

Case no. SC89224

In the Matter of the Care and Treatment of
John R. Van Orden,

Appellant,

v.

State of Missouri,

Respondent.

Appeal to the Supreme Court of Missouri
From the Circuit Court of Webster County
The Honorable Kenneth Thompson

Brief of Respondent, The State of Missouri

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Jurisdictional Statement

John Van Orden appealed to the Missouri Court of Appeals, Southern District, following a jury trial in the Circuit Court of Webster County, Missouri, Probate Division, and the entry of a judgment and commitment order, directing that he be committed to the custody of the Missouri Department of Mental Health for control, care, and treatment under the State's sexually violent predator law, MO. REV. STAT. § 632.480, *et seq.* (2000 and Supp. 2007) LF 176.

But after he filed his opening brief in the Southern District, and before the State had filed its Respondent's Brief, he sought transfer to this Court. The Southern District granted the order, and the case was transferred to this Court on March 14, 2008.

Statement of Facts

I. Procedural History.

John Van Orden pleaded guilty to his index offense, within the meaning of Missouri's sexually violent predator law,¹ in February 1999, specifically, child molestation in the first degree. Tr. 246; LF 11. He was sentenced to four years in the Missouri Department of Corrections. Tr. 250-251; LF 11.

He was paroled twice and sent back to prison both times. Tr. 374-375. The second time, he violated a number of conditions of his parole: failing to report as directed; consuming alcohol; and failing to enter and successfully complete an outpatient sex offender program. LF 115, 128. A parole detainer issued on September 2, 2005, and he was arrested and returned to the Fulton Reception and Diagnostic Center on September 6, 2005. LF 115. His original maximum release date, for release from confinement altogether, was October 21, 2005, and that was the maximum release date noted on his order of parole revocation. LF 127-128.

The agency with jurisdiction, the Missouri Department of Corrections, conducted a sexually violent predator review on September 30, 2005. LF 120. The Department provided notice to the Attorney General and the Multidisciplinary Team on October 5, 2005, advising

¹ The statutory definition of a sexually violent predator includes the requirement that the person has pleaded guilty to, or been found guilty of, a "sexually violent offense." MO. REV. STAT. § 632.480 (5)(a)(Supp. 2007). Sexually violent offenses, for purposes of the SVP law, include child molestation in the first degree. § 632.480(4) (Supp. 2007).

that Mr. Van Orden may meet the criteria for sexually violent predator commitment. LF 116. The Multidisciplinary Team found on October 5, 2005, that Mr. Van Orden met the commitment criteria. LF 122-124. On October 11, 2005, the Prosecutor's Review Committee likewise concluded that Mr. Van Orden meets them. Tr. 125-126.

The State filed its petition for Mr. Van Orden's commitment on October 14, 2005. LF 1, 10.

The Missouri Board of Probation and Parole issued its order revoking Mr. Van Orden's parole on October 20, 2005.

The probate court held a hearing and found probable cause. LF 3.

The court subsequently conducted a jury trial in May 2007. LF 7, 154. The State's evidence at trial included the expert testimony of Dr. Steven Mandracchia, a psychologist. Tr. 239. The State also called Mr. Van Orden in rebuttal, Tr. 423, and read portions of the deposition of Susan Dodson, Tr. 424. Mr. Van Orden's evidence included the testimony of Lucinda Levings, a substance abuse and addiction counselor. Tr. 346. And Mr. Van Orden testified in own behalf. Tr. 367.

The jury rendered a unanimous verdict on May 17, 2007 finding by clear and convincing evidence that Mr. Van Orden is a sexually violent predator. LF 180; Tr. 473. The court entered its judgment and commitment order the same day. LF 180.

II. The evidence.

A. Mr. Van Orden's history.

As addressed in more detail below, Mr. Van Orden's known history of sexually violent offenses includes offenses against children, ranging in ages from 4 to 16 years old,

both girls and a boy. He has been diagnosed with pedophilia, alcoholism, and antisocial personality disorder.

Mr. Van Orden was born in 1962. Tr. 367.

In the 1980's, he had sex with his mentally challenged 16-year-old niece, who subsequently became pregnant. Tr. 250, 278. In 1987, he pleaded guilty to the misdemeanor of sexual misconduct and received two years' probation. Tr. 250.

While he was on probation for having had sexual contact with the 16-year-old niece, Tr. 279, 339, he had sexual contact with his 5-year-old daughter. Tr. 250-251. He pleaded guilty to sexual abuse in the first degree. *Id.* The girl reported that there were repeated incidents, at least ten, and that they involved touching and some penetration. Tr. 262, 394. Mr. Van Orden admitted in his deposition that he had sexually offended against his daughter a total of about 25 times. Tr. 392. He received a sentence of four years in the Missouri Department of Corrections. Tr. 251.

He was convicted in 1999 of child molestation in the first degree for an offense against another girl. Tr. 251.

A year or two after pleading guilty to the sexual abuse of his daughter, his parental rights to his daughter, and to his 4-year-old son, were terminated. *Id.* In the judgment of termination, the court entered a finding that Mr. Van Orden had sexually abused both his daughter and his son. *Id.*

Mr. Van Orden admits that he is sexually attracted to children, male and female, at present and has recurrent fantasies about them. Tr. 259-260. He experiences sexual arousal by touching a child. Tr. 268. He reports masturbatory fantasies of sex with girls, 13 years of

age or younger. Tr. 269. He acknowledges that he has had paraphilic or pedophilic urges from at least his late teenage years, and has struggled with them throughout his life. Tr. 266-267.

During his first incarceration in the Missouri Department of Corrections, he participated in the Missouri sex offender treatment program, MOSOP, but while he was in the second phase of the program, quit group therapy and was eventually terminated from the program. Tr. 397. The therapist concluded that Mr. Van Orden has a chronic history of not finishing projects that he starts; poor ability to deal with frustration and stress; was rarely able to stay focused in group therapy when vigorously confronted by the group about his character defects and cognitive distortions, particularly when his pervasive problems with dishonesty, selfishness, and impulsiveness were addressed; and that these observations were consistent with the fact that he is “highly addicted to his overall style of relating to the world.” Tr. 398. Mr. Van Order does not dispute the therapist’s conclusions. Tr. 397.

During his most recent incarceration, Mr. Van Orden completed Phases 1 and 2 of MOSOP. Tr. 268. When he was let out on parole in 2004, he entered Phase 3 of the program, outpatient treatment, but was terminated from the program. LF 128; Tr. 268.

When he was released on parole in 2004, he was subject to certain provisions of supervision, that included avoiding alcohol, pornography, and being around children, and he was to continue with outpatient sex offender treatment. Tr. 337, 340-341, 350-351, 412. When his probation was revoked, he was consuming alcohol, using pornography, failed to participate in sex offender treatment, and was spending time around children, including dating or living with a woman who had children. *Id.* While he was on parole, he lived in

California, Oregon, and Arkansas. Tr. 399-400. Mr. Van Orden agreed that “[f]or all respects and purposes, [he] disappeared[.]” Tr. 400.

Mr. Van Orden’s other law enforcement contacts include a 1981 conviction for obstruction of justice; failure to pay a fine; a DWI in 1985; another DWI, a few years later; property destruction; and a 1990 forgery offense. Tr. 414-417.

B. The expert testimony.

Dr. Steven Mandracchia, the State’s expert, is a psychologist with extensive experience in making psychological diagnoses and performing risk assessments. Tr. 239-242. He has performed two or three thousand psychological evaluations, including about 15 sexually violent predator evaluations. Tr. 242. Of those 15, he has found that slightly less than half of the persons met the qualifications for commitment as a sexually violent predator. Tr. 243. Dr. Mandracchia testified to a reasonable degree of psychological certainty that Mr. Van Orden meets the definition of a sexually violent predator under Missouri law. Tr. 288-289.

In evaluating Mr. Van Orden, the doctor applied the following definition of a sexually violent predator:

Any person who suffers 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 and who has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to Section 552.030, RSMo, of a sexually violent offense.

Tr. 245.

He defined “predatory acts” as:

Acts directed toward individuals, including family members, for the primary purpose of victimization.

Tr. 245-246.

And he defined “mental abnormality” as:

A congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his/her behavior.

Tr. 253-254.

In performing Mr. Van Orden’s evaluation, the doctor explained that his process was to review as much information as he could, including thousands of pages of documents from Mr. Van Orden’s incarceration in the Department of Corrections. Tr. 247-248. These records included medical, psychiatric, mental health, disciplinary, programming, employment, and placement records. Tr. 248. He also reviewed Probation and Parole records, criminal court records, records from prosecutors and law enforcement, and records from the Department of Family Services. Tr. 247-248. He interviewed Mr. Van Orden, Tr. 252; looked at risk factors associated with sexual offense recidivism; and used actuarial measures, Tr. 247. The information that he had available in this case is the type reasonably relied upon by professionals in his field to arrive at conclusions and form opinions in this

type of case, and he found the information available to him to be otherwise reasonably reliable. Tr. 249.

Dr. Mandracchia noted that Mr. Van Orden had pled guilty to a qualifying sexually violent offense, the offense of child molestation in the first degree. Tr. 246.

In determining whether Mr. Van Orden suffers from a mental abnormality, as defined under the sexually violent predator law, Dr. Mandracchia considered the information available about him and referred to the Diagnostic and Statistical Manual of Mental Disorders, the DSM-IV, a resource commonly used in his profession to arrive at diagnoses. Tr. 254-255. Based on that information and the DSM-IV, Dr. Mandracchia diagnosed Mr. Van Orden, within a reasonable degree of psychological certainty, with pedophilia and alcoholism. Tr. 256, 286.

The doctor explained that pedophilia is a form of paraphilia, a condition in which an individual has recurrent, intense, disturbing sexual fantasies, urges, or behaviors that involve non-normative sexual objects. Tr. 256. In the case of pedophilia, the non-normative object is a prepubescent child, male or female. *Id.* Diagnostic criteria for pedophilia are intense, sexually arousing fantasies, urges, or behaviors, involving sexual activity with a prepubescent child or children, generally defined as 13 years of age or younger, lasting for at least 6 months; the person is either acting on the urges, or the urges or fantasies cause distress or interpersonal difficulties; and the person is at least 16 years old and at least 5 years older than the child or children. Tr. 257-258.

He based the pedophilia diagnosis on Mr. Van Orden's admitted recurrent fantasies, urges, and behaviors starting from age 17 to his mid-20's, and acknowledgment that those

behaviors and urges have continued to the present, Tr. 259; his sexual attraction to males and females, Tr. 259-260; the number of behaviors that Mr. Van Orden has acknowledged and the discrepant number of occasions that his victims have reported, Tr. 261; and Mr. Van Orden's reports that some behaviors were consensual and his victims' reports that they were not, *id.*

The doctor testified that Mr. Van Orden's pedophilia predisposes him to commit sexually violent offenses against prepubescent children and that he has serious difficulty controlling his behavior. Tr. 263-264. The doctor reached that conclusion because Mr. Van Orden has acted on his urges, and to do so, had to cross a line to criminal behavior that the overwhelming majority of people would know was not proper behavior. Tr. 265.

In terms of assessing whether Mr. Van Orden is more likely than not to commit a sexually violent offense if not confined in a secure facility, Dr. Mandracchia looked at known risk factors for sex offense recidivism, and actuarial measures, tests that have been empirically demonstrated to correlate with sexual recidivism. Tr. 271-272. Dr. Mandracchia relied on an actuarial score that Mr. Van Orden received on a test administered within a year of the doctor's evaluation, and which he concluded was reasonable to rely upon. Tr. 272. The instrument was the STATIC-99, a commonly used actuarial that measures the risk of reconviction of a sexually violent offense. Tr. 273. Mr. Van Orden's score on the STATIC-99 associated him with the group having a medium to high risk of reconviction, not just reoffense. Tr. 272-273.

Dr. Mandracchia also explained that he applied his own clinical judgment and reviewed Mr. Van Orden's risk factors for reoffending, as supported by research. Tr. 274.

Mr. Van Orden's history of offending, sexually and nonsexually, increases risk, as does his offense pattern, which are, by definition, sexually deviant behaviors. Tr. 275-276. The doctor also noted that Mr. Van Orden had been diagnosed with antisocial personality disorder on a number of occasions, believes Mr. Van Orden would meet the diagnostic criteria for it, and explained that antisocial personality is a risk factor. Tr. 276. Moreover, the combination of sexual deviance and such a disorder increases the risk of reoffense. Tr. 277. His range of victims, both in terms of ages and sex, increases risk. Tr. 277-278. That he offended against a male victim does, too. Tr. 278. His problems with alcohol increase risk. *Id.* Sexually offending while under supervision, such as offending against his five-year-old daughter while on probation for molestation of his sixteen-year-old niece, increases his risk. Tr. 278-279. His chaotic lifestyle, including having had his children taken away from him, and deficits in normal, legal sexual behaviors also increase risk. Tr. 279-280.

Dr. Mandracchia concluded to a reasonable degree of psychological certainty that Mr. Van Orden is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. Tr. 280-281.

The doctor noted that Mr. Van Orden had completed Phase 2 of sex offender treatment while in the Department of Corrections, after an unsuccessful attempt at it during a prior commitment. Tr. 280. But, the doctor explained, Mr. Van Orden's completion of Phase 2 did not reduce his risk below more likely than not, in view of the number of his offenses, Tr. 281, and because his history and the doctor's interview with him demonstrates that he still does not have sufficient understanding, knowledge, or acceptance of his

treatment and recidivism relapse concepts, Tr. 283. The doctor also noted that Mr. Van Orden had been terminated from Phase 3 of sex offender treatment. Tr. 286.

The doctor also noted, in connection with the diagnosis of alcoholism, that Mr. Van Orden said alcohol was involved in some occasions of his sexual offending, and not in others, but that he continued to have masturbatory fantasies about girls when he was in prison, *i.e.*, even when not intoxicated. Tr. 286-287.

The doctor concluded to a reasonable degree of psychological certainty that Mr. Van Orden 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. Tr. 287.

Mr. Van Orden did not offer any expert testimony. He called Lucinda Levings, a substance abuse and addiction counselor, who testified that he was scheduled to see her about obtaining residential treatment. Tr. 346-349. But that did not happen because of his parole violation. Tr. 349.

III. The jury instructions

At the instruction conference, Mr. Van Orden's counsel offered his Instruction A, to follow Instruction No. 4. LF 140, Tr. 427. That proposed instruction was patterned after a criminal instruction and would instruct the jury that it should presume Mr. Van Orden not to be a sexually violent predator. *Id.* It instructed the jury that "the petitioner [has] the burden of proving by clear and convincing evidence that the respondent is a sexually violent predator." LF 140. The court rejected Instruction A. Tr. 428.

The State offered Instruction No. 5, which provided, in part:

The burden is upon the petitioner to cause you to believe by clear and convincing evidence that Respondent is a sexually violent predator....

LF 136; Tr. 428. Mr. Van Orden's counsel objected, and offered Instructions B and C. LF 141-144; Tr. 428. Specifically, he objected not to the clear and convincing evidentiary standard, but to the lack of a definition of clear and convincing in the State's proposed Instruction No. 5, and offered instructions to define clear and convincing evidence. Tr. 429. The court rejected his proposed Instructions B and C. Tr. 428.

Mr. Van Orden's counsel also objected to the State's proposed verdict director, Instruction No. 6, and offered his Instruction D. LF 137, 145-146; Tr. 430-431. He did not object to the use of the clear and convincing evidentiary standard, but to the criteria for finding a person to be a sexually violent predator. Tr. 431. His proposed verdict director, like the State's, used the clear and convincing standard. LF 145. The court refused his Instruction D. Tr. 432.

His counsel also offered Instruction E, a converse to his proposed verdict director. LF 147; Tr. 432. That instruction again referenced the clear and convincing evidentiary standard. *Id.* The court rejected Instruction E. Tr. 432.

Argument

I. The jury was appropriately instructed to apply a “clear and convincing” evidentiary standard. Assuming that Mr. Van Orden has preserved his constitutional

challenge to this standard, this standard comports with due process. (Responds to Appellant's Point I.)

The jury was instructed under the clear and convincing evidence standard, in accordance with MO. REV. STAT. § 632.495.1 (Supp. 2007). LF 137. Mr. Van Orden offered his own instructions at trial, which included that standard, LF 140-147 (Instructions A-E), rather than the reasonable doubt standard that he now argues is required. Accordingly, he appears to have waived this claim of error.

If the Court reviews it on the merits, the challenge nevertheless fails. Neither the United States Supreme Court nor this Court has ever held that the reasonable doubt standard is required in sexually violent predator commitment proceedings, nor civil commitment proceedings in general. The United States Supreme Court has approved the use of the clear and convincing standard in general civil commitment proceedings, and the high courts of at least two other states have approved the use of that standard in sexually violent predator commitment proceedings.

A. The claim is waived.

Generally, a “party cannot complain on appeal of any alleged error on appeal which, by his ... own conduct at trial, he ... joined in or acquiesced to.” *Johnson v. Moore*, 931 S.W.2d 191, 195 (Mo. App. E.D. 1996) (citation omitted).

And failure to make specific objection to an instruction considered erroneous, distinctly stating the matter objected to and grounds of objection, preserves nothing for review, except review for plain error. *Martha’s Hands, LLC v. Starrs*, 208 S.W.3d 309, 315 (Mo. App. E.D. 2006) (citing Rules 70.03 and 84.13), and *Brenneke v. Dep’t of Mo., Veterans of Foreign Wars of United States of America*, 984 S.W.2d 134, 140-141 (Mo. App. W.D. 1999) (same).

Here, where the appellant not only failed to object to the evidentiary standard in the jury instructions proposed by the State, but offered instructions applying the very same standard about which he now complains, the most appropriate holding would be to reject the claim altogether, as waived.

But as discussed below, the substantive challenge to the clear and convincing evidentiary standard fails on the merits, and could not survive plain error review, in any event.

B. Standard of review.

This Court reviews issues of law *de novo*. *In the Matter of the Care and Treatment of Murrell v. State*, 215 S.W.3d 96, 102 (Mo. 2007) (en banc).

C. The clear and convincing standard is appropriate in civil commitment cases, including sexually violent predator cases.

The United States Supreme Court has “consistently upheld” statutes prescribing the involuntary civil commitment of persons who are unable to control their behavior and thereby pose a danger to public health and safety, “provided the confinement takes pursuant to proper procedures and evidentiary standards.” *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1982), and *Addington v. Texas*, 441 U.S. 418, 426-427(1979)).

More than three decades ago, in *Addington*, the Court examined what standard of proof is required by due process in a civil proceeding brought under state law, for an individual’s involuntary and indefinite commitment to a state mental hospital. 441 U.S. at 419². Describing the reasonable doubt and preponderance of the evidence standards as lying at opposite ends of the proof continuum, *id.* at 424, the Court concluded that both were too extreme, *id.* at 431-433.

The burden of proof standard, the Court explained, “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Id.* at 423. “In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual’s interest in not being involuntarily confined indefinitely and the state’s interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions.” *Id.* at 425 (citations omitted). While “civil commitment for any purpose constitutes a significant deprivation of

² A copy of *Addington* is included in the Appendix.

liberty that requires due process protection, ... [t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.” *Id.* at 425-426.

The Court noted that at the time, only two states permitted involuntary commitment under the preponderance standard, one (Mississippi) by statute and the other (Texas) by caselaw. *Id.* The Court attributed the two states’ stances “not to any lack of concern ... but rather to a belief that the varying standards tend to produce comparable results.” *Id.*

The Court rejected the criminal standard of proof beyond a reasonable doubt for civil commitment proceedings, explaining that there were “significant reasons why” civil and criminal proceedings apply different standards of proof. *Id.* at 428. One, in civil commitment proceedings, “state power is not exercised in a punitive sense.” *Id.* at 428 (footnote omitted).

Two, the reasonable doubt standard has historically been reserved for criminal cases, and “we should hesitate to apply it too broadly or casually in noncriminal cases.” *Id.* (quotation and citation omitted).

Three, while the heavy criminal standard minimizes the risk of error to the individual, “even at the risk that some who are guilty might go free[,] ... [t]he full force of that idea does not apply to a civil commitment.” *Id.* The Court explained:

[E]ven though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient’s condition, and the concern of family

and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma.... It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed.

Id. at 428-429.

Finally, the Court noted, while the basic issue in a criminal prosecution is whether the accused in fact committed the alleged act, the issue is more complex in a civil commitment proceeding, because

factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert[s].... Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

Id. at 429 (citations omitted).

But, “an individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significant and greater than any possible harm to the state.... [T]he individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.” *Id.* at 427.

A middle level of proof, then, between preponderance and reasonable doubt, is the appropriate standard for a civil commitment, the Court concluded. *Id.* at 432-433.

The Court added a final observation about the wording of the instruction that the trial court had used: “clear, unequivocal and convincing.” *Id.* at 433. The Court said that the instruction was constitutionally adequate, but that the word “unequivocal” is not constitutionally required. *Id.* at 432.

Three years later, in *Foucha*, the Court reaffirmed its *Addington* holding, *i.e.*, that a state may use the clear and convincing evidence standard for civil commitment proceedings on the grounds of insanity and dangerousness. 504 U.S. at 86.

A 1997 case that came before the Court, *Hendricks*, involved a challenge to the Kansas statutory scheme for the civil commitment of sexual violent predators. 521 U.S. at 350. Mr. Hendricks was committed upon a jury’s application of a reasonable doubt standard, *id.* at 355, a standard that he did not challenge on appeal. But in addressing the panoply of his constitutional challenges, the Supreme Court never opined that that evidentiary burden was constitutionally required.

The Court examined the Kansas law again in *Kansas v. Crane*, 534 U.S. 407 (2002), rejecting an absolutist approach to the requirement that the state prove a “lack of control,” as

described in *Hendricks*. Again, the Court did not depart from *Addington*, *i.e.*, the Court did change the rule that a clear and convincing burden of proof suffices for civil commitments.

Note, in addition to civil commitment cases, the United States Supreme Court has also approved the use of the clear and convincing standard in other cases involving liberty interests, *e.g.*, deportation, *Woodby v. INS*, 385 U.S. 276, 285 (1966), and denaturalization, *Chaunt v. U.S.*, 364 U.S. 350, 353 (1960), cases.

Several other states with sexually violent predator commitment provisions, analogous to Missouri's, likewise apply the clear and convincing evidentiary standard by statute, *e.g.*, Florida,³ Minnesota,⁴ New Jersey,⁵ New York,⁶ North Dakota,⁷ and Virginia.⁸ And the high courts of at least two of those states, Virginia and Florida, have easily rejected substantive due process challenges to their respective state's clear and convincing standards, relying

³ FLA. STAT. § 394.917(1) (2004).

⁴ MINN. STAT. § 253B.18, subd. 1(a)(2006) (applying clear and convincing standard to commitment petitions for persons who are mentally ill and dangerous); MINN. STAT. § 253B.185, subd. 1 (2006) (providing generally that provisions relating to commitment of mentally ill endangers persons apply also to commitment of sexually dangerous persons).

⁵ N.J. STAT. ANN. § 30:4-27.32 (2008).

⁶ MCKINNEY'S MENTAL HYGIENE LAW § 10.07(d) (2007).

⁷ N.D. CENT. CODE § 25-03.3-13 (2007).

⁸ VA. CODE ANN. § 37.2-908(C) (2007).

almost exclusively on *Addington* grounds. See *Shivae v. Commonwealth of Virginia*, 613 S.E.2d 570, 578 (Va. 2005), *cert. denied* 546 U.S. 1134 (2005) and *Westerheide v. State of Florida*, 831 So.2d 93, 109-110 (Fla. 2002).

* * * * *

Mr. Van Orden’s substantive due process challenge is brought under the federal and state constitutions. Missouri’s due process provision parallels its federal counterpart, and this Court treats the state and federal due process clauses as equivalent. *Jamison v. State*, 218 S.W.3d 399, 405 n. 7 (Mo. 2007) (en banc).

As the above discussion makes clear, *Addington* leaves the Missouri legislature free to select the clear and convincing standard. The reasonable doubt standard urged by Mr. Van Orden is not constitutionally required, because the sexually violent predator proceedings are civil in nature. *In the Matter of the Care and Treatment of Elliott v. State*, 215 S.W.3d 88, 93 (Mo. 2007)(en banc). And factors in criminal cases that favor application of the reasonable doubt standard, as discussed in *Addington*, are different from the factors that apply in proceedings to commit persons who are dangerous and mentally ill under Missouri’s sexually violent predator law. For example, Missouri’s sexually violent predator law is not punitive in nature. *In the Matter of the Care and Treatment of Gibson v. State*, 168 S.W.3d 72, 74 (Mo. App. S.D. 2004). The law provides that the dangerous and mentally ill will be provided care, control, and treatment, for their own benefit and that of the public. Accordingly, the choice of the Missouri legislature to apply that standard to sexually violent predator commitments does not run afoul of the federal or State constitution.

Mr. Van Orden argues that whether commitment under the regular civil commitment statutes also apply the clear and convincing standard cannot justify application of the same standard in SVP cases because, he says, no regular civil commitment order may last longer than one year, while SVP commitments are not so limited. Appellant’s Brief, pp. 29-30, *citing* MO. REV. STAT. §§ 632.350.2 and 632.355.3 (2000). To be clear, regardless of whether any single commitment order in a non-SVP case may exceed one year, “[s]uccessive one-year detention periods...are permissible on the same grounds and pursuant to the same procedures as the initial detention period.” MO. REV. STAT. § 632.360 (2000). And the SVP law is analogous to this aspect of the regular civil commitment law. The SVP law provides that a person who is committed is statutorily entitled to a yearly examination of his mental condition, and may be authorized by the director of the department of mental health to petition for his release, or may petition for release on his own. MO. REV. STAT. §§ 632.498 and 632.501 (Supp. 2007). The practical impact of the two commitment schemes is the same: Commitment is provided for, for as long as the person qualifies under the law. Any differences between the two commitment schemes does not remove the SVP law from the scope of authority that not only permits, but endorses, the “clear and convincing” burden of proof.

Moreover, whether commitment under the SVP law has an explicit time limit or not, the Supreme Court in *Addington* approved the use of the clear and convincing standard in a statutory scheme that provided for an “indefinite” period of commitment. 441 U.S. at 421. The lack of an explicit time limit does not alter the analysis here.

The appellant’s due process challenge fails and his Point I should be rejected.

II. The State complied with the statutory procedure for filing the petition for commitment, and the probate court properly interpreted the statute and denied Mr. Van Orden's motion to dismiss. (Responds to Appellant's Point II).

Section 632.483.1 (Supp. 2007) is a provision that tells the agency with custody of a person who may be a sexually violent predator when to notify the appropriate authorities that the person is nearing release from its custody. The purpose of the statute is to avoid needlessly early notice, in light of the SVP laws' design to provide care, control, and treatment of persons who *currently* suffer from a mental abnormality.

The crux of Mr. Van Orden's second Point is that, although he was arrested for violating his parole and returned to the custody of the Department of Corrections in September 2005, with a maximum release date of October 21, 2005, the State had to wait until October 20, 2005 to file its petition for his commitment as a sexually violent predator, that is, until the Board of Probation and Parole issued its order of Mr. Van Orden's parole revocation. He misreads § 632.483.1, and the reading he proposes is not, in any event, consistent with the purposes of the SVP law. The trial court properly interpreted the statute and denied his motion to dismiss.

A trial court's interpretation of a statute is a question of law, which is reviewed *de novo*. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002).

As noted, Mr. Van Orden was arrested for violation of his parole and returned to the custody of the Department of Corrections, Fulton Reception and Diagnostic Center in September 2005. LF 115. His maximum release date was October 21, 2005. LF 128. The Department conducted a sexually violent predator review at the end of September, LF 120,

and provided notice that Mr. Van Orden may meet the criteria for sexually violent predator commitment, to the Attorney General and the Multidisciplinary Team on October 5, 2005, LF 116. The Multidisciplinary Team and the Prosecutor's Review Committee found that Mr. Van Orden met the commitment criteria on October 5 and 11, respectively. LF 122-126. The State filed the commitment petition on October 14. LF 10. And the Board of Probation and Parole ordered Mr. Van Orden's parole revoked on October 20. LF 127-128.

The notice statute on which Mr. Van Orden relies provides in pertinent part:

1. When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection 4 of this section. Written notice shall be given:

- (1) within three hundred sixty days prior to the anticipated release from a correctional center of the department of corrections of a person who has been convicted of a sexually violent offense, except that in the case of persons who are returned to prison for no more than one hundred eighty days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

MO. REV. STAT. § 632.483.1 (1) (Supp. 2007).

To be clear, this statute says nothing about the timing of the filing of the petition for commitment, the subject of Mr. Van Orden's Point II. Therefore, the probate court could not have misinterpreted this statute as Mr. Van Orden suggests. If Mr. Van Orden's argument is construed as a claim that the agency with jurisdiction gave notice not in keeping with the statute, then that argument also fails, as discussed below.

“The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning.” *In the Matter of the Care and Treatment of Norton v. State*, 123 S.W.3d 170, 172 (Mo. 2003) (en banc) (quotation and citation omitted). The purpose of the SVP law is, as MO. REV. STAT. § 632.495.2 (Supp. 2007) says, the commitment of sexually violent predators 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.” Section 632.483.1 provides for timing of the notice so as to avoid needlessly early referrals.

Specifically, with regard to timing of the written notice, the statute provides that it shall be given by the agency with jurisdiction within 360 days of a person's release from a correctional center, except that a person who is returned to prison for no more than 180 days as a result of revocation of post-release supervision, shall be the subject of notice that is “given as soon as practicable following the person's readmission to prison.” § 632.483.1 (1).

Under Mr. Van Ordens' analysis, he could not be a person who had been returned to prison as a result of revocation of post-release supervision until the Board of Probation and Parole entered its order formally revoking his parole. But that reading of the statute ignores the final phrase, which requires written notice to be given “as soon as practicable following

the person's readmission to prison." And Mr. Van Orden was "readmitted to" prison as of September 6, 2005.

Moreover, the statute simply refers to persons returned to prison "as a result of" revocation of parole. Mr. Van Orden certainly was not *free* on parole at any time between September 6 and October 20, 2005 – he waived his revocation hearing, LF 128, and was in the custody of the Department of Corrections that entire time.

But even if he is correct that the Department did not give notice under the 180 day/revocation of post-release supervision prong, then the 360-day prong would apply by default, because he is a person who had been convicted of a sexually violent offense and was within 360 days of his anticipated release from a correctional center.

In short, the agency with jurisdiction, the Department of Corrections, gave notice in compliance with § 632.483.1 (1). Any other reading of the statute does not do justice to the laws' overall purpose of providing care, control, and treatment of persons who are sexually violent predators, and to § 632.483.1 (1)'s purpose of avoiding needlessly early notice.

The cases upon which Mr. Van Orden relies do not aid him. Because the SVP law is a special statutory proceeding, *In the Matter of the Care and Treatment of Salcedo v. State*, 34 S.W.3d 862, 867 (Mo. App. S.D. 2001) (superseded by statute on other grounds, as recognized by *In the Matter of the Care and Treatment of Barlow v. State*, 114 S.W.3d 328, 331 (Mo. App. W.D. 2003)), comparison to other special statutory proceedings is of limited value.

And the other types of proceedings to which he makes comparisons serve purposes different from the SVP law. He cites, for example, *In the Interest of C.W.*, 211 S.W.3d 93

(Mo. 2007) (en banc), involving the termination of parental rights statutes. The Court held that because there were fundamental interests involved, there must be strict and literal compliance with the statutes authorizing the State to terminate the parent-child relationship. *Id.* at 98 (citation omitted). The failure of strict compliance was reversible error. *Id.*

Here, the overall purpose of the SVP law is to provide for care, control, and treatment. The Court should decline any invitation to deprive SVPs and the public of the benefits of the law, placing them at risk by the happenstance of the allegedly premature timing of the written notice given by the Missouri Department of Corrections under § 632.483.1.

The appellant's Point II should be denied.

III. The probate court did not abuse its discretion in refusing to give unnecessary and confusing definitional instructions. (Responds to Appellant’s Point III.)

For his third Point, Mr. Van Orden complains that the probate court refused to give his suggested jury instructions, defining clear and convincing evidence. The court did not abuse its discretion. *St. Charles County v. Olendorff*, 234 S.W.3d 492, 495 (Mo. App. E.D. 2007) (refusal to give instruction reviewed for abuse of discretion).

When the Missouri Approved Instructions (MAI) contain instructions applicable to a particular case, then those instructions must be given to the exclusion of any other on the same subject. Rule 70.02(b). But there are no applicable MAIs for SVP cases. *In the Matter of the Care and Treatment of Lewis v. State*, 152 S.W.3d 325, 329 (Mo. App. W.D. 2005).

When no applicable instruction appears in MAI, and an instruction must be given, then the instruction “shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.” Rule 70.02(b). And when a claim is premised on a statute, a jury instruction is generally sufficient if it is framed in substantially the same language as the statute. *Cheek v. Weiss*, 615 S.W.2d 453, 458 (Mo. App. E.D. 1981); *Doyle v. St. Louis-San Francisco Ry.*, 571 S.W.2d 717, 723-724 (Mo. App. E.D. 1978).

Giving an instruction that violates Rule 70.02 is error, “its prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 70.03.” Rule 70.02(c). At core, an instruction must follow the substantive law and be readily

understandable by a jury composed of ordinary people. *Huff v. Union Electric Co.*, 598 S.W.2d 503, 516 (Mo. App. E.D. 1980)

Nontechnical, readily understandable words do not need to be defined in an instruction. *Wright v. Edison*, 619 S.W.2d 797, 802 (Mo. App. E.D. 1981). Thus, a court does not commit error when it declines to define commonly understood words in instructions. *State Farm Mutual Auto Ins. Co. v. DeCaigney*, 927 S.W.2d 907, 910 (Mo.App. W.D. 1996); *Huff*, 598 S.W.2d at 510. In *DeCaigney*, in fact, the Western District noted that attempting to define commonly understood terms can “introduce[] additional confusion.” 927 S.W.2d at 910.⁹

Other states’ courts have examined whether “clear and convincing” needs to be defined in jury instructions and concluded no. In *In re R.W.*, 755 N.E.2d 602, 907-908 (Ill.

⁹ Courts have held that common terms not requiring a definition include: “properly,” *DeClue ex rel. DeClue v. Murrell*, 717 S.W.2d 237, 240 (Mo. App. W.D. 1986); “adequate,” *Lindquist v. Scott Radiological Group*, 168 S.W.3d 635, 651-653 (Mo. App. E.D. 2005); “improvements,” *Huff v. Union Electric Co.*, 598 S.W.2d 503, 510 (Mo. App. E.D. 1980); “lifeline,” *Chrisler v. Holiday Valley, Inc.*, 580 S.W.2d 309, 314-315 (Mo. App. E.D. 1979); “agent,” *State v. Day*, 506 S.W.2d 497, 501 (Mo. App. St. L. Dist. 1974); “position of danger,” *Smith v. Wells*, 31 S.W.2d 1014, 1022 (Mo. 1930); “substantially,” *Moore v. McCutchen*, 190 S.W. 350, 352 (Mo. App. Spfld. 1917); “material omission or defect,” *Id.*; “great bodily harm,” *State v. Goodman*, 490 S.W.2d 86, 87 (Mo. 1973); and “living with” and “living in the same household,” *DeCaigney*, 927 S.W.2d at 910.

Ct. App. 2002), the State sought authorization to involuntarily medicate a mental health patient with psychotropic medication, and the clear and convincing standard applied under the statutory scheme. A line of caselaw existed, recognizing the possibility that recognizing defining “clear and convincing” could cause confusion. *Id.* And the Illinois Supreme Court’s civil instructions committee had already concluded that the phrase is “a readily understandable expression in common, everyday usage.” *Id.* Thus, the appellate court affirmed the trial court’s refusal to give an instruction defining clear and convincing. *Id.* See also *In re Estate of Casey*, 507 N.E.2d 962 (Ill. Ct. App. 1987) (concluding that the term “clear and convincing evidence” was best left undefined).

Similarly, the Arizona Court of Appeals has expressly held that “clear and convincing” need not be defined in a jury instruction. *Starkins v. Bateman*, 724 P.2d 1206, 1217 (Ariz. Ct. App. 1986).

Attempts to define the commonly understood words in the term “clear and convincing” in fact demonstrate that it can cause confusion and ultimately is not necessary. It caused confusion in *Laliberte v. Mead*, 628 A.2d 1050, 1052-1053 (Maine 1993). There, the trial court gave an instruction that first defined preponderance and reasonable doubt, and then described clear and convincing as “halfway between the two.” *Id.* The Maine Supreme Court reversed for instructional error, because that definition did “not even remotely suggest[]” the “highly probable” concept properly associated with the standard. *Id.* In other words, by trying to make simple what was already simple, the trial court injected confusion by misstating the law.

A Maryland case demonstrates it is not necessary. There, an appellate court noted with approval the use of a definitional instruction for the term, promulgated by the committee on civil pattern instructions, which stated:

To be clear and convincing, evidence should be “clear” in the sense that it is certain, plain to the understanding, and unambiguous and “convincing” in the sense that it is so reasonable and persuasive as to cause you to believe it.

Genie & Co., Inc. v. Comptroller of the Treasury, 668 A.2d 1013, 1021 (M.D. Ct. Spec. App. 1995) (citations omitted). But that definition really does little, aside from closely tracking dictionary definitions of the words to begin with, *i.e.*, restating the words’ commonly understood meanings:

- “Clear” means “in a clear manner: as **a**: without confusion or obscurity: DISTINCTLY.” WEBSTER’S THIRD NEW INT’L DICTIONARY 419 (1993).
- “Convincing” means “**1**: satisfying or assuring by argument or proof ... **2**: having the power to convince one of the truth, rightness, or reality of what is done or stated: PLAUSIBLE.” *Id.* at 499.

The instructions that the probate court used in the case below tracked the statutory elements for commitment and should be sufficient on that basis. *Cheek*, 615 S.W.2d at 458; *Doyle*, 571 S.W.2d at 723-724. The words “clear and convincing” are everyday words, easily capable of understanding by ordinary people, and analogous to words and phrases

contained in instructions that courts have held required no definition. *See* fn. 10. To define them would only invite confusion.

And the definitions that Mr. Van Orden offered would have caused confusion and did not properly state the substantive law, in any event. Mr. Van Orden's proposed instructions provided, in relevant part:

Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence.

For evidence to be clear and convincing it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and your mind is left with an abiding conviction that the evidence is true. If you are not so convinced, you must give Respondent the benefit of the doubt and find that he is not a sexually violent predator.

LF 141, 143 (Instructions B and C).

More than three decades ago, this Court held that the clear and convincing standard means the trier "should be clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence." *Grissum v. Reesman*, 505 S.W.2d 81, 86 (Mo. 1974). The Southern, Western, and Eastern Districts of the Court of Appeals continue to cite and apply the *Grissum* standard. *See Landers v. Sgouros*, 224 S.W.3d 651, 660 (Mo. App. S.D. 2007); *Brown v. Brown*, 152 S.W.2d 911, 920 (Mo. App. W.D. 2005); and *Norber v. Marcotte*, 134 S.W.3d 651, 658 (Mo. App. E.D. 2004). That

articulation of the burden is close to a restatement of the plain meaning of the words themselves.

Mr. Van Orden's proposed instruction would add more to the *Grissum* definition, specifically, that clear and convincing evidence "instantly tilts the scales when weighed against the evidence in opposition," leaving one's "mind ...with an abiding conviction that the evidence is true," and that he was entitled to "the benefit of the doubt." For those additions, he points to *Lee v. Hill*, 141 S.W.3d 517 (Mo. App. S.D. 2004), and *In re. the Marriage of A.S.A.*, 931 S.W.2d 218 (Mo. App. S.D. 1996). See Appellant's Brief, pp. 46-47, and LF 142, 144 (Instructions B and C)(citing *Lee* and *Marriage of A.S.A.*). The latter case, *Marriage of A.S.A.*, includes the "instantly tilts the scales" and "abiding conviction" verbiage, 931 S.W.2d at 221, as do other Missouri appellate decisions. Neither *Lee* nor *Marriage of A.S.A.* provides authority for the "benefit of the doubt" verbiage.

His proposed definition is at odds with the *Grissum* line of cases. Whether appellate decisions are not entirely consistent in their articulation of the workings of "clear and convincing," he provides no reason why the *Marriage of A.S.A.* articulation should be selected over *Grissum*. And he cites no authority for the "benefit of the doubt" verbiage. A court cannot give a jury instruction that does not properly state the substantive law. *Huff*, 598 S.W.2d at 516.

Moreover, giving his proposed definition – containing, as it did, references to "instantly tilts the scales," "abiding conviction," and "benefit of the doubt" – could have confused the jury. One way that it could have confused the jury is that it purported to define ordinary words already capable of understanding by a jury composed of ordinary people.

Id. Another way is that the verbiage suggests the wrong burden of proof, inasmuch as it is suggestive of the “beyond a reasonable doubt” standard most commonly associated in people’s minds with criminal proceedings. “Beyond a reasonable doubt” is not the standard that MO. REV. STAT. § 632.495.1 supplies. It also could have caused confusion because the jury was already being instructed, per the final sentence of Instruction No. 5, that:

If the evidence in the case does not cause you to believe a particular proposition submitted, then you can not return a finding requiring belief of that proposition.

LF 136.¹⁰ In light of Instruction No. 5, giving Mr. Van Orden’s additional verbiage could have caused the jury to overemphasize his definition, in an attempt to give it meaning sufficiently distinct from the language of Instruction No. 5.

The trial court did not abuse its discretion in refusing Mr. Van Orden’s definition of clear and convincing.

The appellant’s Point III should be denied.

¹⁰ Mr. Van Orden did not object to that part of Instruction No. 5. *See* Tr. 428.

IV. The trial court did not abuse its discretion in allowing the State’s expert evidence regarding Mr. Van Orden’s results on an actuarial measure. (Responds to Appellant’s Point IV.)

For his final Point, Mr. Van Orden essentially asks this Court to overrule last year’s holding in *In the Matter of the Care and Treatment of Murrell v. State*, 215 S.W.3d 96, 108-113 (Mo. 2007) (en banc), that evidence of actuarial measures relating to risk assessment is admissible. Most recently, this Court rejected a similar invitation in *In the Matter of the Care and Treatment of Tyson v. State*, 2008 WL 1724201 (Mo. April 15, 2008) (en banc). The Court should again reject the invitation.

The expert’s testimony here comported with *Murrell*. In *Murrell*, the Court explained that “[i]f the facts and data are shown to be reasonably relied upon by experts in the field, they are necessarily relevant to the issue the expert is addressing.” 215 S.W.3d at 112. The instrument that Dr. Mandracchia relied upon here, the STATIC-99, is of a type reasonably relied upon by experts in his field, he explained, Tr. 273, and is one of the instruments that the Court considered in *Murrell*, 215 S.W.3d at 110. And the Court in *Murrell* concluded that this instrument meets the standard for admissibility of expert testimony under MO. REV. STAT. § 490.065.3 (2000). *Id.* at 110-111.

Further, the Court in *Murrell* explained that the results of an actuarial measure should be combined with independent clinical assessment of the person whose commitment is sought. *Id.* at 112. Here, Dr. Mandracchia testified that he considered the actuarial measure, in combination with his own clinical judgment of Mr. Van Orden’s risk factors, as supported

by research. Tr. 274. He further explained that the actuarial measure was reasonable to rely upon. Tr. 271-272.

As in *Murrell*, then, where evidence regarding results of an actuarial measure was held admissible when used in conjunction with a full clinical evaluation, 215 S.W.3d at 112, Dr. Mandracchia's testimony concerning the actuarial measure used here was likewise admissible. The probate court did not abuse its discretion in allowing the evidence. *See In the Matter of the Care and Treatment of Bernat v. State*, 194 S.W.3d 863, 871 (Mo. 2007) (en banc) (whether to admit or exclude expert testimony lies within trial court's discretion). Mr. Van Orden's arguments at most go to the weight that Dr. Mandracchia's opinion should have been given, not its admissibility. *In the Matter of the Care and Treatment of Elliott v. State*, 215 S.W.3d 88, 95 (Mo. 2007)(en banc).

The appellant's Point IV should be denied.

Conclusion

The judgment should be affirmed.

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 25th day of April, 2008, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,486 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Alana M. Barragán-Scott

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