

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. SC 87803
LARRY L. COFFMAN,)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE DAVID L. DOWN, JUDGE

APPELLANT'S REPLY BRIEF

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS.....	5
POINT RELIED ON.....	6
ARGUMENT	8
CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

CASES:

Foucha v. Louisiana, 504 U. S. 71, 112 S. Ct. 1780, 118 L.Ed.2d 437
(1992) 9

In re Detention of Elmore, 139 P.3d 1140 (Wash. Ct. App. 2006) 10

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 170 (Mo. banc 2004) 9

In the Matter of the Care and Treatment of Schottel, 159 S.W.3d 836
(Mo. banc 2005) 11

Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).. 9

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) 9

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501
(1997)..... 9

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment 6

Missouri Constitution, Article I, Section 10 7

STATUTES:

632.498, RSMo 2000 8

Section 632.504, RSMo Cum. Supp. 2006 8

JURISDICTIONAL STATEMENT

Mr. Coffman incorporates the jurisdictional statement set out in his opening brief.

STATEMENT OF FACTS

Mr. Coffman incorporates the statement of facts set out in pages 7 through 11 of his opening brief.

POINT RELIED ON¹

III.

The probate court erred in denying Mr. Coffman a trial before a jury or judge to determine whether he is safe to be at large if discharged from commitment or released from secure confinement, in violation of his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the probate court denied Mr. Coffman a jury trial on his petition for discharge by considering only the presence of a “mental abnormality” and disregarding all evidence of a lack of dangerousness or risk to engage in predatory acts of sexual violence if Mr. Coffman is not securely confined.

Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983);

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

In re Detention of Elmore, 139 P.3d 1140, 1145 (Wash. Ct. App. 2006);

In the Matter of the Care and Treatment of Schottel, 159 S.W.3d 836

(Mo. banc 2005);

United States Constitution, Fourteenth Amendment;

¹ Mr. Coffman is replying only to the arguments presented by the State in response to Mr. Coffman’s argument presented in Point III of his opening brief.

Missouri Constitution, Article I, Section 10;

Section 632.498, RSMo 2000; and

Section 632.504, RSMo Cum. Supp. 2006.

ARGUMENT

III.

The probate court erred in denying Mr. Coffman a trial before a jury or judge to determine whether he is safe to be at large if discharged from commitment or released from secure confinement, in violation of his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the probate court denied Mr. Coffman a jury trial on his petition for discharge by considering only the presence of a “mental abnormality” and disregarding all evidence of a lack of dangerousness or risk to engage in predatory acts of sexual violence if Mr. Coffman is not securely confined.

Mr. Coffman did not directly challenge in his opening brief the probate court’s denial of his petition for release on a finding that it was “frivolous” under Section 632.504, RSMo Cum. Supp. 2006. But his argument that he presented sufficient evidence in his petition and accompanying documentation to be entitled to a release trial before a judge or jury pursuant to Section 632.498, RSMo 2000, is more than enough to establish that the judgment of the probate court that the petition was “frivolous” is erroneous.

As it did in the probate court below, the State on appeal relies simply on the language of the release provisions to argue that the only basis for release

from commitment is a change in mental status, a change in the statutorily defined “mental abnormality.” This position is contrary to the instruction of the United States Supreme Court in *Kansas v. Hendricks*, that “[i]f Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee *satisfies the same standards as required for the initial confinement.*” 521 U.S. 346, 364, 117 S.Ct. 2072, 2083, 138 L.Ed.2d 501 (1997) (emphasis added). The standards for the initial confinement require proper procedures and evidentiary standards, a finding of dangerousness, and proof of some *additional factor* such as a mental illness or mental abnormality. *Kansas v. Crane*, 534 U.S. 407, 409-410, 122 S.Ct. 867, 869, 151 L.Ed.2d 856 (2002). Thus, the United States Supreme Court requires *both* a mental abnormality *and* dangerousness. So does the State of Missouri. *See, In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 177 (Mo. banc 2004). These cases follow from the previous holding of the United States Supreme Court in *Jones v. United States*, 463 U.S. 354, 368, 103 S.Ct. 3043, 3052, 77 L.Ed.2d 694 (1983), that “the committed acquittee [following an NGRI] is entitled to release when he has recovered his sanity *or* is not longer dangerous.” (emphasis added). The United States Supreme Court explained that this means that the acquittee may be held only as long as he is *both* mental ill and dangerous, but no longer. *Foucha v. Louisiana*, 504 U. S. 71, 77, 112 S. Ct. 1780, 1784, 118 L.Ed.2d 437 (1992). The

State's efforts to continue Mr. Coffman's detention on the sole basis of a mental abnormality alone violates due process of law.

In fact, the State's argument contains a concession that physical condition as well as mental condition can serve as a basis for release when it referred this Court to the Washington case *In re Detention of Elmore*, 139 P.3d 1140, 1145 (Wash. Ct. App. 2006). (Resp. Br. at 27). The Court in *Elmore* noted that a person's condition has so changed to be released from confinement if there has been a substantial change in the person's *physical* or mental condition. *Id.*

The remainder of the State's argument is that the change in Mr. Coffman's physical condition is insufficiently substantial. But that is significantly different than arguing that Mr. Coffman's petition alleging a change in his physical condition failed to present a basis for release. This argument presents an issue of fact determined by the weight of the evidence, not a failure to allege a basis for release under the statute rendering the petition "frivolous."

It appears from the State's arguments regarding the effects of Mr. Coffman's physical infirmities and its reference to the Washington court's explanation that the physical changes must be similar to paralysis, stroke or dementia and must be permanent that the State is suggesting that Mr. Coffman must allege the impossibility of reoffending to qualify for release. This Court has previously rejected the notion that a committed person must prove the impossibility of reoffense to gain his release from confinement. The language of

the release statutes “is not intended to require proof of certainty, but merely to constitute a shorthand way of referring to the requirement that the petitioner must make a preliminary showing that he is not likely to engage in further acts of sexual violence...” *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836, 842 (Mo. banc 2005). “The petitioner need not show a certainty, but merely that there is probable cause to believe that he is safe to be at large and is more likely than not to not reoffend.” *Id.*

Mr. Coffman has clearly met this burden. He provided the court with medical reports of his physical limitations; his chronic oxygen deprivation and dependence upon oxygen assistance, the exacerbation of this limitation upon even minor exertion, the limitation of his mobility which is restricted to a wheel chair. These conditions are permanent (L.F. 36). And his medical expert has informed the court that because of these limitations he “no longer presents as more likely than not to commit predatory acts of sexual violence because he is too physically debilitated.” (L.F. 37).

Mr. Coffman has presented the probate court with evidence which, if believed by the jurors at a release trial, demonstrates that the danger he may have once posed - that he presents a risk more likely than not to reoffend in a sexually violent manner - no longer exists. Without this risk of danger he can no longer be confined by the State. His petition is not frivolous, and in fact is sufficient to warrant a release trial before a judge or jury.

CONCLUSION

This Court should declare the 2004 amendment of Section 632.498 unconstitutional as set out in Points I and II. At a minimum, this Court should reverse the probate court's order and judgment, and remand this cause to the probate court for a probable cause hearing consistent with due process and equal protection of the law. But because the probate court erred in denying Mr. Coffman's petition without submitting the case to a judge or jury in a discharge trial, as set out in Point III, this Court should reverse the judgment of the probate court and remand this cause to the probate court for a discharge trial before a judge or jury.

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 1,527 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 October, 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 ___ day of _____, 2007, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener