IN THE
MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

No. SD25113

IN THE MATTER OF THE CARE AND TREATMENT
OF NELVIN SPENCER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

RESPONDENT=S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

STEVEN C. REED
Assistant Attorney General
Mo. Bar No. 40616
P.O. Box 899
Jefferson City, MO 65102
573-751-4418 / 573-751-1336
(Facsimile)

ANDREA K. SPILLARS
Assistant Attorney General
Mo. Bar No. 36812
P.O. Box 899
Jefferson City, MO 65102

573-751-4418 / 573-751-1336
(Facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Error! No table of authorities entries found.

Other Authorities

Error! No table of authorities entries found.

RESPONSE TO JURISDICTIONAL STATEMENT

In his third Apoint relied on,@ appellant Spencer claims that the Missouri=s sexually violent predator statute, '' 632.480-513, RSMo. 2000, is unconstitutional as a violation of the equal protection clauses of the Missouri and United States constitutions. That issue has been raised repeatedly by persons found to be sexually violent predators. This court transferred four such cases to the Missouri Supreme Court; that court remanded each for a new trial in light of *In re Thomas*, 74 S.W. 3d 789 (Mo. banc 2002), without addressing the equal protection claim. *In re Francis*, 100 S.W. 3d 807 (Mo. banc 2003) (No. SD24198); *In re O=Hara*, 100 S.W. 3d 808 (Mo. banc 2003) (No. SD2441); *In re Daily*, 100 S.W. 3d 809 (Mo. banc 2003) (No. SD24402); *In re Shafer*, 100 S.W. 3d 819 (Mo. banc 2003) (No. SD24046). The statute was implicitly held to be constitutional by the Missouri Supreme Court=s decision to remand each case for a new trial under that statute **B** the same step that court took in *Thomas*, despite the assertion of the same equal protection argument. The Supreme Court=s actions suggest that Spencer=s equal protection argument is not colorable.

STATEMENT OF FACTS

Procedural History

Nelvin Spencer pleaded guilty on April 3, 1996, to one count of statutory rape in the first degree. L.F. 128-129. Prior to Spencer's release from the Department of Corrections on January 19, 2001, the Department evaluated Spencer and concluded that he appeared to meet the criteria as a sexually violent predator. L.F. 21-28. As a result, the case was referred to the Attorney General=s Office. The Multidisciplinary Team voted that Spencer did not meet criteria as a sexually violent predator. L.F. 125. The Prosecutor's Review Committee concluded on January 16, 2001, that Spencer did meet the criteria as a sexually violent predator. L.F. 19.

On January 17, 2002, the Attorney General filed a petition in the probate division of the circuit court for Scott County to commit appellant to the Missouri Department of Mental Health. L.F. 14-28. At the time the petition was filed, the definition of "predatory" set forth in ' 632.480 included "acts directed toward strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." Tr. 32.

At probable cause hearing, Gerald Hoeflein of the Department of Corrections testified in support of the State's petition. Hoeflein agreed that Spencer's victims of sexual abuse were his natural daughter and step-daughters, but he suspected that Spencer had entered into relationships with women in order to molest their children. Tr. 23. In his defense, Spencer produced the three members of the MDT, each of whom acknowleged that Spencer had molested several children. Dr. Joseph Parks, M.D., testified that although there was evidence that Spencer had molested numerous children, he voted Spencer was not a sexually violent predator because all Spencer's victims were intrafamilial, either biological or stepdaughters. Tr. 56. Dr. Jonathan Rosenboom, Psy. D., testified that Spencer was not a sexually violent predator because he molested his natural and stepdaughters and he could not establish that the relationships were primarily for the purpose of victimization. Tr. 68. Dr. Mark Altomari, Ph.D., of the MDT also testified for Spencer opining that Spencer did not meet the "predatory" prong because his victims were primarily children who were either his children or stepchildren. Tr. 79.

The Court found probable cause to believe that Spencer was a sexually violent predator and ordered the Department of Mental Health to conduct an evaluation. Tr. 85, L.F. 131-133. The Court=s order finding probable cause and ordering the Deparment of Mental Health to conduct an evaluation defined predatory as: "acts directed toward strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.@ L.F 132.

Dr. John Rabun conducted the DMH evaluation and concluded that Spencer's victimization did not meet the definition of "predatory" under the statute. L.F. 146. Dr. Rabun concluded that Mr. Spencer did not meet criteria as a sexually violent predator. L.F. 146.

Effective August 28, 2001, the legislature amended the definition of "predatory" to include acts directed toward family members. Tr. 110. Prior to the introduction of evidence at trial on July 1, 2002, the State moved that the definition of predatory to be utilized during the trial should be the new definition effective August 28, 2001. The Court sustained that motion and applied the new definition of predatory. Tr. 112.

History of Spencer=s Sexual Offenses

Four of Spencer=s victims testified at trial. Lafonda Moore was born in 1974. Tr. 298. Her sister is Latequa Moore. Their mother, Glenda Moore, married Nelvin Spencer in 1984. Tr. 299-300. Nelvin Spencer would enter Lafonda=s room late at night, put his hands down her panties, open her vagina so he could ejaculate or have sex with her. Tr. 301. Spencer inserted his penis into her vagina. Lafonda was ten years old the first time this happened. Tr. 301. Lafonda told her mother what was happening to her and Spencer whipped Lafonda with a belt. Tr. 302. Lafonda also saw Spencer rub his penis across her 8 year old brother's mouth. Tr. 303. Lafonda told people at the Division of Family Services about her and her sister's molestation by Spencer and she was removed from her home and from her mother and placed in foster care. Tr. 303. Lafonda recanted her allegations of molestation and rape by Spencer so she could return home to be with her mother. Tr. 305. The sexual abuse by Spencer continued and Lafonda moved out of the home when she was 15 years old.

Latequa Moore was twenty-three at the time of trial. Tr. 312. She was seven or eight when her mother, Glenda Moore, married Nelvin Spencer and Spencer came to live with them. Tr.

313. After Spencer moved into her home, Spencer would enter her room and put his penis between her legs and into her vagina. Tr. 315. Latequa was about nine when Spencer first molested her. Tr. 316. Latequa testified that the molestation occurred more than five times. Tr. 316.

Deneka Daniels was eighteen at the time of trial. Tr. 320. In 1995, when Deneka was about three years old, Nelvin Spencer married her mother, Henrietta Coleman, Spencer's second wife. Tr. 321. Spencer began molesting Deneka when she was about four years old. Tr. 322. Spencer would expose himself to her, make her touch his penis, and later had sexual intercourse with her. Tr. 323. The sexual intercourse began when Deneka was about five years old. Tr. 323. Sexual contact continued until Deneka was twelve. Tr. 323. Deneka did not report that Spencer was molesting her until she was twelve because she was ashamed and scared. Tr. 324. Spencer threatened Deneka that if she ever told her mother about the molestation, he would do something bad or kill her. Tr. 328.

Danielle Daniels was fourteen at the time of trial. Tr. 329. Spencer married her mother, Henrietta Coleman, in 1995, when Danielle Daniels was about three years old. Tr. 330.

Spencer inserted his penis into Danielle's vagina on several occasions. Tr. 331. Spencer molested Danielle from age three to age seven. Tr. 332. Danielle didn't tell anyone about the molestation because she was scared. Tr. 333. Spencer threatened Danielle and her sister, Deneka, that if they told anyone he would kill them or do bad things to them. Tr. 333.

The testimony of the victims was confirmed by medical evidence. Linda Krantz is a nurse practitioner who has performed hundreds of SAFE exams. Krantz performed SAFE exams on Deneke and Danielle Daniels in 1996. Tr. 335-337. Krantz indicated both girls showed trauma to the vaginal opening consistent with sexual abuse. Tr. 338 and 340-341.

Fact Witnesses

Deborah Collins of Probation and Parole testified on behalf of the State that Spencer admitted to sexually molesting Deneke and Danielle Daniels, his stepdaughters from his third marriage. Tr. 349. Spencer also admitted to Collins that he sexually abused his two year old natural daughter. Tr. 349. Spencer also admitted to Collins that he had sexually abused two of his stepdaughters from his second marriage. Tr. 350.

Melba Tucker was the regional sex offender specialist with probation and parole when Spencer pleaded guilty to the statutory rape of Deneke Daniels. Tr. 365. Tucker testified that Spencer admitted sexual contact with Deneke Daniels. Tr. 368. Spencer admitted to her that he had sexually molested his natural daughter when she was two years old. Tr. 369.

Expert Witnesses

Dr. Harry Hoberman testified for the State. Tr. 388. Dr. Hoberman diagnosed Spencer with pedophilia based on a pattern of sexual molestation of prepubescent children over a thirteen to fourteen year period. Tr. 409. Dr. Hoberman testified that Spencer's pedophilia was a mental abnormality as defined by the law. Tr. 416. Dr. Hoberman testified that Spencer's mental abnormality of pedophilia made Spencer more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. Tr. 424-425, 440. Dr. Hoberman testified that Spencer's victimization of his children and stepchildren was "predatory" as defined under the new statutory definition which includes family members. Tr. 440-441.

Dr. John Rabun, a psychiatrist for the Department of Mental Health, testified on behalf of Spencer. Tr. 524-525. Dr. Rabun testified that Spencer suffered from mild mental retardation, but that this was not a mental abnormality. Dr. Rabun did not consider the molestation of Spencer's natural daughter, or his stepdaughters, Danielle, Lafonda and Latequa, in his opinions about Spencer, purportedly because legal counsel for the Department of Mental Health told him not to consider uncharged,

unconvicted crimes that are denied by the perpetrator. Tr. 546. Dr. Rabun testified that Spencer's history of molesting children was best explained by "poor judgment" brought about by mild mental retardation. Tr. 566-569. Though Dr. Rabun did not diagnose pedophilia, on direct examination by Spencer, he opined that he at one time believed that pedophilia could be a mental abnormality. Tr. 548. Dr. Rabun testified that as a result of recent case law from the United States Supreme Court and the Missouri Supreme Court, he now held the opinion that pedophilia could never be a mental abnormality. Tr. 547.

Dr. Rabun agreed on cross-examination by the State that pedophilia "can be" a mental abnormality, but nonetheless, in his opinion, pedophilia can never be a mental abnormality. Tr. 589. The cross-examination of Dr. Rabun concluded with Dr. Rabun stating that even if Nelvin Spencer had molested every child in Scott County, Dr. Rabun would say that Nelvin Spencer is not a sexually violent predator because pedophiles have an extreme degree of control and planning. (Tr. 592-593).

Spencer subpoened the Multidisciplinary Team, including Dr. John Rosenboom, Psy. D., Dr. Richard Gowdy, Ph. D. and Dr. Joseph Parks, M.D. to testify that in their opinion, Spencer was

not a sexually violent predator utilizing the "old" definition of "predatory". Tr. 513. Spencer elected not to present their testimony to the jury in light of the Court's ruling that the "new" definition of "predatory" applied in this case and instead, Spencer made an offer of proof indicating what the MDT member's testimony would have been if the Court was using the old definition. Tr. 513. Dr. Parks testified in the offer of proof on behalf of the MDT members that "we decided that he did not meet that definition in that his victims...were all interfamilial. And we could not clearly say that the relationships had been established or promoted for the primary purpose of victimization". Tr. 518.

The jurors returned a verdict that Spencer should be committed as a sexually violent predator. L.F. 501.

POINTS RELIED ON

I.

Because appellant Spencer is unable to identify any person who meets the definition of a sexually violent predator who would be treated differently under the general civil commitment statute, and because there is a constitutionally adequate basis for requiring the custodial treatment of those meeting the definition of Asexually violent predator@ but not necessarily all other persons with mental abnormalities that render them dangerous, his equal protection argument fails. (Responds to appellant=s point III.)

II.

