

**IN THE
SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI, ex rel.,
WILBUR SCHOTTEL,**

Relator,

v.

**THE HONORABLE LARRY D. HARMAN,
JUDGE, CLAY COUNTY PROBATE
COURT,**

Respondent.

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Case No. SC87857

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**Appeal from the Circuit Court of Clay County, Missouri
The Honorable Larry D. Harman, Judge**

Respondent's Brief

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Statement of Facts

On June 25, 2002, Schottel filed a petition for release from secure confinement as a sexually violent predator. The court heard the matter in May, 2006, but the jury could not reach a unanimous verdict and the court had to declare a mistrial.

The matter was re-set for the end of June, 2006. Meanwhile, on June 5, 2006, the Governor signed H.B. 1698, which went into effect that same day under the law's emergency clause.

Prior to the enactment of H.B. 1698, the state had the burden at a release hearing to prove beyond a reasonable doubt that the SVP's condition remained such that he was not safe to be at large. Under the new law, the state's burden has changed, from beyond a reasonable doubt, to by clear and convincing evidence. The new version of the law also provides that if the SVP is released, he will be subject to continued supervision by the Department of Mental Health so that his condition may be monitored. This is in contrast to the prior version of the law, where an SVP was simply released if the State could not prove that he continued to be dangerous.

Schottel filed a motion in the probate court asking the court to apply the version of the law as it existed prior to June 5, 2006 (A1-A18). The State asked the court to apply the current version of the law (A19-A28). On June 26, 2006,

respondent Judge Harman entered his order that the new version of the law would be applied at Schottel's upcoming release hearing (A29).

Schottel filed a petition for writ of mandamus in the Missouri Court of Appeals, Western District. On July 17, 2006, that Court denied the writ (A30-31) and Schottel filed his petition in this Court.

Argument

Introduction

In the trial court, Schottel's challenge rested upon the ex post facto clauses of both the United States and Missouri Constitutions (A1, A4). His challenge in this Court, however, is limited to the constitutional claim that the application of the new law to him violates Article I, § 13 of the Missouri Constitution (App. Br. 14).¹ That

¹ Schottel also relies on §1.150, RSMo 2000, opening his ostensibly constitutional argument with the statutory text (App. Br. 14) and asserting, without citation, that §1.150 is "rooted in the Missouri Constitution" and Article I, §13 (App. Br. 15).

Schottel appears to focus on §1.150 because it uses a term that Article I, §13 does not: "proceeding" (App. Br. 30-31, 35-36). But devoid of any demonstrable link to the Missouri Constitution, and lacking any mention in Schottel's point relied on, Schottel's §1.150 claims should be deemed abandoned. See *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002) ("an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court."). That said, §1.150 analysis appears to focus upon vested rights, *Darrah v. Foster*, 355 S.W.2d 24, 30 (Mo. 1962), and, as explained in detail below, Schottel has no such rights here.

section, unique to Missouri and just a small group of other states,² see *Doe v. Phillips*, 194 S.W.3d 833, 849 n.16 (Mo. banc 2006) (hereinafter *Jane Doe I*); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 n.1 (Mo. banc 1993) (hereinafter *John Z. Doe*), bars both ex post facto laws and laws that operate retrospectively:

no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

Ex post facto concerns do not apply

Citing *Jane Doe I*, Schottel argues that Missouri’s bar against retrospective laws is broader than the ex post facto clauses of other state constitutions and therefore “renders the ex post facto language largely superfluous” (App.Br. 15). But while Missouri’s retrospective bar may be broad enough to encompass ex post facto concerns, the analysis under the different portions of §13 is separate and distinct.

² The following states also have a bar against retrospective or retroactive laws: Colorado, New Hampshire, Ohio, Texas, Georgia, and Tennessee.

