

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. SC88914
JACKIE HOLTCAMP,)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE THOMAS CAMPBELL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Jackie Holtcamp appealed the judgment and order of the Honorable Thomas Campbell, Cass County, Missouri, Probate Division, committing Mr. Holtcamp to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and jurisdiction was originally in the Missouri Court of Appeals, Western District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.070, RSMO 2000. This Court accepted the case on Mr. Holtcamp's application for transfer after the Western District affirmed Mr. Holtcamp's commitment. Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

Jackie Holtcamp pleaded guilty in Pettis County, Missouri, on May 2, 1983, to attempt to commit forcible rape (L.F. 2).¹ He was received in the Department of Corrections in May of 1983, and was finally released from incarceration on that offense in October of 1985. (Tr. 129-130).

In June of 1999, Mr. Holtcamp pleaded guilty in Johnson County, Missouri, to second degree statutory sodomy (Tr. 130-131). Imposition of sentence was suspended, and Mr. Holtcamp was placed on five years probation (Tr. 130-131). His probation was revoked in July of 2001, for driving while intoxicated, and he was incarcerated on the second degree statutory sodomy (L.F. 41, Tr. 130-131). Mr. Holtcamp was scheduled to be released from incarceration for that crime on August 25, 2004 (Tr. 130-131).

On August 20, 2004, the State filed a petition in Pettis County to involuntarily commit Mr. Holtcamp to the custody of the Department of Mental Health as a sexually violent predator (L.F. 1-5). The State asserted as jurisdiction to proceed with involuntary civil commitment the 1983 Pettis County guilty plea to attempt to commit rape (L.F. 2).

Mr. Holtcamp moved to dismiss the State's petition for a lack of jurisdiction to proceed (L.F. 21-28). He suggested that the petition failed to

¹ The record on appeal consists of a legal file (L.F.) and transcript (Tr.).

invoke the jurisdiction of the court under the SVP law because the offense for which he was then incarcerated is not included within the statutory definition of a “sexually violent offense.” (L.F. 22).

The State responded that current incarceration for an enumerated “sexually violent offense” is unnecessary (L.F. 29-34). It suggested that the commission of a “sexually violent offense” at any time plus current incarceration for any offense invokes the jurisdiction of the SVP law (L.F. 29-30). The State found this jurisdiction in the intent of the legislature to “protect the public” from future offenses by sexual predators (L.F. 32).

The probate court denied Mr. Holtcamp’s motion to dismiss (Tr. 123-126). Mr. Holtcamp subsequently entered into a Stipulation of Facts with the State that he has a mental abnormality as described by the statute and *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789 (Mo. banc 2002), and as a result is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (L.F. 52-55). The parties further agreed in the Stipulation that Mr. Holtcamp was not waiving his challenge to the probate court’s lack of jurisdiction over the case because he was not currently confined for a “sexually violent offense,” but was specifically preserving that challenge for appeal (L.F. 52-55). Mr. Holtcamp personally informed the probate court that he was proceeding under that Stipulation even though he was aware that the

psychologist who performed the court-ordered sexually violent predator evaluation had concluded that he did not meet the qualifications for commitment (Tr. 126-127, 142).

The probate court entered a judgment finding Mr. Holtcamp to be a sexually violent predator and ordered him committed to the Department of Mental Health (Tr. 149, L.F. 56-57).

This appeal follows.

POINT RELIED ON

The probate court erred in denying Mr. Holtcamp's motion to dismiss the State's petition for involuntary civil commitment, in violation of Mr. Holtcamp'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, because the probate court lacked jurisdiction to proceed with the case in that the Sexually Violent Predator law only permits commitment of persons who are then confined for sexually violent offenses as defined by Section 632.480(4), RSMo Cum. Supp. 2005, and at the time the State filed its petition Mr. Holtcamp was confined for an offense not within that definition.

Commonwealth v. McLeod, 771 N.E.2d 142 (Mass. 2002);

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J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000);

United Pharmacal Company of Missouri, Inc., v. Missouri Board of

Pharmacy, 208 S.W.3d 907 (Mo. banc 2006);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.484, RSMo 2000; and

Sections 632.480; 632.483; 632.484; 632,486 RSMo Cum. Supp. 2005.

ARGUMENT

The probate court erred in denying Mr. Holtcamp's motion to dismiss the State's petition for involuntary civil commitment, in violation of Mr. Holtcamp'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, because the probate court lacked jurisdiction to proceed with the case in that the Sexually Violent Predator law only permits commitment of persons who are then confined for sexually violent offenses as defined by Section 632.480(4), RSMo Cum. Supp. 2005, and at the time the State filed its petition Mr. Holtcamp was confined for an offense not within that definition.

The State filed a petition on August 20, 2004, to civilly commit Mr. Holtcamp as a sexually violent predator upon his release from prison following his 1999 guilty plea to statutory sodomy in the second degree (L.F. 1-5, Tr. 130-131). The petition alleged, however, that Mr. Holtcamp qualified for commitment under the SVP law because he was convicted of attempt to commit rape (L.F. 2). Mr. Holtcamp was convicted and incarcerated for attempted rape, but he was sent to prison on that offense in May of 1983, and finally discharged from that sentence in October of 1985 (Tr. 130-131).

Mr. Holtcamp moved to dismiss the petition because he was not confined for a crime defined as a sexually violent offense in the SVP law, and the State was not authorized to file the petition and the probate court lacked jurisdiction to proceed on the petition (L.F. 21-28). The probate court overruled Mr. Holtcamp's motion to dismiss (Tr. 123-126). Appellate review of a question of subject matter jurisdiction is *de novo*. *Ford Motor Co., v. City of Hazelwood*, 155 S.W.3d 795, 797-798 (Mo. App., E.D. 2005).

The Attorney General may file a petition to involuntarily commit someone as a sexually violent predator "[w]hen it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee ... has determined that the person meets the definition of a sexually violent predator...." Section 632.486, RSMo Cum. Supp. 2005. There are two ways in which this "appearance" is provided to the Attorney General.

The first is by notice to the Attorney General from an "agency with jurisdiction." Either the Department of Corrections or the Department of Mental Health is an "agency with jurisdiction." Section 632.480(1), RSMo Cum. Supp. 2005. "When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice to the attorney general" Section 632.483.1, RSMo Cum. Supp. 2005. Notice from the Department of Corrections must be given within 360 days "*prior to the anticipated*

release from a correctional center of the department of corrections of a person who has been convicted of a sexually violent offense” or as soon as practicable prior to release of someone released from the Department of Corrections but later returned for no more than 180 days. Section 632.483.1(1), RSMo Cum. Supp. 2005 (emphasis added). Notice from the Department of Mental Health is given at any time “*prior to the release of a person who has been found not guilty by reason of a mental disease or defect of a sexually violent offense,*” or “*prior to the release of a person who was committed as a criminal sexual psychopath*” Section 632.483.1(2) and (3), RSMo Cum. Supp. 2005 (emphasis added).

Sexually violent offenses are “the felonies of forcible rape, rape, statutory rape in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or an attempt to commit any of the preceding crimes, or child molestation in the first or second degree, sexual abuse, sexual assault, deviate sexual assault, or the act of abuse of a child as defined in subdivision (1) of subsection 1 of section 568.060, RSMo, which involves sexual contact, and as defined in subdivision (2) of subsection 1 of section 568.060, RSMo.” Section 632.480(4), RSMo Cum. Supp. 2005.

The second way an appearance of being a sexually violent predator is provided to the Attorney General is “[w]hen the attorney general receives notice from any law enforcement agency that a person who has pled guilty to or been

convicted of a sexually violent offense and who is not presently in the physical custody of an agency with jurisdiction [h]as committed a recent overt act....” Section 632.484.1(1), RSMo 2000. A “recent overt act” is “any act that creates a reasonable apprehension of harm of a *sexually violent* nature.” Section 632.484.5, RSMo 2000 (emphasis added). The Attorney General may request and receive an order of the probate division of the court in which the person was convicted for the detention of the person in the Department of Mental Health for an evaluation of whether he may meet the definition of a sexually violent predator. Section 632.484(2), (3) and (4), RSMo 2000.

Section 632.484 established another method by which notice could be provided to the Attorney General, but that method no longer exists. A law enforcement agency could give the Attorney General notice that a person had pled guilty or been convicted of a sexually violent offense, was not in custody of an agency with jurisdiction, and “has been in the custody of an agency with jurisdiction within the preceding ten years and may meet the criteria of a sexually violent predator.” Section 632.484.1(2), RSMo 2000. That method expired, however, on December 31, 2001. Section 632.484.6, RSMo 2000.