Neither ' 1.150 or the Missouri Constitution were violated by the trial court=s application of the amended definition of Apredatory@ in effect at the time of appellant=s trial because appellant Spencer acquired no substantive, vested rights under the definition of Apredatory@ as originally enacted because the sexually violent predator statute requires that the jury determine whether future sexually violent acts will be predatory and there was no repeal but simply a procedural clarification to the definition of Apredatory.@

III.

The trial court did not clearly abuse its discretion in overruling Mr. Spencer's objection to the State's cross-examination of Appellant's expert witness, Dr. Rabun, regarding his interpretation of recent case law from the United States Supreme Court and the Missouri Supreme Court which Dr. Rabun contended on direct examination had resulted in a change of his opinion about what types of mental disorders can be a mental abnormality causing serious difficulty controlling behavior.

ARGUMENT

I.

Because appellant Spencer is unable to identify any person who meets the definition of a sexually violent predator who would be treated differently under the general civil commitment statute, and because there is a constitutionally adequate basis for requiring the custodial treatment of those meeting the definition of Asexually violent predator@ but not necessarily all other persons with mental abnormalities that render them dangerous. his equal protection argument fails. (Responds to appellant=s point III.)

Appellant Spencer=s third point **B** his assertion that the sexually violent predator statute, **''** 632.480-513, RSMo. 2000 **B** violates the equal protection clauses of the Missouri and United States constitutions **B** is necessarily taken up first, for if the statute is unconstitutional, as he claims, then the remaining points are entirely irrelevant. By placing that argument last, and by filing his appeal in this court rather than in the Missouri Supreme Court, Spencer implicitly concedes that the claim lacks merit. In fact, it fails at the outset, for Spencer

cannot identify any person, similarly situated, who would be treated differently.

"Equal 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 and under like circumstances." *Ex Parte Wilson*, 48 S.W. 2d 919, 921 (Mo. 1904), *quoting* BRILL'S CYCLOPEDIA OF CRIMINAL LAW, vol. 1, ' 42. An equal protection claim can thus "only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he." *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904).

The equal protection analysis must begin, then, by determining what class of persons is covered by the statute being challenged, then by comparing the law's treatment of that person to its treatment of the challenger. The first question is easy to answer: this law covers only those persons who have committed criminal sexual acts and who are then found beyond a reasonable doubt to be "likely . . . to engage in predatory acts of sexual violence if not confined in a secure facility."

' 632.480(5). Spencer argues his case as if the statute instead covered those who have committed criminal sexual acts and are now likely to engage in predatory acts of sexual violence unless treated in an outpatient setting. But the statute cannot possible be read that way. Spencer has been subjected to involuntary *custodial* treatment by the Department of Mental Health not merely because the jury found that he was Adangerous@ or needed treatment, but because it found that he would be dangerous (to others, not just to himself) unless treated in a secure facility.

At its second step, equal protection analysis requires that Spencer identify someone who is similarly situated, and show that the law treats that person differently in some constitutionally significant sense. There he fails, for he never identifies anyone **B** by name, class, or hypothetical circumstance **B** who is similarly situated but treated differently. Spencer=s argument here does not precisely track the argument made in the cases this court transferred late last year. In those cases, the appellants argued that the state permits some persons civilly committed to be placed in community treatment, even if they are Adangerous.@ For that proposition

they cited ' 632.365, though neither that nor any other Missouri statute says that someone who would be dangerous outside a custodial setting could nonetheless be placed outside a custodial setting. Certainly neither that nor any other Missouri statute suggests that someone who is Alikely . . . to engage in predatory acts of sexual violence if not confined in a secure facility@ could nonetheless be placed in community treatment.

Spencer instead compares his treatment to that of Apersons found not guilty of a crime by reason of mental disease or defect.@ Appellant=s Brief (App. Br.) at 50. He correctly cites ' 552.040.4, RSMo. 2000, for the proposition that although such persons are initially placed Ain a secure facility,@ a court might later Agrant[] a conditional or unconditional release to a nonsecure facility.@ App. Br. At 50. But his comparison to this group is no better than his predecessor=s comparisons to civil committees generally. He identifies no person nor circumstance under which a person found not guilty by reason of mental disease or defect who is found, beyond a reasonable doubt, Alikely . . . to engage in predatory acts of sexual violence if not confined in a secure facility@ (' 632.480(5))

could be released into a nonsecure facility. And indeed, the statute setting forth the criteria for conditional and unconditional releases strongly suggest otherwise. *See* ' 552.040, RSMo. 2000.

One criteria specified in the release statute is the Anature of the offense for which the committed person was committed.@ ' 552.040.7(2). The U.S. Supreme Court has long recognized that states can treat those involved in sexually violent crimes different from those posing different, though also violent, threats. In fact, the U.S. Supreme Court has long recognized that states have the ability, under the Constitution, in the course of drafting statutes dealing with civil commitments, to treat persons who pose threats of sexual violence due to mental conditions differently from others who are dangerous. For example, in *Pearson*, *State ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 272 (1940), the Court upheld Minnesota=s Apsychopathic personality@ law, which applies only to those persons who are Airresponsible for [their] conduct with respect to sexual matters.@ Minn. Stat. ' 253B.02 subd. 18b, cited at 309 U.S. at 272. The Court rejected Pearson=s equal protection claim, finding Ano reason for doubt@ that the

legislature=s decision to single out those threatening sexual violence was constitutionally permissible:

> Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt,

it is not to be overthrown because there are other instances to which it might have been applied."

Id. at 274-75, *quoting Miller v. Wilson*, 236 U.S. 373, 384 (1915). Applying that test, equal protection challenges to a variety of sexual offender and predator laws have been defeated. *E.g.*, *Peterson v. Gaughan*, 404 F.2d 1375, 1377-78 (1st Cir. 1968); *Martin v. Reinstein*, 987 P.2d 779, 795-99 (Ariz. App. 1999); *Trueblood v. Tinsley*, 366 P.2d 655, 659 (Colo. 1961); *Vanderhoof v. People*, 380 P.2d 903, 904 (Colo. 1963); *State v. Evans*, 245 P.2d 788, 790-91 (Idaho 1952); *State v. Little*, 261 N.W.2d 847, 850-51 (Neb. 1978). That the legislature Acould have gone further@ and required custodial treatment of persons who threaten the public safety in ways other than through sexual violence does not establish an equal protection violation.

Here, as in *Pearson* and its progeny, the legislature has chosen to Ahit[] the evil where it is most felt.@ The absence of legislative history makes it impossible to ascertain the precise reasons for the lines drawn here. But in Missouri, as in Michigan, A[i]t is reasonable to presume that the legislature concluded that the need for such restraint as the statute imposes was greatest among that group of criminal psychopathic

persons apparently predisposed to transgressions against society; that is, those persons charged with other violations of the criminal law.@ *State v. Chapman*, 4 N.W. 2d 18, 24-25 (Mich. 1942). Thus, under the rule in *Pearson*, A[t]he legislature, in the exercise of its State police power and in its efforts to afford protection, could limit the scope of a legislative act to the eradication of evil where presumably the need is greatest, even though it might constitutionally have extended the operation of its enactment to a larger class.@ *Id*.

To avoid the holding in *Pearson*, Spencer merely asserts that he is a member of the class of Apersons rendered dangerous to others by a mental disorder; persons or a class of persons in the same place and under like circumstances as he.@ App. Br. at 52. But the class is not nearly so broad. Again, even if the sexual element were eliminated, the class would have to consist of all persons who are, beyond a reasonable doubt, likely to commit violent offenses if not in a secure facility.

Spencer moves from belittling the important of *Pearson* to relying on *In re Young*, 857 P.2d 989, 1011 (Wash. 1993). There, the Washington Supreme Court cited another U.S. Supreme Court decision, one in which the test for evaluating different methods

of committing or treating the mentally ill was articulated as whether the distinction being made has Asome relevance to the purpose for which the classification is made.@ *Baxtrom v. Herold*, 383 U.S. 107, 110 (1966). Unlike *Pearson* and its progeny, the Court in *Baxtrom* did not deal with New York=s law in its entirety. Rather, it took that law apart, comparing little pieces of the specific law at issue to comparable pieces of the law regarding civil commitments generally. Thus it held that Baxtrom was deprived of equal protection because he could not invoke Athe statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York,@ and because he was committed Awithout a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxtrom, nearing the expiration of a penal sentence.@ *Id*. at 110. In other words, he was deprived of two procedural protections that were given to other persons subject to commitment. In the Court=s view, though the distinction between sexual offenders and others may meet constitutional requirements for equal protection

purposes generally, the distinctions did not justify depriving Baxtrom of these two specific procedural rights.

Obviously neither of those specific rights is at issue here, and *Baxtrom* does not state a general rule that precludes the kind of distinctions Missouri law makes. *See State v. Kee*, 510 S.W.2d 477, 481 (Mo. 1974), Missouri=s law gives Spencer the right to a jury trial at which both mental abnormality and dangerousness must be proven by the state. In fact, it gives him greater protection than it gives to civil committees generally: the state must make its case Abeyond reasonable doubt,@ and the jury verdict must be Aunanimous.@ ' 632.495. Spencer does not, of course, challenge those or the other ways in which Missouri=s sexually violent predator law gives him *more* protection than is allocated to civil committees generally. If there were someone who could challenge such procedures in the sexually violent predator law on equal protection grounds, it would be the person who is similarly situated (*i.e.*, equally dangerous absent custodial treatment) but not given the same protections.

Unable to rely on procedural differences in *Baxtrom*, Spencer cites the Washington court=s reference in *In re Young* to

a substantive application of the law: the issue of treatment location. But even there, he ignores the teaching of *Baxtrom*, for he does not consider Athe purpose for which the classification is made.@ The Apurpose for which the classification@ of sexually violent predators was made is obvious: to protect the public, not only by ensuring the most effective treatment of sexually violent predators, but by preventing them from gaining access to new victims while their treatment is under way. The risks of premature access to the public are dramatically demonstrated by the facts of *In re Linehan*, 557 N.W. 2d 171, 175 (Minn. 1996). The horrible nature of sexual offenses and the vulnerability of victims makes the need for custodial treatment greater than it is for civil committees generally.

But again, this Court need never reach that point in the analysis. Spencer has yet to identify a method under which Missouri law would permit the use of community treatment for a person who is Alikely to engage@ in other equivalent kind of Aviolence if not confined in a secure facility.@ Unless and until he does so, he would have no equal protection argument to make even if this Court had jurisdiction to hear such a claim.

II.

Neither ' 1.150 or the Missouri Constitution were violated by the trial court=s application of the amended definition of A**predatory@ in effect at the time of appellant=s trial because appellant Spencer acquired no substantive, vested rights under the definition of** A**predatory@ as originally enacted as the sexually violent predator statute requires that the jury determine whether future sexually violent acts will be predatory, and there was no repeal but simply a procedural clarification to the definition of** A**predatory.@**

A chilling assumption must be made in order to accept appellant=s second argument (that the trial court should have applied the definition of predatory in effect when the petition was filed).[1] That assumption is that the sexually violent

---

[1]While appellant does not characterize this point as an instructional error, it would appear that is the proper challenge. The trial court granted the state=s request to instruct the jury using the amended version of Apredatory.@ Appellant, however, does not include a standard of review for instructional error nor does he set forth the instruction

predator law, as originally enacted, created a vested right to molest family members and avoid civil commitment. No such vested right exists, however, and the act certainly created none. Moreover, appellant=s entire argument is premised on an incorrect assumption - that the state was required to prove that appellant=s prior sexually violent acts fit the definition of Apredatory.@ Appellant misses the mark. The act requires that the jury determine whether future sexually violent acts will be predatory. There is no requirement that past sexual offenses fit any definition of Apredatory,@ and, contrary to appellant=s claims, he had no vested Aright,@ either acquired via the constitution or the statute, to a particular definition of Apredatory.@

The Sexually Violent Predator Act grants authority to the state to civilly commit those individuals who may meet the criteria of a sexually violent predator. ' 632.480, et.seq., RSMo (2000). That statute, among other things, requires the jury

---

given as required by Rule 84.04(e). He simply challenges the Aapplication@ of the amended definition. Thus, respondent will address appellant=s point as presented.

to determine whether the person has a present mental abnormality and whether that mental abnormality makes him more likely than not to commit future predatory acts of sexual violence. ' 632.480(5), RSMo (2000). Thus, the statute requires a present mental condition and evidence that a person will sexually reoffend in a predatory manner at some future time. It is the likelihood of that potential, future predatory sexual conduct that the jury must predict.

At no time is the jury required to make a finding that the person=s past sexually violent acts were predatory. They must, instead, determine if he will commit predatory acts in the future. Specifically, the statute defines a sexually violent predator, in part, as Aany person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility....@ ' 632.480(5), RSMo (2000).

Predicting whether someone will commit a future predatory sexually violent act entails many factors, only one of which includes their past behavior. Expert testimony, such as in this case, can establish that the person has a mental abnormality that predisposes him to commit predatory sexually violent acts.

See Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997). In this case, appellant was diagnosed with pedophilia, meaning that he was sexually attracted to prepubescent children. There was also evidence that he had actually acted on those urges, repeatedly molesting several different children over the course of many years.

An individual=s admissions regarding his desire or need to commit predatory sexually violent acts can also be evidence that he is likely to commit such acts in the future. In the seminal case of *Kansas v. Hendricks*, *supra*, the evidence showed that Hendricks had molested his stepchildren over several years. Hendricks also admitted to pedophilic desires and urges to molest children, although there was no evidence that he had molested anyone outside his family. At that time, the Kansas sexually violent predator statute defined Apredatory@ in the very same way as the original Missouri act: APredatory means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.@ Kansas Stat. ' 359-29a02(c), (1997). Despite the fact that Hendricks= known victims had all been family relations, the trial court found that Hendricks=

pedophilia met the definition of a sexually violent predator and the United States Supreme Court upheld that finding.

Past acts are also evidence that a person may commit predatory sexually violent acts in the future. There is no requirement, however, that the state prove or that the jury find that the future acts will be identical to the past acts or vice versa. In appellant=s case, his prior molestations showed that his pedophilic disorder was more than simply thoughts regarding sexual activities with children; his disorder compelled him to act on his pedophilic desires by actually sexually assaulting children. Whether appellant will commit future acts of predatory sexual violence is not dependent, under the statute, on the particular relationship he had with his victims in the past. The jury must determine, instead, whether he will have predatory relationships with victims in the future.

To that end, section 1.150 , as relied upon by appellant, preserves no vested right or liberty interest in the particular definition of Apredatory@ in effect when the petition for commitment was filed against him. As recognized by the Missouri Supreme Court, A[t]his statute [1.150] was intended to preserve substantive rights vested prior to the repeal of the statute

under which the rights were acquired and does not apply to remedies or procedures which, as we have held here, are not vested.@ *City of Kirkwood v. Allen*, 399 S.W.2d 30, 35-36 (Mo. banc. 1966), *citing Darrah v. Foster*, 355 S.W.2d 24 (Mo. 1962). Thus, for section 1.150 to control, the right must be acquired via the original statute, the right must be substantive, not merely remedial or procedural, and the original statute must have been repealed.

Appellant=s reliance on ' 1.150 fails in all three respects. First, appellant Aacquired@ no rights under the original definition of predatory that were taken away by the subsequent amendment. APredatory@ acts, as originally defined, included Aacts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.@ ' 632.480(3). Molesting children, whether familial relations or not, was unlawful at the time appellant committed those acts and at the time of his commitment trial. Yet, appellant=s argument assumes that the statute actually created a right that excluded him from commitment if, in the past, he committed sexually violent acts solely against children within his family. Whether this assumption is applied

to past acts of molestation (as appellant mistakenly applies it) or to future acts of molestation (as required by the statute), there is no rational support fo find that appellant Aacquired@ any Aright,@ via the original statute, that allowed him to commit sexually violent acts against his own children and avoid civil commitment.

Indeed, appellant=s argument makes even less sense considering that the entire statute is geared toward anticipating and preventing future predatory behavior, not punishing or preventing conduct that has already occurred. *See Kansas v. Hendricks*, *supra*. For that reason, section 1.150 has little application. That section is intended to ensure that repealed statutes continue in effect until the litigation, usually to decide the legal affect of past conduct, is completed. See *City of Kirkwood*, 399 S.W.2d at 35. In that circumstance, there is reason to apply the law in effect at the time the conduct occurred.

That, however, was not the situation here. The purpose of this litigation is to decide if appellant currently suffers from a mental abnormality that means that his future conduct poses a threat to the health and safety of others. The purpose is not

to decide the legal affect of appellant=s prior conduct, but to determine the legal affect of his future conduct. To hold that he somehow acquired rights that enabled him to avoid commitment under the former definition of Apredatory@ would actually mean that he acquired a right to avoid commitment for future acts of molestation against his own children. The fact that the only issue at trial was appellant=s future behavior unequivocally establishes that no Avested right@ was at issue.

Appellant implicitly recognizes the fallacy in his argument and, instead, characterizes his Aright acquired@ under the original definition of Apredatory@ as the right to freedom or liberty. (App. Br. At p. 46). This argument, however, ignores a critical step in the analysis. It is not enough to say that appellant has a general vested right to his liberty. That much is true. But that right did not accrue by virtue of the previous definition of predatory. The crucial question is what vested rights were acquired or created by the original statute that could not be taken away by amending the definition of Apredatory.@

To be sure, the original enactment created no substantive right to molest children if they were family members. A finding

in appellant=s favor, however, would mean just that - appellant had Aacquired@ a substantive vested right to molest his own children in the future and avoid civil commitment. No such right was created.

Secondly, appellant=s argument fails because the statute was not Arepealed@ as contemplated by section 1.150. ASection 1.150 does not require or contemplate, . . ., where the authority to take certain action is continued, that the procedure for carrying out that authority cannot be changed.@ *City of Kirkwood*, 399 S.W.2d at 35; *Darrah v. Foster*, 355 S.W.2d 24 (Mo. 1962). In fact, although an amendment may repeal the original language to which it applies, such an amendment is not a repeal of the statute as envisioned by section 1.150. *See State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 855 (Mo. 1971) (Where a statute was simply amended, the Court held that ' 1.150 was inapplicable because it

Arelat[ed] to the effect of repeal of laws.@)

Here, the legislature obviously intended to continue the state=s authority to civilly commit persons with mental abnormalities who pose a danger to others. That authority remained in effect after the definition of Apredatory@ was amended. Through the amendment, the legislature simply clarified that family members were in fact included within the definition of Apredatory.@ Indeed, the prior definition of predatory did not exempt appellant from civil commitment simply because his past victims were family members. To the contrary, the amendment simply clarified that family members were included within the prior definition of Apredatory:@

> acts directed towards individuals, ***including*** family members, for the primary purpose of victimization.

[emphasis added] ' 632.480(5) (Supp. 2001).

Where, as here, the new law simply seeks to clarify the already existing procedure for determining what qualifies as Apredatory,@ there can be no substantive right vested in the old law. A[N]o person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights.@

City of Kirkwood, 399 S.W.2d at 35, *citing Clark v. Kansas City, St. L. & C.R. Co.*, 118 S.W. 40, 43 (Mo. 1909). Appellant=s argument that he was exempt from civil commitment under the old definition of predatory is simply incorrect.

For the same reasons, appellant=s constitutional challenge must also fail. Appellant relies on the general prohibition against retrospective laws found in Article I, Section 13 of the Missouri Constitution. ARetroactive@ or Aretrospective@ laws are generally defined as:

> those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past. . . . A statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of a person for the purpose of its operation.

State ex rel. Clay Equipment Corp. V. Jensen, 363 S.W.2d 666, 669 (Mo. 1963), *citing State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897, 900 (Mo. 1950).

Appellant acquired no Avested rights@ under the old definition of Apredatory.@ The new definition of Apredatory@ did nothing other than clarify that future predatory conduct the statute sought to prevent included those acts directed toward family members. In that regard, the new definition did not create or change the effect of past events, because the entire statute relates only to future events. The jury may use prior facts to determine the likelihood of that future conduct, but such use does not render the statute unlawfully retroactive.

III.

The trial court did not clearly abuse its discretion in overruling Mr. Spencer's objection to the State's cross-examination of Appellant's expert witness, Dr. Rabun, regarding his interpretation of recent case law from the United States Supreme Court and the Missouri Supreme Court because Dr. Rabun contended on direct examination that this recent case law had resulted in a change of his opinion about what types of mental disorders can be a mental abnormality causing serious difficulty controlling behavior.

Referring to a U.S. Supreme Court decision in examining an expert is certainly unusual. But here it was not improper. Rather, it was necessary to respond to the expert=s own reliance on that decision.

Dr. Rabun testified that he is a licensed physician both in the State of Missouri and the State of Illinois, and that he is board certified in general psychiatry and forensic psychiatry. (Tr. 525). He also lectures about serial sexual homicide and other areas within forensic psychiatry to other psychiatrists. (Tr. 526). Dr. Rabun testified that a forensic psychiatrist is a physician who is trained in psychiatry and gives opinions in

court about an area of mental health that interfaces or comes together with an area of the law, for example the insanity defense. (Tr. 526-527). In a sexually violent predator case, Dr. Rabun must decide whether the person has a mental abnormality and whether he is more likely than not to reoffend. (Tr. 536). In his opinion, although Mr. Spencer had a mental disorder, it did not meet the legal definition of a mental abnormality required by the statute. (Tr. 536).

The U.S. Supreme Court=s decision came up as Dr. Rabun discussed a notable change in his views Ba change promoted by the very court decision that Spencer now says should never have been discussed at trial. On direct examination Dr. Rabun testified that in his opinion, a diagnosis of pedophilia would never qualify under the sexually violent predator law given the new change in the law. (Tr. 547). On direct examination Mr. Spencer elicited the following testimony from Dr. Rabun:

> Q: Okay. Dr. Rabun, you have an opinion about-- about whether a diagnosis of pedophilia would even fall under the sexually violent predator realm; is that correct?
>
> A. Based on the change in the law?

Q. Based on the new change of the law.

A. That's correct.

Q. Okay. And--And, I guess, why is that important in this specific forensic context in this sexually violent predator law? Or -- Or maybe you can tell us why it is that you have this opinion and how your opinion changed.

A. Oh. Prior to the -- Do we need to set the framework as to how it changed? I -- I don't--

Q. Sure. Yeah. I mean, its--I know that at one point you did feel like pedophilia could fit under the statute; is that right?

A. Correct.

Q. Okay. And--But recently you've changed your opinion?

A. Correct.

Q. Okay.

A. Based upon the change in the law.

Q. Okay. And--And what's the--And how did you know about the change in the law?

A. As forensic psychiatrists, we have to keep ourselves abreast of or current on the statutes where we practice, any changes in the statute, like you might have heard about, as well as any--any what we call case law or--or higher court decisions that can also alter the statutes.

And recently the United States Supreme Court and then the Missouri Supreme Court made rulings in the -- in this area, and they attached to this language to the effect that---that the mental abnormality has to also include a serious lack of control or significant lack of control.

(Tr. 547-548).

Dr. Rabun went on to testify that pedophiles show significant control in their behavior by adopting an entire way of life centered upon obtaining children. (Tr. 549-550). He further stated that this showed pedophiles may have extreme control over their conduct because they are not charging down the street attacking children. (Tr. 550).

On cross-examination by the State, Dr. Rabun testified that in his opinion, mild mental retardation leading to poor judgment

had led Mr. Spencer to a 14 year history of sexual offending against prepubescent children. (Tr. 569). Dr. Rabun testified that in his opinion, pedophilia can never be a mental abnormality as it is currently defined by the case law. (Tr. 584). In response to these statements, the State cross-examined Dr. Rabun about his change of view and what prompted it:

> Q. I think during--during the direct examination you indicated that, in your opinion, pedophilia could never be a mental abnormality as its defined currently, correct?
>
> A. As its currently defined, yes.
>
> Q. You said because the pedophile, they--they groom their victims, and if they're grooming their victims, they're controlling their behavior.
>
> A. Correct. Well, I gave other examples. That was one of the examples of control, the fact that they don't do this in public view, the fact that they have adopted an entire way of life for offending, to obtain children, all of the allied acts.
>
> Q. So what you're talking about is--is the classic pedophile, correct?

A. And that is the person, actually the studies all show, is at highest risk to re-offend. That person that--that--that cleverly plans their offenses.

Q. You're familiar with the--the--the US Supreme Court of Kansas v. Crane, aren't you?

A. Yes.

Q. Wherein the US Supreme Court said that--

Mr. Selig: I'm going to object, Your Honor.

Mr. Reed: I'm testing the boundaries of his opinion.

Mr. Selig: Wait a minute. Hold on.

The Court: Wait.

Mr. Selig: I'm going to ask that we approach.

(At this time counsel approached the bench, and the following proceedings were had:)

Mr. Selig: I believe what the State is--is trying to get out is this victim that's in this US v. Crane case where it talked about -- I think that, I mean, one of the justices referred to pedophilia and an inability to control behavior. But I believe that thatBnow that's getting into the--the--the area where

the --it:s the jury's decision about what is a mental abnormality and what is serious difficulty controlling behavior, and--and--

Mr. Reed: No--

Mr. Selig: **B**to say that this is diagnosis is, I think, you--you know, its--its getting into the area where the jury has to make that kind of decision.

The Court: That's what we've been doing all day long is invading the province of the jury with these so-called experts. They're the ones that are going to decide whether or not these young children--these things have happened to these young children.

This is cross-examination. He's your expert.

Mr. Selig: But**B**But, Your Honor, what--what the State is trying to do is use what a--what a sitting Supreme Court justice, whose comment was in terms of--of deciding what the (indiscernible).

The Court: I don't know what he's going to do. I haven't heard the question.

Mr. Selig: Well, I--I**B**

Mr. Locke: Maybe he could tell us what his question is going to be right now.

Mr. Selig: And then maybe I'd ask for some kind of offer of proof of what--

The Court: No. There's not going to be an offer of proof. What was your question going to be?

Mr. Reed: I'm going to ask him about whether he agrees with this opinion of the US Supreme Court wherein pedophilia is**B**can be a mental abnormality that critically involves what a lay person calls lack of control.

The doctor's already testified that--that apparently he thinks pedophilia can never be a mental abnormality.

The Court: The objection will be overruled. He can give his opinion. He's an expert. You qualified him.

Mr. Selig: Okay.

(Tr. 584-587).

Q. You had indicated that pedophilia can never be a mental abnormality as defined by law, right?

A. In my opinion.

Q. Right.

A. That's correct.

Q. And in your opinion--

A. Based upon the new change now.

Q. Right. The new change. And your--your--your opinion about that is, in part, based upon those--the US Supreme Court case opinion, like the Kansas v. Crane case, right?

A. I've read it, yes.

Q. Okay. And the --the Missouri Supreme Court case that recently came out, the Thomas decision?

A. Thomas.

Q. Right.

A. Yes.

Q. All right. And--And--And, 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?

A. Actually, no. There is--I think the--the justices have given considerable wiggle room when thay say "might". Didn't they use that word?

Q. But in your opinion, pedophilia can never be a mental abnormality, right?

A. In my opinion. But they also accept that wiggle room. They've used the word "might". They've qualified it.

Q. And--Okay.

A. They're not saying it is or isn't.

Q. It certainly can be, can't it?

A. Yes.

Q. That's what the US Supreme Court is saying.

A. They're saying it can or can't be.

Q. And you are saying that it can never be.

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

(Tr. 588-589).

The cross-examination of Dr. Rabun concluded with Dr. Rabun stating that even if Nelvin Spencer had molested every child in Scott County, Dr. Rabun would say that Nelvin Spencer is not a

sexually violent predator because pedophiles have an extreme degree of control and planning. (Tr. 592-593).

In closing argument, the State argued, over respondent's objection, regarding Dr. Rabun:s views and their genesis:

> Mr. Reed: The US Supreme Court has spoke to the issue.
>
> Pedophilia: A mental abnormality that critically involves
>
> what a lay person might describe as lack of control. (Tr. 618).

Contrary to its assertion in the Argument made by Appellant in its point I, Appellant must show a **clear** abuse of discretion by the trial court in overruling Spencer's objection to the State's cross-examination of Dr. Rabun. "It is well established that 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 an abuse of discretion is clearly shown." *Nelson v. Wawman, M.D.*, 9 S.W.3d 601, 604, (Mo. 2000) citing *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 868 (Mo. banc 1993).

> "This is especially true for cross-examination of expert witnesses. There is wide latitude to test qualifications, credibility, skill or knowledge, and value and accuracy of opinion." *Callahan* at 869. "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration" *Nelson*, at 604, citing *Kansas City v. Keene Corp.* 855 S.W.2d 360, 367 (Mo. banc 1993).

Dr. Rabun testified that he is a board certified forensic psychiatrist. He testified that he must keep abreast of current statutes and case law, including higher court decisions. Black's Law Dictionary defines "forensic psychiatry" as "that branch of medicine dealing with disorders of the mind in relation to legal principles and cases." Dr. Rabun expressly, on direct examination, testified that he relies on statutes and case law to inform and base his opinion. In fact, it was the "change in the law" brought about by recent "United States Supreme Court and Missouri Supreme Court" cases that resulted in

his conclusion that pedophilia no longer qualified as a mental abnormality under Missouri law. During Dr. Rabun's direct examination, Dr. Rabun initially brought up the issue of pedophilia, and whether that diagnosis would "fall under the sexually violent predator realm" in light of the "change of the law". (Tr. 547). Dr. Rabun went on to discuss his view of recent US Supreme Court and Missouri Supreme Court decisions and how that caused him to change his opinion of whether pedophilia could qualify as a mental abnormality.

