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

REPLY BRIEF

Chelseá R. Mitchell, MOBar #63104
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
E-mail: chelsea.mitchell@mspd.mo.gov

INDEX

Page

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

Missouri Constitution

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

Appellant adopts the Jurisdictional Statement and Statement of Facts from his initial brief.

ARGUMENT

Point I: Constitutionality of the Act

SVP commitment has changed drastically in the last several years. When this Court first examined the constitutionality of the Act in 2003, discharge from commitment was possible, proof beyond a reasonable doubt was required, and the release provisions were unchallenged.*In re Norton*,123 S.W.3d 170,174(Mo.banc2003);*In re Care and Treatment of Schottel v. State*,159 S.W.3d 836(Mo.2005). This Court did have the benefit of observing the law in action over thirteen years.

Van Orden v. Schafer,129 F.Supp.3d 839(E.D.Mo.2015) did and found deficiencies in the annual review process, integration of community release, and release procedures that did not comport with due process.*Id*.at868-9. *Schafer* concluded systemic failures have resulted in punitive, lifetime detention and unconstitutional punishment in confining men who do not meet criteria.*Id.at*844,868-9. If this Court accepts the findings of *Schafer*, it will come to the same conclusions. Substantial changes must be made to meet constitutional standards.*Id*.at870.

Rights to "proper risk assessment and release are rights protected by the constitutional guarantee of liberty, not merely state law."*Id.* Arguing *Schafer* has no application or effect ignores that Missouri statutes and constitutional provisions must be interpreted to comply with the federal Constitution, and have no effect where in conflict with federal law.(StateBr.6,8-10);*Johnson v. State*,366 S.W.3d11,27(Mo.banc2012); U.S.Const.art.VI,cl.2. Either the Act is civil, or results in punitive punishment; the term of

confinement is either not indefinite, lifetime. *In re Van Orden*,271 S.W.3d 579,585-6(Mo.2008);*Schafer*,129 F.Supp.3d at 869.

An actual conflict exists, because compliance with both the Act and federal law is impossible, and because the Act is an obstacle in the accomplishment of the full purpose and objectives of Congress.*State v. Diaz-Rey*,397 S.W.3d 5,9(Mo.App.E.D.2013). In light of the constitutional deficiencies of the Act, as written and as applied, it in conflict with the full purpose and objectives of the Due Process Clause.*Id.*;U.S.Const.amend.XIV. It is impossible for the State and its employees to both comply with *Schafer's* directive to make substantial changes, and prior holdings of this Court permitting commitment as-is. *Id*;U.S.Const.amend.XIV;*Van Orden*,271 S.W.3d at 586(clear and convincing burden of proof);*Norton*,123 S.W.3d at 174(approving secure confinement of SVPs on challenge to failure to consider LREs);*In re Coffman*,225 S.W.3d 439,443(Mo.banc2007)(approving two-step release process;burden on committee;burden of proof).

The rules of preservation of error are not to enable the appellate court to avoid review or make preservation of error difficult for the appellant, but instead to enable this Court to define the precise claim made.*State v. Pointer*,887 S.W.2d 652,654(Mo.App. W.D.1994). Kirks claims of error are clear from the record. Kirk filed motions to dismiss; renewed them pretrial and at trial; incorporated *Karsjen*; filed a memorandum incorporating *Schafer*; requested a stay following the verdict until *Schafer*'s resolution; and included the errors in his post-trial.(L.F.4,45-69,496-96;3Sup.L.F.6-8;PC.Tr.5;VD.Tr.3-7;Tr.15-17,20,23,741-42,745). Kirk challenged the constitutionality of the entire statutory scheme, claiming the Act was punitive in purpose and effect, both written and as applied,

throughout his motions to dismiss.(L.F. 45,4750-1,57-58,65).He claimed amendments eliminated procedural and substantive safeguards and he would be confined for life(L.F.50-51); discussed a punitive increase in punishment and the burden of proof(L.F.57-8); and the release and petitioning process, citing to §§632.498 and 632.504.(L.F.61-2;3Sup.L.F6-10).§632.498.

In light of observations of the past thirteen years, substantive statutory changes, and systemic constitutional deficiencies once committed, Kirk asks this Court to examine the process leading there. This Court should find the Act violates due process, equal protection, double jeopardy and is an *ex post facto* law, and Kirk's commitment under that law is cruel and unusual punishment, and reverse, discharging him.U.S.Const.art.I,§10, amends.X,VIII,XIV;Mo.Const.art.I,§§2,8,10,13,19,21.

Point II: Beyond a Reasonable Doubt

The majority opinion in *Van Orden*, found §632.495 constitutional, but since then commitment in Missouri has changed.271 S.W.3d at 586. Amendments "replaced the dismissal provision with a conditional release provision" and distinguished between a committed person "conditionally released" and a committed person "who has not been conditionally released."(StateBr.13).*See*§§632.498,632.498,632.50,632.504,RSMo.2000. Adding §632.505 mandated conditional release and permits revocation and return to a secure facility by a preponderance finding "the person is no longer suitable for conditional release." The State is not required to prove the individual meets commitment to return him to DMH.

Van Orden and *Addington* relied on the civil/criminal distinction and continuing review opportunities that minimized the risk of erroneous commitments.271 S.W.3d at 585;441 U.S. at 427-33. *Addington* did not hold that clear and convincing was a permissible burden in every commitment proceeding, but only where not punitive and review enabled correction of an erroneous commitment.*Addington v. Texas*,441 U.S. 418,433(1979);*Van Orden*,271 S.W.3d at 592(Teitleman,dissenting). That *Addington* left the precise burden of proof to the state, "specifically indicates that the particulars of a civil commitment statute may require some burden of proof that is more stringent than clear and convincing." *Id*.at593,n.1.

Whether the Act would be considered civil if the statutes were determined to mean that a person was ineligible to ever receive a conditional release was not before this Court. *Id*.at n.5.

Unlike the *Van Orden* appellants, Kirk challenged the entire statutory scheme and argued commitment was *actual* lifetime confinement.(L.F.50-1,130-1);*Id.*at582,584-5,588(Cook,concurring). *Schafer* means "continuing review opportunities" have not minimized risk of erroneous commitments or lead to any releases. 129 F.Supp.3d at 868(failing to reintegrate anyone turned commitment into "punitive, lifetime detention").

This Court did not describe conditional release in *Van Orden* when it said "if commitment is ordered, the term of commitment is not indefinite," because "A person committed … receives an annual review to determine if … *commitment is no longer necessary*."(StateBr.25);771 S.W.3d at 586;*Murrell v. State*,215 S.W.3d 96,105(Mo. 2007)("The annual review mechanism ensures involuntary confinement that was initially permissible will not continue after the basis for it no longer exists."). A time when commitment is "no longer *necessary*" means discharge, an impossibility under the Act. The State imposes "indefinite release without discharge" on all conditionally released men. *Schafer*,129 F.Supp.3dat868. There is no continuing annual review requirement for those conditionally released.§632.498.1. Kirk will always be under the "control, care, and treatment" of DMH; may be "conditionally released," but never "discharged;" and always be subject to conditions.§632.505.1,.3,.5;(L.F.50).

Kirk is not required to demonstrate entitlement to unconditional release in order to challenge the constitutionality of the burden of proof required at his commitment trial in

light of the punitive, lifetime nature of commitment.[1](StateBr.25;L.F.50-1;130-31);*Murrell*,215 S.W.3d at 103,quoting *Hendricks*,521 U.S. at 357. The burden of proof implicates due process.*Addington*,441 U.S. at 423;*Van Orden*,271 S.W.3d at 585; *Coffman*,225 S.W.3d at 443. Equal protection requires that government action infringing upon Kirk's liberty pass strict scrutiny and guarantees Kirk the same protections as the federal constitution.*Coffman*, 225 S.W.3d at 445.

Reliance on *Jeffrey* and *Ferber* is misplaced.(StateBr.26). It is not "conceivable" that the Act "may" be unconstitutionally applied to others, it *is* unconstitutionally applied. *Schafer*,129F.Supp.3d at868-9. Under the general rule of those cases, this Court focuses on the facts of the instant case,*"and similar cases necessary for the development of a constitutional rule"* to address legal problems "with data relevant and adequate to an informed decision."*New York v. Ferber*,458 U.S. 747,767(1982). This practice "allows state courts the opportunity to construe a law to avoid constitutional infirmities."*Id.* Considering *Schafer*, a similar case necessary for the development of a constitutional rule, this Court can address problems in the Act with relevant and adequate data, make an informed judgment, and construe the Act to avoid constitutional infirmities.*Id.*

[1] That would mean Kirk could not challenge procedures and standards applicable to his initial commitment trial now, but later when he sought conditional release or discharge, where Kirk anticipates the State would argue he should have brought his constitutional challenge in his initial commitment proceeding.*Schottel*,159 S.W.3d at 840.

The trial court erred in refusing Kirk's request to use the beyond a reasonable doubt standard.U.S.Const.,amends.X,VIII,XIV;Mo.Const.art.I,§§2,10,21;§§632.495,632.498, 632.505. This Court must reverse and remand for a new trial.

Point III: MDT Found Kirk Not an SVP

The State agreed the MDT "assessment is part of the winnowing procedural safeguard," statutory preconditions must be met before it may file a petition, and the MDT unanimously determined Kirk did not meet criteria.(StateBr.29,31-2). However, it contends that the MDT vote is irrelevant and of no consequence.(StateBr.28).

In *State ex rel. Parkinson*,280 S.W.3d 70(Mo.2009), the "key issue" before this Court was the effect of the EOC author's lack of Missouri licensure.*Id*.at74. This Court was not called upon to determine the significance of an MDT vote in that case, or in *Van Orden*, where it construed the Act to permit a petition if both the MDT and the PRC confirmed an SVP finding.271 S.W.3d.at584,587. The State argues *Van Orden* is dicta, but *Parkinson* is not.(StateBr.31). The MDT cannot be both irrelevant to and also controlling over the filing a petition.*Van Orden*,271 S.W.3dat584;*Parkinson*,280 S.W.3dat77. The State's interpretation of the Act would render the legislature's inclusion of the MDT superfluous, and the MDT without meaning.*Clark v. Rameker*,134 S.Ct. 2242(2014).

The MDT unanimously found Kirk did not "appear[] to meet to meet Sexually Violent Predator definition."(StateBr.29;L.F.37). Section 632.486 permits the State to file an SVP petition only when "it appears a person … may be an [SVP] and the [PRC]…has determined by a majority vote, that the person meets the definition" of an SVP and mandates the MDT assessment be filed with any petition. Therefore, the two preconditions are (1)when it appears the individual may be an SVP, and (2)the PRC majority vote.

The Act is silent as to whom it must "appear" the person meets the definition. Section 632.486 mentions the MDT, PRC and Attorney General, but not the EOC reviewer.

Therefore, to whom it must "appear" cannot refer to the EOC reviewer.*Massey v. Normandy Schools Collaborative*,492S.W.3d189(Mo.App.E.D.2016)(presumption that disparate statutory language enacted purposefully).

The State contends it must appear so to the Attorney General, relying on *Parkinson* and *Perkins*.(StateBr.30). *Perkins* does not assist the State. *Perkins* discussed notification sent to the State when "it appears" so under §632.483.*In re Care and Treatment of Perkins*,175 S.W.3d 179,180(Mo.App.E.D.2005). "After the attorney general is so notified and a [PRC] has determined the individual meets the SVP definition, the attorney general may file a petition."*Id.* Therefore, *Perkins* confirms the assessment of someone else received by the Attorney General is the predicate condition, not an Attorney General's belief.*Id.*

The only two entities remaining in §632.486 are the MDT and PRC. It would be illogical to conclude the statute redundantly requires the PRC to fulfill both predicates, leaving just the MDT. If "it appears a person … may be an [SVP]" does not mean it appears so to the MDT, requiring the MDT conduct an assessment, and its report to be filed, is unnecessary and meaningless.§§632.483,632.486. Thus, the two preconditions must be (1)an MDT assessment that it appears the person may be an SVP, and (2)a PRC majority vote, as discussed in *Van Orden*.271 S.W.3dat584.

