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IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF CARL KIRK, Respondent/Appellant.	))))	No. SC95752

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF HENRY COUNTY, MISSOURI
TWENTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE DEBRA HOPKINS, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Kirk appeals the judgment and order of Judge Hopkins following a jury trial in Henry County, committing Kirk to secure confinement in the custody of the Department of Mental Health("DMH") as a sexually violent predator("SVP"). This appeal presents a question concerning the constitutionality of provisions of the Missouri SVP Act, and is reserved for the exclusive jurisdiction of this Court. Article V, Section 3, Missouri Constitution (as amended 1982), §477.070.[1]

[1] All statutory references are to RSMo. 2000. The Record on Appeal consists of a Transcript (Tr.), Probable Cause Hearing Transcript (PC.Tr.), Voir Dire Transcript (VD.Tr.), Legal File (L.F.), and Supplemental Legal File (Sup.LF).

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STATEMENT OF FACTS

There is no evidence Kirk engaged in any kind of deviant sexual behavior with children since 1987(Tr. 319). Kirk was paroled in 2011, following an evaluation, and later revoked for technical reasons(Tr.316,319). Just before his release onto parole again, on June 27, 2013 the Multidisciplinary Team ("MDT"), comprised of Richard Gowdy, Ph.D and Joseph Parks, M.D., both from DMH, in addition to Greg Markaway, Ph.D and Scott O'Kelley, L.P.C., of the Department of Corrections ("DOC"), unanimously determined that Kirk did not meet the criteria of a sexually violent predator(L.F. 37). Despite this assessment, the members of the Prosecutor's Review Committee ("PRC") voted that Kirk met the definition of an SVP. (L.F. 40). State filed the petition(L.F.26-29).

Trial

The State called Dr. Nena Kircher, End of Confinement ("EOC") reviewer, and Dr. Steven Mandracchia, DMH psychologist(Tr. 237, 329). Both diagnosed Kirk with pedophilia, opined that pedophilia was a mental abnormality, and opined Kirk was more likely than not to reoffend if not committed(Tr.256,292; 334,371).

Mandracchia testified that pedophilia is considered a lifelong condition; once it has been diagnosed, Mandracchia would need evidence to show that it did not continue to exist, rather than current evidence it still existed(Tr.392). Dr. John Fabian testified that Kirk has a pedophilic disorder diagnosis, but there was evidence of serious difficulty controlling behavior because the sexual behaviors were 30 years ago, and because "other factors here" affecting his opinion(Tr.527).

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Risk that is "more likely than not" exceeds fifty percent(Tr.387). Mandracchia said no risk factors outside of actuarial instruments increased Kirk's risk(Tr.382). He initially scored Kirk at an eight on the Static-2002R, which correlates with a predicted risk of recidivism at 34%; sixty-six percent of people with Kirk's actuarial score do not reoffend(Tr.385-6). Mandracchia did not know which group Kirk was in, but it was more likely than not an individual with his score would be in the 66% who do not reoffend(Tr.386-7). Kircher did not know what "more likely than not" meant(Tr.314-15). She said Kirk's risk was in the 97th percentile, and that his "here-and-now" risk was "high"(Tr.276-7).

Mandracchia changed his actuarial score and his estimate of Kirk's risk of reoffending during trial(Tr.323, 48). He increased the Static-2002R score to a nine, increasing the predicted rate of recidivism by 10%(Tr.348,385,369). The night before he formed a new opinion that Kirk had a 1978 juvenile conviction because of two 1986 DOC intake forms(Tr.323,348). There was no record of a juvenile conviction, juvenile records, police reports, charging documents, or other judicial documents from 1978 about the alleged incident(Tr.326,354,381-82). The trial court reviewed the two 1986 DOC records and ruled that the 1978 incident could not be counted in Mandracchia's risk assessment(Tr.327,346). There was not sufficient evidence to show that there was a conviction that could be scored; the information appeared to be based on Kirk's self-report, "[a]nd whether a 14 year old would know whether he was convicted or not is questionable"(Tr.326-327,

346). The trial court reversed its ruling after the State's offer of proof, and over Kirk's objection(Tr.347,366,324,362-63).

Kircher discussed Kirk's release plan and social support system as part of her risk assessment, including that Kirk's system included ex-felons, he would be on parole told not to associate with them, and association would increase his risk. (Tr.276,288-9). She told the jury he "has a lot of things stacked against him" when he goes into the real world, because of the "burden of sex offender registry… and the employment limitations that come with that" and he would be "fairly isolated on top of all these other challenges he would be facing reentering the community as a sex offender"(Tr.289-90). Kirk was not allowed to ask Mandracchia about his release plan(Tr.391). Kirk made an offer of proof: Mandracchia considered Kirk's release plan, including where he would live and go, that he would be on parole supervision until 2017, and the conditions of supervision(Tr.412-13). The fact Kirk would be supervised on parole impacted Fabian's risk assessment(Tr.612-13). Parole supervision is supported by research in the field as mitigating that individual's risk, and experts reasonably rely upon such a fact(Tr.613). Missouri's lifetime supervision of sex offenders (Ex.V) also mitigated Kirk's risk and impacted Fabian's opinion(Tr.613-14).

Penile Plethysmography ("PPG")

Sexual interest in children, as measured by phalometry, is the most significant predictor of future sexual recidivism(Tr.77,138-139,172; Ex.H). The PPG is a phallometric test used to assess sexual arousal and potential sexual

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deviance(Tr. 74;Ex.H). It can be used to assess an individual's arousal and preferences for ages and genders(Tr.183). Fabian used the PPG to assess Kirk's current arousal and sexual preference, current diagnosis required for a mental abnormality, and risk of recidivism(Tr.76). Kirk was not sexually attracted to or aroused by prepubescent male or female children(Ex.G). Kirk's PPG score was 0.8926; scores at and above 0.3 are considered the lowest risk(Ex.G). His PPG showed "no significant evidence of sexual deviance and is qualified as low risk." (Ex.G).

The State filed motion *in limine* seeking exclusion of the PPG and an evidentiary hearing was held(L.F.364;Tr.70). Experts agreed research identified sexual interest in children, as measured by phallometric testing, is the most significant predictor of sexual recidivism(Tr.77,138-139,172,Ex.H). Experts agreed that the PPG is the best, only objective measure for assessing an individual's deviant sexual arousal(Tr.140; Ex.H). Kirk did not exhibit deviant sexual arousal (Ex.G).

Because of the degree of specificity in PPG assessment, the test can assist evaluators in answering questions about an individual's sexual deviancy and attractions(Tr.178). A positive PPG finding showing deviant sexual arousal is "significant" and "highly relevant" in determining a diagnosis; and has reliability and validity(Tr.167). Hoberman also testified the PPG is a valid tool for risk assessment(Tr.172). He testified that ATSA recommends both using the PPG and also that it has validity for risk assessment(Tr.167).

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Stein testified that it is generally accepted for treatment(Tr.148). Stein believes the PPG is valid and reliable in treatment, but not in a forensic setting (Tr.131). There is disagreement in the scientific community as to forensic use(Tr.140). He was aware that other professionals in the field *do* use PPG assessments before an individual is civilly committed(Tr.141,148). Hobberman testified in a case where PPG results were admitted(Tr.171) and was aware PPG results are used in SVP cases in other states(Tr.187).

Wilson affirmed the PPG is reasonably relied upon in the field of forensic psychology for diagnosing paraphilias and treating sex offenders(Ex.H). Fabian agreed the PPG is reasonably relied upon in the field for purposes of assessing sex offender's diagnosis, treatment and recidivism(Tr. 85). It is common to have some disagreement within the field. (Tr. 113-114). Fabian was the only witness specifically trained to use the Monarch PPG system(Tr.73,94;Tr.179-180). The PPG in this case was the first PPG evaluation he performed.(Tr.89).

PPG assessments have been tested(Tr. 84). There are numerous peer-reviewed, published studies relative to accuracy, reliability and validity of PPGs(Tr.84-85); they are the subject of some 400 published articles(Tr.84). Sensitivity results range from 40-96% in various studies(Tr.99,Ex.H). Generally studies place the sensitivity of PPG assessment at 60%, meaning the measure accurately identifies a pedophile 60% or more of the time(Tr.83,99). Research in the field also demonstrates a known error rate at 5%(Tr.83,115;Ex.H). The published sensitivity and specificity rates for PPGs are similar to the accuracy

rates of actuarial instruments like the Static-99R and Static-2002R routinely used in SVP cases(Tr.83-84).

Kirk made an offer of proof which included Fabian's hearing testimony; Exhibit G, Fabian's PPG evaluation report; Exhibit H, Dr. Robin Wilson's affidavit; and Exhibit I, Wilson's CV.(Tr.489,706). Alternatively to discussing the PPG evaluation, Kirk asked that Fabian be permitted to testify to a recent assessment of Kirk's sexual responses and interests, the results of which cause Fabian to doubt whether a pedophilia diagnosis is still present(Tr.538). The trial court prevented Fabian from talking about that evaluation(Tr.573-81). Kirk argued the PPG was part of the facts and data relied upon, necessary background for expert opinion, and that Fabian was allowed to give the basis of his opinion that no mental abnormality existed(Tr.575-76).

Pretrial

Kircher was the only witness at the probable cause hearing(PC.Tr.6). She diagnosed Kirk with pedophilia, based on the criteria in the Diagnostic and Statistical Manual, Fourth Edition.("DSM")(PC.Tr.16-17; PCEx.6). The DSM requires evidence of behaviors involving "prepubescent" children and Kirk had an attraction to "young males"(PC.Tr.20;PC.Ex.6). The trial court denied cross-examination about the diagnosis and the development of anyone Kirk had sexual contact with, claiming "sexual development isn't mandatory for the diagnosis"(PC.Tr.51-2). Kirk made an offer of proof(PC.Tr.53;PC.Ex.6). Counsel objected and filed a motion to dismiss(PC.Tr.64-65;L.F.106;Tr.26).

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Prior to his probable cause hearing, Kirk filed motions to dismiss challenging the constitutionality of the SVP statutory scheme. Kirk alleged the SVP scheme violated the prohibition on *ex post facto* laws and double jeopardy, violated due process and equal protection, and that commitment would be cruel and unusual punishment(L.F.50-69). Each was denied(L.F.4;VD.Tr.3-7;Tr.7,741-42,745). Kirk's motion to dismiss because the MDT unanimously found he did not meet criteria was denied(L.F.4;Tr.21-23;V.Tr.8-9).

Kirk filed a motion for change of judge and change of venue on August 16, 2013 and a change of judge was granted the same day(L.F.104,109). The State opposed, claiming Kirk did not have rights to a change of venue, and that he had not proven prejudice(L.F.170). A writ in the Western District in *State ex rel. Koster v. Dawson*, WD76782, was denied. *Id.* Kirk sought a ruling on his request for change of venue, or alternatively a continuance(L.F.168-9). Both requests were denied. (L.F.14).

Kirk sought exclusion of Kircher's testimony, arguing that admission of the report and her determination was precluded by §495.065, 632.483 and *Bradley*(L.F.16; 372; r.53). He argued the EOC was for a limited purpose and time, solely for screening SVP cases; was supplanted by the DMH evaluation; was irrelevant and prejudicial, based on incomplete information, and that Kirk's statements contained therein should be excluded(Tr.53-5;L.F.372-5). Kirk also submitted deposition testimony from DMH psychologist Richard Scott and

Kircher in support(L.F.377-472). Kirk renewed the motion at trial and in his motion for new trial(Tr.230;L.F.497).

Instructions

Kirk offered Instruction D and asked the trial court to use the "beyond a reasonable doubt" standard at trial because of the punitive effect of the SVP Act(L.F.130-131,490/511;Tr.513-15). The motion was denied(Tr.515).

Kirk argued Instruction 6 improperly submitted a legal finding to the jury and offered Instruction F-1(Tr.518,534-5;L.F.491).

Instruction 7 was given over Kirk's objection to §632.492(Tr.525; L.F. 478). Kirk argued §632.492 was unconstitutional because it required the jury to be informed about the legal consequence of their verdict, because the "care, control, and treatment" was not being administered constitutionally, because there was no evidence to support the instruction, and because giving the instruction violated equal protection(Tr.525-7).

Verdict & Commitment

The jury returned a verdict that Kirk is an SVP(Tr. 494). The probate court entered an order committing Kirk to the custody of DMH for control, care and treatment(L.F.515). This appeal follows(L.F.495-514;512-523).

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POINTS RELIED ON

I.

The trial court erred in denying Kirk's requests to dismiss the petition against him, violating his rights to due process, equal protection, free thought, and a fair trial, to be free from double jeopardy, ex post facto laws, and cruel and unusual punishment, protected by U.S. Const., amends. I, X, VIII, XIV and Mo.Const. art. I, §§2, 9, 8, 10, 13, 21, in that the purpose and effect of the SVP Act is punitive, lifetime confinement in DMH; the law created a second punishment for past offenses; the law does not provide a least restrictive environment or release men once no longer mentally ill or dangerous; and the law permits commitment because of emotional capacity, without any proof of behavioral impairment.

Van Orden v. Schafer, 129 F. Supp.3d 839 (E.D.Mo. 2015)

Karsjens v. Jesson, 109 F.Supp.3d 1139 (D.Minn. 2015)

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

Kansas v. Crane, 534 U.S. 407 (2002)

U.S. Const. Art. IV cl. 2, amends. I, X, VIII, XIV

Mo. Const. art. I, §§2, 8, 10, 13, 19 and 21

Sections 630.115, 632.385, 632.480, 632.498, 632.505, 632.501, RSMo.

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II.

The trial court erred in denying Kirk's request to use "beyond a reasonable doubt" as the burden of proof at trial, violating his rights to due process, equal protection, and a fair trial, to be free from cruel and unusual punishment, protected by U.S. Const., amends. X, VIII, XIV and Mo.Const. art. I, §§2, 10, 21, and §§632.495, 632.498, 632.505, in that civil commitment results in a punitive lifetime loss of liberty because there is no unconditional release, and "beyond a reasonable doubt" is the only burden of proof that protects the interest at stake and risk of erroneous decision

Van Orden v. Schafer, 129 F. Supp.3d 839 (D. Mo. E.D. 2015)

Addington v. Texas, 441 U.S. 418 (1979)

In re Winship, 397 U.S. 358 (1970)

In re Van Orden, 271 S.W.3d 579 (Mo. banc 2008)

U.S. Const., amends. X, VIII, XIV

Mo.Const. art. I, §§2, 10, 21

Sections 632.480, 632.495, 632.498, 632.505, RSMo.

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III.

The trial court erred denying Kirk's motion to dismiss because the MDT unanimously found he did not meet criteria of a sexually violent predator, violating his right to due process guaranteed by U.S. Const., amends. X, XIV and Mo.Const. art. I, §§2, 10, and §§632.483, 632.486, in that the MDT unanimous finding he did not meet criteria for civil commitment precluded the State from petitioning for his civil commitment in this case.

State ex rel. State v. Parkinson, 280 S.W.3d 70 (Mo.banc 2009)

In re Van Orden, 271 S.W.3d 579(Mo.banc 2008)

State v. Moore, 303 S.W.3d 515 (Mo.banc 2010)

Alberici Constructors, Inc. v. Director of Revenue, 452 S.W.3d 632 (Mo.banc 2015)

U.S. Const., amends. X, XIV

Mo.Const. art. I, §§2, 10,

Sections 632.483, 632.486, RSMo.

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IV.

The trial court erred denying Kirk's *Motion to Dismiss for Failure to Permit Respondent to Contest Probable Cause Pursuant to Section 632.489*, in violation of due process, equal protection of the law and to counsel as guaranteed by U.S. Const., amend. IVX, Mo.Const. art. I, §§2, 10, his statutory rights to counsel, to present evidence on his own behalf, and to cross examination under §632.489, in that the probable cause unduly limited Kirk's cross examination of Kircher regarding diagnostic criteria for pedophilia, Kircher's diagnosis was not based on substantial or probative facts, and the court's probable cause finding was not based on evidence adduced at the hearing.

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

In re Detention of Peterson, 42 P.3d 952 (Wash.banc 2002)

In re Marriage of Patrick, 201 S.W.3d 591 (Mo.App.S.D. 2006)

Heckadon v. CFS Enterprises, Inc., 400 S.W.3d 372 (Mo.App.W.D. 2013)

U.S. Const., amend. IVX

Mo.Const. art. I, §§2, 10

Section 632.489, RSMo.

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V.

The trial court erred in denying Kirk's request for a change of venue, because this violated Rule 51.03, and his rights to due process and equal protection of the law as guaranteed by U.S. Const., amends. X, XIV and Mo.Const. art. I, §§2, 10, in that Kirk had a right to a change of venue.

State v. Chambers, 481 S.W.3d 1 (Mo.banc 2016)

State ex rel. Lebanon School Dist. R-III v. Winfrey, 183 S.W.3d 232 (Mo.banc 2006)

State ex rel. R. L.W. v. Billings, 451 S.W.2d 125 (Mo.banc 1970)

State ex rel. Director of Revenue v. Scott, 919 S.W.2d 246 (Mo.banc 1995)

U.S. Const., amends. X, XIV

Mo.Const. art. I, §§2, 10

Sections 472.141, 508.050, 632.484, RSMo.

Rules 41.01, 51.03, 51.04, 51.06

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VI.

The trial court erred in denying Kirk's offer of proof, including evidence of Kirk's release plan and the fact that he would be supervised if released, because this violated his right to due process, a fair trial, to present evidence in his defense, and hire the expert of his choice, guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §§10, §§490.065 and 632.489, in that experts considered and relied upon Kirk's release plan; the State was opened the door by introducing opinion that Kirk's release plan, supervision conditions and post-release support network increased his risk; and in failing to admit Kirk's proffered evidence, the jury was misled and left unable to evaluate the expert opinions.

Kivland v. Columbia Orthopaedic Group, LLP, 331 S.W.3d 299 (Mo.banc 2011)

Howard v. City of Kansas City, 332 S.W.3d 777 (Mo.banc2011)

In re Calleja, 360 S.W.3d 801 (Mo.App.E.D.2011)

Brasch v. State, 332 S.W.3d 115 (Mo.banc 2011)

U.S. Const., amend. XIV

Mo.Const. art. I, §§10

Sections 490.065, 632.489, 632.492, RSMo.

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VII.

The trial court erred in refusing to submit Instruction F-1 and in submitting Instruction 6 instead, because this violated Kirk's rights to due process, a fair trial as guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §§2, 10, in that Instruction 6 submitted a legal question to the jury that had already been determined and misled the jurors by diverting them from the ultimate factual issue: whether Kirk had a mental abnormality that made him more likely than not to reoffend.

Templemire v. W & M Welding, Inc., 433 S.W.3d 371 (Mo.banc 2014)

In re Gormon, 371 S.W.3d 100 (Mo.App.E.D.2012)

Esmar v. Zurich Ins. Co., 485 S.W.2d 417 (Mo.1972)

Henderson v. St. Louis Housing Authority, 605 S.W.2d 800 (Mo.App.E.D.1979)

U.S. Const., amend. XIV

Mo.Const. art. I, §§2, 10

Section 632.480, 632.492, 632.495, RSMo.

Rule 70.02

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VIII.

The trial court erred in submitting Instruction 7, over Kirk's objection and request to declare §632.492 unconstitutional, because that violated Kirk's rights to due process, a fair trial and equal protection of the law as guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §§2, 10, in that §632.492 required the trial court to give Instruction 7; the instruction informed the jury of the legal consequence of their verdict; there was no evidence to support giving the instruction; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for civil commitment.

Templemire v. W & M Welding, Inc., 433 S.W.3d 371 (Mo.banc 2014)

Shannon v. United States, 512 U.S. 573 (1994)

Ross-Paige v. Saint Louis Metropolitan Police Department, -- S.W.3d ---, 2016 WL 3573250 (Mo.banc 2016)

Chism v. Cowan, 425 S.W.2d 942 (Mo.1967)

U.S. Const., amend. XIV

Mo.Const. art. I, §§2, 10

Sections 632.350, 632.480, 632.492, 632.495, RSMo.

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X.

The trial court erred in overruling Kirk's objections to Mandracchia's new opinion that Kirk had a Static-2002R score of nine, because this violated Kirk's rights to due process, equal protection, a fair trial and freedom from cruel and unusual punishment, guaranteed by U.S. Const., amends X, IIX, XIV, Mo.Const. art. I, §§2, 10, 21, §490.065 and Rule 51.06, in that the opinion was founded on a 1978 self-reported incident; the Static-2002R could only be scored based on official criminal records; there were no records demonstrating a 1978 conviction; the opinion depended on the accuracy of hearsay; and Kirk had no notice of the changed opinion prior to trial.

Kivland v. Columbia Orthopaedic Group, LLP, 331 S.W.3d 299 (Mo.banc 2011)

Goddard v. State, 144 S.W.3d 848 (Mo.App.S.D. 2004)

Pasalich v. Swanson, 89 S.W.3d 555 (Mo.App.W.D. 2002)

Thomas v. Festival Foods, 202 S.W.3d 625 (Mo.App.W.D. 2006)

Const., amends X, IIX, XIV

Mo.Const. art. I, §§2, 10, 21

Section 490.065, RSMo.

Rule 51.06

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XI.

The trial court erred in excluding evidence of the PPG at trial, because that violated his right to due process guaranteed by U.S. Const., amend. XIV, Mo.Const. art. I, §10, and §490.065, in that the PPG is reliable and is relied upon in the field to assess current sexual interests and arousal, risk, and treatment; Fabian relied on the PPG in his SVP evaluation; and Kirk did not demonstrate deviant sexual arousal during the assessment.

Kivland v. Columbia Orthopaedic Group, LLP, 331 S.W.3d 299 (Mo.banc 2011)

State Bd. of Reg. Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo.banc 2003)

Murrell v. State, 215 S.W.3d 96 (Mo.banc 2007)

In re Commitment of Sandry, 857 N.E.2d 295 (Ill.App. 2006)

U.S. Const., amend. XIV

Mo.Const. art. I, §10

Section 490.065, RSMo.

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ARGUMENT

I.

The trial court erred in denying Kirk's requests to dismiss the petition against him, violating his rights to due process, equal protection, free thought, and a fair trial, to be free from double jeopardy, ex post facto laws, and cruel and unusual punishment, protected by U.S. Const., amends. I, X, VIII, XIV and Mo.Const. art. I, §§2, 9, 8, 10, 13, 21, in that the purpose and effect of the SVP Act is punitive, lifetime confinement in DMH; the law created a second punishment for past offenses; the law does not provide a least restrictive environment or release men once no longer mentally ill or dangerous; and the law permits commitment because of emotional capacity, without any proof of behavioral impairment.

Last September, Missouri's SVP Act was deemed unconstitutional as applied, because the "systemic failures" of the statutory civil commitment program resulted in punitive, lifetime detention in violation of Fourteenth Amendment due process. *Van Orden v. Schafer*, 129 F. Supp.3d 839, 844, 868 (E.D.Mo. 2015).[2] The nature and duration of commitment bears no reasonable relation to any non-punitive purposes for which men may have been committed. *Id.* at 867.

[2] This opinion was amended in December, and addresses only the liability/penalty phase of the trial. *Schafer*, 129 F. Supp.3d at 843. The remedy phase continues.

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The Supremacy Clause provides that federal law is "the supreme law of the land" and "judges in every state shall be bound thereby" notwithstanding any state law. U.S. Const. Art. IV cl. 2. "Under the Supremacy Clause, state laws and constitutional provisions are 'preempted and have no effect' to the extent they conflict with federal laws." *Johnson v. State,* 366 S.W.3d 11, 27 (Mo. banc 2012). The Supremacy Clause "applies with its full force to orders of a federal court." *Pennell v. Collector of Revenue,* 703 F.Supp. 823, 826 (W.D.Mo. 1989), citing *Cooper v. Aaron,* 358 U.S. 1, 17 (1958). The Supremacy Clause also prevents a state court from reach the merits on any constitutional attack on a federal judge's order. *Id.*

Therefore, this Court is bound to follow and enforce the Federal District Court's order, and must hold that the SVP Act is unconstitutional as applied because it results in punitive, lifetime detention, overruling *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. banc 2008)(construing the SVP Act as civil because the duration of confinement linked to stated purpose of law), and both *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo.banc 2007) and *Murrell v. State*, 215 S.W.3d 96, 103 (Mo.banc 2007)(construing the SVP Act to be constitutional). Because our state's Equal Protection Clause guarantees the same protections as the federal constitution, this Court must also find the SVP Act violates the Missouri Constitution. *Coffman*, 225 S.W.3d at 445; Mo. Const. art. I, §§2, 10. Furthermore, this Court should find that the SVP Act is unconstitutional for

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additional reasons raised by Kirk in his four initial motions to dismiss, and as result find that the trial court erred in denying those motions.

Facts

Prior to his probable cause hearing, Kirk filed his four motions to dismiss challenging the constitutionality of the SVP statutory scheme. First, Kirk asserted the SVP Act violated the *ex post facto* and double jeopardy prohibitions because it created and resulted in a new, second punishment for criminal acts already committed and punished in the criminal justice system(L.F.56-69). Next, Kirk argued the 2006 amendments to the Act eliminated the possibility for unconditional release, and therefore, if committed, he would be confined and deprived of his liberty for the rest of his life(L.F.50-51). Third, Kirk claimed the SVP Act was unconstitutional because the statutory scheme did not allow for consideration of treatment in the least restrictive environment if he was committed(L.F.53-54). Finally, Kirk claimed the SVP Act was unconstitutional because (1) the statute itself does not require a finding that his mental abnormality make him unable able to control his behavior, and (2) the statutory definition of mental abnormality would permit commitment of an individual based solely on his emotional capacity, without any proof of volitional control(L.F.45-49). Commitment under such a law would result in cruel and unusual punishment(L.F.741-42, 745).

Kirk's motions were denied at the probable cause hearing and again pretrial (L.F.4;PC.Tr.5;Tr.15-17;20,23). After filing his motions, Minnesota's similar sex

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offender civil commitment program was declared unconstitutional because it was "a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system" and violated due process. *Karsjens v. Jesson,* 109 F.Supp.3d 1139, 1144 (D.Minn. 2015);[3](Tr.15-16). Kirk raised the motions again informed the court of the *Van Orden* opinion finding the statutory scheme unconstitutional as applied(VD.Tr.3-7). The motions were overruled(Tr.7). Following the verdict, Kirk's request to stay any commitment order until the Federal District Court issued a final remedy was denied(Tr.741-42,745).

Standard of Review

Because civil commitment under the SVP Act affects the fundamental right to liberty, all government action must pass strict scrutiny. *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo.banc 2007), *In re Norton*, 123 S.W.3d 170, 173 (Mo.banc 2003); *see also Karsjens*, 109 F.Supp.3d at 1166 (applying strict scrutiny because civilly committed individuals had "fundamental right to live free from physical restraint."); *Vitek v. Jones*, 445 U.S. 480, 492

[3] An interim relief order was entered October 29, 2015. --- F.Supp.3d ---, 2015 WL 6561712. The defendants appealed the judgment to the Eighth Circuit on November 2, 2015. *Karsjen v. Johnson*, No. 15-3485. Defendant's request to stay the order pending appeal was denied. 2015 WL 7432333 (D.Minn. November 23, 2015).

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(1980)("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."); *but see Schafer*, 129 F. Supp.3d 866-67 (E.D. Mo. 2015)(SVP Act unconstitutional where confinement did not bear rational relationship to purposes of commitment and law would fail under the heightened "shocks the conscious" test). Under strict scrutiny, the burden is on the State to prove that a law is narrowly tailored to serve a necessary, compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)("[T]he Fourteenth Amendment forbids the government to infringe … fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); *Karsjens*, 109 F.Supp.3d at 1166, *Coffman*, 225 S.W.3d at 445.

ANALYSIS

Ex Post Facto & Double Jeopardy Prohibitions Violated

In *Norton*, this Court ruled that if "the effect of the statute were punitive, confinement would violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. These constitutional rights are meant to protect every offender, no matter how reprehensible the offense."123 S.W.3d at 177. Missouri's SVP law results in punitive, lifetime detention. *Schafer*, 129 F. Supp.3d at 868. The effect of the SVP Act *is* punitive, and confinement *does* violate the prohibition on *ex post facto* laws and double jeopardy. U.S. Const., art. I, §10, amend. X; Mo. Const. art. I, §13, 19(L.F.56-58).

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The *ex post facto* clause "forbids the application of any new punitive measure to a crime already consummated." *Kansas v. Hendricks*, 521 U.S. 346, 351(1997)(finding no violation of ex post facto or double jeopardy because the law was civil and did not result in punishment). The SVP Act is a "textbook example" of an *ex post facto* law: it punishes a criminal offense by extending the term of confinement and it inflicts greater punishment than the applicable laws at the time Kirk committed an underlying criminal offense. *Id*. at 371, 379 (Kennedy, A., concurring)(Breyer, dissenting); *see also Karsjens*, 109 F.Supp.3d at 1168.

Civil commitment in Missouri is "secure confinement," "against one's will", and in part, for the purpose of incapacitating an individual who could commit a future crime, and imposed only on men who committed crimes. *Hendricks*, 521 U.S. at 379 (Breyer, dissenting); *Norton*, 123 S.W.3d at 177. Confinement is imposed by persons (State prosecutors), procedural guarantees (trial by jury, assistance of counsel, psychiatric evaluations), and a higher standard than ordinary civil cases because of the liberty interests implicated. *Hendricks*, 521 U.S. at 379-80; §§632.483, .489, .492. State actors believe that SVP treatment exists and is effective. *Schafer*, 129 F. Supp.3d at 858. But the SVP Act "commits, confines and treats [ ] offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate." *Id.*at 381, 385 (emphasis in original); *see* §632.483.

A second purpose of the SVP Act is to provide "necessary treatment" to those committed. *Norton*, 271 S.W.3d at 585; §§632.492, 632.495, ("shall be

committed … for care, control, treatment"). DMH believes that it is capable of providing effective treatment, which includes release into the community. *Schafer*, 129 F. Supp.3d at 859. That part of the program is a "sham." *Id.* at 868. The State had no plans in place for release into the community. *Id.* at 859. None of the men conditionally released had been discharged into the community. *Id.* at 857. No one had ever been release as a result of completing the treatment program. *Id*. at 845; *see also Karsjens*, 109 F.Supp.3d at 1147, 1163-64. "Treatment" provisions of the SVP Act "were adopted as a sham or mere pretext," and treatment is statutorily delayed until the end of a prison sentence "so that further incapacitation is therefore necessary[;]" this confirms a punitive intent. *Hendricks*, 521 U.S. at 371, 381 (Kennedy, A., concurring)(Breyer, dissenting).

Missouri's SVP law imposes a "new punitive measure" to underlying sexual crimes already committed. *Hendricks*, 521 U.S. at 371; *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)(L.F.58-60). A "new" punishment is a second bite at the apple. The prohibition on double jeopardy means no man can be lawfully punished for the same offense twice. *Norton*, 123 S.W. 3d at __ n. 3, *citing Witte v. United States*, 515 U.S. 389, 396 (1995)(L.F.60-65).

What this Court knew in *Norton* was confirmed in *Schafer*. The SVP Act violates the prohibition on *ex post facto* laws and double jeopardy. U.S. Const., art. I, §10, amend. X; Mo. Const. art. I, §13, 19.

No least restrictive alternatives or reintegration violates Due Process & Equal Protection

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This Court is bound to enforce the Federal District Court's finding that the SVP Act is unconstitutional as applied because there is no least restrictive environment or a community reintegration plan for men committed. *Schafer*, 129 F. Supp.3d at 869;(L.F.53-54).

Missouri operates two commitment facilities, both of which are considered "high" or "maximum" security, are located behind razor wire, and patrolled by armed guards. *Id.* at 845. A single, eight-bed "step down" unit is "somewhat less restrictive," yet still behind the patrolled razor wire secure perimeter in Farmington. *Id.* Each of the five men living in the step-down unit obtained a court-order that he no longer met criteria for commitment and was "conditionally released." *Id.* Three of those men obtained a conditional release order over the objection of DMH. *Id.* at 855. "Conditional release" means the individual actually lives in the community. *Id.*, *see also* §632.505.1. At the time of the opinion, none of the men conditionally released had been discharged into the community. *Id.* at 857. Only two men committed in Missouri have ever been reintegrated into the community; but neither released as a result of completing the program, or as a result of DMH's involvement. *Id*. at 845.

There are no procedures in place for community reintegration, nor any placement facilities in the community. *Id.* at 851. As early as 2009, top DMH administrators identified both a need for community-based facilities, and individuals who could be safely placed in less restrictive environments or discharged to skilled care facilities where they could receive appropriate levels of

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medical care. *Id.* at 853. Some of those men were aged and infirmed, while others "may need greater support/treatment, but don't represent a risk to the community …" *Id.* at 853-54. Rather than creating less restrictive options or releasing anyone into the community, the State responded by funding an expansion of the first facility and opening the second. *Id.* 844-45. There are men who the government has admitted have reduced levels of risk, falling below the commitment threshold, and who are ready for community reintegration, either because of treatment progress or illness. *Id.* at 868. But, the State has not released those men, or developed procedures to do so. *Id.*

Justice Breyer warned that a statutory scheme that did not require the State to consider the possibility of a least restrictive environment or to use "alternative and less harsh methods" to achieve a non-punitive objective can show that legislature's "purpose ... was to punish." *Hendricks*, 521 U.S. at 387, quoting *Bell*, 441 U.S. at 539, n. 20. The SVP Act's plain language does not require the State to consider the possibility of least restrictive environment or "less harsh methods," and therefore it is unconstitutional on its face. Instead, the SVP Act explicitly requires that anyone "committed for control, care and treatment … shall be kept in a secure facility." §632.498 (though, purporting not apply to a person who has been conditionally released). If commitment were truly for a civil, remedial purpose, then the Act would provide for placement in a least restrictive environment, like any other person civilly committed for non-punitive purposes. *See* §632.385; and §630.115.1(11)(each DMH resident has the right "to be

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evaluated, treated or habilitated in the least restrictive environment"). Men civilly committed have a constitutional right in avoiding undue confinement, both in duration and in nature. *Schafer*, 129 F. Supp.3d at 867. Where psychiatric civil commitment accomplishes a constitutionally permissible purpose, those committed "are required to be held in the least restrictive environment compatible with their safety and that of the public." *Sherrill v. Wilson*, 653 S.W.3d 661, 664 (Mo. banc 1983).

The Minnesota District Court found fatal failures in that commitment law because of the lack of less restrictive facilities both physically existing and also practically available because of bed space, and the lack of community reintegration. *Karsjens*, 109 F.Supp.3d at 1151-53, 1172. The Minnesota statute itself it not only allowed continued confinement after an individual no longer met statutory criteria for commitment and did not pose a danger to the public or need further treatment, but also when an individual met criteria for a reduction in custody. *Karsjens*, 109 F.Supp.3d at 1156, 1160-61.

The SVP scheme fails to provide less restrictive alternatives altogether, and there are no community-based options(L.F.53-54). A single eight-man unit annexed to the same building, behind the same prison razor wire, patrolled by the same armed guards and still considered "maximum" security is not a less restrictive environment. Nor is it even a "somewhat less restrictive" environment practically available to the 200 plus men committed, because it can only

accommodate eight men and the State has not seen fit to permit more than five men to live there.

No unconditional release violates Due Process & Equal Protection

This Court must enforce the Federal District Court's finding that the SVP Act is unconstitutional because release procedures have not been implemented. *Schafer*, 129 F. Supp.3d at 869. The SVP treatment program has multiple phases, each of indeterminate length and progressing through the phases "is tortuously slow." *Id.* at 850-51. Even if someone was to progress through treatment, obtaining the government's authorization to seek conditional release is "unduly laden with unnecessary procedures," including at least three levels of approval before reaching the DMH director for authorization. *Id.* at 854-55. In fact, since the SVP Act's inception, DMH has *never* authorized a single person to seek release, and State actors "appear to be stalling or blocking" release. *Id.*at 855, 869.

Ironically, the stated goal of the program is "to treat and safely reintegrate committed individuals back into the community." *Id.* at 851. However, the State has equated this with "no more victims" and has stated that commitment would last until an individual presented zero risk and "will not engage in acts of sexual violence if discharged." *Id.* at 848-49. These positions are inconsistent with the SVP Act's requirements. *Id.* at 849.

Top DMH administrators knew the practical effect of the SVP Act. A former DMH director wrote "no one has ever graduated from [the program] and somewhere down the line, we have to do that our treatment processes become a

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sham." *Id.* at 859. Another "admitted that if no one is released from an SVP civil commitment treatment program into the community within 10 years the 'logical conclusion' is that the treatment is a 'sham.'" *Id.* The District Court confirmed release *is* a sham. *Id.* at 868. Men whose risk is below the constitutional standard for confinement have not been released, but met with "extra-statutory hurdles" like "indefinite release without discharge." *Id.*

The Minnesota statute was unconstitutional on its face because it failed to provide a way for someone to obtain release in a reasonable time, once eligible for discharge. *Karsjens*, 109 F.Supp.3d at 1168. Minnesota's failure to fully discharge anyone from the program, and provisional release of only three individuals, evidenced the failed application of the law, as well as the lack of a meaningful relationship between the program and discharge from custody. *Karsjens*, 109 F.Supp.3d at 1171-72. Discharge procedures did not work as they should, nor were there sufficient less restrictive alternative environments. *Id.* at 1171. As applied, the statute had the effect of lifetime confinement. *Id.* 1173.

Civilly committed men have a constitutional right to avoid undue confinement. *Id.* at 867. The State's failure to comply with the SVP Act has resulted in continued confinement of men who no longer meet criteria for civil commitment and unconstitutional punishment. *Id.* at 869, citing *O'Connor v. Donaldson*, 422 U.S. 563,575 (1975), *see Karsjens*, 109 F.Supp.3d at 1172 (finding statute was not narrowly tailored because there are no less restrictive

alternatives). Missouri's "nearly complete failure to protect" the men committed was "so arbitrary and egregious as to shock the conscience." *Id.* at 870.

Furthermore, because annual reviews are only required for committed men, but not for men conditionally released, it would be impossible to ever obtain unconditional release, even if permissible under the SVP Act as currently written. §632.498.1. A statute that does not require periodic risk assessments "authorizes prolonged commitment, even after committed individuals no longer pose a danger … and need further inpatient treatment and supervision." *Karsjens*, 109 F.Supp.3d at 1168.

The Federal District Court found the release provisions in §§632.498, 632.505 did not facially violate the Fourteenth Amendment. *Schafer*, 129 F. Supp.3d at 865. The Federal District Court concluded it was bound to follow this Court's prior presumption of constitutionality in *Coffman*, and read §632.505 to "permit full, unconditional release." *Id.* at 864-66. This Court should declare the SVP Act unconstitutional on its face under Mo. Const. art. I, §§2, 10, because the 2006 amendments eliminated the possibility of unconditional release, and any mechanism for a person committed to be fully liberated from DMH custody. §632.498,(L.F.50). Conditional release after a finding that an individual is no longer dangerous "*does not* result in complete restoration of that person's liberty;" terms of conditional release are a form of commitment and due process requires the person be *fully* released. *Van Orden*, 271 S.W.3d at 590-91 (Cook, J., concurring).

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An individual may only petition for "conditional release," and if successful, "shall be conditionally released," and "the court shall place the person on conditional release pursuant to the terms of [the SVP Act]" §632.498, 632.505. Nothing in the plain language of the statute permits the trial court to modify terms of release such that there are no longer "conditions;" nor does the statutory scheme mention "unconditional" or "full" release. §632.498, 632.505. In construing the constitutionality of the SVP Act under the Missouri Constitution, this Court "cannot add statutory language where it does not exist; rather, courts must interpret the statutory language as written by the legislature." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo.banc 2016).There is something "very wrong" with the program "that has never fully discharged anyone committed to its detention facilities" since the law's creation. *Karsjens*, 109 F.Supp.3d at 1171.

Unconstitutional processes preclude any release & least restrictive placement

Progression through treatment, conditional release, unconditional release, and transfer to a less restrictive environment are all impossible because the SVP Act is unconstitutionally applied. This Court is bound to enforce the Federal District Court's finding that the SVP Act is unconstitutional as applied because annual reviews are not performed in accordance with the statute, case law, or due process. *Schafer*, 129 F. Supp.3d at 869.

"[T]hese annual reviews are the primary tool that courts use to evaluate whether a civilly committed person continues to satisfy the criteria for commitment, or instead whether the person should be conditionally released." *Id.*

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at 852. "[I]t is nearly impossible to successfully petition for conditional release without an annual review from [DMH] recommending such release." *Id.* However, evaluators conducting reviews have not been trained on legal criteria for commitment; they misunderstand, are confused by and do not consistently apply the correct legal standard in evaluating the need for continued confinement or release. *Id.* at 582-83, 868. The Minnesota commitment scheme was defective because periodic risk assessments were not conducted, and the risk assessments completed were not done in a constitutional manner because evaluators did not apply the correct legal standard. *Karsjens*, 109 F.Supp.3d at 1171.

The statutory release process is unconstitutional as written because it shifts the burden to the committed man to demonstrate he no longer meets commitment criteria, and the discharge criteria is more stringent than the initial commitment criteria. §632.501; *see Karsjens*, 109 F.Supp.3d at 1169. DMH has never approved any petition seeking conditional release. *Schafer*, 129 F. Supp.3d at 869. Therefore, the SVP Act burdens the committed man with proving "by a preponderance of the evidence that the person no longer suffers from a mental abnormality that makes the person likely to engage in acts of sexual violence if released" before he is entitled to a jury trial where the government must prove he continues to qualify for commitment. §632.498. This is *not* the constitutional standard for civil commitment. As written, the SVP Act requires that the committed person show he no longer has a mental abnormality to win a jury trial where he might be released. Due process requires that the civilly committed

person be *both* mentally ill and dangerous; if one is missing, civil commitment is unconstitutional. *Murrell v. State*, 215 S.W.3d at 104.

Even if the statute could be constitutionally interpreted to permit release if a mental abnormality persisted, but risk had been reduced, the statute is still unconstitutional. The threshold for commitment is "more likely than not" to commit future offenses. §632.480. The burdensome release statute requires the committed man to show that he is no longer "*likely* to engage in sexual violence if released." This Court previously presumed §632.498 to be constitutional and noted it would be "absurd" to require a committed man to prove is certain to not reoffend at an initial hearing and then shift the burden to the State to prove his likelihood of re-offense at a lower standard at trial. *Schottel v. State*, 159 S.W.3d 836, 842 (Mo.banc 2005). This Court said the statute was "merely … a shorthand way" of referring to the preliminary showing the committed man had to make "that he is not likely to engage in further acts of sexual violence." *Id.* But "no adult male has a 0% risk of committing an act of sexual violence," and there will always be some likelihood of reoffending. *Schafer*, 129 F. Supp.3d at 849.

Practical application of the SVP Act has demonstrated that the government interprets the release standards to keep an individual in custody "until it was determined he will not engage in acts of sexual violence if released" and that he will create "no more victims," which "essentially require[s] a complete absence of risk before a [committed man] will be released." *Schafer*, 129 F. Supp.3d at 849. Just as the government does not have to prove "*total* or *complete* lack of control"

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to obtain commitment, a committed man does not have to prove *total* or *complete* lack of risk to be released. *See Karsjens*, 109 F.Supp.3d at 1169.

Additionally, the release statute completely abandons a finding that an individual is likely to commit *predatory* acts of sexual violence, and permits confinement for *any* acts of sexual violence. §632.480.5(3). Therefore, the net for keeping men confined is cast wider than the net for committing them in the first place.

Furthermore, the burden to justify continued commitment should remain on the State at all times. *Karsjens*, 109 F.Supp.3d at 1169. Relying on *Schottel*, this Court approved the two-part release scheme placing the initial burden on the committed individual in *Coffman*, because the judge's initial determination was not the "final controlling decision." 225 S.W.3d at 443. The observed application of the release procedures reveals *Schottel's* presumptions were wrong and that the SVP Act is unconstitutional. *Schafer*, 129 F. Supp.3d at 849, 869. An SVP statute cannot shift the burden from the state to committed individuals. *Karsjens*, 109 F.Supp.3d at 1169. Without constitutional reviews and procedures in place, release is impossible.

Commitment based on emotions, without finding of volitional decontrol violates Due Process & Equal Protection

The SVP Act, as written, violates due process and equal protection because the statute does not require a finding that an individual's mental abnormality make him unable to control his dangerous behavior, and because it permits commitment

based on a finding of lack of emotional control, without a finding of volitional impairment. (L.F. 45); U.S. Const. amends. X, XIV; Mo. Const. art. I, §§2, 10.

Under the SVP Act, a person may be confined as an SVP if he "suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility and who … has pled guilty [to] a sexually violent offense." §632.480(5). A "mental abnormality" is statutorily defined as "a congenital or acquire condition 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." §632.480(2) (emphasis added).

Constitutional civil commitment requires "proof of serious difficulty controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002); *Thomas v. State*, 74 S.W.3d 789, 792 (Mo.banc 2008). This level of difficulty controlling behavior is required in order to "distinguish the dangerous sexual offender whose mental illness … subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 412, *Thomas*, 74 S.W.3d at 791. Therefore, three distinct findings are now required at trial for constitutional civil commitment: (1) a mental abnormality; (2) that makes a person more likely than not to commit future acts of sexual violence; and (3) he has serious difficulty controlling his behavior.

While *Thomas* announced that the statutory definition of "mental abnormality" must conclude with "in a degree that causes the individual serious

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difficulty in controlling his behavior," the legislature had failed to amend the statutory definition to comply with the constitutional standard. The SVP Act is clearly facially invalid because it does not require proof of serious difficulty controlling behavior. *See* §632.480(2).

The SVP Act is facially unconstitutional because it plainly permits commitment on the basis of emotional capacity, and without a finding of volitional impairment. §632.480(2) ("condition affecting the emotional *or* volitional capacity"). The United States Supreme Court has required commitment laws to "limit confinement to those who suffer from a *volitional* impairment rendering them dangerous beyond their control." *Hendricks*, 521 U.S. at 346, 358 (finding Kansas law constitutional, limiting discussion to volitional impairments). *Hendricks* did not distinguish between "the purely 'emotional' sexually related mental abnormality and the 'volitional.'" *Crane*, 534 U.S. at 871. Neither *Hendricks* nor *Crane* considered the constitutionality of confinement based solely on "emotional" abnormality. *Id.* at 872. This Court is now presented with such a challenge and must consider the constitutionality of confinement based solely on emotional abnormality or impairment.

Commitment because of an "emotional" abnormality or impairment cannot legally or logically be constitutional. The SVP Act is aimed at the risk of future *behaviors*, not future *feelings*. The law requires proof of serious difficulty controlling *behavior*. The government cannot regulate one's thoughts absent some conduct, without violating the First Amendment. *See, e.g., Paris Adult Theatre I v.*

Slaton, 413 U.S. 49, 67-68 (1973)("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution."); *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969)("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds…"). The SVP Act's disjunctive "or" permits a finding of mental abnormality based solely on emotional capacity.

The SVP Act violates due process and equal protection. U.S. Const. amends. I, X, XIV; Mo. Const. art. I, §§2, 8, 10. The trial court erred in denying Kirk's motions to dismiss.

Conclusion

The SVP Act violates due process, equal protection, double jeopardy and is an *ex post facto* law, and therefore Kirk's resulting civil commitment under that law is cruel and unusual punishment. U.S. Const. art. I, §10, amends. I, X, VIII, XIV; Mo. Const. art. I, §§2, 8, 10, 13, 19 and 21. The trial court erred in denying Kirk's motions to dismiss. This Court must reverse the judgment and order of the trial court and release Kirk from his continued, illegal confinement.

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II.

The trial court erred in denying Kirk's request to use "beyond a reasonable doubt" as the burden of proof at trial, violating his rights to due process, equal protection, and a fair trial, to be free from cruel and unusual punishment, protected by U.S. Const., amends. X, VIII, XIV and Mo.Const. art. I, §§2, 10, 21, and §§632.495, 632.498, 632.505, in that civil commitment results in a punitive lifetime loss of liberty because there is no unconditional release, and "beyond a reasonable doubt" is the only burden of proof that protects the interest at stake and risk of erroneous decision.

Because of the punitive effect and application of the SVP Act, clear and convincing is no longer a constitutionally permissive burden of proof on the State at trial. In practice, SVP commitment results in the lifetime commitment to DMH, without the possibility of total, unconditional release once no longer suffering from a mental abnormality or dangerous. The elimination of the opportunity for unconditional release, and elimination of continued annual review, demands a burden of proof that protects against an erroneous commitment: beyond a reasonable doubt. The probate court erred when it permitted the State to proceed under the clear and convincing standard at trial.

Facts

Kirk filed a motion requesting that the court use the beyond a reasonable doubt standard at trial, if the court would not dismiss the action against him in

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light of the SVP Act's elimination of the possibility for unconditional release and punitive effect(L.F.130-131;50-52). Kirk argued that the 2006 amendments eliminated the right to release from DMH custody, and therefore he would be subject to commitment for the rest of his life(L.F.50). Without the ability for release once no longer dangerous or mentally ill, the statutory scheme had become punitive (L.F. 51), requiring the higher burden of proof(L.F.130). The State opposed, relying on *In re Van Orden*, 271 S.W.3d 579 (Mo.banc 2008)(L.F.132). Kirk renewed his request pretrial(L.F. 20, 26), again during the instruction conference, and also proposed Instruction D, employing the beyond a reasonable doubt standard(L.F.490/511;Tr.513-15). The motion was denied and the instruction refused(Tr.515).

Standard of Review

This Court reviews issues of law *de novo. Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). Because of the fundamental liberty interests impinged by civil commitment, all government action must pass strict scrutiny to be permissible. *In re Care and Treatment of Norton*¸ 123 S.W.3d 170, 173 (Mo.banc 2003).

Analysis

Civil commitment is only constitutional provided that an individual presently suffers from a mental abnormality, and that mental abnormality causes the individual to be more likely than not to commit predatory acts of sexual violence if not confined. *Murrell*, 215 at 105; §632.480(5). If one of these characteristics

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abates, commitment cannot constitutionally continue. *Murrell*, 215 S.W.3d at 104, citing *O'Connor v. Donaldson*, 422 U.S. 563,575 (1975). Prior to 2006, the SVP Act provided for full, unconditional release of individuals from their commitment. §632.498. However, after the 2006 amendments, once a court or jury determines that a person no longer meets the criteria, the individual is only "conditionally released." §632.498. Moreover, once "conditionally released," annual reviews are no longer conducted by the court or by DMH. §632.498.1. The statutory scheme does not provide any mechanism for a person to be liberated from "conditional release."[4]

Section 632.495 was also amended in 2006 to reduce the burden of proof on the State to clear and convincing evidence. Clear and convincing was initially approved for use in Missouri SVP trials because "if commitment is ordered, the term of commitment is not indefinite. A person committed as a sexually violent predator receives an annual review… [and] the person may file a petition for release with the court at any time." *Van Orden*, 271 S.W.3d at 586 (3-3 decision)(Cook, J., concurring). However, the 2006 amendments to the SVP Act removed this lynchpin relied upon by the *Van Orden* decision; there is no longer any statutory mechanism for release from the custody of DMH under the SVP Act,

[4] In contrast, those committed under §632.305 are committed for *definite* terms, and commitment may only be extended based on subsequent findings commitment is warranted; otherwise, an individual is released after a year. §632.360.

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nor continued annual review. §§632.498.5(4), 632.505. As such, it is statutorily impossible for one committed to regain his liberty.

Van Orden relied on *Addington*, wherein the United States Supreme Court found clear and convincing evidence was the appropriate burden of proof in a commitment proceeding. *Id.* at 585, *Addington v. Texas*, 441 U.S. 418, 427-31 (1979). *Addington* reasoned clear and convincing was sufficient in that case because the government was not exercising its power in a punitive sense, and continuing opportunities for review minimized the risk of error. *Id.*, *Addington*, 441 U.S. at 427-31. The burden of proof is ultimately a matter of state law. *Id.*, *Addington*, 441 U.S. at 433. *Van Orden* rationalized commitment both protects the public, and "provides [those committed] with necessary treatment." *Id.* "Furthermore, if commitment is ordered, the term of commitment is not indefinite" because there are annual reviews and the right to file a petition for release. *Id.* at 586. The *Van Orden* appellants argued "conditional release" meant a lifetime loss of liberty, but failed to raise the conditional release statute or "the constitutionality problem of the entire SVP statutory scheme" as a point on appeal. *Id.* at 587, (Cook., J. concurring).

The concurring opinion plainly stated the constitutionality of the statutory scheme "may require future review by this Court when the issue is squarely presented." *Id.* at 589. It also warned the conditional release scheme may be unconstitutional for failing to provide sufficient procedural due process protections. *Id.* at 589-90. Any confinement without the opportunity for

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unconditional release "would raise serious due process concerns." *Id.* at 590. The concurrence predicted that "if called to consider the impact the indefinite conditional release statute has on the entire SVP statutory scheme, this Court may be compelled to find that such indefinite restraint on liberty has made the SVP act so punitive in purpose or effect that it no longer can be considered civil in nature -- requiring a higher burden of proof." *Id.*at 591.

Conditional release after a finding that an individual is no longer dangerous "*does not* result in complete restoration of that person's liberty." *Id.* at 590 (emphasis in original). The terms of conditional release are a form of commitment; due process requires that the person be *fully* released. *Id.* Conditional release, therefore, violates due process, even if the commitment is in a less restrictive environment. *Id.*

Dissenting, Judge Teitleman found Missouri's SVP law to be *punitive*. *Van Orden*, 217 at 592. If the SVP act was purely remedial, then once no longer mentally ill or dangerous, it should result in unconditional release. *Id.* "Once the remedial purpose has been fulfilled, the continued deprivation of individual liberty amounts to nothing but a punitive sanction." *Id.* Men civilly committed here "forever will be subject to state oversight," even if no longer dangerous. *Id.* While commitment in *Addington* would have terminated upon successful completion of treatment, that is not so under the SVP law. *Id.* Judge Teitleman concluded, "I would hold that the SVP law is unconstitutional insofar as it permits the state to commit an individual permanently to the care, custody and control of the

department of mental health without having to prove the prerequisites to commitment beyond a reasonable doubt." *Id.* at 593-94.

Warren presented the same burden of proof challenge. 291 S.W.3d 246 (Mo.App.S.D. 2009). The Southern District denied the challenge, because it was bound to follow this Court's controlling *Van Orden* decision. *Id.* at 249.

"The adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course*." Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo.banc 2014). In light of *Van Orden v. Schafer*, 129 F. Supp.3d 839 (E.D.Mo. 2015), discussed in Point I, confirming the criticisms of the concurring and dissenting judges, this Court must change course and declare the only constitutionally permissible burden of proof is beyond a reasonable doubt.

Due process requires the use of a burden of proof that reflects the public and private interests, *and* the risk of an erroneous decision. *Van Orden*, 271 S.W.3d at 585. Beyond a reasonable doubt is the standard used in all other punitive cases and should be applied in the instant case because of the implication on the defendant's liberty interest. *Id.* at 585. *Winship* established that due process demands the beyond a reasonable doubt standard in juvenile cases because of the resulting loss in liberty. *In re Winship*, 397 U.S. 358, 366 (1970). It does not matter that juvenile proceedings are given the "civil label of convenience," or are "designed not to punish, but to save the child." *Id.*at 365, citing *Application of Gault*, 387 U.S. 1, 50 (1967).

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> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

Id. at 364.

Just as a criminal defendant "has at stake interest of immense importance," loss of liberty and stigma from a conviction, so does an individual facing commitment. *Id.* at 363. Where Kirk's *lifelong* liberty is at stake, where he cannot be unconditionally released, and his commitment will not be reviewed if he ever obtains "conditional release," the risk of an erroneous decision could not be higher. Beyond a reasonable doubt is the only appropriate standard. "Both the plain language and actual administration of the SVP law lead to the inescapable conclusion that the initial commitment decision under the SVP law is effectively final. The state should not be able to deprive forever the individual liberty of its

citizens without proving beyond a reasonable doubt the necessity of doing so." *Van Orden*, 217 at 593 (Teitlman, J., dissenting).

The trial court erred in refusing Kirk's request to use the beyond a reasonable doubt standard and his objections to the clear and convincing burden of proof. This Court must reverse the judgment of the probate court and remand for a new trial under the beyond a reasonable doubt burden of proof.

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III.

The trial court erred denying Kirk's motion to dismiss because the MDT unanimously found he did not meet criteria of a sexually violent predator, violating his right to due process guaranteed by U.S. Const., amends. X, XIV and Mo.Const. art. I, §§2, 10, and §§632.483, 632.486, in that the MDT unanimous finding he did not meet criteria for civil commitment precluded the State from petitioning for his civil commitment in this case.

The MDT unanimously determined that Kirk did not meet the criteria of a sexually violent predator(L.F.37). Despite this, the PRC convened and voted that Kirk was an SVP and the State filed the petition(L.F.26-29,40). Kirk filed a motion to dismiss and it was denied(L.F.42,4). The motion was renewed at the pretrial conference[5](Tr. 21-23), and the morning of trial(V.Tr. 8-9).

Section 632.483 establishes the MDT, whose assessment must control the State's ability to file a petition seeking civil commitment under §632.486.

Standard of Review

"Questions of statutory construction are strictly a matter of law and are for the independent judgment of this Court." *Murrell v. State*, 215 S.W.3d 96, 106 (Mo.banc 2007).

Analysis

[5] An amended motion filed on November 1 was discussed at the pretrial conference, is not in the court's file(Tr.22-23).

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When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute. *State v. Moore*, 303 S.W.3d 515, 520 (Mo.banc 2010). This Court must give meaning to every word or phrase of the statute. *Id.* A statute should not be construed in a manner that will leave any part "inoperative or superfluous." *Clark v. Rameker*, 134 S.Ct. 2242 (2014). Provisions in the statute are to be considered together, not read in isolation. *Alberici Constructors, Inc. v. Director of Revenue*, 452 S.W.3d 632 (Mo.banc 2015), "All consistent statutes relating to the same subject are in *pari materia* and are construed together as though constituting one act[.]" *BASF Corp. v. Director of Revenue*, 392 S.W.3d 438, 444 (Mo.banc 2012)(citation omitted). The presumption is that consistent statutes relating to the same subject are intended to be read consistently and harmoniously in their many parts. *Id.*

SVP commitment is a significant deprivation of liberty that requires due process protection and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Murrell v. State*, 215 S.W.3d at 103, citing *Kansas v. Hendricks*, 521 U.S. 346, 357(1997) and *Foucha v. Louisiana*, 504 U.S. at 71, 80 (1992). Procedural safeguards are necessary to ensure that the State only confine a narrow class of particularly dangerous persons, and only after meeting the strictest procedural standards. *Hendricks*, 521 U.S. at 357, 364. The legal process must minimize the risk of erroneous decisions. *Addington*, 441 U.S. at 424; *In re Van Orden*, 271 S.W.3d 579, 587 (Mo.banc 2008).

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One procedural safeguard built in to the statutory scheme is the requirement of review by the MDT. §632.483.1. Prior to filing any petition, DOC must notify both the Attorney General and the MDT that an individual appears to meet criteria for civil commitment. §632.483.1. The purpose of the notice requirement is to "ensure timely notice is given to the attorney general and [MDT] to determine if civil commitment proceedings should be initiated." *Van Orden*, 271 S.W.3d at 875.

Under §632.483.4, the MDT reviews available records about the person, including the EOC report, treatment records, offense history, institutional records, and future residence, to assess whether it believes the person meets the SVP definition. *Fogle v. State*, 295 S.W.3d 504, 507-08 (Mo.App.W.D. 2009); §§632.483.2, .4. The MDT not only reviews records, it is required "to determine if the person meets the definition of an SVP." *Holtcamp v. State*, 259 S.W.3d 537, 539 (Mo.banc 2008). The MDT "gives an opinion on whether a case should proceed." *In re Berg*, 342 S.W.3d 374, 381 (Mo.App.S.D. 2011). The MDT "has to notify the attorney general of the results of its assessment." *Morales v. State*, 104 S.W.3d 432, 436 Mo.App.E.D. 2003). The MDT's assessment is provided both to the prosecutor's review committee and the Attorney General. §632.483.5.

This Court interpreted §632.486 to authorize filing a petition "If the multidisciplinary team *and* the prosecutorial review committee confirm [the end of confinement] finding." *Van Orden*, 271 S.W.3d at 584 (emphasis added). However, a year later this Court noted in dicta that "neither a positive

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recommendation in the report nor by the multidisciplinary committee is essential even to the attorney general's decision whether to proceed with the filing of a petition." *State ex rel. State v. Parkinson***,** 280 S.W.3d 70, 77 (Mo.banc 2009). Furthermore, in the concurring opinion, Judge Wolff suggests that the legislative intent of this mechanism is to protect the respondent from "overzealous experts" and *"*appear to be designed to protect against over-inclusion in the category of sexually violent predator. But, in practice, do the statutes function as they apparently are designed?" *Id.* at 78.

The plain language of the SVP Act reveals the importance and necessary function of the MDT. First, the MDT is mandated to review the EOC determination. §632.483.2(3). This is a procedural safeguard necessary to ensure one person is not single-handedly responsible for determining who is thrust into the SVP process. The review ensures the net is not cast too wide, and that only those who actually meet criteria for civil commitment are referred on in the process.

Second, not only does the MDT review the EOC determination, it also reviews raw data about the individual. §632.483.2(1)-(2). This safeguard ensures that the MDT does not blindly accept the EOC determination, but rather comes to its own assessment, and again protects against over-inclusion. Third, the MDT is mandated to make an assessment of whether the individual meets criteria for commitment. §632.483.4. Thus, the MDT is not a passive conduit of information

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from the agency with jurisdiction to the Attorney General; its function must be to evaluate the facts before them and apply the legal criteria to reach a conclusion.

Next, the MDT is comprised of professionals across State agencies, including both DMH and DOC. §632.483.4. The legislature recognized the importance of a decision made not just by one person, but by a team of professionals with a diversity in experience and expertise. Moreover, it cannot be a mistake that both DMH and DOC must be represented on the team. DOC is the agency tasked with administering punishment and subsequently monitoring criminals; DMH is the agency tasked with administering the SVP commitment. §632.495. These two agencies are uniquely situated to distinguish dangerous, but ordinary, criminals from those who are subject to civil commitment because of a mental abnormality. *Thomas v. State*, 74. S.W.3d 789, 791 (Mo.banc 2002), *citing Crane*, 53 U.S. at 870, *Hendricks*, 521 U.S. at 360.

Fifth, the MDT's assessment is a condition precedent to further review and action under the statute. Because the MDT assessment "shall be made available to the attorney general and the [PRC]", the PRC could not meet and make a determination prior to the MDT assessment. §632.483.5. Next, the statute plainly limits the PRC to considering only the records provided along with the notice in subsection 1, and the MDT assessment. §632.483.5. The only "record" mentioned in subsection 1 is the written notice provided to the Attorney General and the MDT. §632.483.1 The EOC determination is provided to the MDT pursuant to subsection 2. §632.483.2(3). It would be illogical for the legislature to constrain

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the PRC to considering only the MDT assessment, but to interpret the statute to permit the PRC to disregard it. If the MDT assessment had no relevance or bearing on a decision to file a petition, the legislature would not have required the MDT to conduct an independent inquiry prior to proceeding with a PRC.

Furthermore, the legislature granted the MDT and PRC members immunity from liability while performing their statutory duties. §632.483.3. The legislature would have no need to shield MDT members with immunity if their function was meaningless and served no purpose in the SVP process. Finally, the determination by the MDT is so important that the legislature requires the Attorney General to attach a copy of that assessment to any SVP petition filed. *Parkinson*, 280 S.W.3d at73;§632.483.5. Copies of the EOC and PRC determinations are not required under the law. *Id.*

When each subsection is read together, the result is logical and inescapable: each layer is a vital procedural mechanism to winnow down the candidates for SVP commitment.

In Kirk's case, the answer to Judge Wolff's question was "no." *Parkinson***,** 280 S.W.3d at 78 (Wolff, M., concurring). No, the SVP Act did not protect Kirk against over-inclusion. No, in practice, the statutes did not function as they are designed. The procedural safeguards put in place by the plain language of the SVP Act were not followed. The PRC and Attorney General’s office disregarded the unanimous MDT determination that Kirk did not meet the definition of an SVP

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and could not be civilly committed.[6] In practice, the State ignored the MDT's function and determination. Judge Wolff's "fairly safe bet" paid out: the State brought the case to a jury and Kirk "will not be seen at large any time this century" if this Court does not intervene. *Id*. While the MDT accurately identified Kirk as one not subject to civil commitment and performed its duty to protect him against over-inclusion in the category of SVPs, the system failed to do so. *Id.* The necessary strict procedural safeguards were not followed and his commitment is unconstitutional. This Court must reverse the order and judgment of the probate court, and discharge Kirk from custody.

[6] The procedural safeguards seem further degraded, and the integrity of the SVP screening process diminished because the Attorney General's office convened the PRC(L.F. 40). A representative of the Attorney General's office attended the PRC meeting, took minutes and kept the records(L.F.40-41).

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IV.

The trial court erred denying Kirk's *Motion to Dismiss for Failure to Permit Respondent to Contest Probable Cause Pursuant to Section 632.489*, in violation of due process, equal protection of the law and to counsel as guaranteed by U.S. Const., amend. IVX, Mo.Const. art. I, §§2, 10, his statutory rights to counsel, to present evidence on his own behalf, and to cross examination under §632.489, in that the probable cause unduly limited Kirk's cross examination of Kircher regarding diagnostic criteria for pedophilia, Kircher's diagnosis was not based on substantial or probative facts, and the court's probable cause finding was not based on evidence adduced at the hearing.

Standard of Review

This Court held that the probable cause determination is similar to the standards for summary judgment in civil cases reviewed *de novo. Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 844 (Mo.banc 2005). Whether an expert's opinion is supported by sufficient facts in evidence is a matter of law also reviewed *de novo* on appeal. *Thomas v. Festival Foods*, 202 S.W.3d 625, 627 (Mo.App.W.D. 2006).

Facts

Relying on Kirk's criminal history, Kircher diagnosed Kirk with pedophilia (PC.Tr.16-17;PCEx.6). DSM criteria requires behaviors "with a prepubescent

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child or children" and indicates such children are "generally age 13 years or younger”(PC.Ex.6). Kircher testified that Kirk had an arrest in 1981 for kidnapping and attempted sexual molestation, when he was 16 years old, and criminal convictions in 1986 and 1987(PC.Tr.17). Kircher claimed Kirk met criteria, because his behavior "is basically his deviant attraction, fantasy sexual urges towards prepubescent children"(PC.Tr.20). Kirk had an attraction to "young males"(PC.Tr.20). Kircher never provided any evidence concerning the sexual development of any "young male" that could establish the individual was prepubescent.

Kirk attempted to question Kircher about her diagnosis by inquiring about the physical development of the boy involved in Kirk's offense(PC.Tr.51). The court sustained the State's objection, ruling that the physical development was not relevant for probable cause(PC.Tr.51). Kirk argued that a diagnosis of pedophilia required evidence the child was prepubescent(PC.Tr.51). The court stated "[t]he sexual development isn't mandatory for the diagnosis"(PC.Tr.52). Exhibit 6 was admitted in an offer of proof(PC.Tr.53;PC Ex.6). Kircher testified she did not recall medical assessment when asked if there was a record of the physical characteristics or development of the victim(PC.Tr.56).

The court stopped Kirk's cross-examination of Kircher: "I see no reason to go forward. We're done"(PC.Tr.61-3). The court found probable cause and entered an order directing Kirk into the custody of DMH until trial(L.F.4). Counsel objected at the hearing(PC.Tr.64-65) and filed a motion to dismiss on August 16,

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2013(L.F.106). At the July 28, 2015 pretrial conference, Kirk argued both procedural problems with the hearing and the sufficiency of the evidence before the probable cause judge to make a finding(Tr.24-25). Kirk argued that without evidence of present pedophilia criteria, there could not be a triable issue of fact warranting continued proceedings(Tr.25). The trial court denied the motion, claiming it was stale(Tr.26).

Analysis

SVP commitment is a significant deprivation of liberty that requires due process protection and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Murrell v. State*, 215 S.W.3d at 103, citing *Hendricks*, 521 U.S. at 357, and *Foucha v. Louisiana*, 504 U.S. at 71, 80 (1992). Procedural safeguards are necessary to ensure that the State only confine a narrow class of particularly dangerous persons, and only after meeting the strictest procedural standards. *Hendricks*, 521 U.S. at 357, 364. The legal process must minimize the risk of erroneous decisions. *Addington*, 441 U.S. at 424, *and see In re Van Orden*, 271 S.W.3d 579, 587 (Mo.banc 2008).

To comply with constitutional due process requirements, Missouri's SVP Act creates an "elaborate step-by-step procedure conferring on the suspected predator a number of rights." *In re Norton*, 123 S.W.3d 170, 174 (Mo.banc, 2003). One due process protection afforded in SVP cases is a probable cause hearing. *Martineau v. State*, 242 S.W.3d 456, 460 (Mo.App.S.D. 2007), citing *Norton*, 123

at 174. Kirk has the following due process rights at that hearing: to a preliminary determination of whether probable cause exists to believe he is a sexually violent predator; to appear in person at the hearing; to contest an adverse probable cause determination; to assistance of counsel at the hearing; to present evidence on his own behalf, and to cross-examine any adverse witness at the hearing. §632.489.

This Court determined the probable cause standard set out in *In re Detention of Peterson,* 42 P.3d 952 (Wash.banc 2002) applies in SVP release cases. *Care and Treatment of Schottel v. State,* 159 S.W.3d 836, 845 (Mo.banc 2005). *Martineau v. State* applied *Schottel* to initial commitment probable cause determinations. 242 S.W.3d 456, 460 (Mo.App.S.D. 2007). Therefore, the *Peterson* standard is applicable to the probable cause hearing in the instant case.

Under *Peterson*, "[p]robable cause exists if the proposition to be proven has been prima facie shown." 42 P.3d at 957, quoted by *Schottel*, 159 S.W.3d at 845. "…[T]he court determines whether the facts (or absence thereof)- if believed- warrant more proceedings." *Peterson*, 42 P.3d at 957. "Probable cause for initiating a civil action "consists of a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence in the same situation, plus a reasonable belief by such person that under such facts the claim may be valid under the applicable law." *Kelley v. Kelley Residential Group, Inc*., 945 S.W.2d 544, 549 (Mo.App.E.D. 1997); *Schottel*, 159 S.W.3d at 845 n.7.

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The "gatekeeper" role is to determine whether a triable fact has been raised by the State's evidence. *Schottel*, 159 S.W.3d at 845. The judge does not make a determination as to the person's danger or whether he is an SVP. *Id.* at 842. Only if a prima facie showing is made, sufficient enough to raise a triable issue of fact, does the case proceed for a second hearing. *Id*. "If no triable issue of fact is shown by the petitioner's evidence, then a further hearing is not required." *Id*.

In addition, civil commitment is only constitutional if it follows proper application of §490.065 when it comes to expert testimony. To be admissible, expert testimony must be supported by the record. *In re A.B.*, 334 S.W.3d 746, 743 (Mo.App.E.D. 2011). "[A]n expert's opinion must be founded upon substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion." *In re Marriage of Patrick*, 201 S.W.3d 591, 598 (Mo.App.S.D. 2006). Questions as to whether proffered expert testimony is supported by a sufficient factual or scientific foundation are questions of admissibility. *Boughton v. State*, 437 S.W.3d 368, 373-374 (Mo.App.S.D. 2014)(internal citation omitted). Any challenge to the expert testimony must be made timely by objection or motion to strike. *Id.*

Denial of Rights to Counsel, Present Evidence, Cross-Examination and To Contest Probable Cause

The probable cause court refused to let Kirk conduct an adequate cross-examination of the State's witness as afforded by §632.489.3(2). The court stopped Kirk's cross-examination and declared it had found probable cause(PC.Tr.61-63).

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In declaring "I see no reason to go forward. We're done[,]" the probable cause court also denied Kirk's counsel any opportunity to contest probable cause to believe each element required to confine him under the SVP Act and precluded Kirk from denying the allegations raised by the State(PC.Tr.63). Denying cross-examination and argument contesting probable cause effectively denied Kirk assistance of counsel, his right to contest probable cause, cross-examine witnesses, and to present evidence. §632.489.

Evidence at Probable Cause Hearing

The only evidence before the probable cause judge was the testimony of Kircher offered at the hearing. In *Amonette v. State*, the Eastern District announced that the court could find probable cause based on the pleadings supported by corroborating evidence at the hearing. 98 S.W.3d 593, 599. In that case, the petition alleged both that the individual plead guilty to a qualifying sexually violent offense and that he suffered from the mental abnormality of pedophilia. *Id.* at 600. Because the Eastern District found the petition's allegations were substantiated by the attachments to the petition, the court did not decide the admissibility of the witness' opinion. *Id.*

Unlike in *Amonette*, the State's petition does not claim that Kirk suffered from pedophilia, or otherwise identify the mental abnormality the State believed he had(L.F.27). The State attached Kircher's evaluation(L.F.30-36), the MDT report where Kirk was unanimously found *not* to meet criteria for civil commitment by four professional mental health workers from DMH and

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DOC(L.F.37), and the PRC vote(L.F.40). Exhibits attached to motions filed with the probate court are not evidence and are not self-proving. *Ryan v. Raytown Dodge Co.*, 296 S.W.3d 471 (Mo.App.W.D. 2009)(motion to compel arbitration was properly denied where exhibits demonstrating an arbitration agreement were attached to the motion, but not submitted as evidence); *Mayfield v. Director of Revenue*, 100 S.W.3d 847 (Mo.App.S.D. 2003)(director did not admit document with informed consent language and therefore failed to present evidence driver advised of informed consent law). This is true even with respect to rulings on motions. *Ryan*, 296 S.W.3d at 473; *Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372, 380 (Mo.App.W.D. 2013). Exhibits must be introduced as evidence and authenticated. *Ryan,* 296 S.W.3d at 473.

In *Heckadon*, Dealers petitioned the trial court to reduce the damages they were ordered to pay and bore the burden of pleading and proving their affirmative defense. 400 S.W.3d at 377-78. At a hearing on Dealers' motion, Dealers did not present any evidence. *Id.at* 379. Appealing the trial court's denial of their motion, Dealers relied upon a document previously filed with the court to demonstrate their burden was met. *Id.* However, filing a document does not put it before the court as evidence. *Id.* The fact that a document was in the court file did not relieve Dealers of their burden at the hearing and was not proof. *Id.*

The Petition's attachments were not offered or admitted at the probable cause hearing. The attachments did not relieve the State of its burden and were not proof. *Id.* Therefore, only Kircher's testimony was evidence properly before the

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probable cause judge at the time of his determination. The State bore the burden of establishing a *prima facia* case that Kirk meets criteria for civil commitment. *Schottel,* 159 S.W.3d at 845. This includes presenting sufficient evidence that Kirk suffered from a mental abnormality to establish a triable issue of fact that that issue. *Id.* However, in this case, the probable cause judge did not follow the law. Rather than holding the State to its burden of producing competent evidence establishing a triable issue fact, the probable cause judge inserted his own opinions as to the criteria constituting a mental abnormality. Only Kircher's testimony bore on that issue.

Kircher's Diagnosis Was Unsupported and Was Not Admissible

Kircher's diagnosis of pedophilia was the basis for her opinion Kirk has a mental abnormality(PC.Tr.15-17;PCEx.6). The DSM requires evidence of specified behaviors specifically "with a prepubescent child or children"(PCEx.6). Kircher claimed Kirk had an attraction to "young males"(PC.Tr.20).

In *Festival Foods*, the Western District said that an expert's opinion must be based on substantial and probative facts in evidence. 202 S.W.3d at 629. There an expert testified that water had been on the floor an unreasonable period of time and should have been detected, despite not knowing how long the water had been on the floor. *Id.* The appellate court ruled that the expert opinion was not admissible, should not have been considered by the jury in determining the ultimate issues in the case, and "clearly could have affected the jury's verdict." *Id.* Therefore, the verdict was reversed and a new trial granted. Kirk acknowledges

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that this point addresses a probable cause hearing and not a trial. However, the conduct of the hearing is critically important, as the hearing itself is a procedural safeguard required under due process, and because the hearing is what determines if an individual may continue to be confined after expiration of his prison sentence and subjected to a trial. Moreover, SVP commitment is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Murrell*, 215 S.W.3d 103.

Kircher's opinion that Kirk suffered from pedophilia, and therefore a mental abnormality, was not supported by substantial, probative facts in evidence. Kircher never provided any testimony concerning the sexual development of any "young male" that could establish the individual was prepubescent. In fact, she admitted she did not review records which would have indicated the victim's physical development(PC.Tr.56). As such, there were no facts or data establishing the criteria for the diagnosis.

Rather, Kircher's diagnosis was based on an *assumption* that Kirk's victims were in fact prepubescent. A forensic psychologist or psychiatrist's opinion concerning a mental disorder based on an assumption not supported by the record should not be admitted into evidence. *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo.banc 2004). A diagnosis relying on such an assumption is based on speculation and conjecture and cannot form a reliable basis for an expert opinion. *Id.* Lacking adequate foundation for the opinion and diagnosis, Kircher's diagnosis was not admissible evidence. *Boughton*, 437 S.W.3d at 373-374.

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Kirk's timely raised this issue at the probable cause hearing. Kirk objected to Kircher's qualifications to give expert testimony when the State first asked for her opinion as to whether Kirk met sexually violent predator criteria(PC.Tr.10). The objection was overruled(PC.Tr.11). Counsel also attempted to question the State's witness specifically about her diagnosis of pedophilia. Counsel inquired about the physical development of the boy involved in Kirk's 1986 offense(PC.Tr.51). The court sustained the State's objection, ruling that the physical development was not relevant for probable cause(PC.Tr.51).

State Did Not Establish Facts That Met Diagnostic Criteria

Not only was Kircher's opinion unsupported and inadmissible, the judge's ruling that "[t]he sexual development isn't mandatory for the diagnosis" replaced the State's evidence with the court's own opinion(PC.Tr.52). The probable cause court's "gatekeeper" role is to determine whether a triable fact has been raised by *the State's evidence*. *Schottel,* 159 S.W.3d at 845. It does not supply evidence, or diagnostic criteria. It is not the function of this Court to decide disputed facts, but it is this Court's function to assure that the probate court, in finding the facts, does not do so based on sheer speculation. *State v. Grim*, 854 S.W.2d 411, 414 (Mo.banc 1993).

Probable cause could only be established if the State's proposition that Kirk had a mental abnormality was prima facie shown. *Peterson,* 42 P.3d at 957; *Schottel*, 159 S.W.3d at 845. The DSM requires evidence of behaviors "with a prepubescent child or children" to make a diagnosis of pedophilia(PC.Tr.16,

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20;PC.Ex.6). No facts were presented about the physical or sexual development of any victim during the hearing required to establish the presence of the "prepubescent" diagnostic criteria. Therefore, there were no facts which, if believed, established the diagnostic criteria necessary and to supported further proceedings. *Peterson*, 42 P.3d at 957.

The State's evidence did not present a *prima facie* case, nor a triable issue of fact as to mental abnormality. *Schottel*, 159 S.W.3d at 845. *Peterson*, 42 P.3d at 957. The probable cause determination was not based on facts established at the hearing, but on sheer speculation. *Grim*, 854 S.W.2d at 414. Because there was no triable issue of fact raised, further proceedings were not required. *Schottel*, 159 S.W.3d at 845. The court did not act as a gatekeeper and did not merely determine if the State's evidence established probable cause. *Schottel*, 159 S.W.3d at 845; *Martineau*, 242 S.W.3d at 460. In ruling that physical, sexual development was irrelevant to a pedophilia diagnosis(PC.Tr.51-52), the court substituted its own opinion for the evidence presented. The court also exceeded its limited role of determining whether the State's evidence established probable cause, taking on the role of providing evidence and opinion testimony. *Schottel*, 159 S.W.3d at 845. This action relieved the State of the burden of establishing probable cause.

Prejudice

Pretrial failures and errors may be prejudicial. *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 76 (Mo.banc 2009). Not every pretrial error will prohibit proceeding on a petition. *Id.* at 77. The issue of prejudice in pretrial errors

is a factual one reviewed for waiver or prejudice. *Id.*, citing *In re Marriage of Hendrix*, 183 S.W.3d 582, 90 (Mo.banc 2006). Here, Kirk raised the errors in the probable cause court's conduct of the hearing during the hearing itself(PC.Tr.64-65) and filed a subsequent motion to dismiss(L.F.106). The motion to dismiss was raised with the trial court prior to trial(Tr.24). The error was not waived.

Kirk was prejudiced. Because the State's evidence did not establish probable cause, Kirk was subjected to an unnecessary second hearing, a trial on the merits. *Schottel*, 159 S.W.3d at 845. Kirk suffered further prejudice when he was committed at the second trial(L.F.515). At the time his motion to dismiss was presented and argued, Kirk had been confined as a result of the wrongful probable cause for two years(L.F.4). The trial court had the opportunity to prevent Kirk's continued unlawful confinement, by granting the motion to dismiss on July 28, 2015(Tr.26). Without the illogical, unsupported probable cause finding, Kirk would not have been in custody on that date, nor today. There would have been no trial.

This court must reverse the order and judgment of the trial court, and Kirk must be released from custody.

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V.

The trial court erred in denying Kirk's request for a change of venue, because this violated Rule 51.03, and his rights to due process and equal protection of the law as guaranteed by U.S. Const., amends. X, XIV and Mo.Const. art. I, §§2, 10, in that Kirk had a right to a change of venue.

Facts

The State filed the petition on July 9, 2013(L.F.26). Kirk filed a motion for change of judge and of venue, pursuant to Rules 51.06, 51.03, 51.04 and §472.141, on August 16, 2013 and a change of judge was granted the same day(L.F.5,104,109). The State opposed, claiming the rules did not apply to the proceedings(L.F.109). A writ was denied in the Western District. *State ex rel. Koster v. Dawson*, WD76782.

Kirk filed a request for a ruling on his motion for change of venue, or in the alternative for a continuance, on June 12, 2015(L.F.168-9). Kirk did not believe he could get a fair trial given the media frenzy over two other high-profile sex cases(L.F.168-9). For example, Raymond Vallia had just been charged in Henry County Case No. 15HE-CR00137 for kidnapping a 13-year-old girl he met online, and transporting her across state lines to have sex(L.F.168-9). Raymond Horn was recently charged for sex crimes against a woman he kept in a box for months. *State v. Horn*, Pettis County Case No. 15PT-CR00529,(L.F.168-9). Both cases had received local and national media attention(L.F.168-9). Regional media reported that the government requested Horn be "institutionalized after he finished a prison

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sentence" because of prior convictions and a sexual sadism diagnosis, but a court found Horn "changed his ways" and ordered Horn's release from custody(LF.168-9). The State claimed Kirk was not entitled to a change of venue, and had not proven prejudice(L.F.170). Change of venue was denied, but additional jurors were summoned for jury duty(L.F.14).

Standard of Review

A trial court's denial of an application for change of venue as a matter of right is a matter of law. *State v. Chambers*, 481 S.W.3d 1, 4 (Mo.banc 2016). A venue ruling based on factual matters is reviewed for abuse of discretion. *McCoy v. The Hershewe Law Firm, P.C.*, 366 S.W.3d 586, 592 (Mo.App.W.D. 2012).

Analysis

Rule 51.03 grants an automatic change of venue in civil cases triable by jury, in a county with less than 75,000, when requested in writing. The application must be filed not more than 10 days after the answer is due, or if no answer is due, within 10 days after the return of the summons. Rule 51.03. The applicant is not required to show cause. Rule 51.03. If timely, the trial court "shall order" the change of venue. Rule 51.03. This automatic change of venue "saves judicial resources that would otherwise be spent in determining whether a party could get a fair trial in the county in light of the prejudice that may have arisen in a particular case due to publicity or familiarity with the parties or the issues involved." *State ex rel. Audrain Healthcare, Inc. v. Sutherland*, 233 S.W.3d 217, 218 (Mo.banc 2007). The automatic change "avoids any potential unfairness." *Id.* The trial court has a

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duty to grant a change of venue if the application is in substantial compliance with applicable statute. *Pippas v. Pippas*, 330 S.W.2d 132, 134-135 (Mo. App. 1959). Failure to grant a timely application for change of venue as a matter of right is reversible error. *Chambers*, 481 S.W.3d at 5.

Rule 51.04 permits a change of venue for cause, upon a showing that the county's residents are prejudiced against the applicant. A request made for cause must be filed at least 30 days prior to the trial. Rule 51.04(b). The opposing party has 10 days to file a denial. Rule 51.04(e). If no response is filed, or if prejudice is found, the request must be granted and venue changed. Rule 51.04(e). If the other party denies prejudice, then "the court shall hear evidence and determine the issues." Rule 51.04(e). Publicity can give rise to prejudice warranting a change of venue for cause. *State ex rel. Lebanon School Dist. R-III v. Winfrey*, 183 S.W.3d 232, 237 (Mo.banc 2006). "Publicity may be of such character that actual prejudice must be presumed[.]" *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 102 (Mo.banc 1985)(overruled on other grounds).

Rule 51.06 requires applications for a change of judge and for a change of venue to be filed together. The judge presented with a timely motion must sustain the application for a change of judge. Rule 51.06(b). The newly assigned judge determines the change of venue. Rule 51.06(b).

Rules granting change of judge and venue must each be given “its most encompassing application” so the “obvious purpose of the rule[s] governing change of venue and disqualification of a judge should not be defeated.” *State ex*

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rel. R. L.W. v. Billings, 451 S.W.2d 125, 122 (Mo.banc, 1970). Rule granting change of judge or venue as a matter of right "should be construed liberally in favor of the right to grant such change of venue or disqualification[.]" *In re Boeving's Estate*, 388 S.W.2d 40, 50 (Mo.App. 1965). The question is whether the pending case is a "civil" case within the meaning of Rule 51.03. *Id.* A civil suit is distinguished from a criminal case and "means a *proceeding* by which rights of private individuals are protected or enforced." *Id.* For example, probate cases involving removal of a guardian are "civil suits." *Id.*

An SVP proceeding is "a statutorily created civil action" known as a "special statutory proceeding." *In re Norton*, 123 S.W.3d 170, 172 (Mo.banc, 2003), *In re Salcedo*, 34 S.W.3d 862, 867 (Mo.App.S.D. 2001)(overruled on other grounds). Actions under the SVP Act are adversary proceedings. *Care and Treatment of Barlow v. State*, 250 S.W.3d 725, 732 (Mo.App.W.D. 2008)(proceeding not criminal, but "State's representatives still perform their designated functions in the adversary proceeding."). Alternatively, in the event this Court finds that the proceeding is not a "civil action," then it must be a criminal case, and Kirk is entitled to a change of judge under Rule 32.07. *See Billings*, 451 S.W.2d at 127(civil suits are "contradistinguished from criminal cases[,]" and are "all those that are not criminal.").

The SVP Act does not contain all rules and procedures applicable to SVP proceedings. *Bernat v. State*, 194 S.W.3d 863, 864, 867 (Mo.banc 2006). The SVP act "set[s] out only those procedures that are different from the procedures that

would otherwise apply to a civil hearing." *Id.* at 686. It is improper to assume that the legislature intended to deny Respondent any right not listed in the SVP act, by the mere fact that some rights are specifically listed in the Act and some are not. *Id*. at 689. Civil Procedure rules are applicable to such special statutory proceedings, provided the rules are not "inconsistent or repugnant" to the special statutory proceedings. *Billings*, 451 S.W.2d at 128; *State ex rel. R-1 School Dist. Of Putnam County v. Ewing*, 404 S.W.2d 433, 439 (Mo.App.E.D. 1966). Rule 41.01 applies the Rules to all civil cases before an associate or circuit judge, "except those actions governed by the probate code."

While SVP petitions are filed with probate division pursuant to §632.484(1), SVP actions are not "probate proceedings;" the State does not petition for commitment under any chapter in the probate code, but pursuant to the SVP Act itself. *Salcedo*, 34 S.W.3d at 869-70. The probate code is inapplicable and does not govern, nor limit, the rights of parties in SVP proceedings. *Id.* Assuming, *arguendo*, that an SVP proceeding is a probate proceeding, it is an adversarial proceeding to which the Civil Code and the Rules automatically apply, with the exception of Rule 55. §472.141(1). *See Barlow*, 250 S.W.3d at 732.

Furthermore, §632.484(1) establishes where an SVP action is initiated, but does not limit where the case may be tried. *See Winfrey*, 183 S.W.3d at 236. In *Winfrey*, a school district challenged a change of venue, claiming that §508.050 constrained the case to the county in which the school district was located. *Id.* at 234. This Court declared §508.050 established venue for commencement of the

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suit, and Rule 51.03 permitted transfer to another county. *Id.* Rule 51.03's language does not limit its application to specific kinds of civil suits. *Id.* at 234. The school district's challenge was "based on the faulty premise that Missouri statutes contemplate (indeed require) that all lawsuits must be tried in a county in which suit initially could be commenced." *Id.* The legislature was aware how to prohibit change of venue, but chose not to limit that right. *Id.* at 236. Because the county had fewer than 75,000 inhabitants, Rule 51.03 authorized a change of venue. *Id.* at 233, 238.

SVP proceedings are like juvenile proceedings: both were declared civil actions, yet demand certain criminal protections. *Salcedo*, S.W.3d at 867, *Billings*, 451 S.W.2d at 127. Both the juvenile and probate courts are "but [] division[s] of the circuit court." *Id.* at 127. Both proceedings are contemplated by their own respective statutory acts, yet neither act "purport[s] to set up its own procedures in all respects." *Billings*, 451 S.W.2d at 128; *Bernat*, 194 S.W.3d at 864. The SVP Act authorizes an appeal of the final determination, but does not establish any procedure for the appeal. §632.495.1. Likewise, the Juvenile Act authorizes an appeal without establishing the procedure. Just like juvenile appeals, SVP appeals follow the standard appellate procedure set forth by the rules of civil procedure. *Billings*, 451 S.W.2d at 128. Finally, juveniles are entitled to a change of judge and of venue under the Civil Rules because they are civil suits. *Id.*

The same must be true in SVP actions. Appellate courts have commonly applied the Civil Rules to SVP Actions, including rules not listed in Rule 41.01(b),

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Rule 53 regarding commencement of a civil action governs SVP cases. *Norton*, 123 S.W.3d at 172. Jury Instructions must comply with Rule 70. *Care and Treatment of Scates v. State*, 134 S.W.3d 738 (Mo.App.S.D., 2004).

Kirk was entitled to change of venue under Rule 51.03. The State's petition was filed July 9, 2013(L.F.26). No return of service indicating service of the Petition, a summons, or show cause order upon Kirk was available. Filing a motion to dismiss extends the time to file to 10 days after the motion to dismiss is ruled on. *Winfrey*, 183 S.W.3d at 237. Kirk filed several motions to dismiss on July 31, 2013(L.F.3). Those motions were taken up and ruled upon on August 8, 2013(L.F.4). Kirk timely filed and served a joint motion for change of judge and change of venue eight days later, on August 16, 2013(L.F.104).

Kirk cited both Rule 51.03 and 51.04 in his joint motion(L.F.104). Henry County had 22,272 residents at the time. Jason Kander, *Cities and Counties*, Official Manual of the State of Missouri 2013-2014 776 (Laura Swinford, ed.), available at http://s1.sos.mo.gov/cmsimages/bluebook/2013-2014/8_CityCounty.pdf#A3 (last visited July 19, 2016).

Kirk did not notice up his joint motion because the then-current judge immediately granted a change of judge(L.F.5). Kirk brought the application for a change of venue to the trial court's attention on June 12, 2015, [7] requesting a

[7] Then the population was 22,059. Jason Kander, *Cities and Counties*, Official Manual of the State of Missouri 2014-2015 737, available online at

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ruling, or continuance until the sex case publicity, including a case where the defendant had been released from a similar commitment, died down(L.F.168). The State was served with a copy the same day(L.F.169) and filed a response on June 15(L.F.170). On June 18 the parties exchanged emails with the clerk's office and a hearing was set for July 2(Sup.L.F.1). A continuance was denied because a courtroom was available in both Bates and St. Clair County(L.F.14). Change of venue was denied after a hearing(L.F.14). On July 31 the trial was continued until September 2015(L.F. 19).

The purpose of the notice requirement is to allow the opposing party an opportunity to contest. *State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 246, 248 (Mo.banc 1995). In *Scott*, the opposing parties had notice of a hearing on a motion for change of judge as a matter of right, and set the hearing themselves. *Id.* The only applicable objections would be the motion was untimely, the right had been exercised, or the right had been waived. *Id*. Failure to include notice of date for hearing on motion was not fatal where the application was timely filed and served on opposing party, the opposing party had an opportunity to contest the motion, and there was no other cause for denying the motion. *Id.*

Kirk timely sought a change of venue as a matter of right under Rule 51.03(L.F.107,168). The State claimed the Rules did not authorize a change of

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https://www.sos.mo.gov/CMSImages/bluebook/2015-2016/8_CityCounty.pdf (last visited July 19, 2016).

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venue in SVP proceedings and Kirk did not show prejudice(L.F.109,172). The State did not claim Kirk's change of venue request was untimely, had been exercised already, or waived. The State volunteered to initiate the conference call for the hearing(Sup.L.F.1).

Kirk' timing presenting the application for a change of venue did not amount to waiver and waiver was not claimed. In *Chambers*, a party waived his right to a change of venue, where the application was not taken up for several months. 481 S.W.3d at 5-6. The attorney not only failed to raise the motion, he also repeatedly informed the court there were no pending matters. *Id.*at 6. The application was not presented to the court until Sunday evening and was argued just before the trial began Monday morning. *Id.*at 4. This Court found it a "last-minute delay tactic" that did not evidence an intent to exercise the right to a change of venue, but to "bypass" the trial court's denial of his equally late request for a continuance. *Id.*at 6.

Kirk complied with the requirements of Rule 51.03 by filing his request within 10 days after a ruling on his motions to dismiss. He is entitled to the benefit of the procedures with which he complied and which apply to his case. Denying Kirk the right to a change of venue would be "to consign [him] to a limbo beyond the reach of both the Civil and Criminal Rules" solely because the State alleges he is an SVP. *See Billings,* 451 S.W.2d at 130. Denying application of the change of venue would "require [him] to present [his] evidence before a tribunal whose impartiality has been brought into question, yet which retains the power to commit

[him] to an institution where he may be lawfully detained" for the rest of his natural life. *Id.*

Kirk was not required to plead and prove prejudice under rule 51.03, he was entitled to one. U.S.Const., amend V, XIV and Mo.Const. art. I, §§2,10. Kirk has a "liberty interest protected by the due process clause from arbitrary governmental action." *Salcedo,* 34 S.W.3d at 867, quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997). Government action is subject to strict scrutiny. *Coffman,* 225 S.W.3d at 445. No compelling argument exists to deny Kirk a change of venue, justifying differential treatment, and the State offered none.

The trial court erred in denying Kirk's request for a change of venue under Rule 51.03. This Court must reverse and remand for a new trial, in a new venue.

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VI.

The trial court erred in denying Kirk's offer of proof, including evidence of Kirk's release plan and the fact that he would be supervised if released, because this violated his right to due process, a fair trial, to present evidence in his defense, and hire the expert of his choice, guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §§10, §§490.065 and 632.489, in that experts considered and relied upon Kirk's release plan; the State was opened the door by introducing opinion that Kirk's release plan, supervision conditions and post-release support network increased his risk; and in failing to admit Kirk's proffered evidence, the jury was misled and left unable to evaluate the expert opinions.

Facts

The State filed a motion in limine and successfully excluded "whether he has a 'support system' in place," and any other conditions that might exist if Kirk was released(L.F.124). Kirk argued the State was trying to prevent evidence of his release plan, considered by every expert(Tr.3). Kirk asserted he should be permitted to discuss what was relevant to the experts' opinions, relied upon, and identified in research as impacting his risk(Tr. 3-4).

Kircher discussed Kirk's release plan and social support system as part of her risk assessment, including that Kirk's system included ex-felon sex offenders, he would be on parole told not to associate with them, and association would increase his risk. (Tr. 276, 288-9). She testified Kirk "has a lot of things stacked

against him" when he goes into the real world, because of the "burden of sex offender registry… and the employment limitations that come with that" and he would be “fairly isolated on top of all these other challenges he would be facing reentering the community as a sex offender"(Tr.289-90). This support system increased risk because it included negative social influences and suggested lack of supervision cooperation because "He's setting himself up to fail on that again"(Tr.289). It indicated poor problem solving skills, and higher risk, because he had difficulty identifying these difficult situations and because who he planned as support(Tr.289).

Kirk was not allowed to ask Mandracchia about consideration of Kirk's release plan in assessing risk(Tr.391). Kirk argued the State opened the door with Kircher's risk assessment testimony considering social influences and interventions(Tr.389-90), and the evidence served as the basis for expert opinions(Tr.390). Kirk affirmed he would not argue past parole conditions would apply again if released, specific conditions of supervision, or that he would be controlled by parole if released(Tr.4,390,407-08).

Kirk made an offer of proof: Mandracchia considered Kirk's release plan, including where he would live and go, that he would be on parole supervision until 2017, and the conditions of supervision(Tr.412-13). Time on supervision is a protective factor(Tr.413). Mandracchia understood the supervision conditions to be "pretty decent," with mandatory sex offender treatment and polygraphs, include

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registration, geographic limitations, and general probation and parole conditions(Tr.413).

The fact Kirk would be supervised on parole until 2017 impacted Fabian's risk assessment(Tr. 612-13). Research shows the fact of supervised mitigates risk, and Fabian testified experts reasonably rely upon such a fact(Tr.613). Missouri's lifetime supervision of sex offenders(Ex.V) also mitigated Kirk's risk(Tr.613-14). Lifetime supervision provides for residence in a community release center with community-based services, and in community supervision centers assisting with employment, treatment and alternative home plans(Ex.V). Kirk preserved the issue in his motion for a new trial(L.F.502-3).

Standard of Review

"When a motion in limine is sustained, its propriety is judged by the admissibility or inadmissibility of the excluded evidence." *In re Calleja*, 360 S.W.3d 801, 803 (Mo.App.E.D. 2011), citing *Brown v. Hamid,* 856 S.W.2d 51, 55 (Mo.banc 1993). Ordinarily, the trial court has discretion whether to admit evidence, but whether testimony and evidence meet the requirements of §490.065, and is therefore admissible, is reviewed de novo. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo.banc 2011).

Analysis

To satisfy due process, one right afforded to Kirk is the right to require the State to prove by clear and convincing that he is a sexually violent predator, including proving he is more likely than not to commit predatory acts of sexual

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violence prior to commitment. §632.495. The SVP Act also gives Kirk rights given to criminal defendants, including the right to present evidence in his defense. *In re Norton*, 123 S.W.3d 170, 175 (Mo.banc 2003);§§632.489,632.492. Another due process protection is the right to hire one's own expert to conduct an evaluation and form an opinion as to the ultimate issues. §632.489.4.

Under Missouri's expert testimony statute, an expert may offer opinion testimony on the ultimate issues at trial. §490.065.2, *Lee v. Hartwig*, 848 S.W.2d 496, 498 (Mo.App.W.D. 1992). In an SVP trial there are issues which must be decided by the jury, but cannot be without expert testimony because they are beyond the understanding of lay persons. *In re Cokes*, 107 S.W.3d 317, 323 (Mo.App.W.D.2003). One such issue is the likelihood of risk of future acts of sexual violence. Experts relied upon Kirk's release plan in evaluating his future risk, including would live and go, what he would do, who he would associate with, the fact he would be supervised and subject to lifetime sex offender supervision.(Tr.276,289-90,412-13,612-14).

The State contended this was inadmissible "external constraint" evidence excluded under *Lewis v. State*, 152 S.W.3d 325 (Mo.App.W.D.2004), *Care and Treatment of Cokes v. State*, 183 S.W.3d 281, 285–86 (Mo.App.W.D.2005), and *In re Calleja*, 360 S.W.3d 801, 803 (Mo.App.E.D.2011)(L.F.124). In *Lewis*, the trial court prohibited cross examination about continued supervision if released. 152 S.W.3d at 330. Lewis argued "the safeguard of rigorous supervision during probation [made] it less likely that he would engage in predatory acts of sexual

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violence if not confined in a secure facility." *Id.* However, the issue before the jury is not whether some other external constraint would make it less likely that he would engage in the acts. *Id.* at 332. The opinion acknowledged a Massachusetts case stating "additional opportunity for supervision of the defendant in the context of a criminal sentence, through parole or probation is viewed by experts as a protective element that would lower risk." *Id.*at 331, citing *Commonwealth v. Beeso*, No. 011649, 2003 WL 734415, at *7 (Mass.Super.2003). But, because the Massachusetts opinion did not identify the source of that proposition, it was not persuasive. *Id.*[8]

[8] Several other states have determined supervision is a risk factor. *See In re Civil Commitment of R.S.*, --- A.3d ---, 2013 WL 3367641 at 2(N.J.Super.Ct.App.Div. 2013)(individual was high risk without protective factors, supervision in place); *Doe v. Sex Offender Registry Bd.*, 857 N.E.2d 492, 496(Mass.2006)(examiner evaluated risk factors for sexual recidivism, including probation supervision and home situation)(law identifies risk factors, including parole/probation supervision, conditions of supervision, residence in home setting providing guidance and supervision); *People v. Davenport*, 833 N.Y.2d 116, 117(N.Y.App.Div.2007)(the absence of parole or probation supervision is risk factor for reoffending); and *J.J.F. v. State*, 132 P.3d 170(Wyo.2006)(statue requires consideration of probation/parole supervision and home situation in determining risk of reoffense).