Dr. Rabun=s direct testimony that his opinions were based upon recent U.S. Supreme Court and Missouri Supreme Court rulings in this area opened the door for state=s counsel to explore. Spencer opened the door to cross-examination about this Achange of the law@ when he sought to communicate to the jury how Dr. Rabun's testimony and opinions were well-informed and founded upon recent U.S. Supreme Court and Missouri Supreme Court rulings in this area.

Dr. Rabun testified that forensic psychiatrist=s opinions are based on statutes and case law. Dr. Rabun expressly stated that he based his opinion about pedophilia being a mental abnormality on recent high court opinions, including *Kansas v.*

Crane, 122 S.Ct. 867 (2002). "The facts and or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field...." ' 490.065.3 RSMo. Likewise, Federal Rules of Evidence 702 and 703 "allow an expert to present scientific or technical testimony in the form of opinion based on facts or data perceived or made known to the expert before or at trial.@ *Newell Puerto Rico v. Rubbermaid*, 20 F.3d 15, 20 (1st Cir. 1994), citing *DaSilva v. American Brands, Inc*. 845 F.2d 356, 360 (1st Cir. 1988). "Once admitted, [the rules] place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." *Rubbermaid*, at 20, citing *International Adhesive Coating Company v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 544 (1st Cir. 1988), quoting *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980).

Once the door to the basis of Dr. Rabun=s opinion was opened by Appellant, the State was entitled to enter and challenge Dr. Rabun's "skill and knowledge" in this area, and the "value and

accuracy" of his interpretation of US Supreme Court and Missouri Supreme Court opinions. The full burden of exploring the basis of Dr. Rabun=s opinion fell squarely on State=s counsel. Mr. Spencer sought to create the false impression that Dr. Rabun's opinions about pedophilia were well-informed and based on recent high court opinions. Then he sought to limit the State from questioning Dr. Rabun about the accuracy of his interpretation of those cases.

Dr. Rabun testified on direct examination that after reading these higher court cases, he was of the opinion that pedophilia could never be a mental abnormality. This opinion was obviously contrary to the language in the cases themselves. Dr. Rabun's interpretation of these higher court cases was certainly a basis of his opinions, contrary to Appellant's assertion in his brief that a "statement made by the United States Supreme Court was totally foreign to Dr. Rabun's ... basis of his opinion". (App. Br. at p. 35). Dr. Rabun testified that these Supreme Court cases had actually caused him to reconsider his prior opinions and that he had now changed his mind about whether pedophilia could be a mental abnormality.

Appellant's characterization of the State's cross-examination of Dr. Rabun as "pitt[ing] a statement made by judges of the Supreme Court against Dr. Rabun's professional experience and training..." (App. Br. At p. 33) is well off target. The State challenged Dr. Rabun's interpretation of the cases he had relied upon to change his opinions about pedophilia. Dr. Rabun testified that pedophilia can never be a mental abnormality according to his reading of these cases. On cross-examination, however, he agreed that pedophilia "can be a mental abnormality." (Tr. 589). Establishing, through cross-examination, that Dr. Rabun erroneously interpreted cases upon which he expressly relied, and that pedophilia "can" or "might" be a mental abnormality was an entirely legitimate inquiry challenging the basis and accuracy of Dr. Rabun=s opinion.

Experts who testify in SVP cases are required to address the ultimate issue of mental abnormality. See *In the Matter of the Care and Treatment of Johnson*, 58 S.W.3d 496 (Mo. 2001).

In fact, the Court ordered the Missouri Department of Mental Health, in the person of Dr. Rabun, to determine whether Nelvin Spencer suffers from a mental abnormality, and whether that mental abnormality makes him more likely than not to engage in

predatory acts of sexual violence. L.F. 131-133. Following expert testimony that establishes a submissible case, the jury must decide, based on the evidence, expert testimony and jury instructions, whether the person has a mental abnormality which makes him more likely than not to engage in predatory acts of sexual violence. Dr. Rabun did not even diagnose pedophilia. He opined that Mr. Spencer suffers mild mental retardation. Nonetheless, Dr. Rabun went on to discuss how, in his opinion, pedophilia can never be a mental abnormality in an effort to rebut the previous testimony of the State's expert. Having opined that pedophilia can never be a mental abnormality, Dr. Rabun sought to answer the ultimate issue for the jury based on recent US Supreme Court case law. His interpretation of that case law was in error as the State pointed out. Pedophilia "can" or "might" be a mental abnormality.

CONCLUSION

For the reasons stated above, the decision of the trial court should be affirmed and the constitutionality of Missouri=s Sexually Violent Predator Law upheld.

JEREMIAH W. (JAY) NIXON
Attorney General

STEVEN C. REED
Assistant Attorney General
Mo. Bar No. 40616
P.O. Box 899
Jefferson City, MO 65102
573-751-4418 / 573-751-1336 (Fax)

ANDREA SPILLARS
Assistant Attorney General
Mo. Bar No. 36812
P.O. Box 899
Jefferson City, MO 65102
573-751-9635/573-751-1336 (Fax)
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 9,973 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 8th day of August, 2003, to:

Emmett D. Queener
3402 Buttonwood
Columbia, MO 65201-3724

JEREMIAH W. (JAY) NIXON
Attorney General

STEVEN C. REED
Assistant Attorney General
Mo. Bar No. 40616
P.O. Box 899
Jefferson City, MO 65102
573-751-4418 / 573-751-1336 (Facsimile)

ANDREA K. SPILLARS
Assistant Attorney General
Missouri Bar No. 36812
P.O. Box 899

Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent