

IN THE  
MISSOURI SUPREME COURT

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IN THE MATTER OF THE                    )  
CARE AND TREATMENT OF                )     No. SC 87569  
TIMOTHY S. DONALDSON,                 )  
  Appellant.                                 )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF VERNON COUNTY, MISSOURI  
TWENTY-EIGHTH JUDICIAL CIRCUIT, PROBATE DIVISION  
THE HONORABLE GERALD D. McBRIDE, JUDGE

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APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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## **JURISDICTIONAL STATEMENT**

Timothy Donaldson appeals the judgment and order of the Honorable Gerald D. McBeth following a jury trial in Vernon County, Missouri, committing Mr. Donaldson to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This Court accepted this appeal upon Mr. Bernat's Application for Transfer from the Western District Court of Appeal, and this Court has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

## STATEMENT OF FACTS

The State of Missouri filed a petition on December 3, 1999, to involuntarily commit Timothy Donaldson to the custody of the Department of Mental Health (DMH) as a sexually violent predator (L.F. 11-14).<sup>1</sup> A jury returned a verdict on May 16, 2001, finding Mr. Donaldson to be a sexually violent predator (L.F. 6), but the commitment was reversed by this Court in *In the Matter of the Care and Treatment of Timothy Donaldson*, WD 60352 (July 10, 2002), for failure of the jury instructions to follow the requirement of *In the Matter of the Care and Treatment of Thomas*. (L.F. 51).

The cause was again brought to trial on January 27, 2004, but an insufficient number of potential jurors were available following *voir dire* and the trial court declared a mistrial (L.F. 3). On May 5, 2004, Mr. Donaldson filed a motion to dismiss the case for the failure to try the case within ninety days following the declaration of the mistrial, as required by Section 632.495, RSMo 2000 (L.F. 153-155). On the same day, the probate court overruled the motion, finding that “the Administrator of Justice require same,” and set the case for trial beginning on September 29, 2004 (L.F. 3). Mr. Donaldson’s petitions for writs of

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<sup>1</sup> The record on appeal consists of a legal file (L.F.), a supplemental legal file (Sup.L.F.), a transcript of a pre-trial motion to dismiss (H.Tr.), and trial transcript (Tr.).

prohibition to this Court (L.F. 156-165), and to the Missouri Supreme Court (L.F. 201-206), were summarily denied without opinion.

Mr. Donaldson renewed his motion to dismiss immediately prior to the September 29 trial (Tr. 2, 18). The State argued against the motion by suggesting that a new trial date was “penciled in” within the ninety days with each side to determine the availability of their expert witnesses, but that Mr. Donaldson’s expert failed to respond or commit to that date (Tr. 19-20). The Assistant Attorney General argued that the definitive trial date of September 29 was set not because Mr. Donaldson’s expert agreed to that date, but “because I said at the time that we took up this motion if that’s the way Respondent is going to handle this case, then I want to set a trial date, and whether Dr. Maskel can be there or not, we need to try this case.” (Tr. 20). Mr. Donaldson’s counsel responded:

That is not the only reason this case wasn’t tried at that April date. Shortly after the Court – When the Court consulted its calendar for that April date, the Court said it would have to try to move a case to make that April date available. The Court then told us that that April date was not available because the Court wasn’t able to move that other case. This is not simply because Dr. Maskel may not have been available. And I’m not here to say that there may not have been good reason to continue the case either because the Court wasn’t available or because an expert wasn’t

available, but the fact remains that it wasn't continued within that 90-day period. It was only continued after that 90 days expired, after the Court lost jurisdiction in our view.

(Tr. 21). The State countered that the case was not tried within the ninety days only because Mr. Donaldson's expert did not indicate her availability for the date scheduled (Tr. 21-22). The probate court overruled the motion to dismiss (Tr. 22).

Debrah Fritts went to a party on December 7, 1985 (Tr. 294, 296-297). Mr. Donaldson offered to take her home when she wanted to leave the party but her friends did not (Tr. 299). Ms. Fritts had not met Mr. Donaldson before, but he had been gentlemanly and courteous at the party, so she accepted his offer (Tr. 299). When Ms. Fritts told Mr. Donaldson that he was going the wrong way, he made no response (Tr. 301). Mr. Donaldson made a sharp turn onto a utility road; causing Ms. Fritts to strike her head on the rear-view mirror (Tr. 301). She told Mr. Donaldson that she was hurt and wanted to go home (Tr. 301). Mr. Donaldson hit her and told her to shut up (Tr. 301). He also told her, in coarse language, that he wanted to have vaginal and oral sex with her (Tr. 301). When Mr. Donaldson stopped his truck, Ms. Fritts again said that she wanted to go home (Tr. 302). Mr. Donaldson told Ms. Fritts to perform oral sex on him, and he hit her until she did (Tr. 302). After he ejaculated, Ms. Fritts again said that she wanted to go home (Tr. 302). Mr. Donaldson said that he was going to have vaginal intercourse with her (Tr. 302). He told Ms. Fritts to pull down her pants,

and he hit her until she did so (Tr. 302-303). He attempted sexual intercourse with her, but was unsuccessful and demanded more oral sex (Tr. 313). Mr. Donaldson then fell asleep (Tr. 303, 313). Ms. Fritts put her clothing back on, but she did not get out of Mr. Donaldson's truck because they were in a rural area and she did not know where to go (Tr. 304). When Mr. Donaldson woke up he hit Ms. Fritts until she had sexual intercourse with him (Tr. 304, 313). The ordeal lasted about three hours, and she was terrified the whole time (Tr. 305). Mr. Donaldson hit her until she complied with his sexual demands, but he did not hit her during the sexual acts (Tr. 311). He would only hit her if she stopped doing the acts (Tr. 311).

Mr. Donaldson was sentenced to five years in prison upon his plea of guilty to sodomizing Ms. Fritts (Tr. 446). He was said to have done well in AA treatment and the Missouri Sexual Offender Program (MOSOP) (Tr. 446-447). He was paroled in 1989 (Tr. 447). Six months later he sodomized Karen Pettibon and was returned to prison (Tr. 447). He twice failed to complete the MOSOP program, and was paroled in 1996 (Tr. 449). Mr. Donaldson's parole was revoked for associating with a prostitute, alcohol abuse, and being out of the area he was supposed to be in (Tr. 449). He was returned to prison in 1997 (Tr. 449).

Mr. Donaldson completed MOSOP in 2000 (Tr. 580). Larry Slater, a former police officer and licensed professional counselor was Mr. Donaldson's MOSOP phase II therapist (Tr. 547-548, 553). Mr. Donaldson began phase II of the

program in June of 1999 (Tr. 580). This treatment uses a cognitive behavioral approach in a group setting focusing on the cognitive process (Tr. 550-551).

Thoughts are closely linked to feelings and behavior, and this method has been found to be the most effective in treating sex offenders (Tr. 551).

Participants are required to prepare a “problem report” to identify past problems, events, and offending behavior (Tr. 554). They then have to identify the thoughts, feelings and behavior at those times, and to identify appropriate solutions (Tr. 554). There is an empathy portion of treatment to see if the person can make an emotional connection with his victims (Tr. 555-556). Mr. Slater has the inmate assume the role of their victims and pretend to write a letter to the offender telling them what their life has been like since the offense (Tr. 556).

The main issue in the beginning of phase II is for the participant to “take ownership of their case,” to admit what they did (Tr. 559, 568). There was a lot of violence in Mr. Donaldson’s offending and he did a good job of owning up to that (Tr. 560). He had a history of blaming others for his bad decisions, but he came to take responsibility for his offending and did not blame others (Tr. 560). That was a key sign that he was dealing with his problems effectively and rationally (Tr. 560).

MOSOP participants are required to identify their deviant cycle, the patterns of behavior that have created all of the problems in their lives, not just in their offenses (Tr. 556). MOSOP treatment is designed to develop a relapse

prevention plan (Tr. 557). Part of the treatment is to develop coping mechanisms to stop inappropriate behavior (Tr. 558). Mr. Donaldson demonstrated in his treatment group that he understood his deviant cycle and relapse prevention plan (Tr. 562). He was able to identify his internal and external triggers, high risk factors, and his maladaptive coping responses (Tr. 562). Mr. Slater looked to see if the participants could recognize those issues so that they would know to avoid them (Tr. 563). Mr. Slater gave Mr. Donaldson a score of “satisfactory” in his final report (Tr. 579). He never gives a score higher than that because he does not want the person to think that they are all right (Tr. 579). He thinks that a score of “good” or “excellent” impedes future progress (Tr. 579).

Mr. Slater had concerns about Mr. Donaldson because there were a lot of antisocial and narcissistic features in his behavior (Tr. 568). Mr. Donaldson is articulate, intelligent as well as street-wise, insightful, and understanding (Tr. 569). Historically, Mr. Donaldson has had the ability to con and manipulate people (Tr. 569). He has seen other people as objects to be used and he has manipulated people (Tr. 582). He has had difficulty feeling empathy for others (Tr. 582). Mr. Donaldson has, in the past, gone after what he wants regardless of the risk (Tr. 582). He is self-centered, and in the past has had a total disregard for the norms and rules of society (Tr. 584). He has, in the past, perceived situations in a distorted manner (Tr. 584). Mr. Donaldson has manipulated his family and lied to his probation and parole officers (Tr. 578). Mr. Slater recognized that Mr.

Donaldson could not be trusted carte blanche because he has the propensity to be conning and deceptive (Tr. 570). With a majority of the people who suffer antisocial personality disorder it is hard to tell if they are applying concepts or just manipulating circumstances (Tr. 578).

Mr. Slater was aware that Mr. Donaldson had previously completed a MOSOP program, and then went on to commit another sex offense (Tr. 585-586). He distinguished the program Mr. Donaldson completed in 1988 from the one he completed under Mr. Slater (Tr. 564). The earlier MOSOP program was shame-based (Tr. 564-564). The participants were shamed so that they would feel so bad that they would not repeat their offenses (Tr. 564-565). Later research proved that this was the wrong treatment method for sex offenders (Tr. 565).

Mr. Donaldson completed MOSOP under Mr. Slater in January of 2000 (Tr. 508). Mr. Slater believed in October of 1999 that Mr. Donaldson had made a complete turnaround in his approach to therapy and was getting a good understanding of his cognitive process (Tr. 589). He wrote in a December 1999 treatment note that Mr. Donaldson worked hard in group and appeared to be really attempting to apply himself in this second attempt at MOSOP (Tr. 590). Mr. Donaldson had gathered a lot of insight into his behavior (Tr. 590). In the February 2000 final report of Mr. Donaldson's participation in the program, Mr. Slater wrote Mr. Donaldson had taken full responsibility for his behaviors (Tr. 590). Mr. Donaldson demonstrated an understanding of MOSOP problem

solving techniques (Tr. 590). Mr. Donaldson demonstrated a clear understanding of his deviant cycle, and identified his internal and external triggers, articulated how they are used in the build-up phase of his deviant cycle (Tr. 590). He identified environmental risk factors and recognized how his addictive behaviors played an important part in his offending (Tr. 590). Mr. Donaldson demonstrated in group how he used those behaviors to rationalize his thought processes (Tr. 591-592). He recognized how substances reduced his ability to make sound decisions and take responsibility for his actions (Tr. 592). Mr. Donaldson demonstrated an understanding of his distorted thinking, and demonstrated the ability to control his cognitive processes (Tr. 592). Mr. Slater wrote in the final report that Mr. Donaldson demonstrated an understanding of all the treatment concepts, and utilized them in group and in his general conduct while in confinement (Tr. 592). Mr. Slater stood by everything he wrote (Tr. 592).

Mr. Donaldson was still participating in Mr. Slater's MOSOP group at the time the State filed its commitment petition against him (Tr. 581, 593, L.F. 11-14). His release date had, in fact, been set back so that he could successfully complete MOSOP before his release (Tr. 581, 593). Mr. Donaldson filed a motion on February 3, 2000, to dismiss the petition for violating his right to due process of law (L.F. 10, Sup.L.F. 1-9). He suggested in that motion that the Department of Corrections (DOC) had established a procedure to refer to the Attorney General's Office for commitment under the Sexually Violent Predator Act only those

inmates who “have failed, refused or been terminated from the Missouri Sex Offender Program (MoSOP) and have exhausted all opportunities to complete MoSOP.” (Sup.L.F. 2). Inmates not meeting these qualifications were not to be referred for further proceedings (Sup.L.F. 2).

Jonathan Rosenboom, the Director of Behavioral Health Services for DOC, testified at a hearing on Mr. Donaldson’s motion to dismiss (H.Tr. 3). He is involved in preparing policies and procedures for the MOSOP program (H.Tr. 4). In response to the passage of the sexually violent predator law, he prepared an “operating regulation” to “administratively guide our actions as we reviewed cases and interacted with the Attorney General.” (H.Tr. 6). As of January 1, 1999, DOC began tracking offenders who were soon to be released and review their case to determine whether to refer them for further proceedings (H.Tr. 11). The referral process begins with an end of confinement (EOC) report (H.Tr. 21-22). Mr. Rosenboom acknowledged that, “at this point in time, we were ruling out individuals who were going to be released but had successfully completed the MOSOP treatment program.” (H.Tr. 11). If an inmate had completed MOSOP, “the person was not placed on the list for subsequent review by the Sex Offender Assessment Unit examiners.” (H.Tr. 12). That procedure was revised in July of 1999 (H.Tr. 13-15). No longer did the procedure exclude from further proceedings those inmates who had successfully completed MOSOP (H.Tr. 18). The new procedure created a pool of potential sexually violent predators from all

of those inmates who have committed a sexually violent offense and were within 180 days of release (H.Tr. 18, 28-29). According to the procedure as revised in July of 1999, no longer would completion of MOSOP exclude an offender from review under the sexually violent predator law (H.Tr. 29).

The probate court overruled Mr. Donaldson's motion to dismiss (L.F. 10).

Dr. Martha Bellew-Smith is the clinical director of the Missouri Sexual Offender Treatment Center (MSOTC) (Tr. 325-326). Mr. Donaldson had been in treatment at MSOTC from May of 2001 to July of 2002 (Tr. 331-332), from the time of his first commitment until that commitment was reversed on appeal (L.F. 6, 51). When the Assistant Attorney General asked Dr. Bellew-Smith to describe MSOTC, she replied that it is an "inpatient maximum security treatment program for very, very high risk sex offenders." (Tr. 326). Mr. Donaldson objected to the characterization of the facility as a place for high risk offenders (Tr. 326). The Assistant Attorney General responded that it would become clear from her testimony and the testimony of other experts that Dr. Bellew-Smith works with high risk sex offenders and that her testimony was "relevant for the jury's determination that it is in fact a place for high risk sex offenders." (Tr. 326-327). The probate court overruled Mr. Donaldson's objection (Tr. 327). Dr. Bellew-Smith then testified that MSOTC was currently treating rapists, pedophiles, and people who have sex with animals, and people who have sex with dead people (Tr. 332).

Dr. Bellew-Smith said that the program is highly structured because one of the first things a sex offender must learn is to follow rules, and next, to obey laws (Tr. 334-335). She said that following rules is important “because if you break little rules and you’re comfortable breaking little rules, gradually more and more you break bigger rules and laws.” (Tr. 334-335). She said that sex offenders are worse than people who drive fast and get speeding tickets because getting away with breaking rules is reinforcement to break more rules (Tr. 334-335). Dr. Bellew-Smith claimed that, “in fact, they gloat on the fact that they broke the rule and got by with it,” and they sexually re-offend (Tr. 336).

Sexual offender treatment involves identifying triggers of offending, offending cycles, and high risk situations (Tr. 336). What triggers offending is specific to each individual, and the treatment provider must work out with the offender what those triggers are and how to control them (Tr. 340). A relapse prevention plan is how the person runs their life after treatment, and includes things to avoid and things to do when confronted with fantasies or urges in order to prevent offending (Tr. 341). Even sex offenders who have completed treatment can get into an offending cycle (Tr. 347). But they will not always re-offend (Tr. 348). Getting rid of the deviant thoughts is not reasonable, but the function of treatment is to teach the person ways to stop the cycle without offending (Tr. 348).

Dr. Bellew-Smith testified that Mr. Donaldson has completed numerous classes at MSOTC; including Thinking Errors (how offending is rationalized or justified), Communication, Conflict Resolution, Psychiatric Disorders, Mindfulness Skills (how to settle self down when upset), and Violence Education (identifying things that lead to violence). But she said that completion of the classes only demonstrates that Mr. Donaldson is able to do the academic work, not that he can apply the concepts (Tr. 351). She said that Mr. Donaldson has more courses to complete, including Victim Empathy and Relapse Prevention Planning (Tr. 355). Mr. Donaldson completed an acceptable relapse prevention plan in the MOSOP program (Tr. 561). Dr. Bellew-Smith testified claimed that the relapse prevention plan had not been shared with the MSOTC staff (Tr. 422). An October, 2001, treatment note by Dawn Sweeney reported that she and Mr. Donaldson reviewed and discussed his relapse prevention plan (Tr. 422). Dr. Bellew-Smith responded:

There were a lot of things Dawn did that I didn't know occurred.

That's why I fired her.

(Tr. 422). Dr. Bellew-Smith said that she has read Mr. Donaldson's relapse prevention plan prepared in MOSOP, and that she found problems with it (Tr. 368). She said that there was too much emphasis on "external things" like going to church, getting a job, and talking with family, but not enough emphasis on

internal things like on-going sex offender and substance abuse treatment (Tr. 370). She said the plan would not be acceptable for her program (Tr. 370-371).

Dr. Bellew-Smith said that part of Mr. Donaldson's problems in treatment was that he wants to be the boss of everything; he is interested in power, control, and dominance (Tr. 357). She said that Mr. Donaldson, "wants what he wants when he wants it," and has trouble taking "no" for an answer (Tr. 358). Dr. Bellew-Smith discussed an incident in May, 2001, in which Mr. Donaldson came into the day room without a shirt, in violation of the rules, and became angry and verbally abusive when the violation was brought to his attention (Tr. 358-360). Mr. Donaldson later apologized for his behavior (Tr. 360). Dr. Bellew-Smith concluded that Mr. Donaldson could not stop himself, could not calm down, and that he gets abusive when he gets angry (Tr. 360). She also concluded that Mr. Donaldson was engaging in the defensive behavior of "undoing," thinking that if he apologizes it is all over and done with (Tr. 360-361).

Dr. Bellew-Smith referred to incidents of argumentative, disrespectful, and abusive behavior in January and February of 2002 (Tr. 361-362). This behavior seemed, to Dr. Bellew-Smith, to be primarily directed at women (Tr. 362). In March of 2002, Dr. Bellew-Smith advised Mr. Donaldson that his drive to dominate, control, manipulate, and get what he wants are part of his offending cycle (Tr. 362). Dr. Bellew-Smith instructed Mr. Donaldson's case manager to include his difficulty with being told "no" into his treatment plan (Tr. 362). She

referred to other instances of Mr. Donaldson's foul and offensive language toward staff, and suggested that it showed that Mr. Donaldson did not apply the principles of treatment if he did not get what he wanted (Tr. 364-365). Just three hours prior to one of these outbursts, Dr. Englehart noted in treatment records his concern that Mr. Donaldson's hypomanic behavior, irritability, physical agitation, and inability to control his behavior might be the result of antidepressant medications he had been placed on (Tr. 395-396). Dr. Englehart was considering weaning Mr. Donaldson off of the medication (Tr. 395-396). After the outburst, Dr. Englehart wrote that Mr. Donaldson should be taken off of the medication (Tr. 395-396).

Dr. Bellew-Smith said that Mr. Donaldson considered dropping out of treatment in October of 2001 and in May of 2002 (Tr. 366). She said that this was not unexpected because Mr. Donaldson had dropped out of prior treatment three or four times (Tr. 366). Dr. Bellew-Smith said that this demonstrates that Mr. Donaldson is not committed to treatment (Tr. 367). She said that Mr. Donaldson's progress in treatment had been "remarkably poor" because he was always looking at others and not at himself and his need to control (Tr. 367). The Assistant Attorney General asked if Mr. Donaldson "still has a lot of problems" (Tr. 368). Dr. Bellew-Smith said that he does (Tr. 368). She said that Mr. Donaldson is still in the initial stage of treatment, of learning to follow rules before any other treatment can happen (Tr. 372). The Assistant Attorney General

asked if Mr. Donaldson is “a cured sex offender” (Tr. 373). Dr. Bellew-Smith said that he was not (Tr. 373). The Assistant Attorney General asked Dr. Bellew-Smith: “Is he a successfully treated sex offender?” (Tr. 373). She answered: “No.” (Tr. 373).

There is a ward for residents at MSOTC whose need for immediate gratification is so great that they cannot follow the rules (Tr. 389). Mr. Donaldson is not on that ward (Tr. 389). He is on a regular ward for persons who obey most of the rules most of the time (Tr. 395). There are over a hundred entries in treatment notes indicating that Mr. Donaldson is complying with the rules (Tr. 394). There are 225 entries that Mr. Donaldson is pleasant and cooperative (Tr. 394). Of the treatment notes covering five years, Dr. Bellew-Smith has written only three (Tr. 402). The persons teaching the groups are all licensed social workers, psychologists or psychiatrists, and they make daily entries into the records (Tr. 384-385). Reports of cussing and angry outbursts by Mr. Donaldson stop after 2002 (Tr. 393). Dr. Bellew-Smith claimed that such behavior has not stopped, it is only not as extreme (Tr. 393).

Entries in the notes from June of 2001 report that Mr. Donaldson had an excellent understanding of the group principles, which was reflected in his behavior (Tr. 398-399). Notes reflected Mr. Donaldson’s honesty, insight, and full participation in treatment (Tr. 399). Mr. Donaldson was described as wonderful in class, adding to the conversation (Tr. 400). The notes record that

Mr. Donaldson was using the principles taught in MOSOP and MSOTC (Tr. 400). Mr. Donaldson's participation in treatment was described as exceptional (Tr. 401). Dr. Bellew-Smith told the jurors that when she saw these notes she thought: "God, I wonder what that is," because that was not how she saw Mr. Donaldson (Tr. 400).

A note entered into the records in September of 2001 indicated that Mr. Donaldson encouraged another resident by discussing his own participation and admitting his mistakes because he wanted to change and be a better person (Tr. 402). The therapist said that Mr. Donaldson's comments were logical, realistic and sincere (Tr. 402-403). The therapist described Mr. Donaldson as a good role model for peers (Tr. 403). Dr. Bellew-Smith testified that she had a meeting with the therapists to inform them that they were being fooled (Tr. 405). Treatment notes recorded that Mr. Donaldson had gained insight into his past problems and was making progress in his reactions to being told "no" and to personal rejection (Tr. 406). An April, 2002, treatment note recorded that Mr. Donaldson was more open to negative responses than he was earlier, and that while he still needed explanations for those negative responses, he was much more accepting of those explanations and of the treatment staff (Tr. 406). Most of Mr. Donaldson's problems had involved the recreation staff, and an April, 2004 treatment note reported that Mr. Donaldson had been following the rules and was not causing any problems (Tr. 408). A note in August of 2004 indicated that

Mr. Donaldson had, for the most part, been cooperative with the recreation staff (Tr. 408).

Mr. Donaldson had been a leader of a substance abuse group, having been selected for that position by the group members (Tr. 405). He was also tutoring a GED class in July of 2002 (Tr. 406-407). Treatment staff reported that he was doing an excellent job in that position (Tr. 406-407). Dr. Bellew-Smith testified that Mr. Donaldson should not have been allowed to tutor the GED class because he was on detainee status (Tr. 406-407). Mr. Donaldson had agreed to tutor two additional GED classes in March of 2004 (Tr. 407). Dr. Bellew-Smith testified that she did not know why the treatment staff allowed him to tutor more classes, because he was not allowed to do so, and she was going to have a talk with the staff when she returned to MSOTC after testifying at trial (Tr. 408).

Dr. Walker, the clinical director at MSOTC before Dr. Bellew-Smith, did not diagnose Mr. Donaldson with sexual sadism (Tr. 409-410). But Dr. Bellew-Smith testified that Dr. Walker never diagnosed anyone with a paraphilia (Tr. 409-410). Dr. Gupta, the staff psychiatrist in 2001 did not diagnose Mr. Donaldson with sexual sadism or a paraphilia (Tr. 410-411). Dr. Wells, a psychologist on the treatment staff and Mr. Donaldson's group leader in 2001, diagnosed only "the standard thing," sexual abuse of an adult, not sexual sadism (Tr. 412). Mr. Donaldson's treatment plans prepared at MSOTC in May, 2001; January, 2002; and April, 2002, did not diagnose sexual sadism (Tr. 414). Neither

Dr. Bellew-Smith nor Dr. Englehart diagnosed Mr. Donaldson with sexual sadism in their May, 2002, report to the court (Tr. 412-413). Nor did they do so in their May, 2003, annual report (Tr. 414). Dr. Englehart's February, 2004, psychological assessment of Mr. Donaldson did not diagnose sexual sadism (Tr. 414).

Dr. Bellew-Smith acknowledged that the records contained positive comments about Mr. Donaldson's participation in the treatment classes, but she claimed that he was not applying the MOSOP and MSOTC principles in his behavior outside of the classes (Tr. 418). She said that it was not enough that Mr. Donaldson apply the concepts of sex offender treatment most of the time, he must apply them all of the time (Tr. 419). Dr. Bellew-Smith asserted, "You can't make a mistake, when you're a sex offender, about this sort of thing." (Tr. 419). She said that if a sex offender makes a mistake among the public, "Somebody gets hurt, usually badly, very badly." (Tr. 419).

The State hired Dr. Roy Lacoursiere to conduct a sexually violent predator evaluation of Mr. Donaldson (Tr. 426, 433). Dr. Lacoursiere is a clinical and forensic psychiatrist in Kansas, and has performed about twenty SVP evaluations in Kansas and Missouri (Tr. 426-427, 431-432). He is on the editorial board of two journals, has written a book chapter on SVP evaluations, and has made presentations on that topic (Tr. 430, 432-433). Dr. Lacoursiere concluded that Mr.

Donaldson has a mental abnormality and is more likely than not to re-offend if not confined in a secure facility (Tr. 437).

Mr. Donaldson's criminal history was significant to Dr. Lacoursiere's conclusion (Tr. 439). Mr. Donaldson was convicted of a gas station robbery in 1983 (Tr. 439). While Mr. Donaldson used a shotgun during the robbery, he did not beat the attendant (Tr. 439-440). Mr. Donaldson's probation was continued in spite of several violations, until he sodomized Ms. Fritts in 1985 (Tr. 440).

Dr. Lacoursiere considered Mr. Donaldson's statements following that offense to be significant (Tr. 441-442). He admitted hitting her five or six times, threatening her, forcing her to have oral sex three times and vaginal intercourse twice, and admitted two other rapes (Tr. 442-444). Dr. Lacoursiere assumed that Mr. Donaldson was being manipulative by admitting the prior rapes to make himself look good, like he was cooperating and wanted to change (Tr. 444). He also considered it significant that Mr. Donaldson had passed a polygraph test while denying the offense he later admitted to in his guilty plea (Tr. 446).

Dr. Lacoursiere noted that after completing MOSOP and alcohol treatment in prison, he beat Ms. Pettibon almost unconscious and forced her to perform oral sex (Tr. 446-447). The doctor found it significant that while Mr. Donaldson was in a mental facility prior to his guilty plea, he met a woman who he convinced to provide an alibi for him on the night of the crime (Tr. 447). The significance of this for Dr. Lacoursiere was the "denial, lying, covering up, ready

to implicate someone else in his lying, and would let her perjure herself.” (Tr. 448).

Dr. Lacoursiere explained that diagnosing a mental disorder is the first step in determining the presence of a mental abnormality (Tr. 452). He diagnosed Mr. Donaldson with personality disorder with antisocial features, sexual sadism, substance abuse, and a gambling disorder (Tr. 455-456).

He diagnosed a personality disorder because he found a pattern of disregarding and violating the rights of others (Tr. 457). Dr. Lacoursiere found a failure to conform to social norms and lawful behaviors in Mr. Donaldson’s convictions for burglary and the two sodomies, as well as in another arrest for lewd behavior (Tr. 457). He found deceitfulness in Mr. Donaldson’s repeated lying (Tr. 457). Dr. Lacoursiere found impulsivity and a failure to plan ahead in Mr. Donaldson’s consumption of alcohol even though it worsens his impulse control, makes his judgment worse, and led to the sexual assaults (Tr. 458). Unruly behavior as a child, verbal aggression, and fighting indicated irritability and aggressiveness (Tr. 458). That Mr. Donaldson beat Ms. Fritts and Ms. Pettibon without caring how badly he hurt them indicated reckless regard for the safety of others (Tr. 458). Mr. Donaldson did not provide support for his wife or child, indicating irresponsibility in financial obligations (Tr. 458-459). Dr. Lacoursiere found lack of remorse from Mr. Donaldson’s indifference to or

rationalization of his mistreatment of others (Tr. 460). These are diagnostic criteria of a personality disorder (Tr. 457-460).

Sexual sadism:

is when it is a pain of a psychological or physical nature inflicted on a victim that increases, contributes, to the sexual excitement and – that the person has, and that’s why it’s sexual. It’s not just that they cause pain, but pain that is sexually exciting and that contributes to their sex act.

(Tr. 464-465). The most “glaring” evidence for Dr. Lacoursiere that Mr. Donaldson met this definition was that he hit Ms. Fritts out of the blue about a dozen times and had five sexual encounters with her in the car (Tr. 466). And, according to Dr. Lacoursiere, Mr. Donaldson beat Ms. Pettibon nearly unconscious (Tr. 466). He concluded that Mr. Donaldson “beat[] both women beyond what is needed to force them into sexual behavior” (Tr. 467). Dr. Lacoursiere concluded that Mr. Donaldson met the criteria because he beat the women and placed them under complete control in his car in a secluded place (Tr. 467). He said that the women were intimidated, humiliated, psychologically terrified, “and yet on top of that you have physical beating occurring” (Tr. 467).

Dr. Lacoursiere found further evidence of sexual sadism in Dr. Bellew-Smith’s reports of how Mr. Donaldson treated female staff, using sexual terms like “bitch” when verbally abusing women (Tr. 467). Dr. Bellew-Smith suggested that Mr. Donaldson’s verbal abuse was kind of a re-enactment of his sexual

abuse of his victims (Tr. 468). Dr. Lacoursiere concluded that Mr. Donaldson “wants to sadistically injure them as much as he can, which, as we see in the sex acts, gets him aroused.” (Tr. 468).

Dr. Lacoursiere acknowledged that repeated rapes do not make a person a sexually violent predator (Tr. 499, 507). The majority of rapists do not qualify for SVP treatment (Tr. 499). Dr. Lacoursiere said that as a rule, he does not normally find that rapists have sexual sadism (Tr. 509). He testified in a deposition that Mr. Donaldson was the only rapist he diagnosed as a sexual sadist (Tr. 508). But he has since discovered that he made that diagnosis in two other cases (Tr. 508). He has evaluated only a “small number” of rapists, maybe ten (Tr. 508-509).

Dr. Lacoursiere agreed that nearly all rape victims are under the rapist’s control (Tr. 509). But he said it was the degree of control Mr. Donaldson exercised that distinguished him from other rapists (Tr. 509). He opined that Mr. Donaldson exercised an unusual degree of control by taking his victims in his car to a secluded place, a frequent occurrence in rapes, by distinguishing Mr. Donaldson’s conduct from other places where women are raped, like the victim’s home or a college dormitory (Tr. 509-510).

Dr. Lacoursiere agreed that hitting a woman would not qualify a rapist as a sexual sadist (Tr. 511). But it was his evaluation that Mr. Donaldson used more force than was necessary (Tr. 516). Dr. Lacoursiere had read the police reports and deposition of Ms. Fritts and Ms. Pettibon, in which both women said that

Mr. Donaldson hit them to coerce them into the sexual acts, but he did not hit them after they complied (Tr. 512-516). But he maintained his opinion that Mr. Donaldson used more force than was necessary, making him a sexual sadist (Tr. 516). He noted that Mr. Donaldson did not use his size to simply hold them down and see where that got him, he started out by hitting the women (Tr. 517, 519-520).

Dr. Lacoursiere found sexual arousal to the violence in Mr. Donaldson's statement to the police that he ejaculated five times during the assault against Ms. Fritts (Tr.522). Although Ms. Fritts reported only that Mr. Donaldson ejaculated twice, Dr. Lacoursiere did not believe he needed to talk to her (Tr. 525). He said that he might still diagnose sexual sadism if there were only two orgasms, but admitted that fact would provide less information supporting a sexual arousal (Tr. 526). He acknowledged that Mr. Donaldson had only one orgasm in the two to three hours he assaulted Ms. Pettibon, but he noted that Mr. Donaldson did not lose his erection when she was crying, like some men would (Tr. 527-528).

Dr. Lacoursiere said that he had enough information to diagnose sexual sadism, "from the sex acts and from Mr. Donaldson's continued verbally abusive behavior against women." (Tr. 525). He agreed that there were a lot of records indicating that Mr. Donaldson is pleasant and cooperative, "[e]specially recently, recently as in the last two years, there are a lot of statements like that." (Tr. 535).

There were no records within the last two years about Mr. Donaldson calling female staff members “bitches” or “whores” (Tr. 536). The statements in recent MSOTC records were that Mr. Donaldson was showing more respect to women (Tr. 536-537).

Dr. Lacoursiere said that the personality disorder and sexual sadism were mental abnormalities under the statute (Tr. 475-477). He said that both predisposed Mr. Donaldson to commit sexually violent offenses (Tr. 477-478).

Dr. Lacoursiere also concluded that Mr. Donaldson had serious difficulty controlling his behavior (Tr. 477). He drew this conclusion from the nature of Mr. Donaldson’s behavior, the repeated acts, the commission of them in spite of his claim to not want to commit them, the impulsivity and unreasonableness of doing acts for which there was a fair chance that he would be caught, and the commission of the offenses while on probation and parole (Tr. 477-479).

Dr. Lacoursiere said that Mr. Donaldson is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 482). He said that one of the best predictors of future behavior is past behavior (Tr. 428). He also said that there are other factors supported by research to be associated with sexual reoffending (Tr. 484). He identified some of those factors specific to Mr. Donaldson (Tr. 484). Mr. Donaldson’s victims were strangers (Tr. 484). Mr. Donaldson had two sexually related convictions and the more convictions the greater chance of reoccurrence (Tr. 484). The presence of a

paraphilia, the sexual sadism, increases the chance of reoffending (Tr. 484-485). So does the presence of an antisocial personality and substance abuse (Tr. 485). Lack of self-regulation in general increases risk (Tr. 485). Anger is a problem for Mr. Donaldson, especially when he does not get his way (Tr. 490). Dr. Lacoursiere claimed that treatment failure was very important (Tr. 485). That Mr. Donaldson dropped out of sex offender treatment outside of prison suggested to Dr. Lacoursiere that Mr. Donaldson does not see himself at risk to reoffend (Tr. 490). Dr. Lacoursiere said that Mr. Donaldson's risk was greater because if he was not confined, "he'll be on the streets where people are available, where women are available (Tr. 491). Mr. Donaldson had put himself in high risk situations like parties and bars to meet women for sex (Tr. 491). Dr. Lacoursiere believed that Mr. Donaldson felt sexually entitled, that if a woman went to a bar or wore a short skirt she was asking for sex (Tr. 492). Dr. Lacoursiere identified Mr. Donaldson's lack of cooperation with his probation and parole officers as a risk factor (Tr. 493).