This interpretation yields a logical result. The MDT assessment is an informed assessment based on the expertise of its members.*Parkinson*,280S.W.3dat78(Wolff, concurring);§632.483.2,.4. PRC members, who like Attorneys Generals are lawyers, not mental health experts, determine if the State can win at trial.*Id*;§632.483.5. Moreover, only

the MDT assessment is admissible evidence; determinations are not.*Bradley v. State*,440 S.W.3d 546,556-8(Mo.App.W.D.2014);§632.483.5. The legislature would not require filing an inadmissible determination with the petition, which a probate judge will make an initial determination and could constitute the only evidence at a hearing.§§632.486, 632.489.1,.3.

Each step in the process is significant and a predicate to proceeding to the next layer of review.§§632.484,632.486. Section 632.484's screening and petition process confirms an intent for the assessment to be controlling. Once the State receives initial notice, it refers the individual to DMH for an investigation and evaluation.§632.484.3. Only if DMH concludes the person meets criteria does the individual get referred onto the PRC.§632.484.4. Then, only if a PRC majority vote may the State petition.*Id*.

A similar challenge was presented in *Harden v. State*,932 So.2d 1152(Fla.Dist.Ct. App.2006). An SVP successfully petitioned for habeas and his commitment was vacated because the MDT did not recommend commitment.*Id*.at1159.

Under both Missouri and Florida law, the MDT gets notice before the person is released.*Id*.at1154,§394.913,Fla.Stat.(2004);§632.483. The notice must provide the individual's name, identifying factors, anticipated future residence, offense history, institutional adjustment, and information about any treatment received. §394.913(2),Fla.Stat.(2004);§632.483. The MDT reviews information and records, including documentation of any personal interview the individual agreed to participate in.§394.913(3),Fla.Stat.(2004);§632.483.2(3),.4. The MDT must provide the State with an assessment as to whether the person meets the definition of an

SVP.*Id.*,§394.913(3)(e),Fla.Stat.(2004);§632.483.4. After receipt of the MDT's assessment recommending an individual meets criteria, the state may petition.§394.914,Fla.Stat.(2004). Florida does not have an extra layer of protection through a PRC.*See*§§394.913-.914,Fla.Stat.(2004).

Harden was referred to the MDT, which unanimously recommended he did not meet statutory criteria, and therefore should not be subject to commitment. 932So.2dat1154,1157. The state argued the MDT's recommendation was not a precedent to filing a petition and that although the statute required an MDT assessment, it was a non-binding advisory opinion.*Id.*,§394.914,Fla.Stat.(2004). The Court concluded the state was not authorized to initiate proceedings without an MDT recommendation Harden met criteria, and that the state exceeded its authority when it petitioned without one.*Id.*at1156.

Its interpretation that an MDT SVP finding was a precondition was supported by the conduct of probable cause hearings, where probable cause could be sustained based on the petition and attached documentation.*Id.*at1158. The Court's interpretation was consistent with Texas' interpretation of their law.*Id*at1159,*citing Beasley v. Molett*,95 S.W.3d590,606(Tex.App.2002), *In re Commitment of Fisher*,164S.W.3d637,640-1(Tex.2005)(state may petition only after receiving screening committee's conclusion, which only refers persons determined to meet criteria).

The trial court erred in denying Kirk's motion to dismiss and this Court must reverse and discharge Kirk.U.S.Const.,amends.X,XIV;Mo.Const.art.I,§§2,10;§§632.483,632.486.

Point IV: Failure to Permit Kirk to Contest Probable Cause

Pretrial errors are subject to a determination of whether the error caused a failure of proof, was waived or prejudicial.*Parkinson*,280S.W.3dat75;*In re Marriage of Hendrix*,183 S.W.3d 582,590(Mo.banc2006). An error may be prejudicial when those with duties under the Act fail to fulfill them or to correct an error timely brought to their attention. *Bradley*,440 S.W.3dat552. Errors "in substance or procedure in failing to make necessary findings, in making findings not supported by the evidence, in excluding necessary evidence or in mistaking hearing requirements," should be raised on appeal and if prejudicial may result in a remand.*Hendrix*,183S.W.3dat592.

The probable cause hearing is part of the procedural safeguards protecting an individual's due process rights, where it is an individual's right to contest the initial ex parte determination.*Martineau v. State*,242 S.W.3d 456,460(Mo.App .S.D.2007);*Norton*, 123 S.W.3d at174;§632.489. Because Kirk had the rights to contest probable cause and to cross-examine Kircher, he had the right to ask questions that would demonstrate a lack of factual basis for, and the inadmissibility of, her opinion, and that would show a failure of the State's proof. Unduly restricting his right to cross-examination is a constitutional error requiring no showing of prejudice.*State v. Howard*,693 S.W.2d 888,891(Mo.App.W.D. 1985).

In *Howard*, the trial court directed defense counsel not to ask about the juvenile records of the victim, who was the only witness to the crime and the State's key witness, at any point, excluding such evidence at trial.*Id.*at890-1. That ruling foreclosed all cross-

examination on the subject, was an error, and the issue was preserved because there was little else counsel could do given the order.*Id.*at891.

Here, Kircher was the sole witness, key to the State's case, and offered the only evidence upon which a mental abnormality finding could rest.*Id.*at891. Kirk's right to cross-examine her and to contest probable cause was fatally impaired because the hearing court prohibited inquiry into the factual basis for the single diagnosis she offered as a mental abnormality.(PC.Tr.51-3,64-65);*Id*. Like in *Howard*, the hearing court's ruling was clear: "This Court's going to find probable cause."(PC.Tr.62). "There was little else counsel could do in the face of the court's explicit order." 693 S.W.2d at 891. The court's order ended the hearing during Kircher's testimony and foreclosed further questioning, presentation of evidence, argument contesting probable cause, and assistance of counsel.

The hearing court failed to fulfil its duty to allow Kirk to cross-examine witnesses and to contest probable cause. Had Kirk been permitted to fully exercise his rights to cross examination, presentation of evidence and to contest probable cause, the hearing court may have reversed its initial probable cause finding based on testimony it would have heard from Kircher, evidence from Kirk, or argument from defense counsel. In terminating the hearing, the hearing court effectively excluded testimony about factual foundation for the diagnostic criteria of pedophilia necessary to make Kircher's testimony admissible and the to sustain the State's burden. *Hendrix,*183 S.W.3d at 590;(KirkBr.69-73). In doing so, the probate court mistook the hearing's requirements, including the requirement that the hearing be held so that Kirk could contest probable cause.

Kircher testified to criteria for her pedophilia diagnosis, but did not offer or possess facts meeting each criteria, and had incomplete or no information about sexual contacts she alleged had occurred.(PC.Tr.16-21,50-54,56-61). Her diagnosis was the basis for her mental abnormality opinion, and her mental abnormality opinion was the basis for concluding he was an SVP.(PC.Tr.L.F.27;Tr.15-16,21,32). Such circular logic cannot form a reliable basis for expert opinion. *McGuire v. Seltsam*,138 S.W.3d 718,722(Mo.2004). Kircher's diagnosis, mental abnormality opinion and conclusion Kirk was "more likely than not" were not supported by the record, inadmissible, and insufficient to support a probable cause determination.*Id.*; *Morgan v. State*,176 S.W.3d 200,211 (Mo.App.W.D. 2005);§490.065.

There were no facts in evidence upon which the court could have found probable cause based on the State's theory, resulting in a failure of proof. [2] No triable issue was shown and further hearing was not required. *Schottel*,159 S.W.3d at 845. The hearing court made findings not supported by the record when it interposed its own beliefs about pedophilia and when it found probable cause based on Kircher's inadmissible testimony.

[2] When presented with alternate theories, cause can be bound over for trial on any theory of mental abnormality suggested by the State's evidence. *Tyson v. State*,249 S.W.3d 849, 852-3(Mo.banc2008). *Tyson* relied on *Schottel*, 159 S.W.3d at 844 and *Martineau*,242 S.W.3d at 460 n.6(*Schottel* involved a release hearing, but that "is no suggestion that their probable cause pronouncements do not apply equally to other SVP preliminary hearings.").

Hendrix,183 S.W.3d at 590. Incorrect probable cause findings warrant reversal. *See Schottel*, 159 S.W.3d at 846. Where an incorrect probable cause finding leads to an unnecessary jury trial, the jury verdict cannot subsume the probable cause hearing and correct prejudicial error. The State cannot cure one error by combining it with another.

The errors were brought to the hearing court's attention during the hearing, but the hearing court failed to correct its errors or discharge its duty to effectuate Kirk's right to contest probable cause.(PC.Tr.51-3,64-65;Ex.6). The errors were raised again by motion to dismiss, but remained uncorrected. (L.F.106 Tr.24-6). As a result, Kirk was tried, committed, and is confined.

Reliance on *State v. Collins*,72 S.W.3d 188,194(Mo.App.S.D.2002) is misplaced because this is not a criminal case, Kirk did not need to file a motion to suppress to preserve claims of an illegal search or seizure, and this point does not allege an error in the admission of evidence at trial. His issues were raised sufficiently early in the process to allow the trial court to identify and rule on the issue, and to give adequate notice to the State.*Schottel*,159S.W.3dat841n.3. *Garris v. State* confirmed that constitutional violations are timely raised in the form of pretrial motions and preserved in post-trial pleadings. 389 S.W.3d 648, 651(Mo.banc2012). Denial of a motion to dismiss may be considered as part of an appeal from the final judgment.*In re Murphy*,477 S.W.3d 77,81(Mo.App.E.D. 2015). Such was the case here.(L.F.106,496;Tr.24-6;PC.Tr.51-3,64-65;Ex.6). He discussed constitutional due process in his brief.(KirkBr.67-69).

The trial court erred when it denied Kirk's motion to dismiss. U.S.Const.V,XIV;Mo.Const.art.I,§§2,10. This Court must reverse and release Kirk.

Point V: Change of Venue

The State's arguments are now that Kirk is not entitled to a change of venue because he did not include notice and waived his request.(StateBr.47-9;KirkBr.85;L.F.109,170-74). "Parties on appeal generally must stand or fall by the theories upon which they tried and submitted their case in the circuit court below."*Ross-Paige v. St. Louis Metropolitan Police Department*,492 S.W.3d 164,175(Mo.banc2006);*Kleim v. Sansone*,248 S.W.3d 599,602-3(Mo.banc2008)(refusing to evaluate appellant's compliance with notice requirements when raised for first time on appeal).

The State's arguments should be rejected. The decisive fact in *Chambers* was the repeated affirmative representation that the defendant had no pending motions and wished the case to continue to trial, relied upon by the State and court.*State v. Chambers*,481 S.W.3d 1,6(Mo.banc2016). Four hearings were held without calling up the motion; his request for a continuance was denied Friday before a trial; he notified the Court of the motion Sunday night before the Monday morning trial; and the jury had already been empaneled and sworn.*Id.*

Here, there was one prior hearing with the trial judge.(L.F.12). When the parties argued venue, the trial was a month away and a courtroom in a different venue was available that week, which was why a continuance was denied.(L.F.13-14). The State successfully argued that Kirk was not "authorized to file" judge or venues request and Kirk's application was denied.(L.F.14,172). The subsequent continuance was unrelated to venue or Kirk's motions; it ordered to hold an evidentiary hearing on the State's motion to exclude the PPG.(L.F.19).

