

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. DOWD, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	6
STATEMENT OF FACTS.....	7
POINTS RELIED ON	12
ARGUMENT	
Point I, The 2004 amendment of Section 632.498 violates	
due process of law	17
Point II, The 2004 amendment of Section 632.498 violates	
equal protection of the law	25
Point III, Mr. Coffman demonstrated probable cause to believe	
that he is safe to be at large	30
CONCLUSION.....	36
APPENDIX	38

TABLE OF AUTHORITIES

Page

CASES:

Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)
..... 22

Detention of Peterson, 42 P.3d 952 (Wash.Sup.Ct., 2002) 12, 20, 21

Ex parte Wilson, 48 2d 919 (Mo. 1932) 13, 25

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)
..... 15, 33

In the Matter of the Care and Treatment of Amonette, 98 S.W.3d 593 (Mo. App.,
E.D. 2003) 32

In the Matter of the Care and Treatment of Cokes, 183 S.W.3d 281 (Mo. App.,
W.D. 2005)..... 34, 35

In the Matter of the Care and Treatment of Lewis, 152 S.W.3d 325 (Mo. App.,
W.D. 2004)..... 34

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 170 (Mo. banc
2004)..... 11, 13, 15, 18, 21, 23, 26, 30, 32, 33

In the Matter of the Care and Treatment of Schottel, 159 S.W.3d 836 (Mo. banc
2005) 11, 15, 19, 21, 32, 33

In the Matter of the Care and Treatment of Thomas, 74 S.W.3d 789 (Mo. banc
2002) 18

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) 15, 33

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)
 33

Newbill v. Forrester-Gaffney, 181 S.W.3d 114 (Mo. App., E.D. 2005) 22

Ware v. Ware, 647 S.W.2d 582 (Mo. App., E.D. 1983) 12, 22

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment 12, 13, 15

Missouri Constitution, Article I, Section 2 13

Missouri Constitution, Article I, Section 10 12, 15

STATUTES:

Section 632.305, RSMo 2000 13

Section 632.330, RSMo 2000 13

Section 632.340, RSMo 2000 13

Section 632.355, RSMo 2000 13

Section 632.360, RSMo 2000 14

Section 632.400, RSMo 2000 14

Section 632.498, RSMo 2000 12, 14, 18, 19

Section 632.498, RSMo 2004 12, 14, 19, 20, 21, 27

JURISDICTIONAL STATEMENT

Larry L. Coffman appeals the order of the Honorable David L. Dowd, Probate Judge, Circuit Court of the City of St. Louis, Missouri, denying Mr. Coffman's petition for discharge from commitment to the Department of Mental Health as a sexually violent predator without submitting the petition to a jury trial. Mr. Coffman sought a declaration that the 2004 amendment to the release provisions of Section 632.498 is unconstitutional. Jurisdiction therefore lies in the Missouri Supreme Court. Article V, Section 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The State filed a petition on July 27, 2000, to involuntarily commit Larry Coffman to the custody of the Department of Mental Health (DMH) as a sexually violent predator (L.F. 1).¹ Mr. Coffman was committed to DMH on January 13, 2004, following a jury trial (L.F. 12).

Mr. Coffman filed a petition for release from that commitment pursuant to Section 632.498, RSMo, on March 7, 2006 (L.F. 18-37). He requested that the probate court apply the standard entitling him to a jury trial described by the Missouri Supreme Court in *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836, 841-843 (Mo. banc 2000): “a preliminary showing that he is not likely to engage in further acts of sexual violence[.]... The [person seeking release] 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.” (L.F. 19).

Along with his petition for discharge, Mr. Coffman challenged the constitutionality of the 2004 amendment to Section 632.498 (L.F. 38-48). Prior to the amendment, Section 632.498 required the probate court to determine whether “probable cause exists to believe that the person’s mental abnormality has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged.” If such probable cause exists, the matter is set for a trial

¹ The record on appeal consists of a legal file (L.F.) only.

before the court or jury to determine whether the person is discharged or remains committed. The statute was amended in 2004 to require the probate court to determine whether the committed person has demonstrated “by a preponderance of the evidence” that he is no longer likely to engage in acts of sexual violence in order to trigger the requirement of a trial before the court or jury on the question of discharge or continued commitment.

Mr. Coffman based his constitutional challenge on Judge Wolff’s concurring opinion in *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. banc 2003) (L.F. 39). Applying Judge Wolff’s analysis, Mr. Coffman argued that the amendment violated due process and equal protection by creating an unduly burdensome procedure to obtain a release trial which does not afford the individual a meaningful means to achieve re-integration with society (L.F. 43-47). The probate court never entered a ruling on this motion (L.F. 15-16).

To meet what he believed to be the appropriate standard of “probable cause to believe that he is safe to be at large and more likely than not to not reoffend,” Mr. Coffman informed the probate court that his health had deteriorated significantly since his initial commitment (L.F. 20). He noted that his cardiac and pulmonary functioning required him to be confined to a wheelchair and to rely upon supplemental oxygen on a full-time basis (L.F. 20). He further supported his petition with the results of consultations by Dr. Stephen

Peterson, Dr. Allen Soffer, and Dr. Mark Breite (L.F. 20-37). Dr. Peterson conducted an initial psychiatric/medical examination (L.F. 20). He noted that Mr. Coffman's medical status had changed considerably since his last assessment, although Dr. Peterson did not note when that assessment was made (L.F. 24).² His initial impressions of morbid obesity, congestive heart failure, severe COPD with oxygen dependency, exertional dyspnea, and likely Type II diabetes mellitus warranted consultations with pulmonary and cardiovascular specialists (L.F. 26).

Dr. Soffer performed the cardiovascular evaluation (L.F. 28-29). He found no heart disease, and suspected that Mr. Coffman's symptoms were the result of pulmonary issues, including chronic obstructive pulmonary disease and pulmonary fibrosis (L.F. 29).

Dr. Briete performed the pulmonary evaluation (L.F. 30-32). He noted obstructed and restricted lung function, with elevated blood pressure in the lungs and an enlargement of the right ventricle (L.F. 31-32). This resulted in shortness of breath upon exertion and required the use of a wheelchair and supplemental oxygen (Tr. 31-32).

² Dr. Peterson reiterated in his follow-up report that Mr. Coffman's physical condition had "considerably declined" (L.F. 34).

Dr. Peterson completed his consultation after receiving the reports of the cardiovascular and pulmonary evaluations (L.F. 34-37). He concluded that Mr. Coffman is “severely physically debilitated by his lung disease.” (L.F. 36). Dr. Peterson reported that Mr. Coffman’s heart will ultimately weaken to the point of congestive heart failure, the inability to pump sufficient blood to provide oxygen to body tissues or to remove fluids (L.F. 36). The damage to Mr. Coffman’s lungs “cannot be reversed” (L.F. 36). Dr. Peterson’s ultimate conclusion was: “Taken together, the clinical information strongly indicates that Mr. Larry Coffman 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’s physical condition would also require that he live in a nursing home or skilled nursing care facility outside of MSOTC, arrangements that would further decrease his access to potential child victims (L.F. 37).

The State suggested that Mr. Coffman’s petition for release should be denied as frivolous because release requires a change in the diagnosed mental abnormality, not a physical inability to engage in predatory acts of sexual violence (L.F. 49-51).

The probate court entered an order finding “that Respondent fails to assert that his mental abnormality has changed and fails to allege any facts that would suggest that he no longer 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.” (L.F. 52). The court also found that because
“Respondent fails to allege any facts that would suggest that his mental
condition has changed or that his mental abnormality no longer remains,
Respondent’s petition is based on frivolous grounds,” and it denied the petition
for release without a hearing (L.F. 53).

POINTS RELIED ON

I.

The 2004 amendment to Section 632.498, RSMo, setting out the procedure for discharge from involuntary civil commitment as a sexually violent predator violates the constitutional guarantee of due process of law afforded by Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the amendment creates a two-trial discharge procedure that is unduly burdensome because it shifts the burden of proof on the ultimate question of whether he is safe to be at large to Mr. Coffman by requiring him to prove by a preponderance of the evidence that he is safe to be at large, deferring determinations of credibility and weight of the evidence to the probate court, relieving the State of its burden to prove beyond a reasonable doubt that Mr. Coffman is not safe to be at large by denying a hearing to those who fail to persuade the probate court by a preponderance of the evidence that they are safe to be at large but for whom there is a triable issue of fact whether the State can prove beyond a reasonable doubt are not safe to be at large.

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

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

banc 2005);

Detention of Peterson, 42 P.3d 952 (Wash.Sip.Ct., 2002);

Ware v. Ware, 647 S.W.2d 582, (Mo. App., E.D. 1983);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.498, RSMo 2000;

Section 632.498, RSMo 2004.

II.

The 2004 amendment to Section 632.498, RSMo, setting out the procedure for discharge from involuntary civil commitment as a sexually violent predator violates the constitutional guarantee of equal protection of law afforded by Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the amendment creates a two-trial discharge procedure requiring Mr. Coffman to prove in the first trial by a preponderance of the evidence that he is safe to be at large, denying him the meaningful means to achieve re-integration with society provided to other persons involuntarily civilly committed who do not have to make an initial showing by any standard that they are safe to be discharged.

Ex parte Wilson, 48 S.W.2d 919 (Mo. 1932);

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

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 2;

Section 632.305, RSMo 2000;

Section 632.330, RSMo 2000;

Section 632.340, RSMo 2000;

Section 632.355, RSMo 2000;

Section 632.360, RSMo 2000;

Section 632.400, RSMo 2000;

Section 632.498, RSMo 2000;

Section 632.498, RSMo 2004.

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.

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

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

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

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

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10.

ARGUMENT

I.

The 2004 amendment to Section 632.498, RSMo, setting out the procedure for discharge from involuntary civil commitment as a sexually violent predator violates the constitutional guarantee of due process of law afforded by Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the amendment creates a two-trial discharge procedure that is unduly burdensome because it shifts the burden of proof on the ultimate question of whether he is safe to be at large to Mr. Coffman by requiring him to prove by a preponderance of the evidence that he is safe to be at large, deferring determinations of credibility and weight of the evidence to the probate court, relieving the State of its burden to prove beyond a reasonable doubt that Mr. Coffman is not safe to be at large by denying a hearing to those who fail to persuade the probate court by a preponderance of the evidence that they are safe to be at large but for whom there is a triable issue of fact whether the State can prove beyond a reasonable doubt are not safe to be at large.

“This Court is foreclosed from considering the validity of the [sexually violent predator law] on its face based on [*Kansas v. Hendrix*, [521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)]] and its progeny, including this Court’s

decision in [*In the Matter of the Care and Treatment of*] *Thomas*, [74 S.W.3d 789 (Mo. banc 2002)].” *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 181 (Mo. banc 2004) (J. Wolff, concurring). “While the statutory scheme is constitutional as written, I am doubtful about its constitutionality as applied.” *Id.* at 176. “The practices of the state over the next few years will show whether there is a meaningful attempt to treat those previously determined to be sick and dangerous, or whether these offenders will simply be warehoused without treatment and without meaningful efforts to re-integrate them into society.” *Id.* “If the state simply warehouses these men, without appropriate treatment and without a meaningful means to achieve re-integration with society – rights that are accorded to other mental patients – their constitutional rights will be violated.” *Id.* at 182.

Judge Wolff issued these cautionary words on January 27, 2004. During the 2004 legislative session, the State answered Judge Wolff’s questions about how it would treat the men it had involuntarily committed to the custody of DMH for secure confinement: the State would make it even harder for those men to re-integrate with society.

Section 632.498 permits the committed person to file a petition for release from commitment. The 2000 version of Section 632.498 provided:

If the court at the hearing [on the petition for release] determines that probable cause exists to believe that the person’s mental abnormality

has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue.

Section 632.498, RSMo 2000. The “hearing on the issue” is a trial before a jury or judge to determine whether, beyond a reasonable doubt, the person’s mental abnormality remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence. *Id.*

Under the “probable cause” standard, the probate court determines only whether a triable issue of fact is presented by the committed person’s petition for discharge. *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836, 844-845 (Mo. banc 2005). This standard prohibits the probate court from making credibility determinations or weighing and balancing competing evidence. *Id.* at 845. “If credibility or a weighing of the evidence is required, then a triable issue of fact exists and the court should set the evidentiary hearing provided for in the final clause of Section 632.498.” *Id.*

The Missouri legislature amended Section 632.498 in 2004, effective August 28 of that year, to increase the individual’s burden in securing a discharge trial before a jury or judge. The amended law now requires:

If the court at the hearing [on the petition for release] determines by a preponderance of the evidence that the person no longer suffers from a

mental abnormality that makes the person likely to engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue.

Section 632.498, RSMo 2004.³

The 2004 amendment violates Due Process of Law

The 2004 amendment clearly changes the procedure to authorize the probate court to determine witness credibility and to weigh and balance competing evidence. The standards of proof of clear and convincing evidence, beyond a reasonable doubt, and preponderance of the evidence are applicable to trials. *Detention of Peterson*, 42 P.3d 952, 957 (Wash. Sup. Ct. 2002). These

³ Section 632.498 has yet again been amended by the legislature to impose further limits on the release of persons previously committed involuntarily by the State. According to a 2006 amendment, “[i]f the court or jury finds that the person’s mental abnormality has so changed that he is not likely to commit acts of sexual violence if released, the person shall be conditionally released as provided in Section 632.505.” Thus, under the newest version of the statute, if the State fails to prove that the person meets the qualifications for commitment as a sexually violent predator, the person is not discharged from that commitment as under the prior statutes, but remains committed to DMH and is only released from secure confinement upon conditions.

standards seek to weigh evidence and measure asserted facts against potentially competing ones. *Id.* This Court found the discussion of the various burdens of proof in *Peterson* to be applicable to the review in *Schottel*. 159 S.W.3d 845. In essence, the 2004 amendment of Section 632.498 converted what had been a probable cause hearing simply to determine whether triable issues of fact exist into a trial where those issues are tried and credibility is determined and evidence is weighed and balanced.

The 2004 amendment created a bench trial which the individual must win in order to get another trial where his discharge or continued commitment will be finally decided. The State has created a two-trial system in which the person must win both trials to gain his discharge from involuntary commitment by the government.

So, the State's response to Judge Wolff's concern whether it would provide "a meaningful means to achieve re-integration with society," was to add another trial with a higher burden of proof before the people it involuntarily commits can have their return to society submitted to a jury for determination. This, as Judge Wolff warned, violates their constitutional rights. *Norton*, 123 S.W.3d at 176, 182.

The 2004 amendment creates a procedure that is unduly burdensome for the involuntarily committed person. The person's burden may, in fact, be insurmountable. Section 632.498 applies to petitions for discharge without the consent of the director of DMH. Thus, the State will contest every petition filed

under that statute. It is well settled in Missouri that reviewing courts defer to the credibility findings of the trial court, and if the evidence supports either of two contrary conclusions, the lower court's determination will prevail. *Ware v. Ware*, 647 S.W.2d 582, 583-584 (Mo. App., E.D. 1983); *Newbill v. Forrester-Gaffney*, 181 S.W.3d 114, 118 (Mo. App., E.D. 2005). Because the State has purposefully authorized the probate court to determine credibility and weigh competing evidence, it has offered the probate court virtually total deference to deny the committed person a trial to determine whether he should remain committed or be discharged. The increased, if not impossible burden falls squarely on the individual whose liberty has been stripped away by the government. The "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cooper v. Oklahoma*, 517 U.S. 348, 362, 116 S.Ct. 1373, 1381, 134 L.Ed.2d 498 (1996). The State has increased the committed person's burden to a difficult, if not impossible standard, thus shifting the consequence of an erroneous decision to the person whose liberty the State has taken away in the first place. Once the probate court says that the committed person's evidence that he is safe to be at large is less than a preponderance of all the evidence, the State is relieved of its burden to present evidence which proves beyond a reasonable doubt that the person is not safe to be at large. The amendment of the statute indicates that it was the State's intention to erect this impediment to his re-integration into society.