Dr. Lacoursiere opined that Mr. Donaldson met the statutory definition of a sexually violent predator (Tr. 496).

Mr. Donaldson's counsel hired Dr. Lynn Maskel, a psychiatrist, to conduct a sexually violent predator evaluation (Tr. 664-665, 671). She has a lot of experience in SVP evaluations, going back to when she worked in a Wisconsin mental health facility for civilly committed persons, and Wisconsin passed its

SVP law (Tr. 666, 668). She has also been the director of Forensic Psychiatry at Loyola University Medical School in Chicago (Tr. 666). She has given presentations on SVP evaluations, mostly in seminars of the American Academy of Psychiatry and the Law, an organization for forensic psychiatrists (Tr. 669).

Dr. Maskel diagnosed Mr. Donaldson with antisocial personality disorder (APD) (Tr. 675). Persons with that disorder often break rules or laws, they are irresponsible, they can lie, be self-centered, and inconsiderate of others (Tr. 676). These difficulties peak in the person's twenties and thirties, and begin to decline in their forties and continue to decline through the fifties and sixties (Tr. 676). Persons with APD often break laws and end up in prison (Tr. 679). As high as eighty percent of men in prison can be diagnosed with APD (Tr. 679). These are persons for whom society has decided have made bad choices and are held criminally responsible for them (Tr. 679). They are not given a mental excuse in the criminal world (Tr. 679). Their volitional capacity is not so impaired or overwhelmed that they have little or no choice against acting out (Tr. 679). Antisocial persons have the ability to curb their behavior, but they decide not to do that (Tr. 680). Nothing about APD predisposes a person to commit a sexual crime (Tr. 680).

Dr. Maskel has not found APD to be a mental abnormality in an SVP evaluation (Tr. 681). She has evaluated persons with APD who sexually

assaulted women, and found them to be sexually violent predators (Tr. 681). Not because of the APD, but because of some other diagnosis (Tr. 681).

Dr. Maskel testified that for most rapists there is not a mental disorder compelling or pushing them to commit rapes (Tr. 682). Only a small group among all rapists has such a disorder (Tr. 682). That disorder is sexual sadism (Tr. 683). Sexual sadism is “not common at all” among rapists (Tr. 684). Less than ten percent of rapists can be diagnosed with sexual sadism (Tr. 684). Dr. Maskel is not concerned about APD in an SVP evaluation because that disorder simply indicates a typical, ordinary criminal (Tr. 683). She looks for the special or extraordinary case where a mental abnormality is predisposing or compelling the person to rape (Tr. 684). Dr. Maskel said that Mr. Donaldson is in the general group of rapists, but not the extraordinary group (Tr. 684).

Dr. Maskel looked for sexual sadism during her evaluation of Mr. Donaldson, and did not find it (Tr. 685). She was aware the Dr. Lacoursiere said he found it in the excessive use of force to overcome resistance, but Dr. Maskel said the key is not the presence or level of violence, but “why was there violence” (Tr. 685). For the sexual sadist the violence is exciting (Tr. 686). The violence is the goal, not the sexual act (Tr. 686). Physical or psychological suffering occurs in a high percentage of rapes, but that is not what is exciting to the rapist (Tr. 686). Rapes are almost always violent in some way (Tr. 689). Almost all rape victims are subjected to suffering, intimidation and humiliation (Tr. 690). All this

falls within the general group of rapists (Tr. 689-690). Force is something to consider in looking for sexual sadism, not the amount of force but whether it was what was sexually exciting (Tr. 696-697). Dr. Maskel began working in the area of sexual sadism in 1991 when she was asked to do so by the department chairman at Loyola Medical School (Tr. 696). She has worked with a group of men with very serious, sexually sadistic fantasies and urges (Tr. 686-687). They reported complex fantasies of humiliation, torture, and hurting women (Tr. 687). Dr. Maskel has found very few sexual sadists in SVP evaluations, and the disorder is usually fairly dramatic (Tr. 687).

Dr. Maskel responded to Dr. Lacoursiere's assertion that paraphilic fantasies or urges were not necessary if certain behavior was involved (Tr. 698-699). She noted that the essence of a paraphilia is that the behavior is motivated by deviant fantasies or urges (Tr. 699). A person who engages in the behavior without the fantasies is simply a criminal (Tr. 699). Self-reports regarding fantasies can be unreliable (Tr. 699). But to determine the presence of fantasies from behavior alone, the behavior must be so marked, so explicit, so differentiated, that the evaluator can hypothesize that the fantasies truly exist (Tr. 699). There was nothing so dramatic or explicit in Mr. Donaldson's behavior to demonstrate pathology (Tr. 700-701). There was nothing dramatic or explicit in that he took the women to a secluded place, that he kept them under his control for a period of time, or that he hit them numerous times (Tr. 701-702).

There was nothing specific about his ability to maintain an erection (Tr. 702). Many rapists have erections along with the violence or the physical or psychological suffering (Tr. 702). Many rapists have APD so they care only about themselves, not others, and can get erections in spite of the victim's suffering (Tr. 702). Mr. Donaldson's behavior was very typical for rapes (Tr. 703).

Mr. Donaldson told the jurors that he sexually assaulted Ms. Fritts in 1985 (Tr. 595). He admitted his need for immediate gratification, and that while he would have preferred consensual sex he was willing to do it even without consent (Tr. 597-598). Ever since he was a teenager he just did whatever made him feel good, and alcohol, drugs and sex made him feel good (Tr. 598-599). Mr. Donaldson admitted that he sexually assaulted Ms. Pettibon six months after being released from prison (Tr. 606). He said that he did not "soak up" the lessons of MOSOP and minimized a lot of his issues (Tr. 606). He focused only on alcohol as the reason he offended, but not on why he drank (Tr. 606). He thought that as long as he stayed away from alcohol he would be okay (Tr. 607). But he has come to learn that the alcohol is just a symptom (Tr. 607). He really needed to understand what led to the drinking and his self-destructive behavior (Tr. 608). When he offended against Ms. Pettibon he had gone to a bar with his job supervisor only to have a soda, but he had a beer and his offending cycle began again (Tr. 608). Ms. Pettibon was by herself in the bar so he thought she

was there to get sex (Tr. 609). He thought he had impressed her with his new truck and his attention to her children (Tr. 609, 612). He did not accept her rejection because the alcohol lowered his inhibitions, he wanted the gratification, and he was not thinking about her feelings (Tr. 613).

When Mr. Donaldson returned to prison his family stopped supporting him (Tr. 615-616). He started thinking about how he had messed up his life (Tr. 616). He was given another chance at MOSOP in 1999 (Tr. 616). Mr. Donaldson admitted that he had been a con and manipulator in the past (Tr. 622). But he knew that he could be targeted for SVP commitment and that scared him (Tr. 622). He finally got serious and learned what MOSOP was teaching (Tr. 622). He focused on what the group was saying, not on what he wanted to hear (Tr. 618). He had gotten some sex offender treatment in 1996 and 1997 while on parole, and he had a better understanding of his deviant cycle (Tr. 620-621). He developed empathy for his victims and developed a relapse prevention plan (Tr. 618-619).

Mr. Donaldson told the jurors that he has been practicing the MOSOP principles at MSOTC (Tr. 623). He admitted that he has problems accepting rejection and has had angry outbursts (Tr. 623). He is aware that that behavior is inconsistent with MOSOP principles (Tr. 623). But he now has a better understanding of his deviant cycle and while he may get into that cycle he

knows how to get out of it (Tr. 623). That is what his relapse prevention plan is for (Tr. 623-624).

Mr. Donaldson told the jurors that he is different now than when he got out of MOSOP in 1988 (Tr. 629-630). He has gotten rid of his unhealthy coping mechanisms; the drug and alcohol abuse and his gambling (Tr. 629-630). He has developed a new set of coping skills (Tr. 631). He has a good grasp of his deviant cycle, and has incorporated a relapse prevention plan (Tr. 631). Mr. Donaldson is also aware that if he sexually offends again he will never get out of prison (Tr. 635).

The Assistant Attorney General (AAG) reminded the jurors of the diagnoses of sexual sadism placed on Mr. Donaldson (Tr. 764-765). The AAG chose not to go “back through all the facts that you’ve heard both through Deborah Fritts and through the expert testimony regarding Karen Pettibon.” (Tr. 765). The AAG also reminded the jurors that Dr. Lacoursiere as well as Dr. Maskel diagnosed Mr. Donaldson with a personality disorder (Tr. 763-764). He then pointed out to the jurors that according to the jury instruction, the State had to prove only one mental abnormality, and the jurors could chose to believe that Mr. Donaldson had either a personality disorder or sexual sadism (Tr. 766). The AAG argued that the personality disorder predisposes Mr. Donaldson to commit acts of sexual violence by pointing to the two convictions and two admissions he made in the past (Tr. 766-767). The AAG argued:

The question is, in addition to all other ways in which he disregards the law, disregards the consequences of his actions, is he also predisposed to commit sexually violent offenses as a part of that? Yes, he is. It is clear from his history that sexually-related breaking of the law is part of that in a degree that causes the individual serious difficulty controlling his behavior.

(Tr. 766-767).

The jurors returned a verdict finding that Mr. Donaldson is a sexually violent predator (L.F. 273). The probate court committed Mr. Donaldson on October 4, 2004, to the custody of the Department of Mental Health to be held in secure confinement until his condition so changed that he was safe to be at large (L.F. 274). Mr. Donaldson appealed on February 2, 2005 (L.F. 231).

## POINTS RELIED ON

### I.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss Petition Because Of Violation Of The Respondent's Procedural Due Process Rights, because the referral of Mr. Donaldson to the Attorney General's Office for SVP commitment arbitrarily abrogated a state-created procedure in violation of Mr. Donaldson's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that at the time Mr. Donaldson entered MOSOP in 1999 it was the established procedure of DOC not to begin the process of referring an inmate to the Attorney General's Office for civil commitment as a sexually violent predator unless the inmate had failed, withdrawn, or was terminated from MOSOP, or unless the inmate was no longer eligible for MOSOP, and Mr. Donaldson was enrolled in MOSOP when he was referred to the Attorney General's Office and the civil commitment petition was filed against him.

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

*Richardson v. State Highway & Transportation Com'n*, 863 S.W.2d 876 (Mo. banc 1993);

*Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 953 (1974);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10; and

Sections 589.040, 632.480, 632.483, RSMo 2000.

## II.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss For Failure To Try The Case Within Ninety Days Of The Declaration Of A Mistrial, because retrial within ninety days was required by Section 632.495, RSMo 2000, which denied Mr. Donaldson his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that a mistrial was declared on January 27, 2004, and the case was not tried until September 29, 2004, nor was it continued within the ninety-day period of time according to the provisions of Section 632.492, RSMo 2000.

*Bauer v. Transitional School District of the City of St. Louis, et al.*, 111 S.W.3d 405 (Mo. banc 2003);

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

*State ex rel. Hammett v. McKenzie*, 596 S.W.2d 53 (Mo. App., E.D. 1980);

*Commonwealth v. Fisher*, 301 A.2d 605 (Penn. 1973);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Sections 632.483, 632.486, RSMo Cum. Sup. 2004; and

Sections 632.489, 632.492, 632.495, RSMo 2000.

### III.

The probate court abused its discretion in admitting evidence that Mr. Donaldson suffers antisocial personality disorder (APD), because APD cannot satisfy the statutory requirement of a “mental abnormality,” in violation of his rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the jury may have used APD as a basis for its finding of a mental abnormality, but APD fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal conduct in general.

*Koontz v. Ferber*, 870 S.W.2d 855 (Mo. App., W.D. 1993);

*Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (1997);

*Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (2002);

*Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999);

United States Constitution, Fourteenth Amendment; and

Missouri Constitution, Article I, Section 10.

## ARGUMENT

### I.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss Petition Because Of Violation Of The Respondent's Procedural Due Process Rights, because the referral of Mr. Donaldson to the Attorney General's Office for SVP commitment arbitrarily abrogated a state-created procedure in violation of Mr. Donaldson's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that at the time Mr. Donaldson entered MOSOP in 1999 it was the established procedure of DOC not to begin the process of referring an inmate to the Attorney General's Office for civil commitment as a sexually violent predator unless the inmate had failed, withdrawn, or was terminated from MOSOP, or unless the inmate was no longer eligible for MOSOP, and Mr. Donaldson was enrolled in MOSOP when he was referred to the Attorney General's Office and the civil commitment petition was filed against him.

Mr. Donaldson was still participating in Mr. Slater's MOSOP group at the time the State filed its commitment petition against him (Tr. 581, 593, L.F. 11-14). His release date had, in fact, been set back so that he could successfully complete MOSOP before his release (Tr. 581, 593). Mr. Donaldson filed a motion on

February 3, 2000, to dismiss the petition for violating his right to due process of law (L.F. 10, Sup.L.F. 1-9). He suggested in that motion that the Department of Corrections (DOC) had established a procedure to refer to the Attorney General's Office for commitment under the Sexually Violent Predator Act only those inmates who "have failed, refused or been terminated from the Missouri Sex Offender Program (MoSOP) and have exhausted all opportunities to complete MoSOP." (Sup.L.F. 2). Inmates not meeting these qualifications were not to be referred for further proceedings (Sup.L.F. 2).

Jonathan Rosenboom, the Director of Behavioral Health Services for DOC, testified at a hearing on Mr. Donaldson's motion to dismiss (H.Tr. 3). He is involved in preparing policies and procedures for the MOSOP program (H.Tr. 4). In response to the passage of the sexually violent predator law, he prepared an "operating regulation" to "administratively guide our actions as we reviewed cases and interacted with the Attorney General." (H.Tr. 6). As of January 1, 1999, DOC began tracking offenders who were soon to be released and review their case to determine whether to refer them for further proceedings (H.Tr. 11). The referral process begins with an end of confinement (EOC) report (H.Tr. 21-22). Mr. Rosenboom acknowledged that, "at this point in time, we were ruling out individuals who were going to be released by had successfully completed the MOSOP treatment program." (H.Tr. 11). If an inmate had completed MOSOP, "the person was not placed on the list for subsequent review by the Sex Offender

Assessment Unit examiners.” (H.Tr. 12). That procedure was revised in July of 1999 (H.Tr. 13-15). No longer did the procedure exclude from further proceedings those inmates who had successfully completed MOSOP (H.Tr. 18). The new procedure created a pool of potential sexually violent predators from all of those inmates who have committed a sexually violent offense and were within 180 days of release (H.Tr. 18, 28-29). According to the procedure as revised in July of 1999, no longer would completion of MOSOP exclude an offender from review under the sexually violent predator law (H.Tr. 29).

The probate court overruled Mr. Donaldson’s motion to dismiss (L.F. 10). Because the probate court received evidence regarding DOC’s procedure in notifying the Attorney General’s Office of inmates who might meet the definition of a sexually violent predator, the motion to dismiss is treated as a motion for summary judgment and reviewed accordingly. *Harmon v. Headley*, 95 S.W.3d 154, 156 (Mo. App., W.D. 2003). Where there is no disputed issues of fact and the question is purely an issue of law, the standard of review is *de novo*. *Id.* at 157. There is no dispute over the facts. When Mr. Donaldson began MOSOP, the Department of Corrections did not refer persons to the Attorney General’s Office unless they had failed MOSOP or were not eligible for MOSOP, and Mr. Donaldson was then in MOSOP and successfully completed it after the State filed its commitment petition (H.Tr. 11-12, Tr. 581, 593, L.F. 11-14). That procedure was changed *after* Mr. Donaldson began MOSOP, but before the State filed its

petition. The question then is one of a matter of law: did the State violate Mr. Donaldson's right to due process of law by initiating the commitment proceedings in a manner contrary to the procedures in place when he began MOSOP? Summary judgment is appropriate if there are no genuine issues of fact and the movant is entitled to judgment as a matter of law. *State ex rel. Public Housing Agency of the City of Bethany v. Krohn*, 98 S.W.3d 911, 913 (Mo. App., W.D. 2003). As will be discussed further below, Mr. Donaldson believes his due process right arises from the establishment of a specific procedure by DOC, which the State must follow according to *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 953 (1974). The *Wolff* Court determined that the analysis of the liberty interest in that case paralleled the accepted due process analysis as to property. 418 U.S. at 557, 94 S.Ct. at 2975. One of the property cases cited by the Court was the revocation of an attorney's federal bar license upon his disbarment in his home state. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, \_\_\_ L.Ed.2d \_\_\_ (1968). The United States Supreme Court noted that the United States Court of Appeals simply accepted the analysis of the state supreme court, and did not conduct a *de novo* review. 390 U.S. at 549, 88 S.Ct. at 1225. The United States Supreme Court said, "We turn then to the question of whether in Ohio's procedure there was any lack of due process." 390 U.S. at 551, 88 S.Ct. at 1226. Mr. Donaldson believes that this, too, suggests that the standard of review for this Court in this appeal is a *de novo* review of the question of law presented.

Civil commitment of Mr. Donaldson as a sexually violent predator impinges on his fundamental right of liberty. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2004). As a general rule, due process guarantees that the claimant receive whatever process is constitutionally mandated or permitted under the laws in effect at the time of his claim. *Richardson v. State Highway & Transportation Com'n*, 863 S.W.2d 876, 879 (Mo. banc 1993). But where the State has established procedures relating to an individual's liberty interest, those procedures must also comport with due process of law. *Wolff, supra.*, 418 U.S. at 556-557, 94 S.Ct. at 2975.

The State of Nebraska had a statute providing that the chief officer of a correctional facility is responsible for discipline within the facility. 94 S.Ct. at 2969. The statute provides for a range of possible disciplinary action, including the loss of good time credit. *Id.* at 2969-2977. Prison authorities had established written regulations dealing with procedures and policies for controlling inmate misconduct. *Id.* at 2970. The appellant challenged those procedures, claiming that they deprived him of due process of law. The State of Nebraska countered that the regulations did not implicate the appellant's due process rights. *Id.* at 2975. The United States Supreme Court disagreed. The Court noted that the state did not have to provide for good time credit, but it not only chose to provide that credit, it also specified by law that it was only to be forfeited for serious misbehavior. *Id.* "[H]aving created the right to good time and ...

recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.*

The director of the department of corrections shall develop a program of treatment, education and rehabilitation for all imprisoned offenders who are serving sentences for sexual assault offenses. Section 589.040.1, RSMo 2000. That is the MOSOP program. All persons imprisoned by the department of corrections for sexual assault offenses shall be required to successfully complete the programs developed by the department. Section 589.040.2. When it appears that a person may meet the criteria of a sexually violent predator, the department of corrections shall give notice within 180 days of the anticipated release of the person from a correctional center to the Attorney General's Office and the Multidisciplinary Team. Sections 632.480(1) and 632.483.1(1), RSMo 2000. It was pursuant to these statutes that Mr. Rosenboom prepared an "operating regulation" in the MOSOP plan to "administratively guide our actions as we reviewed cases and interacted with the Attorney General." (H.Tr. 6). Thus, as in *Wolff v. McDonnell*, Mr. Donaldson is guaranteed due process of law in that procedure.

Mr. Donaldson had to complete phase I of MOSOP before beginning phase II of the program with Mr. Slater in June of 1999 (Tr. 567, 580). When Mr. Donaldson began the program, it was DOC's established procedure to exclude from the SVP referral process those persons who had not failed, refused or been terminated from MOSOP, and those persons who had not yet exhausted all opportunities to complete MOSOP. In fact, Mr. Donaldson was working toward completion of MOSOP, which he successfully completed in January of 2000, when the State filed its commitment petition in December of 1999 (L.F. 11, Tr. 580, 581, 593). It appears from the evidence that Mr. Donaldson moved continuously through the MOSOP program. Thus, at the time Mr. Donaldson began MOSOP, DOC's official procedure excluded him from referral for SVP commitment. This should have remained the case as Mr. Donaldson moved continuously through completion of the program. Judge Wolff noted in his concurring opinion in *In the Matter of the Care and Treatment of Norton*, that "[f]ailure to successfully complete MOSOP triggers the statutory process leading to civil commitment as a sexually violent predator." 123 S.W.3d at 179. Mr. Donaldson did not fail to successfully complete MOSOP.

And yet, DOC violated its established procedure and referred Mr. Donaldson to the Attorney General's Office. This referral resulted in the deprivation of his liberty after the completion of his prison sentence. The due process provided by this procedure to Mr. Donaldson was arbitrarily abrogated

by DOC's failure to follow their established procedure. The probate court erred in denying his motion to dismiss the petition. Mr. Donaldson's commitment should therefore be reversed, and he should be discharged from custody.

## II.

**The probate court erred in denying Mr. Donaldson's Motion to Dismiss For Failure To Try The Case Within Ninety Days Of The Declaration Of A Mistrial, because retrial within ninety days was required by Section 632.495, RSMo 2000, which denied Mr. Donaldson his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that a mistrial was declared on January 27, 2004, and the case was not tried until September 29, 2004, nor was it continued within the ninety-day period of time according to the provisions of Section 632.492, RSMo 2000.**

Mr. Donaldson's 2001 commitment was reversed due to an erroneous jury instruction. *In the Matter of the Care and Treatment of Timothy Donaldson*, WD 60352 (July 10, 2002). The cause was again brought to trial on January 27, 2004, but an insufficient number of potential jurors were available following *voir dire* and the trial court declared a mistrial (L.F. 3). On May 5, 2004, Mr. Donaldson filed a motion to dismiss the case for the failure to try the case within ninety days following the declaration of the mistrial, as required by Section 632.495, RSMo 2000 (L.F. 153-155). On the same day, the probate court overruled the motion, finding that "the Administrator of Justice require same," and set the case for trial beginning on September 29, 2004 (L.F. 3). Mr. Donaldson's petitions

for writs of prohibition to this Court (L.F. 156-165), and to the Missouri Supreme Court (L.F. 201-206), were summarily denied without opinion.

Mr. Donaldson renewed his motion to dismiss immediately prior to the September 29 trial (Tr. 2, 18). The State argued against the motion by suggesting that a new trial date was “penciled in” within the ninety days with each side to determine the availability of their expert witnesses, but that Mr. Donaldson’s expert failed to respond or commit to that date (Tr. 19-20). The Assistant Attorney General argued that the definitive trial date of September 29 was set not because Mr. Donaldson’s expert agreed to that date, but “because I said at the time that we took up this motion if that’s the way Respondent is going to handle this case, then I want to set a trial date, and whether Dr. Maskel can be there or not, we need to try this case.” (Tr. 20). Mr. Donaldson’s counsel responded:

That is not the only reason this case wasn’t tried at that April date. Shortly after the Court – When the Court consulted its calendar for that April date, the Court said it would have to try to move a case to make that April date available. The Court then told us that that April date was not available because the Court wasn’t able to move that other case. This is not simply because Dr. Maskel may not have been available. And I’m not here to say that there may not have been good reason to continue the case either because the Court wasn’t available or because an expert wasn’t

available, but the fact remains that it wasn't continued within that 90-day period. It was only continued after that 90 days expired, after the Court lost jurisdiction in our view.

(Tr. 21). The State countered that the case was not tried within the ninety days only because Mr. Donaldson's expert did not indicate her availability for the date scheduled (Tr. 21-22). The probate court overruled the motion to dismiss (Tr. 22).

Unlike the motion to dismiss discussed in Point I, the probate court did not need to go outside the pleading to evaluate the motion to dismiss the petition for failing to bring Mr. Donaldson back to trial within thirty days of the mistrial. Thus, this motion is not reviewed as a motion for summary judgment, but as a motion to dismiss. *Harmon v. Headley*, 95 S.W.3d 154, 156, (Mo. App., W.D. 2003). The Court reviews the grant or denial of a motion to dismiss *de novo*, examining the pleadings to determine whether they invoke principles of substantive law. *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App., W.D. 2004). The pleadings are liberally construed and all alleged facts are accepted as true and construed in the light most favorable to the pleader. *Id.* If, however, this Court concludes that the probate court had to refer to matters outside of Mr. Donaldson's pleading, such as reviewing the docket sheets for the dates of trial, the dates of the events are uncontested, and review is still *de novo*. *Harmon, supra.*

“Any subsequent trial following a mistrial shall be held within ninety days of the previous trial, unless such subsequent trial is continued as provided in section 632.492.” Section 632.495, RSMo 2000. The probate court held Mr. Donaldson’s subsequent trial 246 days after the declaration of the mistrial. Two questions arise. Is the ninety-day time limit mandatory? Was the subsequent trial continued as provided in Section 632.492?

Is the ninety-day time limit mandatory? The starting point to determine the meaning of a statute is the plain language of the statute itself. *Jones v. Director of Revenue*, 981 S.W.2d 571, 574 (Mo. banc 1998). Generally, the word “shall” connotes a mandatory duty. *Bauer v. Transitional School District of the City of St. Louis, et al.*, 111 S.W.3d 405, 408 (Mo. banc 2003). This Court noted that other opinions, including one of its own earlier opinions, have held that where a statute does not state what results will follow in the event of a failure to comply with its terms, the statute is directory, not mandatory. *Id.* But this Court went on to say that the presence or absence of a penalty provision is only one method for determining whether a statute is directory or mandatory, citing its own earlier opinions. *Id.* Whether the word “shall” is mandatory or directory is primarily a function of context and legislative intent. *Farmers & Merchants Bank and Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995).

Civil commitment under the sexually violent predator law is a continuation of confinement of persons who have completed the criminal

incarceration for the offense they committed in the past. Such commitment impinges on the fundamental right of liberty. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2004). While such commitment has been permitted, it comes perilously close to constitutional boundaries and must be carefully circumscribed. The inclusion of time limits in many of the provisions of the sexually violent predator law may well have been for this reason, and indicate the legislature's intention to impose significant limits upon the time a person may be held in confinement after completion of his prison sentence pending completion of the constitutionally necessary procedures to further deprive him of his liberty. If DOC concludes that an inmate may meet the criteria, it must notify the Multidisciplinary Team which must evaluate the inmate and prepare a report of its findings within thirty days. Section 632.483.2, .4, RSMo Cum. Sup. 2004. Upon notice from the Prosecutor's Review Committee and the Multidisciplinary Team that an inmate may meet the criteria, the Attorney General's office must file a commitment petition, if it chooses to do so, within forty-five days. Section 632.486, RSMo Cum. Sup. 2004. If the probate court determines probable cause exists to believe that the person is a subject to further confinement, the Department of Mental Health must complete an evaluation within sixty days. Section 632.489.4, RSMo 2000. A trial must be held within sixty days of that determination. Section 632.492, RSMo 2000. And any subsequent trial following a mistrial must be held within ninety days. Section

632.495. It is clear that the legislature intended the detention of the person after serving his sentence but before civil commitment to be limited, and the final determination to be made as expeditiously as possible. Mr. Donaldson believes that the body of this legislation demonstrates the legislature's intention that the time limits be mandatory, not merely directory.

The provisions of the sexually violent predator law also demonstrate that the legislature is not entirely unfamiliar with the real world, particularly that reality which exists in Missouri's courthouses. While Section 632.492 mandates that the commitment trial occur within sixty days of the DMH evaluation, it also permits continuance of the trial. Section 632.495 also permits continuation of a subsequent trial following declaration of a mistrial, according to the provisions of Section 632.492.

"Any subsequent trial following a mistrial shall be held within ninety days of the previous trial, unless such subsequent trial is continued as provided in section 643.492." Section 632.495. Which brings us to the second question raised by this brief point: Was Mr. Donaldson's subsequent trial continued in compliance with the provisions of Section 632.492? That section provides: "The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced." Section 632.492.

Neither party requested a continuance of a trial date scheduled within ninety days of the mistrial (L.F. 3). In fact, no trial was scheduled by the probate court within ninety days of the mistrial (L.F. 3). The court's docket shows nothing between the January 27 docket entry, "Court grants mistrial," and the May 5 docket entries, "Motion to Dismiss: Failure to Try Case Within Ninety Days Following Declaration of Mistrial filed," and "Motion to Dismiss is overruled. Court finds the Administrator [sic] of Justice require same. Trial set Sept 29, 30, and Oct 1, 2004...." (L.F. 3). The probate court asserted that the administration of justice required that the case not be tried within the ninety days mandated by the legislature, but it failed to provide any basis for that assertion. The State claimed on the morning of trial, September 29, that the trial date "penciled in" on the day of the mistrial was not met because Mr. Donaldson's witness would not commit herself to appearing on the "penciled in" date (Tr. 19-22). Mr. Donaldson's counsel noted that a potential conflict may have arisen in the court's docket (Tr. 20-21). But the probate court did not suggest either of these events on May 5, as the "administration of justice" requiring the court to continue the case on its own motion (L.F. 3). Nor did the probate court suggest either of these events as the "administration of justice" it had relied upon when it again overruled Mr. Donaldson's motion following argument on the morning of trial, September 29 (Tr. 22). There is simply no

evidence that “the due administration of justice” required the court to continue the case beyond the ninety day time limit.

Another problem with the probate court’s order is the *post facto* nature of its entry into the record. The court’s order appears to be an afterthought once the violation of the time limit was brought to its attention by Mr. Donaldson’s motion to dismiss. There is no Missouri opinion considering the re-trial after a mistrial provision of Section 632.495. But there is an existing body of law in the similar circumstances of the time limits imposed in the Uniform Mandatory Disposition of Detainers Law (UMDDL) and the Interstate Agreement on Detainers Law (IAD). Under the UMDDL, if the case is not brought to trial within 180 days of the defendant filing his request for disposition of the detainer, the trial court loses jurisdiction to proceed further. A court would lack jurisdiction to enter an order continuing a case after the time limit had expired. Section 632.492 does not have language similar to that in the UMDDL stripping away subject matter jurisdiction upon expiration of the time limits. To this extent, it is similar to the time limits in the IAD. The time limits contained in the IAD are not jurisdictional, *Ellsworth v. State*, 964 S.W.2d 455, 457 (Mo. App., E.D. 1998) (and thus a violation of the time limits may be waived by a guilty plea), but a failure by the State to demonstrate a waiver of the time limit by the defendant or good cause why the case could not be tried within the time limit requires dismissal of the charges. *State ex rel. Hammett v. McKenzie*, 596 S.W.2d

53, 59-60 (Mo. App., E.D. 1980). Mr. Donaldson believes that the mandatory nature of the time limit requires a continuance to be sought and granted before the expiration of the time limit.

Guidance in this matter can be found in the Pennsylvania Supreme Court's opinion in *Commonwealth v. Fisher*, 301 A.2d 605 (Penn. 1973). Fisher properly filed his request for disposition of detainers under the IAD. *Id.* at 605-606. The IAD required that the Commonwealth bring Fisher to trial within 180 days. *Id.* On the one hundred and eighty-first day, the Commonwealth filed a motion for a continuance alleging that the court's calendar prevented trial within the time limit. *Id.* at 606. The Pennsylvania Supreme Court accepted that the Commonwealth might arguably have had good cause to continue the trial, but required that the motion to continue the case had to be made prior to the expiration of the 180 day time limit. *Id.* at 607, citing the New Jersey Supreme Court opinion of *State v. Lippolis*, 262 A.2d 203 (N.J. 1970).

The *Fisher* Court's opinion was influenced by the purpose of the detainer law in preventing interference with an inmate's incarceration inherent in the filing of a detainer against him on other charges. 301 A.2d at 607. This is the same harm the UMDDL seeks to prevent. The Missouri Supreme Court noted in *State ex rel. Kemp v. Hodge*, 629 S.W.2d 353, 355 (Mo. banc 1982), noted that the filing of a detainer can cause strain, anxiety and apprehension in an inmate sufficient to interfere with his desire or ability to take advantage of rehabilitative

programs. The Court also noted that a detainer may deprive an inmate of privileges in prison such as trusty status, and lower levels of custody including eligibility for work camps. *Id.* “Experience has shown that once a ...detainer is filed against an inmate, that inmate’s status within the prison changes adversely.” *Id.* at 305. Mr. Donaldson is convinced that as “baleful” as these effects are on an inmate, they are significantly less than the adverse effect of the SVP law’s continued confinement of an inmate beyond his release date. The purpose of the SVP time limits, to protect the individual’s liberty, requires strict application of the statutory provision for continuances, and requires that the continuance be requested or granted before expiration of the time limit.

This notion is not without precedence. In *State ex rel. Wright v. Dandurand*, a probationer sought a writ of prohibition to keep the circuit court from refusing to discharge him from probation and to prevent the circuit court from setting a probation violation hearing. 973 S.W.2d 161, 162-163 (Mo. App., W.D. 1998). The probationer argued that Section 559.016, RSMo, limited felony probation to five years, and that the circuit court lost jurisdiction once the five year term expired. *Id.* at 161-162. In making the preliminary writ of prohibition permanent, the Western District of the Missouri Court of Appeals agreed with the probationer and held that because the term of probation had expired, the circuit court was “acting in excess of [its] jurisdiction in refusing to grant

Relator's discharge from probation, and setting the case for a probation violation hearing." *Id.* at 163.

A similar situation arose in a non-criminal context in *State ex rel. Stewart v. Civil Service Commission of the City of St. Louis*, 120 S.W.3d 279 (Mo. App., E.D. 2003). The Commission maintained employee lists for promotion according to Civil Service Rules. *Id.* at 282. The list remains in effect for two years unless sooner canceled or "extended beyond the original two-year period by the Director when continued use of the employment list is deemed to be in the best interest of the service." *Id.* 286. The Director of Personnel allowed a promotion list to expire under the civil service rules, but the mayor requested that the Director to extend the list. *Id.* at 282-283. The Civil Service Commission instructed the Director to reinstate the employment list for another year. *Id.* at 283. The Eastern District Court of Appeals held that the extension of the list was improper. *Id.* at 287. This conclusion followed from the decision of this Court in *State v. Graves*, 182 S.W.2d 46 (Mo. 1944). When the legislative body provides for a time period to expire, but authorizes the time to be extended, "extended" means "prolonged." 120 S.W.3d at 287, 182 S.W.2d at 51. "[A] prolongation of time cannot occur *after* the time originally limited has *expired*." *Id.* (emphasis in original). "As a result a time extension may be granted before the original time period has expired, but may not be granted 'after the expiration of the time first limited.'" *Id.*

The Florida Supreme Court agrees with Mr. Donaldson's position in this case. In *State v. Goode*, 830 So.2d 817, 818 (Fla. 2002), the Court affirmed the dismissal of the commitment petition "because a trial was not commenced within the mandatory thirty-day time period provided by the statute, and no continuance was ordered prior to expiration of that period." The Florida Supreme Court concluded that the Florida legislature was concerned about the patent constitutional issues implicit in a scheme of involuntary and indefinite detention imposed in addition to specific criminal penalties imposed for the same conduct, and therefore sought to temper the drastic effects of the indefinite detention scheme by the imposition of rigid time constraints. *Id.* at 822. The Second District of the Florida Court of Appeals had previously held in *Kinder v. State*, 779 So.2d 512, 514-515 (Fla. 2d 2000), that the thirty-day time limit was mandatory because the intent of the legislature in enacting the time limit was to ensure that detainees were brought to trial without undue delay. The Florida Supreme Court further noted in *Goode* that courts should avoid interpreting a statute in a manner which would render it meaningless. 830 So.2d at 824. The Court concluded: "If the thirty-day time limit in section 394.916(1) were held to be merely directory and could be routinely ignored without consequence, the limitations on continuances listed in section 394.916(2) would essentially be rendered meaningless." *Id.* The Florida Supreme Court reaffirmed its opinion in *Osborne v. Florida*, 907 So.2d 505, 507 (Fla. 2005).

The Western District Court of Appeals below relied upon *In the Matter of the Care and Treatment of Searcy*, 49 P.3d 1 (Kan. 2002), to order Mr. Donaldson's discharge. WD No. 65069, Slip Op., 5. The Kansas Supreme Court held that the sixty-day time limit in the Kansas statute to bring the person to trial was jurisdictional, mandatory, and a statutory right. 49 P.3d at 10. The petition against Searcy was dismissed because he "was not brought to trial within 60 days of his waiver of the right to contest the probable cause finding and the record contains no indication that the trial court granted a continuance prior to expiration of those 60 days...." *Id.*

The Western District noted that the holding of *Searcy* was later superseded by the Kansas legislature when it amended the statute. WD No. 65069, Slip Op., 5. The Kansas legislature amended its SVP statutes after the *Searcy* decision to provide that "either as originally enacted or as amended, [the time limits] are intended to be directory and not mandatory...." The State picks up this thread in its Application for Transfer by suggesting that the Kansas legislature, "in so many words," told "the Kansas Supreme Court that it got it wrong in *Searcy*." (Trans. App. 9). The State directs this Court to *In the Matter of the Care and Treatment of Hunt, et al.*, 82 P.3d 861 (Kan. App. 2004), decided after the Kansas legislature amended the statute. (Trans. App. 9). The *Hunt* Court noted that it had to follow the opinion of the state Supreme Court in *Searcy* "unless subsequent developments in the legislature or in Supreme Court cases have

altered or limited its holding or called it into question.” 82 P3d at 869. The Appellate Court noted that the legislature had amended the SVP statutes in 1999, 2002, and 2003 to state its intention that the time limits were not mandatory. *Id.* at 870.

But unlike the Kansas legislature, the Missouri legislature has not amended the SVP statutes in Chapter 632 to indicate an intention that the time limits applied to every stage of the process in our laws were not meant to be mandatory. Mr. Donaldson filed his motion to dismiss in 2004, after the *Searcy* decision and three statutory amendments of the Kansas laws. The State Solicitor’s Office takes a seemingly unusual position that the Kansas legislature was speaking for and expressing the intent of the Missouri legislature when it amended the Kansas statutes. That the Missouri legislature did not amend our statutes more likely suggests that our legislature’s intention is exactly the same as that expressed by the *Searcy* Court. The amendment of the Kansas statutes does not demonstrate the will of our legislature.

The State offered a number of out-of-state cases in its Application for Transfer to suggest that Mr. Donaldson’s commitment should be affirmed. In each instance, there are reasons that they do not persuade against finding the time limits in the Missouri SVP law to be mandatory.

The time limit in issue in *Commitment of Beyer*, 633 N.W.2d 627, 629 (Wis. App., 2001), was the requirement that a probable cause hearing occur seventy-

two hours after the person's detention. Beyer filed a motion for change of judge at 5:00 p.m. on the last day of this time limit. *Id.* The Court found that the seventy-two hour time limit was not mandatory because the state of Iowa gets only one chance to file a commitment petition, and allowing the person to frustrate the seventy-two hour limit with a last minute procedural motion would defeat the purpose of the SVP law – the treatment of high risk sex offenders and the protection of the public from such offenders. *Id.* at 630. By contrast, in the present case, Mr. Donaldson had been detained for five years before he filed his motion to dismiss. He had been to trial once and his commitment was overturned on appeal. He was brought back for a new trial that could not be had due to an insufficient number of jurors. The State then had ninety days to bring him again to trial, but failed to meet that deadline. The only frustration in this case is in Mr. Donaldson's right not to be detained for an unreasonable amount of time without a determination by a jury that he is legally subject to continued confinement.

The Iowa Supreme Court did not decide in *Detention of Huss*, 688 N.W.2d 58, 63-64 (Iowa 2004), whether the time limit was directory or mandatory. The Court held that the appellant's refusal to submit to the statutorily required mental evaluation was good cause for the delay under the continuance provisions of the statute because the required evaluation is a "critical stage" of the proceeding. The State argued in its Application for Transfer that Mr.

Donaldson's trial was delayed for good cause because his expert would not commit to a new trial date. The problem with the State's position is that an independent evaluation by a defense expert is not a critical stage of the proceeding in the nature of the statutorily required evaluation in Iowa, and if Mr. Donaldson was not ready for a trial scheduled within the time limit he could have resorted to the continuance provisions of Section 632.498 and 632.495 to continue the trial until he was prepared. This does not absolve the State from its obligation to provide him a trial within the mandatory time limits.

In *People v. Evans*, 34 Cal.Rptr.3d 35, 39 (Cal.App., Div. 4, 2005), the appellant sought to apply a general time limit from the Code of Civil procedure to dismiss the petition against him. *Id.* at 38-39. The California court would not do so because the SVP law was a special statutory proceeding that did not incorporate the general rules of civil procedure. *Id.* at 39. The Court noted in dicta that the California SVP law contains few time limits, and that prior cases have held that dismissal is only warranted for failure to file a petition for recommitment before a prior SVP commitment has expired. *Id.*

The appellant in *In the Interest of M.D.*, 598 N.W.2d 799, 802 (N.D. 1999), was to be brought to trial within thirty days of the probable cause hearing. The State requested a continuance on the thirty-second day, because the court-appointed psychologist could not complete the evaluation, and the State's attorney had been sick and out of the office for two weeks. *Id.* The North

Dakota Supreme Court concluded that this provided good cause to extend the trial, and, without explanation, that the petition did not have to be dismissed because the State's motion was filed outside the thirty-day time limit. *Id.* at 803. Mr. Donaldson would point out that the Court also stated, "We urge the trial courts to set the hearing date as soon as possible, *and to be mindful of the liberty interest of freedom from bodily restraint* when determining whether a delay is for 'good cause' in this type of case." *Id.* at 803 (emphasis added). When the trial court below denied Mr. Donaldson's without a hearing and with the bare notation that the "administration of justice" required the delay, it does not seem to have been mindful of Mr. Donaldson's liberty interest of freedom from bodily restraint. The State below did not request a delay, or provide any basis for granting it.

The Massachusetts Supreme Court concluded in *Commonwealth v. DeBella*, 816 N.E.2d 102, 106 (Mass. 2004), that the sixty-day time limit for trial could be extended upon specified exceptions contained in the statute. Those exceptions are upon motion of one of the parties for good cause shown or upon the court's motion in the interest of justice. *Id.* The State presented uncontradicted evidence that defense counsel was unavailable to try the case until well after the deadline, and in several contacts with the State made no effort to see that the case was set for trial within the time limit, and requested a trial date outside that limit. *Id.* at 104-105. The Massachusetts Supreme Court found this

was good cause shown by the State for the delay. *Id.* at 108. This is an interesting conclusion because the Court noted that the State filed no motion suggesting good cause to delay the trial. *Id.* at 104. As in Mr. Donaldson's case, the Massachusetts trial court simply denied the appellant's motion to dismiss filed after expiration of the time limit. It would seem that the correct question was whether the trial court properly delayed the trial in the interests of justice rather than whether one party demonstrated good cause in a motion to delay the trial.

In spite of the holding of the Massachusetts Supreme Court, there are very important statements made by the Court which are applicable in Mr. Donaldson's case. The Court noted, "[c]lose adherence to the language of the statute and its express exceptions is even more important where a defendant's freedom is involved and there are due process considerations." *Id.* at 106. The importance of these issues led the Court to say:

In view of the language of [the statute], and in light of the significance of an individual's freedom, the Commonwealth must ensure that the trial is commenced within sixty days unless the judge makes a finding, based on supporting evidence, that there is good cause to continue the trial or that it is otherwise in the interests of justice to do so. Any request to continue the case beyond the sixty-day period must appear on the record, supported by "good cause," with record made of the judicial

action taken, and the reasons therefore. If the court determines on its own motion that the interests of justice require a continuance, the record must so reflect, again with adequate findings. The findings must not simply repeat the wording of the statute; they must reflect the specific grounds presented to the judge.

*Id.* at 107. Nothing remotely resembling this procedure occurred in Mr. Donaldson's case. The trial court initially denied Mr. Donaldson's motion to dismiss on the same day the motion was filed (L.F. 3). The trial court did not include any findings of the reason for the denial of the motion or delay in the trial; it only repeated the wording of the statute (L.F. 3). On the first day of trial the parties presented conflicting arguments for the delay in the trial, and the trial court again denied the motion to dismiss, again without any reference to the specific grounds presented to it for the delay (Tr. 22).

The State's argument that the time limit contained in Section 643.495, and by extension in the other sections in the SVP law; 632.483.2, 632.486, 632.489.4, and 632.492, is merely directory would, indeed, render the time limits meaningless. The State argued in the Western District Court of Appeals that because the language of the statute is only directory, "[t]here is no penalty ... for failure to retry the case within 90 days of the mistrial." (Resp. Brief, WD 65069, p. 19). The Western District Court of Appeals agreed that the State's position rendered the time limit meaningless. Slip Op. 5. The State's contrary argument

in its Application for Transfer is just completely wrong. The State suggests that the Western District is incorrect because rather than finding the time limits mandatory, a delay in bringing a person to trial can be addressed by a writ, or by filing for an array of sanctions including the sanction of dismissal. (Trans. App. p. 11). This is precisely what has happened in this case. When Mr. Donaldson was not brought to trial within ninety days, he filed a motion for the sanction of dismissal (L.F. 153-155). When the trial court refused to grant that sanction, Mr. Donaldson filed writs in the Western District Court of Appeals and in this Court. WD 64559, SC 86317. Both were denied without briefing, without argument, and without opinion. In this appeal from the denial of the sanction of dismissal, the State argues that Mr. Donaldson must lose because the time limit is directory, meaning that there is no sanction for the State's delay in bringing him to trial.

Some of the State's concluding remarks in its Application for Transfer need to be addressed. One that Mr. Donaldson will not honor with a reply is the State's remark that the statute is rendered meaningless by permitting his "expert to sandbag the State by refusing to make herself available for trial..." (Trans. App. 11). The remainder of the State's remarks were addressed by Judge Holliger's recognition in oral argument before the Western District that the intent of the legislature to protect Mr. Donaldson from unnecessary detention is met by scheduling the trial within ninety days, not "penciling it in," and if Mr. Donaldson cannot be ready for trial in that time he can extend the date for good

cause shown under the continuance provisions of the statute. Under this procedure, the State would suffer no harm from a defense expert's alleged "sandbagging." Mr. Donaldson would be hard pressed to argue on appeal that he was "forced" to trial unprepared if he did not make recourse to the available continuance procedures in the statute. And if Mr. Donaldson was truly prejudiced by the trial court's refusal to grant him a continuance for good cause under the statute that would produce an entirely different appeal than the one presently pending before this Court.

The probate court's *post facto* attempt to rescue the State's petition from the application of the time limit mandated by the legislature in Section 632.495 was unavailing. The probate court erred in denying Mr. Donaldson's motion to dismiss the petition. The judgment and commitment order of the probate court must be reversed, and Mr. Donaldson must be discharged.

