SC95752

# In the Supreme Court of Missouri

**In the Matter of the Care and Treatment of**

**Carl Kirk,**

**Appellant**

**Appeal from the Circuit Court of Henry County**
**The Honorable Debra Hopkins, Judge**

## Respondent's Brief

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## STATEMENT OF FACTS

Carl Kirk was committed to the custody of the Director of the Department of Mental Health for care, control, and treatment as a sexually violent predator ("SVP") following a jury trial in the Circuit Court of Henry County, Probate Division, the Honorable Debra Hopkins presiding (L.F. 515). The jury committed Kirk upon the following facts:

### Kirk's Offending History

Kirk admitted that he put his penis between the legs of an unrelated boy (Tr. 258). At the time, Kirk's nephew was ten or eleven-years-old (Tr. 264). Kirk was also charged with a sex offense for luring a five-year-old boy into a garage and leaving him there (Tr. 264). Kirk's index offense was a sodomy conviction that resulted from Kirk placing Kirk's penis in the anus of his nephew (Tr. 258). Kirk and the nephew were working on dirt bikes in the garage (Tr. 266). The nephew brushed up against Kirk (Tr. 266). Kirk became aroused and thought "So you want to do something?" (Tr. 266). Kirk was aroused when he sodomized the nephew (Tr. 286). Kirk was paroled in 2011, and then later revoked (Tr. 316)

### Kirk's Treatment History

Kirk completed Missouri Sex Offender Treatment while in prison (Tr. 284). Kirk was only able to give a superficial discussion of what he learned in treatment (Tr. 284). Kirk was not able to articulate tools he had learned to

use to reduce his risk (Tr. 285). After treatment, Kirk had a lack of insight into his offending (Tr. 290).

**Dr. Nina Kircher**

Dr. Nina Kircher, a licensed psychologist, evaluated Kirk to determine if he was an SVP (Tr. 250). She said she reviewed Kirk's medical history, mental health records, and probation and parole records (Tr. 247).

Dr. Kircher first testified that Kirk had been convicted of a sexually violent offense (Tr. 260).

Dr. Kircher next testified she looked for a mental abnormality (Tr. 256). Dr. Kircher testified that Kirk suffered from pedophilia as described in the DSM-IV-TR (Tr. 256). Dr. Kircher testified that Kirk's pedophilia caused him serious difficulty controlling his behavior (Id). Dr. Kircher explained that Kirk had a long history of offending against boys (Tr. 258).

Dr. Kircher also testified that she performed a risk assessment (Tr. 269). Dr. Kircher scored Kirk on the Static-99R and the Stable-2007 (Tr. 270). She scored Kirk a seven on the Static-99R (Tr. 275). A score of seven is in the 97th percentile (Tr. 275). A score of seven is "pretty rare," (Tr. 280) and is in the high-risk category (Tr. 277). Dr. Kircher also scored Kirk on the Stable-2007 (Tr. 277). She scored Kirk as a sixteen (Tr. 277). A score of sixteen is in the high-risk category (Tr. 277). Dr. Kircher also testified she considered additional risk factors from the literature (Tr. 282). Dr. Kircher found that

Kirk's age decreased his risk (Tr. 284). Dr. Kircher found that Kirk was not entitled to a risk reduction for successfully completing treatment (Tr. 284–85). Dr. Kircher found that Kirk's risk was increased by violating his conditional release (Tr. 287), by Kirk's deviant sexual interest (Tr. 288), by negative social influences (Tr. 288), Kirk's history of childhood behavioral problems (Tr. 289), by Kirk's poor problem solving (Tr. 289), and by Kirk's lack of emotionally intimate relationships with adults (Tr. 290). After considering the actuarials and the additional risk factors, Dr. Kircher opined that Kirk was more likely than not to commit a future act of sexual predatory violence unless confined to a secure facility (Tr. 291).

Dr. Kircher's opinion was that Kirk is an SVP (Tr. 292)

**Dr. Stephen Mandracchia**

Dr. Stephen Mandracchia, a licensed psychologist from the Missouri Department of Mental Health evaluated Kirk to see if he was an SVP (Tr. 329). Dr. Mandracchia testified he had done approximately 45 sexually violent predator evaluations (Tr. 330). Dr. Mandracchia testified that Kirk had a mental abnormality, specifically pedophilia (Tr. 334–35). That mental abnormality, according to Dr. Mandracchia, causes Kirk serious difficulty controlling his behavior (Tr. 334).

Dr. Mandracchia also performed a risk assessment (Tr. 334). Dr. Mandracchia scored Kirk on the Static-2002R (Tr. 334). Kirk received a score

of nine (Tr. 367). A score of nine on the Static-2002R is in the high-risk category (Tr. 367). A score of nine is associated with a 44% sexual recidivism rate within five years (Tr. 367). Recidivism, in most cases, measures reconviction, not re-offense (Tr. 368). Dr. Mandracchia also considered Kirk's additional risk factors from the literature (Tr. 369). Dr. Mandracchia opined that Kirk was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility (Tr. 374–75).

Dr. Mandracchia opinion was that Kirk is an SVP (Tr. 375).

**Kirk**

The State called Kirk to the stand (Tr. 425). Kirk identified a letter he had written (Tr. 431). In the letter, Kirk described community-based sex offender treatment as a "joke for real" (Tr. 435). Kirk also testified that he sexually victimized a boy named Bobby (Tr. 444). Kirk "slick-legged" Bobby by placing Kirk's penis between Bobby's closed legs (Tr. 444). Kirk admitted to "violating" a boy named Donny in 1987, when Kirk put Kirk's penis in Donny's anus (Tr. 446). Kirk admitted that he offended against Donny about two-and-a-half-months after being conditionally released for victimizing Bobby (Tr. 449).

**Dr. John Fabian**

Kirk called Dr. Fabian, a forensic psychologist and a neuropsychologist (Tr. 547). Dr. Fabian performed testing on Kirk, and determined that Kirk

has ADHD (Tr. 559). Dr. Fabian also performed an SVP evaluation on Kirk. Dr. Fabian found that Kirk had pedophilia (Tr. 578). But Dr. Fabian testified he saw no evidence that Kirk was sexually attracted to prepubescent children (Tr. 578). Dr. Fabian testified that he did not believe that Kirk had a mental abnormality (Tr. 610). Dr. Fabian testified that he did not believe that Kirk was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility (Tr. 610).

Dr. Fabian testified that in his opinion, Kirk was not an SVP (Tr. 610).

**Probate Court's Judgment**

The jury found that Kirk was an SVP (Tr. 739). On October 1, 2015, the probate court issued its Judgment and Commitment Order finding that Kirk was an SVP and committing him to the custody of the Department of Mental Health for control, care, and treatment until such time as Kirk's mental abnormality had so changed that he was safe to be at large (L.F. 515).

## ARGUMENT I

**The probate court did not err in refusing to grant Kirk's pre-trial motions to dismiss (1) because the SVP Act is not punitive; (2) because this Court has held that the Due Process Clause does not require the SVP Act to consider the least restrictive environment; (3) because the Due Process Clause does not require the SVP Act to offer unconditional release; (4) because Kirk did not make his arguments about the SVP Act's release procedures to the probate court; and (5) because the SVP Act does require the State to prove a putative SVP has serious difficulty controlling his behavior.**

In his first point, Kirk presents five separate and distinct arguments about why the probate court should have granted his pre-trial motions to dismiss (Kirk Br. 30–49). Each of Kirk's arguments fails.

### Standard of Review

On questions of whether a state statute violates the federal constitution, this Court is not bound by the decisions of a United States District Court or the United States Court of Appeals. *See State v. Mack*, 66 S.W.3d 706, 710 (Mo. 2002) ("general declarations of law made by lower federal courts do not bind this Court"). Instead, this Court is bound only by decisions from the United States Supreme Court. *Hanch v. K.F.C. Nat. Management Corp.*, 615 S.W.2d 28, 33 (Mo. 1981).

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. 2007). All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every reasonable intendment to sustain the constitutionality of the statue.'" *Id.*, *quoting Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. 1984).

**Discussion**

In this first point, Kirk presents five separate arguments. First, Kirk argues that the SVP Act is unconstitutional because the purpose of the act is punitive in violation of the *Ex Post Facto* and Double Jeopardy Clauses (Kirk Br. 34–36). Kirk is mistaken. This Court has already explained that the SVP Act *is not punitive*. Second, Kirk argues that the SVP Act violates due process because it does not consider the least restrictive environment (Kirk Br. 36–40). Kirk is wrong because this Court has held that the Due Process Clause does not require the SVP Act to consider the least restrictive environment. Third, Kirk argues that the SVP Act violates the Due Process Clause because it does not allow for unconditional release (Kirk Br. 40–43). But the SVP Act does not have to allow for unconditional release. Fourth, Kirk argues that the probate court should have granted his motion to dismiss because the SVP Act's release procedures are unconstitutional (Kirk Br. 46–46). Kirk is wrong as a matter of law, and Kirk presented the probate court with no evidence to

support his argument. Fifth, Kirk argues that the SVP Act is fatally flawed because it does not require the State to prove that a putative SVP has serious difficulty controlling his behavior (Kirk Br. 46–49). But this Court has already held that the SVP Act *does* require the State to prove that a putative SVP has serious difficulty controlling his behavior.

**A. The SVP Act is not punitive in nature and therefore does not violate *ex post facto* or double jeopardy protections.**

In his first argument, Kirk contends that the United States District Court's decision in *Van Orden v. Schafer*, 129 F.Supp.3d 839 (E.D. Mo. Sept. 11, 2015, *modified* Dec. 22, 2015), means that the SVP Act violates the *Ex Post Facto* Clause and the Double Jeopardy Clause. Kirk's argument is not persuasive because *Van Orden v. Schafer* is not applicable in this case, and because Kirk has confused the *purpose* of the SVP Act with the *alleged implementation* of the SVP Act.

The *Ex Post Facto* and Double Jeopardy Clauses do not apply to SVP acts unless the act is criminal, not civil, in nature. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). This Court has previously held that "[a]lthough the proceedings involve a liberty interest, *they are civil proceedings*." *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. 2008) (emphasis supplied). So, the SVP Act is civil, not criminal in nature. Under this Court's ruling in *Van Orden*, Kirk's argument fails. Kirk attempts to avoid this Court's ruling in *Van Orden* by

relying on the federal case of *Van Orden v. Schafer* (Kirk Br. 36), and by arguing that this Court may not question the federal *Van Orden v. Schafer*'s holding (Kirk Br. 31).

In *Van Orden v. Schafer*, a group of sexually violent predators filed suit against Missouri, and alleged, among other things, that the SVP Act was facially unconstitutional, and unconstitutional as applied to them. *Van Orden v. Schafer*, 129 F.Supp.3d at 843. *Van Orden v. Schafer* is not a final decision, but instead represents the United States District Court's findings of fact and conclusions of law after a bench trial on liability. *Id.* Kirk relies on *Van Orden v. Schafer* non-final holding that the release provisions were being unconstitutionally implemented because the Department of Mental Health was making it too difficult to progress through the treatment program. The remedy phase is still on-going. The district court rejected the facial challenge to the SVP Act. *Id.* at 865. The district court also rejected the plaintiff's as-applied challenge to the SVP Act's treatment provisions. *Id.* at 867.

However, the district court did sustain the challenge to the SVP Act's release procedures as-applied to the plaintiffs. *Id.* at 867–870. The district court has not ordered the release of the plaintiffs, but has ordered Missouri to apply the SVP Act in a constitutional manner to the plaintiffs. *Id.* at 871.

The non-final holding in *Van Orden v. Schafer* does not support Kirk's argument for relief. Kirk summarily concludes that the SVP Act violates the

*Ex Post Facto* and Double Jeopardy Clauses because of the holding in *Van Orden v. Schafer* (Kirk Br. 36). Even if the district court is correct that the SVP Act is being improperly implemented, that does not mean that the act is punitive. The United States Supreme Court has held that the party challenging an SVP act as punitive must provide "the clearest proof that the scheme is so punitive in purpose or effect as to negate" the state's intention to deem it civil. *Hendricks*, 521 U.S. at 361. In this case, Kirk has not provided "the clearest proof." *Van Orden v. Schafer* is not final. Missouri is actively engaged in efforts to comply with the district court's order. Kirk is silent about what developments have happened since the *Van Orden v. Schafer* order was issued in 2015. For instance, Kirk's brief does not mention that there are at least ten pending petitions for conditional release. *In re Richard Berg*, 312P05-00088 (Greene County Cir. Ct.); *In re Stephen Elliott*, 7PR204000306 (Clay County Cir. Ct); *In re George Evans*, 04PR72330 (St. Francois Cir. Ct.); *In re Claude Hasty*, 12DE-PR00001 (Dent County Cir. Ct.); *In re Larry Lusby*, 39P049900137 (Lawrence County Cir. Ct.); *In re Lou Martineau*, 05NW-PR00096 (Newton County Cir. Ct.); *In re Jessie Moyers*, 02PR323155 (Cole County Cir. Ct.); *In re Steven Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.); *In re Charles St. Clair*, 02PR610339 (Washington County Cir. Ct.); *In re Wade Turpin*, 17P020100226 (Cass County Cir. Ct.). Moreover, Kirk's brief does not mention that three petitions for conditional

release have recently been granted. *In re Clifford Boone*, 21PR00135062 (St. Louis County Cir. Ct.) (conditional release granted Aug. 30, 2016); *In re Adrian Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.) (conditional release granted Sept. 30, 2016); *In re David Seidt*, 43P040300031 (Daviess County Cir. Ct.) (conditional release granted Aug. 25, 2016).

There is not sufficient evidence, let alone "the clearest proof" that Missouri's SVP Act is a criminal law. The non-final nature of *Van Orden v. Schafer* and the lack of any evidence about what has happened in the months since *Van Orden v. Schafer* demonstrates that this Court cannot rely on the district court's decision.

Without evidence, Kirk has failed to prove that Missouri's SVP Act is anything other than a civil law. And because Missouri's SVP Act is civil in nature, it cannot violate the *Ex Post Facto* or Double Jeopardy Clauses. Therefore, this Court should reject Kirk's first argument.

**B. This Court has held that the Due Process Clause does not require the SVP Act to consider the least restrictive environment.**

In his second argument, Kirk asserts that Missouri's SVP Act violates the Due Process Clause and the Equal Protection Clause because the Act does not allow for SVP's to be placed in the least-restrictive environment (Kirk Br. 36–40). This Court has rejected the least-restrictive-environment argument, and Kirk fails to distinguish this Court's opinion.

In *In re Norton*, this Court found that "secure confinement of persons adjudicated to be SVPs, as provided in sections 632.480 to 632.513, is narrowly tailored to serve a compelling state interest." *In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. 2003). This Court explained that the State has a compelling interest in protecting the public from crime. *Id.*[1] The *Norton* Court then explained that the State's interest in protecting the public from crime justified treating SVPs differently from other mental health patients. *Id.*

Moreover, the *Norton* Court found that an SVP is further protected by procedural safeguards such as (1) the right to a preliminary hearing; (2) the right to contest an adverse probable cause determination; (3) the right to counsel at that hearing, and to appear in person at that hearing; (4) the right to present evidence and cross-examine witnesses at the hearing; (5) the right to a jury trial; and (6) the right to a unanimous verdict before commitment. *Norton*, 123 S.W.3d at 174–75. Kirk received all those rights. It is true that the *Norton* Court also identified the beyond-a-reasonable-doubt standard as a procedural safeguard. *Id.* at 174. But this Court has subsequently held that

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[1] This Court has since reaffirmed that protecting the public from crime is an important state interest. *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. 2015).

an SVP's rights are sufficiently protected by the clear-and-convincing-evidence standard used at Kirk's trial. *In re Van Orden*, 271 S.W.3d at 586.

The *Norton* Court also found that there were statutory provisions for court review and "dismissal from secure confinement." *Norton*, 123 S.W.3d at 175. It is true that after *Norton*, the Missouri General Assembly replaced the dismissal provision with a conditional release provision. *In re Van Orden*, 271 S.W.3d at 586. But, conditional release can function like a dismissal, in that some SVPs have been given physical access to the community. *See, e.g., In re James Fennewald*, 06B7-PR00024 (Boone County Cir. Ct.) Order Revoking Conditional Release (July 13, 2016) (ordering that SVP be returned to physical custody in a secure facility).

On balance, the SVP Act has not changed since the *Norton* decision in a way that would require this Court to overrule *Norton*. Kirk's arguments are grounded in the statutory language that was affirmed in *Norton*. This Court should reject Kirk's argument.

**C. Kirk has not shown that the Due Process Clause and Equal Protection Clause requires the SVP Act to offer unconditional release.**

In his third argument, Kirk asks this Court to find that the SVP Act is facially unconstitutional under the Missouri constitution's due process and equal protection guarantees (Kirk Br. 42). Kirk does not appear to raise an

as-applied challenge. This Court should reject Kirk's argument to find the SVP Act facially invalid because Kirk has not demonstrated that he is eligible for conditional or unconditional release and because Kirk has not shown that the SVP Act is required to offer unconditional release.

In this Court's decision in *In re Van Orden*, two concurring judges and one dissenting judge questioned whether Missouri's SVP Act was constitutional because it did not explicitly provide for unconditional release. *Van Orden*, 271 S.W.3d at 586 n.5. However, the majority pointed out that issue was not before the Court because the SVPs had failed to "show that they were entitled to unconditional releases." *Id.*

Moreover, Kirk has not shown that the burdens of conditional release are so great that due process requires the State to use the beyond-a-reasonable-doubt standard at trial. Both the State and Kirk agree that conditional release encumbers Kirk's liberty interest. However, Kirk has the burden to prove that conditional release imposes such a burden that beyond a reasonable doubt is the necessary standard of proof. If Kirk has raised a facial challenge, his claim fails because he has not demonstrated that every SVP will be entitled to an unconditional release. If Kirk has raised an as-applied challenge, his claim fails because he has not shown how *his* liberty would be impacted.

For instance, Kirk alleges that *if* he is conditionally released, then his commitment will never be reviewed (Kirk Br. 56). Not so. The SVP Act permits Kirk to file a petition for review of his conditional release. Section 632.505(6) RSMo ("The court may modify conditions of release upon its own motion or upon the petition of the department of mental health, the department of corrections, *or the person on conditional release*").

And, Kirk has not demonstrated that he would be entitled to unconditional release. Kirk's complaint is with the release procedures. But Kirk has not demonstrated that he is entitled to conditional release, let alone unconditional release. If Kirk wants to assert he is entitled to unconditional release, he can raise that claim when he files a petition for conditional release. Kirk claim is not ripe because Kirk *has not* filed any petitions for release. Kirk cannot attack the commitment procedures in his case by asking this Court to assume that the State will act unconstitutionally in the future.

Kirk also alleges that the *In re Van Orden* dissent was correct when it claimed that the "actual administration" of the SVP Act meant that "the initial commitment decision" is "effectively final" (Kirk Br. 56). Kirk supports that statement with an earlier citation to the non-final federal *Van Orden v. Schafer* case (Kirk Br. 55). But, as the State pointed out in point I.A., *supra*, *Van Orden v. Schafer* does not represent the way the SVP Act is currently being implemented. For instance, less than one month ago, an SVP was

conditionally released with the Director of the Department of Mental Health's support. *In re David Seidt*, 43P040300031 (conditional release granted with Director's support). Kirk fails to show why, in his view, the SVP Act will always be implemented in an unconstitutional manner.

Kirk's main authority, the non-final federal *Van Orden v. Schafer*, decision also undercuts his argument. The United States District Court for the Eastern District of Missouri held that Section 632.505(6) can be interpreted to mean that a Missouri court could remove all pre-conditions on an SVP's conditional release. *Van Orden v. Schafer*, 129 F.Supp.3d at 865. Kirk offers no compelling reason why that provision of his main authority is mistaken. If the United States District Court's analysis is correct, then the SVP Act *does* offer a pathway to unconditional release.

**D. This Court should deny Kirk's complaints about the SVP Act's release procedures because Kirk's complaints were not preserved for appellate review.**

In his fourth argument, Kirk asserts that the SVP Act is unconstitutional "as written" because the release procedures are unconstitutional as applied to other individuals (Kirk Br. 43–46). This argument was not presented to the probate court, and so has not been preserved for appellate review.

In order to preserve a constitutional claim for appellate review, the claim must be made at the earliest opportunity and the claim must be preserved throughout the entire proceeding. *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. 2012), *quoting State v. Wickizer*, 583 S.W.2d 519, 523 (Mo. 1979).

In this case, Kirk now complains that the statutory release process is unconstitutional both facially and as-applied (Kirk Br. 43–46). Specifically, Kirk complains about the annual review process, the process to petition for conditional release, and the burden of proof in the conditional release process. But Kirk never raised those complaints in a pre-trial motion to dismiss. And, Kirk never raised those complaints in his motion for new trial (L.F. 495–505). Under the rule in *Liberty* and under Rule 78.07, the claim is not preserved for review because it was not raised in the motion for new trial.[2]

**E. The State is required to prove that a putative SVP has serious difficulty controlling his behavior.**

In his fifth argument for relief, Kirk contends that the SVP Act violates due process and equal protection because the SVP Act does not always

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[2] This claim is similar to Kirk's argument in point II that the burden of proof should have been beyond a reasonable doubt because of the release procedures. Respondent provides merits analysis of that claim in point II, *infra*.

require the State to prove that a putative SVP has serious difficulty controlling his behavior (Kirk Br. 46–49). This Court should reject Kirk's argument because this Court has previously found that Missouri's SVP Act *does* require the state to prove that a putative SVP has serious difficulty controlling his behavior.

In *Thomas v. State*, 74 S.W.3d 789 (Mo. 2002), two putative SVPs argued that Missouri's SVP Act was unconstitutional because Missouri's statute did not define "mental abnormality" so as to include the requirement that the mental abnormality causes "serious difficulty in controlling his behavior." *Thomas*, 74 S.W.3d at 791. This Court agreed that the jury instructions given at the trials did not comply with the United States Supreme Court's instructions in *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407 (2002). So, this Court remanded the case back to the probate court with the requirement that the probate court include a jury instruction that read "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." *Thomas*, 74 S.W.3d at 792 (emphasis removed).

In Kirk's case, the *Thomas* jury instruction was given (L.F. 486). Kirk's main argument seems to be that the Missouri General Assembly did not

amend the SVP Act to require "proof of serious difficulty controlling behavior" after this Court decided *Thomas* (Kirk Br. 48). There was no need for the General Assembly to modify the statutory language of the SVP Act because this Court rejected the argument that the SVP Act was constitutionally infirm. *Thomas*, 74 S.W.3d at 791 n.1. The argument that Kirk makes now was made by the dissent, and properly rejected by the majority. *Id.* at 793 (Limbaugh, C.J. dissenting).

Kirk also contends that this Court must consider if it is permissible for the definition of mental abnormality to include "emotional or volitional capacity" (Kirk Br. 48). Kirk argues that neither *Hendricks* nor *Crane* considered this question (Kirk Br. 48). The disjunctive construction of the statute does not present a problem. First, the United States Supreme Court found that an identical definition satisfied substantive due process concerns. *Hendricks*, 521 U.S. at 356. Second, even if an individual had a condition that affected only the putative SVP's "emotional capacity," Missouri law still requires that condition to cause the putative SVP "serious difficulty controlling his behavior." *Thomas*, 74 S.W.3d at 792. In other words, even if the problem is emotional and not volitional, the result is still serious difficulty controlling behavior. Under that formulation, the definition of mental abnormality passes constitutional muster.

**Conclusion**

In his first point for relief, Kirk presents five separate arguments. None of them merit relief. The SVP Act is not punitive in nature. The SVP Act is not required to consider the least restrictive environment. The SVP Act does not have to allow for unconditional release. Kirk has failed to preserve his complaints about the release procedures. And finally, the Missouri General Assembly did not need to amend the definition of mental abnormality after this Court's decision in *Thomas*.

## ARGUMENT II

**The probate court did not err when it refused Kirk's request to use the beyond a reasonable doubt standard at trial because that standard is not required, in that the clear and convincing evidence standard fully protects Kirk's rights.**

In his second point, Kirk argues that the probate court erred by using the clear and convincing standard of proof because due process demands that Missouri adopt the beyond a reasonable-doubt-standard (Kirk Br. 50). This Court should reject Kirk's argument because nothing has changed since the last time this Court ruled that clear and convincing evidence was the proper standard.[3]

### Standard of Review

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell*, 215 S.W.3d at 102. All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every

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[3] Kirk's point relied on also asserts that the SVP Act violates his right to equal protection, his right to a fair trial, and his right to be free from cruel and unusual punishment under both the federal and Missouri constitutions (Kirk Br. 50). Kirk does not put forth argument in support of those allegations inside the argument portion of his brief.

reasonable intendment to sustain the constitutionality of the statue.'" *Id.*, *quoting Westin Crown Plaza Hotel*, 664 S.W.2d at 5.

**Discussion**

Kirk appears to bring both a facial challenge and an as-applied challenge to the SVP Act. Neither challenge merits relief. Kirk's facial challenge fails because the SVP Act has not changed since the last time this Court rejected the argument in *In re Van Orden*, 271 S.W.3d 579 (Mo. 2008). Kirk's as-applied challenge fails because Kirk cannot bring an as-applied challenge to the SVP Act's commitment procedures by arguing the act's treatment and release procedures are unconstitutional as-applied to others.

**A. The SVP Act is not facially unconstitutional because it protects a putative SVP's rights.**

Kirk contends that the 2006 amendments have so transformed Missouri's SVP Act that the only permissible standard is beyond a reasonable doubt (Kirk Br. 51). But Kirk is mistaken. The United States Supreme Court has explained that the burden of proof is a question left to the states. Moreover, Missouri's statutes have not changed since this Court last held that the clear-and-convincing-evidence standard properly protected the rights of putative SVPs.

In *Addington v. Texas*, the United States Supreme Court explained that the beyond a reasonable doubt standard is not required by the federal

constitution because a state may not be able to meet that burden, "given the uncertainties of psychiatric diagnosis...." *Addington v. Texas*, 441 U.S. 418, 432 (1979). The Supreme Court also held that the preponderance standard was constitutionally deficient, and that clear and convincing evidence satisfied federal constitutional concerns. *Id.* at 431. Invoking federalism, the United States Supreme Court explained that each state was free to impose a burden higher than clear and convincing evidence, *if the state wished*. *Id.* at 431.

This Court followed the United State Supreme Court's guidance when it decided *In re Van Orden*, 271 S.W.3d 579 (Mo. 2008). In *Van Orden*, this Court considered the 2006 amendments to the SVP Act and determined that clear and convincing evidence was the appropriate burden of proof. *Id.* at 586. This Court recognized that the SVP Act implicates a sexually violent predator's liberty interest. *Id.* at 587. But the SVP Act does not totally remove an SVP's liberty. SVPs are *not* subject to indefinite physical commitment. *Id.* If an SVP is committed, they receive an annual review to determine if their mental abnormality has changed to a degree that makes physical commitment no longer necessary. *Id.* A probate court reviews the report. *Id.* Even if the report recommends *against* release, the SVP may still file a petition for release. *Id.* Moreover, if the petition for conditional release is denied, the SVP may obtain appellate review. *See, e.g. Barlow v. State*, 114

S.W.3d 328, 331–32 (Mo. App. W.D. 2003) (holding that the general appellate statute applies to proceedings under the SVP act).

The SVP Act also provides an alleged SVP with "many of the same rights as a criminal defendant, including a formal probable cause hearing, the right to a jury trial, the right to an attorney, and the right to an appeal." *Van Orden*, 271 S.W.3d at 585.

The *Van Orden* Court also found that the purpose of the SVP Act is to protect society and to provide mental health treatment to SVP's in need of such treatment. *Id*. As this Court noted, the "Missouri General Assembly has identified sexually violent predators as a very real threat to the safety of the people of Missouri." *Murrell*, 215 S.W.3d at 102. In *Van Orden*, this Court considered the effect of the Act on those physically committed, the pre-commitment protections, and the purpose of the SVP Act. Then, this Court concluded that clear and convincing evidence was a permissible burden of proof. *Van Orden*, 271 S.W.3d at 585–86. This Court explained its reasoning, holding that the clear-and-convincing standard properly allocated the risk between the State and the putative SVP, and that the SVP Act protected the rights of putative SVPs. *Id*.

Kirk is really arguing that *Van Orden* was wrongly decided (Kirk Br. 52). Kirk argues that *Van Orden* is no longer good law because the SVP Act was amended to remove unconditional release (Kirk Br. 52–53). But the

burden of proof was changed in the same bill that replaced discharge with conditional release. Kirk agrees that the 2006 amendments altered the burden of proof and changed dismissal into conditional release (Kirk Br. 52). So, when the *Van Orden* Court wrote that "if commitment is ordered, the term of commitment is not indefinite," this Court was describing conditional release. *Van Orden*, 271 S.W.3d at 586.

Kirk also claims that *Van Orden* was a "3-3 decision" (Kirk Br. 52). Kirk misunderstands the outcome of the case. In *Van Orden*, the majority opinion was written by Judge Price, joined by Chief Justice Stith, Judge Russell, and Judge Breckenridge. Special Judge Cook concurred in the majority opinion and wrote a separate concurrence, which was joined by Judge Wolff. Judge Teitelman dissented in a separate opinion. Judge Fisher did not participate. Accordingly, a full seven-member Court heard the case and there was a clear majority opinion. The SVP act has not changed since the *Van Orden* case was decided, and Kirk's arguments that this Court should overrule *Van Orden* are not persuasive.

Moreover, Kirk has committed the same error the SVPs committed in *Van Orden*; Kirk has not demonstrated that he would be entitled to unconditional release. *Van Orden*, 271 S.W.3d at 586 n.5. The probate court committed Kirk on October 1, 2015 (L.F. 515). Because only a little more than one year has passed, Kirk has not yet received his annual review, and Kirk

has not yet petitioned for conditional release. Accordingly, Kirk is in the same position as the SVPs in *Van Orden* in that he has not shown that he would be entitled to conditional or unconditional release.

**B. Kirk has failed to prove the SVP Act is unconstitutional as-applied to him because he cannot attack his commitment procedures by attacking the release procedures of others.**

Kirk also purports to bring an as-applied challenge to Missouri's SVP Act (Kirk Br. 50). But Kirk's argument is improper because he cannot allege that the commitment procedures are unconstitutional *as applied to him* by arguing that the treatment and release procedures are unconstitutional *as applied to others*.

Kirk makes a passing reference to the non-final federal case of *Van Orden v. Schafer*, and tells this Court that *Van Orden v. Schafer* is a sufficient reason to declare the entire SVP Act unconstitutional (Kirk Br. 55).

First, *Van Orden v. Schafer* is not yet a final decision. And, as the State demonstrates in point I.A, *supra*, the State has made many changes to the application of the SVP Act.

Second, Kirk cannot argue that the commitment procedures in his trial are unconstitutional *as applied to him* based on evidence that the treatment and release procedures have been held unconstitutional *as applied to others*. In *State v. Jeffrey*, this Court held "the general rule is that 'a person to whom

a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. 2013), *quoting New York v. Ferber*, 458 U.S. 747, 767 (1982). Kirk's argument is essentially that the probate court erred by not forcing the State to prove he is an SVP beyond a reasonable doubt because there is a risk that the SVP Act will be applied unconstitutionally to him in the future. But Kirk has failed to show that the SVP Act is being unconstitutionally applied to him, or even that the allegedly deficient release procedures are being applied to him *at all*.

**Conclusion**

Kirk was not entitled to the beyond-a-reasonable-doubt instruction in this case. The SVP Act's use of clear and convincing evidence is, on its face, constitutional under *In re Van Orden*, 271 S.W.3d 579 (Mo. 2008). Kirk cannot bring an as-applied challenge to the use of the clear-and-convincing-evidence standard because the release procedures Kirk complains about have not yet been applied to Kirk. This Court should deny this point.

## ARGUMENT III

**The probate court did not err in denying Kirk's motion to dismiss based on the multidisciplinary team vote, because the vote is not a condition precedent for the Attorney General to file a sexually violent predator petition.**

In his third point for relief, Kirk contends that the probate court should have granted his motion to dismiss because the multidisciplinary team assessment concluded he did not appear to meet the SVP criteria (Kirk Br. 58–64). Kirk is mistaken because both the plain language of Section 632.486 and this Court's precedent make clear that the Attorney General may file a petition regardless of what the multidisciplinary team assessment says.

### Standard of Review

This Court reviews questions of statutory interpretation *de novo*. *Murrell*, 215 S.W.3d at 103. When this Court interprets a statute, "a sentence should not be given a meaning that thwarts a section; a clause should not undermine a sentence." *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. 2009).

### Relevant Facts

Before the Attorney General filed a petition seeking Kirk's commitment, Dr. Nina Kircher performed the end of confinement report as

required by Section 632.483.2(3) (L.F. 30–36). Then the multidisciplinary team convened and unanimously voted "no" when asked if Kirk "appears to meet Sexually Violent Predator definition?" (L.F. 37). Next, the Prosecutor's Review Committee was provided a copy of the multidisciplinary team's vote (L.F. 38). The Prosecutor's Review Committee unanimously voted that Kirk *did* meet the SVP Act's criteria (L.F. 38). The Attorney General reviewed the information, and filed a petition to commit Kirk as an SVP (L.F. 26–28).

Kirk filed a pre-trial motion to dismiss, which alleged that the Attorney General could not file a petition to commit him unless the multidisciplinary team voted that he appeared to meet the criteria (L.F. 42–43). The motion was denied (Tr. 23). Kirk preserved his argument by placing it in his motion for new trial (L.F. 496).

**Discussion**

The plain language of the statute gives the Attorney General authority to file a petition *unless* the Prosecutor's Review Committee votes no.

Section 632.486 governs when the Attorney General may file a petition to involuntarily commit an SVP. It provides that:

> When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection 5 of section 632.483 has determined by a majority vote, that the person meets the

> definition of a sexually violent predator, the attorney general may file a petition...

Section 632.486.1, RSMo. This Court has interpreted Section 632.486 to require two conditions precedent before the Attorney General may file a petition: (1) it must appear to the Attorney General that the person "may be a sexually violent predator" and (2) the Prosecutor's Review Committee must determine by "a majority vote that the person meets the criteria." *State ex rel. Parkinson*, 280 S.W.3d 70, 73 (Mo. 2009); *see also In re Care and Treatment of Perkins*, 175 S.W.3d 179, 180 (Mo. App. E.D. 2005).

In *Parkinson*, the putative SVP alleged that the probate court did not have subject-matter jurisdiction to consider the Attorney General's petition because of non-compliance with the pre-trial procedures in Section 632.483. *Id.* at 76. This Court then set out all the pre-trial procedures, including the discussion on the two requirements for the Attorney General to file a petition. *Id.* at 72–74. Yet, Kirk points to a different part of *Parkinson* and argues that the Court's holding that the multidisciplinary team's recommendation is not binding on the Attorney General is mere dictum (Kirk's Br 60–61). Kirk is mistaken.

The language in *Parkinson* is not dictum because it is essential to the Court's holding. *See* Black's Law Dictionary, Obiter Dictum (10th ed. 2014). *Parkinson* was a writ of prohibition case. Under this Court's rulings, a writ of

prohibition will not issue unless there is a clear entitlement to the writ. So, if the other pre-trial procedures were not complied with in *Parkinson*, this Court would not have issued its writ of prohibition, and the putative SVP would have been released. Upon review, this Court noted that the multidisciplinary team voted that the putative SVP "*did not* meet the criteria" while the prosecutor's review committee "unanimously determined that [the putative SVP] *did* meet the definition..." *Parkinson*, 280 S.W.3d at 74. If Kirk was right that the multidisciplinary committee's vote was a condition precedent for the Attorney General to file a petition, this Court would not have issued its writ in *Parkinson*.

Kirk now relies on *In re Van Orden*, which Kirk argues is binding authority in this context, and which says, "If the multidisciplinary team and the prosecutorial review committee confirm that finding, the attorney general files a petition for commitment." *In re Van Orden*, 271 S.W.3d at 584. But that portion of *Van Orden* is dictum and cannot be taken literally. If Kirk's chosen language from *Van Orden* were taken literally, then the Attorney General would be *required* to file a petition if the multidisciplinary team and the prosecutor's review committee agreed that an individual met the criteria. But that is not what the statute says. Instead, the statute gives the Attorney General discretion to file a petition if the pre-conditions are met. Section 632.483 ("...the attorney general *may* file a petition") (emphasis supplied).

Kirk also argues that when the various procedural safeguards are considered together, the multidisciplinary team's review is part of a winnowing process, and therefore must be a condition precedent for the Attorney General to file a petition (Kirk Br. 61–63). But Kirk's interpretation of the statute ignores the plain language of Section 632.486. Kirk cannot read the SVP Act in such a way that thwarts the plain language of Section 632.486. And, although Section 632.486 mentions the multidisciplinary team's assessment, it requires the assessment to be filed with the petition. If the General Assembly wanted the multidisciplinary team's assessment to be a condition precedent—like the prosecutor's review committee's vote—then the General Assembly would have said so in the statute. But it did not.

Finally, Kirk is correct that the multidisciplinary team's assessment is part of a winnowing procedural safeguard. The assessment is "made available to the prosecutor's review committee. Section 632.486. Likewise, the assessment is made available to the Attorney General for consideration in determining if it "appears that the person presently confined may be a sexually violent predator...." *Id*; *see also* Section 632.483.4. The assessment is also provided to the probate court before it determines if there is probable cause. Section 632.486. But those provisions cannot override the plain language of the General Assembly.

## Conclusion

The General Assembly's intent is demonstrated by the SVP Act's plain language. Section 632.486 creates two conditions that must be satisfied before the Attorney General can file a petition. This Court has agreed that all that is required is that it must appear to the Attorney General that an individual meets the criteria, and that a majority of the prosecutor's review committee votes that the individual does meet the criteria. So, the probate court correctly denied Kirk's argument that the Attorney General could not file a petition without a positive assessment from the multidisciplinary team. Accordingly, Kirk is not entitled to relief.

## ARGUMENT IV

**The probate court did not plainly err in denying Kirk's motion to dismiss because Kirk had an opportunity to contest probable cause and cross-examine Dr. Kircher, and because Dr. Kircher's opinion was supported by substantial facts.**

In his fourth point, Kirk contends that his rights were violated when the probate court denied his motion to dismiss based on the fact that the probate court ended his cross-examination and that—according to Kirk—Dr. Kircher's opinion was not supported by sufficient evidence (Kirk Br. 65–76). Kirk is not entitled to relief because he has not fully preserved his claim, because a court has wide latitude in controlling the scope of testimony, and because Dr. Kircher's opinion was supported by substantial facts.

### Standard of Review

Kirk misunderstands the standard of review for a probable cause hearing during the *commitment phase*. In the commitment phase, the question is whether the State has raised a triable issue of fact, under any theory. *Tyson v. State*, 249 S.W.3d 849, 852–53 (Mo. 2008), *citing Martineau v. State*, 242 S.W.3d 456, 460 (Mo. App. S.D. 2007). The probate court is not entitled to make credibility determinations or weigh evidence. *Id*. Instead, the probate court is merely allowed to determine if there is probable cause.

## Relevant Facts

The State called Dr. Nina Kircher at the probable cause hearing (P.C. Tr. 6–61). Dr. Kircher has a bachelor's degree in psychology and religion, a master's degree in clinical psychology, and a doctorate in psychology (P.C. Tr. 6). Dr. Kircher testified she was a licensed psychologist in Missouri (P.C. Tr. 8). Dr. Kircher testified that she had prior experience in conducting risk assessments from her past employment (P.C. Tr. 7). Dr. Kircher also testified she had done 100 sexually violent predator evaluations at the time of the probable cause hearing, and that she had been trained in how to do those evaluations (P.C. Tr. 8). Dr. Kircher explained how she conducts a structured risk assessment in order to complete her report under Missouri law (P.C. Tr.9–10). Kirk objected that Dr. Kircher was not qualified to be an expert under Missouri law, and the probate court overruled her objection (P.C. Tr. 10–11).

Dr. Kircher testified that she relied on records from the Missouri Department of Corrections, from Probation and Parole, and from Kirk's sex offender program file (P.C. Tr. 11). Dr. Kircher testified those records were reasonably reliable (P.C. Tr. 12). Dr. Kircher also performed a 60 minute clinical interview of Kirk (P.C. Tr. 11–12).

Dr. Kircher testified that Kirk had been convicted of sodomy—a sexually violent offense—for having oral and anal sex with his ten-year-old-

nephew (P.C. Tr. 13). Dr. Kircher testified she found, under Missouri law, that Kirk had a mental abnormality (P.C. Tr. 15–16). Dr. Kircher explained that, in her opinion to a reasonable degree of psychological certainty, Kirk had pedophilia as described in the Diagnostic and Statisticians Manual, fourth edition, text revision (DSM-IV-TR) (P.C. Tr. 16). The DSM-IV-TR is reasonably relied upon by members of Dr. Kircher's profession (P.C. Tr. 16–17).

Dr. Kircher also described Kirk's history of sexual offenses. For instance, Kirk was arrested in 1981 for kidnapping and attempted sexual molestation of a five-year-old male stranger (P.C. Tr. 17). In 1987, Kirk was convicted of first-degree sexual abuse for what Kirk did to an eleven-year-old in 1986 (P.C. Tr. 17–18). Dr. Kircher asked Kirk about the 1986 offense during the clinical interview (P.C. Tr. 18). Kirk said that he had placed his penis between the boy's legs (Id). Kirk's counsel did not object to Kirk's statements. (Id). Dr. Kircher also testified that Kirk committed the sodomy offense eighteen days after he was paroled for the 1986 offense (P.C. Tr.18–19). Kirk told Dr. Kircher that he committed the sodomy offense because Kirk believed the boy had brushed up against Kirk in a sexual manner (P.C. Tr. 19). Kirk further elaborated to Dr. Kircher that he also victimized the boy "to get back at the boy's father" (P.C. Tr. 19).

Dr. Kircher explained that this history of sexually offending, in addition to Kirk's statements of being sexually aroused, demonstrated a sexual attraction to "young males" (P.C. Tr. 20). Dr. Kircher testified that, based on all the information she had, Kirk met the diagnostic criteria for pedophilic disorder (P.C. Tr. 20–21). Dr. Kircher further explained that Kirk's pedophilia caused him serious difficulty controlling his behavior (P.C. Tr. 21–22). As a result, Dr. Kircher concluded, to a reasonable degree of psychological certainty, that Kirk had a mental abnormality (P.C. Tr. 22).

Dr. Kircher also testified about how she and other members of her profession evaluate risk (P.C. Tr. 22–25). Dr. Kircher, after using the actuarials and looking for other risk factors supported by the literature, explained that in her opinion, Kirk had the statutorily required level of risk (P.C. Tr. 32).

Kirk then cross examined Dr. Kircher (P.C. Tr. 32). Kirk attacked Dr. Kircher's training and experience (P.C. Tr. 33–34). Kirk pointed out that Dr. Kircher had never testified in a probable cause hearing before (P.C. Tr. 34). Kirk asked questions about the screening process (P.C. Tr. 34–35). At this point, the State objected that Kirk's questions were not relevant for a probable cause hearing (P.C. Tr. 37). The probate court overruled the objection, but noted that the questions were "starting to sound like a deposition, not a probable cause hearing" (P.C. Tr. 37–38). Kirk then asked

additional questions about Dr. Kircher's training and the purpose of her evaluation (P.C. Tr. 38–39). Kirk then asked questions about Missouri's SVP Act, and how Dr. Kircher and members of her field interpret the SVP Act (P.C. Tr. 39–40). The State again objected that these questions were not relevant in a probable cause hearing (P.C. Tr. 41). The probate court overruled the objection, but explained to Kirk that the questions were very nearly irrelevant (P.C. Tr. 41). Kirk also elicited that Dr. Kircher relied on the reports from the Department of Corrections when reaching her opinion (P.C. Tr. 44). Dr. Kircher admitted that she has limited records, in that Dr. Kircher does not have every record about an individual's entire life at the time of her report (P.C. Tr. 45–46).

Kirk asked additional questions about Dr. Kircher's interview process, why Dr. Kircher chooses to do an interview, how many evaluations Dr. Kircher has done, how Kirk appeared during Dr. Kircher's interview, and about how freely Kirk answered Dr. Kircher's questions (P.C. Tr. 48–51). Kirk then asked whether Dr. Kircher had records about the physical development of the eleven-year-old boy that Kirk had offended against (P.C. Tr. 51). Again, the State objected that the question was not relevant (*Id*). The objection was sustained, and Kirk offered exhibit 6 as an offer of proof (P.C. Tr. 53).

Kirk then asked additional questions about the details of Dr. Kircher's report (P.C. Tr. 58–60). The State eventually objected that Kirk's cross-examination was attempting to weigh the evidence (P.C. Tr. 61). The State also asked the probate court to find probable cause (Id). Kirk argued that the State had failed to lay sufficient foundation for Dr. Kircher's expert opinion, and that cross-examination should continue (P.C. Tr. 62). The probate court sustained the State's objection and found probable cause (Id).

Kirk objected that ending the probable cause hearing would violate his rights to "due process, equal protection, the right to a fair trial, active assistance of counsel as guaranteed by the U.S. Constitution, the Fifth and Fourteenth Amendments, and also by the Missouri Constitution, Article One, Section Two...Section Ten and Section 18A" (P.C. Tr. 64–65).

Kirk filed a pretrial motion where he raised the additional arguments that the probate court denied him his rights under the SVP Act (L.F. 113–12). These arguments were not raised at the probable cause hearing. Before trial, Kirk raised his motion to dismiss and argued that the probable cause hearing denied his statutory rights under the SVP Act (Tr. 24). Kirk also argued that there were not sufficient facts to establish that Kirk has pedophilia (Tr. 24). After trial, Kirk renewed his written pre-trial motion to dismiss by placing it in his motion for new trial (L.F. 496).

## Discussion

In his point relied on, Kirk asserts that his rights to due process and equal protection under the federal and Missouri constitutions were violated (Kirk Br. 65). Kirk also complains that his statutory rights under the SVP Act were violated (Kirk Br. 65). Kirk further complains that the probate court committed error when it found probable cause because Dr. Kircher's opinion was not supported by sufficient facts (Kirk Br. 65).

Kirk is not entitled to relief on this point. First, most of Kirk's point is not preserved. Kirk's brief contains no analysis on federal or state due process or equal protection requirements, other than to argue that due process requires that he receive a probable cause hearing (Kirk Br. 67–69). Kirk's claim about the SVP Act's statutory procedures are not preserved because he failed to raise his complaints when he objected at the hearing (Kirk Br. 69–70). None of these unpreserved claims are entitled to plain error relief. Second, Kirk's complaints about Dr. Kircher's testimony are meritless because the State is not required to prove any particular theory at the probable cause hearing.

**A. Kirk failed to preserve his point by failing to raise his objection at the earliest opportunity and by failing to preserve it throughout trial and on appeal.**

Kirk has failed to preserve two of the arguments in his point; Kirk's complaints about the SVP Act's procedures are not preserved, and Kirk's complaints about due process and equal protection are not preserved.

Kirk briefly complains that his statutory right to counsel, his statutory right to present evidence, his statutory right to cross-examine witnesses, and his statutory right to contest probable cause were all violated (Kirk Br. 69–70). These claims are not preserved. At the probable cause hearing, Kirk objected to the end of the hearing, but did not raise *any* of the statutory rights under the SVP Act (P.C. Tr. 61–66). An objection must be made at the earliest possible opportunity to preserve the issue for appellate review. *See State v. Collins*, 72 S.W.3d 188, 194 (Mo. App. S.D. 2002) (objection to evidence); *see also Garris v. State*, 389 S.W.3d 648, 651 (Mo. 2012) (challenge to constitutionality of a statute).

**B. Kirk is not entitled to plain error relief on his unpreserved claims.**

Even if this Court were to grant Kirk plain error review, he would not be entitled to relief. Kirk's statutory right to counsel, right to present evidence, right to cross examine witnesses, and right to contest probable

cause were not violated. These rights are not unlimited; they are subject to reasonable restrictions. *See, e.g. United States v. Scheffer*, 523 U.S. 303, 308 (1998) (Sixth Amendment right to present evidence is not unlimited); *State v. Hicklin*, 969 S.W.2d 303, 307 (Mo. App. W.D. 1998) ("The right of cross-examination is not unlimited").

Kirk had counsel appear at the hearing. The probate court even commended Kirk's counsel, saying "You're asking wonderful questions" and "You're zealously representing your client. I really admire your tenacity" (P.C. Tr. 61).

Kirk never asked to present any evidence at the probable cause hearing (P.C. Tr. 61–66). It cannot be said that Kirk's right to present evidence was violated when Kirk did not attempt to present evidence.

Kirk was able to cross examine Dr. Kircher (P.C. Tr. 32–64). Even in a criminal case, the trial court has wide latitude to limit cross-examination. *State v. Smith*, 32 S.W.3d 134, 135 (Mo. App. E.D. 2000).

Kirk was able to contest probable cause. The probate court heard considerable cross-examination from Kirk's attorney (P.C. Tr. 32–64). Kirk's attorney was able to make arguments that Dr. Kircher was not qualified (P.C. Tr. 10–11), and that Dr. Kircher did not have enough information to support her conclusions (P.C. Tr. 45–46; 62).

**C. Kirk's complaints about Dr. Kircher's testimony are meritless because the State presented sufficient evidence, and because the State was not required to present any particular theory at the probable cause hearing.**

The focus of Kirk's complaints about Dr. Kircher's testimony at the probable cause hearing seems to be that Dr. Kircher's opinion that Kirk suffered from a mental abnormality is not supported by the record (Kirk Br. 72–75). Kirk further argues he was prejudiced thereby (Kirk Br. 75–76). Kirk is mistaken.

This Court has explained that the probate court is not required to believe any particular theory in order to find probable cause. *Tyson*, 249 S.W.3d at 853.

In *Tyson*, the State presented evidence at the probable cause hearing that the putative SVP suffered from pedophilia and antisocial personality disorder. *Tyson*, 249 S.W.3d at 851. The probate court found that the state failed to submit sufficient evidence of the pedophilia diagnosis at the probable cause hearing, but agreed that the State had demonstrated an antisocial personality disorder. *Id.* At trial, the State presented evidence that the putative SVP had pedophilia, and the jury committed him. *Id.* On appeal, the putative SVP argued that probate court should not have allowed

the State to present evidence of pedophilia at trial because the probate court rejected the pedophilia diagnosis at the probable cause hearing. *Id.*

This Court rejected that argument. The *Tyson* Court explained that the probate court is not required to find probable cause "under any precise theory suggested by the State's evidence...." *Id.* at 853. The *Tyson* Court continued "Nothing in the SVP Act articulates that probable cause to bind a suspected SVP over for trial requires acceptance of a particular diagnosis of his mental abnormality." *Id.*

The *Tyson* Court's holding logically follows from the language of the SVP Act, which allows the State to rest on its petition. Section 632.489.2(2). Here, the State did more—it supplemented the petition with Dr. Kircher's in-person testimony.

Kirk's argument fails under this Court's holding in *Tyson*. Kirk's argument assumes that the probate court could not find probable cause because Dr. Kircher's diagnosis of pedophilia was not supported (Kirk Br. 74). Kirk makes this assumption based on his reading of *In re Care and Treatment of Schottel v. State*, 159 S.W.3d 836 (Mo. 2005). *Schottel* is no longer good law to the extent that it conflicts with *Tyson* because *Tyson* was decided three years after *Schottel*. Moreover, *Schottel* is not applicable to this case because *Schottel* is a case about a probable cause hearing *in the release procedures*. *Schottel*, 159 S.W.3d at 839–40. By its own terms, *Schottel* is

limited to a hearing under Section 632.498. But here, Kirk is challenging commitment probable cause hearing held under Section 632.489. *Schottel* is simply not applicable in this case.

**D. Kirk cannot demonstrate prejudice because the probable cause determination was subsumed by the jury trial.**

Kirk also claims that he was prejudiced by all the alleged errors in the probable cause hearing (Kirk Br. 75–76). Even if Kirk were correct that the probable cause hearing was defective, he was not prejudiced because the probable cause hearing was subsumed by the jury trial.

This Court has not yet been presented with the argument that the jury trial subsumes the probable cause determination. The Missouri Court of Appeals has acknowledged that the trial may subsume the probable cause hearing, but has not answered the question. *See, e.g. Martineau*, 242 S.W.3d at 460. Under the facts presented in this case, the trial has subsumed the probable cause hearing for purposes of prejudice.

Kirk contends that he was prejudiced because he had to wait two years for a ruling on his motion to dismiss (Kirk Br. 76). But, as the State points out in part V *infra*, the delay between the probable cause hearing and the trial is attributable to his many requests for continuances. And, Kirk could have sought appellate review before trial. *See State ex rel. Parkinson*, 280 S.W.3d 70 (Mo. 2009) (appellate review of motion to dismiss at probable cause

stage); *see also State ex rel. Koster v. Suter*, 477 S.W.3d 673 (Mo. App. W.D. 2014) (appellate review of motion to dismiss before trial).

Kirk also cites *Schottel* for the proposition that a commitment trial was prejudicial (Kirk Br. 76). Again, *Schottel* is a case about a probable cause hearing in the release procedures. If *Schottel* does apply, then it merely demonstrates that pre-trial review of a probable cause hearing is available. Kirk cannot claim to be prejudiced by not challenging the probable cause hearing until after a trial where the jury found the State proved its case.

**Conclusion**

Kirk is not entitled to relief on his fourth point. Many of his arguments are not preserved for review, and they do not represent plain error. Kirk's attempt to invalidate the probable cause hearing because of alleged errors in Dr. Kircher's testimony is not meritorious under this Court's ruling in *Tyson*, and Kirk has failed to demonstrate prejudice. Accordingly, this Court should deny relief.

## ARGUMENT V

**The probate court did not abuse its discretion in denying the motion for change of venue because the motion did not comply with Rule 51.03, and because Kirk waived his motion for change of venue.**

### Standard of Review

Rule 51.03 allows for a change of venue in a civil case but imposes certain requirements on the motion. One requirement is that the motion for change of venue must include "notice of the time when it will be presented to the Court...." Mo. Sup. R. 51.03. Kirk contends that this Court's review is for an abuse of discretion if the probate court's decision was based on factual matters (Kirk Br. 78). Kirk also suggests that this Court's review is de novo if the probate court denied the motion as a matter of law (Kirk Br. 78). A motion for a change of venue should be denied when the motion is used as a last-minute delay tactic to avoid a trial date. *State v. Chambers*, 481 S.W.3d 1, 6 (Mo. 2016).

### Relevant Facts

Kirk filed his motion for change of venue on August 16, 2013 (L.F. 104–105). The motion for change of venue did not include any notice of the time when it would be presented to the probate court (L.F. 104–105). That same day, Petitioner filed a response, asserting that the motion for change of venue was not permitted under the rules (L.F. 109). Kirk did not notice the motion for

hearing until nearly two years later, on June 12, 2015 (L.F. 13). Kirk requested three continuances between August 16, 2013 and June 12, 2015 (L.F. 8, 10, 12). As an alternative to granting the motion for change of venue, Kirk requested a fourth continuance (L.F. 13, 168–169). The probate court set the matter for a conference call hearing, and under the Clerk's office protocol, the attorneys were responsible for facilitating the conference call (Supp. L.F. 2). The Missouri Attorney General's Office agreed to bear the financial costs of the call by using the state conference call operator service (Supp. L.F. 1). Although the probate court initially denied the motion for change of venue and the motion for continuance (L.F. 14), the probate court eventually continued the trial at Kirk's request (L.F. 19).

**Discussion**

Kirk complains that the court committed error when it denied his motion for change of venue (Kirk Br. 86). This claim is without merit as Kirk's failure to comply with Rule 51.03 was an adequate basis to deny the motion. Moreover, Kirk waived his claim by waiting nearly two years to renew his motion and by requesting and receiving alternative relief.

Kirk's brief on this point spends significant time arguing that Rule 51.03 applies to a sexually violent predator case (Kirk Br. 80–83). The Court does not need to decide this question because Kirk has failed to comply with

Rule 51.03 and even if Kirk had complied with the rule, Kirk has waived his claim.

Although Rule 51.03 requires a notice of the time the motion will be presented to the court, Kirk's motion did not contain any notice (L.F. 103–104). Kirk's failure to comply with Rule 51.03 is fatal to his claim. In *State ex rel. Jackson v. Thompson*, 661 S.W.2d 677, 679 (Mo. App. W.D. 1983), the Missouri Court of Appeals held that motions for change of venue *must* include "a reasonable notice of the time when the motions will be presented and heard by the court." Kirk argues in his brief that this Court has held that the notice requirement is intended only to allow the other party to appear and defend (Kirk Br. 84). But the case Kirk relies on, *State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 246 (Mo. 1995) is a case about a motion for change of *judge* not change of *venue*. *Scott*, 919 S.W.2d at 248 ("We hold that the failure to include the notice of a date for hearing in an application for a change of judge under Rule 51.05 is not fatal..."). *Scott* is not applicable to Kirk's complaint about a motion for change of venue.

Kirk also asserts that he did not waive his request for a change of venue under this Court's ruling in *State v. Chambers*, 481 S.W.3d 1 (Mo. 2016). *Chambers* is a criminal case, where defense counsel timely filed a motion for change of venue, but defense counsel allowed the motion to languish for eight months and defense counsel affirmatively represented

during pretrial conferences that there no other pending matters for the trial court to take up. *Chambers*, 481 S.W.3d at 5.

In this case, Kirk noticed a motion hearing for November 18, 2013, but then Kirk canceled that hearing (L.F. 7). On December 23, 2013, the probate court set a motion hearing for January 21, 2014 in order to "take up all pending motions" (L.F. 8). That hearing was eventually rescheduled for May 19, 2014, and a jury trial was set for May 28–30, 2014 (L.F. 9). That hearing was canceled because of Kirk's continuance request (L.F. 11). A motion hearing was held on August 4, 2014 (L.F. 12). There is no indication that Kirk attempted to take up his motion for change of venue. Kirk does not assert that he did. On January 20, 2015, the probate court held a telephone conference setting the case for trial August 4–7, 2015 (L.F. 13). Again, there is no indication that Kirk raised his motion for change of venue. Then, on June 12, 2015, Kirk filed both a motion to continue the trial, and noticed a hearing on the motion for change of venue (L.F. 13–14). Kirk also admits that he did not bring his motion to the probate court's attention until June 12, 2015 (Kirk Br. 83).

Under the rule in *Chambers*, Kirk's behavior amounted to an affirmative waiver of his motion for change of venue. In *Chambers*, the defendant allowed his motion to "languish in the case file for more than eight months." *Chambers*, 481 S.W.3d at 6. Here, the application languished for

nearly 22 months. In *Chambers*, the defendant had four pretrial conferences at which he could have raised the application. *Id.* at 5. In this case, Kirk scheduled and canceled a motion hearing, and there is no evidence that Kirk raised the issue during the August 4, 2014 telephone conference. Likewise, there is no evidence that Kirk raised his motion for change of judge at the January 20, 2015 trial setting.

This Court held that motions for change of venue should not be used as a "last-minute delay tactic" and that applicants "should not be rewarded on appeal for manipulating the purpose and objectives" of the rule. *Id.* at 7. But Kirk used his motion for change of venue in precisely that fashion.

Moreover, Kirk's request for alternative relief—e.g. another continuance request—was a clear and unequivocal intent to waive his motion for change of venue if the alternative relief was granted. It is true that the motion for continuance was initially denied (L.F. 14). But, on July 31, 2015, the probate court granted Kirk's motion for continuance (L.F. 19). Kirk's conduct shows that his ultimate goal in noticing up the motion for change of venue was to avoid going to trial on August 4, 2015. That goal was successful when the August trial date was continued.

In sum, the probate court did not abuse its discretion when it denied Kirk's motion for change of venue because Kirk failed to comply with Rule 51.03 and because waived his request under this Court's decision in

*Chambers*. Kirk has not established that there was an error of law. Kirk's point should be denied.

## ARGUMENT VI

**The probate court did not abuse its discretion by excluding testimony about Kirk's release plan because evidence of external constraints was not relevant.**

### Standard of Review

"When a motion *in limine* is sustained, its propriety is judged by the admissibility or inadmissibility of the excluded evidence." *Brown v. Hamid*, 856 S.W.2d 51, 53 (Mo. 1993). The probate court has broad discretion to admit or exclude evidence, and appellate courts will not reverse the probate court's ruling absent an abuse of discretion. *Id.* at 56. An abuse of discretion occurs when a probate court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Murrell*, 215 S.W.3d at 109. Since review is for prejudice, not mere error, the probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110.

"The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence." *Hamid*, 856 S.W.2d at 56. "'Exclusion of evidence of collateral matters is demanded when the evidence introduces many new controversial points and a confusion of issues would result.'" *Id.*

The jury in a civil commitment trial must find, by clear and convincing evidence, that the person named in the petition is a "sexually violent predator." Section 632.495.

**Discussion**

Kirk argues that his Due Process Clause rights were violated because the experts considered external-constraints evidence (Kirk Br. 89–90), and that the probate court could not refuse this evidence because "the State opened the door" (Kirk Br. 94). Neither argument is persuasive. Kirk's claim is without merit as the evidence he sought to admit was not relevant.

**A. The probate court did not commit a due process violation when it excluded evidence that was not relevant.**

Relevance has two tiers, logical and legal. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002). "Evidence is logically relevant 'if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.'" *State v. Dennis*, 315 S.W.3d 767, 768 (Mo. App. E.D. 2010), *quoting State v. Tisius*, 92 S.W.3d 751, 760 (Mo. 2002)). If logically relevant evidence is legally relevant, it is admissible. *Anderson*, 76 S.W.3d at 276. "Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the

jury, undue delay, waste of time, or cumulativeness." *Id*. If the costs of logically relevant evidence outweighs its benefits, the evidence is excluded. *Id*. Whether a piece of evidence is relevant depends, in part, on the issues in the case.

"The Missouri legislature created a mechanism to civilly commit sexually violent predators; i.e., 'any person who suffers from a mental abnormality [that] makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." *In the Matter of the Care and Treatment of A.B.*, 334 S.W.3d 746, 752 (Mo. App. E.D. 2011). "The law seeks, above all else, the protection of society against a particularly noxious threat: sexually violent predators." *In the Matter of the Care and Treatment of Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008). Section 632.480(5), , defines a "sexually violent predator" as:

> 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, or been found not guilty by reason of mental disease or defect . . . of a sexually violent offense[.]

Section 632.492 provides that "the court shall conduct a trial to determine whether the person is a sexually violent predator."

Thus, for an offender to be committed, the state must satisfy a three-prong test: (1) the offender must have committed a sexually violent offense; (2) the offender must suffer from a mental abnormality; and (3) that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. *In the Matter of the Care and Treatment of A.B.*, 334 S.W.3d at 752 (describing a two-step test when the offender has plead guilty to a sexually violent offense).

Kirk suggests that his due process rights were violated because external-constraints evidence is relevant as to whether Kirk is more likely than not to commit a future act of predatory sexual violence (Kirk Br. 90).

In *In the Matter of the Care and Treatment of Lewis*, 152 S.W.3d 325, 330–32 (Mo. App. W.D. 2004), the SVP argued that the probate court had abused its discretion when it prohibited evidence that the SVP would still be under supervised probation even if he were released following the SVP hearing. *Lewis*, 152 S.W.3d at 330. The SVP contended that the evidence was relevant because the safeguard of rigorous supervision during probation would make it less likely that he would engage in predatory acts of sexual violence if not confined in a secure facility. *Id.* at 330. The Missouri Court of Appeals rejected his argument, holding that the question was whether the SVP suffered from a mental abnormality that made him more likely than not to engage in predatory acts of sexual violence if not confined in a secure

facility. *Id.* at 332. The question was not whether some "external constraints" make it less likely that he would engage in such acts. *Id.* at 332.

In *In the Matter of the Care and Treatment of Cokes*, 183 S.W.3d 281, 285 (Mo. App. W.D. 2005), the SVP argued that the probate court erred when it excluded evidence about his proposed medication arrangements in the event he was released from secure confinement. The SVP also argued that his case was distinguishable from *Lewis* because he did not seek to present evidence about potential supervision if released, but instead that the evidence regarding his medication arrangements would have allowed the jury to consider whether he had a mental disorder that left him unable to pursue treatment voluntarily and therefore made him more likely to reoffend. *Id.* The Court of Appeals disagreed "that the evidence had any relevance in determining the existence of a mental disorder," as the excluded testimony of a prescribing psychiatrist and family member were "precisely the type of 'external constraints'" that *Lewis* had deemed irrelevant in an SVP proceeding. *Id.*

Here, Kirk attempts to distinguish *Lewis* and *Cokes* by arguing that in those cases the SVP was attempting to introduce external-constraints evidence as "independent, substantive evidence" but Kirk merely wanted to introduce testimony about external-constraints because the experts considered it (Kirk Br. 92). According to Kirk, he wanted to "explain and

demonstrate the basis of the experts' assessments, opinions, and the strengths and weaknesses of their evaluations" (Kirk Br. 93). Even if that is true, the evidence is still not relevant to any of the issues in the case.

Kirk's argument is not persuasive. In effect, Kirk is arguing that evidence that would be inadmissible on its own becomes admissible merely because an expert considers it. That is not the law. Under Kirk's rule, if an expert relied upon a polygraph examination, then the results of that examination could be discussed in court. That cannot be the rule. And, the Missouri Court of Appeals has held that admitting external-constraints evidence "might well confuse and mislead a jury," and that a jury might mistakenly base its determination on "an assessment of the likely effectiveness" of external constraints rather than relevant evidence pertaining to the offender's actual mental condition. *Lewis*, 152 S.W.3d at 332, *quoting People v. Krah*, 7 Cal.Rptr.3d 853, 860 (Cal. App. 2003). Kirk does not plausibly explain why *Cokes* and *Lewis* should be overturned.

Kirk also relies on this Court's opinion in *In re Brasch*, 332 S.W.3d 115 (Mo. 2011). Kirk argues that *Brasch* cited the absence of parole supervision, therefore testimony about parole supervision must be admissible (Kirk Br. 92). But *Brasch* does not say that external-constraints evidence is admissible. The portion of *Brasch* that Kirk relies on does not say if the evidence was admitted over the State's objection. If so, then the State would have had no

way to contest the evidence on appeal because the State prevailed at trial. Moreover, *Brasch* was decided in 2011, while *Cokes* and *Lewis* were decided in 2004 and 2005. If this Court had intended to overrule *Cokes* and *Lewis*, it would have said so. *See, e.g., State v. Honeycutt*, 421 S.W.3d 410, 422–23 (Mo. 2013) (holding that the Missouri Supreme Court disfavors *sub silence* rulings). Yet, *Brash* does not say that external constraints evidence is admissible. *Brasch* does not support Kirk's position.

At bottom, the evidence that Kirk wanted admitted, by his own admission, could not have been used to prove or disprove whether Kirk was an SVP. That makes the evidence irrelevant and the probate court properly excluded it.

**B. Even if the State "opened the door" to the evidence, the probate court properly excluded additional irrelevant evidence.**

Kirk also argues that because the State "opened the door" to external-constraints evidence, it was improper for the probate court to exclude Kirk's additional external-constraints evidence (Kirk Br. 94). In fact, Kirk argues that such evidence "cannot be excluded" when the State opens the door (Kirk Br. 94; 95). Kirk is mistaken because the rule of curative admission gives the probate court discretion about whether to admit or exclude the evidence.

Kirk relies on *Lewey v. Farmer*, 362 S.W.3d 429 (Mo. App. S.D. 2012), for his contention that external-constraints evidence "cannot be excluded." In

*Lewey*, the plaintiff "opened the door" to inadmissible evidence about plaintiff's lower-back pain. *Id.* at 434. The defendant then cross-examined about the lower-back pain. *Id.* Ultimately, the plaintiff prevailed on liability, but appealed the amount of damages as unfairly reduced by the testimony on the lower-back pain. *Id.* at 431. The Court of Appeals found that the trial court did not abuse its discretion when it allowed the defendant to adduce more evidence because the plaintiff was the first party to put in evidence on lower-back pain. *Id.* at 434.

