

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI ex rel.)	
WILBUR SCHOTTEL,)	
)	
Relator,)	
)	SC 87857
vs.)	
)	Clay County Probate Court
THE HONORABLE LARRY D.)	Case No. CV200-88P
HARMAN, JUDGE, CLAY COUNTY)	
PROBATE COURT,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this petition for writ of mandamus by Article V, Section 4 of the Missouri Constitution, and Missouri Supreme Court Rules 84.22 to 84.26, and 94.01 to 94.07.

STATEMENT OF FACTS

Mr. Schottel incorporates the Statement of Facts set out in pages 9 through 11 of his initial brief.

POINT RELIED ON

The Honorable Larry D. Harman erred in ruling that the amended provisions of the Sexually Violent Predator law, which became effective on June 5, 2006, applied to the trial of Mr. Schottel's petition for discharge from custody filed on June 25, 2002, because applying the amendments to the State's burden of proof and the consequence of the State's failure to meet that burden violate the prohibition against retrospective laws in Article I, Section 13 of the Missouri Constitution, in that the burden by which a party must prove its claim is a matter of substantive law, and the imposition of conditional release rather than discharge from commitment interferes with a vested interest and operates in a punitive manner.

American Dredging Co. v. Miller, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994);

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006);

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 172 (Mo. banc 2003);

Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970);

Missouri Constitution, Article I, Section 13; and
Section 632.498, RSMo.

ARGUMENT

The Honorable Larry D. Harman erred in ruling that the amended provisions of the Sexually Violent Predator law, which became effective on June 5, 2006, applied to the trial of Mr. Schottel's petition for discharge from custody filed on June 25, 2002, because applying the amendments to the State's burden of proof and the consequence of the State's failure to meet that burden violate the prohibition against retrospective laws in Article I, Section 13 of the Missouri Constitution, in that the burden by which a party must prove its claim is a matter of substantive law, and the imposition of conditional release rather than discharge from commitment interferes with a vested interest and operates in a punitive manner.

Burden of Proof

The State asserts, as it did below, that the amendment reducing its burden of proof to continue Mr. Schottel's commitment is prospective only because it applies to the future re-trial of the petition he filed in 2002 (Resp. Br. 12). Mr. Schottel noted in his initial brief that this assertion runs afoul of this Court's holding in *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 172 (Mo. banc 2003), that a civil "proceeding" begins with the filing of a petition. An amendment of a substantive law may not be applied retrospectively in a

pending proceeding. Missouri Constitution Article I, Section 13; Section 1.150, RSMo 2000.

The State cites this Court to several cases to support its argument that the amendment in its burden of proof can be applied to Mr. Schottel's re-trial because it simply affects the conduct of the trial. The cases cited by the State involved procedural changes, which may be applied retrospectively. But those cases did not involve amendment of a party's burden of proving its claim and therefore they do not apply when, as in Mr. Schottel's case, the amendment makes a substantive change.

Beatty, et al. v. State Tax Commission, 912 S.W.2d 492 (Mo. banc 1995), involved the amendment of the definition in the tax code of "residential property." In this regard, *Beatty* is similar to *In the Matter of the Care and Treatment of Spencer*, 123 S.W.3d 166 (Mo. banc 2003), and *In the Matter of the Care and Treatment of Morgan*, 176 S.W.3d 200 (Mo. App., W.D. 2005), which permitted the application of the amended definition of what acts are deemed "predatory." These changes were permitted under the Missouri Constitution and Section 1.150 because they did not make substantive changes in the law. As none of these cases involved a substantive amendment to the State's burden of proof, the State's assertion in its brief that "the statutory change in the burden of proof is prospective in nature," (Resp. Br. 12), is misplaced.

The State cites this Court to two California cases, *Tapia v. Superior Court*, 807 P.2d 434 (Cal. 1991), and *Albertson v. Superior Court*, 23 P.3d 611 (Cal. 2001) (Resp. Br. 12). *Tapia* clearly applied to a procedural matter in the conduct of a trial, the manner of conducting voir dire. *Albertson* did not even involve the conduct of a trial; it involved the ability of the state to secure a pre-trial evaluation of the individual. Neither of these cases involved amendments to the party's burden of proving its claim. Furthermore, as the State noted in its brief (Resp. Br. 7-8), Missouri's bar against retrospective laws in Article I, Section 13, is shared by very few states, and California is not one of them.

The State cites this Court to *State v. Thomaston*, 726 S.W.2d 448 (Mo. App., W.D. 1987), for the proposition that the burden of proof is a procedural matter (Resp. Br. 13-14). This assertion fails to account for the different contexts in which the term "burden of proof" is used. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970). Burden of proof is similar to a rule of evidence, and therefore procedural, when it determines which party has the duty to present evidence on a particular question. *Id.* at 220. This was the situation before the Court in *Thomaston*, the amendatory law re-assigned which party had the burden of proving a particular question.

But unlike *Thomaston*, or the District of Columbia case it relied upon, the amendment in Missouri's SVP law does not re-assign who has the burden of

producing evidence on a particular question. To the contrary, the amendment in the SVP law only amends, by reducing, the burden which remains on the State to prove its claim. In this sense, the burden of proof is not a procedural evidentiary rule controlling who has to produce evidence, but is a substantive matter controlling the standard by which to determine whether the party has proven its claim at all. In this context, the burden of proof is “a part of the very substance of [the] claim and cannot be considered a mere incidence of a form of procedure.” *American Dredging Co. v. Miller*, 510 U.S. 443, 454, 114 S.Ct. 981, 988, 127 L.Ed.2d 285 (1994).

Conditional Release

The State argues that since it has not yet failed to meet its burden of proof for Mr. Schottel’s continued confinement, his right to be discharged from commitment rather than released with conditions upon the State’s failure has not yet vested. Mr. Schottel must disagree.

When Mr. Schottel filed his petition for release in 2002, and when the State attempted to prove in May of 2006 that he was not safe to be at large, Section 632.498 specifically provided that if the State failed to meet its burden of proof Mr. Schottel would be fully discharged from commitment to DMH. But now, if the State fails to meet its burden of proof, Mr. Schottel will not be fully

discharged from commitment, but will remain committed to DMH for the rest of his life and will only be released from secure confinement upon extensive conditions. This amendment in the law imposes a new duty or obligation not permitted under Article I, Section 13 of the Missouri Constitution. *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006).

This Court held in *Doe* that the persons released on probation or parole did not have a vested interest in not being subject to the requirements of the Megan's Law because, "Nothing in the Does' releases from supervision states that no further collateral consequences will be imposed. 194 S.W.3d at 851-852. In contrast, when Mr. Schottel filed his petition, and when he want to trial the first time on his petition, Section 632.498 specifically set out the consequences to follow upon the State's failure to prove its case. The State has now amended those specific consequences to add new duties and obligations upon Mr. Schottel if it cannot prove its case.

CONCLUSION

For all the reasons set forth above and in Mr. Schottel's initial brief, Mr. Schottel prays this Court for its Writ of Mandamus ordering the Honorable Larry D. Harman to apply the provisions of the former law in the pending retrial of Mr. Schottel's petition for discharge.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 1,573 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 12th day of October, 2003, to Cheryl Caponegro Nield, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener