

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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IN THE MATTER OF THE                    )  
CARE AND TREATMENT OF                )     No. ED93929  
JAMES BRASCH,                            )  
  Appellant.                    )

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APPEAL TO THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT  
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI  
ELEVENTH JUDICIAL CIRCUIT, PROBATE DIVISION  
THE HONORABLE JON CUNNINGHAM, JUDGE

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APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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## JURISDICTIONAL STATEMENT

James Brasch appeals the judgment and order of the Honorable Jon Cunningham following a jury trial in St. Charles County, Missouri, committing Mr. Brasch to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal challenges the constitutionality of a statute and jurisdiction lies in the Missouri Supreme Court. Missouri Constitution, Article V, Section 3. Mr. Brasch filed a motion to transfer this cause to the Missouri Supreme Court contemporaneously with this brief.

## STATEMENT OF FACTS

James Brasch was residing at the Edgewood Children's Center when he was fourteen years old (Tr. 195).<sup>1</sup> A girl accused him of sexually abusing her (Tr. 195). Mr. Brasch said that the accusation was false, that he had recently broken up with the girl (Tr. 195). No charges were brought against Mr. Brasch (Tr. 195).

Mr. Brasch was later adjudicated as a delinquent for thefts and other problematic behaviors and placed in the custody of the Division of Youth Services (Tr. 196).

In 1984, when Mr. Brasch was nineteen years old, a woman reported that he had been in her home, then came back later and climbed into bed with her and touched her breasts (Tr. 197, L.F. 15). Mr. Brasch said that he had a key to her home, that he had fallen asleep on her couch, and he shook the woman's leg but did not touch her breasts (Tr. 197). Mr. Brasch was arrested but the prosecuting attorney did not file charges against him (Tr. 197).

Mr. Brasch kept getting arrested for crimes; burglary, stealing and forgery, and was eventually sent to prison (Tr. 197). He was back in the community in 1993 (Tr. 198).

In May of 1993, Mr. Brasch entered the home of a former girlfriend through an unlocked door (Tr. 198). He went into the bedroom of the woman's ten year old daughter, removed her underpants, and caressed her buttocks (Tr.

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<sup>1</sup> The record on appeal consists of a legal file (L.F.) and trial transcript (Tr.).

198). The girl asked who was there and Mr. Brasch said "James" (Tr. 198). The girl ran into the bathroom and locked the door (Tr. 198). Mr. Brasch then went into the bedroom of the woman, removed his clothes and got in bed with her (Tr. 198). The woman screamed at Mr. Brasch to leave, but he left only when she called the police (Tr. 198). Mr. Brasch was arrested for first-degree sexual abuse, third-degree assault, and first-degree burglary (Tr. 198-199). The sexual abuse and burglary charges were dismissed when Mr. Brasch pleaded guilty to the assault (Tr. 199). He was sentenced to fifteen days in jail (Tr. 199).

In July of 1993, an elderly woman found Mr. Brasch smoking a cigarette in her kitchen (Tr. 199-200). He had broken into her home (Tr. 199).

Later that same evening, Mr. Brasch put a trash can below a window and climbed into the bedroom of a ten year old girl (Tr. 200). He got on top of the girl, kissed her and fondled her buttocks (Tr. 200). The girl recognized Mr. Brasch from the neighborhood (Tr. 200). When the girl told Mr. Brasch to leave, he said that he was in the wrong room and left the house (Tr. 200). A sexual abuse charge was dropped when Mr. Brasch pleaded guilty to first-degree burglary (Tr. 200). He was sentenced to five years in prison (Tr. 200). Shortly after these incidents, Mr. Brasch became focused upon bizarre religious beliefs (Tr. 336). He had been very involved in religious courses in the early 1990's and came to believe in the "end-times" (Tr. 316). He believed that before the "end-times" everyone would have a device implanted in them, but that he had been

chosen to have a device and that gave him an unusual ability to talk to God (Tr. 316). Prison officials reported these strange comments as religious zealotry (Tr. 264).

Mr. Brasch was released on parole in 1996 (Tr. 200). Shortly thereafter he when on a “spree of offending” in a single night (Tr. 201). At the first house he placed a bar-b-que grill against the house and was trying to get in a window (Tr. 202). Mr. Brasch fled when someone saw him and screamed (Tr. 202). He tried to get in a window at a second house, but he fled when a woman inside said that she had called the police (Tr. 202). Mr. Brasch managed to get into a third house (Tr. 202). He placed his fingers in the vagina of a woman sleeping on a couch (Tr. 202). She awoke thinking that it was her husband (Tr. 202). She tried to get up when she realized it was not her husband, but Mr. Brasch pushed her back down (Tr. 202-203). The woman screamed, waking her husband (Tr. 203). The husband struggled with Mr. Brasch until he was able to flee the house (Tr. 202). Mr. Brasch entered a fourth house through an open patio door (Tr. 203). A woman in the house woke to find Mr. Brasch standing over her bed (Tr. 203). He was drooling and smelled of alcohol (Tr. 203). The woman asked who he was, and Mr. Brasch answered “Jim” (Tr. 203). He left the house when she told him to (Tr. 203). All of these events occurred in the same general area and continued while the police were present responding to the first two calls (Tr. 202). Mr.

Brasch eventually pleaded guilty to one count of sodomy and three counts of burglary (Tr. 204).

In 1996, Dr. Richard Scott of the Department of Mental Health (DMH) found Mr. Brasch to be incompetent to stand trial (Tr. 186, 204). He was “very ill,” experiencing auditory hallucinations and paranoid delusions (Tr. 205). He believes that devices were implanted in his body during an appendectomy when he was nine years old, and during surgery to repair a broken jaw, so that he can be tracked by the CIA (Tr. 205, 316). He also believes that “lenses” have been put in his eyes which allow the CIA to use him to track other people (Tr. 205). Mr. Brasch also believes that the devices allow the CIA and officials with St. Charles County to control his body (Tr. 205). He explained that his sex offenses were caused by the CIA or St. Charles County officials controlling his body (Tr. 212). Mr. Brasch has held on to these beliefs as absolute facts, and he cannot be shaken from these beliefs (Tr. 205). Dr. Scott diagnosed Mr. Brasch with schizophrenia and paranoid delusions (Tr. 205). After three years of treatment Mr. Brasch was restored to sufficient competency to enter a plea of guilty to the 1996 charges (Tr. 204).

Mr. Brasch was not given the opportunity to participate in the Missouri Sex Offender Program (MOSOP) while in prison (Tr. 208). He was unable to participate in the treatment because his schizophrenia was “interfering with his ability to be a reasonable participant in the treatment at that time.” (Tr. 208). The

thought disorder, disorganization of thought and speech would have interfered (Tr. 274). When ill, Mr. Brasch cannot take in information or use it to make reasonable choices (Tr. 274). Mr. Brasch would not have received any benefit from the program (Tr. 274). Dr. Scott acknowledged that schizophrenics whose symptoms are adequately controlled with medications can participate in the MOSOP program, but MOSOP officials determined that Mr. Brasch was not stable enough on medication to participate in the program (Tr. 209). In fact, Mr. Brasch was periodically transferred to the Fulton State Hospital because he was too ill to manage in a prison setting (Tr. 209).

Ten days before Mr. Brasch was to be released from prison, the State filed a petition to involuntarily commit Mr. Brasch to the custody of DMH as a sexually violent predator (SVP) (L.F. 6-14). Mr. Brasch's counsel filed a counter-petition to civilly commit Mr. Brasch according to the general civil commitment procedures established in Section 632.305, but that petition was dismissed by the probate court (L.F. 4, 33-54). Mr. Brasch also filed a motion to dismiss the SVP commitment petition, arguing that as a result of the cognitive problems caused by his schizophrenia he would be unable to successfully participate in the SVP treatment program without an adequate medical regimen, which DMH was not providing (L.F. 101-128). As a result, he argued, civil commitment under the SVP law would be nothing more than "warehousing a chronically mentally ill man." (L.F. 102-103). This motion was also denied by the probate court (Tr. 13).

Dr. Scott testified at Mr. Brasch's commitment trial that he diagnosed Mr. Brasch with antisocial personality disorder (APD) and paranoid schizophrenia (Tr. 215). The APD diagnosis rested upon Mr. Brasch's numerous arrests for all types of crimes (Tr. 219-220). Mr. Brasch has shown impulsivity and a failure to plan ahead (Tr. 220-221). Breaking in to homes and some of Mr. Brasch's driving offenses demonstrated what Dr. Scott called a reckless disregard for the safety of others (Tr. 221). Dr. Scott believed Mr. Brasch has shown consistent irresponsibility by failing to maintain employment or pay some criminal fines (Tr. 221-222). Dr. Scott also suggested that Mr. Brasch's belief that much of his behavior was controlled by the devices implanted in him evidences a lack of remorse for his behavior (Tr. 222). And the trouble Mr. Brasch got into as a juvenile indicated a conduct disorder before age fifteen (Tr. 223).

The final criterion for a diagnosis of APD is that the behaviors are not the result of schizophrenia or manic episodes (Tr. 223-224). Dr. Scott said this criterion was met because he concluded that Mr. Brasch's schizophrenia did not develop until 1996 when abnormal behaviors were first reported by jail officials (Tr. 223-225, 266). Mr. Brasch was twenty-nine years old at the time (Tr. 223-224). Schizophrenia typically develops between the ages of eighteen and twenty (Tr. 265).

Dr. Scott said that the connection between APD and sexual offending is the antisocial attitudes which allow the person to "violate the boundaries of others

and commit sexual offenses.” (Tr. 228). APD is often exhibited through sex offending “in addition to to other ways that it will be exhibited.” (Tr. 229). Dr. Scott believed that Mr. Brasch was driven to offend sexually beginning in adolescence, and that he sought and took sex through home invasions (Tr. 229). He said, “To me this is an expression of his character, of his personality, rather than being caused by another condition directly.” (Tr. 229). Mr. Brasch told Dr. Scott during the evaluation that he entered the houses for sex, and that he believed that when the women saw it was him they would want to have sex with him (Tr. 210). Dr. Scott said this was a “faulty core belief” indicating that Mr. Brasch did not recognize boundaries (Tr. 211). He described this “belief” as a criminal thinking error, a way to justify the sexual behavior (Tr. 285-286). Dr. Scott did not believe that the incidents with the ten year old girls indicated a pedophilia, but were simply opportunistic (Tr. 211).

Dr. Scott believed that Mr. Brasch’s APD was driving his sexual offending (Tr. 232). He believed that Mr. Brasch continuing to engage in the behavior after being caught and sanctioned demonstrated serious difficulty controlling his behavior (Tr. 232-233). Dr. Scott said Mr. Brasch’s ability to control his behavior was further limited by the delusion that he does not have control over his body as a result of the device that has been placed in him (Tr. 233). Dr. Scott was concerned that this belief would make it difficult for Mr. Brasch to exercise

control over his behavior (Tr. 233). Dr. Scott opined that Mr. Brasch has a mental abnormality under the SVP law (Tr. 233).

Dr. Scott also opined that Mr. Brasch is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 255). He anchored this opinion with the results of the Static-99 and Rapid Risk Assessment for Sexual Reoffense (RRASOR) actuarial instruments (Tr. 236, 241). The four factors comprising the RRASOR are duplicated in the ten factors comprising the Static-99, but Dr. Scott said that he used both because the RRASOR captures offending caused by sexual deviance while the Static-99 captures sexual offending caused by antisocial attitudes (Tr. 242-243). Both of these instruments placed Mr. Brasch in the high-risk range (Tr. 240, 246). Dr. Scott also based his opinion on factors not contained in the actuarial instruments (Tr. 250). Mr. Brasch would be unsupervised if he was released into the community (Tr. 250). He had victims under the age of twelve (Tr. 250). He uses sex to cope with tension, anger and anxiety (Tr. 250). He has offended while on parole (Tr. 251). And Mr. Brasch has shown a lot of impulsivity and poor behavioral controls (Tr. 251).

The schizophrenia also increases Mr. Brasch's risk to reoffend (Tr. 254). His belief that his actions are controlled by the device implanted in him may make him less likely to try to prevent a new sex offense (Tr. 254). Dr. Scott suggested, however, that even if treatment can adequately address Mr. Brasch's

impulsivity and lack of control associated with the schizophrenia, the other risk factors would still be present (Tr. 252).

The delusions associated with Mr. Brasch's paranoid schizophrenia are the greatest problem for his treatment (Tr. 258). Dr. Scott noted that Mr. Brasch is being treated in a mental health facility with access to the newest and best medications and psychological treatment as any other patient in DMH (Tr. 253). But the delusions have persisted in spite of twelve years of treatment (Tr. 267). Mr. Brasch has been treated with the same medications since 2006, Haldol, Risperdal and Paxil, when he was too unstable to participate in MOSOP (Tr. 272-273). The idea that Mr. Brasch has a device that controls his actions is a fixed delusion which has not responded to medication (Tr. 254). Dr. Scott believes that Mr. Brasch "is at the best he can be." (Tr. 253).

Dr. Scott admitted that an older drug, Clozaril, also known as Clozapine, has recently been touted as a "miracle drug" in the treatment of schizophrenia that has not responded to other treatment (Tr. 259). He has seen this drug effectively treat people who have not responded to other medications (Tr. 259). Clozaril has a rare side-effect, however, of a potentially fatal blood disorder (Tr. 259). It is therefore rarely used, and only as a medication of last resort (Tr. 259). According to Dr. Scott, Mr. Brasch has responded well to baseline medications (Tr. 259).

Mr. Brasch's attorneys asked Dr. William Logan to evaluate him (Tr. 301, 310). Dr. Logan is a medical doctor and a psychiatrist (Tr. 301). He began working with sexual offenders in 1984 (Tr. 303-304). He was involved in establishing a prison-based sex offender treatment program in Texas, and was a representative of a federal judge overseeing the implementation of another mental health program (Tr. 304). He has also done over seventy SVP evaluations in Missouri, Kansas, Iowa, Nebraska and Texas (Tr. 304). Dr. Logan worked for the Menninger Clinic in Kansas and consulted with state and federal hospitals on difficult to treat patients, including schizophrenics who had not responded to medication (Tr. 310).<sup>2</sup> Schizophrenics comprise only about two percent of all sexual offenders, so they present an uncommon situation (Tr. 296).

In an offer of proof outside the hearing of the jurors, Dr. Logan told the court that Mr. Brasch is not amenable to treatment at this time if committed as a sexually violent predator (Tr. 295). The sex offender treatment facility uses the same sort of cognitive and behavioral therapies as the MOSOP program (Tr. 25-296). Mr. Brasch was rejected for that treatment program for the same levels of psychoses he is currently experiencing (Tr. 296). Mr. Brasch's thinking becomes

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<sup>2</sup> Dr. Logan testified in the trial court in *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997); and evaluated Michael Crane, of *Kansas v. Crane*, 122 S.Ct. 867, three times (Tr. 296-297).

loose and disorganized (Tr. 296). He responds to hallucinations and becomes pre-occupied with delusional thoughts (Tr. 296). Mr. Brasch is unlikely to benefit from cognitive/behavioral sex offender treatment (Tr. 296). If Mr. Brasch's condition on current medications is as good as he will get, he cannot successfully participate in the treatment program (Tr. 297).

Dr. Logan also testified in the presence of the jurors (Tr. 301). Mr. Brasch's disorganized thoughts and delusions interfered with Dr. Logan's ninety-minute interview (Tr. 311-312). Mr. Brasch does not think he is mentally ill, but he wants to get rid of the voices (Tr. 312-313). His experiences are at times quite distressing, and he has thought about killing himself because nothing else makes the voices go away (Tr. 313). Dr. Logan testified that it was possible that Mr. Brasch had schizophrenia before anyone saw signs of it (Tr. 317-318). Mr. Brasch told Dr. Logan a "bizarre" story about inheriting money in 1983, when he was eighteen years old, but the money was gone when he went back to the bank later to get it (Tr. 314). This, too, might have been a delusion (Tr. 314).

Dr. Logan noted that the medications given to Mr. Brasch have not quelled the delusions (Tr. 322). Some schizophrenics can get to the point where they still believe the delusions but they do not focus on them and the delusions do not interfere with their daily functioning (Tr. 326). This is not the case with Mr. Brasch (Tr. 326). Mr. Brasch has been treated primarily with Haldal, Risperdal and Paxil, the same medications he was on in 2006 when he was so delusional

that he was turned down for sex offender treatment (Tr. 324-325). Mr. Brasch was placed on Zyprexa for a while, and he had the greatest response to this medication (Tr. 324). But a side-effect of Zyprexa is weight gain, so the medication was apparently stopped (Tr. 324). But weight gain is also a side-effect of Risperdal, and Mr. Brasch had gained 120 pounds since 2007 (Tr. 324).

Dr. Logan believed that Mr. Brasch is not being appropriately treated (Tr. 326). His medications have not been changed even though he still has significant symptoms of the schizophrenia (Tr. 327). There are many alternatives DMH could have tried; different medications, more frequent assessments, more modifications to the treatment regimen (Tr. 327). For several years Mr. Brasch has simply been assessed every three months with no modification in his medications (Tr. 327). DMH did try a newer antipsychotic medication for a while, but Mr. Brasch's symptoms got worse so it was discontinued (Tr. 327-328). But there are other medications for persons non-responsive to Mr. Brasch's current medications (Tr. 328). One such medication is Clozaril (Tr. 328-329). Dr. Logan testified that in about one percent of cases, Clozaril can cause the patient's bone marrow to stop producing blood cells so the patient has to be frequently monitored (Tr. 328-329). If the condition is caught early, it is usually reversible (Tr. 329). The condition has been fatal, however, in a few cases (Tr. 329). Dr. Logan testified that he might not recommend Clozaril yet, but he would recommend placing Mr. Brasch back on Zyprexa because he had good response

on that medication (Tr. 329). There are steps that can be taken, including other medications, to control the weight gain caused by Zyprexa (Tr. 329).

Dr. Logan testified that he could not diagnose Mr. Brasch with APD (Tr. 330-331, 335). APD requires a pervasive pattern of behavior and Mr. Brasch's behavior has been exhibited in isolated bursts separated by several years (Tr. 331). Personality disorders are not supposed to be diagnosed in the presence of a major mental illness, drug abuse or a head injury (Tr. 331). Mr. Brasch has had all three (Tr. 331). The schizophrenia is such a prominent part of Mr. Brasch's history that Dr. Logan believed that APD is a mischaracterization of his condition (Tr. 331). Antisocial traits may have contributed to Mr. Brasch's offending prior to 1996, but Dr. Logan did not think APD was the sole factor for those behaviors (Tr. 336-337). Most telling for Dr. Logan is that Mr. Brasch has not shown any problematic behavior in the past two years at the treatment center, something Dr. Logan would not expect if Mr. Brasch has an aggressive criminal personality (Tr. 331-332).

Dr. Logan did not believe that it is possible to accurately predict Mr. Brasch's risk of sexual offending in the future (Tr. 345). He acknowledged that there is a risk of uncontrolled mental illness that can lead Mr. Brasch in numerous directions (Tr. 345). But he did not think that there is any way to say that Mr. Brasch is more likely than not to engage in predatory acts of sexual violence because the index offenses were thirteen years ago and Mr. Brasch's

current delusions do not involve sexual offending (Tr. 345). Dr. Logan also believed that the actuarial instruments could not accurately predict Mr. Brasch's future risk (Tr. 343). The predictive strength of the instruments depends on the number of people followed over time (Tr. 342). Ninety-eight percent of the Static-99 sample group did not have schizophrenia (Tr. 342). Only about 900 of the 30,000 men in the sample group had a mental disorder of any kind (Tr. 343). Dr. Logan did not believe that this number was sufficient to establish the validity of the instrument as to schizophrenics (Tr. 340-341). Schizophrenics are so different from the overall sample group that the Static-99 may be of little help in assessing future risk (Tr. 343). Dr. Logan acknowledged that the scoring manual of the Static-99 states that the instrument can be used on persons with mental health issues such as schizophrenia or mood disorders (Tr. 367). But he said that this is only "generally" true (Tr. 367). The Static-99 studied men released into the community after prison, and the schizophrenics in the sample group would necessarily have been in remission (Tr. 367). Schizophrenics who were actively psychotic would not have been released into the community, and therefore they would not have been within the sample group (Tr. 367).

During the final phase of the State's closing argument to the jurors, the Assistant Attorney General (AAG) said:

Ladies and gentlemen, you've got an important job today and I'm asking you not to add any more names to this list because we are telling you in this trial ..."

(Tr. 428). Mr. Brasch objected, arguing that this argument was improper, and he asked for a curative instruction or a mistrial (Tr. 428-429). The AAG argued to the court that everything in the case indicated that Mr. Brasch is more likely than not to re-offend and that means another victim, "which is our whole point." (Tr. 429). The AAG said that evidence of another victim is simply the fourth element of the jury instruction, that Mr. Brasch is more likely than not to engage in predatory acts of sexual violence in the future if not securely confined (Tr. 429). The court overruled the objection and denied the mistrial (Tr. 429). The AAG told the jurors: "we are telling you more likely than not he is going out and make another victim and I'm asking you not to let that happen." (Tr. 429). The very last thing the AAG told the jurors before they retired to deliberate on Mr. Brasch's fate was:

Ladies and gentlemen, we are telling you more likely than not the science tells you that this is going to happen, this type of behavior is going to repeat itself. You have a job, you have a responsibility and the result of your decision - there is going to be another name to this list."

(Tr. 430).

The jurors returned a verdict finding Mr. Brasch to be a sexually violent predator (L.F. 145). The probate court ordered Mr. Brasch into the custody of DMH until his mental abnormality has so changed that he is safe to be at large (Tr. 146). This appeal followed (L.F. 162-166).

## POINTS RELIED ON

### I.

The trial court erred in denying Mr. Brasch's motion to dismiss the petition because the SVP law is unconstitutional as applied to him, in violation of Mr. Brasch's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that involuntary civil commitment of sexually violent predators must provide meaningful treatment affording a genuine opportunity for future release in order to satisfy the constitutional guarantee of individual liberty, and the State has not provided such treatment because the State has maintained Mr. Brasch on a medical regimen in response to his paranoid schizophrenia and active delusions that has remained unchanged from when he was found by State agents to be incapable of successfully participating in sexual offender treatment in 2006, with no apparent effort or intention to pursue alternative regimens in order to resolve Mr. Brasch's schizophrenia or delusions and enable him to successfully participate in the treatment necessary to gain his release from secure confinement.

*In re Salcedo*, 34 S.W.3d 862 (Mo. App., S.D. 2001);

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

*Foucha v. Louisiana*, 112 S.Ct. 1780 (1992);

*Kansas v. Hendricks*, 117 S.Ct 2072 (1997);

United States Constitution, Fourteenth Amendment; and

Missouri Constitution, Article I, Section 10.

## II.

**The trial court abused its discretion in failing to declare a mistrial at Mr. Brasch's request during the State's closing argument, in violation of his rights to due process of law and a fair trial before a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State sought Mr. Brasch's commitment upon an improper basis because the Assistant Attorney General's argument that it was the jurors' responsibility to prevent another victim being added to the list of Mr. Brasch's victims was a plea to the jurors' emotions, passions and prejudices.**

*State v. Green*, 136 S.W.2d 837 (Mo. App., S.D. 2004);

*McMillin v. Union Elec. Co.*, 820 S.W.2d 352 (Mo. App., W.D. 1991);

*State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993);

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

United States Constitution, Sixth Amendment;

United States Constitution, Fourteenth Amendment; and

Missouri Constitution, Article I, Section 10.

## ARGUMENT

### I.

The trial court erred in denying Mr. Brasch's motion to dismiss the petition because the SVP law is unconstitutional as applied to him, in violation of Mr. Brasch's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that involuntary civil commitment of sexually violent predators must provide meaningful treatment affording a genuine opportunity for future release in order to satisfy the constitutional guarantee of individual liberty, and the State has not provided such treatment because the State has maintained Mr. Brasch on a medical regimen in response to his paranoid schizophrenia and active delusions that has remained unchanged from when he was found by State agents to be incapable of successfully participating in sexual offender treatment in 2006, with no apparent effort or intention to pursue alternative regimens in order to resolve Mr. Brasch's schizophrenia or delusions and enable him to successfully participate in the treatment necessary to gain his release from secure confinement.

"In our society liberty is the norm...." *United States v. Salerno*, 107 S.Ct. 2095, 2105 (1987). Civil proceedings for involuntary commitment impinge on the

fundamental right of liberty protected by the due process clause from arbitrary government action. *In re Salcedo*, 34 S.W.3d 862, 867 (Mo. App., S.D. 2001); *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 176 (Mo. banc 2004).

Mr. Brasch filed a motion prior to trial to dismiss the SVP commitment petition because the SVP law is unconstitutional as applied to him (L.F. 101-128). He noted that Section 632.495.2, RSMo Cum. Supp 2008, provides that persons determined to be sexually violent predators “shall be committed to the custody of the director of the department of mental health for control, care and treatment (L.F. 102). He argued that the medical regimen provided by the State had been proven unsuccessful in resolving his schizophrenia and delusions such that he could successfully participate in the sexual offender treatment employed by the State (L.F. 102-108, Tr. 8-10).

The probate court denied Mr. Brasch’s motion to dismiss the petition (Tr. 13). Constitutional challenges to a statute are reviewed *de novo*. *F.R. v. St. Charles County Sheriff’s Department*, 301 S.W.3d 56, 61 (Mo. banc 2010). A statute is presumed valid and will not be held unconstitutional unless it is clearly contravenes a constitutional provision. *Id.* The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution. *Id.*

Due process requires that the nature of commitment bear some reasonable relationship to the purpose for which the individual is committed. *Foucha v. Louisiana*, 112 S.Ct. 1780, 1785 (1992). In holding that the Kansas SVP law, the precursor of Missouri's law, was constitutionally permissible since it was remedial rather than punitive, the United States Supreme Court noted that the law obligated the state to provide treatment designed to restore the person to a condition appropriate for release back into the community if such treatment was available. *Kansas v. Hendricks*, 117 S.Ct. 2072, 2084-2085 (1997). Justice Kennedy, concurring in the *Hendricks* opinion, indicated that a significant basis for his concurrence was that the purpose of the law was to provide genuine treatment, not merely the sham or pretext of treatment. 117 S.Ct. at 2087. He suggested that even the Justices who dissented from the opinion "might even validate the statute ... assuming a reasonable level of treatment." *Id.* Justice Breyer, with whom Justices Stevens, Souter and Ginsberg joined in dissent, stated that because Hendricks' condition was treatable but the state failed to provide any treatment before his release from prison and provided only "inadequate treatment thereafter," the purpose of the law was not simply an effort to commit him civilly but an effort to inflict further punishment upon him. 117 S. Ct. 2087-2088.

The Missouri Supreme Court has also recognized this fundamental role of treatment in the commitment scheme. Judge Wolff concurred in the Court's

opinion in *Norton, supra.*, that the purposes of civil commitments are incapacity for the safety of the individual or the public, and treatment. 123 S.W.3d at 176. Judge Wolff noted: “The idea behind such confinements is that a patient is ‘sick’ and dangerous, that he must be locked up to be treated, and that when he gets ‘well,’ he will be released.” *Id.* He was concerned, however, that “[t]he practices of the state over the next few years will show whether there is a meaningful attempt to treat those previously determined to be sick and dangerous, or whether these offenders will simply be warehoused without treatment and without meaningful efforts to re-integrate them into society.” *Id.*

There is no question that Mr. Brasch is “sick.” He is floridly schizophrenic and actively delusional. He has been that way for twelve years, in spite of the efforts made by the State to treat his condition. The question, therefore, is whether the State is providing adequate and meaningful treatment to make Mr. Brasch “well” so that he may be re-integrated back into the community. It has not been doing so. The State has been providing Mr. Brasch the same medications since 1996, even though those medications have not resolved the schizophrenia and delusions nor made Mr. Brasch capable of participating in sex offender treatment. Other medications and regimens are available which might resolve the schizophrenia and delusions, but the State has not used them in an attempt to enable Mr. Brasch to participate in treatment and return to the community. The State is simply warehousing Mr. Brasch.

In 1996, Dr. Richard Scott of the Department of Mental Health (DMH) found Mr. Brasch to be incompetent to stand trial (Tr. 186, 204). He was “very ill,” experiencing auditory hallucinations and paranoid delusions (Tr. 205). He believes that devices were implanted in his body during an appendectomy when he was nine years old, and during surgery to repair a broken jaw, so that he can be tracked by the CIA (Tr. 205, 316). He also believes that “lenses” have been put in his eyes which allow the CIA to use him to track other people (Tr. 205). Mr. Brasch also believes that the devices allow the CIA and officials with St. Charles County to control his body (Tr. 205). He explained that his sex offenses were caused by the CIA or St. Charles County officials controlling his body (Tr. 212). Mr. Brasch has held on to these beliefs as absolute facts, and he cannot be shaken from these beliefs (Tr. 205).

Mr. Brasch was not given the opportunity to participate in the Missouri Sex Offender Program (MOSOP) while in prison (Tr. 208). He was unable to participate in the treatment because his schizophrenia was “interfering with his ability to be a reasonable participant in the treatment at that time.” (Tr. 208). The thought disorder, disorganization of thought and speech would have interfered (Tr. 274). When ill, Mr. Brasch cannot take in information or use it to make reasonable choices (Tr. 274). Mr. Brasch would not have received any benefit from the program (Tr. 274). Dr. Scott acknowledged that schizophrenics whose symptoms are adequately controlled with medications can participate in the

MOSOP program, but MOSOP officials determined that Mr. Brasch was not stable enough on medication to participate in the program (Tr. 209). In fact, Mr. Brasch was periodically transferred to the Fulton State Hospital because he was too ill to manage in a prison setting (Tr. 209).

The delusions associated with Mr. Brasch's paranoid schizophrenia are the greatest problem for his treatment (Tr. 258). Dr. Scott noted that Mr. Brasch is being treated in a mental health facility with access to the newest and best medications and psychological treatment as any other patient in DMH (Tr. 253). But the delusions have persisted in spite of twelve years of treatment (Tr. 267). Mr. Brasch has been treated with the same medications since 2006, Haldol, Risperdal and Paxil, when he was too unstable to participate in MOSOP (Tr. 272-273). The idea that Mr. Brasch has a device that controls his actions is a fixed delusion which has not responded to medication (Tr. 254). Dr. Scott believes that Mr. Brasch "is at the best he can be." (Tr. 253). This belief does not seem to be supported by other evidence produced at trial.

Dr. Scott admitted that an older drug, Clozaril, also known as Clozapine, has recently been touted as a "miracle drug" in the treatment of schizophrenia that has not responded to other treatment (Tr. 259). He has seen this drug effectively treat people who have not responded to other medications (Tr. 259). Clozaril has a rare side-effect, however, of a potentially fatal blood disorder (Tr. 259). It is therefore rarely used, and only as a medication of last resort (Tr. 259).

According to Dr. Scott, Mr. Brasch has responded well to baseline medications (Tr. 259). But Mr. Brasch certainly has not responded well enough to the medications the State has chosen to use to enable him to successfully participate in meaningful sex offender treatment designed to make him “well” enough to return to the community.

Dr. Logan recognized that Mr. Brasch is not amenable to treatment at this time if committed as a sexually violent predator (Tr. 295). The sex offender treatment facility uses the same sort of cognitive and behavioral therapies as the MOSOP program (Tr. 295-296). Mr. Brasch was rejected for that treatment program for the same levels of psychoses he is currently experiencing (Tr. 296). Mr. Brasch’s thinking becomes loose and disorganized (Tr. 296). He responds to hallucinations and becomes pre-occupied with delusional thoughts (Tr. 296). Mr. Brasch is unlikely to benefit from cognitive/behavioral sex offender treatment (Tr. 296). If Mr. Brasch’s condition on current medications is as good as he will get, he cannot successfully participate in the treatment program (Tr. 297).

Dr. Logan noted that the medications given to Mr. Brasch have not quelled the delusions (Tr. 322). Some schizophrenics can get to the point where they still believe the delusions but they do not focus on them and the delusions do not interfere with their daily functioning (Tr. 326). This is not the case with Mr. Brasch (Tr. 326). Mr. Brasch has been treated primarily with Haldal, Risperdal and Paxil, the same medications he was on in 2006 when he was so delusional

that he was turned down for sex offender treatment (Tr. 324-325). Mr. Brasch was placed on Zyprexa for a while, and he had the greatest response to this medication (Tr. 324). But a side-effect of Zyprexa is weight gain, so the medication was apparently stopped (Tr. 324). But weight gain is also a side-effect of Risperdal, and Mr. Brasch had gained 120 pounds since 2007 (Tr. 324).

The State has not changed Mr. Brasch's medications even though he still has significant symptoms of the schizophrenia (Tr. 327). There are many alternatives DMH could have tried; different medications, more frequent assessments, more modifications to the treatment regimen (Tr. 327). Involuntary civil commitment must include treatment adequate and effective to create the potential for release. *Hendricks, supra*. For several years Mr. Brasch has simply been assessed every three months with no modification in his medications (Tr. 327). DMH did try a newer antipsychotic medication for a while, but Mr. Brasch's symptoms got worse so it was discontinued (Tr. 327-328). But there are other medications, such as Zyprexa or Clozaril, for persons non-responsive to Mr. Brasch's current medications (Tr. 328-329). Zyprexa proved more effective for Mr. Brasch and proper treatment can address the side-effects. Dr. Logan testified that in about one percent of cases, Clozaril can cause the patient's bone marrow to stop producing blood cells so the patient has to be frequently monitored (Tr. 328-329). If the condition is caught early, it is usually reversible (Tr. 329). The condition has been fatal, however, in a few cases (Tr. 329). Dr.

Logan testified that he might not recommend Clozaril yet, but he would recommend placing Mr. Brasch back on Zyprexa because he had good response on that medication (Tr. 329). There are steps that can be taken, including other medications, to control the weight gain caused by Zyprexa (Tr. 329). Mr. Brasch's commitment is constitutional under *Hendricks* and *Norton* only if the State provides adequate treatment to provide him the opportunity to get "well" and to be released from confinement.

It is the State's failure to continue to pursue adequate and effective medications to enable Mr. Brasch to participate in treatment that renders the SVP law unconstitutional as applied to him. The State has the obligation to provide Mr. Brasch with such treatment. *Foucha*, *Hendricks*, and *Norton* require the State to provide Mr. Brasch with such treatment. Due process demands it.

This is what distinguishes Mr. Brasch's commitment from the commitment of *Hendricks* accepted by the United States Supreme Court. *Hendricks* admitted that when he gets stressed out he cannot control the urge to molest children. 117 S.Ct. at 2078. He agreed that he was not cured of his pedophilia, and stated that treatment is "bull----." *Id.* The United States Supreme Court accepted that involuntary civil commitment of persons for whom no treatment will ever be successful is still constitutional. *Id.* at 2083-2084. This is also recognized in Missouri. *In the Matter of the Care and Treatment of Whitfield*, 250 S.W.3d 722 (Mo. App., W.D. 2008).

But no one, including Dr. Scott, testified that Mr. Brasch's condition is untreatable. The State has simply chosen to stop trying to resolve his schizophrenia and delusions. Dr. Scott recognized that Clozaril has demonstrated remarkable effectiveness in resolving schizophrenia that has not responded to other medications. But the State has apparently chosen not to use it. This may be because it has potentially fatal side-effect. But that side-effect is rare, and usually avoidable with attentive monitoring. Mr. Brasch is in the custody of DMH twenty-four hours a day, seven days a week, and three hundred and sixty-five days a year. His condition can be appropriately monitored by DMH. And even if there remains a slight risk of death, Mr. Brasch told Dr. Logan that sometimes he thinks about killing himself to make the voices stop (Tr. 313). He may well be willing to run the risk associated with Clozaril in order to get the benefit if the State will simply give him the choice.

The State has chosen to simply provide Mr. Brasch with medications that keep him calm and problem-free while in custody, but not to provide him medications that will provide him the opportunity to successfully participate in the sex offender treatment that will make him "well" and able to return to the community. The State has chosen to warehouse him under the SVP law. Under this circumstance, the law is unconstitutional. *Norton, supra.*

Because the SVP law is unconstitutional as it is being applied to Mr. Brasch, the probate court erred in denying his motion to dismiss the commitment

petition. Mr. Brasch's commitment as a sexually violent predator must be vacated.

## II.

**The trial court abused its discretion in failing to declare a mistrial at Mr. Brasch's request during the State's closing argument, in violation of his rights to due process of law and a fair trial before a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State sought Mr. Brasch's commitment upon an improper basis because the Assistant Attorney General's argument that it was the jurors' responsibility to prevent another victim being added to the list of Mr. Brasch's victims was a plea to the jurors' emotions, passions and prejudices.**

During the final phase of the State's closing argument to the jurors, the Assistant Attorney General (AAG) said:

Ladies and gentlemen, you've got an important job today and I'm asking you not to add any more names to this list because we are telling you in this trial ..."

(Tr. 428). Mr. Brasch objected, arguing that this argument was improper, and he asked for a curative instruction or a mistrial (Tr. 428-429). The AAG argued to the court that everything in the case indicated that Mr. Brasch is more likely than not to re-offend and that means another victim, "which is our whole point." (Tr. 429). The AAG said that evidence of another victim is simply the fourth element

of the jury instruction, that Mr. Brasch is more likely than not to engage in predatory acts of sexual violence in the future if not securely confined (Tr. 429). The court overruled the objection and denied the mistrial (Tr. 429).

The AAG returned before the jurors and said: “we are telling you more likely than not he is going out and make another victim and I’m asking you not to let that happen.” (Tr. 429). The very last thing the AAG told the jurors before they retired to deliberate on Mr. Brasch’s fate was:

Ladies and gentlemen, we are telling you more likely than not the science tells you that this is going to happen, this type of behavior is going to repeat itself. You have a job, you have a responsibility and the result of your decision – there is going to be another name to this list.” (Tr. 430).

The declaration of a mistrial is a drastic remedy, which is only granted in extraordinary circumstances. *State v. Green*, 136 S.W.2d 837, 842 (Mo. App., S.D. 2004). The determination of the prejudicial effect of closing argument lies in the sound discretion of the trial court and that discretion will not be disturbed absent an abuse of that discretion. *McMillin v. Union Elec. Co.*, 820 S.W.2d 352, 355 (Mo. App., W.D. 1991). What sanction is appropriate to remedy errors made in closing argument also lies largely within the judgment of the trial court. *Id.*

A jury’s verdict may not be based upon speculation or emotion. *State v. Grim*, 854 S.W.2d 403, 414, 425 (Mo. banc 1993). The possibility of a verdict

based upon emotion, or passion or prejudice, is a particular danger in SVP cases. Judge Wolff noted in his concurrence in *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 178 (Mo. banc 2004), that the “elephant in the room” which cannot be ignored by psychologists, judges or jurors is that sexually offending against children is reprehensible. Judge Wolff noted: “The fact that jurors regularly find convicted sex offenders to be sexually violent predators should come as no surprise. Even where there is doubt about whether the offender has a mental abnormality, what juror wants to free someone who may someday molest another child?” *Id.* Judge Wolff questioned whether the State’s responsibility to prove its case beyond a reasonable doubt was sufficient to safeguard the individual’s due process rights under these circumstances. *Id.*

While most of Mr. Bracsh’s acts were directed against adult women, two involved ten year old girls, a fact the AAG repeatedly noted in his closing argument (Tr. 406, 407, 412, 414, 426, 429). And for that matter, it seems hardly less significant that the AAG told the jurors that it was their responsibility to prevent any future adult victims.

It was this assertion that it was the jurors’ responsibility to prevent any more victims that was particularly egregious. In fact, the AAG’s argument suggested that if the jurors did not commit Mr. Bracsh, *they* would be responsible for the next victim. It is, of course, true that the State’s burden was to prove that Mr. Bracsh is more likely than not to engage in predatory acts of sexual violence

if not confined. But there is a vast difference between arguing that the State's evidence supports a conclusion that Mr. Brasch is more likely than not to re-offend, and warning the jurors that if they did not meet their responsibility in this case that they would be making someone else a victim. Allowing this argument failed to protect Mr. Brasch's right to due process of law to be committed based upon evidence rather than emotion, passion or prejudice.

Because the AAG's argument encouraged the jurors to commit Mr. Brasch based upon speculation, emotion and passion, the probate court abused its discretion in failing to declare a mistrial. The judgment and commitment must be reversed and the cause remanded for a new trial.

## CONCLUSION

Because the SVP law is unconstitutional as it is being applied to Mr. Brasch, as set out in Point I, the probate court erred in denying his motion to dismiss the commitment petition, and Mr. Brasch's commitment as a sexually violent predator must be vacated. Because the AAG's argument encouraged the jurors to commit Mr. Brasch based upon speculation, emotion and passion, as set out in Point II, the probate court abused its discretion in failing to declare a mistrial. The judgment and commitment must be reversed and the cause remanded for a new trial.

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 8,092 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 August, 2010. 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 September, 2010, to Shaun J. Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Emmett D. Queener

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