Mr. Holtcamp’s 1983 conviction for attempt to commit rape was a “sexually violent offense.” Section 632.480(4), RSMo Cum. Supp. 2005. But he was discharged from the Department of Corrections, an “agency with

jurisdiction,” for that offense in October of 1985. Mr. Holtcamp was not in the custody of an agency with jurisdiction on this offense when the Attorney General filed his petition to commit Mr. Holtcamp as a sexually violent predator on August 20, 2004. The Attorney General did not proceed under Section 632.484 upon notice of a “recent overt act.” (L.F.1-5). The Attorney General proceeded upon the authority of Section 632.483, alleging in its petition: “By notice received on August 9, 2004, within 45 days of the filing of this petition, the Missouri Department of Corrections, an agency with jurisdiction, has certified that respondent, Jackie Holtcamp, may meet the criteria of a sexually violent predator as defined by statute....” (L.F. 2). The specific basis alleged for the jurisdiction of the petition was the 1983 conviction. (L.F. 2). Mr. Holtcamp was released from the agency with jurisdiction on this conviction in 1985, not within forty-five days of the notice or the Attorney General’s petition, nor within the 360 days prior to his release for the sexually violent offense required by Section 632.483.1(1).

Mr. Holtcamp was not in the custody of an agency with jurisdiction on August 20, 2004, for a sexually violent offense as defined in Section 632.480(4). He was incarcerated for the offense of statutory sodomy in the second degree, an offense not defined as sexually violent in Section 632.480(4). The Attorney General’s petition failed to satisfy the jurisdictional requirements of the several statutes, and the probate court is without jurisdiction to proceed with the case.

The SVP law unambiguously requires confinement for a sexually violent offense at the time a commitment petition is filed.

Whether a person must be incarcerated or committed for a sexually violent offense at the time the commitment petition is filed pursuant to 632.480 et seq. had never been addressed in Missouri before this case was submitted to the Western District Court of Appeals, below. The Court of Appeals concluded that the meaning of the phrase “has been convicted” of a sexually violent offense is ambiguous, and subject to judicial construction according to recognized rules. Mr. Holtcamp disagrees that the intention of the legislature in this regard is unclear.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 172 (Mo. banc 2003). The mere fact that litigants disagree over the meaning of words used in a statute, however, does not render the statute ambiguous. *J.B. Vending Co. Inc., v. Director of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001). An ambiguity arises from duplicity, indistinctness, or an uncertainty of the meaning of an expression. *Id.* A statute is not ambiguous every time it uses a word that can have more than one meaning. *Id.*, at 187. The intent of the legislature and the language of a

statute can be intrinsically clear when the statute as a whole is considered. *Id.*, at 188. All of the statutory provisions of the SVP law must be read together and harmonized. *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53, 59 (Mo. App., W.D. 2005).

The disagreement between the parties in this case is whether the legislature intended the language “prior to the anticipated release of a person ... who has been committed of a sexually violent offense” used in Section 632.483 to mean that the person must be confined for a sexually violent offense at the time the State files the sexually violent predator commitment petition, or to mean that the person does not have to be confined for a sexually violent offense at the time the sexually violent predator petition is filed if the person was ever confined for such an offense in the past. Just because the State advances the latter meaning does not render the statute ambiguous. The intention of the legislature to require confinement for a sexually violent offense at the time the petition is filed is intrinsically clear when the provisions of the SVP law are read together.

The State focused on the language of Section 632.486 authorizing the Office of the Attorney General to file an SVP petition, while ignoring the predicate events mandated by Sections 632.483 and 632.484. This focus on the language in isolation without regard to the context of that language in the SVP

law as a whole is what creates the erroneous impression that the language is ambiguous regarding the legislature's intention.

It is certainly correct, as the State pointed out below, that Section 632.486 permits the Office of the Attorney General to file a commitment petition when it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee has determined that the person is a sexually violent predator. It is also true that Section 632.486 does not include the language that the person must be confined for a sexually violent offense. But this ignores the context of Section 632.486 within the SVP law.

As discussed above, the appearance that a presently confined person may be a sexually violent predator is provided either by an agency with jurisdiction or by law enforcement personnel. Section 632.483, 632.484. These predicate steps must occur before the State files the commitment petition pursuant to 632.486. The Department of Corrections provides notice of that appearance "[w]ithin three hundred sixty days prior to the anticipated release from a correctional center ... of a person who has been convicted of a sexually violent offense..." Section 632.484.1(1). The Department of Mental Health provides notice of that appearance "[a]ny time prior to the release of a person who has been found not guilty by reason of a mental disease or defect of a sexually violent offense..." Section 632.483.1(2). Notice of that appearance can be provided by law

enforcement personnel if the person is not confined in DOC or DMH and “[h]as committed a recent overt act,” defined as an “act that creates a reasonable apprehension of harm of a sexually violent nature.” This last section is important in the context of the statutes because the most recent “overt act” of sexual violence for a person confined is deemed to be the sexually violent offense that resulted in the incarceration. *Detention of Gonzales*, 658 N.W.2d 102, 105 (Iowa 2003); *In the Interest of Kochner*, 662 N.W.2d 195, 198 (Neb. 2003). All three statutory provisions demonstrate clear legislative intention that the commitment process follows the most recent act of sexual violence, and reject the notion that the legislature intended the process to commit someone based on an act of sexual violence at any time in the remote past.

The intention of the legislature to require a current sexually violent offense as a predicate for commitment is also apparent in its passage of Section 632.484.1(2), RSMo 2000, with a sunset clause. This section specifically allowed the Attorney General’s Office to reach back in time and commit those persons previously incarcerated for a sexually violent offense but since been released from custody for that offense. But the legislature also specifically withdrew that authority after December 31, 2001, the date on which the legislature directed the statutory provision to expire. Inclusion of the expiration date is a direct and clear

expression by the legislature that what the State is attempting to do in Mr. Holtcamp's case was not intended.

It seems incongruent that the legislature would deny the Office of the Attorney General the ability to go back in time to find a qualifying sexually violent offense to file a commitment petition without evidence of a recent overt act of sexual violence for a person not confined, but intended to allow the Attorney General do so only because the person is confined in a state facility. A person in custody may not be subjected to civil commitment in a manner inconsistent with that applied to a person not in custody without violating the equal protection and due process clauses of the constitution. *See, Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Statutes should not be construed in a manner that will render them unconstitutional. This Court will resolve all doubt in favor of an act's constitutional validity, will make every intendment to sustain the constitutionality of a statute, and if a statutory provision can be interpreted in two ways, one constitutional and the other not, the constitutional construction will be adopted. *Murrell v. State*, 215, S.W.3d 96, 102 (Mo. banc 2007).

The question of whether a person must be confined for a statutorily defined sexually violent offense at the time a sexually violent predator commitment petition is filed has been addressed in Massachusetts, Iowa, Florida,

Arizona, and New Jersey. Comparison of the statutes of those states with the Missouri SVP law sheds light on how the language of our statutes demonstrates the legislative intention to require confinement for a sexually violent offense at the time the commitment petition is filed.

In Iowa, “[w]hen it appears that a person who is confined may meet the definition of a sexually violent predator, the agency with jurisdiction shall give written notice to the attorney general and the multidisciplinary team ... no later than ninety days prior to ... [t]he anticipated discharge of a person who has been convicted of a sexually violent offense from total confinement.” *Detention of Gonzales*, 658 N.W.2d at 103-104. Iowa law also allows a “petition for the commitment of a person who is *not* presently confined ... *if it appears that a person who has committed a recent overt act meets any of the following criteria*: [t]he person was convicted of a sexually violent offense and has been discharged after the completion of the sentence imposed for the offense. *Id.* at 104. (emphasis in original). The Iowa Supreme Court concluded that the “confinement” for a commitment petition “means confinement for a sexually violent offense” in part because the terms “confinement” and “sexually violent offense” or “sexually violent predator” are used in the same sentence in the statutes, and otherwise “the result would allow the State to reach back in time, seize on a sexually violent offense for which the defendant was discharged, and couple this with a

present confinement for a totally different – or even perhaps a trivial – offense and use [the SVP law] to confine the person.” *Id.* at 104-105. The Iowa statutes mirror Sections 632.483 and 632.484.

In Massachusetts, “any agency with jurisdiction of a person who has been convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense [elsewhere defined] or who has been charged with such offense but has been found incompetent to stand trial shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months prior to the release of such person....” *Commonwealth v. McLeod*, 771 N.E.2d 142, 145 (Mass. 2002). “When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined [elsewhere], the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person....” *Id.* McLeod was convicted and sentenced to prison on qualifying sexual offenses in 1988 and 1992, but had been released from prison on both offenses well before the Commonwealth filed its petition to commit him as a sexually dangerous person. *Id.* at 144. At the time the petition was filed, McLeod was incarcerated on offenses not within the statutory definition of “sexual offenses.” *Id.* The Massachusetts Supreme Court noted that

the “thrust of the statutory scheme is that commitment petitions should be brought against persons currently incarcerated for sexual offenses who are about to be released into the community, but who, because they are sexually dangerous, are likely to commit another sexual offense, and, therefore, should not be released.” *Id.* at 146-147. McLeod was not serving a sentence for a sexual offense conviction that would trigger the procedures set forth in the Massachusetts law. *Id.* at 147. The Massachusetts Supreme Court held: “Because there is no underlying sexual offense conviction that would trigger the procedures set forth in [the Massachusetts law], the defendant is not eligible for potential civil commitment.” *Id.* The Court found the prior qualifying offenses to be irrelevant to its conclusion because McLeod had completed his sentences before the sexually dangerous person law was passed “and his present crimes are not enumerated sexual offenses.” *Id.* According to the Court, this conclusion was required because “[w]ere we to conclude otherwise, any defendant serving a sentence for any crime who had ever in the past committed an enumerated sexual offense, no matter how temporally distant, would be eligible for civil commitment....” *Id.* The Massachusetts’ statute was very similar to Section 632.483.

The Florida, Arizona, and New Jersey laws are much different in a very important respect. Florida’s statutory definition of a “sexually violent offense”

includes “any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense.” *Hale v. State*, 891 So.2d 517, 520-521 (Fla. 2004). The Florida Supreme Court relied on this definition to conclude that its legislature did not intend that the law apply only to persons currently incarcerated in Florida for a sexually violent offense. *Id.* at 521.

Arizona law includes within the definition of a sexually violent offense, “[a]n act committed in another jurisdiction that if committed in this state would be a sexually violent offense listed in subdivision (a) or (b) of this paragraph.” *In re the Detention of Wilber W.*, 53 P.3d 1145, 1152 (Ariz. App., 2002). Thus, admission of a California conviction was admissible in the Arizona trial. *Id.*

New Jersey law includes within the definition of a sexually violent offense, “a criminal offense with substantially the same elements as any offense enumerated [elsewhere in the statute], entered or imposed under the laws of the United States, this State or another state.” *In the Matter of the Civil Commitment of P.Z.H.*, 873 A.2d 595, 598 (N.J. App., 2005). This led the New Jersey court to conclude that the legislature did not intend to limit that state’s SVP commitment to persons currently confined in that state on a qualifying offense. *Id.*, at 599-600.

The Missouri statutes make no provision for foreign convictions. Section 632.480(4). Thus, the basis upon which the Florida, Arizona, and New Jersey courts relied to find that confinement on a qualifying sexually violent offense at the time the petition was filed was not required in order to file a commitment petition is not present in the Missouri statutes.

**Applicable rules of construction if the SVP law
is considered to be ambiguous.**

The Western District Court of Appeals found that the arguments by Mr. Holtcamp and the State, while contradictory on the meaning of the statutory language, were both reasonable. Slip Op. 6. This led the Western District Court to conclude that the language was ambiguous, and to turn to rules of construction to discern the meaning of the language. Recognizing that statutory language is considered ambiguous if “it is capable of being read differently by reasonably well-informed individuals,” *State v. Meggs*, 950 S.W.2d 608, 610 (Mo. App., S.D. 1997), Mr. Holtcamp will address the rules of construction discussed by the Western District Court of Appeals, even though he maintains the belief that it is clear from the totality of the SVP law and the language used in the context of that law that he be confined on a sexually violent offense at the time the State’s petition is filed.

The Western District Court of Appeals considered two opposing rules of construction: the rule of lenity which limits the reach of a statute and applies its

meaning narrowly; and the remedial nature of the statute which expands the reach of a statute and applies its meaning broadly. The Western District Court suggested that limiting the reach of the SVP law and applying it narrowly might be preferable because the law “creates the power to impair the right to liberty without the full panoply of protections found in a criminal trial...” Slip Op. 6, fn 6. But because this Court has not extended the rule of lenity beyond criminal statutes or penal civil statutes, the Western District Court of Appeals chose not to apply the rule of lenity. *Id.* The Western District therefore expanded the reach of the SVP law because it is a remedial law, and applied the statute broadly to permit the State to file a commitment petition in circumstances not expressly precluded by the statutes. Slip Op. 6, 11.

The Western District Court of Appeals was correct that the appropriate approach in this case is to apply the statutes narrowly and to limit their reach because the result of the SVP law is the deprivation of an individual’s constitutionally guaranteed right to liberty and freedom from restraint. The rule of lenity construes an ambiguity in a penal statute against the government or party seeking to impose penalties and in favor of the person against whom such penalties are sought to be imposed. *J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo. banc 2000). It is a rule of mercy. *United Pharmacal Company of Missouri, Inc., v. Missouri Board of Pharmacy*, 208 S.W.3d 907, 914 (Mo. banc 2006) (Stith, J.,

concurring). Statutes of a penal nature “are always strictly construed, and can be given no broader application than is warranted by [their] plain and unambiguous terms.” *Id.*

Judge Stith noted in *United Pharmacal* that the rule of lenity has been applied almost exclusively to criminal statutes. 208 S.W.3d at 914. The only exceptions were in *J.S. v. Beaird, supra.*, and *City of Kansas City v. Tyson*, 169 S.W.3d 927 (Mo. App., W.D. 2005). In both of those cases, while the statutes were essentially regulatory, penalty provisions applied for violations of the regulations. The penalty provisions invoked the rule of lenity. *Beaird*, 28 S.W.3d at 877; *Tyson*, 169 S.W.3d at 929.

The reason for Judge Stith’s separate concurrence in *United Pharmacal* is important to the question presented in this appeal. Noting that the rule of lenity is almost exclusively applied to criminal statutes, not to statutes containing both civil remedies and penal provisions, Judge Stith recognized that the same result could be reached in appellant’s favor, and the same interests would be served, by applying strict construction to the penal clause. 208 S.W.3d at 914-915. In her analysis, it was appropriate to employ strict construction to limit the scope of the penal provisions of the law to only those persons “that are clearly regulated by the statute’s literal meaning.” *Id.* at 915. Mr. Holtcamp agrees that if the rule of lenity is not appropriately extended to SVP cases, strict construction of the

statutes is appropriate to protect the same interests presented in these types of cases.

Commitment to a secure facility under the SVP law is not considered “penal,” but it certainly implicates the constitutional right to liberty. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d at 173. It is for this reason that several other states have applied the rule of lenity or strict construction to their SVP and similar “civil” laws.

While construing the meaning of a provision of the Virginia sexually violent predator law found ambiguous by the Virginia Supreme Court, the Court recognized the substantial liberty interest at stake because the law may result in the person’s involuntary commitment. *Miles v. Commonwealth*, 634 S.E.2d 330, 333 (Virginia 2006). The Virginia Supreme Court, therefore, held: “As a result of this liberty interest, we apply the rule of lenity normally applicable to penal statutes to the [SVP] Act’s provisions. Under that rule, a statute must be strictly construed in favor of a defendant’s liberty and may not be extended by implication and construction.” *Id.*

The Supreme Court of Massachusetts and the Second District Court of Appeals in Illinois applied the similarly effective rule of strict construction to ambiguous provisions of their states’ sexually violent predator laws. The Massachusetts Court stated: “[O]ur interpretation is necessarily informed by the

rule that “[l]aws in derogation of the liberty or general rights, of the citizen ... are to be strictly construed” *Commonwealth v. Gillis*, 861 N.E.2d 422, 425 (Mass. 2007). As with the rule of lenity in Missouri, the Massachusetts Court noted that, “[w]hile the rule is principally applicable to criminal cases, and proceedings under [the Massachusetts SDP law] are civil in nature, ‘the potential deprivation of liberty to those persons subjected to these proceedings,’ warrants this more stringent analysis.” *Id.* (internal citations omitted). The Massachusetts Court explained the reason for this decision: “Narrowly construing the SDP statute, as with other statutes in derogation of liberty, not only helps avoid possible constitutional due process problems, but also helps ensure that individuals are not deprived of liberty without a clear legislative intent to do so.” *Id.* (internal citations omitted). The Massachusetts Supreme Court noted that it had implicitly expressed this opinion in the *McLeod* case cited above by Mr. Holtcamp: “Indeed, we adopted this approach implicitly in *Commonwealth v. McLeod*. (citation omitted). We refused to broaden the class of persons subject to SDP commitment where ‘the language of G.L. c. 123A [did] not plainly and unambiguously [so] provide’ and stated that ‘any broadening of the statute would be the province of the Legislature, not this court.’” *Id.*

The Second District Court of Appeals in Illinois recognized, as well, that proceedings under that state’s sexually violent predator law are civil, not

criminal in nature. *People v. McVeay*, 706 N.E.2d 539, 543 (Ill. App., 2nd Dist., 1999). Nonetheless, the Court held that, “because of the possible loss of individual liberty, certain procedural safeguards normal to criminal prosecutions must be followed, including strict construction of the statute.” *Id.*

In a case not involving a sexually violent predator commitment, but rather commitment of a juvenile under the provisions of a special juvenile code, the Superior Court of Delaware noted that it was dealing with a civil, rather than a criminal law. *Bartley v. Holden*, 338 A.2d 137, 142 (Del. 1975). But because this civil commitment deprived the juvenile of the same liberty interest possessed by an adult in a criminal case, the Delaware Court held that “there must be a clear legislative provision requiring” the commitment. *Id.* The Court said: “No law should be construed to deprive a person of his freedom unless that result is clearly compelled by the language used.” *Id.* While recognizing the validity of the concern for treatment and care of juveniles justifying involuntary commitment, the Delaware Court insisted that juvenile commitment be based on “legislation demonstrating a clear intent to do so.” *Id.*

All of these cases consistently hold that the right to liberty is not to be taken away by construction or implication, but only by a clear and unambiguous legislative expression of the intent to take away that liberty. These cases instruct that individual liberty cannot be taken away, even by civil confinement, “without

a clear statement of legislative intent to do so,” *Gillis*; “unless the language ... plainly and unambiguously [so] provide[s],” *McLeod*; and only upon “a clear legislative provision requiring such result [and] clearly compelled by the language used.” *Bartley*. The government’s power to deprive an individual of his liberty is not to be “extended by implication or construction.” *Miles*. That is the flaw in the Western District Court of Appeals’ decision in Mr. Holtcamp’s case. The Western District quite obviously noted that the SVP law does not clearly or expressly deprive Mr. Holtcamp of his liberty under the facts of this case, but the Court upheld that deprivation by construction and implication; by expanding the language of the statute beyond what is clearly expressed by the legislature and compelled by the language it used.

The Western District Court of Appeals justified its expansion of the statutory language beyond what is clearly expressed because the SVP law has been called “remedial,” that it seeks to protect society from the particularly noxious threat of sexually violent predators. Slip Op. 6. But here, the Western District may have arrived at a conflict that is as old as our constitutional form of government: the conflict between individual rights and the public welfare. The legislature, and often the courts, are called upon to resolve this conflict.

Relevant to the conflict before this Court in this appeal, in criminal law, where the individual right to liberty is guaranteed by the constitutions of the

United States and state of Missouri, the right of the individual is given preference over the welfare of the public inherent in the prosecution of crimes by strictly construing statutes or applying the rule of lenity. In this case, where the constitutional right to liberty is also implicated, the same preference should prevail. The opposite preference, expanding or broadening of the language on the basis that the law is remedial, deprives the individual of his liberty by construction and implication beyond what is clearly expressed and compelled by the language used by the legislature.

As a general rule, remedial laws are to be construed in favor of the law's application and to accomplish the greatest public good. *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. banc 1991); *Hagan v. Director of Revenue*, 968 S.W.2d 704 (Mo. banc 1998); *State ex rel. Ford v. Wenskay*, 824 S.W.2d 99 (Mo. App., E.D. 1992); *City of St. Louis v. Carpenter*, 341 S.W.2d 786 (Mo. 1961). But the situation before this Court is not the general situation where this expansion has been appropriate. These cases, cited by the Western District Court of Appeals, Slip Op. 7, do not involve the deprivation of an individual's constitutionally guaranteed right. In these cases there was no conflict between the public welfare and constitutionally guaranteed individual rights. The remedial nature of the statute establishing the filing deadline of a worker's compensation claim in *Abrams* was the interest favoring a review of the claim on

the merits. The appellant in *Hagan* claimed that hardship driving privileges were remedial, a notion this Court rejected because a license to drive is a privilege, not a right. The remedial nature of the law in *State ex rel. Ford* was the protection of children provided by the Uniform Parentage Act establishing a duty of parental support for the child. The remedial nature of the statute in *City of St. Louis* was protection of the public provided by the requirement of automobile insurance. These cases do not in the least support the position that the reach of the government to deprive its citizens of their liberty can be expanded by claiming that such deprivation serves the general welfare of the public.

And while many cases note that the primary “purpose” of the SVP law is to protect the public from the danger caused by sexual predators, no case Mr. Holtcamp has been able to find holds that this purpose makes the SVP law “remedial.” The closest the Western District Court of Appeals could come to such a holding involved the now repealed Criminal Sexual Psychopath law. Slip Op. 6. The case cited by the Western District to support the finding that the SVP law is remedial is *Bynum v. State*, 545 S.W.2d 720 (Mo. App., St.L.D. 1977). Slip Op. 6. *Bynum*, however, involved a sentencing issue based on alleged prior convictions raised in a Rule 27.26 motion. 545 S.W.2d at 721. The Court found that the only evidence of prior crimes at the time of the sentencing was the

appellant's acknowledgment that he had been committed as a criminal sexual psychopath. *Id.* The appellate court noted that "[t]he proceeding during which an individual is found to be a criminal sexual psychopath is civil, remedial and curative rather than criminal and punitive." *Id.*, citing, *State ex rel. Wright v. MacDonald*, 330 S.W.2d 175 (Mo. App., K.C.D. 1959).

The *Wright v. MacDonald* Court cited *State ex rel. Sweezer v. Green*, 232 S.W.2d 897 (Mo. banc 1950), for the proposition that the criminal sexual psychopath law was civil, remedial and curative. 330 S.W.2d at 177. It is significant to note the reasons the *Sweezer* Court found the CSP law to be remedial and curative; and the differences between the repealed CSP law and the current SVP law. The *Sweezer* Court found the CSP law to be remedial and curative because "[t]he public policy of the State (as expressed in this Act) is to treat and cure such persons, not to punish them." 232 S.W.2d at 900. "One of the evident purposes of the enactment is to prevent persons suffering from this mental disorder, though 'not insane or feebleminded', from being punished for crimes they commit during the period of this mental ailment." *Id.* This is significant because unlike the current SVP law, a CSP petition was filed during the pendency of a criminal charge, and if the person was found to be a criminal sexual psychopath, the person was committed to a mental institution in lieu of being prosecuted for the purpose of imprisonment. The current SVP laws do not

substitute commitment for punishment as a remedy for persons allegedly suffering from the mental ailment. The current SVP law punishes first for the criminal offense, and then adds additional confinement for the mental ailment under the theories of treatment and protection. This is certainly not the same sort of remedial or curative purpose of the law found by this Court in *Sweezer*.

The *Sweezer* opinion makes another observation that is very significant here. The Court stated: “In principal and application [the CSP law] is not unlike our Juvenile statutes wherein certain minors, when charged with a crime, are made a class apart and certain remedial substantive procedures are provided for in lieu of their being prosecuted under the criminal laws.” 232 S.W.2d at 900. This recognition by the Court aligns the civil commitment statutes of the CSP and SVP laws with the holding of the Superior Court of Delaware in *Bartley v. Holden, supra.*, that the deprivation of liberty inherent in juvenile commitments invokes the strict statutory construction typically applied to criminal laws.

This Court’s holding in *J.S. v. Beaird, supra.*, is also very similar regarding this issue. This Court noted that the “obvious legislative intent for enacting [the registration law] was to protect children from violence at the hands of sex offenders.” 28 S.W.3d at 876. This is essentially the same reason that the Western District Court of Appeals held below that the SVP law is “remedial.” And yet, when it came to the provisions of the registration statute which

deprived the person of his liberty, this Court imposed the rule of lenity. *J.S. v. Beaird, supra.*

The Sexually Violent Predator law deprives individuals of their right to liberty and freedom from restraint. That liberty is guaranteed and protected by the constitutions of the United States and state of Missouri. Those constitutional protections demand that liberty not be taken away without a clear and unambiguous legislative intention to do so. These protections cannot be lost by implication or construction by the courts.

The State lacked jurisdiction to petition for Mr. Holtcamp's involuntary confinement under circumstances not expressly provided for by the legislature. The probate court lacked jurisdiction to enter a judgment and order committing Mr. Holtcamp to involuntary civil commitment under the SVP law. The probate court's judgment and order must be vacated and Mr. Holtcamp must be released from commitment.

CONCLUSION

Because the probate court lacked jurisdiction to enter a judgment and order committing Mr. Holtcamp to involuntary civil commitment under the SVP law, the judgment and order must be vacated and Mr. Holtcamp must be released from commitment.

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 7,861 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 January, 2008. 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 January, 2008, to James R. Layton, State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

APPENDIX

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