

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. SC 87415
ALBERT BERNAT,)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE JON A. CUNNINGHAM, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

This Court's jurisdiction is set out on page 6 of Mr. Bernat's Substitute Statement, Brief and Argument.

STATEMENT OF FACTS

Mr. Bernat incorporates the Statement of Facts set out in pages 7 through 24 of his Substitute Statement, Brief and Argument.

POINTS RELIED ON

I.

The probate court plainly erred in denying Mr. Bernat's motion to preclude the State from calling him as a witness or using his right to remain silent against him, in violation of Mr. Bernat's right to Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that persons the State is seeking to civilly commit under the general civil commitment statutes are provided a right to remain silent at trial by Section 632.335, RSMo 2000, and the State did not, and cannot show a compelling state interest in treating Mr. Bernat differently than other persons similarly situated.

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

banc 2004);

State ex rel. Nixon v. Askren, 27 S.W.3d 834 (Mo. App., W.D. 2000);

U.S. Constitution, Fourteenth Amendment;

Mo. Constitution, Article I, Section 2; and

Sections 476.110, 476.120, RSMo 2000.

II.

The probate court abused its discretion in permitting the State to read into evidence, over Mr. Bernat's objection, the testimony of Linda Kelly, in violation of Mr. Bernat's rights 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 Ms. Kelly was not qualified to diagnose or testify regarding the existence of a mental abnormality causing Mr. Bernat to meet the definition of a sexually violent predator.

ARGUMENT

I.

The probate court plainly erred in denying Mr. Bernat's motion to preclude the State from calling him as a witness or using his right to remain silent against him, in violation of Mr. Bernat's right to Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that persons the State is seeking to civilly commit under the general civil commitment statutes are provided a right to remain silent at trial by Section 632.335, RSMo 2000, and the State did not, and cannot show a compelling state interest in treating Mr. Bernat differently than other persons similarly situated.

The State began its argument on this point with the assertion that "Sexually violent predators are not similarly situated to others civilly committed," claiming that this Court said so in *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2004). (Resp. Br. 9, 10). The State continues to misinterpret and overstate this Court's holding in *Norton*. It is true that the Equal Protection clauses of the United States and Missouri Constitutions only require similar treatment of persons similarly situated. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 841 (Mo. App., W.D. 2000). But it is not

true, as the State suggests, that this Court held in *Norton* that sexually violent predators are not similarly situated to other persons civilly committed under Chapter 632. This Court's opinion, at the place specifically cited by the State, was exactly the opposite. This Court held in *Norton* that the denial of least restrictive alternatives to secure confinement was not an Equal Protection violation because it was narrowly tailored to serve a compelling state interest. 123 S.W.3d at 174. This is the strict scrutiny test to determine whether disparate treatment of *similarly situated persons* violates the Equal Protection clauses. 123 S.W.3d at 173. By applying this test in *Norton*, this Court necessarily found that sexually violent predators are similarly situated to other persons civilly committed under Chapter 632. If this Court had concluded, as the State suggests, that sexually violent predators are not similarly situated to others persons committed under Chapter 632, the review undertaken by this Court would not have been necessary.

The State's next assertion, that this Court held in *Norton* that "[t]he sexually violent predator statutes are narrowly drawn to advance a compelling state interest," (Resp. Br. 12), equally overstates this Court's holding. This Court only held that denial of least restrictive alternatives under Section 632.495 was narrowly drawn to advance a compelling state interest. This Court did find a compelling interest in the sexually violent predator statutes of protecting society from crime. 123 S.W.3d at 174. But the *Norton* opinion does not say that all the

provisions of the sexually violent predator statutes are narrowly drawn in all instances to serve this purpose. This Court dealt with specific provisions of the various statutes, and considered how each affected that interest. The State takes the position that this Court's opinion in *Norton* has resolved for all time every Equal Protection issue under every statute of the sexually violent predator law that may ever arise. Mr. Bernat does not believe that this Court intended its ruling to be so broad, or to eliminate any future challenge to specific statutes under the Equal Protection clauses.

The State then echoes from *Norton* the proposition that its compelling interest is the protection of society against crime (Resp. Br. 13). As Mr. Bernat pointed out in his Substitute Statement, Brief and Argument, this interest is so broad that it could encompass impermissible and unconstitutional restrictions. It is the extraordinarily broad scope of such interests that the statute must also be narrowly drawn in order to survive a constitutional challenge. The State's assertion that the statute is narrowly drawn is erroneous, as discussed above, because that applies only to Section 632.495 relating to the level of confinement. Mr. Bernat discussed in his Substitute Statement, Brief and Argument how denying the right to silence at trial is neither sufficiently compelling nor narrowly drawn to serve a compelling interest.

The State argues that it has a compelling interest in denying Mr. Bernat the right to remain silent at trial because his cooperation aids in the diagnosis and

treatment of a mental abnormality if he has one, relying on *In re Young*, 857 P.2d 989, 1014-1015 (Wash. 1993). (Resp. Br. 13). Mr. Bernat demonstrated previously that *Young* is inapplicable because it concerned a pretrial evaluation with a psychologist or psychiatrist, not testimony at trial, and that treatment is irrelevant to the jury's determination in an SVP case. The State responded that treatment is relevant because it is the overriding purpose of the sexually violent predator statutes (Resp. Br. 13). This is not what the State told the jurors or the trial court below. The Assistant Attorney General told the venire panel in voir dire: "... some things you won't get answers to, so I don't need to ask the question, if you don't know how long it [treatment] is, if you don't know what the treatment is, those are left to those with experience with treating Mr. Bernat ..." (Tr. 29). When Mr. Bernat objected to this voir dire, the State responded below: "I'd be happy to quit questioning about that issue if the Court says. Maybe the Court says, well, this, the treatment is not an issue that will be decided by this jury, and that's fine by me." (Tr. 30). The court sustained Mr. Bernat's objection and instructed to disregard the Assistant Attorney General's statement because "this issue we're talking about is an issue that is not going to be before the jury...." (Tr. 33-34).

The State argues that Mr. Bernat's position would "eviscerate the treatment purpose of the statute" by providing an incentive to avoid treatment and to not cooperate with an evaluation in the hope that the State could not meet

its burden at trial (Resp. Br. 14). This alarm is totally contradicted by the entire body of law in sexually violent predator cases. The State constantly uses the person's failure in treatment or refusal of treatment as a reason for commitment. The State routinely relies on experts who have been refused an interview to commit persons as sexually violent predators. The State has recently called upon one of its experts to testify that a recent study has shown no effect on an evaluator's opinion whether the individual agrees to or refuses an in person interview.¹

The State suggests that while Mr. Bernat is unlike other persons involuntarily civilly committed under Chapter 632, he is like a party in a typical civil suit for damages or in the execution of a will, permitting the State to take a advantage of an adverse inference against him. Mr. Bernat must again note that he has lost his constitutionally protected liberty interest. The Kansas City Public Service Company was not at risk of losing its liberty in the civil suit for personal injuries in *State ex rel. Williams v. Buzzard*, 190 S.W.2d 907 (Mo. 1945) (Resp. Br. 18); the attorney who prepared the contested will in *Pasternak v. Mashak*, 428

¹ The Effect of the Examinee's Decision to Participate in the Clinical Interview in Sexually Violent Person Commitments; Katherine M. Flynn, Dale A. Bernalac, Christopher Tyre, Anthony Jurek, *Journal of Sexual Offender Civil Commitment: Science and the Law*, 1, 83-89 (2006).

S.W.2d 565 (Mo. 1967) (Resp. Br. 18-19) was not at risk of losing his liberty; the defendant in the action for damages arising from an auto accident was not at risk of losing his liberty in *Kelsey v. Kelsey*, 329 S.W.2d 272 (St.L.D. 1959) (Resp. Br. 19).

The State defends its advantage in an adverse inference by citing *Block v. Rackers*, 256 S.W.2d 760 (Mo. 1953) for the proposition that it cannot vouch for an opposing party's testimony, and by claiming that it is just following the general rule that an attorney should not ask a question he or she does not know the answer to (Resp. Br. 19). Mr. Bernat finds it hard to believe that the right to remain silent granted in criminal cases by the Constitution or to general civil commitment respondents by Chapter 632 exist simply to protect the government from having to vouch for opposing parties or from difficult trial strategies. Mr. Bernat believes that those rights exist as expressions of our fundamental belief about how the government must go about depriving persons of their liberty.

Undersigned counsel acknowledges his failure to discover that there is a way for civil parties to be deprived of their liberty other than those set out in Mr. Bernat's Substitute Statement, Brief and Argument: being held in contempt under Sections 476.110 and 476.120, RSMo 2000 for "contumacious and unlawful refusal ... to be sworn as a witness, or, when so sworn, to refuse to answer any legal and proper interrogatory." (Resp. Br. 21). But Mr. Bernat notes that because exercising the right to remain silent is neither contumacious nor

unlawful when the party is the respondent in a general civil commitment with the statutory right to remain silent, the State could not invoke Section 476.110 against that person. So, too, it could not be invoked against the respondent in a sexually violent predator commitment who has the equal right to silence. Counsel was unaware of this statute, but it has nothing to do with the issue before this Court.

II.

The probate court abused its discretion in permitting the State to read into evidence, over Mr. Bernat's objection, the testimony of Linda Kelly, in violation of Mr. Bernat's rights 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 Ms. Kelly was not qualified to diagnose or testify regarding the existence of a mental abnormality causing Mr. Bernat to meet the definition of a sexually violent predator.

Mr. Bernat will rely on the arguments presented in his Substitute Statement, Brief and Argument on this point.

CONCLUSION

Because Mr. Bernat was denied equal protection of the law as set out in Point I, the judgment of the probate court must be reversed and the cause remanded for a new trial. Because the probate court abused its discretion in admitting Ms. Kelly's testimony as an "expert" asserting that Mr. Bernat has a mental abnormality necessary for involuntary commitment, as set out in Point II, the judgment of the probate court must be reversed and the cause remanded for a new trial.

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 2,060 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 March, 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 April, 2006, to Trevor Bossert, Assistant Attorney General, 720 Olive Street, Suite 2150, St. Louis, MO. 63101.

Emmett D. Queener