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In *Cokes*, the trial court properly excluded rebuttal evidence of proposed post-release medication arrangements where Cokes himself sought, and was granted, a ruling that no evidence would be presented about medication or treatment if released.183 S.W.3d at 285.When the State's expert testified Cokes would not take medicine himself if released, Cokes did not object but made an offer of proof. *Id.* He claimed the evidence would allow the jury to consider whether his mental disorder prevented him from participating in treatment voluntarily. *Id.* The excluded evidence was not relevant to determining whether Cokes had a mental abnormality. *Id*.

In *Calleja* the State's motion in limine to exclude evidence of immigration status and potential deportation was granted. 360 S.W.3d at 802. Calleja's offer of proof included testimony that depending on federal procedures, a deportation order could be entered and he could be deported. *Id.* at 803. Calleja's evidence was not relevant to a determination of whether he had a mental abnormality or risk.*Id.*

The three external constraint cases demonstrate the excluded evidence was offered as independent, substantive evidence, and there was no testimony that any expert relied on the excluded evidence in formulating an opinion as to mental abnormality or risk. In contrast, in *Brasch v. State*, this Court cited expert testimony noting the absence of protective factors, specifically parole supervision, in a risk analysis. 332 S.W.3d 115, 118 (Mo.banc 2011).This case is the exact inverse of *Brasch*; if the absence of supervision can be considered when deciding risk, then it should also be considered when present.

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In the instant case, experts considered Kirk's release plans as part of their risk assessment(Tr.276,412-13). Kirk did not argue conditions of supervision would safeguard the public or keep him from reoffending. *Lewis*, 152 S.W.3d at 330. He did not seek to admit evidence of a *potential* legal action that had no bearing on either of the issues, or that medication would abrogate a mental disorder or enable him to participate in treatment. *Calleja*, 360 S.W.3d at 802-03; *Cokes*, 183 S.W.3d at 285. He sought only to explain and demonstrate the basis of the experts' assessments, opinions, and the strengths and weaknesses of their evaluations. And he did so after the State opened the door.

The State was permitted to present Kircher's testimony concerning her risk assessment, including Kirk's support group of former felons, and parole conditions(Tr.276). Kircher increased Kirk's risk because of things that would happen if he was released. She increased Kirk’s risk for lack social support, negative social influences, a theoretical lack of cooperation with supervision, and for poor planning(Tr.276,282,288-90).Kircher considered what Kirk's life would look like if released, telling the jury, "to think about Kirk being able to go out into the world and function, he has a lot of things stacked against him," including sex offender registry and employment limitations(Tr.289). Kircher also testified about supervision conditions Kirk faced during his release from 2011-2012, including living in the community release center with access to basic services, an onsite parole officer and therapist, facility rules, and a curfew(Tr.292). Taken as a whole, Kircher's testimony implied that Kirk would be thrust into the community on his

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own, without any support, in contrast to his community time in 2011-2012, and therefore his risk increased.

"When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible." *Howard v. City of Kansas City*, 332 S.W.3d 777, 785 (Mo.banc2011). Testimony "that tends to explain, counteract, repel or disprove evidence offered by [one party] may be offered in rebuttal." *Id.* Evidence that might be otherwise inadmissible cannot be excluded if the objecting party was first to introduce the evidence. *Lewy v. Farmer*, 362 S.W.3d 429, 433 (Mo.App. S.D.2012), citing *Union Elec. Co. v. Metro. St. Louis Sewer Dist.*, 258 S.W.3d 48, 57 (Mo.banc2008). The party who first opened the door to the evidence may not complain. *Id.*

In *Union Electric*, expert testimony interpreting a contract was properly admitted where the opposing party had opened the door. 258 S.W.3d at 57. The Sewer District asked an expert for his evaluation of the meaning of contract language. *Id.* Therefore, the Sewer District opened the door for the opposing party's expert to testify about the meaning of the contract, even though such testimony would generally be inadmissible and prohibited. *Id.*

The State asked Kircher about her evaluation of Kirk's risk, bringing out evidence of Kirk's release plans and what would happen if released with its first witness in its case-in-chief(Tr.276,288-89). Therefore the State opened the door to Kirk's evidence. *Union Elec.*,258 S.W.3d at 57. Kirk's proffered evidence sought to explain, counteract, repel and disprove the testimony about Kirk's risk and

release plans. *Howard*, 332 S.W.3d at 785. Because the State introduced such evidence first, Kirk's evidence could not be excluded. *Lewy*, 362 S.W.3d at 433.

Kirk was denied an opportunity to present testimony through Mandracchia and Fabian that Kirk would be under the same supervised parole Kircher described until 2017(Tr.412-13;612-13;L.F.33 "Upon his release, Kirk indicated that his plan was to return to KCCRC.";Ex.V). The jurors heard about factors increasing risk, but Kirk was prevented from present testimony that parole in and of itself was a protective factor mitigating risk(Tr.276,412-13;612-13). The jurors heard he would reenter the community "isolated," without support, subject to conditions, and to employment limitations, but Kirk was prevented from telling them about release centers and supervision centers that would provide that support and housing(Tr.289;Ex.V). Kircher was permitted to testify Kirk's risk increased because of what release would look like for him; but Kirk was not permitted to present testimony to contradict that(Tr.412-13;612-13). It was fundamentally unfair that one expert was permitted to testify about release part of her risk assessment in order to secure his lifetime confinement, but Kirk was unable to do the same where it demonstrated lower risk and disproved the State's evidence.

Kirk's evidence was necessary to correct the unfair prejudice caused by Kircher's testimony, which, as a whole, created the impression that Kirk would be thrust into the community on his own, without any support, and therefore he was at an increased risk to reoffend. First, the impression created was not, in fact, true. Kircher herself was aware of Kirk's plan to return to the community release center

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she described as a "very structured environment" providing basic services and a support next work including a probation officer and therapists(L.F.33;Tr.292). Exhibit V demonstrated not only was the same community release center available, so was a community support center; both would provide social support, housing, assistance with employment, and more(Ex.V).

Second, that Kirk would have been returned to a community release center was necessary to rebut Kircher's evaluation of risk based on Kirk's planned social support system. Not only would the community release center provide support, the men Kirk intended to be stay in contact with would have been fellow residents, not "negative social influences" he was prohibited from associating with in Kircher's view(Tr.276,288-89). Kirk was not "setting himself up to fail again" where he intended to fully cooperate with supervision by entering the community release center(Tr.289). Kirk's evidence would have rebutted Kircher's evaluation he had problem solving deficits, because the evidence demonstrated there was a plan in place to deal with the things in the real world like registration and employment limitations, and he would not be "isolated"(Tr.289-90). Finally, in contrast to Kircher's opinion about Kirk's risk in light of his release, both Mandracchia and Fabian agreed that the mere fact Kirk would be on parole supervision was a protective factor(Tr.413,612-13).

The probate court erred when it excluded Kirk's evidence. Kirk's evidence was considered by all three experts in their risk assessments, and is the type of facts or data reasonably relied upon by experts in the field. Kirk was permitted to

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explain *why* his expert believed he was not "more likely than not," and to demonstrate the basis for that opinion. He was entitled to impeach the State's experts and to rebut the State's evidence.

If this court find the excluded evidence was inadmissible external constraint evidence, the State opened the door. Admission of Kirk's evidence was necessary to rebut, counter and disprove the State's evidence and to cure the prejudice Kirk suffered from admission of evidence of his release plan and parole supervision in the first place. This court must reverse the order and judgment of the trial court and remand for a new trial.

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VII.

The trial court erred in refusing to submit Instruction F-1 and in submitting Instruction 6 instead, because this violated Kirk's rights to due process, a fair trial as guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §§2, 10, in that Instruction 6 submitted a legal question to the jury that had already been determined and misled the jurors by diverting them from the ultimate factual issue: whether Kirk had a mental abnormality that made him more likely than not to reoffend.

Facts

The trial court gave Instruction 6, and refused Kirk's proposed F-1(L.F. 486,491;Tr.533,353). Kirk argued *Gormon* meant the jury should not be instructed to find his conviction qualified as a sexually violent offense ("SVO") because that was a question of law already decided(Tr.518). The State acknowledged that *Gormon* supported Kirk's argument that the SVO is not requierd in the verdict director(Tr.523). Trial court decided the propositions one and two in Instruction 6 are factual findings the jury must make(Tr.534-35). Kirk objected and raised the issue in his motion for a new trial(Tr.535;L.F.504-5).[9] The State told the jurors in closing argument they had to find Kirk was guilty of sodomy, and that the crime

[9] Kirk also objected to Exhibits and testimony that Kirk had a qualifying sexually violent offense(Tr.247-250;L.F.500,503).

was a sexually violent offense(Tr.719). The State pointed out Instruction 6 told them sodomy was a sexually violent offense(Tr.719).

Instruction 6, the verdict director, provided:

If you believe the evidence clearly and convincingly establishes:

First, that the respondent was found guilty of sodomy in the Circuit Court of Henry County, State of Missouri, and

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality, and

Fourth, that this mental abnormality makes the respondent more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility,

then you will find that the respondent is a sexually violent predator.

However, unless you find and believe that the evidence has clearly and convincingly established each and all of these propositions, you must find the respondent is not a sexually violent predator.

As used in this instruction, "sexually violent offense" includes the offense of sodomy.

As used in this instruction, “mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior.

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As used in this instruction, "predatory" means acts directed towards individuals, including family members, for the primary purpose of victimization.

Instruction F-1 did not include the first two propositions, or the definition of "sexually violent offense"(L.F.491). Instruction F-1 submitted only two propositions to the jury:

> First, that the respondent suffers from a mental abnormality, and
>
> Second, that this mental abnormality makes the respondent more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility,

(L.F.491).

Standard of Review

Whether a jury is properly instructed reviewed de novo. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 376 (Mo.banc 2014). Reversal is warranted if the instructional error resulted in prejudice that materially affected the merits of the action. *Id.*

Analysis

The jury in an SVP trial determines whether an individual is an SVP as defined by §632.480. *In re Gormon*, 371 S.W.3d 100, 106 (Mo. App.E.D.2012); §§632.492, 632.495. Section 632.480 defines SVP as:

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any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:

(a) Has pled guilty or been found guilty … of a sexually violent offense; or

(b) Has been committed as a criminal sexual psychopath …

In *Gormon*, the jury was not instructed to find whether a conviction was an SVO. *Id.* Whether the conviction is an SVO under §632.480 is a question of law for the court to decide. *Id.* at 106. There was no error in omitting such a finding from the verdict director. *Id.* The jury was properly instructed on the *ultimate evidentiary issue*, whether the individual was an SVP. *Id.* The trial court correctly followed the substantive law, and only submitted the factual issues to the jury. *Id.* The trial court did not "remove" an issue. *Id.* 106-107. Juries do not receive instructions on questions of law. *Id.* at 106.

There are no applicable MAI instructions for SVP cases. *Gormon*, 371 S.W.3d at 106. Therefore, Rule 70.02(b) requires that "instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." *Id.* The trial court must follow the substantive law. *Id.* The trial court properly follows the substantive law when it instructs the jury on the ultimate issues, but not on the determination of law that a conviction qualifies as an SVO. *Id.*

Instruction 6 presented a legal issue to the jury outside of its role in determining a mental abnormality and risk. *See Gormon*, 371 S.W.3d 106.

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Paragraphs one and two submitted a legal question that had already been determined by the trial court. *Id*. Therefore, Instruction 6 did not properly follow the substantive law and failed to submit only ultimate evidentiary issues to the jury. *Id*. Giving Instruction 6 was error.

In *Esmar v. Zurich Ins. Co.*, 485 S.W.2d 417, 422 (Mo.1972), prejudicial error resulted when the jury was given a non-MAI verdict director asking for a legal conclusion, not a finding of fact. One of the three propositions instructed the jury to find the "plaintiff sustained a loss within the terms of the policy."*Id.* Likewise, it was prejudicial error to give Instruction 6, calling for a legal conclusion. Instruction 6 misdirected the jury as to the factual issues within their province to decide.

Henderson v. St. Louis Housing Authority, 605 S.W.2d 800, 802 (Mo.App.E.D.1979), involved a claim of wrongful discharge for filing a Worker's Compensation claim. There was no MAI instruction covering this situation, so the plaintiff submitted and the trial court gave a non-MAI instruction. *Id*. at 803. One of the "elements" of the cause of action was that the plaintiff exercised his rights under the law. *Id*. The defendant challenged the instruction on appeal, arguing it submitted only an abstract statement of law. *Id*. Because there were no MAI instructions, the submitted instruction had to submit only ultimate facts, not abstract statements of law. *Id.* Since filing a claim is only one of many rights in the workmen's compensation law, the court found the instruction improper. *Id*. What is a right under the law is a legal question for the court, and not the jury, to

determine. *Id.* The Court reversed the judgment and remanded the case for a new trial. *Id*. at 804.

The State asked the jurors to find Mr. Kirk to be an SVP, and used Instruction 6 to instruct the jurors that he had been convicted of an SVO. The trial court erred in refusing Kirk's verdict director and in overruling his objections to Instruction 6. This Court must reverse the order and judgment of the trial court, and remand for a new trial in which the jury is only instructed to determine ultimate evidentiary issues.

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VIII.

The trial court erred in submitting Instruction 7, over Kirk's objection and request to declare §632.492 unconstitutional, because that violated Kirk's rights to due process, a fair trial and equal protection of the law as guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §§2, 10, in that §632.492 required the trial court to give Instruction 7; the instruction informed the jury of the legal consequence of their verdict; there was no evidence to support giving the instruction; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for civil commitment.

Facts

The trial court gave Instruction 7, over Kirk's objections(Tr.525;L.F.478). Kirk's counsel objected to §632.492, which required the trial court to give Instruction 7(Tr.525). Kirk argued that because the jury is not advised of the consequence of its verdict in any other setting unless the jury gets to make a determination about the consequence, SVP litigants are treated differently than any other litigant(Tr.526). Counsel highlighted the federal decision finding that the DMH custody, control and treatment was not being administered constitutionally(Tr.526). The parties were not permitted to present evidence of what the "care, control and treatment" was and Kirk was precluded from rebutting the instruction(Tr.526). Finally, Kirk argued there was no evidence to support Instruction 7(Tr.527). The trial court called it "a toss-up" gave Instruction 7

because "the law requires that it be given"(Tr.527). This issue was preserved in the motion for a new trial(L.F.498,504,505).

Instruction 7 read: "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care and treatment"(L.F.478).

Standard of Review

Whether a jury is properly instructed is reviewed de novo. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 376 (Mo.banc2014). A reversal is warranted if the instructional error results in prejudice that materially affected the merits of the action. *Id.*

Analysis

Section 632.492 requires the trial court to instruct the jury that "if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment." This is the legal consequence of an SVP verdict, beyond the scope of the jury's role determining ultimate evidentiary issues.

The SVP jury only determines whether an individual is an SVP, defined by §632.480. *In re Gormon*, 371 S.W.3d 100, 106 (Mo.App.E.D.2012); §§632.492, 632.495. The two ultimate evidentiary issues are: (1)does the person have a mental abnormality and, if so, (2)does that mental abnormality cause the person to be more likely than not to engage in predatory acts of sexual violence if not confined. *Gormon*, 371 S.W.3d at 106.

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The legal consequence of an SVP verdict, mandatory commitment to DMH, is left to the trial judge. §632.495.2. This is consistent with Missouri psychiatric civil commitment law, where confinement and treatment following a verdict is a question of law determined by the probate court. §632.350.5. As such, §632.350.2 directs that "the jury shall determine and shall be instructed only upon the issues of whether or not the respondent is mentally ill, and as a result, presents a likelihood of serious harm to himself or others." Following the trial and a jury's determination of those issues, it is left to the trial court alone to address confinement and treatment. §632.350.5.

However, §632.492 requires an instruction advising the jury of the consequence of the verdict. The evidence and instructions given to SVP juries should be constrained to the ultimate issue before them, whether or not a respondent is a sexually violent predator. *Gormon*, 371 S.W.3d 106. Jurors should not be asked to pass upon question of law; their function is to decide questions of fact. *Eagle Star Group, Inc. v. Marcus*, 334 S.W.3d 548 (Mo.App.W.D.2010). Instructions are properly refused in civil cases where the instruction would submit questions of law for the court to decide. *See Carson-Mitchell, Inc. v. Macon Beef Packers, Inc.*, 544 S.W.2d 275 (Mo.App.KC1876)(instruction submitting purely legal defense properly refused). Giving such instructions has been held to be reversible error. *See Esmar v. Zurich Ins. Co.*, 485 S.W.2d 417 (Mo.1972)(giving instruction submitting legal matter for determination by court, and not calling for factual determination of jury was prejudicial error).

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The jury should not be informed of a later consequence during the fact finding phase of trial. It is reversible error to submit an instruction in phase one of a bifurcated trial that informs the jury of a matter in phase two of the trial. For example, in *Advantage Buildings,* it was error to instruct the jury it could aware punitive damages in the first phase of a bifurcated trial. *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16, 29 (Mo.App.W.D.). The instruction was a blatant misstatement of law that misled and confused the jurors, resulting in prejudice warranting reversal. *Id.*at 30.

This is particularly true where the jury has no role in determining the consequence of the verdict. "It is well established that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed." *Shannon v. United States,* 512 U.S. 573, 579 (1994)(internal quotation and citation omitted). This is even true in cases where a defendant is relying on an NGRI defense, and the defendant would go to the Department of Mental Health following a jury verdict. *Id.*

Instructions presenting abstract statements of law not requiring any finding by the jury mislead and confuse the jury, and are properly refused. *Mobley v. Webster Elec. Co-op.*, 859 S.W.2d 923, 933 (Mo.App.S.D.1993); *Chism v. Cowan*, 425 S.W.2d 942, 949 (Mo.1967). In *Chism* this Court affirmed the refusal of an instruction giving an exact recital of a statute because it was "simply an abstract statement of law requiring no finding by the jury" 425 S.W.2d at 949. Such

instructions deviate from the requirement that non-MAI instructions to submit ultimate facts and not abstract statements of law. *Mobley*, 859 S.W.2d at 933.

There are no MAI instructions applicable in an SVP case. *Warren v. State*, 291 S.W.3d 246, 250 (Mo.App.S.D.2009). Prior SVP appeals have upheld giving the §632.492 instruction because the statute requires it, and the instruction followed the substantive law. *See Lewis v. State*, 152 S.W.3d 325 (Mo.App.W.D. 2004), *In re Care and Treatment of Scates v. State*, 134 S.W.3d 738 (Mo.App. S.D.2004), and *Warren*, 291 S.W.3d 246. However, those cases are distinguishable, because they challenged only the *instruction* and failed to challenge the *statute* itself. *See Warren*, 134 S.W.3d at 250, n. 6.

Lewis and *Scates* complained the instruction invited the jury to focus on irrelevant treatment, rather than whether he was an SVP, and as minimized the juror's responsibility for their verdict. 152 S.W.3d at 329;134 S.W.3d at 741-42. Both challenges were overruled because of the statutory mandate, and because both of the appellants submitted proposed instructions containing the language they complained about.152 S.W.3d at 329, 134 S.W.3d at 742. *Warren* examined both of those opinions where the appellant challenged the §632.492 instruction because it did not accurately reflect the duration of confinement. 134 S.W.3d at 250-51. The Southern District aptly noted that the appellant challenged only the instruction, not the underlying statutes. *Id.* at 250, n. 6. Here, Kirk challenges the underlying statutes.

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Instruction 7 misleads and confuses the jury for several reasons. First, the instruction does not submit ultimate facts, but is "an exact recital of the statute" and "simply an abstract statement of law requiring no finding by the jury." *Chism*, 425 S.W.2d at 949, *Mobley*, 859 S.W.2d at 932. Second, it presents a legal consequence outside of the findings of the jury, and over which jurors have no control. Third, it invites the jury to consider the very thing it should ignore, commitment to the custody of DMH for "control, care, and treatment," rather than focusing on the ultimate evidentiary issue of whether the individual is an SVP. *Shannon* 512 U.S. at 586. In fact, the State specifically highlighted Instruction 7 in closing argument and told the jury Kirk "needs care, control and treatment"(Tr.731). Fourth, it diminishes the responsibility of the jurors to decide the issues and render a verdict. As a result, Kirk was prejudiced. Where statute requires an improper instruction, the statute itself is the problem.

There must be substantial evidence supporting an instruction. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo.banc2010)."Substantial evidence is evidence which, if true, is probative of the issues and from which the jury can decide the case." *Id.* This Court reviews the evidence in the light most favorable to submission of the instruction. *Id.* Submitting an instruction not supported by substantial evidence is an error. *Id.* In *Hayes*, the trial court improperly gave a failure to look out instruction, because the instruction was not supported by substantial evidence. *Id.* at 652. The driver was prejudiced because he was

assessed a percentage of comparative fault as a result of the improper instruction. *Id.* This Court reversed the judgment assessing damages. *Id.*

This Court also reversed for instructional error in *Ross-Paige v. Saint Louis Metropolitan Police Department*, -- S.W.3d ---, 2016 WL 3573250 (Mo.banc June 28, 2016). The trial court submitted an instruction presenting different theories of liability, including a claim that defendants unjustly refused or delayed paying out disability claims. *Id.* at 4. This Court held the instruction was not supported by substantial evidence, and defendants were prejudiced because they were found liable under the instruction. *Id.* at 6,8. "[T]his Court cannot rule out the possibility that the jury improperly returned its verdict upon a theory that was not supported by substantial evidence and that misdirected or confused the jury." *Id.* Submitting the instruction was reversible error, and the cause was remanded. *Id.*

In this case, there was no evidence presented at trial concerning DMH control, care or treatment. In SVP cases, the litigants are not generally allowed to present evidence of what happens after the jury's verdict because it is irrelevant to the issues decided by the jury. *See In re Calleja*, 360 S.W.3d 801, 803-4 (Mo.App.E.D.2011)(excluding immigration status, potential deportation), *Care and Treatment of Cokes v. State*, 183 S.W.3d 281, 285–86 (Mo.App.2005) (excluding medicines, treatment available if not committed), *Lewis v. State*, 152 S.W.3d 325, 328–32 (Mo.App.W.D.2004)(excluding supervised probation if not committed). It is fundamentally unfair that the State would be permitted to an instruction informing the jury of the consequence of their verdict is commitment

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for care, control and treatment, while Kirk would be precluded from presenting any evidence or argument at trial about what would happen if he was not found to be an SVP, or even what that DMH commitment would look like.

Prejudice also occurs when the jury is led to decide the case on some basis other than the established propositions of the case. *Nolte v. Ford Motor Company*, 458 S.W.3d 368, 383 (Mo.App.W.D.2014). Such was the case here. Instruction 7 produced an "inevitable result", drawing the jury's "attention toward the very thing—the possible consequences of its verdict—it should ignore." *Shannon,* 512 U.S. at 586. The jurors were invited to consider custody in DMH for care, control and treatment. This was a matter "not within their province," that "distract[ed] them from their fact finding responsibility" and was confusing. *Id.* at 579.

The trial court erred to Kirk's prejudice in giving Instruction 7. This Court should declare §632.492 unconstitutional. This Court must reverse the order and judgment of the trial court and remand for a new trial.

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IX.

The trial court erred in overruling Kirk's objection and admitting Kircher's testimony regarding her analysis for the EOC report, determination that Kirk meets the SVP criteria, and testimony of Kirk's statement made to her, in violation of his right to due process of law guaranteed by U.S. Const., amend. XIV and Mo.Const. art. I, §10, and §490.065, in that the EOC determination is inadmissible pursuant to §632.483; the EOC is only a screening review; her determination was two years old, based on incomplete and insufficient information, and not applicable to the higher burden of proof on the State at trial.

Kirk filed a motion to exclude Kircher's End of Confinement report and determination from evidence, arguing that admission of the report and her determination was precluded by §495.065, 632.483 and the *Bradley* decision, 440 S.W.3d 546 (Mo.App.W.D.2014)(L.F.16;372;Tr.53). Kirk argued that *Bradley* distinguished between assessments and determinations, and the EOC is a "determination"(Tr.53). He also argued the EOC was for a limited purpose and time, solely for screening SVP cases; was supplanted by the DMH evaluation; was irrelevant and prejudicial; based on incomplete information, and that Kirk's statements contained therein should be excluded(Tr.53-5;L.F.372-5). Kirk also submitted deposition testimony from DMH psychologist Scott and Kircher in

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support(L.F.377-472). Kirk renewed the motion at trial and in his motion for new trial(Tr.230;L.F.497).

Standard of review

Ordinarily, the trial court has discretion whether to admit evidence at trial. *Elliot v. State*, 215 S.W.3d 88, 92-93 (Mo.banc 2007). Whether testimony and evidence meets the requirements of §490.065, and is therefore admissible, is reviewed de novo. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo.banc 2011). Whether an expert's opinion is supported by sufficient facts and evidence is also a question of law. *Robinson v. Empiregas Inc. of Hartville,* 906 S.W.2d 829, (Mo.App.S.D. 1995).

Analysis

Kirk incorporates his discussion and analysis of §490.065, as set forth in Point ___. In *Bradley*, a DOC psychologist determined in an EOC report that Bradley met the definition of an SVP, and she referred Bradley to the Attorney General and MDT. 440 S.W.3d at 548. The MDT reviewed Bradley's records and concluded that he did *not* meet the criteria of a sexually violent predator. *Id*. However, the PRC concluded that Bradley did meet, and the State filed a petition. *Id*. The State objected to any evidence or testimony regarding the assessment of the MDT at trial, arguing it was inadmissible under §632.483.5. *Id*. The trial court agreed and excluded the evidence. *Id*.

Section 632.483.5 provides, *inter alia*: "The determination of the prosecutor's review committee or *any member pursuant to this section or section*

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632.484 shall not be admissible evidence in any proceeding to prove whether or not the person is a sexually violent predator." The Court of Appeals noted that although §632.483 used the term "members" to refer to individuals comprising both the PRC and MDT, "632.483.5 precludes the use of only 'determinations;'" the MDT makes an "assessment." *Id*. At 577. Thus, the Court found that §632.483.5 did not exclude the *assessment* of the MDT. *Id*. at 558.

The *Bradley* Court noted that "the individual issuing the [EOC] report" is one of the "members" in §632.483 who makes a pre-commitment "determination." 440 S.W.3d at 557-558. Kirk correctly argued below that the *Bradley* Court was not distinguishing between the individuals involved, but rather between the duty of the individual to make an "assessment" or a "determination." Therefore, as Kirk argued below, the EOC report and opinion prepared by Kircher was a "determination" excluded by §632.483.5.

The EOC is a screening evaluation only for the limited purpose of providing guidance to the State in deciding whether to file a petition. §632.483(L.F.36). Evidence of the screening process was without probative value, was unfairly prejudicial and should have been excluded. *See In re Care and Treatment of Foster*, 127 P.3d 277 (Kan.2006). The jury should not be informed that there was a screening evaluation, review by committees and/or the State, nor of a preliminary determination by the court. *Id.* 283, 286-87. Such evidence is "extremely prejudicial," is "inconsistent with substantial justice and affects [] substantial rights." *Id.* at 288.

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Evidence that someone picked out a person as a candidate for SVP commitment "presents a real danger the jury will be unfairly influenced by a purportedly unbiased imprimatur." *In re Detention of Stenzel*, 827 N.W.2d 690, 707 (Iowa 2013). The resulting prejudice is "significant," "because a jury has a natural tendency to look for guidance from those clothed in authority… even when guidance is not needed." *Id.*, quoting *Foster*, 127 P.3d at 286. Evidence of the screening process has the effect of commenting on the credibility of the State's witnesses and even the State's attorney's own opinions, in addition to highlighting that the court has already made a probable cause determination. *Id.* There was no way to effectively cross-examine Kircher about the inadequacy of her report for trial and the specific purpose for which it was generated without informing the jury of the prior screening and judicial determination. Cross examination cannot distinguish between the EOC and later comprehensive evaluations(L.F.384-89).

Moreover, whether Kirk met criteria in 2013 had no bearing on whether he met criteria at the time of his trial two years later. Kircher's testimony mislad the jury, claiming Kirk's "here-and-now" risk was "high," when in fact, that was her assessment of his risk in August 2013(Tr.277;L.F.30). The jury was further misled by her present-tense testimony that Kirk had a mental abnormality, was more likely than not, and was an SVP(Tr.291-2). Kircher's opinion was relevant only to a "finite moment in time," when she was asked to decide "whether an offender releasing from incarceration will go home on his out date or whether he will be referred into a process that might lead to civil commitment"(L.F.437). The scope

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of the EOC is only a referral(L.F. 390, 400-1). This limited scope screening referral is different than the full DMH evaluation; "the purpose of the full evaluation is to inform the jury at the time of trial"(L.F.452). The EOC is only an opinion for probable cause; it is not an opinion to a reasonable degree of psychological certainty for the higher clear and convincing trial burden(L.F.413-14,490,402).

Kircher had limited information available such that "the bases for her opinions are going to limit the reliability of the ultimate conclusion"(L.F.404). Once an SVP petition is filed and the discovery process begins, other information and records become available. *See* §§632.489, 632.483;(L.F.403-4). Kircher did not have the full range of facts and data, and at the EOC stage "there's just too little information to make the opinion reliable enough to be admissible at that [trial] level"(L.F.408,413). For example, Kircher did not have juvenile records, official records, allegations were unclear based on the limited records she had, nor was she aware of Kirk's MoSOP treatment details(Tr.259,268,300,312). Experts completing SVP evaluations rely on the full range of facts and data and cannot render opinions based only upon the DOC treatment and institutional adjustment records available to the EOC reporter under §632.483. Therefore, the facts and data available to Kircher were insufficient to support her opinion at trial, were not reasonably relied upon in the field for rendering an opinion for trial, and were not otherwise sufficient or reliable. §490.065.

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This is precisely why the legislature enacted §632.489.4 requiring a full, comprehensive SVP evaluation by DMH. This Court affirmed that the EOC "essentially now has been supplanted by the new [court-ordered] evaluation" completed by DMH; "It is that [court ordered] evaluation ... that supports further proceedings" *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 77 (Mo.banc 2009), *and see Fogle v. State*, 295 S.W.3d 504 (Mo.App.W.D. 2009)(EOC "report was supplanted by subsequent evaluations").

Moreover, Kirk's statements to Kircher should have been excluded. At the time of the EOC interview, he was "not even a Respondent yet" and did not have any protections that are afforded a DOC inmate or DMH insanity acquittee(L.F.421). If Kirk was questioned in the same way concerning a criminal matter, he would get a lawyer; but at the EOC, he does not(L.F.422). Because Kirk did not have protections like assistance of counsel and other statutory rights at the time of the EOC report, the protection should come at the trial level, limiting the EOC reporter's testimony(L.F.417).The EOC report should be excluded, just as the MDT, PRC and probable cause determinations are excluded at trial. (L.F.419). The absence of protections at the EOC level "requires protection at the trial level against the misuse of information from the end of confinement evaluation"(L.F. 419).

The trial court erred in admitting Kircher's testimony, determination Kirk's statements. The judgment of the trial court must be reversed and the cause remanded for a new trial.

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X.

The trial court erred in overruling Kirk's objections to Mandracchia's new opinion that Kirk had a Static-2002R score of nine, because this violated Kirk's rights to due process, equal protection, a fair trial and freedom from cruel and unusual punishment, guaranteed by U.S. Const., amends X, IIX, XIV, Mo.Const. art. I, §§2, 10, 21, §490.065 and Rule 51.06, in that the opinion was founded on a 1978 self-reported incident; the Static-2002R could only be scored based on official criminal records; there were no records demonstrating a 1978 conviction; the opinion depended on the accuracy of hearsay; and Kirk had no notice of the changed opinion prior to trial.

Facts

Mandracchia initially scored Kirk at an eight on the Static-2002R, which correlates with a predicted risk of recidivism at 34% and means that 66% of people with the same score do not reoffend(Tr.385-6). On the second morning of trial, Mandracchia changed the score on item four, "rate of sexual offending"(Tr.348). This raised the Static-2002R score to a nine, increasing the predicted risk to 44%(Tr.348,385,369). Mandracchia increased the score because of his new opinion there was a 1978 juvenile conviction based on two DOC intake forms created in 1986 (Tr.323-4,327,348). [10]

[10] Kirk was 14 years old in 1978. (Tr. 326).

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There was no record of conviction, juvenile records, police reports, charging documents, or other judicial documents from 1978 about the alleged incident(Tr.326-7,354,381-2). The State conceded it did not have a certified copy of a conviction(Tr.326). The 1986 DOC records appeared to be based on Kirk's self-report, "[a]nd whether a 14 year old would know whether he was convicted or not is questionable"(Tr.326). The trial court reviewed the two 1986 DOC records and ruled that the 1978 incident could not be counted in Mandracchia's risk assessment, because there was not sufficient evidence to show that there was a conviction(Tr.327,346). However, because Kirk reported the event, the incident could be discussed(Tr. 327). The trial court stated "happening and being convicted of it is two different things"(Tr. 346).

When asked about his Static-2002R score, Mandracchia replied "I'm not sure how to answer that, counselor"(Tr.346). The State told the court that Mandracchia "feels very strongly" his new score was accurate and that the witness "has some difficulty with being told that he can't score that point" as a result of the court's ruling on the 1978 incident(Tr.346). Because the trial court affirmed its ruling, the State made an offer of proof(Tr.347). Mandracchia claimed one 1986 DOC document indicated a conviction for first degree sexual assault in 1979, and claimed the other indicated Kirk was hospitalized as a sanction for molesting a nephew in 1978(Tr.349). Mandracchia affirmed the documents are the type of documents reasonably relied upon by experts in the field, and that he found them to be reasonably reliable(Tr.349). It was his opinion that the two records could be

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used to score the Static-2002R(Tr.349-50). Mandracchia did not know what information the person who wrote the 1986 DOC documents had, because no sources of information were listed and agreed reliance on the 1986 DOC documents depends on the documents being accurate(Tr.356,358). The "conviction" was not listed on other documents, like an official criminal history report. (Tr. 359).

The trial court noted it heard Mandracchia testify he was entitled to rely on DOC records(Tr.356), and that one document used the word "conviction"(Tr. 366). "Based upon the documents [ ] Mandracchia is relying on," the trial court reversed its ruling(Tr.366). Kirk objected based on his motion in limine number 4, because the new score was not based on reasonably reliable information required to support an expert opinion under §490.065, and because Mandracchia's opinion was based on multiple levels of hearsay by declarants unavailable for cross examination(Tr.324,362-63;L.F.214-224).

Standard of Review

This court reviews for prejudicial error and will reverse where a prejudicial error deprived Mr. Stecker of a fair trial. *Elliot v. State*, 215 S.W.3d 88, 92-93 (Mo.banc 2007). An error is prejudicial if there is a reasonable probability it affected the outcome of the trial. *Id.* The probate court has discretion whether to admit evidence at trial. *Id.* Whether testimony and evidence meets the requirements of §490.065, and is therefore admissible, is reviewed de novo. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo.banc

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2011). Whether an expert's opinion is supported by a sufficient factual or scientific foundation is a question of admissibility reviewed de novo. *Boughton v. State*, 437 S.W.3d 368, 373-374 (Mo.App.S.D. 2014).

Analysis

When inadmissible evidence is received at trial, this court assumes that the jury considered evidence in reaching the verdict. *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo.App.S.D. 2001). Section 490.065 sets forth the standard for admissibility of expert opinion testimony. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo.banc, 2011), *State Bd. of Reg. Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo.banc 2003). In Missouri, therefore, civil commitment is only constitutional if it follows proper application of §490.065.

Under §490.065, the trial court must determine four things prior to the admission of expert testimony: (1)the expert is qualified; (2)the expert's testimony will assist the trier of fact; (3)the expert's testimony is based on facts or data reasonably relied upon by experts in the field; and (4)the facts or data upon which the expert relies are otherwise reasonably reliable. *Kivland*, 331 S.W.3d at 310-111. All statutory factors must be met in order for the expert's testimony to be admissible evidence; if not, it must be excluded. *Kivland*, 331 S.W. at 311.

The trial court may defer to the expert's assessment of what facts and data are reasonably reliable in the field. *Doe v. McFarland*, 207 S.W.3d 52, 62 (Mo. App.E.D. 2006), citing *Goddard v. State*, 144 S.W.3d 848, 854 (Mo.App.S.D.

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2004). But, the court has a duty to independently determine whether the facts and data are "otherwise reasonably reliable. *Kivland*, 331 S.W. at 311, citing *McDonagh*, 123 S.W.3d at 156. In the independent determination, the trial court must look past the expert's assessment of reliability. *Id.*, citing *Goddard*, 144 S.W.3d at 854. The court must find that expert's opinion is based on substantial and probative facts to be admissible and must be supported by the record. *Thomas v. Festival Foods*, 202 S.W.3d 625, 627 (Mo.App.W.D. 2006); *In re A.B.*, 334 S.W.3d 746, 743 (Mo.App.E.D. 2011). The expert's opinion cannot not be based in "mere conjecture or speculation, and there must be a rational basis for the opinion." *McFarlane*, 207 S.W.3d at 62. Expert testimony must be excluded where the basis of the opinion is so slight as to be fundamentally unsupported, because testimony with that little weight will not assist a jury. *Id.*, *Goddard*, 144 S.W.3d at 855.

Records did not establish a conviction

The trial court made a determination that the two 1986 documents did not establish a 1978 conviction, concluding the information was self-reported, and there was not sufficient evidence to show a "conviction" that could be scored(Tr.326-27,346). Therefore, the trial court concluded Mandracchia's conclusion was not supported by substantial and probative facts in the record, and was not admissible because it was not based on reliable facts and data. *Kivland*, 331 S.W. at 311, *Goddard*, 144 S.W.3d at 854, *Festival Foods*, 202 S.W.3d at

627, *In re A.B.*, 334 S.W.3d at 743; §490.065. The trial court then erred when permitting Mandracchia to testify to his new risk assessment anyway(Tr.366).

The DOC documents did not meet professional standards

The 1986 DOC documents failed to meet accepted professional standards for scoring the Static-2002R, and are not reasonably relied upon in the field for that purpose. *Goddard*, 144 S.W.3d at 854. Professional standards for scoring the Static-2002R are set forth in the official coding rules(Tr.349), which must be followed to calculate the right score(Tr. 85). *See* Phenix, Doren, Helums, Hanson, Thorton, CODING RULES FOR STATIC-2002, Public Safety Canada (2008), available online at http://www.static99.org/pdfdocs/static2002codingrules.pdf (last checked July 25, 2016). When the coding rules are not followed, the Static-2002R is no longer useful or reliable(Tr.583). Following the rules gives the instrument reliability, consistency and objectivity(Tr.583).

Item Four "Rate of sexual offending" falls within Category II: Persistence of Sexual Offending, and is scored based on the total number of sentencing occasions for a sexual offense. *Coding Rules*, 13. A "sentencing occasion" is when an individual attends court, admits to the offense, or is found guilty, and receives some form of sanction[11](Tr.353), *Coding Rules*, 15, 17. "Specifically official records are required to establish the existence of prior charges and sentencing

[11] "This threshold is fairly high; arrests and charges (without convictions) do not count." *Coding Rules*, 17.

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occasions"(Tr352), *Coding Rules*, 5, 39. "[T]he evaluator must have access to an official criminal record as recorded by police or other law enforcement agency, court, or correctional officials" and self-reported convictions may not be used to score that item(Tr.325,352), *Coding Rules*, 5, 39.

For a juvenile offense to be scored as a "conviction," a juvenile petition must be sustained or adjudicated delinquent and supported by an official criminal record(Tr. 353), *Coding Rules*, 16, 32. "Placement as juvenile in a state-sanctioned home for a sexual crime does not count as a sentencing occasion," nor do informal hearings and sanctions, such as placement in a treatment facility or a residential move as a result of illegal sexual behavior(Tr.354), *Coding Rules*, 32.

There were no official records from a court or juvenile office indicating a 1978 petition was filed, sustained, adjudicated delinquent or that Kirk went to court and was adjudicated to be guilty(Tr.354). There were no juvenile records, police reports, charging documents, judicial documents/court order from 1978 about the alleged incident, or indicating Kirk was sanctioned, sent to a state-facility or supervised that year(Tr.381-2).The records did not show a conviction in juvenile court, only that Kirk was hospitalized(Tr.327). The incident was not corroborated by other documents(Tr.359).

The reports documented Kirk's own report and did not establish a conviction, adjudication, determination of guilt, sentencing or formal sanction in a court of law(Tr.326-27,346,353,358-59), *Coding Rules*, 15. Recording a self-reported statement in a DOC intake form does not transform the self-report into an

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official record(Tr.364;583-84). The self-reported statement cannot be used to score the Static-2002R(Tr.583-84). Even if Kirk had been hospitalized in 1978, placement in a juvenile home, treatment facility, or a residential move do not count as sentencing occasions for purposes of scoring the Static-2002R(Tr.354), *Coding Rules*, 32. The two 1986 DOC documents do not meet the Static-2002R coding rules standards and are not reasonably relied upon in the field for scoring that instrument.

Mandracchia's opinion depends on the accuracy of the 1986 documents

Mandracchia's reliance on the two 1986 DOC documents depended upon the documents being accurate(Tr.325). The 1986 DOC documents' authors were not available for cross-examination and the documents list their sources of information(Tr.356,358). Kirk's report was, in and of itself, unreliable, because "whether a 14 year old would know whether he was convicted or not is questionable"(Tr. 328).

Such records are prime examples of unreliable sources. *See State v. Bybee*, 254 S.W.3d 115, 118 (Mo.App.W.D, 2008)(reference to conclusion derived from hearsay statements made by witnesses improper, because expert merely made a credibility determination and accepted it as fact), *Goddard*, 144 S.W.3d at 854, n. 6 *citing Edgell v. Leighty*, 825 S.W.2d 325, 328-29 (Mo.App.S.D., 1992)(police officer could not offer expert opinion when conclusion based on hearsay statement of a witness), and *Grab ex rel. Grab v. Dillion*, 103 S.W.3d 228, 239-40 (Mo. App. E.D. 2003)(expert may not rely upon anonymous source unavailable for

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cross examination; where credibility of opinion depends on credibility of individual not in case, testimony should be excluded).

Admitting an opinion based these unreliable sources of information only "serves to cloak the witness' statements and [the expert's] conclusion based thereupon with an undeserved authority that could unduly sway a jury." *Bybee*, 254 S.W. 3d at 118, *Edgell*, 925 S.W.2d at 329. The sources of Mandracchia's opinion, were "so slight as to be fundamentally unsupported" and the fact finder could not receive his opinion. *Goddard*, 144 S.W.3d at 854, *Festival Foods*, 202 S.W.3d at 627.

Admission violated §490.065

Mandracchia's opinion was not based on records reasonably relied upon in the field to score the Static-2002R, nor on facts and data otherwise reasonably reliable. His opinion was not supported by the records, nor based on substantial and probative facts. *In re A.B.*, 334 S.W.3d at 743, *Festival Foods*, 202 S.W.3d at 627. Rather, the opinion relied on sources "so slight as to be fundamentally unsupported" and could not assist the jury. *McFarland*, 207 S.W.3d at 62, *Goddard*, 144 S.W.3d at 855. Because three of the four required statutory factors were not met, his testimony was not admissible under §490.065 and should have been excluded. *Kivland*, 331 S.W. at 311.

Prejudice

Admitting this testimony and opinion prejudiced Kirk and affected the outcome of trial. We must assume the jury considered this information in reaching

the verdict. *Gates*, 57 S.W.3d at 396. Mandracchia's opinion was cloaked with undeserved authority that could unduly sway the jury. *Bybee*, 254 S.W. 3d at 118, *Edgell*, 925 S.W.2d at 329. It misled the jury, giving the false impression that Kirk in fact had a 1978 juvenile conviction for a sex offense, supported by reliable sources of information. As the trial court pointed out, "[w]e know Kirk admitted that something happened … but happening and being convicted of it is two different things, and that thing [the Static] scores convictions"(Tr.346).

The change in Mandracchia's score lead to a 10% increase in Kirk's predicted risk of recidivating to 44%(Tr.369). Mandracchia testified "more likely than not" exceeds fifty percent(Tr.387). He also testified that any potential additional risk factors would not change his opinion(Tr.370). Therefore, admitting Mandracchia's opinion allowed Mandracchia to get closer to the 50% mark he needed to hit to consider Kirk's risk to be "more likely than not." Because he was permitted to change his score, Mandracchia then testified 44% percent of people who scored a nine on the instrument "actually would be convicted of another sexual offense within five years"(Tr.367). This prejudicially created the impression that there was a 44% chance Kirk "actually would be convicted" of another offense.

Finally, Kirk was prejudiced because he had no notice of the changed opinion prior to trial. Kirk had a right to prepare for trial, including discovering the Mandracchia's opinions and the basis of his opinions. Rule 56.01. The State disclosed Mandracchia's report and Kirk deposed him prior to trial, including

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asking questions specifically about the Static-2002R(Tr.56,58;384-85). Kirk had a right to rely on Mandracchia's deposition opinion until notified otherwise. *Pasalich v. Swanson*, 89 S.W.3d 555, 564 (Mo.App.W.D. 2002). The State failed to fulfill its duty to disclose any change in Mandracchia's opinion, including reliance on new or different facts. *Bradford v. BJC Corp. Health Services*¸200 S.W.3d 173, 180 (Mo.App.E.D. 2007); Rule 56.01(e). Failure to seasonably disclose a change in the expert's opinion resulted in concealment and unfairness at trial. *Bradford*, 200 S.W.3d at 180. "Untimely disclosure or nondisclosure of expert witnesses is so offensive to the underlying purposes of the discovery rules that prejudice may be inferred." *Wilkerson v. Pretlutsky*, 943 S.W.2d 643, 649 (Mo.banc 1997).

The untimely disclosure impacted Kirk's trial strategy and the presentation of his case, entitling him to a new trial. *Pasalich,* 89 S.W.3d at 564. Mandracchia's new opinion was not discovered until 8:30 a.m., on the second day of trial(Tr.380). Prior to the changed opinion, Mandracchia and Fabian came to the same conclusion about Kirk's actuarial risk and predicted likelihood of recidivism(Tr.582). Kirk's trial strategy was affected, because he prepared believing Fabian's actuarial risk assessments were consistent with *both* of the State's witnesses(Tr.273;581), *Pasalich,* 89 S.W.3d at 564. This was particularly critical to the defense, as all experts agreed Kirk had a diagnosis of pedophilia. (Tr.217,256,334,572). The changed opinion also could have impacted the jury's perceptions of the witnesses and parties credibility, since the two experts would

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have offered consistent opinions about Kirk's Static-2002R risk and underlying offenses. *Id.*

Conclusion

The trial court erred when it overruled Kirk's objections and admitted Mandracchia's new opinion at trial and had the evidence been properly excluded, the outcome of trial would have been different. This court must find that an expert cannot base an opinion on the 1986 DOC documents because they are not the type reasonable relied upon by experts in the field, as evidenced by the explicit Static-2002R coding rules, are not otherwise reasonably reliable. The order and judgment of the trial court must be reversed, and this cause remand for a new trial.

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XI.

The trial court erred in excluding evidence of the PPG at trial, because that violated his right to due process guaranteed by U.S. Const., amend. XIV, Mo.Const. art. I, §10, and §490.065, in that the PPG is reliable and is relied upon in the field to assess current sexual interests and arousal, risk, and treatment; Fabian relied on the PPG in his SVP evaluation; and Kirk did not demonstrate deviant sexual arousal during the assessment.

Facts

The State successfully argued a motion *in limine* seeking exclusion of the PPG and kept that evidence out at trial(L.F.364;Tr. 537,577). Kirk made an offer of proof which included Fabian's hearing testimony, and Exhibit G, H, and I. (Tr.489,706). Alternative to discussing the PPG evaluation, Kirk asked that Fabian be permitted to testify to a recent assessment of Kirk's sexual responses and interests, the results of which cause Fabian to doubt whether a pedophilia diagnosis is still present(Tr.538). The trial court said Kirk could "briefly talk about his evaluation" without details(Tr.545); but prevented testimony about that evaluation(Tr.573-81). Kirk argued the PPG was part of the facts and data relied upon, necessary background for expert opinion, and that Fabian was allowed to give the basis of his opinion that no mental abnormality existed(Tr.575-76). The State wanted to keep the PPG out so it could argue in closing that Kirk had a current attraction to children, there was no current evaluation of Kirk's sexual interests, and no basis for Fabian's opinions(Tr.575-76).

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Standard of Review

This court reviews for prejudicial error and will reverse where a prejudicial error deprived Kirk of a fair trial. *Elliot v. State*, 215 S.W.3d 88, 92-93 (Mo.banc 2007). An error is prejudicial if there is a reasonable probability it affected the outcome of the trial. *Id.* Generally the decision to admit or exclude evidence is reviewed for abuse of discretion, but whether testimony and evidence meets the admissibility requirements of §490.065 is reviewed de novo. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo.banc 2011). Whether an expert's opinion is supported by sufficient facts and evidence is also a question of law. *Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, (Mo.App.S.D. 1995).

Analysis

Under §490.065, the trial court must be satisfied of four statutory factors before admitting expert testimony: 1)the expert is qualified, 2)the expert's testimony will assist the trier of fact, 3)the testimony is based upon facts or data reasonably relied upon by experts in the field, and 4)the facts and data relied upon by the expert are otherwise reasonably reliable. *Kivland*, 331 S.W.3d at 311. Each factor must be met, but the trial court is not required to consider the degree to which they are met. *Id.* The trial court may defer to the expert's assessment of what facts and data are reasonably reliable in the field. *Doe v. McFarland*, 207 S.W.3d 52, 62 (Mo.App.E.D. 2006). Section 490.065 does not require that an expert's opinion, relying on certain facts and data, "must be in conformity with the

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general medical consensus or must be generally accepted." *State Bd. of Reg. Healing Arts v. McDonagh,* 123 S.W.3d 146, 153 (Mo.banc 2003). "The jury will decide whether to accept the expert's analysis of the facts and data" and weaknesses in the underlying facts go to the weight, not admissibility. *Kivland*, 331 S.W.3d at 311. "[A]ny concern about the accuracy of the expert's instruments can be made known to the jury and goes to the weight the evidence should receive." *Id.*

Applying §490.065, this Court must conclude Fabian's expert opinion was admissible. The trial court erroneous denied admission of Fabian's opinion and testimony that Kirk did not demonstrate deviant sexual arousal, including pedophilic arousal, on the PPG because the court incorrectly found the PPG was not reasonably reliable(Tr.577).

In re Commitment of Sandry, an SVP case, examined PPG testing in depth. 857 N.E.2d 295 (Ill.App.2006). *Sandry* held an expert may rely on PPG testing under the *Frye* test. *Id.* at 317. Case law from 21 other states mention PPG testing. *Id*. at 310. The test is useful both in diagnosing and in treating sex offenders, as well as risk assessment. *Id.* at 310-11, 315; *see also Parker v. Dodgion*, 971 P.2d 496, 499 n. 6 (Utah 1998)(recognizing usefulness of PPG in treatment and diagnosis of sex offenders); *In re Detention of Halgren,* 132 P.3d 714, 722 (Wash. 2006)(PPG useful for diagnosing and treating sex offenders); *Commonwealth v. Rosenberg*, 573 N.E.2d 949, 954 (1991)(PPG had "fair degree of reliability"). "A review of the academic literature reveals that a substantial number of experts

consider it useful for dealing with sex offenders." *Id.* at 313. *Sandry* identified more than 20 different scientific studies confirming the PPG's accepted using in assessing deviant sexual interests and paraphilias. *Id.* at 313-14.

Some of those were identified and discussed at the PPG hearing: J. Schober, *et al.*, *Leuprolide Acetate Suppresses Pedophilic Urges and Arousability*, Vol. 34, No. 6 Archives of Sexual Behavior 691, 699 (December 2005)("At baseline, Abel Assessment and PPG accurately detected pedophilic interest in 100 and 80% of subjects, respectively")(Tr.142); D. Laws, *Direct Monitoring by Penile Plethysmography*, in *Relapse Prevention with Sex Offenders* 105–06 (D. Laws ed. 1989)("[M]any researchers and clinicians believe that erectile response is a highly powerful measure for assessing and treating sexual disorders, especially when used in conjunction with other assessment tools. In fact, penile plethysmography may 'equal or exceed' the psychometric properties of more traditional measurement techniques,…")(Tr.144-145); G. Woodworth & J. Kadane, *Expert Testimony Supporting Post–Sentence Civil Incarceration of Violent Sexual Offenders,* 3 Law, Probability, & Risk 221, 229 (2004)("The single best predictor was phallometric assessment of deviant sexual preference (plethysmography")(Tr.142); E. Janus & R. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability,* 40 Am.Crim. L.Rev. 1443, 1468 (2003)("In their combined sample, they found support for the predictive validity of ratings on the Psychopathy Checklist, penile plethysmographic assessment, and prior criminal history")(Tr.142-43); C. Mee &

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H. Hall, *Risky Business: Assessing Dangerousness in Hawaii,* 24 U. Haw. L.Rev. 63, 105 n. 227 (2001) ("Yet research findings show that the plethysmograph is the single best predictor of sexual violence")(Tr.145); R. Hamill, *Recidivism of Sex Offenders: What You Need to Know,* 15 Criminal Justice 24, 29 (ABA 2001) (citing 1996 and 1998 studies by R. Karl Hanson and Monique T. Bussiére that identified "plethysmographic preference for children" as having the strongest predictive value among 21 factors for predicting sexual recidivism—"plethysmographic preference for boys" was listed as the twelfth strongest indicator)(Tr.143); and R. Schopp, M. Scalora & M. Pearce, *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks,* 5 Psychol. Pub. Pol'y & L. 120, 135 (1999)("Deviant sexual preferences, as measured through plethysmographic assessment, increase the probability of recidivism")(Tr.144).

Attempts to distinguish PPGs for use in treatment from use in risk prediction are "artificial." *Id.* at 316. "If an expert believes that he or she can garner information from a PPG test to an extent that it is useful in treating a sex offender, this indicates the expert believes the test yields satisfactory information and thus that the expert accepts the utility of the test." *Id.* In fact, any treatment the person had already received would be "relevant to the person's present mental condition." *Id*. at 316-17. The Court concluded that "the use of PPG testing for treatment is probative of its value for the qualitative assessment of future

dangerousness." *Id.* at 317. The Court did not making any findings about the instrument's validity or reliability.

PPG results have been admitted in SVP proceedings in other states. Recent examples include: *In re Commitment of Rendon*, 22 N.E.3d 1195 (Ill.App. 2014)(Experts discussed PPG results in SVP case, including that test results revealed no indication of arousal, but also that the individual engaged in behavior that could have invalidated the test); *In re Detention of Martin*, 180 Wash. App. 1017 (Wash.App. 2014)(noting PPG admissible under applicable rules of evidence); and *Conley v. State*, 129 So. 3d 1120 (Fla.App. 2013).

In *Murrell*, the expert testified he believed an actuarial instrument was validated and widely accepted, cited two authoritative texts advocating the use of the instrument and claimed the instrument was the subject of twenty-two studies. 215 S.W.3d 96, 111(Mo. banc 2007). This was sufficient for this Court to find the instrument was reasonably reliable under §490.065.3. *Id.* The limitations of the instrument were "made know to the jury and [went] to the weight the evidence should receive." *Id.* "If the facts and data are shown to be reasonably relied upon by experts in the field, they are necessarily relevant to the issue the expert is addressing." *Id.* This Court noted that the instruments were "merely one of many tools considered in the evaluation" used to "corroborate" the assessment and were not the sole basis for it. *Id.*

The facts before the trial court demonstrated that PPG is reliable. The PPG is the best objective measure for assessing an individual's deviant sexual arousal

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and assists evaluators in answering questions about an individual's sexual attractions and deviancy(Tr.140,178). Positive responses have utility, reliability and validity in determining a diagnosis(Tr.185,186). It is valid for risk assessment (Tr.172). The Association for the Treatment of Sexual Abusers recommends PPG use and confirmed it is valid(Tr.167). State witnesses both agreed the PPG is used in the field, and confirmed it is reliably used in assessing in sexual arousal, diagnosis, risk and treatment(Tr.178,167,148,148). Fabian found the PPG to be reliable(Tr.85). Stein made an "artificial" distinction between using the PPG in treatment or forensic settings(Tr.131).

PPG assessments have been tested by the field(Tr.84). There are numerous peer-reviewed, published studies relative to accuracy, reliability and validity of the PPG(Tr. 84-85;Ex.H). Generally studies place the sensitivity of PPG assessment to be about 60%, meaning the measure accurately identifies a pedophile 60% or more of the time(Tr.83,99;Ex.H). Published research in the field also demonstrates a known false positive/false negative error rate at 5%(Tr. 83,115;Ex.H). The published sensitivity and specificity rates for PPGs are similar to the accuracy rates of actuarial instruments like the Static-99R and Static-2002R routinely used in SVP cases(Tr.83-84). Research in the field also demonstrates a known false positive/false negative error rate about 5 percent(Tr.83,115). The sensitivity and specificity rates for PPGs are similar to the accuracy rates of actuarial instruments like the Static-99R and Static-2002R(Tr.83-84). It is precisely because of the instrument's degree of specificity that the test can assist in evaluating sexual

deviancy and attractions(Tr.178). While there may be limitations to the instrument, they do not affect the admissibility of the PPG. *Kivland,* 331 S.W.3d at 311;

The State offered one expert to extol the virtues of the PPG in a treatment, and denounce its use in this SVP case. The State offered a second to proclaim the utility and reliability of results that would condemn Kirk to lifetime commitment, but to turn around and reject findings that demonstrate the State may be wrong in their quest. An instrument cannot be reliable and valid once committed, but not before. Nor can results only be helpful if they secure that commitment.

The PPG was critical to Kirk's defense. "[T]here is a logical, plausible, common-sense connection between sexual arousal and penile engorgement," which the PPG purports to measure. *Sandry*, 857 N.E.2d at 316. The State offered only one possible condition as a mental abnormality: pedophilia, a deviant sexual attraction and preference for prepubescent children. The PPG is the only objective measure sexual arousal and deviance(Tr.74). It was used to assess Kirk's sexual arousal and preferences for ages and genders(Tr.183). It was the only *current* measure of Kirk's arousal and interest, the central issue in the SVP case.

Mandracchia testified that pedophilia is considered a lifelong condition; once it has been diagnosed, Mandracchia would need evidence to show that it did not continue to exist, rather than current evidence it still existed(Tr.392). Due process requires that the civilly committed person be both mentally ill and dangerous; if one is missing, civil commitment is unconstitutional. *Murrell*, 215

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S.W.3d at 104. Therefore, the present tense language of §632.480 required the jury find Kirk *presently suffer* from a mental abnormality, a condition not only *affecting* him, but also *predisposing* him. *Id.* Expert testimony, and the PPG test, was required to show the jury the lack of any deviant, pedophilic sexual arousal, because this was outside of the understanding of lay persons. *In re Cokes*, 107 S.W.3d 317, 323 (Mo.App.W.D. 2003). The State's argued Kirk "still has that deviant sexual attraction to children" in closing(Tr. 721).The PPG results were the objective, current evidence showing sexual interest or preference for children was not present. This is the very evidence Mandracchia needed. It was the very evidence Kirk must be permitted to present to the jury if his right to present a defense at trial means anything. The PPG result was critical in assisting the jury in understanding Fabian's and Mandracchia's evaluations.

The State also argued that Kirk did not benefit from MoSOP treatment and told the jury "he needs care, control, *and treatment*" in DMH(Tr.731,736). Stein believed the instrument was valid to assess whether an individual learned to control his sexual arousal through treatment(Tr.125). The PPG results demonstrated a benefit from treatment: Kirk did not exhibit deviant sexual arousal (Ex.G).

Fabian was permitted to testify to his ultimate opinions in this case under §490.065.2. An expert opinion that Kirk did not have a mental abnormality is meaningless if the expert cannot tell the court *why*: no current evidence suggested Kirk possessed deviant sexual attraction to children, it confirmed the opposite.

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Kirk's statutory and constitutional right to a defense expert means nothing if he is not able to meaningfully present the expert's opinion at trial. Had Kirk been able to present PPG testimony at trial, there is a reasonable probability the outcome would have been different. The jurors would have heard there was no current evidence of sexual arousal or attraction to children, according to the only objective way to measure sexual interest. The jury would have heard evidence that directly called into question Mandracchia's only diagnosed condition, pedophilia, and therefore his opinion that Kirk had a mental abnormality. The jury would have heard another factor considered in expert risk assessment that did not suggest Kirk was more likely than not to reoffend.

Fabian's opinion was supported by sufficient, reliable facts and data. Any weaknesses in his opinion, based on the PPG, went to credibility and not admissibility. Fabian's opinion was not inadmissible; it was only damning to the State's case. The probate court erred in excluding the PPG evidence from trial. This Court must reverse the order and judgment of the probate court and remand for a new trial including the PPG evidence.

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CONCLUSION

This Court must declare the provisions of the SVP Act unconstitutional for the reasons stated in Points I, II and VIII. This Court must reverse for the reasons set forth in Points I, III, and IV and release Kirk from confinement. Alternatively, this Court should remand for a new trial for the reasons set forth in Points II, IV, VII, VIII, X and XI.

Respectfully submitted,

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Certificate of Compliance and Service

I, Chelseá R. Mitchell, 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 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 30,715 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On August 17, 2016, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Chelseá R. Mitchell

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