The facts in this case are different. Here, Kirk alleges that the State "opened the door" to external-constraints evidence. Assuming, *arguendo*, that Kirk is right, that does *not* mean the probate court committed an error of law by refusing to allow *more* impermissible evidence to be admitted. In fact, when Kirk argued to the probate court that the State had "opened the door" to external-constraints evidence, the probate court disagreed, and reaffirmed that the evidence should be excluded (Tr. 390–91). Under Missouri law, the probate court has discretion about whether to allow curative admission. *See, e.g.* 22 Mo. Prac. Evid. §106.1 n.36 (4th ed.); *see also Daniel v. Indiana Mills & Mfg., Inc.,* 103 S.W.3d 302, 314 (Mo. App. S.D. 2003) (curative admission "is an issue within the sound discretion of the trial court"). Kirk has not demonstrated that the probate court abused its discretion by refusing his offer of proof.

## Conclusion

The probate court did not abuse its discretion in sustaining the state's motion *in limine* and in excluding evidence regarding Appellant's potential living arrangements if he were to be released, and the exclusion of the evidence, in the court's exercise of its discretion, did not violate Appellant's right to present a defense. The jury found Appellant to be an SVP and the probate court did not err in committing him to the custody of the Department of Mental Health for control, care, and treatment. This claim should be denied.

## ARGUMENT VII

**The probate court did not err in submitting Instruction 6 because whether Kirk was convicted of a sexually violent offense is a question of fact for the jury to decide.**

In his seventh point, Kirk argues that it was improper for the probate court to issue Instruction 6 because it instructed the jury on two questions of law (Kirk Br. 98–99). But that is not true. Whether Kirk had been convicted of sodomy in the Circuit Court of Henry County was a question of fact for the jury to decide. And, even if the second point in the verdict director was a pure question of law, Kirk was not prejudiced.

### Standard of Review

The probate court's ruling on an instruction will not be reversed unless the probate court abused its discretion. *In re Care and Treatment of Scates*, 134 S.W.3d 738, 741 (Mo. App. S.D. 2004). Further, "'the giving of an alleged erroneous instruction is not grounds for reversal unless the appealing party was prejudiced thereby.'" *Id*, *quoting Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 476 (Mo. App. S.D. 2001).

### Discussion

Kirk complains about two parts of Instruction 6: the first prong and the second prong (Kirk Br. 101–102). The first prong (was Kirk convicted of

sodomy) is a question of fact. The second prong (is sodomy a sexually violent offense) was not prejudicial.

Rule 70.02(b) provides that if a Missouri Approved Instruction ("MAI") is applicable to a particular case, its use is mandatory. *Hosto v. Union Elec. Co.*, 51 S.W.3d 133, 142 (Mo. App. E.D. 2001). However, there are no applicable MAI instructions in SVP cases. *Scates*, 134 S.W.3d at 742. When there are no applicable MAI instructions "so that an instruction not in MAI must be given," Rule 70.02(b) requires that "such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." Moreover, in adopting a non-MAI instruction, "the court must adopt an instruction that follows the substantive law and can be readily understood by the jury." *Id.* at 142, *citing Murphy v. City of Springfield*, 794 S.W.2d 275, 278 (Mo. App. S.D. 1990). "When reviewing instructions, jurors are presumed to have ordinary intelligence, common sense, and an average understanding of the English language." *In re Care & Treatment of Boone v. State*, 147 S.W.3d 801, 808 (Mo. App. E.D. 2004).

The SVP Act provides in Section 632.480.2(5) that a person is an SVP if he has pled guilty to or been convicted of a sexually violent offense; if he suffers from a mental abnormality; and if that mental abnormality makes the person more likely than not to engage in predatory acts of sexual violence if

not confined in a secure facility. The state had the burden to prove these elements by clear and convincing evidence.

There can be no dispute that, in using the precise language of Section 632.480.2(5), Instruction No. 6 "follow[ed] the substantive law," pursuant to both *Hosto* and *Murphy*.

In *Lewis*, the SVP challenged an instruction that contained the same language as the one in the present case as it included both the paragraphs that Kirk challenges. *Lewis*, 152 S.W.3d at 328–29. The Court found that it was a correct instruction. *Id.* at 329.

Kirk relies on *In re Care and Treatment of Gormon v. State*, 371 S.W.3d 100 (Mo. App. E.D. 2012), to support his claim that the first two paragraphs of the verdict director should have been omitted (Kirk Br. 101).

The first paragraph of the instruction in *Gorman* was the same as the first paragraph in the current case. The *Gorman* Court found that the instruction contained all the required elements and that the jury was properly instructed. *Id* at 106. Therefore, *Gorman* does not assist Kirk as to the inclusion of the first paragraph. Moreover, whether Kirk was convicted of sodomy is a question of fact, not a question of law. At trial, the State introduced a certified copy of the conviction in order to prove this fact (Tr. 254). But the jury was free to believe all, some, or none of the State's

evidence, including the validity of the certified conviction. *See State v. Jackson*, 433 S.W.3d 390, 398–99 (Mo. 2014).

In *Gorman*, the SVP argued that the jury was improperly instructed because the instruction did not require the jury to find that Appellant's crime was a sexually violent offense. *Gorman*, 371 S.W.3d at 105. The *Gorman* Court found that whether the SVP's crime was a sexually violent offense was a matter of law for the court to decide. *Id.* at 106. It further found that the jury was properly instructed. *Id*. While *Gorman* found that omitting that second paragraph in the instruction was not an abuse of discretion, it did not hold that it must be excluded. *Id*.

In this case, Instruction No. 6 was not an MAI instruction as there was no MAI instruction available. However, the instruction mirrored the language in the statute and it followed the substantive law. The first and second prongs were proper. It was not an abuse of discretion to submit this instruction to the jury.

But, even if the second prong was improper, Kirk is not entitled to relief. The giving of an alleged erroneous instruction is not grounds for reversal unless the appealing party was prejudiced thereby. *Lewis,* 152 S.W.3d at 329. Kirk argues that he was prejudiced because the instruction "call[ed] for a legal conclusion" (Kirk Br. 102). Even if that is true, the second prong did not prejudice Kirk because it did not materially alter the outcome.

The testimony of the experts was that statutory sodomy was a sexually violent offense. Moreover, Instruction 6 told the jury that sodomy was a sexually violent offense. Kirk was not prejudiced by the instruction which correctly instructed the jury. There was no indication that the jury was misled or confused.

*Conclusion*

In sum, Instruction No. 6 was clear and it tracked the language in the statute. This claim should be denied.

## ARGUMENT VIII

**This Court should not review Kirk's constitutional challenge to Section 632.492 because it is not preserved, in that he raised it by oral motion long after he could have raised the claim.**

In his eighth point on appeal, Kirk complains that Section 632.492 is unconstitutional because the statute requires the probate court to give an instruction which reads "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" (Kirk Br. 104–05). This Court should deny the claim because Kirk failed to raise his constitutional challenge at the earliest opportunity. And, Kirk's claim does not merit plain error review because he has not demonstrated it has any merit.

### Standard of Review

"[T]he rule is clearly established that in order to preserve a constitutional issue for appellate review, it must be raised at the earliest time consistent with good pleading and orderly procedure and must be kept alive during the course of the proceedings." *Liberty*, 370 S.W.3d at 546, *quoting Wickizer*, 583 S.W.2d at 523. A constitutional challenge to a statute is waived when it is not made at the earliest possible opportunity. *Garris*, 389 S.W.3d

at 651, *quoting State ex rel. York v. Daugherty*, 969 S.W.2d 223, 225 (Mo. 1998).

**Relevant Facts**

Kirk did not challenge the constitutionality of Section 632.492 until the jury instruction conference on the second day of trial (Tr. vi; 525). At the instruction conference, Kirk noted that he had an objection to Instruction 7 (Tr. 525). Kirk then explained that "My objection is not to the instruction itself, Judge, but my objection is to Statute 632.492" (Tr. 525). Kirk then argued that Section 632.492 was unconstitutional because it violated due process and equal protection, in that a sexually violent predator case is the only case where this type of instruction is given and because there was no evidence admitted at trial about what control, care, and treatment meant (Tr. 526). In Kirk's opinion, the statute gave "a scapegoat for the jurors" (Tr. 526).

In his motion for new trial, Kirk renewed his objection to the statute "for the reasons stated in Respondent's oral objection," because "no evidence was presented at trial," and because "the jury is [sic] should not consider the consequence of their verdict" (L.F. 505).

**Discussion**

Kirk's constitutional challenge to Section 632.492 was not raised at the earliest opportunity and is not preserved for appellate review. Constitutional challenges "must be raised at the earliest time consistent with good pleading

and orderly procedure." *Liberty*, 370 S.W.3d at 546. Kirk had many opportunities to raise his challenge, but held it in reserve until the jury instruction conference. Moreover, Kirk did not file any written pleadings raising this claim. Instead, Kirk made an oral challenge to the statute (Tr. 526). By making an oral challenge, Kirk deprived the probate court and the State of the opportunity to conduct legal research and fully consider his claim. This Court has held that it is wrong to consider a claim that the probate court did not have an opportunity to rule on.

In *State v. Wickizer*, this Court explained that a constitutional challenge was not preserved when it was not raised at the earliest possible opportunity. 583 S.W.2d 519, 523 (Mo. 1979). In *Wickizer*, the Court found the claim was not preserved, in part because the appellant had filed "several motions" before trial but did not raise the constitutional challenge. *Id.* In this case, Kirk filed 16 more pre-trial motions than the appellant filed in *Wickizer* (L.F. i–v). Even then, Kirk did not raise his constitutional challenge before the trial. As such, Kirk did not raise his constitutional challenge at the earliest opportunity.

It is also true that this Court has found that a constitutional issue may be preserved when it is not raised at the earliest opportunity. *In re Schottel*, 159 S.W.3d at 841 n.3. Under the exception in *Schottel*, the constitutional claim must be 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 opposing party*." *Schottel*, 159 S.W.3d at 841 n.3 (emphasis supplied). But it cannot be said that Kirk's challenge to the constitutionally of Section 632.492 falls within this exception. Kirk raised the claim by oral motion at the instruction conference. Waiting until the instruction conference did not give the probate court enough time to consider Kirk's arguments. Waiting until the instruction conference gave no notice to the State that it should prepare to refute such a claim—especially in light of the extensive pre-trial motion practice in the case. Accordingly, this Court should decline to find this claim within the *Schottel* exception.

Additionally, Kirk has not demonstrated that there has been a due process or equal protection violation in this case. Kirk's rights to due process, a fair trial, and equal protection have not been violated. Moreover, even if Kirk had asked for plain error review, this Court would be unable to give him relief. At trial, Kirk's counsel said "My objection is not to the instruction itself, Judge, but my objection is to Statute 632.492" (Tr. 525). Even if Kirk had preserved his claim, this Court could not grant him relief because Kirk did not object to the instruction that was given. In other words, Kirk is asking for a purely advisory opinion.

## Conclusion

This Court requires a constitutional challenge to be raised at the earliest opportunity. Kirk could have raised his constitutional challenge to Section 632.492 before trial. But he did not. Kirk could have raised his challenge the morning of trial. But he did not. Instead, Kirk raised his challenge at the end of the second day of trial during the jury instruction conference. That was not the earliest opportunity, so Kirk's claim is not preserved for review.

## ARGUMENT IX

**The probate court did not abuse its discretion in overruling Kirk's objection to Dr. Kircher's testimony about the end-of-confinement report because the report was not barred under Section 632.483 and because Dr. Kircher's testimony was admissible under Section 490.065.**

In his ninth point, Kirk raises three complaints about Dr. Kircher's testimony. First, Kirk complains that Dr. Kircher's testimony was not admissible under Section 632.483, which prohibits evidence from "members" who make a "determination" (Kirk Br. 113–14). But Dr. Kircher was not a "member" under Section 632.483, so her testimony was admissible. Second, Kirk complains that Dr. Kircher's testimony admitted evidence of the screening process, and so it was inadmissible (Kirk Br. 114–15). But this claim was not preserved, and no Missouri appellate court has ever ruled that evidence of the screening process must be excluded. And third, Kirk complains that Dr. Kircher did not offer expert testimony under Section 490.065 because Dr. Kircher had "limited information" (Kirk Br. 115–17). But that complaint goes to the weight, not the admissibility, of Dr. Kircher's testimony.

## Standard of Review

A probate court's decision to allow evidence at trial is reviewed for abuse of discretion**.** *Elliott v. State*, 215 S.W.3d 88, 92 (Mo. 2007). Abuse of discretion is found only if the probate court's ruling was against the logic of the circumstances and was so arbitrary or unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* "Even when this threshold is met, we will not reverse unless the error had a material effect upon the merits of the action." *In re Care and Treatment of Wadleigh v. State*, 145 S.W.3d 434, 438 (Mo. App. W.D. 2004). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Spencer*, 123 S.W.3d 166, 168 (Mo. 2003).

## Discussion

### A. Section 632.483 only bars "determinations" made by "members," and Dr. Kircher is not a "member" under the statute.

Kirk argues that Dr. Kircher should not have been allowed to testify about the end-of-confinement report she generated because it was prohibited by Section 632.483.5 and *In the Matter of the Care and Treatment of Bradley*, 440 S.W.3d 546 (Mo. App. W.D. 2014) (Kirk Br. 113–14).

When a person who is confined may be an SVP, the agency with jurisdiction shall give written notice to the attorney general and the

multidisciplinary team. Section 632.483.1. The agency with jurisdiction shall provide to the attorney general and the multidisciplinary team the person's name; identifying factors; anticipated future residence; offense history; institutional adjustment documents' treatment history; and a determination by a psychiatrist or psychologist as to whether the person meets the definition of a sexually violent predator. Section 632.483.2.

