IN THE
SUPREME COURT OF MISSOURI

SC88914

IN THE MATTER OF THE CARE
AND TREATMENT OF
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

SUBSTITUTE BRIEF OF RESPONDENT, STATE OF MISSOURI

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Missouri Bar No. 45631
Supreme Court Building
Post Office Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov

Attorneys for Respondent
State of Missouri

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF FACTS 5

ARGUMENT 5

A. "Sexually violent predator" 5

B. Circuit court jurisdiction 7

C. Attorney General authority 8

D. Department notice 11

E. Canons of construction 25

CONCLUSION 30

CERTIFICATE OF SERVICE 30

CERTIFICATION OF COMPLIANCE 31

TABLE OF AUTHORITIES

Cases

Barrett v. United States, 423 U.S. 212, 96 S.Ct. 498 (1976) 17

City of St. Louis v. Carpenter, 341 S.W.2d 786 (Mo. 1961) 28

Commonwealth v. McLoed, 771 N.E.2d 142 (Mass. 2002)..... 23, 24

Detention of Gonzalez, 658 N.W. 2d 102 (Iowa 2003)..... 23

G.R. Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986 (1984) 17

Hale v. State, 891 So.2d 517 (Fla. 2004)..... 22

In re Wilbur W., 53 P.3d 1145 (Ariz. Ct. App. 2002)..... 22

In the Matter of the Care and Treatment of Thomas, 74 S.W.3d 789 (Mo. banc 2002) 5, 6, 7, 28

J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000)..... 26, 27

Kansas v. Hendricks, 521 U.S. 346 (1997) 28

Missouri Comm'n on Human Rights v. Red Dragon, 991 S.W.2d 161 (Mo. Ct. App. W.D. 1999) 29

Offenbacker v. Sodowsky, 499 S.W.2d 421 (Mo. 1973) 17

Scarborough v. United States, 431 U.S. 563, 97 S.Ct. 1963 (1977)..... 17

Southwestern Bell Yellow Pages, Inc. v. Director of Revenue, 94 S.W.3d 388 (Mo. banc 2002) 23

State ex rel. Ford v. Wenskay, 824 S.W.2d 99 (Mo. Ct. App. E.D. 1992)..... 29

State v. Kraus, 530 S.W.2d 684 (Mo. 1975) 29

State v. Owen, 216 S.W.3d 227 (Mo. Ct. App. W.D. 2007)..... 16

Tabor v. State, 864 So.2d 1171 (Fla. Ct. App. 2004) 21, 22

United Pharmacal Co. v. Missouri Bd. of Pharmacy, 208 S.W.3d 907 (Mo. banc 2006)..... 26, 27

Statutes

§ 388.195..... 27

§ 632.480..... 5

§ 632.480(1) 10

§ 632.480(4) 20

§ 632.480(5) 14, 18, 19

§ 632.483..... 10, 12, 19

§ 632.484, RSMo. Supp. 2007 15

§ 632.484.1..... 7

§ 632.484.1(1) 14

§ 632.484.1(2) 15

§ 632.484.2..... 7

§ 632.484.4..... 14

§ 632.486..... 7, 9, 10, 11

§ 632.489.1 8

§ 632.492 8

§ 632.495 8

§§ 589.400 to 589.425 27

§§ 632.480-513 5

§§ 632.498-.507 8

Other Authorities

Garner, THE OXFORD DICTIONARY OF AMERICAN USAGE AND STYLE, 328 (2000) 15, 16

STATEMENT OF FACTS

Appellant Holtcamp's Statement of Facts adequately sets out the few facts pertinent to the narrow issue presented on appeal:

- He stipulated that he is a sexually violent predator as defined in § 632.480[1] and *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789 (Mo. banc 2002) (*In re Thomas*) (Appellant's Substitute Brief ("App. Sub. Br.") at 8, citing L.F. 52-55); and
- At the time proceedings for his commitment as a sexually violent predator began, he was in the custody of the Missouri Department of Corrections, serving a sentence for second degree statutory sodomy (App. Sub. Br. at 7, citing Tr. 130-31).

ARGUMENT

A. "Sexually violent predator"

This case arises under Missouri's "sexually violent predator" law, §§ 632.480-513. That law defines a "sexually violent predator":

> (5) "Sexually violent predator", any person who suffers from a mental abnormality which makes the

[1] Except as other wise indicated, all references to Missouri statutes are to RSMo 2000.

> person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:
>
> (a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, RSMo, of a sexually violent offense; or
>
> (b) Has been committed as a criminal sexual psychopath pursuant to section 632.475 and statutes in effect before August 13, 1980.

§ 632.480. This court held that in addition to the requirements set out in the statute, the factfinder must find that the alleged predator's mental abnormality "predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior has serious difficulty in restraining from performing sexually violent acts." *In re Thomas*, 74 S.W.3d at 792.

But this appeal is not about whether appellant Holtcamp is a sexually violent predator. He stipulated in the trial court that he is. (App. Sub. Br. at 8, citing L.F. 52-55; *see* also Tr. at 119-151). And here, he cannot and does not seek relief from that stipulation. The sole question here is whether,

despite being a sexually violent predator as that term is defined in the statute and *Thomas*, he is exempt from commitment for care and treatment.

B. Circuit court jurisdiction

Holtcamp's argument is, in essence, a jurisdictional one. In his view, the circuit court lacks jurisdiction to commit him for care and treatment. But he does not and cannot directly challenge the circuit court's jurisdiction. And logically so, for not only are circuit courts ones of general jurisdiction, but the statute here specifically endorses their handling of sexually violent predator commitment proceedings.

Section 632.484.1 instructs the Attorney General to file his petition, initiating the commitment proceeding, "with the probate division of the court in which the person was convicted, or committed." The instruction is reiterated in § 632.486. The statute instructs that court to determine whether "the person may meet the definition of a sexually violent predator," and if so, "the court shall order the detention and transport of such person to a secure facility to be determined by the department of mental health." § 632.484.2. The statute similarly instructs "the judge [to] determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator," and if there is probable cause, to "direct that person be taken into custody and direct that the person be

transferred to an appropriate secure facility." § 632.489.1. After completion of an evaluation of the alleged predator, that "court shall conduct a trial to determine whether the person is a sexually violent predator." § 632.492. And so on, though the commitment (§ 632.495) and even consideration of petitions for release (§§ 632.498-.507). The statute leaves no room for a direct argument that the circuit court lacks jurisdiction to take up and decide a sexually violent predator commitment proceeding properly brought to it.

C. Attorney General authority

To fit within the statutory framework, Holtcamp's argument that he cannot be subject to commitment must therefore be an indirect one. Thus he argues that the proceeding could never be initiated. And because only the Attorney General can initiate such a proceeding, Holtcamp's argument must be that the Attorney General lacks authority to file a petition to commit him for care and treatment. But here again, Holtcamp cannot and does not make a direct attack. After all, from the standpoint of the instructions and authority the statute gives to the Attorney General, there is no direct argument that the Attorney General lacked authority to file a petition to commit Holtcamp.

The statute sets out the requirements to be met for the Attorney General to file a commitment petition. The Attorney General may file a

commitment petition only when "it appears that [a] person presently confined may be a sexually violent predator." § 632.486. The definition of "sexually violent predator" and Holtcamp's concession that he not only "may be" but actually is a "sexually violent predator" are discussed in part A, above. That leaves two questions. First, was Holtcamp "presently confined"? And second, when the Attorney General filed the petition (*i.e.*, before Holtcamp stipuated), did it "appear" that Holtcamp "may be" a predator?[2]

The statute gives content to the term, "presently confined." It does not authorize the Attorney General to search the State for persons "presently confined," looking, for example, in county jails or private mental health

---

[2] We do not mean to suggest, by including these questions separately as a matter of analytical clarity, that the Attorney General's determination in that regard is separately reviewable. All the Attorney General's determination leads to is the initiation of a probable cause hearing in the circuit court. At that hearing, the court considers the evidence that the Attorney General presents – and can find, if the evidence does not show that the person was "presently confined" or does not support the conclusion that he "may be a sexually violent predator," that there is not probable cause that would justify further examination or proceedings.

facilities for persons who may be sexually violent predators. Rather, it places responsibility and authority for identifying possible predators on just two state agencies: "the department of corrections [and] the department of mental health." § 632.480(1)[3]. For purposes of the statute, the Attorney General's knowledge of whether someone is "presently confined" and "may be a sexually violent predator" comes only from notice or report given by one of those two agencies: "When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction," *i.e.*, the Department, "shall give written notice of such to the attorney general . . . ." § 632.483. Thus it is the responsibility of the Departments of Corrections and Mental Health, not the Attorney General, to identify from among those in their custody who may be a "sexually violent predator," and to notify the Attorney General.[4]

---

[3] Another section, § 634.484 provided for notice by law enforcement agencies, but imposed other requirements, discussed below on pp. 14-15.

