve gotten angry at somebody or something, right?

A. Or frustrated.

Q. So, the time when you need the medicine the most, when you’re angry and you’re frustrated are the times that you’ve refused to take it; right?

A. Not in all incidents, no, sir.

Q. Now, you said that at one point you refused to take the medication because you were having problems getting along with a few people there and you didn’t know how to communicate with people; do you

remember that?

A. I may have said that.

Tr. 665-66. Later, Murrell responded to questions about seven documented cases where he threatened staff or other residents with the same answer each time: – “I may have.” Tr. 669-70. These answers show that Murrell either does not recognize that his behavior is wrong, or is unwilling to come to grips with his behavior.

As for religion, Murrell was questioned about a time during his first prison commitment, in 1981, when his probation and parole file indicated that Murrell appeared to have a sincere interest in church and appeared sincere in his religious convictions. Tr. 703-04. Murrell responded that he was singing in choir at the time, and that was pretty much it. Tr. 704. In further testimony, Murrell admits that, despite his regular study of the Bible, he has not been able to fully control his anger or his acting out on his anger. Tr. 706-07.

This testimony, along with the testimony of Dr. Hoberman, illustrates the continuing struggle Murrell has in attempting to gain control over his behavior.

Dr. Sisk’s Testimony

Murrell called Dr. Gregory Sisk to testify about his mental condition and whether that condition caused Murrell serious difficulty in controlling his behavior. While Dr. Sisk agreed with the other experts that Murrell had APD (Tr. 746), he disagreed with Drs. Hoberman and Gunnin that APD qualified as a mental abnormality because nothing about that abnormality mentions anything about a tendency to commit sex offenses. Tr. 751-52.

In support of his position, Dr. Sisk noted that Murrell's crimes did not establish a pattern of sexual criminal behavior. He noted that there were 17 years between the rape offense and the child molestation offense. Tr. 753-54. He also felt like Murrell's sex crimes – one rape and another child molestation – supported his position that there was no abnormality because the two crimes did not comport with sex offense patterns he was used to seeing in those with mental abnormalities, like paraphilia and sexual sadism.

Finally, Dr. Sisk noted that there were no allegations of sexual offenses while Murrell has been in custody – which he considered to be evidence that Murrell does have control over his behavior. Tr. 756-57, 759. He criticized the examples of Murrell's serious difficulty in controlling his behavior, cited in Dr. Hoberman's testimony, by saying that threats, name-calling, or urinating on the floor do not add up to serious difficulty controlling sexual behavior. Tr. 762.

Dr. Sisk asked for too much – for reasons explained by the Eighth Circuit in *Linehan*. Linehan, like Murrell, had spent the vast majority of his adult life in prison. As a result, the courts must “look for more subtle signs than rape and killing” when evaluating the person's control of behavior. *Id.* at 928 (citation omitted). As a result, the court considered:

Linehan's behavior toward hospital and prison staff in relation to his likelihood of engaging in future harmful conduct and found that his aggressiveness toward both staff and guards indicated an inability to control his behavior even when subject to careful supervision.

Id. Dr. Sisk's conclusion that Murrell's APD is not a mental abnormality is contrary to both Dr. Hoberman's and Dr. Gunnin's conclusion. Moreover, his belief that APD cannot be a mental abnormality for purposes of finding a person to be an SVP has been consistently rejected.

This Court should uphold the trial court's decision to admit evidence of Murrell's APD because there was ample testimony that Murrell suffers from this disorder as well as ample evidence that, for Murrell, his APD causes him serious difficulty in controlling his behavior and makes it more likely than not that he will commit additional sex offenses if not committed to DMH for additional treatment.

CONCLUSION

Murrell's due process challenge to Section 632.480, RSMo, should be denied because, under that statute's existing language, the state must show, beyond a reasonable doubt, that Murrell's current dangerousness makes it more likely than not that he will commit another sex offense if not released. His challenges to the admission of evidence regarding his mental abnormality and the actuarial measures determining risk of other, similarly situated, sex offenders should be denied because the trial court did not abuse its discretion in admitting that evidence over Murrell's objections.

For these reasons, this Court should uphold the trial court's judgment committing Murrell as an SVP.

Respectfully submitted,

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Certification of Service and of Compliance With Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 25th day of August, 2006 two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Emmett D Queener
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Columbia, MO 65201

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 10,649 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.

Assistant Attorney General

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