The multidisciplinary team is established by the director of the department of mental health and the director of the department of corrections. Section 632.483.4. The multidisciplinary team consists of no more than seven members and there must be at least one member from the department of mental health and one member from the department of corrections. Section 632.483.4. The multidisciplinary team assesses the available record and assesses whether the person meets the definition of an SVP. Section 632.483.4.

The prosecutors' review committee is established by the prosecutors coordinators training council. Section 632.483.5. It consists of five members. Section 632.483.5. This committee reviews the records and determines whether or not the person meets the definition of an SVP. Section 632.483.5.

When it appears that the person may be an SVP and the prosecutors' review committee determines that the person meets the definition of an SVP,

the attorney general may file a petition alleging that the person is an SVP Section 632.486.1.

Section 632.483.5, RSMo, provides, "The determination of the prosecutors' review committee or any member pursuant to this section or section 632.484 shall not be admissible evidence in any proceeding to prove whether or not the person is a sexually violent predator." Two elements are required to exclude evidence under Section 632.483.5. First, it must be a determination and second it must be made by a "member."

The end-of-confinement report that was generated by Dr. Kircher was a "determination" under section 632.483.2, RSMo, but Dr. Kircher was not a "member" for purposes of the statute. *Bradley* examined the question of who is a "member" for purposes of section 632.483.5 and found that the term "member" included the persons on the prosecutor's review committee and persons on the multidisciplinary team, not the person conducting the end-of-confinement report. "[S]ection 632.483 uses the term 'members' to refer to the individuals comprising both the prosecutor's review committee and the multidisciplinary team" *Bradley*, 440 S.W.3d at 557. The Court further found that "the only 'members' referred to in Section 632.484 are those forming the prosecutors' review committee." *Id.* at 558.

Kirk argues that the *Bradley* Court "noted that the individual issuing the end-of confinement report is one of the 'members' in Section 632.483"

(Kirk Br. 114). Kirk has misunderstood the Court of Appeals' findings. The *Bradley* court found as follows:

> There are several individuals and entities in section 632.483 and .484 that make "determinations" (e.g., the *individual* issuing the end-of-confinement report, the prosecutors' review committee, the probate court, and the department of mental health).

*Bradley*, 440 S.W.3d at 557–58. (emphasis supplied).

The *Bradley* court did not find that the person issuing the end-of-confinement report was one of the "members" but rather referred to that person as an individual.

In short, the probate court did not abuse its discretion in permitting Dr. Kircher's testimony about the end-of-confinement report. The end-of-confinement report was a determination. Under 632.483, 632.484, and *Bradley*, Dr. Kircher was an individual, not a member, and therefore her testimony and report were admissible. The end-of-confinement report is not excluded by statute or by case law. This claim should be denied.

**B. The probate court did not err when it allowed Dr. Kircher to testify, even though Dr. Kircher was part of a pre-trial screening process.**

Next, Kirk argues that the probate court committed error when it allowed Dr. Kircher to testify because the end-of-confinement report was part of the screening process (Kirk Br. 114–15).

Kirk argues that both the Iowa Supreme Court and the Kansas Supreme Court would grant relief because it is an error to allow the jury to hear evidence about the pre-trial screening procedures (Kirk Br. 114–15). But the facts of Kirk's case are dramatically different from the facts of the Iowa or Kansas cases.

In *In re Detention of Stenzel*, 827 N.W.2d 690 (Iowa 2013), the expert witness "was asked to explain the process of civil commitment in Iowa." *Stenzel*, 827 N.W.2d at 704. The expert witness then provided many details about the screening process, including the fact that he "relied on [the] winnowing process in part to support his opinion." *Id.* In *In re Care and Treatment of Foster*, 127 P.3d 277 (Kan. 2006), the Kansas Supreme Court explained that the Kansas assistant attorney general had committed misconduct by telling the jury—in opening statement—that decisions are made by a multidisciplinary team, a prosecutor's review committee, the

Kansas Attorney General's office, and then a probable cause hearing presided over by a judge. *Foster*, 127 P.3d at 852.

But Kirk's brief does not point to any fact in the record that demonstrates that the jury heard evidence of the screening process. In fact, there was no such evidence adduced during Dr. Kircher's testimony. It is true that Dr. Kircher testified that she performed evaluations on offenders who were "approaching the end of their incarceration" (Tr. 238). But that testimony is nothing like the detailed process testimony at issue in *Stenzel*. Likewise, the Attorney General did not argue in opening statement that there was a pre-trial screening procedure. In fact, before trial, the Attorney General specifically told the probate court that he had "no desire or interest" to talk about the screening process (Tr. 205).

Moreover, Kirk did not raise this objection during Dr. Kircher's testimony. In fact, Kirk never objected on the basis that Dr. Kircher was testifying about pre-trial screening procedures. Therefore, the issue is not preserved for appeal. *See, e.g., Derossett v. Alton & Southern Ry.,* 850 S.W.2d 109, 111 (Mo. App. E.D. 1993).

What Kirk really seems to be complaining about is that, in his opinion, his cross-examination of Dr. Kircher was "limited" and that "cross-examination cannot distinguish between the [end of confinement report] and later comprehensive evaluations" (Kirk Br. 115). Not so. At trial, Kirk was

able to get Dr. Kircher to admit that she reviewed his file two-and-a-half years ago (Tr. 301). Kirk would have been able to highlight that Dr. Kircher's review was based on limited records, if Kirk had asked the question. Instead, Kirk used his cross-examination to, among other things, highlight the extensive work he did in the Missouri Sex Offender Program, and the benefits he supposedly gained (Tr. 301–09). A review of Kirk's cross-examination shows that it was not improperly restrained in any way.

Kirk's claim that Dr. Kircher's testimony should be barred because it concerned a pre-trial screening process is not meritorious. No Missouri case support's Kirk's argument. The Iowa case cited by Kirk is not on point because in that case there was detailed testimony about the screening process. No such testimony was given in this case.

**C. The probate court did not err when it allowed Dr. Kircher to testify because Dr. Kircher was an expert witness.**

In his third complaint about Dr. Kircher, Kirk asserts that Dr. Kircher's testimony was not supported by sufficient facts and data (Kirk Br. 116). All of Kirk's complaints go to the weight, not the admissibility, of Dr. Kircher's testimony.

Missouri's SVP statute is civil in nature. *See Hendricks,* 521 U.S. at 367–68. Admission of expert testimony in civil cases is governed by Section 490.065. *State Board of Registration for the Healing Arts v. Edward W.*

*McDonagh*, 123 S.W.3d 146, 153 (Mo. 2003). The statute provides, in relevant part:

> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Section 490.065.3.

Generally speaking, for an expert's opinion to be admissible, it must be supported by the record. *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. 2004); *Care and Treatment of Morgan v. State*, 176 S.W.3d 200, 211 (Mo. App. W.D. 2005). It is only proper for a probate court to exclude an expert's opinion if the "sources relied on by the expert are 'so slight as to be fundamentally unsupported'...." *In re Matter of Sohn*, 473 S.W.3d 225, 230 (Mo. App. E.D. 2015), *quoting Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo. App. E.D. 2006).

Kirk complains that Dr. Kircher's evaluation was two years old at the time of trial (Kirk Br. 115). But that goes to the weight, not the admissibility of the testimony. *In re Matter of Sohn*, 473 S.W.3d at 230. Kirk also complains that Dr. Kircher was asked to answer a different question, based on a transcript of a witness that was filed as an attachment (Kirk Br. 115). But that witness cannot establish whether Dr. Kircher's opinion is admissible

under Section 495.065.[4] Kirk further argues that Dr. Kircher did not have all the records that later evaluators did (Kirk Br. 116). And that is true. But the fact that other experts had additional information *does not* mean that Dr. Kircher's opinion was based on "insufficient" facts or data.

Dr. Kircher testified that she reviewed Kirk's Missouri Sex Offender Program records, his probation and parole records, and his medical and mental health records from the Department of Corrections (Tr. 246). Dr. Kircher also testified that those records are the type of records that are reasonably relied upon by professions in her field, and that she found them reasonably reliable (Tr. 247). Dr. Kircher testified that she usually receives between 300 and 2,000 pages of material (Id). Dr. Kircher's opinion in this case was *not* based on sources of information that were so slight as to be fundamentally unsupported. Accordingly, her testimony was proper.

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[4] Elsewhere in his brief, Kirk argues that exhibits attached to motions are not automatically admitted into evidence (Kirk Br. 71, *citing Ryan v. Raytown Dodge Co.,* 296 S.W.3d 471 (Mo. App. W.D. 2009)). The State assumes, without conceding, that Dr. Scott's deposition is part of the record before this Court.

## Conclusion

Kirk is not entitled to relief on this point. Kirk's argument that Dr. Kircher's testimony is barred by Section 632.483 fails because the statute bars "determinations" made by "members," and Dr. Kircher is not a "member." Kirk's argument that Dr. Kircher's testimony should have been excluded because it included information about a pre-trial screening procedure also fails because Dr. Kircher did not testify about a pre-trial screening procedure. Finally, Kirk's argument that Dr. Kircher's testimony should have been excluded under Section 490.065 fails because Dr. Kircher's testimony was supported by sources of information that are reasonably relied upon by members of her profession.

## ARGUMENT X

**The probate court did not commit error when it overruled Kirk's objection to Dr. Mandracchia's testimony that Kirk had a score of nine on the Static-2002R.**

In his tenth argument, Kirk assigns several points of error to the probate court for allowing Dr. Mandracchia to testify that Kirk had a Static-2002R score of nine (Kirk Br. 118). First, Kirk argues that Dr. Mandracchia's score should have been excluded under Section 490.065 (Kirk Br. 121). Second, Kirk argues that that he was prejudiced by the probate court's admission of the testimony because Dr. Mandracchia's score increased and because Kirk did not have sufficient notice before trial (Kirk Br. 127–29).

### Standard of Review

The probate court has broad discretion to admit or exclude evidence. *Murrell*, 215 S.W.3d 109. A probate court has not abused its discretion to admit evidence "unless the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* Since review is for prejudice, not mere error, the probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110. In other words, reversal is only merited if the error was so severe

that it deprived the appellant of a fair trial. *In re Matter of Sohn*, 473 S.W.3d at 229.

## Discussion

Kirk's allegations of error fall within three general categories. First, Kirk complains that Dr. Mandracchia should not have been allowed to testify that Kirk had a score of nine on the Static-2002R because that opinion is not—according to Kirk—supported by the record (Kirk Br. 122–26). Kirk is mistaken because Dr. Mandracchia adequately explained what records he relied on for a score of nine, and how he reached that conclusion. Second, Kirk complains that he was prejudiced by the admission of that testimony because a score of nine is correlated to a higher risk (Kirk Br. 126–27). But Kirk has not established that the probate court abused its discretion in admitting the evidence. And third, Kirk complains that the trial court should have excluded the testimony because of a late disclosure (Kirk Br. 127–129). But again, Kirk has not shown that the trial court abused its discretion when it gave Kirk additional time with Dr. Mandracchia instead of excluding the evidence.

### A. Dr. Mandracchia's testimony complied with Section 490.065.

Section 490.065 governs the admissibility of expert opinions in a sexually violent predator case. *Sohn*, 473 S.W.3d at 229, *citing Murrell*, 215

S.W.3d at 110. Kirk has not disputed that Dr. Mandracchia was a qualified expert witness. Instead, Kirk has alleged that Dr. Mandracchia's score of nine was based on records that were not reasonably relied on in the field, and that the facts and data were not otherwise reasonably reliable (Kirk Br. 126).

In *Sohn*, the Missouri Court of Appeals was confronted with a similar challenge. There, the putative SVP was deaf. *Sohn*, 473 S.W.3d at 226. He argued that his interview—assisted by sign language interpreters—was not a source of information that was reasonably relied upon in the field of SVP evaluations. *Id*. at 230. The putative SVP also argued that his interview was not otherwise reasonably reliable. *Id*. The Court of Appeals rejected his arguments. The Court of Appeals held that the probate court did not abuse its discretion in deferring to the expert on the question of whether the source of information was reasonably relied upon in the field. *Id*. at 230. And, the Court of Appeals held that the probate court did not abuse its discretion when it found the interview was otherwise reasonably reliable. *Id*. at 231.

The same result is warranted in this case. Kirk complains that the Department of Corrections' documents that recount a juvenile conviction for a 1978 sex offense are not the sort of documents that are reasonably relied on in Dr. Mandracchia's field (Kirk Br. 123–125). Kirk reaches this conclusion by arguing the Static-2002R coding rules to this Court (Id). The documents at issue are records from the Missouri Department of Corrections or probation

and parole (Tr. 349). Dr. Mandracchia testified that the documents he relied on to reach a score of nine are the type of documents that are reasonably relied on in his field (Tr. 349). Dr. Mandracchia also testified that he personally found the documents to be reasonably reliable (Tr. 349). Moreover, even though Kirk disagrees, Dr. Mandracchia testified that using the documents was allowed under the coding rules for the Static-2002R (Tr. 350).

All of the arguments that Kirk makes to this Court about why the documents are outside the Static-2002R coding rules were made to the probate court during Kirk's cross-examination (Tr. 352–354, 358). But, at the end of the offer of proof, Dr. Mandracchia testified that the records are something "that I believe I can and should rely on" (Tr. 360).

The probate court then reversed its prior ruling, and held that Dr. Mandracchia could testify that Kirk received a score of nine on the Static-2002R (Tr. 366). Kirk has not shown the ruling was so erroneous that it was "against the logic of the circumstances and so arbitrary or unreasonable as to shock the sense of justice...." *Sohn*, 473 S.W.3d at 229. The probate court reached its decision after careful consideration (Tr. 366).