It appears the State's actual complaint is the written motion did not contain notice, relying on *State ex rel. Jackson v. Thompson*,661 S.W.2d 677,679(Mo.App.W.D.1983), and a contention that *State ex rel. Director of Revenue v. Scott*,919 S.W.2d 246, 248(Mo.banc1996) does not apply.(StateBr.49). *State ex rel. Mountjoy v. Bonacker*,831 S.W.2d 241,246(Mo.App.S.D.1992) held notice did not need to accompany the application, disagreeing with *Jackson*. Change of venue and judge rules have similar rationales and are generally "considered and construed with reference to each other;" failure to include notice in an application is not fatal when the motion was otherwise timely filed and served.*Chambers*,481 S.W.3d at 6n.3;*Scott*,919 S.W.2d at 248. The State had reasonable notice of Kirk's motion, request for ruling and of the hearing.(L.F.109,168-9;170-75;Sup.L.F.1).

Kirk's purpose in requesting a change of venue, was to obtain a change of venue. Kirk was entitled to a change of venue under Rule 51.03, the trial court erred in denying his request, and no compelling interests exists to deny him a change of venue.*Coffman*,225 S.W.3d at 445;U.S.Const.,amendV,XIV;Mo.Const.art.I,§§2,10. This Court must reverse and remand for a new trial in a new venue.

Point VI: Release Plan

Each expert considered and relied on Kirk's release plan in forming their opinions on the central issue of whether Kirk was more likely than not to commit predatory acts of sexual violence if not confined.§632.480(5)(Tr.276,288-90,412-13,612-14). The facts and data on which an expert rely need not be independently admissible, so long as the evidence is (1)reasonably relied upon the field and (2)otherwise reasonably reliable. *Whitnell v. State*,129 S.W.3d 409,419-8(Mo.App.E.D.2004);§490.065. If the facts and data meet the two criteria, "they will necessarily be relevant to the case, and testimony as to the facts and data will be admissible."*Murrell v. State*,215 S.W.3d 96,110(Mo.banc. 2007).

In *Whitnell*, the was no error in permitting expert testimony on allegations the SVP argued were inadmissible hearsay, injected a collateral issue, and more prejudicial than probative.129 S.W.3d at416,420. Experts can rely on inadmissible sources of information, so long as the sources are not admitted as independent substantive evidence.*Id*.at416. The expert relied on allegations in the records, and said considering allegations was generally accepted in the field and the records were the type evaluators would use in an SVP evaluation.*Id*.at417. "Of course" the evidence was prejudicial because it was relied upon in forming a negative opinion of the SVP, but such prejudice did not outweigh the probative value.*Id*.at419.

Kircher testified to: Kirk's "release plan;" social support system of ex-felons; Kirk would renter the community; have employment limitations; be isolated and face challenges in the community; would be on parole; register as a sex offender; and be subject to conditions, including not to associate with ex-felons.(Tr.276,289-90). Fabian testified

Kirk's sentence was converted to community supervision by probation and parole, and he had to register as a sex offender.(Tr.594,602). The facts admitted without objection. The State's complaint is really with the expert's opinions that these facts reduced risk.

When used to increase risk, the State liked the facts. Kircher concluded Kirk's risk increased, and ultimately he was "more likely than not" because ex-felons were a negative social influence; planning to associate with them demonstrated poor problem solving and non-compliant with supervision; and he could not identify solutions to the challenges he would face in the community.(Tr.289-91).

When these facts could mitigate risk, the State took issue.(Tr.389-91,407-8). Fabian relied on the fact of community supervision in his risk assessment; on research in the field demonstrating supervision mitigated risk; that experts within the field rely on the same; and it was his opinion the fact of supervision reduced Kirk's risk.(Tr.612-4;612-4,554,556,558,580,595-7). Mandracchia considered Kirk's release plan and the fact Kirk had remaining parole supervision was a protective factor, though he did not think either significantly reduced Kirk's risk.(Tr.412-4,370-71).

Kirk's release plan was not "collateral" because those facts were in dispute, material, and pertinent to the issues developed.*Mitchell v. Kardesch*,313 S.W.3d 667,675(Mo.banc2010);§632.480.5. Factors considered and relied on by the experts in forming their "more likely than not" opinions were material, and facts about Kirk's release plan were in dispute.(Kirk Br.95). Opinion about these facts was no different than the State's evidence about risk factors like Kirk's cancer and MoSOP treatment, and opinions

that neither reduced his risk.(Tr.284-6). The facts and opinions met the criteria of §490.065, were relevant and should have been admitted.*Murrell*,215 S.W.3d at 110;§490.065.2.

Mandracchia's testimony showed the evidence considered a protective factor and rooted in research, corroborated Fabian's testimony, and went to the accuracy, credibility and weight of his own opinion. Facts about Kirk's release plan and supervision contradicted Kircher's testimony, accuracy and credibility. The credibility of a witness is always relevant and a witness may be cross-examined by questions that test his or her accuracy, veracity or credibility.*Mitchell*,313 S.W.3d at 675. The trial court has no authority to prevent impeachment of the State's witnesses on matters related to a paramount issue or that affect the witness' accuracy, veracity or credibility.*Black v. State*,151 S.W.3d 49,56(Mo.banc2004).

Of course this evidence was "prejudicial" to the State's case because Fabian relied upon it in forming an opinion contrary to the State's position, it disproved the State's evidence, and diminished the credibility, accuracy and weight of its own experts' opinions. *Whitnell*,129 S.W.3d at419-20. Any prejudicial impact would have been minimized by presenting testimony that Mandracchia did not believe the factors, though present, reduced Kirk's risk.(Tr.414,370-71).

The trial court erred in excluding Kirk's evidence.U.S.Const.,amendV,XIV; Mo.Const.art.I,§§2,10;§490.065. This court must reverse the order and judgment of the trial court and remand for a new trial.

