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JURISDICTIONAL STATEMENT

Larry L. Coffman appeals the order of the Honorable David L. Dowd, Probate Judge, Circuit Court of the City of St. Louis, Missouri, issued under §632.504 RSMo (2006) of Missouri's Sexually Violent Predator Law, denying Coffman's petition for release from commitment without a hearing. Coffman does not assert a constitutional challenge to §632.504. Coffman does assert a constitutional challenge to §632.498 RSMo (2006), but the probate court did not apply that statute. Jurisdiction therefore does not lie with the Missouri Supreme Court under Article V, Section 3, Missouri Constitution (as amended 1982), but with the Court of Appeals, Eastern District, §477.050, RSMo (2000).

The Respondent addresses jurisdiction more fully in Argument Section II, below.

Statement of Facts

On January 13, 2004, a St. Louis City jury found Larry Coffman to be a sexually violent predator (SVP). (L.F. 12). Coffman suffers from pedophilia and a personality disorder and his conditions predispose him to commit sexually violent offenses to such a degree that he has serious difficulty controlling his behavior and is more likely than not to commit another sexually violent offense if not in a secure facility. (S.L.F. 35; S.L.F. 15). In accordance with the jury verdict, the probate court committed Coffman to a secure Department of Mental Health (DMH) facility—the Missouri Sex Offender Treatment Center (MSOTC) in Farmington, Missouri—until such time as Coffman’s “mental abnormality has so changed that he is safe to be at large.” (S.L.F. 15; L.F. 012).

At the time of his commitment, Coffman presented to MSOTC with a history of COPD, leg edema, and smoking-related lung disease. (S.L.F. 9-10). And in providing for Coffman’s care, control, and treatment, MSOTC took steps beginning in February of 2004 that were consistent with Coffman’s physical problems including taking precautions with stairs, restricting his smoking, wearing “ted hose,” and encouraging consistent leg elevation. (S.L.F. 10).

Coffman also filed a motion for judgment notwithstanding the verdict on February 9, 2004. (L.F. 12), and then advised MSOTC staff that he “refuse[d] to begin participation in treatment classes until his post-trial motion ...has been ruled upon...and [will] just sit tight until the motion is decided one way or another.” (S.L.F.12).

Coffman's post-trial motions were denied on May 6, 2004, and he filed his notice of appeal on May 17, 2004. (L.F.13).

On February 16, 2005, MSOTC submitted its "annual examination of mental conditions as required by Section 632.498," opining that Coffman's "mental abnormalities remain such that he is not safe to be at large." (S.L.F. 1, 13-14). Coffman "appeared to make little or no effort to progress in treatment. After a brief period of attending groups, he ceased engaging in most treatment activities while on the readiness ward, preferring (per his attorney) to wait for the outcome of an appeal of his commitment." (L.F. 13).

On May 3, 2005, the Missouri Court of Appeals affirmed the judgment committing Coffman as a sexually violent predator. (L.F. 14).

On May 9, 2005, Dr. Stephen E. Peterson conducted a "one hour psychiatric exam with brief physical exam," at the request of Coffman's attorney, "to assess the changes in Mr. Coffman's medical status as they had bearing on his SVP status." (L.F. 24, 34). On July 8, 2005, Coffman filed his "Motion To Transport for Medical Testing and Physician Consultation." (L.F. 15). Coffman described the testing as "a possible prelude to the filing of a petition for release/discharge in this court." (S.L.F. 21). Coffman's motion was granted by the probate court. (L.F. 15).

Dr. Allen Soffer performed a cardiology evaluation on September 1, 2005 and found "no evidence of significant structural or ischemic heart disease." (L.F. 28-29). Dr. Soffer recommended that Coffman lose weight, go on a low-sodium diet, wear support hose, elevate his leg and avoid "prolonged leg dependency." (L.F. 29). Dr. Soffer did not

assess whether Coffman's physical condition prevented him from acting on his mental abnormality or whether his physical condition prevented him from committing future acts of sexual violence. (L.F. 28-29). Dr. Soffer recommended that Coffman, who had a forty-pack-a-year habit of smoking cigarettes, have a pulmonary consultation. (L.F. 29).

Dr. Soffer did note that Coffman's medical problems predated his commitment. Dr. Soffer wrote in his September 2005 report that Coffman "was diagnosed with left lower extremity deep venous thrombosis approximately two years ago, and has been anticoagulated on Coumadin since then. Edema has been problematic since then, particularly in the left lower extremity, with edema worsening as the day progresses, and being only mild when he first awakens." (L.F. 28). Coffman also reported to Dr. Soffer he experienced dyspnea when "walking on level ground." (L.F. 28).

Coffman filed his "Motion to Transport for Further Medical Testing and Physician Consultation" on October 21, 2005. (S.L.F. 15; S.L.F. 20-23). Coffman's motion was granted by the probate court. (L.F. 15). On January 11, 2006, Dr. W. Mark Breitle evaluated Coffman due to his shortness of breath (dyspnea). (L.F.30). Dr. Brietle noted in his report that Coffman "utilizes a wheelchair." (L.F. 31). Dr. Brietle did not indicate to what extent, if any, Coffman's conditions required the use of a wheelchair. (L.F. 30-32). Dr. Brietle made various recommendations regarding further testing and specifically recommended that Coffman continue with his inhalers, avoid smoking, and adopt a "diet and exercise program and weight loss." (L.F. 32). Dr. Brietle did not assess whether Coffman's physical condition prevented him from acting on his mental abnormality or

whether his physical condition prevented him from committing future acts of sexual violence. (L.F. 30-32)

On February 9, 2006, the trial court received MSOTC's "annual examination of mental condition as required by section 632.498." (L.F. 15). The report noted that:

Mr. Coffman is currently in Phase I/Level 2 of the treatment program. On 1/22/2005 he was returned to Level 2 after being transferred from the readiness Ward to Hoctor 1. Although Mr. Coffman has not met the criteria to progress from the readiness Ward, he was transferred to the Special Needs Unit due to his medical condition. Since that time, he has accumulated 12 violations including refusal to follow directions, contraband, staff shopping, unacceptable communication, inappropriate sexual behavior (observed rubbing hand over the leg of another resident), unsanitary conditions, pornographic material, disrespect to staff, unauthorized exchange, and manipulation.

(S.L.F. 25)

The report went on to note Coffman's "very minor progress in treatment over the last year indicates that his mental abnormality has not so changed that his risk to sexually reoffend has been reduced." (S.L.F 31).

On January 17, 2006,¹ MSOTC's Chief of Clinical Services interviewed Coffman for the 2006 annual report. Coffman reported that he will "be happy to get out of here.

¹ The 2006 annual report dates the interview as "2005" as opposed to "2006." But given the context and the reference -- "this past year of treatment"--and that Coffman would, in

You know that will be soon” and cited his “bad heart, bad lungs, bad back” as the reasons.(S.L.F. 30). Coffman further reported that:

the content of [MSOTC] groups and classes just ‘runs off me like water off a duck’s back.’ He reported that he did not want to discuss the content of what the courts and the program considers sex offending. He said, ‘I don’t want to change. I’m 60 years old and I’ve seen a lot.’ Mr. Coffman then reported that he plans to leave the state, avoid taking up residence in any state with an SVP law, and return to his profession (truck driving). (S.L.F. 30).

On March 7, 2006, Coffman filed a petition for release, supported by the opinion of Dr. Peterson. (L.F. 18-23) Dr. Peterson, who practices in the area of Forensic, Adolescent and Adult Psychiatry, limited his opinion to a discussion of Coffman’s physical condition. (L.F. 24, 34). After reviewing Dr. Soffer’s and Dr. Brietle’s reports, Dr. Peterson offered his forensic assessment and opined that “taken together, the clinical information strongly indicates that Mr. Larry Coffman no longer presents as more likely than not to commit predatory acts of sexual violence because he is too physically debilitated.” (L.F. 37). Dr. Peterson supported his opinion by offering that “any potential victim out of his immediate reach is safe. He certainly can’t chase anyone down and

fact, have been 60 years old on January 17, 2006, this is a typographical error. (S.L.F. 30).

cannot exert himself without quickly feeling exhausted...Even if he were tempted to approach children he could easily be controlled by putting him in his room as he is wheelchair bound.” (L.F. 37).

Coffman’s sex offense history, as documented by MSOTC in its annual reports to the probate court, include: molesting a boy whom he had locked in a bathroom; “penetrating girls’ vaginas and the boys’ rectums with his fingers...[and] placing broomsticks in their body cavities;” and “developing ‘sexual instruments, such as wooden penises.” (S.L.F. 33) Coffman’s daughter reported that he molested her ten-month-old son and her two-year-old daughter. (S.L.F 33). Dr. Peterson’s report does not mention Coffman’s sexual history, nor his pedophilia. (L.F. 24-27; 34-37). Dr. Peterson did note that while Coffman should refrain from smoking due to his medical condition, if released, “the first thing [Coffman] wants to do is light up a cigarette.” (L.F. 37).

On May 1, 2006, the probate court found “upon review of [Coffman’s] petition, ...that [Coffman] fails to assert that his mental abnormality has changed and fails to allege any fact that would suggest that he no longer suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.” (L.F. 52). The Court affirmed that it had “conducted an annual review of the status of [Coffman’s] commitment.” (L.F. 52). And “upon review of said petition, the files, records and proceedings, the court determines and finds the petition to be based upon frivolous grounds and under Mo. Rev. Stat. §632.504, denies the petition without a hearing.” (L.F. 52).

Argument

I. Introduction

Larry Coffman is a sexually violent predator (SVP). Assuming this case is properly before this Court, it presents a narrow question of first impression in Missouri: whether a probate court may dismiss, without a hearing, an unapproved and frivolous petition for release filed by a committed SVP. In Missouri, §632.504² vests probate courts with this authority. To the extent there is a constitutional challenge before this court, which the State does not admit, it is a challenge to the validity of the probate court's authority under §632.504.

An SVP is “any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.” §632.480(5). And §632.501 authorizes an SVP's petition for release when the Director of DMH (Director) determines that an SVP's “mental abnormality is so changed that the person is not likely to commit acts of sexual violence if released.” An SVP may also petition the probate court for his release absent the Director's approval under §632.504. But when an SVP petitions for release without the Director's approval, the “court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.” §632.504. Petitions for release filed without the Director's

² All statutory references are to the Missouri Revised Statutes (Supp. 2006) unless otherwise noted.

approval, but which are based on non-frivolous grounds, proceed to hearing under §632.498 to determine if a trial is warranted. §632.504; §632.498.

Coffman's petition for release was filed without the Director's approval. And under §632.504, the probate court determined the petition was frivolous and denied the petition without a hearing. Though Coffman's case did not warrant a hearing, Coffman now challenges the constitutionality of the hearing provisions of §632.498 as though there was a hearing and judgment under §632.498. But the probate court never ruled adversely to Coffman under §632.498. And Coffman fails to explain how a decision under §632.504 implicates the constitutionality of §632.498. It is the dismissal of Coffman's petition under §632.504 that constitutes the adverse ruling in this case. And, in failing to challenge, or even recognize, the statutory authority upon which the probate court acted, Coffman fails to submit a constitutional issue for this Court to decide.

II. Jurisdiction and Rule 84.13 (Responds to Appellant's Points I & II)

This Court lacks jurisdiction to hear Coffman's appeal because Coffman fails to challenge the applicable SVP statute upon which the court ruled. "It is evident that once a person is committed under the SVP Act, a probate judge will be making rulings under §632.498, §632.501, or §632.504-or perhaps all of them-as long as the commitment persists." *In re Care and Treatment of Salcedo v. State*, 34 S.W.3d 862, 868. (Mo. App. S. D. 2001). The Court in *Salcedo* recognized that §632.504 allows the court to deny a

petition for discharge by the committed person without a hearing if the court finds the petition “is based upon frivolous grounds.” *Id.* at 868.³

The probate court did not issue a judgment under §632.498 in this case. Rather, the judgment explicitly states that Coffman’s petition for release was “based on frivolous grounds and under Mo.Rev. Stat §632.504 [the court] denies the petition without a hearing.” (L.F. 52). When the trial court has not ruled on the constitutional question presented for appeal, rendering a judgment adverse to the appellant, this Court lacks jurisdiction. *Kersting v. City of Ferguson*, 388 S.W.2d 794, 796 (Mo. 1965); *Motchar v. Hollingsworth*, 162 S.W.2d 805, 806-807 (Mo. 1942). According to Coffman, his constitutional challenge to §632.498 is the source of this Court’s jurisdiction. (App. Brief 2,6). There is simply nothing for this Court to review under §632.498. Coffman’s appeal is a hypothetical. Coffman incorrectly assumes he filed a non-frivolous petition and then hypothesizes that his petition was heard under §632.498—a statute he argues is unconstitutional. But such a hearing never occurred, nor was it required under the SVP law.

The probate court did rule adversely to Coffman under §632.504. But Coffman has yet to raise a challenge, constitutional or otherwise, to the trial court’s dismissal of

³ In *Salcedo*, the court also noted the absence of any right to appeal except under §632.495. *Id.* The legislature quickly added and broadened the right of appeal to “[a]ny determination as to whether a person is a sexually violent predator may be appealed.” *In re Care and Treatment of Barlow*, 114 S.W.3d 328, 331 (Mo. App. W.D. 2003)

his petition under §632.504. Thus, constitutional claims not asserted at the earliest opportunity are waived. *Crittenton v. Reed*, 932 S.W.2d 403, 406 (Mo. banc 1996); *Callier v. Director of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989). An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal. *Land Clearance for Redevelopment Authority v. Kansas University Endowment Ass'n*, 805 S.W.2d 173, 175 (Mo. banc 1991). “We will not convict the circuit court of error on an issue that it was not accorded an opportunity to rule.” *Lincoln Credit Co. v. Peach*, 636 S.W.3d 31, 36 (Mo. banc 982).

Absent a constitutional challenge, jurisdiction rests, in this case, with the Eastern District Court of Appeals. To vest jurisdiction in the Supreme Court, the constitutional challenge must be real and substantial *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. banc 1999). If the constitutional challenge is merely colorable, the [Eastern District] retains jurisdiction. *Id.* Coffman never asserted a constitutional challenge to §632.504 while the matter was pending in the probate court, nor at any time since. “If the constitutional challenge is not preserved properly for appellate review, jurisdiction remains with the [Eastern District] court.” *State v. Bowens*, 964 S.W.2d 232, 236 (Mo. App. E.D. 1998).

And in that Coffman has failed to even brief the validity of §632.504 in his brief, the Court cannot consider the issue. “[A]llegations of error not ... properly briefed shall not be considered in any civil appeal[.]” Rule 84.13(a). “[I]t is not within this Court’s province... to speculate about, then decide, arguments that are not asserted or that are

merely asserted but not developed.” *State v. Hendricks*, 944 S.W.2d 208, 210 (Mo. banc 1997).

Thus, Coffman has presented this court with a case it does not have jurisdiction to hear, and has failed to brief the validity of the statute upon which the case was decided. And if what remains is simply a question of whether the probate court erred in its decision under §632.504, then Coffman’s appeal should be transferred to the Court of Appeals, Eastern District.

III. Standard of Review

This Court reviews issues of law de novo. *In the Matter of the Care and Treatment of Bernat v. State*, 194 S.W.3d 863 (Mo. banc 2006). Where a statute is challenged as being unconstitutional, this Court presumes that the statute is constitutional, and the burden of showing otherwise rests on the challenger. *Reproductive Health Services of Planned Parenthood of the St. Louis region, Inc., v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc. 2006). “This Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts the fundamental law embodied in the constitution.” *Id.*, quoting *Suffian v. Usher*, 19, S.W.3d 130, 134 (Mo. banc 2000) (citation omitted). If a constitutional challenge exists in this case, which the Respondent does not concede, it is a constitutional challenge to §632.504. And this Court would review the challenge de novo.

The interpretation and application of §632.504 in Coffman’s case would also be reviewed de novo by this Court. Questions of law are reviewed de novo. *United Pharmacal Company of Missouri, Inc., v. Missouri Board of Pharmacy*, 208 S.W.3d.

907, 909 (Mo. banc 2006). To the extent this Court reaches the issue of whether the probate court correctly applied §632.504, this Court will reach “its own conclusions about the application of the law to the facts.” *Pony Express Community Bank v. Campbell*, 206 S.W.3d 399, 401 (Mo. App. W.D. 2006). And given that this case constitutes a dismissal of a petition, “all issues for review concern the interpretation and application of the law to the facts, and those facts are undisputed by the parties.” *Grewell v. State Farm Mutual Automobile Insurance Co., Inc.*, 102 S.W.3d 33, 36 (Mo. banc 2003).

**IV. The probate court’s authority to dismiss frivolous SVP petitions for release
(Responds, in part, to Appellant’s Point III)**

SVPs are committed to DMH upon a finding that they suffer from a “mental abnormality,” a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses to a degree that the person has serious difficulty controlling his behavior which makes them more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. §§ 632.480(2), 632.480(5), 632.495, *Thomas v. State*, 74 S.W.3d 789, 791-792 (Mo. banc 2002). An SVP’s commitment is subject to annual review by the probate court. §632.498. And the SVP may petition for release with or without the Director’s approval. §§ 632.501, 632.504. But an SVP “shall be committed to the custody of the [Director] for control, care and treatment until such time as the [SVP’s] mental abnormality has so changed that the person is safe to be at large.” §632.495.

Missouri's statutory scheme for the commitment of sexually violent predators is "narrowly tailored to promote the compelling interest of protecting the public from this small percentage of offenders." *In re The Care and Treatment of Norton v. State*, 123 S.W.3d 170, 174 (Mo. banc 2003). And this Court recently commented favorably on the release component of the SVP law:

Following the procedures set forth in the statute, if the director, the judge, or a jury finds that the individual no longer suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence, he shall be ... released. Sec. 632.498.5(4). Indeed, commitment pursuant to the SVP statute is not necessarily indefinite, nor a life sentence. "[T]he confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." *Hendricks*, 521 U.S. at 363. The annual review mechanism ensures involuntary confinement that was initially permissible will not continue after the basis for it no longer exists. *O'Connor*, 422 U.S. at 575. It is, of course, hoped that the committed individual responds to treatment so that he is no longer a threat.

In the Matter of the Care and Treatment of Murrell, No. SC87804, slip. op. at 7 (Mo. banc February 13, 2007).

Missouri's SVP law went into effect in 1999. *See generally* §632.480. And since 1999, probate courts have had statutory authority to dismiss, without a hearing, petitions

for release when brought without the approval of the Director and based on frivolous grounds. §632.504.

In 2005, this Court stated that a “normal” petition for release would proceed to hearing, inferring that the frivolous petition addressed in §632.504 would not:

As noted, under section 632.498, if the director of DMH objects to release, then the committed person may petition for release over objection. The court normally must hold an initial hearing on the petition, and: If the court at the hearing determines that probable cause exists to believe that the person’s mental abnormality has *so* changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue.

In the Matter of Care and Treatment of Schottel v. State, 159 S.W. 3d 836 (Mo. banc 2005) (italics omitted).

While §632.504 has been in place since the SVP law’s enactment, it has not been the subject of appellate review. But vesting probate courts with such authority is in keeping with the procedures followed in other states with similar laws. Texas law provides for the “Review of Unauthorized Petition for Release”: “[T]he judge shall deny without a hearing a petition for release filed without the case manager’s authorization if the petition is frivolous.” Texas Code Ann. §841.123 (1999). And Texas Courts have sanctioned the authority. “Finally, at any time and even absent the case manager’s authorization, the SVP has the right to file a petition for release.” *In re Commitment of Fisher*, 164 S.W.3d 637, 643 (Tex. 2005). “A petition for release filed without the case

manager's authorization, however, is subject to a more stringent standard of review by the trial court. *See* Tex. Health & Safety Code §841.123." *Id.*

California law provides that the court may deny a petition as frivolous "either upon review of the petition or following a hearing." Cal.Welf. & Inst. Code §6608 (2000). And again, reviewing courts have held the denial of frivolous petitions as a permissible component of the legislative scheme. "A petition for conditional release under §6608 may be initiated at any time by the defendant, who can accompany such a petition with an explanation why conditional release should be granted. The superior court can review the explanation and determine if the petition is frivolous." *People v. Cheeks*, 24 P.3d 1204, 1209 (Cal. 2001).

Wis. Stat. §980.09(2)(a) (2004), provides similar authority. "The statute affords a committed person the right to petition for release, with the trial court acting 'as the gatekeeper weeding out frivolous petitions by committed persons who allege that they are no longer dangerous and are fit for release.'" *State v. Fowler*, 694 N.W.2d 446, 449 (Wis. Ct. App. 2005), *quoting* *State v. Paulick*, 570 N.W.2d 626 (Wis. Ct. App. 1997). "[T]he stringent procedural safeguards of the initial commitment process obviate the need for strict standards on recommitment and that the procedures set forth in ch 980, Stats., are constitutionally sufficient." *Paulick*, 570 N.W.2d at 629.

Kansas' statute mirrors Missouri's. "Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon

frivolous grounds and if so shall deny the petition without a hearing.” Kan. Stat. Ann. §59-29a11. (2005).

And in Illinois, when a frivolous petition has been filed, the court may dismiss subsequent petitions without a hearing. Ill. Ann. Stat. 207/70 (2004); *People v. Botruff*, 817 N.E.2d 463, 471 (Ill. 2004). “The Act does not limit the number of petitions for discharge that a committed person may file, nor does it place any time limitations on such petitions. Rather, the Act simply does not require a full evidentiary hearing whenever a petition for discharge is filed in the absence of facts showing that the petition has possible merit.” *In re Detention of Varner*, 734 N.E.2d 226, 235 (Ill. App. Ct. 2000). The Court in *Varner* approved the statute’s gate keeper mechanism:

The Act does not deprive the committed person of the right to have a judge examine every petition for possible merit.... The extra costs, to both committed persons and the State, of requiring an evidentiary hearing in every instance when a committed person files a petition for discharge are high in comparison to any additional protections this would provide. We cannot conclude that due process requires an evidentiary hearing every time a committed person files a petition for discharge.

Id. The reasoning is equally applicable to probate courts in this state confronted with SVP cases.

Missouri courts are vested with this gate-keeper authority in other matters as well. In reference to the termination of a guardianship or conservatorship, §475.083.4, RSMo (2000), provides: “At any time the guardian, conservator or any person on behalf of the

ward or protectee ... may petition the court to restore the ward or protectee, or to decrease the powers of the guardian or conservator, except that if the court determines that the petition is frivolous, the court may summarily dismiss the petition without hearing.” And such authority has been met with approval when considered on appeal. Section 475.083 “allows a ward or protectee, individually, to file a petition for restoration...that enactment also allows the probate court to ‘summarily dismiss’ such a petition without hearing if the court determines the petition is frivolous.” *State ex rel. Baumbach v. Kamp*, 922 S.W.2d 411, 415 (Mo. App. S.D. 1996). The *Baumbach* court noted with approval that the provisions of §475.083 were “aimed at preventing probate courts from becoming bogged down by frivolous restoration provisions.” *Id.*

In the arena of prisoner litigation, courts are vested with similar authority. “[T]he court shall dismiss an offender’s civil action ... if the court determines (2) the litigation is frivolous, malicious or fails to state a claim upon which relief may be granted.” §506.375, RSMo (2000). *See also* §506.381, RSMo (2000) and §506.384, RSMo (2000) (similar authority in the arena of prisoner litigation).

The SVP law does not explicitly define what constitutes a frivolous petition for release. But analogous Missouri case law defines a frivolous petition as one that, based on the pleading, permits the plaintiff to prove no set of facts entitling him to relief. In *State ex rel. Coats v. Lewis*, 689 S.W.2d 800, 806 (Mo. App W.D. 1985), the Western District held that the trial court should “examine the plaintiff’s petition [filed under the in forma pauperis statute] to see if it is patently and irreparably frivolous or malicious on its face so that, as pleaded, the plaintiff could prove no set of facts entitling him to relief.”

But a “court is not limited to the claims made in the ... petition. Rather, the court may look outside the pleadings, and ‘may rely on its records and files to determine whether a claim is frivolous.’” *Cooper v. Knox*, 950 S.W.2d 498, 501-502 (Mo. App. W.D. 1997); *Muza v. Department of Social Services* 769,S.W.2d 168, 175 (Mo. App. W.D. 1989).

Armed with the knowledge of Coffman’s case by virtue of the annual reports reviewed, the probate court in this case was in a position to make an informed determination of whether Coffman’s petition for release was based on frivolous grounds. (L.F. 52). And, as discussed more fully below, it is clear that the probate court properly found that Coffman could prove no set of facts entitling him to relief from his commitment as an SVP. (L.F.52) The dismissal of Coffman’s petition without a hearing comports with due process and the exercise of statutory authority vested to other Courts considering frivolous SVP (and non-SVP) petitions.

The probate court did not err as a matter of law, and its dismissal should be affirmed.

V. Coffman’s petition for release was based on frivolous grounds and its dismissal without a hearing did not violate due process (Responds, in part, to Appellant’s Point III)

Coffman still suffers from a mental abnormality. That is not disputed. Coffman makes no claim that he has benefited from treatment. (L.F. 18-22; 37). In fact, Coffman has rejected treatment and does not want to change. (S.L.F. 30). So, in failing to allege any change in his mental abnormality, Coffman told the probate court to consider his petition with the understanding that his pedophilia and personality disorder still

predispose him to commit sexually violent offenses to such degree that he has serious difficulty controlling his behavior. Obviously, an SVP's failure to even allege that his mental abnormality has changed goes a long way in rendering his petition frivolous and removing any need for a hearing on the issue.

Coffman relies heavily on this Court's 2005 opinion in *Schottel*. Schottel's case, though, has been subject to review at multiple junctures and is wholly different in its procedural development. And it is important to note that Schottel, from the outset, at least alleged a change in his mental abnormality and the probate court found his petition not to be based on frivolous grounds. In 2003, the Western District framed the early litigation in *Schottel*:

Schottel argues the probate court erred in denying his Petition for Release without a hearing because he made a prima facie showing, based on Dr. Dean's report, that his mental abnormality was so changed he was safe to be at large §632.504 allows a full evidentiary hearing upon a preliminary showing that a petition for release is not frivolous. Schottel points out that the probate court recognized Dr. Dean's report “probably gets [the Petition] past the frivolous grounds” but then refused to grant a full hearing, thereby violating his due process rights.

In the Care and Treatment of Schottel v. State, 121 S.W.3d 337, 339 (Mo. App. W.D. 2003). The appeal before the Western District became moot when the probate court granted Schottel a hearing. *Id.* In contrast to Schottel, Coffman is not alleging any

change in his mental abnormality since commitment. And the probate court explicitly determined Coffman's petition was frivolous.

Coffman incorrectly suggests that the probate court did not consider Coffman's risk to reoffend. (App. Brief pp. 29-30). But the probate court specifically found that Coffman "fails to allege any fact that would suggest that he no longer suffers from a mental abnormality **that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.**" (L.F. 52) (emphasis added). There is nothing in the medical reports submitted with Coffman's petition that would suggest that Coffman is physically incapable of committing another sexually violent offense in the future, nor that "shortness of breath" and "leg swelling" makes an SVP more likely than not to engage in acts of sexual violence.⁴

⁴ Coffman contacted Dr. Peterson five days after the Eastern district affirmed his commitment. And while Dr. Peterson was arriving at his opinion on Mr. Coffman's risk, Coffman received conduct violations for inappropriate sexual behavior and pornography. (S.L.F. 25). And while Dr. Peterson was offering his unsupported conclusion that Coffman was wheel chair bound and destined to spend the rest of his days in a nursing home, Coffman was casually expressing his intention to resume his truck driving profession (but in a state without an SVP law). (L.F. 30). Coffman's petition for release is frivolous on its face. But the record also strongly suggests that it was made in bad faith.

Coffman's petition rests on the faulty premise that physical force is the exclusive means by which predators gain access to their victims. And it is this dangerously simplistic approach to his release that cements the frivolous nature of Coffman's petition. Child molesters, like Coffman, use multiple techniques to gain access and control over the children they victimize. Grooming behavior, internet contact, coercion, threats, bribes, intimidation, and incapacitation of the victim (whether by age, intoxicants or an accomplice)--all are predatory techniques available to Coffman irrespective of his physical ability to "chase down children." A review of the "sexually violent offenses" set forth in §632.480(4), especially those related to child victims, reveals that overpowering a victim is not a typical element of the criminal offenses. Dr. Peterson completely and utterly failed to address the reality of the scope of predatory behavior the SVP law was enacted to address. The probate court was under no obligation to join in such obtuseness in making its determination under §632.504.

The State of Washington has codified within its SVP law the change that needs to occur to merit a committed SVP's release from a secure facility. And this codification, as detailed by *In re Detention of Elmore*, sheds light on why Coffman's petition is lacking:

Probable cause exists to believe that a person's condition has "so changed" only when evidence exists, since the person's last commitment trial proceeding, of a substantial change in the person's physical or mental condition such that the person no longer meets the definition of a sexually violent predator RCW 71.0.090(4)(a) A new trial proceeding ... may be ordered, or held only when there is current evidence from a licensed

professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding: (i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or (ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment.

In re Detention of Elmore, 139 P.3d 1140, 1145 (Wash. Ct. App. 2006).

If Coffman had alleged that since his commitment he had been stricken with a permanent condition that rendered him unable to commit a sexually violent offense, then a hearing on the issue would have likely been appropriate irrespective of any change in his mental condition. But that is not the petition Coffman filed. Essentially, Coffman alleged, that he was too obese and short of breath to catch the children he is driven to molest. That is a patently frivolous basis upon which to assert a petition for release and did not require a hearing by the probate court for disposition. Furthermore, by all accounts, Coffman's obesity and smoking-related lung disease were present when a jury found him to be a sexually violent predator in 2004. Coffman's petition does not allege a change, even if believed, that has occurred since his commitment that would necessitate a hearing on his release.

Thus, Coffman's continued commitment does not violate due process. A determination of current mental illness and dangerousness negates due process concerns regarding continued commitment. *Foucha v. Louisiana*, 112 S.Ct. 1780, 1784-85 (1992).

The purpose of the civil commitment involved in this case is to protect society from SVPs. The purpose dictates that the length of commitment be indeterminate so long as the danger persists. And, if commitment is subject to periodic review, as is the case with Missouri's SVPs, due process is not offended when commitment continues. *Jones v. United States*, 103 S.Ct. 3043, 3051-3052 (1983). Coffman's continued commitment, as reflected in the probate court's order, is based on his persisting mental abnormality and his ongoing risk to reoffend. Due process requires simply that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual was committed. *Jackson v. Indiana*, 92 S.Ct. 1845, 1858 (1971). Coffman's commitment continues because he continues to be an SVP.

And the burden is properly placed on a committed SVP to initially come forward with a (non-frivolous) basis for why his commitment no longer should exist. *Styles v. State*, 877 S.W.2d 113, 114-115 (Mo. banc 1994); *Grass v. Nixon*, 926 S.W.2d 67, 70 (Mo. App. E.D. 1996). The Director did not approve of Coffman's release. And Coffman's own expert concedes that there has been no change in Coffman's mental abnormality since commitment. Coffman has rejected the treatment offered to address his predation. And, while Coffman may have long-standing medical problems, his allegations of the import of those medical problems in the context of his commitment as an SVP were frivolous. There are a myriad of ways Coffman could find himself in "close proximity" to a child and no where in his petition is it suggested that he would not again commit a sexually violent offense upon that child. A hearing was not required to deny Coffman's petition for release.

The probate court correctly applied the law to the facts before it, and its dismissal should be affirmed.

Conclusion

The Court should transfer Coffman's appeal to the Court of Appeals, Eastern District, without argument. In the alternative, the Court should affirm the probate Court's judgment, under §632.504, denying Coffman's petition for release without a hearing.

Respectfully submitted,

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Certificate of Service and of Compliance with Rule 84.06(b)

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 6,820 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk simultaneously filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 16th day of February, 2007.

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