This is not the process due to Missouri citizens. Judge Wolff cautioned the State in *Norton* that its actions would be scrutinized for constitutionality, especially those actions directed at returning the committed person's liberty. In response, the State made it even harder for the person to return to society.

Conclusion

That all constitutional government is intended to promote the welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; *that to give security to these things is the principal office of government, and that when the government does not confer this security, it fails in its chief design.*

Missouri Constitution, Article I, Section 2 (emphasis added). The 2004 amendment failed to secure the due process of law of persons involuntarily committed, and by its passage the government of Missouri has failed in its design. This Court should find the 2004 amendment of Section 632.498 unconstitutional. 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 of the law. But as Mr. Coffman will discuss in Point III, he believes that his petition for discharge establishes

probable cause to believe that he is safe to be at large, and under that standard this cause should be remanded to the probate court for a discharge trial before a judge or jury.

II.

The 2004 amendment to Section 632.498, RSMo, setting out the procedure for discharge from involuntary civil commitment as a sexually violent predator violates the constitutional guarantee of equal protection of law afforded by Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the amendment creates a two-trial discharge procedure requiring Mr. Coffman to prove in the first trial by a preponderance of the evidence that he is safe to be at large, denying him the meaningful means to achieve re-integration with society provided to other persons involuntarily civilly committed who do not have to make an initial showing by any standard that they are safe to be discharged.

“[A]ll persons are created equal and are entitled to equal rights and opportunities under the law.” Missouri Constitution, Article I, Section 2. “Nor shall any state ... deny to any person within its jurisdiction the equal protection of the law.” United States Constitution, Fourteenth Amendment. “Equal protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place or under like circumstances.” *Ex parte Wilson*, 48 S.W.2d 919, 921 (Mo. 1932). Strict scrutiny applies to Mr. Coffman’s claim

because his liberty is at stake. *Norton*, 123 S.W.3d at 173. To pass strict scrutiny, a governmental intrusion must be justified by a compelling state interest and must be narrowly drawn to express the compelling interest at stake. *Id.*

The 2004 amendment denies Equal Protection of the Law

This Court held in *Norton* that the State has a compelling state interest in protecting the public from crime that is served by the secure confinement of persons adjudicated sexually violent predators. 123 S.W.3d at 174. But Judge Wolff again cautioned: “If the state simply warehouses these men, without appropriate treatment *and without a meaningful means to achieve re-itegration with society – rights accorded to other mental patients – their constitutional rights will be violated.” Id.* at 182 (emphasis added). As discussed in Point I above, the 2004 amendment denies all persons committed as SVPs a meaningful means to achieve re-itegration with society. It also does so in a manner significantly different than for other mental patients, but is not narrowly tailored to serve the State’s compelling interest.

No other person involuntarily civilly committed must make a preliminary showing to a trial court of facts “warranting” a second trial to determine the person’s release. All involuntary commitments under the general provisions of Chapter 632 end upon the expiration of a specific period of time, never exceeding one year. 632.305, 632.330, 632.340, 632.355, 632.360, RSMo 2000. “No order of

civil commitment under this chapter may exceed one year for an inpatient detention or one hundred eighty days for an out patient detention period.”

Section 632.360. Subsequent involuntary commitment requires the party seeking continued commitment to file a new petition. “At the end of any detention period ordered by the court under this chapter, the respondent shall be discharged unless a petition for further detention is filed and heard in the same manner as provided herein.” *Id.*

Even with these limited periods of detention, Chapter 632 provides the committed person a procedure by which to have the need for his commitment reexamined during the detention period. Section 632.400, RSMo 2000. If the person or his guardian files a motion for reexamination, the probate court sets the matter for a hearing to determine the need for continued detention. *Id.*

There is no screening, no requirement that the person show probable cause that he is safe for release or to show he is safe for release by a preponderance of the evidence. There is no hearing or trial to determine whether the person should be given a trial for his release from detention.

Subjecting persons committed as SVPs to the “screening” procedure of Section 632.498 may serve the State’s compelling interest to protect society from sexually violent predators. But elevating that procedure from a hearing requiring the person to demonstrate a triable issue of fact to a trial where he bears the burden of proof and the burden of persuading the trial judge by the

greater weight of the evidence presented by credible witnesses is not narrowly tailored to serve that interest. That interest is adequately served by reviewing the request for discharge to ascertain that the matter presents a triable issue of fact, as was the procedure in the 2000 version of the statute. This protects the court from the useless task of holding a trial on frivolous petitions for discharge, protects the public from sexually violent predators by presenting only viable factual contests to jurors to determine, ultimately, whether the person will be discharged into the community, and protects the liberty interests and equal protection rights of the committed person. Overreaching to serve a compelling interest is as much a constitutional violation as is acting with no compelling interest at all.

Conclusion

That all constitutional government is intended to promote the welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; *that to give security to these things is the principal office of government, and that when the government does not confer this security, it fails in its chief design.*

Missouri Constitution, Article I, Section 2 (emphasis added). The 2004 amendment failed to secure the equal protection of the law for persons civilly committed, and by its passage the government of Missouri has failed in its design. This Court should find the 2004 amendment of Section 632.498 unconstitutional. 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 equal protection of the law. But, again, as Mr. Coffman will discuss in Point III, he believes that his petition for discharge establishes probable cause to believe that he is safe to be at large, and under that standard this cause should be remanded to the probate court for a discharge trial before a judge or jury.

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.

“[I]f this statute is used simply to impose life sentences of confinement based upon a labeling of the inmate’s thoughts, this Court will have a constitutional duty to take another look.” *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 182 (Mo. banc 2004) (J. Wolff, concurring).

Mr. Coffman sought his discharge from commitment because his failing health makes it unlikely that he will engage in future predatory acts of sexual violence (L.F. 20). He informed the probate court that his failing cardiac and pulmonary functions require him to be confined in a wheelchair and to depend upon supplemental oxygen at all times (L.F. 20). He supported his request with reports from three consulting physicians (L.F. 24-37). A cardiac specialist found

no heart disease, but suspected that Mr. Coffman's physical limitations resulted from pulmonary diseases (L.F. 28-29). A pulmonary specialist identified obstructed and restricted lung function, elevated blood pressure in the lungs, and an enlargement of the right ventricle (L.F. 30-32). These conditions resulted in shortness of breath upon exertion, requiring the use of a wheelchair and supplemental oxygen (L.F. 31-32). The primary medical consultant, Dr. Stephen Peterson, combined his own evaluation with those of the other doctors to conclude that Mr. Coffman "no longer presents as more likely than not to commit predatory acts of sexual violence because he is too physically debilitated." (L.F. 37). The damage to Mr. Coffman's lungs cannot be reversed (L.F. 36). Mr. Coffman will ultimately suffer congestive heart failure (L.F. 36). Mr. Coffman's physical condition will not allow him to live outside of a nursing home or a skilled nursing facility (L.F. 37).

The State's response to this evidence was that Mr. Coffman's physical inability to engage in predatory acts of sexual violence is not a basis for discharge from SVP commitment (L.F. 49-51).

The probate court denied Mr. Coffman's petition for discharge without providing a release trial on the finding "that [Mr. Coffman] fails to assert that his mental abnormality has changed and fails to allege any facts that would suggest that he no longer 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.” (L.F. 52). The trial judge is the sole judge of the sufficiency of the evidence to determine whether probable cause exists under Section 632.498. *In the Matter of the Care and Treatment of Amonette*, 98 S.W.3d 593, 599 (Mo. App., E.D. 2003). Determination of probable cause is similar to a summary judgment in the general civil context, and appellate review of the trial court’s determination is *de novo*. *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836 (Mo. banc 2005).

The State correctly cited the language of Section 632.501 that commitment is continued upon evidence that the person’s “mental abnormality remains such that the [person] is not safe to be at large and that if discharged is likely to commit acts of sexual violence.” (L.F. 49-51). From this, the State assumes the position that only a change in a committed person’s mental status is a statutory basis for discharge from commitment as a sexually violent predator. That is not true.

Judge Wolff noted in *Norton* that commitment cannot be continued only “upon a labeling of the inmate’s thoughts.” 123 S.W.3d at 182. And this Court noted in *Schottel, supra*, that the language used by the legislature in defining the discharge procedures was “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, without restating the longer and more awkward description of an SVP contained in Section 632.480.5.” 159 S.W.3d at 842.

The holding of the Court in *Schottel* is consistent with the instruction delivered by 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). This detention is only permissible where (1) the confinement takes place pursuant to proper procedures and evidentiary standards, (2) there is a finding of dangerousness either to one’s self or others, and (3) proof of dangerousness is coupled with proof of some additional factor such as a mental illness or mental abnormality. *Norton*, 123 S.W.3d at 177; quoting *Kansas v. Crane*, 534 U.S. 407, 409-410, 122 S.Ct. 867, 869, 151 L.Ed.2d 856 (2002). The mere presence of a designated mental abnormality will not permit involuntary civil commitment. The United States Supreme Court requires *both* a mental abnormality *and* dangerousness. *See also Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). It violates due process of law to say simply that Mr. Coffman is dangerous because the definition of a mental abnormality includes dangerousness. Doing so is nothing more than a “labeling of the inmate’s thoughts.” *Norton*, 123 S.W.3d at 182. The State must prove a danger to others - the more likely than not risk of reoffending - before it can detain Mr. Coffman or continue to detain him. The State simply rejects that obligation, and the probate court acquiesced to that rejection. No matter what

Mr. Coffman is thinking, no matter what urges he might have, if he is so physically debilitated that he cannot act on those thoughts or urges he does not present a substantial danger.

In every commitment case the State's experts identify a mental abnormality and then conduct a risk assessment independent of that mental condition to determine the likelihood of reoffending. Those experts use actuarial instruments unrelated to a mental health diagnosis to assess risk. They consider compliance with supervision. They consider lifestyles and marital status. They consider the size of the victim pool based on victim characteristics such as age and sex. They consider non-sexual offending. There are a plethora of issues the State's experts consider to determine whether the person for whom they have already identified a mental abnormality is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. The State cannot reject this same burden simply to prevent Mr. Coffman's re-integration into society.

Mr. Coffman needs to discuss a couple of other Missouri cases. The Western District Court of Appeals considered the relevance of "external constraints" as a means of controlling behavior in *In the Matter of the Care and Treatment of Lewis*, 152 S.W.3d 325 (Mo. App., W.D. 2004) and *In the Matter of the Care and Treatment of Cokes*, 183 S.W.3d 281 (Mo. App., W.D. 2005). The Western District held that continuing parole supervision, *Lewis*, and private

arrangements to secure necessary medications, *Cokes*, were external constraints over behavior and were inadmissible because the question is whether the person suffers a mental abnormality making him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility, and not whether some external constraint makes it less likely that the person will engage in such acts. 152 S.W.3d at 332; 183 S.W.3d at 285.

These cases do not control Mr. Coffman's situation. His physical disabilities are not constraints imposed on his behavior by some external source. His disabilities are physical impediments preventing his ability to engage in sexually violent acts. This is not a situation where the external constraints may prove ineffectual because the person can refuse to be constrained by some external control. Mr. Coffman's situation is that he is physically incapable of presenting a substantial danger of sexual violence regardless of his desires and urges or the efforts of others to control him.

Because the probate court erred in denying Mr. Coffman a trial before a jury to determine whether he is safe to be at large, the judgment of the probate court must be reversed and the cause remanded for further proceedings.

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 6,266 words, which does not exceed the 31,000 words allowed for an appellant's 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 18th day of December, 2006, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

TABLE OF CONTENTS TO APPENDIX

	<u>Page</u>
Judgment and Order	A-1
Section 632.498, RSMO 2000.....	A-3
Section 632.498, RSMO 2004.....	A-4