Point VII: Instructional Error in Presenting Legal Question

The State is mistaken about the standard of review.(StateBr.62). Whether the jury was properly instructed is a question of law reviewed *de novo*.*In re Ginnery*,295 S.W.3d 871,873(Mo.App.S.D.2009),*citing Edgerton v. Morrison*,280 S.W.3d 62,65(Mo.banc 2009). *Lewis* does not assist the state because it was decided twelve years before *Gormon*, and was about the verdict *form*, not the verdict director Lewis conceded was proper.*Lewis v. State*,152 S.W.3d 325,329(Mo.App.W.D.2004)(StateBr.64).

When an individual has plead guilty to an underlying sexually violent offense, a verdict director following the substantive law only submits the two issues the State must prove at trial:(1)he suffers from a mental abnormality; (2)that "makes him more likely than not."(State Br. 56);*In re A.B.*,334 S.W.3d 746,752(Mo.App.E.D.2011);§632.480. A jury is properly instructed when the sexually violent offense question is not submitted. *In re Gormon*,371 S.W.3d 100, 106-7(Mo.App.E.D.2012)(propriety of submitting underlying criminal conviction to the jury was not presented or decided). Proper instructions do not submit evidentiary details to avoid undue emphasis of certain evidence or facts, confusion, and the danger of favoring one party over the other.*Huelskamp v. Patients First Healthcare,LCC*,475 S.W.3d 162,173 Mo.App.E.D.2014).

Both parties agree Proposition Second submitted a legal question.(StateBr.62-3,65;KirkBr.98,101). Non-MAI instructions improperly submitting questions of law cause prejudicial error requiring reversal. *Ozark Production Credit Ass'n v. Hopkins*,718 S.W.2d 667(Mo.App.S.D.1986).

Paragraph First's factual submission was only necessary for the legal question the State must prove to the judge, not the jury.[3]*Gormon*,371 S.W.3d at106;§632.480. It is similar to sentencing enhancement cases where the State must prove, and the court must find, a prior offender status outside the hearing of the jury.*State v. Drudge*,296 S.W.3d 37,41(Mo.App.E.D.2009);*State v. Brown*,97 S.W.3d 97(Mo.App.W.D.2002);§§588.021; 558.018.

Instruction 6 improperly emphasized the conviction, did not follow the substantive law, and misdirected and confused the jury because it asked them to find unnecessary evidentiary details that favored the State's case and to answer a legal question beyond its purview, failed to submit only the ultimate facts necessary, and materially affected the outcome of trial. The trial court erred in submitting Instruction 6. U.S.Const.amend.XIV;Mo.Const.art.I,§§2,10. This Court must reverse and remand.

[3] Kirk objected both to admission of the record of his sodomy conviction and to expert testimony on the sexually violent offense legal issue at trial.(Tr.248-50).

Point VIII: §632.492 & Instruction 7

Instruction 7 submitted an abstract statement of law, requiring no findings. *Hopkins*, 718 S.W.2d 667. The consequence of the jury's SVP finding was entirely collateral and outside the scope of the two issues they were to decide at trial.(StateBr.56); *In re A.B.*, 334 S.W.3d at 752. The State said so in *voir dire*:

> And this is a case about whether [Kirk] meets the legal criteria that the Judge will give you. Now, this isn't a case where you get to decide, if selected, what would happen after you decided whether he meets the criteria or not.
>
> ***
>
> I'm going to draw an analogy, so–and this is not a criminal case but, in a criminal case there are sometimes people who say, well I can't determine if somebody is guilty or not unless I also get to determine what kind of sentence they should get. Does that makes sense now?

(VD.Tr.57-8;Tr.528).

This Court should reject the State's preservation argument.(StateBr.68);*Pointer*, 887 S.W.2d at654. An instructional error is preserved when counsel makes a specific objection to the instruction at trial and raises the error in the post-trial motion. *Hertz Corp. v. RAKS Hospitality, Inc.*,196 S.W.3d 536,546(Mo.App.E.D.2006);*see*Rules70.03,78.07. Kirk objected at the instruction conference, first to the constitutionality of §632.492; then,

to the inability to defend or rebut the instruction with evidence;[4] to giving the jury a scapegoat; and to giving an instruction unsupported by facts in evidence.(Tr.526-7). The issues were preserved in his post-trial motion.(L.F.505).

The trial court and State had opportunity to consider Kirk's arguments and the instruction.(StateBr.69). The instruction conference was held on Wednesday and the court took several instructions under advisement to conduct research, affording the State the same opportunity.(Tr.vi,499,530-532). The instructions were not given until the following afternoon.(Tr.vii,718). Persuaded by the State's argument, "the statute requires that the instruction be given, so it must be given," the trial court gave Instruction 7 over Kirk's objections.(Tr.526-8).

> Closing,the State told the jury it would get Instruction 7, which
>
> says that, if you find Mr. Kirk to be a sexually violent predator, he shall be committed to the custody of the Department of Mental Health for control, for care, and for treatment. He needs care, control and treatment.

(Tr.731). The trial court warned the State to only argue the facts, "something that was said," but denied Kirk's request for a mistrial.(Tr.731-33).

Giving Instruction 7 was erroneous.U.S.Const.amend.XIV;Mo.Const.art.I,§§2,10. No compelling State interests exists offer the instruction.*Coffman,*225 S.W.3d at 445. This Court must reverse and remand.

---

[4] Kirk's request at trial to introduce evidence of the treatment once committed was denied.(VD.Tr.7-8;Tr.256).

IX. Admission EOC Opinion

The issues in Point IX were properly preserved: Kirk filed pretrial motions to exclude Kircher, objected to her testimony at trial, and included the error in admitting her testimony in his motion for a new trial.(3Sup.L.F.1-5;L.F.372-5,497). At trial, Kircher was the State's first witness.(Tr.237). A recess was held after opening statement, permitting Kirk to make two objections: (1)objecting and renewing his motions to exclude Kircher's testimony, and (2)objecting to certain §490.065.1 criteria at the time Kircher wrote her report.(Tr.230). He renewed his objections again during Kircher's testimony.(Tr.240).

In *Bradley*, the Court was only asked examined the admissibility of the MDT assessment, not that of the EOC determination. *Bradley*,440S.W.3d at 556-8. Section 632.483 precludes only "determinations" of (1)"the prosecutor's review committee, [(2)]or any member of section 632.483 or section 632.484." §632.483.5.[5] "Several individuals and entitles…make 'determinations' (e.g., the individual issuing the EOC report, the [PRC], the probate court, and the department of mental health). But the MDT is not among these individuals and entities."*Id.*at557-8;§632.483.5. Kircher, however, is.*Id.*;§632.483.2. A "member" of §632.483 would be any one individually identified, like the EOC author and probate court, of or belonging to an entity listed, like the PRC or MDT.*Id.*at557-8.

[5] *Bradley* misinterpreted the disjunctive "or" as "and" to make a reference to the MDT's absence from §632.484 as support for its holding. *Id.*at588;§632.483("or any member of section 632.483 ***or*** section 632.484.").

Kircher's determination was not admissible as evidence to prove whether Kirk was an SVP.§632.483.5.

This is a logical conclusion since the determination is part of a pre-trial screening process, for the purpose of advising the Attorneys General, and her role was only to determine if Kirk met criteria for that referral. §632.483,(PC.Tr.10,35,39;L.F.2,436). Her report is different than the court-ordered DMH evaluation, because that "full evaluation" is to inform the jury at the time of trial.(L.F.373,437,452). At trial, Kircher testified she completed evaluations for sex offenders who were approaching the end of their confinement; concluded Kirk met criteria; and "took the standard action in the process" and "referred him forward."(Tr.238,254,291).

"The language of section 632.480 is written in the present tense and necessarily requires the jury to find an individual *presently* poses a danger to society if released." *Murrell*,215 S.W.3d at 104. Kircher's two-year-old screening/referral determination could not assist the jury in determining whether Kirk *presently* had a mental abnormality making him "more likely than not" at the time of trial, and should not have been admitted.[6]*Id.; In re A.B.*,334 S.W.3d at 752;§490.065.1;(L.F.372-4;Tr.230,238,240). Nonetheless she presented her opinions as though they were current and applicable to the jury's determination of whether Kirk was an SVP at that time.

[6] Kirk incorporates his analysis of expert testimony and §490.065 from his brief.(e.g.,KirkBr.69,121-2;125-7).

For example, when asked "does Kirk have that [mental abnormality]", she testified "I believe that he does."(Tr.256). Kircher testified the Stable-2007 was a"here-and-now factor"(Tr.276); "we're high on the Static and high on the Stable"(Tr.282); and discussed dynamic risk factors in present tense.(Tr.287-90). The State asked, "It's your opinion… that Mr. Kirk ***has*** a mental abnormality?"; "you believe that Mr. Kirk ***has*** a mental abnormality?"; "And that mental abnormality ***is*** pedophilia?"; and "…that he ***is*** more likely than not…", and Kircher affirmed.(Tr.269,292). Kircher gave her ultimate opinion, "I believe that he does, yes" meet criteria for commitment.(Tr.292).

Presenting Kircher's two-year-old point-in-time determination as though Kirk presently met criteria was prejudicial, giving the impression Kircher's determination was for the purpose of trial, was up-to-date, and current.

The trial court erred in admitting Kircher's testimony.§§490.065,632.483; U.S.Const.amend.XIV;Mo.Const.art.I,§§2,10. This court must reverse and remand for a new trial.

Point X: Mandraccha's Static-2002R Score

Kirk objected to Mandracchia's new score under §490.065 criteria.(Tr.324,362-3). Admissibility of his testimony required the trial court to interpret a statute, which is reviewed *de novo.Kivland v. Columbia Orthopaedic Group,LLP*,331 S.W.3d 299,311 (Mo.banc2011).

In *State v. Doss*, the Western District examined what evidence could prove a juvenile adjudication absent a juvenile court order. 394 S.W.3d 486(Mo.App.W.D.2013). An amended juvenile petition and a motion to modify the prior disposition from the same juvenile case were insufficient and inadmissible because the State could not prove by a preponderance that the defendant engaged in the alleged conduct.*Id.*at494,496. It was impossible to tell which allegations in the petition were sustained, and there were allegations without evidence demonstrating that the defendant actually engaged in the alleged conduct.*Id.* The exhibits should have been excluded and the case was reversed because the Court could not say their admission was not prejudiced.*Id.*

Neither document Mandracchia relied upon identified a case name or number, or demonstrated there were juvenile proceedings, and it was impossible to tell what, if any, factual allegation was made, plead, litigated, or sustained. *Id.*(Tr.354,356,358-60). Mandracchia's testimony it was his understanding and recollection "that you can use basically to correctional records"(sic); "as far as I know that is done by other members of my field;" and "That is a record that I believe I can and should rely on" did not establish the two DOC documents on were reasonably relied upon the field for scoring the Static, or

that the coding rules permitted scoring on those documents.(Tr.349-50). His reliance was not "proof" that Kirk actually engaged in any type of alleged conduct.*See id.*at495.

Having found the "conviction" was self-reported, "whether a 14 year old would know whether he was convicted or not is questionable," there were no records showing a conviction in juvenile court, there was not sufficient evidence showing a conviction so that it could be scored, the trial erred in admitting evidence of Mandracchia's new score.(Tr.326-7,366). Such a self-report is not reasonably relied upon in the field or otherwise reasonably reliable.(KirkBr.123-5;Tr.325,352-4,359,381-2);*Coding Rules*,5,15-17,32,39. A self-reported "conviction" noted on an interview intake form is not an official record of conviction produced by law enforcement or a correctional agency, like a MULES/MACHS or NCIC criminal records report, or a Department of Corrections Face Sheet.[7](Tr.325-27,346,352, 359);*Coding Rules*,5,39. Mandracchia's personal opinions and beliefs were not based on substantial and probative facts, supported by the record, or admissible under §490.065.*Thomas v. Festival Foods*,202S.W.3d 625,627(Mo.App.W.D. 2006); *In re A.B.*,334 S.W.3dat743. *Sohn* said an expert's in person interview with a Deaf individual, conducted with the assistance interpreters, constituted substantial information from a reasonably reliable source and is not helpful.*In re Matter of Sohn*,473S.W.3d 225,223(Mo.App.E.D.2015);(State.Br.86).