As this Court noted in *Jane Doe I*, Missouri's ex post facto clause applies to criminal laws only, *Jane Doe I*, 194 S.W.3d at 842; *State v. Thomaston*, 726 S.W.2d 448, 459 (Mo.App., W.D. 1987). But the Missouri Sexually Violent Predator Civil Commitment laws, §§632.480 through 632.513, RSMo, are civil, not criminal statutes. Because the remedy sought – treatment – is not “punishment,” ex post facto prohibitions simply do not apply. See *Smith v. Doe*, 538 U.S. 84, 93-94, 123 S.Ct. 1140 (2003), quoting *Fleming v. Nestor*, 363 U.S. 603, 616, 80 S.Ct. 1367 (1960) (“Where a legislative restriction is an incident of the state’s power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power and not a purpose to add punishment.”). Accordingly, the United States Supreme Court has repeatedly held that proceedings under similar commitment statutes are civil. Indeed, the Court specifically found that the constitutional prohibitions against ex post facto laws do not affect proceedings under the Kansas SVP law, which is similar to Missouri’s law, *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789, 790 (Mo. banc 2002), because those proceedings do not result in “punishment,” and therefore are not criminal. *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2080 (1997).

Schottel’s conclusion, therefore, that “[b]ecause of Article I, Section 13, cases discussing ex post facto laws are as equally persuasive here” (App. Br. 15) is a little wide of the mark. Criminal cases discussing ex post facto concerns are not at all applicable because, again, the sexually violent predator statutory scheme is civil in

nature. Indeed, in its Article I, §13 analysis in *Jane Doe I*, this Court reviewed the history of its cases under that section, *id.*, 194 S.W.3d at 850-51; it did not broaden the analysis to include criminal, ex post facto cases or analysis. Likewise, it should not do so here. See *id.*, 194 S.W.3d at 841 (“because no provision of the federal constitution is comparable to Missouri’s ban on laws retrospective in their operation, Mo. Const. art I, §13, federal decisions provide no guide to this Court’s interpretation of that clause.”).

Prospective and retrospective laws

While Missouri’s ex post facto bar applies to criminal cases, the retrospective bar applies to civil cases. *Thomaston*, 726 S.W.2d at 459; see also *State v. Vashaw*, 312 A.2d 692, 692-93 (N.H. 1973) (New Hampshire Constitution’s retrospective bar “forbids retrospective laws made for the decision of civil causes”). And because of this bar against retrospective application, “[a] statute is presumed to operate prospectively unless the legislative intent for retrospective application clearly appears from the express language of the statute or by necessary or unavoidable implication.” *State Board of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260, 263 (Mo.App., W.D. 2002), citing *Dept. of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. banc 1985).

But while a statute may be retrospective, *i.e.*, its language may apply to conduct that pre-dates the effective date of the statute, Missouri’s Constitution “does not forbid retrospective laws. . . . Instead it condemns laws that *operate*

retrospectively.” *Beatty, et al. v. State Tax Commission*, 912 S.W.2d 492, 496 (Mo. banc 1995), citing *Dial v. Lathrop R-II School District*, 871 S.W.2d 444, 447 (Mo. banc 1994); see also *Jane Doe I*, 194 S.W.3d at 851, quoting *Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm’n*, 702 S.W.2d 77, 81 (Mo. banc 1985) (a law does not operate retrospectively merely “because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage”). “A statute operates retrospectively – is retroactive – if it takes away or impairs a vested or substantial right or imposes a new duty in respect to a past transaction.”³ *Beatty*,

³ Courts use the terms “retrospective” and “retroactive” somewhat differently and somewhat inconsistently. In *Beatty*, this Court equates retroactive with “operates retrospectively.” *Beatty*, 912 S.W.2d at 496. The Court of Appeals, Western District, seems to equate “retroactive” with “retrospective.” See *Thomaston*, 726 S.W.2d at 459 (“the term *retroactive* has been defined as synonymous with the term *retrospective*.”). Colorado, however, draws a distinction between the two terms. *Kuhn v. State*, 924 P.2d 1053, 1056-57 (Colo. 1996) (citations omitted) (“Legislation is applied retroactively when it operates on transactions or rights and obligations that occurred or existed before its effective date” whereas retrospective legislation impairs vested rights or creates new obligations, duties, or disabilities; the former may be constitutional while the latter is

912 S.W.2d at 496, *citing John Z. Doe*, 862 S.W.2d at 340, *citing Lucas v. Murphy*, 348 Mo. 1078, 156 S.W.2d 686, 690 (Mo. banc 1941); *Missouri National Education Association, et al., v. Missouri State Board of Education, et al.*, 34 S.W.3d 266, 284 (Mo.App., W.D. 2000).

In turn, a right has vested where a person has acquired “a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.” *Jane Doe I*, 194 S.W.3d at 851, *quoting La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 525 (Mo. banc 1999), *quoting Fischer v. Reorganized Sch. Dist.*, 567 S.W.2d 647, 649 (Mo. banc 1978). It must be something more than a mere expectation based upon an anticipated continuance of an existing law. *La-Z-Boy Chair Co.*, 983 S.W.2d at 525. A vested right is “fixed, accrued, settled or absolute.” *Id.*

Burden of proof

Applying these principles, the change in the sexually violent predator law as to the burden of proof does not run afoul of Article I, §13 because 1) it is a change that operates prospectively, and 2) it does not implicate a vested right.

not).

As to the former, the statutory change in the burden of proof is prospective in nature. *Cf. Beatty*, 912 S.W.2d at 493, 496 (statute effective August 28, 1995, was, “by its clear language,” retrospective, because it defined “residential property” more broadly than it had been defined in the past, and made the new definition applicable on January 1, 1995). That burden, plainly, is one that the state must shoulder at trial and Schottel’s trial to see if he is safe to be released, albeit not his first, is upcoming. “[A] law governing the conduct of trials is being applied ‘prospectively’ when it is applied to a trial occurring after the law’s effective date.” *Tapia v. Superior Court*, 53 Cal.3d 282, 288-289 (1991). This is true regardless of when the underlying events occurred. *Id.* See also *Albertson v. Superior Court*, 25 Cal.4th 796, 804 (2001) (new statute permitting updated evaluations of SVP’s and access to treatment records applied in both pending and future cases). A change to the burden of proof required in upcoming release trials, including Schottel’s, is a change taking effect in the future. Since the central issue for the jury to decide is whether, at the time of trial, Schottel remains a sexually violent predator (as opposed to whether he was a sexually violent predator prior to June 5, 2006, when the new law went into effect, or whether he was a sexually violent predator in June of 2002, when he filed his release petition), it is appropriate to apply the current burden of proof designated by the legislature to govern release cases yet to be decided.

And as to the latter, Schottel has no vested right that the law governing release hearings will remain static. *La-Z-Boy Chair Co.*, 983 S.W.2d at 525. At the

time of the change in the law, Schottel's release hearing had not yet begun, so the new, and not the old burden of proof should apply.

For similar reasons, and even if the law could be seen to operate retrospectively, Schottel still cannot prevail because a law may operate retrospectively, without running afoul of the state constitution, where it is solely procedural. *Boston*, 72 S.W.3d at 263. And, as to the burden of proof, the Court of Appeals, Western District, has specifically held in similar circumstances that it is procedural in nature:

This court has found no Missouri case which has declared that the burden of proof is a procedural law. This court has reviewed and herein adopts the rule announced in *United States Corporation v. Bruton*, 213 A.2d 892 (D.C. 1965) which states:

There is no vested right in a rule of evidence, and a statute relating solely to procedural law, such as burden of proof and rules of evidence applies to all proceedings after its effective date even though the transaction occurred prior to its enactment.

Thomaston, 726 S.W.2d at 461. See also *Missouri National Education Association*, 34 S.W.3d at 284 ("The constitutional prohibition against retrospective laws does not

apply, however, to a statute that is procedural or remedial in nature because a litigant has no vested rights in matters of procedure.”).

In *Thomaston*, Thomaston petitioned for release, either conditional or unconditional. *Id.* at 450. The court held a hearing during which time the law regarding release changed: “two days after the commencement of the hearing and the submission of appellant’s evidence on September 26, 1985, §552.040 was amended and the effective date of that change was September 28, 1985.” *Id.* at 459. The amended law set out the burden of proof and placed it, in the case of unconditional release, upon the party, and in the case of conditional release, upon the state. *Id.* at 457. Thomaston argued that the new law, placing the burden upon the state, should apply in his case.

The Western District disagreed, with the critical point being that the evidence had already been submitted at the time the statute was amended:

One might presuppose that since appellant had initiated these proceedings prior to the effective date of the amended §552.040, that concluded the matter. That is not the rule. The rule applicable is set forth by our Missouri Supreme Court in the case of *Clark v. Kansas City, St. L. & C.R. Co.*, 219 Mo. 524, 118 S.W. 40, 43 (1909), which holds:

Where a new statute deals with procedure only, prima facie it applies to all actions – those which have accrued or are pending and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in and all things done under the late law will stand unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. If what has been done under the old law is bad or insufficient under that law, it remains so, though it would have

been good if done in the same way under the
new law.

Thomaston, 726 S.W.2d at 462.

In *Thomaston's* case, therefore, the new law did not apply because “the pleading and evidentiary stages of this proceeding had ‘been done under the old law and hence, under *Clark*, that part of the proceeding ‘remains so.’” *Id.*

In *Schottel's* case, in contrast, while his petition was filed in June of 2002, his case was not pending before a jury when the SVP law was amended; rather, a mistrial had been earlier declared. And while that will “remain so” in *Clark* parlance, any new release hearing should be governed by the new law.

Schottel argues that earlier litigation in his case supports application of the old burden of proof (App. Br. 16). But this Court's decision in *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836 (Mo. banc 2005), actually supports the application of the new burden of proof in any hearing going forward. In *Schottel*, the trial judge found that *Schottel* had failed to show probable cause that he was safe to be at large, and thus was not entitled to a hearing on the issue. *Id.* at 840. The Missouri Supreme Court reversed, finding that *Schottel* had shown probable cause, and thus was entitled to a hearing. *Id.* at 843-45.

As to remedy on remand, the State had argued that even though *Schottel* had cleared the probable cause hurdle, he should have to repeat the initial hearing, rather than get an evidentiary hearing, because the statute had changed, “entitling

the committed person to a further hearing only upon a showing by a 'preponderance of the evidence' that the person is safe to be at large and will not re-offend if released." *Id.* at 845.

This Court disagreed, because what was done under the old, probable cause standard, was done:

The Court rejects this approach. Mr. Schottel met his burden at the initial hearing on his second petition for release, a hearing held under the 2000 version of section 632.498, and was thereby entitled to proceed to a second hearing on the merits of his petition. The fact that section 632.498 was later amended to change the burden of proof that Mr. Schottel may be required to meet in the future cannot affect the fact that he met his burden of proof and was entitled to a hearing on the merits of his October 2002 petition for release. Since he was incorrectly denied such a hearing, he is entitled to receive it on remand.

Id.

Here in contrast, nothing has been done as to evidentiary matters on Schottel's petition for release. Indeed, this Court's language from *Schottel* alludes to the proper outcome here: "Section 632.498 was later amended to change the burden of proof that Mr. Schottel may be required to meet in the future." *Id.* at 845.

Consistent with *Clark*, *Thomaston*, and *Schottel*, therefore, the change in the burden of proof is procedural and should be applied to Schottel at any future release hearing.

Release provisions

Schottel argues that if the state cannot prove that he continues to be a danger, then he is entitled to release under the old version of the law, rather than conditional release under the amended version of the law (App. Br. 32-37). Schottel again points to *Jane Doe I* in support of his position.

In *Jane Doe I*, this Court rejected the majority of the Does' claims regarding the alleged unconstitutionality of Missouri's version of Megan's Law and its most recent amendments. In particular as relates to Article I, §13, this Court rejected the Does' argument that once they were released from parole or probation, they "had a vested right to be free from further collateral consequences of their prior pleas of guilty." *Jane Doe I*, 194 S.W.3d at 852. But this Court found that as to those who committed their crimes prior to the enactment of Missouri's Megan's Law, the registration requirement imposed new obligations that operated retrospectively; it held that those requirements look

solely at . . . [the Does'] past conduct and uses that conduct not merely as a basis for future decision-making by the state, in regard to things such as issuance of a license, or as a bar to certain future conduct by the Does,

such as voting. Rather, it specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registry regularly, based solely on their offenses prior to its enactment.

Jane Doe I, 194 S.W.3d at 852.

As noted, Schottel relies upon *Jane Doe I*, but he gets its holding precisely backwards, asserting that “[t]his Court held that the 2006 amendments could not be imposed against the Does, with one exception” (App.Br. 35, citing *Jane Doe I*, 194 S.W.3d at 852). That aside, Schottel argues that as with the Does who pled guilty or were convicted prior to the enactment of Megan’s Law, the new provisions of the SVP law as to release operate retrospectively as to him because had he gained release prior to June 5, 2006, he would have been released without conditions (App.Br. 36).