[4] Even then, the Attorney General is not immediately authorized to proceed. He must first forward the notice of the "agency with jurisdiction" (and a report from a multidisciplinary team that reviewed the matter in that agency) to a committee of prosecutors. § 632.486. Only if "the prosecutor's review

But § 632.486 is unambiguous as to the key point with regard to this step in the analysis underlying Holtcamp's argument: When the Attorney General receives notice that a person "presently confined" within the jurisdiction of the Department of Corrections or the Department of Mental Health may be a sexually violent predator, he has authority to file a commitment petition. There is no dispute that the Attorney General received notice that Holtcamp was "presently confined" in the Missouri Department of Corrections. *See* L.F. at 52. And there is no dispute – as shown by the report of the Department, as well as by the circuit court's decision following the probable cause hearing – that it appeared that Holtcamp "may be a sexually violent predator." It would seem, then, that there would be no question that the Attorney General had authority to initiate the commitment proceeding, and that the circuit court had jurisdiction to act.

D. Department notice

Unable to directly challenge the circuit court's jurisdiction or the Attorney General's authority, Holtcamp asks the court to look behind the

---

committee . . . determine[s] by a majority vote, that the person meets the definition of a sexually violent predator" may the Attorney General file a petition. *Id.*

Attorney General's authority, and to find that the Attorney General could not act because the notice that triggered his authority was impermissibly sent by the Department of Corrections. But his interpretation and application of the statute giving instructions to the Department is wrong.

Holtcamp bases his argument on § 632.483, which states, in pertinent part:

> 1. When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection 4 of this section. Written notice shall be given:
>
> (1) Within three hundred sixty days prior to the anticipated release from a correctional center of the department of corrections of *a person who has been convicted of a sexually violent offense*, except that in the case of persons who are returned to prison for no more than one hundred eighty days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the

person's readmission to prison; …

(Emphasis added.)

Holtcamp's argument is derived from the italicized language in clause (1). To put his argument in the structure of the sexually violent predator law, Holtcamp points out – correctly – that the instructions to the Department regarding when to notify the Attorney General apply only when a person in the Department's custody "has been convicted of a sexually violent offense," and then concludes that if within the 360-day period the person is not serving a sentence for such an offense, the Department lacks authority to notify the Attorney General, the Attorney General lacks authority to file a petition, and the circuit court lacks jurisdiction to commit. That conclusion is unsupported by the language that Holtcamp cites, inconsistent with the purpose of the 360-day provision, and leads to results contrary to legislative intent.

Language of the notice provision. The phrase that Holtcamp relies on, "has been convicted of a sexually violent offense," simply does not have the limited meaning that he assigns to it. The phrase uses a particular verb tense, present perfect, created by the use of the present form of the auxiliary verb "has" with a past participle, as in "has been convicted." The legislature chose that same tense in three other provisions of the statute, in a somewhat parallel or related way.

One of those is the definition of "sexually violent predator," § 632.480(5), discussed in part A, above. There, the legislature used "has" and a past participle to form four compound verbs: has pled guilty; has been found guilty; has been found not guilty by reason of mental disease or defect; and has been committed. Holtcamp, of course, by stipulating that he is a sexually violent predator, necessarily stipulated that he "has pled guilty [to] a sexually violent offense."

The next place that the statute uses the auxiliary verb "has" and a past participle to form the present perfect tense is in a notice provision different from the on that Holtcamp relies on here. Under § 632.484.1(1), a "law enforcement agency" may notify the attorney general and thus initiate the process leading to a sexually violent predator proceeding when it finds "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 has committed a recent overt act" (emphasis added) ("overt act" being defined as "any act that creates a reasonable apprehension of harm of a sexually violent nature," § 632.484.4). That provision treats the prior conviction and the "overt act" (for which the person might ultimately be convicted) as two different things.

The original version of the sexually violent predator law included a

fourth relevant use of the present perfect tense: § 632.484.1(2), a provision that has since expired (*see* § 632.484, RSMo. Supp. 2007), permitted a "law enforcement agency" to notify the attorney general and thus initiate the process leading to a sexually violent predator proceeding when it found "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 been in the custody of an agency with jurisdiction within the preceding ten years and may meet the criteria of a sexually violent predator . . . ." § 632.484.1(2) (emphasis added).

In each instance, the legislature referred to what we might call the "index crime" – *i.e.*, the crime that forms one element of the definition of "sexually violent predator" ((a) index crime + (b) mental abnormality that makes the person likely to reoffend unless treated in a secure facility = sexually violent offender). By choosing a present tense – the present perfect tense – each time it referred to the index crime, the legislature maintained the focus on Holtcamp's current, rather than past, condition. *See* Garner, THE OXFORD DICTIONARY OF AMERICAN USAGE AND STYLE, 328 (2000). Garner explains the present perfect tense and its proper usage:

> the present perfect tense is formed with have [+ past participle], as in I have done that. Either of two

> qualities must be present for this tense to be appropriate: indefiniteness of past time or a continuation to the present. This tense sometimes represents an action as having been done in the past. . . .
>
> But sometimes, too, the present perfect indicates that an action continues to the present

Id. at 329.

The legislature's use of "has been convicted," then, connotes "indefiniteness of past time or a continuation to the present." In the 360-day notice provision, it means that the "agencies with jurisdiction" are to notify the Attorney General if a person in their custody "has been convicted of a sexually violent offense" at some indeterminate time in the past. That is entirely consistent with the way this court, the Missouri Court of Appeals, and other courts of interpreted use of the present perfect tense. *See State v. Owen*, 216 S.W.3d 227, 229 (Mo. Ct. App. W.D. 2007) ("[t]he words 'has been issued' should be read together and are in the present perfect tense. … A person of plain and ordinary intelligence would understand the phrase 'any individual who has been issued a commercial driver's license' to mean simply any individual who, at some point, has had a commercial driver's license

issued to him."); *Offenbacker v. Sodowsky*, 499 S.W.2d 421, 424 (Mo. 1973) ("The phrase 'to have stopped' is in the present perfect tense, and 'represents action going on at any time up to the present.'"); *Barrett v. United States*, 423 U.S. 212, 216-17, 96 S.Ct. 498, 501 (1976) (language from 18 U.S.C. §922(h) indicating that convicted felons, among others, could not "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" was unambiguous, and the "has been shipped" language was in the present perfect tense, meaning that Barrett could not receive a firearm that had ever been shipped in interstate commerce, not that the firearm had to be shipped interstate in the particular transaction in which Barrett was involved). *See also Scarborough v. United States*, 431 U.S. 563, 569, 97 S.Ct. 1963, 1966 (1977) (use of present perfect tense in §922(h) led Court to conclude in *Barrett* that Congress clearly "denot[ed] an act that has been completed"); *G.R. Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116, 103 S.Ct. 986, 993-94 (1984) (citing *Barrett* with approval and noting that Congress knows the difference between "present status and a past event" and uses the tenses – present and perfect present – accordingly).

In essence, the legislature wanted to ask Holtcamp, "Have you been convicted of a sexually violent offense?" And his answer, of course, must be, "Yes." And that is all that the statute requires for the Department of

Corrections to notify the Attorney General, and thus for the Attorney General to file a commitment petition and for the probate court to proceed.

The legislature's use of a present tense is consistent with the nature of the task being assigned to the Department, the Attorney General, and the circuit court: to determine Holtcamp's present condition. To some extent, that present condition is a result of past – and completed – actions. Thus Holtcamp *is* a convicted felon, despite the fact that he served his sentence at some time in the past. Other pertinent aspects of Holtcamp's condition may change – most notably, he may reach a point where he no longer has a mental abnormality, or where his mental abnormality no longer makes him "more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." § 632.480(5). But even the answers to those questions may be based in part on past acts, such as a person's past behavior. Again, if Holtcamp is asked, "Are you a sexually violent predator," his answer is dictated in part by past acts that affect his current condition. It is not a snapshot of his current situation isolated from the past.

In that regard, the question posed is precisely parallel to one he answered when he agreed that he was a sexually violent predator: he has pled guilty to a sexually violent offense, the index crime that forms one element of the predator definition. He never adequately explains how he can

concede that he has pled guilty of a crime for purposes of § 632.480(5), but claim that he has not been convicted of the same crime for purposes of § 632.483.

Purpose of the 360-day notice provision. Holtcamp's reading ignores the purpose of the provision he cites. The 360-day provision is designed to prevent premature notice to the Attorney General. The object of a sexually violent predator proceeding is to protect the public from current, not past threats. Thus the circuit court is assigned to determine current, not past, condition. The legislature logically decided to defer notice to the Attorney General – and the accompanying and resulting evaluations – until near the end of a person's confinement. § 632.483. It would make little sense to require that the Attorney General be notified every time a Department finds it is housing someone who may be a sexually violent predator. It would be most nonsensical to require notice at the moment a person is ordered into the custody of the Department of Corrections. During their confinement – which might last for many years – the person's mental condition could change. By deferring the Department's assignment to evaluate an inmate and provide notice to the Attorney General until near the end of inmates' prison terms, the legislature ensured that the Attorney General would not act on information that was well out of date.

But that is all that the 360-day provision does. There is no basis in the logic, context, and structure of the statute for claiming that it also accomplishes what Holtcamp asks: exempting from commitment proceedings anyone whose sentence on a sexually violent offense is completed before the 360-day period begins.

Result of Holtcamp's reading. Holtcamp's reading of the statute, requiring the "agency with jurisdiction" to look at the reason for confinement at the 360-day mark and to differentiate between otherwise similar individuals depending on whether the reason for confinement on that day was for a sexually violent offense or for some other, produces an irrational result. That irrationality is shown with the hypothetical of a person incarcerated for two crimes, one of them a sexually violent offense as defined in § 632.480(4), the other not. It is quite possible that during the last 360 days of such a person's incarceration, he is not serving the sentence imposed for the sexually violent offense – either because the sentences were consecutive and the one for the sexual offense was served first, or because they were concurrent and the shorter sentence was for the sexual offense. Under Holtcamp's reading of the statute, in such a circumstance the Department of Corrections could not notify the Attorney General, and the Attorney General could not file a petition, because at the time of notification the person in Department custody

was not actually serving a sentence on a sexually violent offense. Nothing in the statute suggests that the General Assembly intended that result.

The Florida Court of Appeals posited a slightly different, but equally problematic hypothetical:

> A person in custody in Florida, whose only conviction for a sexually violent offense is from another jurisdiction, would not be in custody for a sexually violent offense. The non-Florida sentence for the sexually violent offense could be running concurrently, could have been completed, or could be consecutive to the Florida sentence. Under none of those scenarios would the current incarceration be as a result of the sexually violent offense.

Tabor v. State, 864 So.2d 1171, 1174 (Fla. Ct. App. 2004).

The result in Holtcamp's case may be even less rational than those in our hypothetical and the one posed in *Tabor*, for Holtcamp was serving time on a sexual offense – albeit one that didn't make the "sexually violent offense" list. Had Holtcamp taken his commitment to trial instead of conceding that he qualifies as a sexually violent predator, that offense would have been evidence of his continued difficulty in resisting the temptation to offend

sexually. So in his view, the fact that an inmate's latest crime was slightly below the "violent" threshold – or that he obtained a plea agreement placing it below that threshold – eliminates the possibility of adjudication under § 632.480. Again, there is no basis in the statute on which to suggest that the General Assembly intended that result.

The correct result is that reached in Arizona, where Wilbur W., who had been convicted in 1983 of a sexually violent offense, but who at the time his predator petition was filed was serving a sentence for a non-violent sexual crime, was adjudicated to be a sexually violent predator. *See In re Wilbur W.*, 53 P.3d 1145 (Ariz. Ct. App. 2002), *reversed on other grounds*, 63 P.3d 126 (Ariz. 1003). The question as to both Wilbur W. and Holtcamp is whether he committed an index crime in the past and his mental condition makes him a sexually violent predator today, not whether his confinement at some magic moment is based on a sexually violent offense.

Decisions in other states. A portion of Holtcamp's argument is based on precedents from other states. There, he attempts to directly distinguish *Wilbur W.* (*see* App. Sub. Br. at 25), and to indirectly distinguish *Tabor*. (He actually ignores *Tabor*, but cites another Florida case, *Hale v. State*, 891 So.2d 517 (Fla. 2004).) He lists New Jersey with Florida and Arizona as states with statutes that differ from ours, and lists Iowa and Massachusetts

as states with statues like ours, which courts have interpreted by judicially adding a qualification the legislature omitted, *i.e.*, by holding that the statute be read to say, "has been convicted of *and is presently incarcerated for* a sexually violent offense."

This court should reject the holdings reached in Iowa and Massachusetts. Not only do they violate the bar on "add[ing] words to a statute under the auspice of statutory construction," *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002) (citations omitted), but in doing so they open a considerable hole in the statute's protection for the public. And the courts that reached those holdings entirely fail to explain why the legislature would have chosen to include such a hole. *See Detention of Gonzalez*, 658 N.W. 2d 102 (Iowa 2003); *Commonwealth v. McLoed*, 771 N.E.2d 142, 145 (Mass. 2002).

The principal problem presented by the justification they do give for their problematic reading of their sexually violent predator statutes is demonstrated by language that Holtcamp quotes from the Massachusetts decision – language that fails to account for the focus of sexually violent on treatment for current conditions that threaten the public. The Massachusetts court was addressing whether McLoed could be committed though he had completed sentences on his sexually violent offenses before the Massachusetts

sexually dangerous person law was passed. It held, as Holtcamp quotes (App. Sub. Br. at 24) that McLoed could not, and said: "Were 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 distant, would be eligible for civil commitment …." 771 N.E. 2d at 147. That statement diverts attention from the key to Missouri's (and, presumably, Massachusetts's) law: its focus on current mental condition. The only persons "serving a sentence for any crime" who are "eligible for civil commitment" are those whose "mental abnormality makes them more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility" – a class that includes, as he stipulated below, Holtcamp, but that certainly does not include, as the Massachusetts court suggested, everyone who every committed a sexually violent offense.

In fact, the Missouri, Iowa, and Massachusetts laws, on the one hand, and the Arizona, Florida and New Jersey laws, on the other, are not "much different in a very important respect." (App. Sub. Br. at 24). Indeed, their goals are identical: to protect the public by confining and treating those who require treatment in a confined setting. Though Arizona, Florida, and New Jersey have expressly referenced convictions in other states, there is no rational basis for concluding that the Missouri General Assembly, by

including the broad language discussed above without any limitation on site of conviction, meant to exempt from commitment someone convicted of a sexually violent offense elsewhere merely because the crime for which they are serving time in Missouri does not qualify – nor that the legislature meant to exclude Holtcamp and others who, at the moment the Department of Corrections is required to notify the Attorney General that they may be sexually violent predators, are confined on some other charge.

E. Canons of construction

Holtcamp argues that if he is not right that the plain language of the sexually violent predator statute barred the Department from issuing a report about him to the Attorney General, then the language is ambiguous – and that the rule of lenity applies to require the construction of that language in favor of his desired result. That claim is problematic for three reasons.

First, the language is not ambiguous; it permits – indeed, requires – precisely what the Department did. We discussed that in parts A through D, above.

Second, the rule of lenity does not apply. The key point in Holtcamp's discussion of the rule of lenity comes in his discussion of the Western District's refusal to apply that rule: "But because this Court has not extended the rule of lenity beyond criminal statutes or penal civil statutes, the Western

District Court of Appeals [sic] chose not to apply the rule of lenity." (App. Br. at 27.) Judge (currently Chief Justice) Stith, in a recent concurring opinion, similarly noted that the rule of lenity (at least until the case in which she spoke, *United Pharmacal Co. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006))

> is a rule of mercy that, until recently, had been applied exclusively in criminal cases. A search in the Missouri cases database on Westlaw for the term "lenity" reveals thirty-two cases invoking the rule of lenity. All but two of these cases involve criminal defendants urging that a criminal statute is ambiguous and the defendant therefore is entitled to the more lenient interpretation.

Id. at 914 (Stith, J. concurring). Judge Stith observed that only one of those two cases, *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. banc 2000), was decided by this Court, and that in *J.S.* the Court merely "noted that the rule of lenity 'reinforced' its contextual reading" of the statute at issue. *United Pharmacal*, 208 S.W.3d at 915, citing *J.S.*, 28 S.W.3d at 876-77. Judge Stith's comment was prompted by the majority's willingness, unprecedented except in *J.S.*, to apply the rule of lenity in a purely civil case. *United Phamaracal*, 208 S.W.3d

at 913.

In the State's view, the court should retreat from, not advance, the movement of the rule of lenity into the civil realm. But it need not retreat here, for this case is easily distinguishable from *J.S.* and *United Pharmacal*.

The civil statutes at issue in *J.S.* and *United Pharmacal* had a critical point in common: though each defined a civil obligation, there was authority for bringing criminal charges for violation of that obligation. Thus in *J.S.*, the Court observed: "While the requirement of registration is not necessarily punitive, sections 589.400 to 589.425 penalize a failure to register as a class A misdemeanor and subsequent offenses as a class D felony." 28 S.W.3d at 877. And in *United Pharmacal*, the majority pointed out: "Section 388.195 provides that failing to comply with chapter 338 is a class C felony." 208 S.W.3d at 913. Missing from Holtcamp's plea that the Court apply the rule of lenity here is any citation to a criminal penalty for failure to comply with the statute. Nor of course, would such a penalty make any sense, for the statute is written entirely as directions to the Departments of Mental Health and Corrections, the Attorney General, and the circuit court, not as a requirement that Holtcamp must understand and meet.

The absence of a penalty tied to the sexually violent predator statute means that Holtcamp must find justification for the imposition of the rule of

lenity within that statute standing alone. But the sexually violent predator statute is not penal. If it were, it could not have survived the ex post facto and double jeopardy challenges raised against it in *In re Thomas*. *See also Kansas v. Hendricks*, 521 U.S. 346, 361-66 (1997). For the Court to apply the rule of lenity to a non-penal statute that imposes no obligations that someone (other than government agencies and officials) must comprehend and obey would be entirely unprecedented in this state.

Holtcamp leaps past that point, insisting instead that it is enough that he will be confined for treatment. In doing so, he in effect asks the court to apply the rule of lenity to all civil commitments – a dramatic change in Missouri law that he makes no real attempt to justify. But the rule makes little sense in the context of any civil commitment because, again, it is traditionally (and appropriately) applied only to statutes that require private persons to behave in a certain way, which commitment statutes do not do.

Third, if there is an ambiguity that must be resolved, and if the court must look to overarching canons of construction to resolve it, it should look to the canon that applies to remedial statutes, *i.e.*, those enacted to protect the public. *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961) (a "remedial statute" is one "enacted for the protection of life and property"). The sexually violent predator statute, enacted for that purpose, should be

construed to "favor of those entitled to the benefits of the statute." *State v. Kraus*, 530 S.W.2d 684, 689 (Mo. 1975). *See also State ex rel. Ford v. Wenskay*, 824 S.W.2d 99, 100 (Mo. Ct. App. E.D. 1992) ("Remedial statutes should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case."); *Missouri Comm'n on Human Rights v. Red Dragon*, 991 S.W.2d 161, 166-67 (Mo. Ct. App. W.D. 1999) (quoting *Wenskay*). Unlike the rule of lenity, that rule has been consistently applied to civil statutes.

Here, the "persons entitled to the benefits of the statute" are the potential victims of sexually violent crimes. The Court should decline Holtcamp's invitation that it deprive them of the benefits of the remedial rule, placing them at risk by the happenstance of what the basis for confinement of an admitted sexually violent predator is at the moment the Department notifies the Attorney General of his status.

CONCLUSION

For the reasons stated above, the decision of the circuit court should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
Missouri Bar No. 45631
State Solicitor
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were mailed, postage prepaid, via United States mail, on this 11th day of February, 2008, to:

Emmett D. Queener
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, MO 65203

_____
JAMES R. LAYTON
State Solicitor

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,615 words.

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

_____
JAMES R. LAYTON
State Solicitor