[7] Missouri Uniform Law Enforcement System, Missouri Automated Criminal History Site, National Crime Information Center.

It is true the State notified Kirk of the change, but it did so 30 minutes before the trial was to resume.(Tr.325). Kirk identified five different ways the erroneous admission prejudiced him.(Kirk Br. 127-8). That Mandracchia's SVP opinion may not have changed, his prediction of the likelihood Kirk would reoffend did change, increasing 10%.(Tr.369).

The trial court erred when it admitted Mandracchia's new score opinion at trial. U.S.Const.amends.V,IIV,XIV;Mo.Const.art.I,§§2,10,21;§490.065;Rule51.06. This Court must reverse and remand.

Point XI: PPG

The PPG sufficiently reliable that Missouri uses it for assessment and treatment of all SVPs.(Tr.85); DMH Policy No. S-PC.201,*Use of Penile Plethysmograph(PPG)*; (R.App.A18-24). The PPG "provides objective male sexual arousal and can be useful for identifying sexual interests during an evaluation" and "the primary objective of the plethysmograph is to obtain accurate information regarding sexual arousal."*Id.* The PPG must be integrated into risk assessments.*Id.*

It is disingenuous for the State claim the PPG is unreliable. Stein agreed the PPG the best objective measure of deviant sexual arousal and phallometric testing indicating interest in children is the single strongest predictor of sexual recidivism.(Tr.125,140; StateBr.93). In his opinion, the PPG is a valid, reliable tool in a treatment setting.(Tr.131). Hobberman testified, "It's a valid tool for the–risk assessment" and PPG responses indicating deviant arousal are "significant' and "highly relevant" for diagnoses. (Tr.167;172).While he was on ATSA's board, the board developed guidelines recommending the use and validity of the PPG.(Tr.167).

The trial court excluded Fabian's testimony about the PPG as not reasonably reliable under §490.065.(Tr.577;2Sup.LF.5). Therefore, the trial court was interpreting that statute, an issue reviewed *de novo*. *Kivland,* 331 S.W.3d at 311. Even so, an abuse of discretion occurs when a trial court erroneously finds the requirements of §490.065 were not met. *Id.*

Murrell, holding that testimony about actuarial risk assessments is admissible under §490.065, is controlling.215 S.W.3d at113;(StateBr.95). Like the PPG, actuarials were "relatively new in the judicial context," though "used rather extensively in other

settings."*Id.*at108. The instrument was "otherwise reasonable reliable" because of testimony it was the expert's "belief" the instrument had been validated and accepted, and two authoritative texts advocated its use.*Id.*at111. Similarly, evidence demonstrated experts believed the PPG was reliable, valid and accepted within the field for assessment, treatment and diagnoses.*Id.*(Tr.85). Experts testified about seven authoritative texts, and ATSA guidelines, advocating PPG use.*Id.*(Kirk Br.133-4;Tr.80,142-5). Wilson's affidavit identified 25 authoritative texts demonstrating it is the only objective method of measuring sexual arousal; deviant sexual arousal measured by the PPG is be most robust predictor of sexual recidivism; 15 out of 16 SVP programs use the PPG; its reliability; and men who are not pedophiles will almost never be incorrectly identified as being aroused by children.(Exhibit I). Under *Murrell*, the PPG was reasonably reliable.*Id.*;§490.065.

Both ATSA and Monarch have issued standardization protocols for the PPG. (ExhibitsI;Tr.80,145).The State admitted the Monarch standardization manual. (Exhibits1&2). Any concerns about the sufficiency of that standardization, the PPg's accuracy and limitations, and how many times Fabian administered the PPG went to the weight the evidence should receive, not its admissibility.*Murrell*,215 S.W.3d at 11;(Tr.78-9,116,125,132,163,159,181-2;StateBr.92).

Kirk was diagnosed by pedophilia based on history.(Tr.572). A mental abnormality finding required evidence Kirk was ***presently suffering*** from a condition ***affecting*** his volitional capacity and ***experiencing*** serious difficulty controlling his sexual behaviors ***at the time of trial***. *Murrell*,215 S.W.3d at 104. The PPG results showed Kirk's then-current sexual arousal and demonstrated pedophilic attraction was not affecting him such that he

was experiencing serious difficulty controlling his sexual behaviors and responses.(Exhibit1). It also showed he did not demonstrate pedophilic deviant sexual arousal that increases a risk of reoffending.(Exhibit1;Tr.125,140,172).

The trial court erred in excluding evidence of the PPG, through Fabian's testimony, at trial. U.S.Const.amend.XIV;Mo.Const.art.I,§10;§490.065. This Court must reverse and remand for a new trial.

CONCLUSION

This Court must declare the provisions of the Act unconstitutional for the reasons stated herein and in Appellant's Brief 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,

/s/ Chelseá R. Mitchell

Chelseá R. Mitchell, MOBar #63104
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
E-mail: chelsea.mitchell@mspd.mo.gov

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 7,484 words, which does not exceed the 7,750 words allowed for an appellant's brief.

On November 3, 2016 electronic copies of Appellant's Reply and Appellant's Reply Appendix were placed for delivery through the Missouri e-Filing System to Greg Goodwin at gregory.goodwin@ago.mo.gov.

/s/ Chelseá R. Mitchell

_____

Chelseá R. Mitchell