### III.

The probate court abused its discretion in admitting evidence that Mr. Donaldson suffers antisocial personality disorder (APD), because APD cannot satisfy the statutory requirement of a “mental abnormality,” in violation of his rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the jury may have used APD as a basis for its finding of a mental abnormality, but APD fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal conduct in general.

Mr. Donaldson filed two motions prior to trial to exclude evidence that he suffers antisocial personality disorder or another personality disorder, arguing that such a disorder fails to meet the statutory definition of a mental abnormality under the statute (L.F. 41-47, 52-60). The probate court denied the motions (L.F. 3).

Trial courts have broad discretion in determining the admissibility of evidence. *Koontz v. Ferber*, 870 S.W.2d 885, 891 (Mo. App., W.D. 1993). This Court’s review is limited to an abuse of discretion standard. *Still v. Ahnemann, M.D.*, 984 S.W.2d 568, 572, (Mo. App., W.D. 1999). Discretionary rulings are presumed to be correct, and an appellate court will only reverse on a showing

that the trial court abused its discretion. *Id.* Judicial discretion is abused when the order of the trial court is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Willis v. Willis*, 50 S.W.3d 378, 383 (Mo. App., W.D. 2001).

Dr. Lacoursiere said that Mr. Donaldson had two statutory mental abnormalities: sexual sadism and personality disorder with antisocial features (Tr. 477). The State reminded the jurors in closing argument of that testimony, but argued that the jurors only had to find one of them to return a verdict against Mr. Donaldson (Tr. 766). Thus, as the State conceded, the jurors could have returned their verdict based on the mental abnormality of a personality disorder. Indeed, it is very likely that they did so. Dr. Lacoursiere's assertion that Mr. Donaldson suffers sexual sadism was pretty specious. He made that diagnosis because Mr. Donaldson struck his victims, took them to a secluded area in his car, and subjected them to physical and psychological suffering (Tr. 466-467). He admitted in cross-examination that those factors are present in almost every rape (Tr. 509, 511, 516). He admitted that most rapists are not sexual sadists (Tr. 509). Dr. Lacoursiere distinguished Mr. Donaldson from a typical rapist because he did not rape his victims in their own homes or in a college dormitory (Tr. 509-510). It would not be surprising that the jurors found this distinction unpersuasive. The real support that Dr. Lacoursiere offered for his diagnosis of sexual sadism is that

Mr. Donaldson beat the women more than was necessary to gain compliance (Tr. 516). Both women said that Mr. Donaldson only hit them until they complied with his demands, and did not beat them after they complied, and Dr. Lacoursiere knew that (Tr. 512-516). It is reasonable, at the very least, to believe that the jurors rejected this diagnosis, and Dr. Lacoursiere's associated testimony that it is a statutory mental abnormality.

It is much more likely that the jurors returned their verdict based on the presence of a mental abnormality resting on the diagnosis of a personality disorder. Not only did Dr. Lacoursiere diagnose a personality disorder, but so did Dr. Maskel, Mr. Donaldson's expert (Tr. 675). The only difference between the testimony of the two experts was whether the personality disorder predisposes Mr. Donaldson to commit sexually violent offenses (Tr. 477, 681). Because of the probability that the jurors based their verdict on a personality disorder, the verdict was improper if a personality disorder is insufficient to constitute a statutory mental abnormality.

Mr. Donaldson can be committed under Missouri's sexually violent predator law only upon proof beyond a reasonable doubt that he has a mental abnormality, defined as a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree causing the person serious difficulty controlling behavior. Section 632.480(2), RSMo Cum. Sup. 2004; *Thomas v. State*,

74 S.W.3d 789 (Mo. banc 2002). This definition clearly establishes separate requirements of the condition: that it affect emotional or volitional capacity; that it predispose the person to commit sexually violent offenses, and; that it cause serious difficulty controlling behavior. The State focuses almost solely on the difficulty controlling behavior, and the danger that poses. But future danger, no matter how likely, is not alone sufficient to permit civil commitment. There must also be evidence proving beyond a reasonable doubt the separate element of predisposition to sexually violent offenses.

The State of Missouri is not authorized to civilly commit Mr. Donaldson as a sexually violent predator due to a mental condition that may lead him to commit crimes in general. In *Kansas v. Crane*, 534 U.S. 407, 412, 122 S.Ct. 867, 870, 151 L.Ed.2d 856 (2002), the United States Supreme Court explained and reiterated its holding in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997):

*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. That distinction is necessary lest “civil commitment” becomes a “mechanism for retribution or general deterrence,” – functions properly those of criminal law, not civil commitment.

The evidence must “distinguish the dangerous sexual offender whose serious illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” *Crane*, 122 S.Ct. at 870. Justice Breyer noted in his concurring opinion in *Crane*, “Hendricks’ abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions.” *Id.* at 2088-2089.

Judge Werdegar, Jr. of the California Supreme Court wrote a separate concurrence in *Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999). He quoted Justice Kennedy’s admonition in *Hendricks*: “If ... civil confinement were to become a mechanism for general retribution or general deterrence, or if it were shown that the mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Id.* Judge Werdegar described how a mental disorder is determined to be too imprecise:

One way in which a “diagnosed mental disorder” ... may come to be recognized as “too imprecise a category” is if such diagnoses cease to distinguish meaningfully between ... offenders whose violent predatory conduct stems in some way from an abnormality of thought, perception or affect, and ... all remaining offenders, who by virtue of their deviant

conduct may properly be described as abnormal but whose abnormality only traces, in circular fashion, back to their conduct.

*Id.* The United States Supreme Court noted in *Foucha v. Louisiana*, 504 U.S. 71, 85, 112 S.Ct. 1780, 1788, 118 L.Ed.2d 437 (1992) that to permit the State to hold Foucha indefinitely because of his past crimes and present APD would also permit the State hold indefinitely a convicted criminal if it could be shown that he had a personality disorder that may lead to criminal conduct. The *Foucha* Court cautioned that such a procedure could substitute civil commitment based on danger rather for a conviction for a proven crime or for mental illness. *Id.*

Judge Werdegar noted that a diagnosis of APD is founded on behavioral criteria, including a history of criminality. *Hubbart*, 969 P.2d at 612. He cautioned: "To the extent the diagnosis simply places a psychiatric label on a particular character structure or a generalized propensity to do ill, *Foucha's* warnings assume more immediate constitutional significance." *Id.*

Dr. Lacoursiere's testimony failed to move from the potential danger of a typical recidivist to a "specific, serious, and highly unusual" condition necessary for a mental abnormality under the civil commitment laws. The indices of a personality disorder with antisocial features identified by Dr. Lacoursiere are a failure to conform to societal norms or laws, deceitfulness, impulsivity, aggressiveness, disregard for the safety of others, financial irresponsibility, and lack of remorse (Tr. 457-460). What highly unusual predisposition toward sexual

violence apart from typical criminal recidivism is demonstrated by these indices? None. Dr. Lacoursiere asserted that Mr. Donaldson's personality disorder was a mental abnormality, but he offered no support for that assertion. This is clear from this exchange with the Assistant Attorney General:

Q. Does the personality disorder that Mr. Donaldson has, that you diagnosed him with, does that predispose him to commit sexually violent offenses?

A. Yes, it does.

Q. Does the sexual sadism that you diagnosed Mr. Donaldson with predispose him to commit sexually violent offenses?

A. Yes, it does.

Q. How does what you know about Mr. Donaldson lead you to believe that those cause him serious – that each cause him serious difficulty controlling his behavior?

(Tr. 477). Dr. Lacoursiere answered why he thought Mr. Donaldson has serious difficulty controlling his behavior (Tr. 477). In fact, the next six questions and answers involved Dr. Lacoursiere's opinion of Mr. Donaldson's ability to control his behavior (Tr. 477-479). As demonstrated by the cases above, dangerousness and criminal recidivism do not justify civil commitment. But that is where the State focuses its, and the jurors' attention. Compare the State's pursuit with Dr. Lacoursiere of Mr. Donaldson's potential for future danger with its failure of

proof that the personality disorder causes an unusual predisposition toward sexual violence:

Q. Is ASPD or personality disorder NOS with antisocial features, are those always mental abnormalities under the law?

A. Not - Not - I mean, they're always mental disorders, but not mental abnormalities, here as the law defines it. No, they are not.

Q. Okay. So people - a person could have an antisocial personality disorder and not have - which would be a mental disorder - but not have a mental abnormality under the law?

A. Definitely. Definitely.

(Tr. 479-480). The State then asked Dr. Lacoursiere, "Is it your opinion that Mr. Donaldson's personality disorder is a mental abnormality within a reasonable degree of psychiatric certainty?" (Tr. 481). Dr. Lacoursiere answered, "Yes, it is." (Tr. 481). Then the State turned its attention to Mr. Donaldson's risk, again putting before the jurors the notion of potential danger, rather than calling upon Dr. Lacoursiere to support his opinion that Mr. Donaldson's personality disorder predisposed him to commit acts of sexual violence.

The only relationship identified by Dr. Lacoursiere between Mr. Donaldson's sexual offenses and the diagnosis of a personality disorder is the doctor's use of the sex offenses as evidence of Mr. Donaldson's failure to conform to societal norms and lawful behavior (Tr. 457). This reference is to general

criminal behavior, not an unusual condition specifically predisposing Mr. Donaldson to sexual offending. Dr. Lacoursiere described a criminal personality, not a paraphilia, a sexually abnormal disorder. The Assistant Attorney General's closing argument was rife with similar errors. He argued in support of the personality disorder being a mental abnormality:

The question is, in addition to all other ways in which [Mr. Donaldson] disregards the law, disregards the consequences of his actions, is he also predisposed to commit sexually violent offenses as a part of that? Yes, he is. It is clear from his history that sexually-related breaking of the law is part of that in a degree that causes the individual serious difficulty controlling his behavior.

(Tr. 766-767). Contrary to the State's argument, if Mr. Donaldson commits sex crimes simply as a part of general criminal behavior, it is not the result of an unusual and specific predisposition toward sexual offending. This is the necessary predisposition required for civil commitment the State continues to minimize. If Mr. Donaldson simply commits crimes, of a sexual as well as non-sexual nature, he is a typical recidivist. Recidivists are subject to the criminal law, not civil commitment. This is true even of the typical, but dangerous, recidivist, because future danger alone will not justify civil commitment.

Nothing in Dr. Lacoursiere's testimony establishes the necessary elements of a mental abnormality defined by the statute. Mr. Donaldson's belief that Dr.

Lacoursiere could never do so has been borne out by the doctor's inability to do so in his testimony at trial. Dr. Lacoursiere made a bald assertion, expressed a personal opinion, that Mr. Donaldson has a statutory mental abnormality, but his testimony is clearly inadequate to establish that the personality disorder meets the requirements of the law. The probate court abused its discretion in overruling Mr. Donaldson's motions to exclude the evidence, and in admitting the evidence at trial. The judgment and commitment order must be reversed and Mr. Donaldson must be discharged.

## CONCLUSION

Because the probate court erred in denying Mr. Donaldson's motion to dismiss the petition for a violation of his rights to due process of law, as set out in Point I, Mr. Donaldson's commitment to DMH should be reversed, and he should be discharged from custody. The probate court's *post facto* attempt to rescue the State's petition from the application of the time limit mandated by the legislature in Section 632.495 was unavailing. Because the probate court erred in denying Mr. Donaldson's motion to dismiss the petition because he was not brought to trial within ninety days of the declaration of a mistrial, as set out in Point II, the judgment and commitment order of the probate court must be reversed, and Mr. Donaldson must be discharged. Because the probate court abused its discretion in overruling Mr. Donaldson's motions to exclude evidence of a personality disorder, and in admitting the evidence at trial, as set out in Point III, the judgment and commitment order must be reversed and Mr. Donaldson must be discharged.

Respectfully submitted,

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### Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 18,864 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this \_\_\_ day of \_\_\_\_\_, 2006, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

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Emmett D. Queener

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