

No. SC87415

IN THE MISSOURI SUPREME COURT

**IN THE MATTER OF THE CARE AND TREATMENT
OF ALBERT BERNAT
Appellant,**

v.

**STATE OF MISSOURI,
Respondent.**

**Appeal from the St Charles County Circuit Court, Probate Division
The Honorable Jon A. Cunningham, Judge**

SUBSTITUTE BRIEF OF RESPONDENT

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Table of Contents

	Page(s)
Table of Authorities	2
Statement of Facts	6
ARGUMENT	9
I Equal Protection does not grant alleged sexually violent predators an unequivocal right to remain silent in civil commitment hearings	9
A. Sexually violent predators are not similarly situated to others civilly committed	9
B. The sexually violent predator statutes are narrowly drawn to advance a compelling state interest.	12
i. The SVP statute protects a compelling state interest	13
ii. The SVP statute is civil, not criminal	16
iii. Adverse inferences are appropriate in civil proceedings ...	18
iv. The SVP statute is narrowly drawn	23
II Ms. Kelly was qualified to diagnose and testify regarding the existence of mental abnormalities causing Appellant to meet the definition of a sexually violent predator	25
Conclusion	29
Certification of Service and of Compliance with Rule 84.06(b) and (c)	30
Appendix	A-1

Table of Authorities

Cases	Page(s)
<i>Allen v. Illinois</i> , 478 U.S. 364 (1986)	14, 15, 17, 20
<i>Arnold v. City of Columbia</i> , 197 F.3d 1217 (8 th Cir. 1999)	9
<i>Bailey v. Gardebring</i> , 940 F.2d 1150 (8th Cir. 1991)	11
<i>Bilokumsky v. Tod</i> , 263 U.S. 149 (1923)	19
<i>Block v. Rackers</i> , 256 S.W.2d 760 (Mo. 1953)	19
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981)	14
<i>In re Bernat</i> , 2005 WL 3149590 (Mo. App. E.D. 2005)	8, 26-28
<i>In re Burgess</i> , 147 S.W.3d 822 (Mo. App. S.D. 2004)	14
<i>In re Cokes</i> , 107 S.W.3d 317 (Mo. App. W.D. 2003)	17
<i>In re Hay</i> , 263 Kan. 822, 953 P.2d 666 (1998)	14
<i>In re Johnson</i> , 58 S.W.3d 496 (Mo. banc 2001)	26-28
<i>In re Kelley</i> , 698 N.W.2d 336 (Iowa App 2005)	15
<i>In re Norton</i> , 123 S.W.3d 170 (Mo. banc 2004)	10-13, 20, 24
<i>In re Samantha C</i> , 268 Conn. 614 (Conn. 2004)	23
<i>In re Spencer</i> , 103 S.W.3d 407 (Mo. App. S.D. 2003)	27
<i>In re Young</i> , 857 P.2d 989 (Wash. 1993)	13, 14
<i>Kansas v. Hendricks</i> , 521 U.S. 346 (1997)	16, 17
<i>Kelsey v. Kelsey</i> , 329 S.W.2d 272	19

<i>Miranda v Arizona</i> , 384 U.S. 436 (1966)	22
<i>Pasternak v. Mashak</i> , 428 S.W.2d 565 (Mo. 1967)	18
<i>People v. Burns</i> , 128 Cal.App.4th 794 (Cal. App. 2005)	14
<i>People v. Leonard</i> , Cal.App.4th 776, 191-2, Cal.Rptr.2d 180 (3rd Dist. 2000)	15, 16
<i>Seling v. Young</i> , 531 U.S. 250 (2001)	16
<i>State ex rel. Nixon v. Askren</i> , 27 S.W.3d 834 (Mo. App. W.D. 2000)	9, 11, 17
<i>State ex rel. Williams v. Buzard</i> , 354 Mo. 719, 190 S.W.2d 907 (1945)	18
<i>State v. Davis</i> , 814 S.W.2d 593 (Mo banc 1991)	25
<i>State v. Harris</i> , 277 Conn. 378 (Conn. 2006)	17
<i>State v. Zanelli</i> , 212 Wis.2d 358 (Wis App. 1997)	14
<i>Westerheide v. State</i> , 831 S.2d 93 (Fla. 2002)	12
<i>Whitnell v. State</i> , 129 S.W.3d 409 (Mo. App. E.D. 2004)	25

Statutes

42 Pa. Cons.Stat. §§ 6401-6409	20
725 Ill. Comp. Stat. 207/1-99	20
Ariz.Rev.Stat. §§ 36-3701 to 3717	20
Cal. Welf. & Inst.Code §§ 6600-6609.3	20
Fla. Stat. Ann. §§ 394.910-.931	20
Iowa Code §§ 229A.1-.16	20
Kan. Stat. Ann. §§ 59- 29a01 to 29a21	20

Mass. Gen. Laws ch. 123A, §§ 1-16	20
Minn.Stat. §§ 253B.185(1)-(7)	20
Mo. Ann. Stat. §§ 632.480-.513	20
N.D. Cent.Code §§ 25-03.3-01 to 03.3-23	20
N.J. Stat. Ann. §§ 30:4-27.24 to 27.38	20
S.C.Code Ann. §§ 44-48-10 to 170	20
Tex. Health & Safety Code § 841.003	20
Va.Code Ann. §§ 37.1-70.1-.19	20
Wash. Rev.Code §§ 71.09.010-.902	20
Wis. Stat. § 980.01	20
Wis. Stat. § 980.05(1m)	22
§ 211.059 RSMo	21, 22
§ 211.171 RSMo	21
§ 337.015. RSMo	27
§ 337.600, RSMo	27
§ 476.110 RSMo	21
§ 476.120 RSMo	21
§ 490.065 RSMo	25
§ 491.030 RSMo	18
§ 632.005, RSMo	11
§ 632.335 RSMo	11, 22

§ 632.355 RSMo (2000) 9

§ 632.480, RSMo (Cum. Supp. 2003) 10, 14

§ 632.483, RSMo 25-27

§ 632.484 RSMo (Cum. Supp. 2003) 16

§ 632.486, RSMo 16

§ 632.489, RSMo 24, 26

§ 632.492, RSMo 24

§ 632.495, RSMo 11, 13, 16, 17, 24

§ 643.486, RSMo 26

Statement of Facts

Appellant Albert Bernat argues that the sexually violent predator law as implemented violates his rights to equal protection. As the facts are largely ancillary to this appeal, Bernat's 16-page Statement of Facts includes many facts not relevant to his argument. The State sets forth the following facts relevant to this appeal.

On a cold December day in 1985, Bernat lured an 18-year old woman into his vehicle, handcuffed her at gunpoint, and forced her to the floor of the vehicle. (2001 Tr. 6-11). He took the woman to his trailer and forced her to engage in intercourse. (2001 Tr. 13-14). Bernat pled guilty to forcible rape on August 8, 1986. (2001 Tr. 14-15, L.F. 10).

In late 1992, Bernat was paroled and began receiving counseling. (2003 Tr. 380). During this period, Bernat frequented bars, on one occasion tested positive for alcohol, and periodically paid prostitutes for sex. (2003 Tr. 384-87).

Under circumstances similar to previous events, on a cold night in December of 1995, Bernat offered a ride home from work to a waitress at a local bar he patronized. (2001 Tr. 19). Rather than taking the woman home, Bernat took her to his trailer. (2001 Tr. 21). At this point the woman alleges that Bernat produced a gun and forced her to have sexual intercourse. (2001 Tr. 21-22). Bernat claimed that the woman was a prostitute and that he paid for sex with her. (2001 Tr. 202-03). Bernat was acquitted of the rape charge, but his parole was revoked. (2003 Tr. 333).

Prior to Bernat's scheduled release date, the Missouri Attorney General filed a motion on December 11, 2000, to commit Bernat in the custody of the Department of Mental Health as a sexually violent predator. (L.F. 9-12).

At the jury trial in October 30-November 1 2001, Linda Kelly, a certified clinical social worker with a master's degree in social work, who prepared Bernat's end of confinement report, testified "to a reasonable degree of scientific certainty" that Bernat suffered from the mental abnormality paraphilia not otherwise specified (NOS). (2001 Tr. 195-200). On November 1, 2001, the trial court declared a mistrial when the jury, deadlocked at 11-1, failed to reach a unanimous verdict. (L.F. 5).

At his second trial on June 24, 2003, the State offered evidence not previously adduced at the 2001 trial. Specifically, the State showed that: Bernat had forced his wife to have sex with him (2003 Tr. 258); he had forced his 13-year old niece on top of him and simulated sex (2003 Tr. 203-04); he had reached inside his 11-year old daughter's panties and touched her vagina (2003 Tr. 268); and he had forced his daughter's 13-year old friend to simulate intercourse with him while his daughter screamed and prepared to hit her father with a frying pan if necessary (2003 Tr. 268-69).

Bernat objected when the State attempted to read Kelly's previous testimony into the record. (2003 Tr. 210-14). The court overruled the objection and the testimony was read to the jury. (2003 Tr. 217-218).

Bernat also filed a motion to preclude the State from calling him at trial or from making reference to his failure to testify. (L.F. 78-83). The court overruled the motion.

(L.F. 4.) Bernat did not testify. In its closing argument, the State commented that the jury had not had the opportunity “to judge [Bernat’s] credibility” because he had not testified. (2003 Tr. 611, 616).

Following trial, the jury unanimously found beyond a reasonable doubt that Bernat is a sexually violent predator. (L.F. 137). The court ordered Bernat into the custody of the Department of Mental Health. (L.F. 137).

Bernat appealed to the Missouri Court of Appeals, Eastern District, which upheld the trial court in an opinion dated November 22, 2005. *In re Bernat*, 2005 WL 3149590 (Mo. App. E.D. 2005). This Court accepted transfer on February 28, 2006.

ARGUMENT

Bernat argues 1) that the trial court violated his right to equal protection by not granting him an unequivocal right to remain silent at trial, and 2) that the trial court violated his right to due process in allowing the testimony of a licensed social worker at trial. Both arguments fail.

I – Equal Protection does not grant alleged sexually violent predators an unequivocal right to remain silent in civil commitment hearings. (Responds to Appellant’s Point I)

Though there is a statutory right “to remain silent” in other involuntary civil commitment proceedings, § 632.355.2(4) RSMo (2000), equal protection does not require the extension of such a right to sexual predator proceedings. Sexually violent predators are not similarly situated to other civilly committed persons. Regardless, the sexually violent predator statutes are narrowly drawn to serve a compelling state interest.

A. Sexually violent predators are not similarly situated to others civilly committed.

The Equal Protection Clauses of the U.S. and Missouri Constitutions require that similarly situated persons be treated in a similar manner. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 841 (Mo. App. W.D. 2000). To prove an equal protection violation, Bernat is required, as a threshold matter, to demonstrate that he was treated differently from others similarly situated from him. *Arnold v. City of Columbia*, 197 F.3d 1217, 1220 (8th Cir. 1999). Bernat has made no such showing.

Because Bernat conveniently skips this part of the analysis, simply assuming that sexually violent predators are similarly situated to general civil detainees, the State can only assume that Bernat believes that this Court decided the issue in *In re Norton*, 123 S.W.3d 170 (Mo. banc 2004). *Norton* did no such thing. Rather, in *Norton*, this Court “assum[ed], arguendo, that other persons rendered dangerous by a mental disorder compose a comparable class to that of” sexual violent predators, and reviewed the individual’s equal protection claim. 123 S.W.3d at 173.

In Missouri, only those persons who “suffer[] from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility” qualify for commitment as a sexually violent predator. § 632.480(5), RSMo (Cum. Supp. 2003). And sexual predators are not unusually dangerous only because their mental conditions make them likely to offend, but also because they have offended in the past. To qualify as a sexual predator, a person must have pled guilty or been found guilty, or not guilty by reason of mental disease or defect, of “a sexually violent offense” or have been committed as a criminal sexual psychopath. § 632.480(5)(a), (b), RSMo. Sexually violent offenses are rape, sodomy, child molestation, and sexual abuse and assault felonies. § 632.480(4), RSMo.

In contrast, the general civil commitment statute provides for a period of “inpatient detention and treatment,” if, after hearing, “the court finds, based upon clear and convincing evidence,¹ that [the individual], as the result of mental illness, presents a likelihood of serious

¹ Not surprisingly, Bernat does not argue that equal protection entitles him to the

harm to himself or others.” § 632.335.1, .4 RSMo. And such a showing requires only a “substantial risk” that such harm will occur. § 632.005(9)(a-c). It is not necessary to show that the individual has committed past crimes, that the chance of serious harm is “more likely than not,” or that the potential harm is of the overwhelmingly serious nature of that described in the sexually violent predator statutes.

The legislature has determined that the mental abnormalities of sexual predators “make[s] them distinctively dangerous because of the substantial probability that they will commit future crimes of sexual violence if not confined in a secure facility.” *Norton*, 123 S.W.3d at 174. Because of this distinct danger of re-offending, and the horrific nature of the violations when a sexually violent predator does re-offend, Missouri’s legislature and courts have recognized that “sexually violent predators suffer from a mental condition that differs substantially from the mental conditions which are the subjects of the usual civil commitment proceedings.” *Askren*, 27 S.W.3d at 842. No constitutional right is violated “when persons who suffer from severe disorders are treated differently from persons with less serious conditions.” *Id.*, quoting *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991). See also *Westerheide v. State*, 831 S.2d 93, 112 (Fla. 2002) (noting the “false premise” of similar situations between general civil committees and sexually violent predators).

lower standard of “clear and convincing evidence,” contained in the general civil commitment statute as opposed to proof “beyond a reasonable doubt,” required to find someone a sexually violent predator. § 632.495, RSMo.

Indeed, Bernat's suggestion that a sexually violent predator is similarly situated to an individual who suffers from mental illness, but has neither committed sexual violence, nor has any proclivity toward future sexual violence, in addition to being against the clear weight of the authority and the intent of the legislature, is nothing short of offensive.

Because sexual predators are not similarly situated to other dangerous persons civilly committed, granting one group the statutory right to remain silent and not the other does not violate equal protection.

B. The sexually violent predator statutes are narrowly drawn to advance a compelling state interest.

If equal protection is implicated, then the legislative classification must be narrowly drawn and justified by a compelling state interest if similarly situated individuals are treated differently, because civil commitment of sexually violent predators "impinges on the fundamental right of liberty,". *Norton*, 123 S.W.3d at 173. This Court has already decided that the statute "is narrowly tailored to serve a compelling state interest." *Id.* at 174.

i. The SVP statute protects a compelling state interest.

“The State has a compelling interest in protecting the public from crime.” *Norton*, 123 S.W.3d at 174. More specifically, the State has a compelling interest in protecting the public from individuals who are “distinctively dangerous because of the substantial probability that they will commit further crimes of sexual violence.” *Id.* “This interest justifies the differential treatment of those persons adjudicated as sexually violent predators.” *Id.* In the present case, that differential treatment is that alleged sexually violent predators do not have the statutory right to remain silent that other civil committees do.

The legislature’s decision not to extend the right “to remain silent” to sexual predator proceedings is further justified by two other compelling state interests. First, there is the interest in securing the cooperation of alleged sexual predators to diagnose and treat their unusually intractable mental illnesses. *See In re Young*, 857 P.2d 989, 1014-15 (Wash. 1993) (refusing to extend to sexual predators other mentally ill persons’ statutory right to remain silent). And second, there is the interest of enhanced reliability of fact finding in these cases where the public’s health and safety is so palpably at stake.

Though Bernat argues that “the method of treatment . . . is irrelevant,” (App. Brf., 31), the overriding purpose of the sexual violent predator statutes is to allow for “control, care, and treatment until such time as the person’s mental abnormality has so changed that the person is safe to be at large.” § 632.495 RSMo. The sexual predator’s full “cooperation with the diagnosis and treatment procedures is essential.” *Young*, 857 P.2d at 1014.

Yet Bernat asks this Court to implement a scheme that would provide incentive for sexual predators to refuse treatment, encouraging strategic non-cooperation with the State's psychologists in the hopes that the State will then be unable to prove its case beyond a reasonable doubt. *See, e.g., In re Burgess*, 147 S.W.3d 822 (Mo. App. S.D. 2004)(Sexual predator refused to cooperate with State's psychologist so that statements could not be used against him); *Estelle v. Smith*, 451 U.S. 454 (1981)(Psychiatrist's testimony based on pretrial examination of defendant in criminal trial inadmissible in hearing to enhance sentence); *State v. Zanelli*, 212 Wis.2d 358, 370-71 (Wis App. 1997)(When SVP statute grants all "constitutional rights available to a defendant in a criminal proceeding," State may not comment on refusal to speak with psychiatrist). Bernat's proposed scheme would simply eviscerate the treatment purpose of the statute.

Moreover, an alleged sexual predator's testimony would plainly enhance the reliability of fact finding regarding whether the alleged predator has a mental abnormality and is likely to engage in predatory acts of sexual violence if not confined in a secure facility. § 632.480(5), RSMo (Cum. Supp. 2003).

And the United States Supreme Court, as well as other courts, have held that, because sexual predator commitments are civil proceedings, the privilege against self incrimination certainly does not bar the state from calling the alleged sexual predator as an adverse witness. *See Allen*, 478 U.S. at 374; *In re Hay*, 263 Kan. 822, 953 P.2d 666, 679-680 (1998); *In re Young*, 857 P.2d at 1014 (1993); *People v. Burns*, 128 Cal.App.4th 794, 803 (Cal. App. 2005)("California Courts have consistently refused to treat SVP Act proceedings as criminal

and transplant the full range of procedural rights accorded criminal defendants.”); *In re Kelley*, 698 N.W.2d 336 (Iowa App 2005)(“the purpose of a commitment is public safety and treatment of an individual rather than punishment,” and “does not implicate the defendant’s Fifth Amendment privilege.”). These courts have noted that the alleged predator’s testimony enhances the reliability of decision making:

It is difficult, if not impossible, to see how requiring the privilege against self-incrimination in these proceedings would in any way advance reliability. Indeed, the State takes the quite plausible view that denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would *decrease the reliability* of a finding of sexual dangerousness. The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons.

Allen, 478 U.S. at 374–375 (emphasis added)(internal citation omitted).

Similarly, in *People v. Leonard*, Cal.App.4th 776, 191-2, Cal.Rptr.2d 180, 190 (3rd Dist. 2000), the court rejected the claim that there is a right to remain silent in sexually violent predator hearings. Indeed, much as the State argues here, the California court found that the statute “provides for the collection of reliable evidence to assist the jury in

determining whether the person before the court is a sexually violent predator,” and that “the [accused’s] participation enhances the reliability of the outcome.” *Id.* at 792-93.

ii. The SVP statute is civil, not criminal.

Comparing the general civil committee’s right to remain silent to the 5th Amendment, Bernat assumes that he is entitled to the same protections as criminal defendants. (App. Brf. 37). Because sexually violent predator proceedings are not criminal in nature, his argument is without merit.

No doubt exists now that Missouri’s sexually violent predator commitment proceedings are civil in nature. Like the Washington and Kansas procedures examined in *Seling v. Young*, 531 U.S. 250, 260 (2001) (Washington), and *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (Kansas), Missouri’s procedures on their face are civil in nature. Missouri’s procedures are not placed in any criminal code, but rather in Chapter 632 of the Revised Statutes of Missouri that deals with comprehensive psychiatric services, and are described as “civil commitment.” A proceeding to adjudicate a person to be a sexual predator can be initiated only in the probate division of the circuit court. *See* § 632.484.1, RSMo (Cum. Supp. 2003) (respondent not presently confined); § 632.486, RSMo (respondent “presently confined”). If adjudicated a sexual predator, the person is not placed in the custody of the Director of the Department of Corrections, but rather in the custody of Director of the Department of Mental Health. *See* § 632.495, RSMo (Cum. Supp. 2003). And confinement is not for any purpose of punishment, but rather for “control, care, and treatment until such

time as the person's mental abnormality has so changed that the person is safe to be at large.”
§ 632.495 RSMo.

The application of some procedural safeguards traditionally applied to criminal prosecutions to facially civil commitment proceedings does not change the nature of those proceedings. A state's decision “to provide some of the safeguards applicable in criminal trials cannot itself turn [sexually violent predator commitment] proceedings into criminal trials.” *Hendricks*, 521 U.S. at 364, quoting *Allen v. Illinois*, 478 U.S. 364, 372 (1986).

Missouri's courts, as well as those of other states, have unanimously recognized that sexually violent predator commitments are civil proceedings. *See Thomas v. State*, 74 S.W.3d 789, 790 (Mo. banc 2002) (Missouri's statutes provide for “continued civil commitment”); *In re Cokes*, 107 S.W.3d 317, 324 (Mo. App. W.D. 2003) (sexual predator commitment proceeding “deemed a civil proceeding”); *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 838 (Mo. App. W.D. 2000) (examining right to bench trial in “civil commitment cases”); *State v. Harris*, 277 Conn. 378, 394 (Conn. 2006) (“the primary purpose of the continued commitment proceedings is to protect society and to treat the [individual's] mental illness, not to punish.”). In this civil proceeding, Bernat is not entitled to the protections reserved for criminal defendants.

iii. Adverse inferences are appropriate in civil proceedings.

Since 1849, a party has had the statutory right in civil cases to examine an adverse party under the rules of cross examination and to compel him to answer, either in court or on deposition. *See State ex rel. Williams v. Buzard*, 354 Mo. 719, 190 S.W.2d 907, 909 (1945).

Currently, the statute provides:

Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses.

§ 491.030 RSMo.

Bernat asserts that “the best proof that there is no compelling state interest in denying . . . the right to remain silent is that . . . *the State did not call him as a witness at trial.*” (Brf. App. 32)(emphasis in original).

Bernat’s conclusion is baseless. “The rule which permits an unfavorable inference to be drawn, against a party, knowledgeable of the facts of the controversy, who fails to testify and which permits such failure so to be used by an opponent in argument to a jury is well established.” *Pasternak v. Mashak*, 428 S.W.2d 565, 568 (Mo. 1967). “In such cases

the failure of a party to testify raises a presumption that his testimony would have been unfavorable to his cause.” *Kelsey v. Kelsey*, 329 S.W.2d 272, 273. “The presumption thus raised may therefore be properly mentioned in the argument.” *Id.* This is because Bernat was not “available” as a witness to the State “because of his personal interest . . . in the outcome of the case.” *Block v. Rackers*, 256 S.W.2d 760, 764 (Mo. 1953). “It could hardly be anticipated that . . . [the State] could safely vouch for [Bernat’s] testimony by placing him on the witness stand.” *Id.* Indeed, Bernat’s false premise is perhaps most plainly rebutted by Justice Brandeis’s pithy observation that “[s]ilence is often evidence of the most persuasive character.” *Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923).

Far from proving that the State has no interest in having Bernat testify, the State’s decision not to call Bernat merely reflects the commonly held belief that an attorney should not ask questions to which he does not know the answer, as here. Rather than call Bernat to the stand having no idea what he was going to say, the State appropriately commented on his failure to testify and called upon the jurors to draw an adverse inference from the fact that he did not do so. The alternative – calling Bernat cold, and being unprepared to meet whatever his testimony was – would unnecessarily risk making the proceeding *less* reliable.

Bernat next cites cases from two states, which he claims “reject the notion that depriving a person subject to commitment as a sexually violent predator of the right to remain silent is either essential or compelling.” (Brf. App. 33). “Obviously,” Bernat concludes, “these other states do not agree” with Missouri’s statute. (Brf. App. 33). The argument is without merit.

While the State agrees that two other states have, by statute, granted the right to remain silent to alleged sexually violent predators, the State fails to see the relevance of this argument. That two other states – out of the numerous sexually violent predator statutes² – “do not agree” with Missouri hardly diminishes Missouri’s “compelling interest in protecting the public from . . . [individuals who are] distinctively dangerous because of the substantial probability that they will commit future crimes of sexual violence.” *Norton*, 123 S.W.3d at 174. There is no justification for judgments in sexually violent predator commitments to be less reliable than judgments in other civil cases — unless it be that sexual predator proceedings are really criminal prosecutions. *See Allen*, 478 U.S. at 475 (privilege against self-incrimination not intended to enhance reliability of fact finding). They are not.

Finally, relying upon a juvenile detention and abuse statute, Bernat attempts to distinguish SVP proceedings from other civil proceedings, arguing that when the State

² *See* Ariz.Rev.Stat. §§ 36-3701 to 3717; Cal. Welf. & Inst.Code §§ 6600-6609.3; Fla. Stat. Ann. §§ 394.910-.931; 725 Ill. Comp. Stat. 207/1-99; Iowa Code §§ 229A.1-.16; Kan. Stat. Ann. §§ 59- 29a01 to 29a21; Mass. Gen. Laws ch. 123A, §§ 1-16; Minn.Stat. §§ 253B.185(1)-(7); Mo. Ann. Stat. §§ 632.480-.513; N.J. Stat. Ann. §§ 30:4-27.24 to 27.38; N.D. Cent.Code §§ 25-03.3-01 to 03.3-23; 42 Pa. Cons.Stat. §§ 6401-6409; S.C.Code Ann. §§ 44-48-10 to 170; Tex. Health & Safety Code § 841.003; Va.Code Ann. §§ 37.1-70.1-.19; Wash. Rev.Code §§ 71.09.010-.902; Wis. Stat. § 980.01.

“attempts to deprive its citizens of their liberty . . . it does not compel the person to risk losing his liberty because he chooses not to take the stand to testify.” (App. Brf. 35). Bernat’s cited civil statute does not support his argument.

As an initial matter, Bernat asserts that in Missouri, civil “parties only lose their liberty under Chapter 632 and Chapter 211, relating to juvenile courts.” (App. Brf. 35). This contention is patently untrue. A court may, for example, hold an individual in contempt for the “contumacious and unlawful refusal . . . to be sworn as a witness, or, when so sworn, to refuse to answer any legal and proper interrogatory.” § 476.110(5) RSMo. “Punishment for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting, or both.” § 476.120 RSMo. Contrary to Bernat’s unsupported assertion, a civil party may lose his liberty precisely *for* remaining silent.

Bernat’s claim that section 211.059 states that a “juvenile does not have to take the stand to defend himself or suffer an adverse inference,” (App. Brf. 35) is equally untrue. Section 211.059 covers custodial interrogation, as both the section’s text and its reference to “Miranda warning” in the title makes clear, with only a minor discussion of hearings.³

In any event, Bernat’s apparent belief that the section actually furthers his argument is simply puzzling. Bernat has made no claim – in this equal protection challenge – that he is similarly situated to juvenile offenders or abuse victims.

Moreover, Section 211.059, which is reproduced in full in the appendix, provides an impressive array of protections derived from criminal 5th Amendment jurisprudence. To the

³ Section 211.171, covering the hearing procedure, is likewise silent on the issue.

extent that section 211.059 has any relevance to the present proceeding whatsoever, it can only be to show that the legislature, when it intends to provide a full panoply of criminal constitutional protections (or, in this case, the prophylactic warnings designed to protect the 5th Amendment right to be free from compelled testimony in a criminal case required by *Miranda v Arizona*, 384 U.S. 436 (1966)), which are not otherwise required, it does so. Comparing section 211.059's expansive and specific enumeration of legislatively granted rights to section 632.335.2(4)'s grant of the right to "remain silent," and treating the two as identical stretches the rules of statutory construction beyond their rational limits.

Other states' sexual predator laws also provide context for the language a legislature would use in granting a full 5th Amendment right to remain silent. For example, in Wisconsin, Wis. Stat. § 980.05(1m) provides that at "the trial to determine whether the person . . . is a sexually violent person . . . All constitutional rights available to a defendant in a criminal proceeding are available to the person." Again, this all-encompassing grant of rights is simply not comparable with Missouri's more limited language.

Section 632.335.2(4) is much more similar to Connecticut's Practice Book, 2001, § 34-1(f), which provided that in a parental rights termination proceeding, no "parent who is the subject of a petition [to terminate parental rights] shall be compelled to testify if the testimony might tend to incriminate . . . or establish the facts alleged in the petition." Yet in *In re Samantha C*, 268 Conn. 614, 624-25, (Conn. 2004), the trial court specifically weighed "the evidence in light of the [parents] to testify to the contrary," and found them to be unfit. The Connecticut Supreme Court upheld the inference, ruling that:

We cannot conclude, however, that a parent’s right not to testify, which exists only by virtue of a rule or statute, and is not constitutionally required, would, simply because of that enactment, also carry with it a protection that is generally reserved for the fifth amendment. The fact remains that the respondents in the present case asserted a nonconstitutional privilege, in a proceeding that is “essentially civil.”

Samantha C, 268 Conn 614, 664.

Bernat’s equal protection claim does not involve the 5th Amendment’s right to be free from compelled incrimination, and its numerous prophylactic protections, which have developed over the last 40 years. Rather, it involves a statutory “right to remain silent,” which is limited in its scope, and exists in general civil commitment proceedings not as a matter of constitutional necessity, but as legislative grace.

iv. The SVP statute is narrowly drawn.

It is also clear that the limitation is narrowly drawn. The sexually violent predator statutes provide “an elaborate, step-by-step procedure, conferring on the alleged predator a number of rights enjoyed by defendants in criminal prosecutions.” *Norton*, 123 S.W.3d at 174. Those rights include: the right to a preliminary hearing (§ 632.489.1); notice and the opportunity to contest a probable cause finding within 72 hours (§ 632.489.2); the right to counsel (§ 632.489.3(1)); the right to present evidence (§ 632.489.3(2)); the right to cross-examine witnesses (§ 632.489.3(3)); the right to a jury trial (§ 632.492); the right to require

the State to prove its case beyond a reasonable doubt (§ 632.495); and the right to a unanimous verdict (§ 632.492).

Certainly this multitude of procedural protections, as well as the “multiple opportunities for court review and dismissal from secure confinement” the statutes provide, grants adequate protections to alleged predators. *Norton*, 123 S.W.3d at 174. As this Court has already stated:

Given the additional procedural safeguards . . . and multiple opportunities for court review . . . this Court finds that Missouri’s *statutory scheme* is narrowly tailored to promote the public from this small percentage of offenders.

Id. at 175 (emphasis added).

Because the SVP statute is narrowly drawn to advance several compelling state interests, Bernat’s equal protection claim must fail.

II – Ms. Kelly was qualified to diagnose and testify regarding the existence of mental abnormalities causing Appellant to meet the definition of a sexually violent predator.

(Responds to Appellant’s Point II)

Bernat next contends that the trial court erred in allowing Linda Kelly, a licensed clinical social worker, to provide expert testimony about his mental abnormality. Bernat claims that an amendment to section 632.483.2(3) “should be applied to . . . exclude the testimony” at trial of anyone who is not a psychiatrist or social worker. Bernat’s argument badly misconstrues the applicable law, not to mention the holdings of his two cited cases.

“In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” § 490.065.1 RSMo. It is within the trial court’s discretion to admit or exclude an expert’s testimony. *State v. Davis*, 814 S.W.2d 593, 603 (Mo banc 1991). A reviewing court will not interfere with the trial court’s ruling unless an abuse of discretion is plainly shown. *Whitnell v. State*, 129 S.W.3d 409, 413 (Mo. App. E.D. 2004).

Section 632.483.2(3) requires the “agency with jurisdiction” over the alleged sexually violent predator (normally the Department of Mental Health or the Department of Corrections) to “provide the attorney general . . . with . . . [a] determination by either a psychiatrist or psychologist . . . as to whether the person is a sexually violent predator.” The information is to be used in making the initial determination of whether the individual meets the definition of a sexually violent predator, and whether a petition for civil commitment

should be filed pursuant to section 643.486. § 632.483.4, and .5, RSMo (Cum. Supp. 2003). Section 632.483 says nothing about trial whatsoever, and certainly, as Bernat admits, “does not discuss admissibility of testimony at trial.” (Brf. App. 42).

Far from supporting his contention, as Bernat claims, to the extent that *In re Johnson*, 58 S.W.3d 496 (Mo. banc 2001), is on point, it disposes of the case against him. In *Johnson*, the State offered testimony from a purported expert from the Department of Corrections who was not a licensed social worker or counselor, but was working towards becoming a licensed counselor. *Id.* at 497. Referring to the statutory definition of “professional counseling,” the court found that the term was “not defined to include ‘diagnoses’ of any sort.” *Id.* at 499, citing § 337.500 RSMo. Any “diagnoses” the purported expert made “had to be approved . . . by a supervising licensed psychologist,” so he “should not have been permitted to testify to his ‘diagnoses’ at trial.” *Id.*

As noted by the Eastern District, not “only is *Johnson* distinguishable from the case at bar, Bernat misstates the holding of the Supreme Court therein.” *Bernat*, 2005 WL at *5. This Court in *Johnson* made no mention of Bernat’s argument that only psychologists or psychiatrists can provide expert testimony. Indeed, this Court noted identical language contained in section 632.489.4 mandating that a post-probable cause examination be conducted only by “a psychiatrist or psychologist,” and concluded that the statute “makes no such limitations at trial.” *Id.* at 498. If any statute could succumb to Bernat’s strained analysis, it is section 632.489.4, which involves a court ordered examination after the court has found probable cause – as opposed to section 632.483, which comes into effect before

a decision to file a petition has even been made – before any of the enumerated rights in the sexual violent predator statutes even attach. Yet in *Johnson*, this Court had no problem determining that the language had no bearing on testimony offered at trial.

Moreover, this Court explicitly found that “licensed social workers are permitted by law to evaluate persons and make diagnoses of mental disorders.” *Johnson*, 58 S.W.3d at 499. This Court’s analysis hinged entirely on the absence of the term “diagnosis” from the statutory definition of “professional counseling,” as opposed to “practice of psychology” and “clinical social work,” whose definitions both do include the term “diagnosis.” *Id.*, §§ 337.015.3 (practice of psychology); 337.600 (clinical social work). Under any reading of *Johnson*, it is plain that licensed clinical social workers, such as Ms. Kelly, are competent to diagnose and testify to the existence of mental disorders in sexually violent predator commitment proceedings.

In re Spencer, 103 S.W.3d 407 (Mo. App. S.D. 2003), upon which Bernat also heavily relies, is similarly unhelpful to his cause. Bernat claims that the *Spencer* court found “a licensed clinical worker’s testimony inadmissible.” (Brf. App. 35). “Again, Bernat misstates the holding of the court.” *Bernat*, 2005 WL at *5. Quite to the contrary, in *Spencer*, as in the present case, “the licensed clinical social worker who wrote the end of confinement report, also testified for the State” at trial. *Spencer*, 103 S.W.3d at 412. But the court did not disqualify the expert from testifying. In fact, the case contains no further reference to the social worker’s qualifications whatsoever – apparently showing that, contrary to Appellant’s profound misreading, the court found nothing wrong with a licensed clinical social worker

providing expert testimony. The *Johnson* case is discussed briefly for the proposition that remand, rather than reversal, was appropriate under certain circumstances when the State had not met its burden. *Id.* at 415-16. But it certainly did not provide the basis, as Bernat contends, for invalidating any expert testimony. Indeed, as the court below noted, “the court did not discuss the admissibility of testimony of a licensed social worker in its opinion, nor did it apply the court’s holding in *Johnson* to find that any such testimony was inadmissible.” *Bernat* 2005 WL at *5. Nor, as Bernat concedes, does the language of either statute say anything about admissibility at trial. (Brf. App. 34).

Because Ms. Kelly is fully qualified to testify that Bernat has the sexual abnormality paraphilia NOS, the trial court was correct in overruling Bernat’s objection, and his claim must fail.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the trial court, and the Missouri Court of Appeals, Western District, finding that Albert Bernat is a sexually violent predator.

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 7th day of April, 2006, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Emmett Queener
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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 6428 words according to WordPerfect software.

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.

Trevor Bossert

APPENDIX