IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF NELVIN SPENCER, Respondent/Appellant.	))))))))	SD 25113

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSOURI
THIRTY-THIRD JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE W. H. WINCHESTER III, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

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JURISDICTIONAL STATEMENT

Nelvin Spencer appeals from his commitment to secure confinement as a sexually violent predator on July 2, 2002, following a jury trial in the Circuit Court of Scott County, Missouri. Mr. Spencer filed a motion for judgment of acquittal notwithstanding the verdict or for a new trial on July 31, 2002. Notice of Appeal was timely filed on August 9, 2002. To the extent that this appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Southern District Court of Appeals, Article V, Section 3, Missouri Constitution (as amended 1982); Section 477.050, RSMo 2000. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction lies in the Missouri Supreme Court; and Mr. Spencer requests transfer to that Court.

STATEMENT OF FACTS

Nelvin Spencer pleaded guilty on April 3, 1996, to one count of statutory rape in the first degree for acts involving Deneka Daniels (L.F. 15, (Tr. 348-349).[1] He was to be released from incarceration on January 19, 2001 (L.F. 21). But on January 11, 2001, Gerald Hoeflein, an employee of the Department of Corrections, concluded that Mr. Spencer appeared to meet the criteria for a sexually violent predator as defined in Chapter 632.480, RSMo 2000 (L.F. 21-28). The Multidisciplinary Team unanimously voted that Mr. Spencer did not fit the definition of an SVP (Tr. 514-515, 517-518). But the Prosecutor's Review Committee concluded on January 16, 2001, that Mr. Spencer met the definition of an SVP (L.F. 19). The State filed a petition on January 17, 2002, in the Scott County Probate Court to declare Mr. Spencer an SVP and to confine him in a secure facility (L.F. 14-28). The probate court ordered Mr. Spencer's continued detention in a secure facility on the same day (L.F. 29).

The State called upon Mr. Hoeflein to establish probable cause to proceed to trial (Tr. 8, 10). Mr. Hoeflein conducts End of Confinement reports pursuant to Section 632.480, RSMo 2000, in the Department of Corrections (Tr. 10, 13-14). Such a report is done on any inmate with an index crime who fails to satisfactorily complete the MOSOP program (Tr. 15). In addition to reviewing DOC and

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

Probation and Parole records, Mr. Hoeflein interviewed Mr. Spencer (Tr. 16-17). Mr. Hoeflein believed that the information indicated that Mr. Spencer had a mental abnormality of pedophilia as described by the Diagnostic and Statistical Manual (Tr. 19).

Mr. Hoeflein applied the definition of "predatory" set out in the statute: acts directed toward stangers or individuals with whom relationships have been established or promoted for the purpose of victimization (Tr. 32). He agreed that the alleged victims of Mr. Spencer's sexual abuse were his natural daughter and step-daughters, not strangers (Tr. 32-33, 35). But he suspected that since the abuse of his step-daughters allegedly occurred shortly after his marriages that the marriages may have been for the primary purpose of gaining access to the girls (Tr. 35).

Mr. Hoeflein acknowledged that in five years in the Department of Corrections Mr. Spencer had no conduct violations (Tr. 37). He also acknowledged that Mr. Spencer successfully completed Phase I of the MOSOP program (Tr. 38). Mr. Spencer began Phase II, but was terminated due to "poor concept application" (Tr. 40). The MOSOP therapist thought that Mr. Spencer was not progressing (Tr. 39). Mr. Spencer enrolled in Phase II a second time, but was again terminated for the same reason (Tr. 41). Mr. Hoeflein acknowledged that Mr. Spencer was diagnosed with mild mental retardation, but he did not know if that would cause Mr. Spencer's poor concept application (Tr. 40).

Three members of the Multidisciplinary Team, Joseph Parks, Jonathan Rosenboom, and Mark Altomari, testified that they each concluded that Mr. Spencer

did not fit the criteria of an SVP (Tr. 53, 55, 65, 68, 78, 79). Each concluded that Mr. Spencer's conduct did not fit the definition of "predatory" because the alleged abuse was all interfamilial; with a natural daughter or step-daughters during a marriage (Tr. 56, 68, 79). Dr. Parks agreed that there was speculation in the records that the marriages were to gain access to the girls, but he saw no evidence of that (Tr. 56-57). Dr. Rosenboom testified that the relationships started out as a usual "father" type relationship and therefore could not have been for the primary purpose of victimization (Tr. 68-69). Dr. Altomari agreed (Tr. 79). He was aware that an ex-wife believed that was the purpose of the marriage, but Dr. Altomari noted that she had an ax to grind (Tr. 80). Each doctor based his opinion on the definition of "predatory" contained in the statute (Tr. 63, 69, 79). The court took judicial notice that the other members of the Multidisciplinary Team also voted that Mr. Spencer did not fit the definition of a SVP (Tr. 85).

But the court found probable cause that Mr. Spencer was potentially an SVP (Tr. 85, L.F. 131-133). Dr. John Rabun conducted the SVP evaluation ordered by the probate court (L.F. 132-133, 134-146). Dr. Rabun concluded that Mr. Spencer's alleged offenses did not suggest that he promoted or established relationships for the primary purpose of victimization, and therefore did not fit the definition of "predatory" under the statute (L.F. 146). He concluded that Mr. Spencer did not suffer a mental abnormality predisposing him to commit sexually violent offenses (L.F. 146). Dr. Rabun concluded, within a reasonable degree of medical certainty,

that Mr. Spencer was not more likely than not to engage in acts of predatory sexual violence if not confined in a secure facility (L.F. 146).

After the probable cause hearing but before the trial, the legislature amended the definition of "predatory" to include acts against family members (Tr. 110). The State filed a motion to apply the new definition in the case against Mr. Spencer (L.F. 227-229). It argued that a statutory provision that is remedial or procedural operates retrospectively unless the legislature specifies otherwise, and that statutes enacted for the protection of life or property, or are conducive to the public good are considered remedial (L.F. 227-228). The State believed that the new definition came within these principles (L.F. 228, Tr. 111). The State suggested to the trial court that the legislature had simply closed a "loophole" in the law (Tr. 111). Mr. Spencer believed that he should face trial under the statute in effect at the time the petition was filed against him (Tr. 111-112). The court permitted the new "predatory" definition to be applied against Mr. Spencer at trial (Tr. 112).

Lafonda Moore was twenty-seven years old at the time of trial (Tr. 297). She claimed that she was twelve years old when her mother married Mr. Spencer in 1984 (Tr. 299-300). She also testified that Mr. Spencer would touch her and her younger sister inside their panties at night, and that he had sexual intercourse with her from ages ten to fifteen (Tr. 301). Lafonda said that she, her sister, and her brother would get beaten if they told anyone (Tr. 302-303). She told the Division of Family Services what happened when she was twelve years old and she and her sister were placed in a foster home (Tr. 303-304). She said that she changed her story so that

the girls could return to their home (Tr. 304-305). Lafonda testified that she did not tell about the abuse after that because there was nothing she could do about it (Tr. 306-307).

Lafonda denied that she started telling people that Mr. Spencer had sex with her after she was caught having sex with a seventeen year old boy (Tr. 309). She was caught having sex with the boy, and was put in foster care the same day, but Lafonda denied at trial that she was put in the foster home for that reason (Tr. 310-311). She said that she reported Mr. Spencer's sexual abuse to the police, but he was not arrested (Tr. 311).

Latequa Moore, Lafonda's twenty-three year old sister, testified at trial that Mr. Moore put his penis between her legs and tried to have sex with her more than five times beginning when she was nine years old (Tr. 312-313, 315-316).

Eighteen year old Deneka Daniels had known Mr. Spencer since she was three years old (Tr. 320-321). Mr. Spencer married her mother about four years later (Tr. 322). She said at trial that Mr. Spencer lived next door to her family, and he would expose himself and make her touch his penis when she was four years old (Tr. 322-324). Deneka said that Mr. Spencer began having sex with her when she was five years old, and it continued until she reported it when she was twelve years old (Tr. 323). She told he jurors that she was too scared and ashamed to tell anyone until her sister said that Mr. Spencer was touching her too (Tr. 324). Deneka said that Mr. Spencer never used force against her (Tr. 325). But she did claim that Mr. Spencer threatened to do something bad or kill her if she told (Tr. 328).

Danielle Daniels, Deneka's younger sister, told the jurors that Mr. Spencer touched her vagina and put his penis in her vagina from the time she was three years old until she was seven (Tr. 331-332).

A SAFE examination of Deneka was inconclusive because of her age and maturity (Tr. 340-341). The examiner testified that Deneka reported a "history" of sexual abuse (Tr. 342). An examination of Danielle revealed narrowing of the hymenal tissue and a bump at the bottom of the vaginal opening, consistent with the sexual abuse she reported to the examiner (Tr. 338).

Probation and Parole officer Deborah Collins prepared a presentence report regarding Mr. Spencer in March of 1996 (Tr. 346-348). She testified that Mr. Spencer admitted sexually abusing Danielle and that he sexually abused and raped Deneka (Tr. 349). According to DFS records she reviewed, Mr. Spencer admitted that he sexually abused his two year old natural daughter (Tr. 349). Ms. Collins said that Mr. Spencer also admitted to her that he sexually abused two of his step-children during his second marriage (Tr. 350). When asked why, Mr. Spencer replied, "the devil came over me" (Tr. 352). He added, "I hear the Lord more clearly now. I told the devil he's not going to use me any more." (Tr. 351). Mr. Spencer told Ms. Collins that the devil was in the room with them (Tr. 352).

Ms. Collins spoke with Mr. Spencer three times during her investigation (Tr. 354). She said that Mr. Spencer wanted to talk about his offense against Deneka, but she would not let him do so (Tr. 354-355). Ms. Collins thought that Mr. Spencer was "getting off" talking about it and he asked to go to the bathroom (Tr. 355).

Ms. Collins could tell that Mr. Spencer had "mental issues" regarding his I.Q. (Tr. 359). Mr. Spencer cannot read or write (Tr. 359). Mr. Spencer's brothers told Ms. Collins that he received social security disability for mental retardation, and she confirmed that with the Administration (Tr. 360).

Melba Tucker was the regional sex offender specialist with Probation and Parole and attended one interview with Mr. Spencer (Tr. 365-366). She testified that Mr. Spencer admitted sexual contact three or four times with Deneka, but denied any contact with Danielle (Tr. 368). Ms. Tucker said that Mr. Spencer reported that he thought Deneka wanted the contact because she touched him between the legs (Tr. 368). Mr. Spencer said that he knew it was wrong, but Satan told him to do it (Tr. 368). Ms. Tucker said that Mr. Spencer also admitted that he molested his natural daughter when she was two years old (Tr. 369). But she added that at times Mr. Spencer denied that he had done anything to the children (Tr. 370).

Dr. Harry Hoberman testified for the State (Tr. 388). He is a self-employed psychologist in Minnesota with training in risk assessment and treatment of sex offenders (Tr. 394-395). He reviewed reports and records from the Department of Corrections, Department of Mental Health, Division of Family Services, and police reports regarding Mr. Spencer, and depositions of Lafonda and Latequa (Tr. 403, 406).

Dr. Hoberman testified that he diagnosed Mr. Spencer with pedophilia because the records indicated a pattern of sexually offending against children over a thirteen to fourteen year period (Tr. 409). He considered the victim's reports, Mr.

Spencer's admissions, and substantiation by agencies such as DFS (Tr. 410). Dr. Hoberman applied the definition set out in the Diagnostic and Statistical Manual, IV (Tr. 413). He testified that in his opinion, to a reasonable degree of psychological certainty, Mr. Spencer's pedophilia was a mental abnormality defined in the statute (Tr. 416). He also believed that the abnormality affected Mr. Spencer's volitional capacity, his capacity to make choices and control his behavior (Tr. 416). Dr. Hoberman also believed that the condition predisposed Mr. Spencer to commit sexually violent offenses because the arousal leads to sexual behavior with young children (Tr. 416).

The doctor testified that the predisposition caused Mr. Spencer serious difficulty controlling his behavior (Tr. 417-418). He said that he found evidence of that in the sexual abuse of a two year old daughter and sexual contact with step-children shortly after entering new marriages (Tr. 418). Dr. Hoberman said that Mr. Spencer's explanation that "it just happened," and blaming the "devil" spoke to a lack of control (Tr. 418-419). The doctor found support for his conclusion in the opinion of the probation and parole officers that Mr. Spencer lacked control over his behavior (Tr. 419).

Dr. Hoberman was aware of Dr. Rabun's diagnosis of mild mental retardation (Tr. 420). But he thought that there was insufficient evidence to justify that diagnosis (Tr. 422). Dr. Hoberman said that there had been no I.Q. test, although records noted an I.Q. of 60, and that there was no evidence of difficulty in functioning in daily life (Tr. 420). He noted that Mr. Spencer had a driver's license

and had held different jobs with different responsibilities (Tr. 421). Mr. Spencer had never been committed for mental retardation (Tr. 421).

Dr. Hoberman acknowledged that a finding of SVP required a mental abnormality that makes the person more likely than not to engage in acts of predatory sexual violence if not confined in a secure facility (Tr. 424-425). For this, he looks to scientific literature establishing "base rates," or the rate at which things occur in certain groups of individuals (Tr. 425). One study that followed released prison inmates over twenty-five years suggests that persons who have sexual contact with children have a base rate of re-offense of fifty-two percent (Tr. 426). Dr. Hoberman then looked for particular risk factors to determine if Mr. Spencer's risk to re-offend was higher or lower than the base rate (Tr. 426). He applied two actuarial instruments, the Static- 99 and MnSOST-R, typically used to determine risk of re-offense (Tr. 426-428). Both of these instruments "indicated a low rate of re-offending" (Tr. 428-429).

Dr. Hoberman then suggested that there were "limitations" to using those instruments (Tr. 429). He suggested that to be useful for a correctional sample, the instruments had to rely on information known to correctional systems so that they could be easily scored (Tr. 429). Dr. Hoberman said that the instruments were best applied to persons with a record of sex offenses, and Mr. Spencer's lack of charges affected the overall scores (Tr. 429-430). The doctor therefore turned to literature identifying fifty to one hundred characteristics investigated as potential risk factors

for sex offender re-offense (Tr. 431, 433). Dr. Hoberman said that he identified a number of these characteristics applicable to Mr. Spencer (Tr. 433-434).

The first of these factors Dr. Hoberman identified was deviate sexual arousal (Tr. 434). Basically, that referred to his diagnosis of pedophilia (Tr. 434). The doctor said that deviate sexual arousal was a strong indicator of re-offense (Tr. 434). He noted that there was a long history of alleged abuse, which escalated from fondling to intercourse (Tr. 435).

The second factor adopted by Dr. Spencer was "anti-social traits" (Tr. 436-437). He considered Mr. Spencer to be self-centered, and lacking self-control and empathy or concern for others (Tr. 436-437). Dr. Spencer also considered that Mr. Spencer's continued offending after losing his parental rights to his natural child, after investigations, and after removal of step-children from the home to be equivalent to a failure to learn from experience (Tr. 437). The doctor considered a risk from Mr. Spencer's substance abuse because some of the contacts supposedly occurred while he was intoxicated (Tr. 437-438).

The third factor Dr. Hoberman considered was not succeeding in treatment (Tr. 438). He suggested that literature indicates that treatment failure is a significant issue in re-offending (Tr. 438).

Dr. Hoberman concluded that to a reasonable degree of psychological certaintly, Mr. Spencer was more likely than not to re-offender if not confined in a secure facility (Tr. 440). He said that Mr. Spencer had a mental abnormality; pedophilia (Tr. 440). And he believed that Mr. Spencer's acts were predatory under

the new statutory definition (Tr. 440-441).[2] Dr. Hoberman drew this conclusion because Mr. Spencer has twice married women with children and supposedly molested the children more than he had sex with the mothers (Tr. 442).

Dr. Hoberman acknowledged in his report that his conclusions would be affected if the reports of statements he reviewed were wrong or biased (Tr. 454). He agreed that there were discrepancies in those reports and the statements of the complaining witnesses (Tr. 454, 455). Dr. Hoberman knew that Lafonda had recanted her allegations (Tr. 455). He was aware that Lafonda's allegations against Mr. Spencer were made after she was caught having sex with a seventeen year old boy (Tr. 456). Dr. Hoberman was also aware that Mr. Spencer had admitted the acts for which he was convicted, but not the other allegations against him (Tr. 454-455).

Dr. Hoberman admitted in cross-examination that the records he reviewed indicated that Mr. Spencer has mild mental retardation (Tr. 472). He listed that in his report as a diagnosis to consider, but he did not believe that the records fully supported that diagnosis (Tr. 473). Dr. Hoberman was aware that Mr. Spencer was getting SSI for mental retardation and a back injury (Tr. 473). But he reiterated that having a driver's license showed that Mr. Spencer did not have adaptive deficiencies

[2] Mr. Spencer renewed his objection to application of the new definition (Tr. 440-441).

(Tr. 473). Dr. Hoberman was unaware that Mr. Spencer had to take the test three times, and the written portion had to be read to him (Tr. 473-474).

Dr. Hoberman conceded that many of the allegations he relied upon had not resulted in charges or convictions against Mr. Spencer (Tr. 466). Neither the MnSOST-R or the Static-99 contemplate using allegations that resulted in no charges or no convictions (Tr. 467-468). In fact, the scoring manual for the MNSOST-R instructs not to rely on allegations that resulted in no charge and are denied (Tr. 467-468).

The fifty-two percent base rate for sexual re-offense came from an article by another doctor, Dr. Doren, commenting on the results of several studies (Tr. 489-490). The major study, the one with the twenty-five year examination, was a study of a particular analytical method (Tr. 486-487). The article regarding the study advised that its results could not automatically be applied to other studies because it was only an analysis of methodologies (Tr. 487). Dr. Spencer admitted that it was possible that the doctor who conducted the twenty-five year study has stated that using the fifty-two percent base rate is a bad interpretation of his work (Tr. 497). Dr. Hoberman said that he was not automatically applying the fifty-two percent base rate to Mr. Spencer, he was only citing it as an example (Tr. 492).

Dr. Spencer was familiar with another study, "Hanson and Bussiere, Predicting Relapse: a Meta- analysis of Sexual Offender Recidivism Studies." (Tr. 478). The meta-analysis was a combination of different studies and information, and involved over 23,000 individuals (Tr. 479). It is the largest study and involved the

largest number of individuals (Tr. 479). The base rate from this study for recidivism of child molesters was just under thirteen percent (Tr. 479). Dr. Hoberman considered threats and force by Mr. Spencer in his opinion (Tr. 480). The meta-analysis found that threats and force have no correlation to recidivism (Tr. 480). Dr. Hoberman considered Mr. Spencer's low motivation for treatment (Tr. 480). The meta-analysis found no correlation to recidivism from low motivation (Tr. 480-481). Dr. Hoberman considered Mr. Spencer's substance abuse (Tr. 481). The meta-analysis found no correlation between alcohol abuse and recidivism (Tr. 481).

Dr. John Rabun, a psychiatrist with the Department of Mental Health, testified on Mr. Spencer's behalf (Tr. 524-525). When the State passed the sexually violent predator statutes the Department provided training for its doctors who would conduct the evaluations (Tr. 527). The training was conducted by Dr. Doren (Tr. 527).

Dr. Rabun used the MnSOST-R and Static-99 actuarial instruments for Mr. Spencer because those are the instruments used by the DMH examiners and other experts in the field (Tr. 533). Those instruments indicated that Mr. Spencer was at low risk to re-offend (Tr. 535). Dr. Rabun testified that the instruments consider risk factors but will not say whether any specific person has or does not have that risk (Tr. 534). Therefore, his opinion is not based solely on them (Tr. 535). He must decide whether the person has a mental abnormality, and then whether they are more likely than not to re-offend (Tr. 536). Dr. Rabun concluded that that Mr. Spencer had a mental disorder, but that it does not meet the statutory definition for a

SVP (Tr. 536). He also concluded that Mr. Spencer is not more likely than not to re-offend (Tr. 536).

Dr. Rabun told the jurors that Mr. Spencer's mental disorder is mild mental retardation (Tr. 537). Dr. Rabun considered Mr. Spencer's family, educational, legal, medical, and psychiatric histories (Tr. 537).

Mr. Spencer's legal history included only the index offense (Tr. 537).

His educational history showed specific problems suggesting mental retardation that was verified by DOC records reflecting an I.Q. of 60 (Tr. 538). Mr. Spencer's work history was limited, and was of the type typical of persons with mental retardation (Tr. 538). Family members have described Mr. Spencer as "slow" (Tr. 538). Mr. Spencer used concrete language during his interview with Dr. Rabun, typical of mental retardation (Tr. 539). Mr. Spencer had a lot of trouble communicating ideas to Dr. Rabun (Tr. 539). Another indicator of mental retardation was that Mr. Spencer never had a bank account, he would cash his entire check and carry the money with him (Tr. 540). Mr. Spencer had a driver's license, but the test had to be read to him and he had to take the test three times (Tr. 540). During the interview with Dr. Rabun he either got the names of his ex-wives wrong or he mispronounced them (Tr. 541).

Dr. Rabun noted the importance of inquiring about an individuals sexual interests, about what arouses them, to determine any paraphilic interests; sex with children, deviant sex, or hurtful sex (Tr. 542). Mr. Spencer denied any of these interests, and described himself as heterosexual (Tr. 542). Mr. Spencer did not

describe the sexual encounter with his twelve year old step-daughter as involving a child (Tr. 542). He knew the girl's age, but described her as sexually developed (Tr. 542). Mr. Spencer told Dr. Rabun that he was not interested in pre-pubescent children (Tr. 542). Mr. Spencer did not see this as pedophilia or child molesting (Tr. 543-544). Dr. Rabun explained a tendency for mentally retarded persons to gravitate toward persons of their own mental functioning (Tr. 543). Dr. Rabun had seen that many times regarding sexual practices as well (Tr. 543).

Dr. Rabun believed that Mr. Spencer had gravitated toward the age at which he functioned (Tr. 544). He told the jurors that it was hard to tell Mr. Spencer's mental age, but from the language Mr. Spencer used and his educational history, he probably functioned at a mental age between eight and twelve (Tr. 544). Dr. Rabun did not diagnose pedophilia because he found no pattern of behavior in the charges or convictions suggesting that diagnosis (Tr. 544). Mr. Spencer had not engaged in grooming tactics or a life-style intended to garner victims (Tr. 544-545). Persons with mental retardation make poor judgments, especially in stressful situations, and it was Dr. Rabun's opinion that this is what happened with Lafonda (Tr. 545). Mr. Spencer indicated that at the time of the offense he and his wife were having problems (Tr. 545).

Dr. Rabun was aware of the other accusations against Mr. Spencer contained in the records (Tr. 545). But he did not consider those allegations in reaching his conclusions because the actuarial instruments instruct examiners not to consider such allegations (Tr. 545). The DMH examiners apply the same standard to their

own investigations (Tr. 545-546). Dr. Rabun, other doctors, the director of forensic services, and the legal counsel of DMH had discussed this issue and agreed not to consider uncharged, unconvicted crimes that are denied (Tr. 546). To do otherwise would put the DMH doctor in the position of deciding who is right and who is wrong (Tr. 546). Nothing in their training allows them to make that determination (Tr. 546).

Dr. Rabun had Lafonda's and Latequa's depositions available but the allegations contained in them did not change his opinion (Tr. 559). An agency of the government had investigated those allegations but chose not to file charges (Tr. 559). Dr. Rabun would not "re-litigate" those accusations (Tr. 559). The same was true for the allegations of Danielle even with the results of the SAFE examination (Tr. 560). Dr. Rabun acknowledged that he will consider uncharged allegations if they are admitted (Tr. 561). He was aware of Mr. Spencer's admission to molesting his natural daughter, and that he voluntarily relinquished his parental right, but he noted that Mr. Spencer had on other occasions denied molesting her (Tr. 562).

Dr. Rabun believed that there were portions of the MOSOP training that Mr. Spencer had retained (Tr. 552). When Dr. Rabun asked Mr. Spencer about dating a women with small children, Mr. Spencer interrupted to say that he would not do that because he could not be around small children (Tr. 553). Mr. Spencer advised Dr. Rabun that he had a fiance, but her children were grown (Tr. 553).

Dr. Rabun's opinion, to a reasonable degree of medical certainty, was that Mr. Spencer is not more likely than not to re-offend (Tr. 546). The actuarial instruments

indicated a low risk of re-offense, there was only a single index offense, and the pattern of behavior suggested mental retardation (Tr. 547). Mental retardation does not fit the statutory definition of a SVP because a person will engage in acts suggesting poor judgment, but it does not make the person a sexual predator (Tr. 547).

Dr. Rabun was certainly familiar with the DSM-IV criteria for pedophilia (Tr. 563). The incident involving Deneka could fall within that criteria, but Dr. Rabun excluded that finding because of his diagnosis of mild mental retardation (Tr. 566). Dr. Rabun believed that the incident was the result of poor judgment resulting from mental retardation (Tr. 566). He believed that Mr. Spencer's history was one of poor judgment, not necessarily an attraction to pre-pubescent girls based in part on the fact that their age corresponded with Mr. Spencer's mental age (Tr. 569).

Dr. Rabun also testified that he believed at one time that pedophilia came within the provisions of the statute, but has changed his opinion due to changes in the law (Tr. 548). The United States and Missouri Supreme Courts have ruled that a "mental abnormality" must include "serious difficulty controlling behavior (Tr. 548-549). Dr. Rabun's training and experience demonstrate that pedophiles are at high risk to re-offend, but they show significant control in their behavior (Tr. 549). Pedophiles adopt an entire way of life centered upon obtaining children (Tr. 549-550). They have homes to go to, and clever lines to lure children (Tr. 550). They do not immediately offend but gain the child's compliance (Tr.550). Pedophiles act in

a very calculating manner and can offend without getting caught (Tr. 550). This all suggests an ability to control behavior (Tr. 550).

Mr. Spencer objected when the State sought to cross-examine Dr. Rabun about the opinion of the United States Supreme Court in ***Kansas v. Crane*** (Tr. 585). The State argued that it was just "testing the boundaries of [Dr. Rabun's] opinion." (Tr. 585). Mr. Spencer argued that the State was simply attempting to get before the jurors what the Supreme Court said about pedophilia and behavior control, and that question was for the jurors (Tr. 585-586). The probate court replied that they have been invading the province of the jurors all day long, and overruled the objection (Tr. 586-587). The State asked, and Dr. Rabun confirmed, that the had read the opinion in ***Kansas v. Crane*** (Tr. 588). The State then asked: "Dr. Rabun, where the US Supreme Court said that an individual -- in a case where an individual is suffering from pedophilia, a mental abnormality that critically involves what a lay person might describe as a lack of control, you disagreed with that opinion, correct?" (Tr. 589). Dr. Rabun answered that he did not necessarily disagree because the United States Supreme Court qualified that it might involve a lack of control (Tr. 589). The State repeated the question, and Dr. Rabun repeated his answer (Tr. 589). The State then engaged Dr. Rabun in the following:

> Q: It certainly can be, can't it?
>
> A: Yes.
>
> Q: That's what the Supreme Court is saying.
>
> A: They're saying it can or can't be.

Q: And you're saying that it never can be.

A: I'm saying that's my opinion based upon the change.

(Tr. 589).

The State began its closing argument by reiterating the allegations made by Lafonda, Latequa, and Deneka (Tr. 610-613). It recalled the testimony of the probation and parole officers regarding Mr. Spencer's statements about those allegations (Tr. 613-614). It told the jurors that pedophilia, not mental retardation, explained Mr. Spencer's actions (Tr. 615). The State reminded the jurors in closing argument that Dr. Rabun said that pedophilia could not be a "mental abnormality" as defined by the law (Tr. 617). The State then asked: "What in the world were these laws made for?" (Tr. 617). The State answered its question: "This law is designed specifically for these kinds of people, pedophiles who repeatedly engage in sexual acts with children." It argued over objection: "The US Supreme Court has spoken to the issue. *** Pedophilia: A mental abnormality that critically involves what a lay person might describe as a lack of control." (Tr. 618). The State suggested that Dr. Rabun said that Mr. Spencer would not be a sexually violent predator even if he molested every child in Scott County (Tr. 618-619). It asked the jurors:

> How many before you're a sexually violent predator? How many before you're a sexually violent predator who needs to go the Department of Mental Health for care, control and treatment of your condition so that you can learn to manage and control your behavior that leads you to your sexual offending against children?

(Tr. 618-619). Again, the State answered its questions:

> We don't have to wait for another victim. That's why we have the law. We don't have to wait. We don't have to put anybody through what these girls testified they went through. We don't have to do that.

(Tr. 619).

The jurors returned a verdict that Mr. Spencer should be committed to the Department of Mental Health for control, care, and treatment as a sexually violent predator (L.F. 501). The probate court entered a judgment and commitment order on July 2, 2002, committing Mr. Spencer to the custody of the Department of Mental Health as a sexually violent predator (L.F. 536). Mr. Spencer filed a motion for judgment notwithstanding the verdict on July 31, 2002, which was denied the same day (L.F. 514-535, 537). Notice of appeal was filed on August 9, 2002 (L.F. 538-541).

POINTS RELIED ON

I.

The trial court abused its discretion in overruling Mr. Spencer's objection and permitting the State to question Dr. John Rabun in cross-examination about statements in the opinion of the United States Supreme Court in *Kansas v. Crane* which indicated that pedophilia is a mental abnormality that involves what a lay person might describe as a lack of control, in violation of Mr. Spencer's rights to due process of law and a fair trial before a fair and impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and Article I Sections 10 and 18(a) of the Missouri Constitution, in that the examination was improper impeachment based on a legal opinion rather than a medical opinion, and invaded the province of the jurors to determine an ultimate issue in the case, whether Mr. Spencer had serious difficulty controlling his behavior, an element necessary to find Mr. Spencer a Sexually Violent Predator.

Kansas v.Crane, 122 S.Ct. 867 (2002);

Nelson v. Waxman, M.D., 9 S.W.3d 601(Mo. banc 2000);

Powell v. Norman Lines, Inc., 674 S.W.2d 191 (Mo. App., E.D. 1984);

Rodriguez v. Suzuki Motor Corporation, 996 S.W.2d 47 (Mo. banc 1999).

II.

The Probate Court erred in permitting the State to proceed to trial using the amended definition of "predatory" which became effective after the petition against Mr. Spencer was filed, in violation of Mr. Spencer's right to be tried according to the law in effect at the time the petition was filed as set forth in Section 1.150, RSMo 2000; and applied the law retrospectively in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 13 of the Missouri Constitution, in that the revised definition impaired Mr. Spencer's constitutionally protected liberty interest because it altered the basis upon which he could be involuntarily committed to a secure facility as a sexually violent predator.

Barbieri v. Morris, 315 S.W. 2d 711 (Mo. 1958);

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 872 (Mo. banc 1993);

City of Kirkwood v. Allen, 399 S.W.2d 30 (Mo. banc 1966);

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

Section 1.150, RSMo 2000;

Section 632.480, RSMo 2000 and RSMo Cum. Supp. 2001.

III.

The probate court erred when it denied Mr. Spencer's motion to dismiss the petition due to the failure of Section 632.495, RSMo 2000 to provide for less restrictive alternatives to secure confinement, in violation of Mr. Spencer's right to Equal Protection of the law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that similarly situated persons must be treated similarly and persons other than "sexually violent predators" who are involuntarily committed to the Department of Mental Health are entitled to treatment in the least restrictive environment.

Baxstrom v. Herold, 86 S.Ct. 760, 763 (1966);

Detention of Brooks, 36 P.3d 1034, 1040 (Wash. 2001);

Ex parte Wilson, 48 S.W.2d 919, 921 (Mo. banc 1932);

In re Young, 857 P.2d 989 (Wash. 1993);

Section 552.040, RSMo 2000;

Section 556.061, RSMo 2000;

Section 630.115, RSMo 2000;

Section 632.300, RSMo 2000;

Section 632.355, RSMo 2000;

Section 632.365, RSMo 2000;

Section 632.495, RSMo 2000.

ARGUMENT

I.

The trial court abused its discretion in overruling Mr. Spencer's objection and permitting the State to question Dr. John Rabun in cross-examination about statements in the opinion of the United States Supreme Court in *Kansas v. Crane* which indicated that pedophilia is a mental abnormality that involves what a lay person might describe as a lack of control, in violation of Mr. Spencer's rights to due process of law and a fair trial before a fair and impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and Article I Sections 10 and 18(a) of the Missouri Constitution, in that the examination was improper impeachment based on a legal opinion rather than a medical opinion, and invaded the province of the jurors to determine an ultimate issue in the case, whether Mr. Spencer had serious difficulty controlling his behavior, an element necessary to find Mr. Spencer a Sexually Violent Predator.

It was Dr. Rabun's opinion that that Mr. Spencer's mental disorder, mild mental retardation, did not meet the definition of a SVP (Tr. 536). It was also his opinion that Mr. Spencer was not more likely than not to re-offend (Tr. 536). Dr. Rabun told the jurors that he did not believe that Mr. Spencer had pedophilia (Tr. 544). He believed that Mr. Spencer's mild mental retardation simply led him to

gravitate toward persons near his mental functioning and to make poor decisions (Tr. 543-544).

Dr. Hoberman, to the contrary, said that he believed that Mr. Spencer did have pedophilia (Tr. 409). He said that pedophilia caused Mr. Spencer to be predisposed to sexual behavior toward young children, and thus caused serious difficulty controlling his behavior (Tr. 416-418).

In response, Dr. Rabun testified that his experience and training demonstrated that pedophiles show significant control over their behavior (Tr. 549). A pedophiles entire way of life is centered upon obtaining children (Tr. 549-540). They have homes to go to and clever lines to lure children (Tr. 550). They do not immediately offend, but gain the child's compliance (Tr. 550). Pedophiles act in a very calculating manner and can offend without getting caught (Tr. 550). All of these things suggest an ability to control behavior (Tr. 550). Dr. Rabun therefore concluded that pedophilia did not fall within the requirements of the Supreme Courts of the United States and Missouri that the mental abnormality causes serious difficulty controlling behavior (Tr. 548-549).

The State sought to cross-examine Dr. Rabun about the opinion of the United States Supreme Court in ***Kansas v. Crane***[3] (Tr. 585). Mr. Spencer objected to the question (Tr. 585). The State argued that it was just "testing the boundaries of [Dr. Rabun's] opinion." (Tr. 585). Mr. Spencer countered that the State was simply attempting to get before the jurors what the Supreme Court said about pedophilia and

behavior control, and that question was for the jurors (Tr. 585-586). The probate court replied that they had been invading the province of the jurors all day long, and overruled the objection (Tr. 586-587).

The State asked, and Dr. Rabun confirmed, that he had read the opinion in ***Kansas v. Crane*** (Tr. 588). The State then asked: "Dr. Rabun, where the US Supreme Court said that an individual -- in a case where an individual is suffering from pedophilia, a mental abnormality that critically involves what a lay person might describe as a lack of control, you disagreed with that opinion, correct?" (Tr. 589). Dr. Rabun answered that he did not necessarily disagree because the United States Supreme Court qualified that it might involve a lack of control (Tr. 589). The State repeated the question, and Dr. Rabun repeated his answer (Tr. 589). The State then engaged Dr. Rabun in the following:

> Q: It certainly can be, can't it?
>
> A: Yes.
>
> Q: That's what the Supreme Court is saying.
>
> A: They're saying it can or can't be.
>
> Q: And you're saying that it never can be.
>
> A: I'm saying that's my opinion based upon the change.

(Tr. 589).

The State argued in closing that pedophilia, not mental retardation, explained Mr. Spencer's actions (Tr. 615). It reminded the jurors that Dr. Rabun said that

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[3] 122 S. Ct. 867 (2002).

pedophilia could not be a "mental abnormality" as defined by the law (Tr. 617). The State argued over Mr. Spencer's renewed objection: "The US Supreme Court has spoken to the issue. *** Pedophilia: A mental abnormality that critically involves what a lay person might describe as a lack of control." (Tr. 618).

It is certainly true that the State was entitled to challenge Dr. Rabun's opinion and diagnosis. ***Nelson v. Waxman, M.D.***, 9 S.W.3d 601, 604 (Mo. banc 2000). The extent and scope of cross-examination in a civil action is within the discretion of the trial court and will not be disturbed unless the abuse of discretion is clearly shown. ***Id***. This is especially true for cross-examination of expert witnesses to test qualifications, credibility, skill or knowledge, and the value and accuracy of the witness' opinion. ***Id***.

But the State's impeachment of Dr. Rabun with a statement of the United States Supreme Court did not test the doctor's qualification, skill or knowledge, or the accuracy of his opinion. The State simply pitted a statement made by judges of the Supreme Court against Dr. Rabun's professional experience and training in psychology. The State did not present evidence challenging Dr. Rabun's professional opinion, it informed the jurors that the United States Supreme Court rejected his opinion.

The abuse of the probate court's discretion is shown by comparing the impeachment of Dr. Rabun with the proper challenge of an expert's knowledge, skill, or credibility in other cases. ***Rodriguez v. Suzuki Motor Corporation***, 996 S.W.2d

47 (Mo. banc 1999), involved the roll-over of a Suzuki Samurai motor vehicle. Plaintiff's expert testified regarding the results of a computer generated analysis of the accident using a program he developed. ***Id***. at 60. Defendant was precluded from cross-examining the expert with statements he made that the computer program was flawed, failed to accurately evaluate the forces involved, and had been discredited in other studies. ***Id***. The Missouri Supreme Court found this exclusion to be an abuse of the trial court's discretion. ***Id***.

Nelson v. Waxman, M.D., ***supra***., was a medical malpractice suit. The plaintiff called another doctor to testify that the defendant breached a duty of care to plaintiff. 9 S.W.3d at 604. In qualifying that witness, plaintiff examined the doctor to establish his certification in a medical specialty. ***Id***. The defendant was permitted to cross-examine the doctor regarding his failure in the certification exam of a related specialty. ***Id***. at 604-605.

Powell v. Norman Lines, Inc., 674 S.W.2d 191 (Mo. App., E.D. 1984), involved a cross-claim by a bus company for damages to its bus in an accident. A bus company accident estimator testified regarding the depreciation in the value of the bus caused by the accident. ***Id***. 196. The defendant was permitted to cross-examine the witness with statistics regarding the frequency of accidents involving the company's busses. ***Id***. The Eastern District found this examination properly related to the value and accuracy of the witness' opinion regarding the depreciation of the bus. ***Id***.

In ***Rodriguez*** and ***Nelson***, the examination directly related to the knowledge or qualification of the expert to express the opinion given. The expert in ***Rodriguez*** testified that his opinion was derived from an analytical program he designed, but he could be cross-examined on the unreliability of opinions drawn from that program. In ***Nelson*** the cross-examination challenged the qualification of the witness on his failure to pass certification tests. These challenges went directly to the accuracy of the opinions and the weight to be given to them. The cross-examination in ***Powell*** did not go to the qualifications of the expert, but it did go to the basis of his opinion. His estimate of the amount of damage to the bus was challenged by evidence demonstrating routine damage to the company's busses.

The State's impeachment of Dr. Rabun was of a totally different, and improper, character. The State did not challenge his credentials or his knowledge or training. It did not challenge Dr. Rabun with the conclusions of other psychiatrists or psychologists, or the results of other scientific studies. A statement made by United States Supreme Court was totally foreign to Dr. Rabun's qualifications or the basis of his opinion. It simply informed the jurors that the highest court in the country made a contrary statement regarding a mental disease.

The jurors had to decide whether Mr. Spencer has serious difficulty controlling his behavior. They were sitting in a courtroom inside the county courthouse. They were watching a case presided over by a judge. They heard Dr. Rabun testify that pedophilia did not cause serious difficulty controlling behavior as

defined by the law. They also heard the prosecutor say, both during cross-examination and closing argument, that the United States Supreme Court said in a published opinion that pedophilia does involve serious difficulty controlling behavior. The jurors would have concluded that the symptoms of the disease had been judicially determined by the Supreme Court, the highest judicial authority in the country. They were told by the State to reject Dr. Rabun's opinion not due to a lack of qualification or error in his assessment, not on a contrary opinion drawn from psychiatric or psychological science, but because the contrary opinion has been expressed by the United States Supreme Court.

Jurors are advised of the law by approved instructions. No instruction has been approved to inform the jurors that pedophilia causes serious difficulty controlling behavior. This is a factual question of medical opinion. This factual question was contested between Dr. Rabun and Dr. Hoberman. This is not a question of law. But Mr. Spencer's jurors were "instructed" by the State that this question has already been answered by the United States Supreme Court. The probate court abused its discretion in permitting the State to cross-examine Dr. Rabun in that manner, and to argue the matter to the jurors. The judgment of the probate court must be reversed and the cause remanded for a new trial.

II.

The Probate Court erred in permitting the State to proceed to trial using the amended definition of "predatory" which became effective after the petition against Mr. Spencer was filed, in violation of Mr. Spencer's right to be tried according to the law in effect at the time the petition was filed as set forth in Section 1.150, RSMo 2000; and applied the law retrospectively in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 13 of the Missouri Constitution, in that the revised definition impaired Mr. Spencer's constitutionally protected liberty interest because it altered the basis upon which he could be involuntarily committed to a secure facility as a sexually violent predator.

The State filed its petition to declare Mr. Spencer a sexually violent predator, and to confine him in a secure facility, on January 17, 2002 (L.F. 14-28). At that time, predatory acts were those "directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." Section 632.480(3), RSMo 2000. The Multidisciplinary Team unanimously concluded that Mr. Spencer did not meet this definition, and was not a sexually violent predator (Tr. 514-515, 517-518). But the Prosecutor's Review Committee voted that Mr. Spencer is a sexually violent predator, and the State went forward with the petition (L.F. 19).

Gerald Hoeflein, a Department of Corrections employee who prepares End of Confinement reports, applied this definition to his evaluation (Tr. 8, 10, 13-14). He agreed that the alleged victims of Mr. Spencer's abuse were his natural daughter and step-daughters, not strangers (Tr. 32-33, 35). But he suspected that since the abuse of his step-daughters occurred shortly after his marriages that the marriages may have been for the primary purpose of gaining access to the children (Tr. 35).

Three members of the Multidisciplinary Team, Joseph Parks, Jonathan Rosenboom, and Mark Altomari, testified at the probable cause hearing that they each concluded that Mr. Spencer did not fit the criteria of a SVP (Tr. 53, 55, 65, 68, 78, 79). Each concluded that Mr. Spencer's conduct did not fit the definition of "predatory" because the alleged abuse was all interfamilial; with a natural daughter or step-daughters during a marriage (Tr. 56, 68, 79). Dr. Parks agreed that there was speculation in the records that the marriages were to gain access to the girls, but he saw no evidence of that (Tr. 56-57). Dr. Rosenboom testified that the relationships started out as a usual "father" type relationship and therefore could not have been for the primary purpose of victimization (Tr. 68-69). Dr. Altomari agree (Tr. 79). He was aware that an ex-wife believed that was the purpose of the marriage, but Dr. Altomari noted that she had an ax to grind (Tr. 80). Each doctor based their opinion on the definition of "predatory" contained in the statute (Tr. 63, 69, 79). The court took judicial notice that the other members of the Multidisciplinary Team also voted that Mr. Spencer did not fit the definition of a SVP (Tr. 85).

But the court found probable cause that Mr. Spencer was potentially a SVP (Tr. 85, L.F. 131-133). Dr. John Rabun conducted the SVP evaluation ordered by the probate court (L.F. 132-133, 134-146). Dr. Rabun concluded that Mr. Spencer's alleged offenses did not suggest that he promoted or established relationships for the primary purpose of victimization, and therefore did not fit the definition of "predatory" under the statute (L.F. 146). He concluded that Mr. Spencer did not suffer a mental abnormality predisposing him to commit sexually violent offenses (L.F. 146). Dr. Rabun concluded, within a reasonable degree of medical certainty, that Mr. Spencer was not more likely than not to engage in acts of predatory sexual violence if not confined in a secure facility (L.F. 146).

After the probable cause hearing but before the trial, the legislature amended the definition of "predatory" to include acts against family members (Tr. 110). The State filed a motion to apply the new definition in the case against Mr. Spencer (L.F. 227-229). It argued that a statutory provision that is remedial or procedural operates retrospectively unless the legislature specifies otherwise, and that statutes enacted for the protection of life or property, or are conducive to the public good are considered remedial (L.F. 227-228). The State believed that the new definition came within these principles (L.F. 228, Tr. 111). The State suggested to the trial court that the legislature had simply closed a "loophole" in the law (Tr. 111). Mr. Spencer believed that he should face trial under the statute in effect at the time the petition was filed against him (Tr. 111-112). The court permitted the new "predatory" definition to be applied against Mr. Spencer at trial (Tr. 112). The

revision defined "predatory" as "acts directed towards individuals, including family members, for the primary purpose of victimization." Section 632.480(3), RSMo Cum. Supp. 2001.

A sexually violent predator is one who suffers 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. Section 632.480(5). The State asked Dr. Hoberman his opinion whether "the activities that [Mr. Spencer] has engaged in are predatory." (Tr. 440). It was his opinion that the acts were predatory as defined by the revised statute (Tr. 440-442). Dr. Hoberman paraphrased Lafonda that it seemed that Mr. Spencer married her mother "for the purpose of getting with the girls and that he would just have sex with her mother for show." (Tr. 442).

Mr. Spencer was prepared to call Drs. Rosenboom, Gowdy, and Parks to testify that Mr. Spencer did not fit the "old" predator definition (Tr. 512-513). He was not allowed to do so because the probate court allowed the case to proceed under the "new" definition (Tr. 512-513). Mr. Spencer was allowed to make an offer of proof (Tr. 513).

Dr. Parks was the medical director of the Psychiatric Division, Comprehensive Psychiatric Services, of the Department of Mental Health, and a member of the Multidisciplinary Team that reviewed Mr. Spencer's case (Tr. 514-515). The team first reviewed whether Mr. Spencer's acts were predatory, using the "old" definition of relationships established or promoted for the primary purpose of victimization (Tr. 517). The team concluded that Mr. Spencer's acts did not fit this

definition because all of the alleged victims were interfamilial (Tr. 518). Nor could the team clearly say that the relationships had been established for the primary purpose of victimization (Tr. 518).

Instruction No. 5 informed the jurors that they had to find that Mr. Spencer's mental abnormality makes him "more likely than not to engage in predatory acts of sexual violence if he is not confined to a secure facility." (L.F. 496). This instruction defined the term "predatory" as "acts directed towards individuals, including family members, for the primary purpose of victimization." (L.F. 496). Mr. Spencer offered Instruction No. D defining "predatory" using the definition in effect at the time the petition was filed against him, "acts directed toward strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization," but the probate court refused to submit this instruction to the jurors (L.F. 506).

The Missouri legislature provided Mr. Spencer the right to be tried pursuant to the law in effect at the time the petition was filed against him. "[N]or shall any law repealing a former law, clause or provision abate, annul or in any wise affect any proceedings had or commenced under or by virtue of the law so repealed, but the same is as effectual and shall be proceeded on to final judgment and termination as if the repealing law had not passed, unless it is otherwise expressly provided." Section 1.150, RSMo 2000. The due process clauses of the United States and Missouri constitutions guarantee that right. United States Constitution, Fourteenth Amendment; Missouri Constitution, Article I, Section 13.

The Supreme Court of Missouri stated in ***City of Kirkwood v. Allen***, 399 S.W.2d 30, 35 (Mo. banc 1966), "It has been held that what is now § 1.150 was 'intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed.'" (citation omitted). Section 1.150 therefore requires that the action initiated against Mr. Spencer under the repealed statute had to continue to judgment under the provision of that statute, regardless of the subsequent amendment of the definition of "predator." *See also*, ***Atchison v. Retirement Board of Police Retirement System of Kansas City***, 343 S.W.2d 25 (Mo. banc 1960). The probate court erred in permitting the State to initiate the petition against Mr. Spencer under the law defining "predatory" as acts "directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization," Section 632.480(3), RSMo 2000, but then submit the case to the jurors and achieve Mr. Spencer's confinement in a secure facility premised on predatory "acts directed towards individuals, including family members, for the primary purpose of victimization." Section 632.480(3), RSMo Cum. Supp. 2001. The application of the revised statutory definition of the crime not only violated Section 1.150, but it unquestionably prejudiced Mr. Spencer at trial.

A genuine question exists whether the State could have persuaded the jurors that Mr. Spencer's acts were "predatory" under the old definition, a necessary element in the jury's commitment finding. Mr. Hoeflein did not testify at trial, but testified at the probable cause hearing that he suspected that Mr. Spencer's acts were

predatory because while they were not directed at strangers, the marriages may have been for the primary purpose of gaining access to the children for victimization (Tr. 32-33, 35). This fit the repealed definition for predatory acts "directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." While Dr. Hoberman testified at trial that he concluded that Mr. Spencer's acts were predatory under the "new" definition, his testimony also echoed Mr. Hoberman's suspicion that the relationships were established to for the primary purpose of victimizing the girls (Tr. 440-442).

Mr. Spencer had extensive evidence with which to counter Mr. Hoeflein and Dr. Hoberman. He was prepared to call Dr. Rosenboom, Dr. Gowdy, and Dr. Parks to testify that his acts did not meet the "old" definition of predatory (Tr. 512-513). These doctors indicated that the acts did not meet the definition because they were interfamilial (Tr. 56, 68). Dr. Rosenboom testified at the probable cause hearing that the relationships started out as a usual "father" type relationship and therefore could not have been for the primary purpose of victimization (Tr. 68-69). Dr. Parks testified at the probable cause hearing that he saw no evidence to support the speculation that the marriages were entered into for the purpose of gaining access to the children (Tr. 56-57). He testified during the offer of proof that none of the members of the Multidisciplinary Team could say that the relationships were entered into for the primary purpose of victimization (Tr. 518). Thus, the stage was clearly set to present the question to the jurors before they could find that Mr. Spencer was in need of confinement as a sexually violent predator. But because the probate court

permitted the State to proceed on the revised definition, this evidence and question were never presented to or answered by the jurors.

The State argued in favor of applying the new definition by suggesting that the SVP statutes were enacted for the protection of life, property, or "public good," and were therefore remedial (L.F. 227-228). From this it argued that the revision of the definition of "predatory" after the State filed its petition against Mr. Spencer could be applied retrospectively (L.F. 227-229). The State cited ***City of St. Louis v. Carpenter***, 341 S.W.2d 786 (Mo. 1961), and ***Barbieri v. Morris***, 315 S.W.2d 711 (Mo. 1958), in support of this argument (L.F. 227).

The Missouri Supreme Court stated in ***City of St. Louis v. Carpenter*** that statutes enacted for the protection of life and property, or which introduce some new regulation conducive to the public good are generally given liberal construction. 341 S.W.2d at 788. The Court further held in ***Callahan v. Cardinal Glennon Hospital***, 863 S.W.2d 852, 872 (Mo. banc 1993), also cited by the State in its motion, that a statutory provision that is remedial or procedural operates retrospectively unless the legislature expressly states otherwise. This superficial argument by the State does not permit retrospective application of the revised "predatory" definition to trump Mr. Spencer's liberty interest.

The Missouri Supreme Court also said in ***Callahan*** that statutory provisions which are substantive are generally presumed to operate prospectively. 863 S.W.2d at 872. The definition of a "sexually violent predator" subject to secure confinement

under Chapter 632 is clearly substantive rather than procedural. Retrospective laws are generally defined as those which take away or impair vested rights acquired under existing law or attach a new disability in respect to transactions or considerations already past. ***Barbieri***, 315 S.W.2d at 714. Mr. Spencer has a fundamental and constitutional liberty interest which is taken away by commitment under the sexually violent predator statutes. ***Kansas v. Hendricks***, 117 S.Ct. 2072, 2079 (1997). That interest was put in jeopardy when the State filed its petition. Application of the subsequently revised definition attached a new disability to Mr. Spencer's liberty in a proceeding already underway. Applying the new definition of a "sexually violent predator" to Mr. Spencer in a proceeding already underway violated Section 1.150 and Article I, Section 13 of the Missouri Constitution.

The State's argument suggests an alarming analogy. ***Barbieri*** and ***City of St. Louis v. Carpenter*** involved revocations of driver's licenses. Operating a motor vehicle is a privilege, not a right. ***Barbieri***, 315 S.W.2d at 713. An individual's liberty is a constitutionally guaranteed right. But the State seeks to equate a constitutionally vested liberty interest with a statutorily granted privilege to drive a car. This comparison is vacuous.

The probate court erred in allowing the case to proceed under the revised definition of "predatory." Mr. Spencer was prejudiced because he lost a substantial defense to the allegations under the revised definition. The judgment of the probate

court must be reversed and the cause remanded for a new trial applying the definition of "predatory" in effect at the time the State filed the petition against Mr. Spencer.

III.

The probate court erred when it denied Mr. Spencer's motion to dismiss the petition due to the failure of Section 632.495, RSMo 2000 to provide for less restrictive alternatives to secure confinement, in violation of Mr. Spencer's right to Equal Protection of the law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that similarly situated persons must be treated similarly and persons other than "sexually violent predators" who are involuntarily committed to the Department of Mental Health are entitled to treatment in the least restrictive environment.

Mr. Spencer filed a motion to dismiss the petition because Section 632.495, RSMo 2000, fails to allow for confinement of a person involuntarily committed under the statute in an environment less restrictive than a secure facility (L.F. 191-193). He argued that the statute deprived him of equal protection of the law because other persons involuntarily committed pursuant to Chapter 632 must be confined in the least restrictive environment appropriate for their treatment and control (L.F. 192).

Section 632.495 provides that a person determined to be a sexually violent predator is committed to the custody of the Department of Mental Health for control, care and treatment. That section further demands: "At all times, persons committed for control, care and treatment by the department of mental health

pursuant to sections 632.480 to 632.513 shall be kept in a secure facility designated by the director of the department of mental health and such persons shall be segregated at all times from any other patient under the supervision of the director of the department of mental health." ***Id***.

Chapter 632 sets out Missouri's Comprehensive Psychiatric Services. Persons other than those defined as "sexually violent predators" can be involuntarily civilly committed under that chapter if "as a result of a mental disorder, [the person] presents a likelihood of serious harm to himself or others." Section 632.300, RSMo 2000. If a person is found to present a likelihood of serious harm to himself or others as the result of a mental illness, the person is "detained for involuntary treatment in the least restrictive environment for a period not to exceed one year or for outpatient detention and treatment under the supervision of a mental health program in the least restrictive environment for a period not to exceed one hundred eighty days." Section 632.355, RSMo 2000. It is further required by Chapter 632: "Notwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department, the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting." Section 632.365, RSMo 2000. Indeed, the Missouri legislature has granted certain entitlements to persons in the custody of the Department of

Mental Health, among them the right "[t]o be evaluated, treated or habilitated in the least restrictive environment." Section 630.115(11), RSMo 2000.

Although not specifically raised in Mr. Spencer's motion, it is instructive to review the treatment under Chapter 552 of persons found not guilty of a crime by reason of a mental disease or defect. When a criminal defendant is tried and acquitted on the basis of a mental disease or defect excluding responsibility, the defendant is ordered into the custody of the director of the Department of Mental Health. Section 552.040.2, RSMo 2000. Except for persons charged with dangerous felonies as defined by Section 556.061, murder in the first degree, or sexual assault, the defendant may be permitted immediate conditional release from custody of the director. ***Id***. In all circumstances, any person found not guilty by reason of a mental disease or defect can ultimately be considered for care, control and treatment outside of a secure facility:

> Notwithstanding section 630.115, RSMo any person committed pursuant to subsection 2 of this section shall be kept in a secure facility until such time as a court of competent jurisdiction enters an order granting a conditional or unconditional release to a nonsecure facility.

Section 552.040.4.

All of these statutes deal with persons committed to the Department of Mental Health due to a mental condition. Persons with a mental disorder rendering them dangerous to themselves or others and criminal defendants found not guilty due to a mental disease or defect excluding responsibility are permitted by statute to be

confined, cared for, and treated in the least restrictive environment appropriate. But to the contrary, persons with a mental abnormality "affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," Section 632.480(2), can only be confined, cared for, and treated in a secure facility. No less restrictive alternative is permitted by Section 632.495.

In deciding whether a statute violates equal protection, this Court must decide whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. ***Etling v. Westport Heating and Cooling Services, Inc.***, 92 S.W.3d 771-774-775 (Mo. banc 2003). If so, the classification is subject to strict scrutiny and the Court must determine whether it is necessary to accomplish a compelling state interest. ***Id***. If not, review is limited to whether the classification is rationally related to a legitimate state interest. ***Id***.

Equal protection does not require that all persons be dealt with identically, but does require that a distinction made has some relevance to the purpose for which the classification is made. ***Baxstrom v. Herold***, 86 S.Ct. 760, 763 (1966). And certainly, a legislature is free to recognize degrees of harm and may confine its restrictions to those classes where the need is deemed the clearest. ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, 60 S.Ct. 523, 526 (1940). But, "[e]qual protection of the law means equal security or burden under the

laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place or under like circumstances." ***Ex parte Wilson***, 48 S.W.2d 919, 921 (Mo. banc 1932). The statute in ***Pearson*** distinguished for special treatment those persons who by habitual course of misconduct in sexual matters had evidenced an utter lack of power to control their sexual impulses from all persons guilty of sexual misconduct or having strong sexual tendencies. ***Id***. 525-526. Mr. Spencer has been denied equal protection because he is treated differently under Section 632.495 from other persons rendered dangerous to others by a mental disorder; persons or a class of persons in the same place and under like circumstances as he.

The Supreme Court of the State of Washington found an equal protection violation in the failure of that state's SVP statute to provide care and treatment in the least restrictive environment appropriate, a requirement of its general civil commitment law. ***In re Young***, 857 P.2d 989 (Wash. 1993). The Washington statutes were very similar to those in Missouri. Washington defined a SVP as a person "who has been convicted of or charged with a crime of sexual violence and who suffers a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." ***Id***. at 993. A mental abnormality is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal

sexual acts." ***Id***. A person found to be a SVP under the Washington statutes is committed to a facility for control, care and treatment until the person is safe to be at large, and limits the treatment centers to which a person is committed to mental health facilities located within correctional institutions. ***Id***.

This limitation was inconsistent with the Washington statutes controlling general involuntary civil commitments which required consideration of less restrictive alternatives as a precursor to confinement. 857 P.2d at 1012. The Washington Supreme Court held, "The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so." ***Id***. The Court found no justification for considering less restrictive alternatives under the general commitment statutes, but not considering them under the SVP commitment statutes. ***Id***. The Washington Supreme Court explained the basis for its judgment:

> Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under RCW 71.05 [the general civil commitment statute], it is necessary to account for these differences by considering alternatives to total confinement. We therefore hold that equal protection requires the State to comply with the provisions of RCW 71.05 as related to the consideration of less restrictive alternatives.

Id.

By the same token, equal protection requires application of Section 632.365, "[n]otwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department [of mental health], the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting," and Section 630.115, "[e]ach patient, resident or client shall be entitled to the following without limitation: [t]o be evaluated, treated or habilitated in the least restrictive environment," to persons committed under Section 632.495.

The State will in all likelihood suggest that the Missouri statutes differ from the Washington statutes in a way sufficient to distinguish the result in ***Young*** and thus survive an equal protection challenge. This suggestion would be wrong.

The State may suggest that the Missouri legislature has exercised its authority under ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, ***supra***., to recognize degrees of harm and confine its restrictions to those classes where the need is deemed the clearest. Missouri defined a "sexually violent predator" as any person who suffers 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*. Section 632.480(5). The State may suggest that this emphasized qualifier is the legislature's recognition of a special degree of harm justifying

different treatment. This language was not contained in the statute considered by the Washington Supreme Court in ***Young***.

But the Washington legislature added that exact language to its statute in response to the decision in ***Young***. *See* ***Detention of Ross***, 6 P.3d 625, 628 (Wash. App., 2000). The respondent in ***Ross*** was not allowed to present evidence that care, control and treatment could be provided to him in a less restrictive alternative to secure confinement. ***Id***. The State argued on appeal that the new language of the statute, "if not confined in a secure facility" precluded admission of that evidence. ***Id***. at 629. The Washington appellate court disagreed. Because the State was required to establish that the respondent was more likely than not to reoffend if not confined in a secure facility, he was entitled to present evidence to rebut the necessity of secure confinement. ***Id***.

The Washington legislature again responded by amending the statute to allow a person committed as a sexually violent predator to present evidence of a less restrictive alternative only at an annual release hearing following commitment, but not at trial. ***Detention of Brooks***, 36 P.3d 1034, 1040 (Wash. 2001). The Washington Supreme Court re-affirmed its holding in ***Young*** that "persons confined under chapter 71.05 RCW and chapter 71.09 RCW are similarly situated with respect to the legitimate purposes of the laws." ***Id***. at 1042. The Court accepted the State's argument that there were good reasons for treating SVPs differently from mentally ill persons because SVP are generally more dangerous. ***Id***. But the Court

also found that there was no rational basis to permit SVPs to present evidence of less restrictive alternatives only at annual reviews, and not at trial for the jurors' consideration whether the person was even an SVP at all. ***Id***. at 1043-1044. The Washington Supreme Court held, "As we did in *Young* when we found an equal protection violation, we remand [the] cases for new commitment trials at which LRAs to confinement may be considered." ***Id***. at 1044.

There is no rational basis for the Missouri statutes to permit less restrictive alternatives to persons involuntarily committed on the basis of "a mental disorder [that] presents a likelihood of serious harm to himself or others," but denies that consideration to persons with a mental abnormality "constituting … a menace to the health and safety of others." The failure of chapter 71.05 RCW and chapter 71.09 RCW to permit consideration of less restrictive alternatives to secure confinement violates equal protection of the laws. The statute is unconstitutional, and the probate court erred in failing to dismiss the petition filed against Mr. Spencer. The judgment must be reversed and Mr. Spencer released from confinement.

CONCLUSION

Because the probate court abused its discretion in permitting the State to cross-examine Dr. Rabun with language used in a United States Supreme Court opinion, and to argue the matter to the jurors, as set out in Point I, the judgment of the probate court must be reversed and the cause remanded for a new trial. Because the probate court erred in allowing the case to proceed under the revised definition of "predatory," as set out in Point II, the judgment of the probate court must be reversed and the cause remanded for a new trial applying the definition of "predatory" in effect at the time the State filed the petition against Mr. Spencer. Because Section 632.495 violates equal protection by failing to allow consideration of less restrictive alternatives to secure confinement, as set out in Point III, the judgment against Mr. Spencer must be reversed and he must be released from confinement.

Respectfully submitted,

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Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

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 Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 12,724 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March, 2003. 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 _____, 2003, to James R. Layton, State Solicitor, Office of Attorney General, 207 W. High, Supreme Court Building Jefferson City, Missouri 65101.

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Emmett D. Queener

APPENDIX

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