But unlike the registration requirement in *Jane Doe I*, which required the Does to register based solely upon past convictions of pleas of guilty, the release provisions of the amended SVP law are prospective and forward-looking – they relate not to the SVP’s prior sexual offenses or convictions, but rather to the SVP’s current condition. And while it is true that the SVP’s condition is viewed – following a release hearing – in terms of whether or not the state has shown continued dangerousness, the fact remains that all SVP’s have been adjudicated to have mental abnormalities that predispose them to commit sexually violent and predatory

acts. Under these circumstances, new provisions regarding continued treatment and monitoring look to current mental states and maintaining treatment gains going forward, not looking backwards.

For similar reasons, Schottel and others like him cannot claim a vested right in the old version of the law that simply allowed for release, versus conditional release.

At the time of the statutory amendment, Schottel had not yet gained release. So he had no right to presume that the law as to release would remain the same. *La-Z-Boy Chair Co.*, 983 S.W.2d at 252. Just as a right to be free from suit does not vest until the applicable statute of limitations period has come and gone, see *John Z. Doe*, 862 S.W.2d at 341, so, too, Schottel has no right to be free from further monitoring and treatment since he had not gained release at the time of the statutory amendment.

Moreover, any conditions imposed upon Schottel (again assuming that at any upcoming release hearing the state cannot show that Schottel continues to be a danger) are based upon a legislative determination that, while not perhaps dangerous as in the manner of his original commitment, Schottel and persons like him are in need of continuing assistance to make sure that their conditions do not deteriorate. As noted, a person adjudicated to be an SVP has been determined to have a mental abnormality that makes him more likely than not to commit sexually violent, predatory offenses if not confined in a secure facility. So, while the state may not be able to prove that Schottel's "mental abnormality remains such that . . . [he] is not safe to be at large and if released is likely to engage in acts of sexual

violence,” §632.498.5(3), RSMo Cum. Supp. 2006, Schottel’s original SVP determination means he still has difficulties that members of the general population do not. Thus, the need – made express in H.B. 1698 – for continued monitoring and treatment of SVP’s. Such a determination is well within the legislative province, and here, the legislature made its remedial purpose explicit:

The primary purpose of conditional release is to provide outpatient treatment and monitoring to prevent the person’s condition from deteriorating to the degree that the person would need to be returned to a secure facility designated by the director of the department of mental health.

Section 632.505.1, RSMo Cum. Supp. 2006.

Because of this remedial purpose, even if the release provisions were seen to be retrospective, this would be permissible. After all, there is no fathomable reason why the legislature would want to exclude certain SVP’s from continued monitoring and treatment that may help them stay out of secure facilities in the future based only upon the timing of their lawsuits.

Schottel, though, argues that “remedial” has nothing to do with ameliorating a perceived societal problem; rather, a “remedial statute” is narrowly defined as “one that provides a remedy for an existing cause of action otherwise barred by operation of law” (App. Br. 37, citing *Wilkes v. Missouri Highway and Transportation*

Commission, 762 S.W.2d 27 (Mo. banc 1989) and *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App., S.D. 1994)). But there is no reason to believe that because the statutes at issue in those cases related to sovereign immunity, that this defines the boundaries of the term “remedial” generally or as it is used in the Article I, §13, context. To the contrary, public policy concerns can animate the consideration of whether a statute impairs a vested right; the advancement of societal goals, therefore, is a valid consideration in any retrospectivity analysis. See *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6, 16-17, 21 (Colo. 1993) (in determining whether rights are vested, it is appropriate to balance the effect on the public interest versus whether the statute upsets reasonable reliance and long-held expectations).

Finally, Schottel claims that the amended law improperly imposes new duties and obligations upon him (App. Br. 36). But again, and unlike *Jane Doe I*, the law does not “look solely at past conduct” to require Schottel “to fulfill a new obligation.” *Jane Doe I*, 194 S.W.3d at 852. Rather, the conditional release provisions of the amended law look at an SVP’s condition upon release and going forward, and represent a permissible legislative determination that such persons need continuing assistance if they are to stay out of secure confinement.

Conclusion

In view of the foregoing, respondent submits that the petition for writ of mandamus should be denied and respondent should be permitted to hold a hearing in this matter under the amended version of Missouri's sexually violent predator law.

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 6th day of October, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,766 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.

Deputy Solicitor