This Court should also reject Kirk's argument that the documents were not otherwise reasonably reliable. In *Sohn*, the Missouri Court of Appeals rejected the putative SVP's challenge to the MoSOP documents as not otherwise reasonably reliable because the expert witness explained what the

MoSOP documents were, and what sources of information they contained. *Sohn*, 473 S.W.3d at 231–32. In this case, Dr. Mandracchia testified that the sources of information were otherwise reasonably reliable because they came from the Missouri Department of Corrections (Tr. 349). Dr. Kircher also testified that Missouri Department of Correction records are otherwise reasonably reliable (Tr. 246–47). The probate court held that "Dr. Mandracchia is entitled to rely on corrections documents from the Missouri Department of Corrections" (Tr. 366). Kirk has not shown the ruling was so erroneous that it was "against the logic of the circumstances and so arbitrary or unreasonable as to shock the sense of justice...." *Sohn*, 473 S.W.3d at 229. The probate court reached its decision after careful consideration (Tr. 366).

Kirk also argues that the documents that Dr. Mandracchia relied on are "so slight as to be fundamentally unsupported" (Kirk Br. 126). The probate court disagreed. At the conclusion of the offer of proof, the probate court specifically said that Kirk could challenge the weight that Dr. Mandracchia gave the report (Tr. 366). As such, the probate court did not find "sources relied on by the expert are 'so slight as to be fundamentally unsupported'...." *Sohn*, 473 S.W.3d at 230, *quoting McFarlane*, 207 S.W.3d at 62. Kirk has also failed to show that ruling was an abuse of discretion.

**B. Kirk cannot establish prejudice.**

Kirk also argues that he was prejudiced by Dr. Mandracchia's testimony that he scored a nine on the Static-2002R because that represented a 10% increase in risk (Kirk Br. 127). In order to show the necessary prejudice, Kirk would have to demonstrate that allowing Dr. Mandracchia to testify that Kirk had a score of nine was so egregious that it deprived Kirk of a fair trial. *Sohn*, 473 S.W.3d at 229. Kirk's argument is not persuasive.

Dr. Mandracchia testified that his opinion on risk would be the same regardless of whether Kirk received a score of eight or a score of nine (Tr. 405). And, Dr. Fabian—Kirk's own expert—testified that Kirk admitted to the 1978 sex offense against his cousin Butch (Tr. 568). Under that set of facts, Kirk cannot demonstrate that he was denied a fair trial when the probate court allowed Dr. Mandracchia to testify that Kirk had a score of nine on the Static-2002R.

**C. The trial court did not abuse its discretion when it denied Kirk's request to exclude the evidence.**

In his final argument on this point, Kirk contends that he was prejudiced when he discovered that Dr. Mandracchia scored Kirk a nine instead of an eight on the morning of Dr. Mandracchia's testimony (Br. 127–29). Kirk implies that the probate court was required to exclude the evidence based on the time of disclosure. Kirk is mistaken.

Kirk relies on *Pasalich v. Swanson*, 89 S.W.3d 555 (Mo. App. W.D. 2002) for his contention that the probate court should have excluded the evidence (Kirk Br. 128). In *Pasalich*, the Missouri Court of Appeals observed that the probate court is "vested with broad discretion as to its choice of action...." *Pasalich*, 89 S.W.3d at 562. Under the facts of that case, the trial court granted a new trial as a discovery sanction, and the Missouri Court of Appeals refused to find that the trial court abused its discretion. *Id*. at 564. But Kirk has not shown that the probate court abused its discretion when it ultimately declined to exclude the evidence.

When the trial court asked Dr. Mandracchia when he realized that the score should have been a nine and not an eight, Dr. Mandracchia explained that although he had the records in advance, it was an "oversight" on his part (Tr. 350–51). Kirk's counsel brought the issue up on the record before the jury was brought in (Tr. 322). Kirk's counsel admitted that the State informed her of the change before trial, and that the State provided her with copies of the documents Dr. Mandracchia was relying on (Tr. 323–24). Under these facts, Kirk has not demonstrated that the probate court's decision to admit the evidence was an abuse of discretion.

**Conclusion**

Kirk is not entitled to relief on this point. He has failed to show that the probate court abused its discretion when it admitted the evidence.

## ARGUMENT XI

**The probate court did not commit error when it excluded testimony about the penile plethysmograph because the probate court correctly determined that the penile plethysmograph was not admissible at the pretrial hearing, in that the penile plethysmograph is not "otherwise reasonably reliable."**

### Standard of Review

The probate court has broad discretion to admit or exclude evidence. *Murrell*, 215 S.W.3d at 109. A probate court has not abused its discretion to admit evidence "unless the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id*. This Court's direct review of the probate court's decision on admissibility under Section 490.065 is reviewed for an abuse of discretion. *Murrell*, 215 S.W.3d at 109–110; *accord Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 n.2 (Mo. 2014).

### Relevant Facts

Before trial, Kirk disclosed to the State that his expert, Dr. Fabian, had conducted a penile plethysmograph and Kirk was going to seek to admit the penile plethysmograph into evidence at trial. The State filed a motion *in limine* to exclude the penile plethysmograph (L.F. 364). Kirk filed suggestions

in opposition. The probate court decided to hold a hearing on the penile plethysmograph (L.F. 18). The hearing was held at Kirk's request (Tr. 71). Kirk called Dr. John Fabian (Tr. 71–121). The State called Dr. Robert Stein (Tr. 121–152) and Dr. Harry Hoberman (Tr. 152–192).

**Dr. Fabian**

Dr. Fabian testified that that the penile plethysmograph that he used operates by attaching "basically [a] rubber band" to the shaft of an individual's penis (Tr. 74–5). Other sensors are attached to the individual to measure chest breathing and skin response (Tr. 75). The individual is then shown "stimuli" (Tr. 75). Pornography is not shown in the United States (Tr. 75). Measurements are taken to ascertain "penile tumescence" or the degree to which the individual has an erection (Tr. 75). Dr. Fabian admitted the penile plethysmograph suffered from "a number of problems" including standardization, the accuracy of the test, and test-retest reliability, among others (Tr. 78–79). Dr. Fabian testified that the penile plethysmograph has been tested in the field (Tr. 84). The penile plethysmograph, according to Dr. Fabian, is used in the assessment and treatment of sex offenders (Tr. 85).

Dr. Fabian also testified that he tried to follow the standardization procedure when he administered the penile plethysmograph (Tr. 80). Dr. Fabian further testified that he found the penile plethysmograph to be a relevant test in the field (Tr. 84). Dr. Fabian also testified that the penile

plethysmograph is reasonably reliable, and that it is reasonably relied upon in the field (Tr. 85).

On cross-examination, Dr. Fabian admitted that this was his first and only penile plethysmograph evaluation (Tr. 89). Dr. Fabian also agreed that he attempted to perform a penile plethysmograph examination in New York, but was not able to (Tr. 89). Dr. Fabian also testified that he administered the penile plethysmograph in a conference room in the public defender's office, not a laboratory (Tr. 98). If an individual masturbated before the penile plethysmograph, then Dr. Fabian agreed that the test would have little value (Tr. 101). If an individual did not want to cooperate with the penile plethysmograph, then Dr. Fabian agreed the test would have little value (Tr. 101). Dr. Fabian also agreed it was possible for an individual to ignore the stimuli while taking the test (Tr. 103). Dr. Fabian also admitted that when he administered the penile plethysmograph to Kirk, Kirk had a significant response to a neutral stimuli (Tr. 104). Dr. Fabian did not include that result in his report (Tr. 104). Dr. Fabian also admitted that he did not know if penile plethysmograph had been cross-validated (Tr. 106).

**Dr. Robert Stein**

The State called Dr. Stein as its first witness (Tr. 121). Dr. Stein has a doctorate in neurological and cognitive psychology (Tr. 123). Dr. Stein has administered over 4,000 penile plethysmograph examinations in his career

(Tr. 124). Dr. Stein explained that in his experience, the penile plethysmograph was a good tool in the treatment setting (Tr. 125). According to Dr. Stein, "any other use is questionable and is—would not be considered valid" (Tr. 125).

Dr. Stein explained that in some studies, 80% of individuals could suppress arousal "easily" (Tr. 125). Because the penile plethysmograph no longer involves pornography, an individual would have to be "extra cooperative in order to participate in the test" (Tr. 126). Those factors make the penile plethysmograph "invalid for forensic purposes" according to Dr. Stein (Tr. 126). Dr. Stein explained that there are many ways for someone to "fake the results" of a penile plethysmograph (Tr. 127).

Dr. Stein also explained that, to his knowledge, the Monarch brand penile plethysmograph has not been standardized or cross-validated (Tr. 130). On cross-examination, Dr. Stein testified that in his opinion, the majority of professionals in his field would agree that the penile plethysmograph is best used in treatment (Tr. 140–41). Dr. Stein also explained that the general finding in the literature is that the penile plethysmograph should not be used for diagnostic purposes (Tr. 141).

**Dr. Harry Hoberman**

The State also called Dr. Hoberman (Tr. 152). Dr. Hoberman has a doctorate in clinical psychology (Tr. 152). Dr. Hoberman is a forensic examiner and has done SVP evaluations since 1992 (Tr. 152–53).

Dr. Hoberman testified that the penile plethysmograph is not a scientifically reliable and valid test (Tr. 154). Dr. Hoberman explained that the penile plethysmograph was developed to test men who were believed to lying about being homosexual in order to avoid serving in the Czechoslovakian Armed Services (Tr. 154–55).

Dr. Hoberman testified that no research has confirmed that the penile plethysmograph has ecological validity (Tr. 157). Dr. Hoberman also testified that there is not a consensus in the field about what degree of arousal is significant (Tr. 159). Dr. Hoberman also explained that the literature reported that the majority of sex offenders "showed very little or no response to the" penile plethysmograph (Tr. 160). Dr. Hoberman testified that because there was so little standardization in the penile plethysmograph, there is not one accepted way to administer the test (Tr. 163).

Dr. Hoberman also testified that he was familiar with the Monarch brand penile plethysmograph system (Tr. 164). The company that owns the system refuses to release its internal testing data (Tr. 164). Dr. Hoberman

testified that the penile plethysmograph could not be used to rule out the presence of pedophilic disorder (Tr. 169).

**Discussion**

Kirk's complaint in his eleventh point on appeal is that he was not permitted to adduce any evidence about the penile plethysmograph because the probate court "incorrectly found the [penile plethysmograph] was not reasonably reliable" (Kirk Br. 132). Kirk's point must be rejected because the probate court did not abuse its discretion in refusing the evidence. The penile plethysmograph is not reasonably reliable, and it should not be admitted in Missouri courts.

The controlling case is *Murrell v. State*, 215 S.W.3d 96 (Mo. 2007). In *Murrell*, the putative SVP argued that the probate court abused its discretion when it allowed the State's expert (Dr. Hoberman) to testify about the MnSOST-R and the Static-99R, because they were not "otherwise reasonably reliable." *Murrell*, 215 S.W.3d at 109. In *Murrell*, the State adduced testimony from its expert, Dr. Hoberman. Dr. Hoberman testified that that the MnSOST-R was otherwise reasonably reliable, and that it had been validated and widely accepted. *Id.* at 112. Dr. Hoberman testified that the Static-99R had been cross-validated at least 22 times. *Id.* Dr. Hoberman also testified that the MnSOST-R had been subjected to cross-validation. *Id.* Dr. Hoberman further testified that authoritative texts advocated the use of

actuarials. *Id*. at 111. With that evidence, this Court found that the probate court had not abused its discretion when it found the actuarials were otherwise reasonably reliable under Section 490.065.3. *Id*. at 113.

Kirk failed to present this type of evidence to the probate court, and the State presented ample evidence that demonstrates the penile plethysmograph is not otherwise reasonably reliable. Kirk's own expert admitted that he did not know if the penile plethysmograph had been cross-validated (Tr. 106). Dr. Stein testified that he was not aware of any research that the penile plethysmograph has been cross-validated (Tr. 130). Dr. Hoberman, who also testified in *Murrell*, testified that the penile plethysmograph has not been cross-validated because the company that owns the Monarch brand penile plethysmograph has not released the necessary data (Tr. 165–66).

The State's experts testified that the penile plethysmograph has not been standardized (Tr. 130, 163).

And, Dr. Stein testified that the consensus in the literature is that the penile plethysmograph should not be used for diagnostic purposes. (Tr. 141). Dr. Hoberman went further: he testified that the penile plethysmograph was not a scientifically reliable and valid test (Tr. 154).

Further, Dr. Stein and Dr. Hoberman testified that at least one authoritative article instructed that the penile plethysmograph should not be

used for diagnostic purposes. Both Dr. Stein and Dr. Hoberman found Dr. Roy O'Shaughnessy's article "Commentary: Phallometry in Court—Problems Outweigh Benefits" to be instructive (Tr. 135, 150, 170); *see also* Roy O'Shaughnessy, *Commentary: Phallometry in Court—Problems Outweigh Benefits*, 45 J. Am. Acad. Psychiatry Law 154 (2015). Dr. Hoberman explained that the article indicated that the penile plethysmograph should not be used in court proceedings because the penile plethysmograph's stimuli are not standardized, because the penile plethysmograph's assessment is not standardized, because there is not an agreement on scoring, and because more research is needed on the penile plethysmograph's sensitivity and specificity (Tr. 171). Dr. Fabian was not aware of the article (Tr. 104–05).

In the face of that evidence, the probate court ruled that the penile plethysmograph was not otherwise reasonably reliable, and excluded Dr. Fabian's testimony on that issue (2nd Supp. L.F. 5). The probate court did not abuse its discretion.

In an attempt to persuade this Court to reverse the probate court, Kirk cites to articles that he admits were not provided at the hearing (Kirk Br. 133–34). This Court should not reverse the probate court for not considering articles that Kirk failed to present at the hearing.

Kirk also attempts to persuade this Court by pointing out that some other jurisdictions have admitted the penile plethysmograph (Kirk Br. 135).

That argument is misplaced for two reasons. First, in *Murrell*, this Court looked to other jurisdictions to see if the actuarials were "reasonably relied upon by experts in the field," not if the actuarials were "otherwise reasonably reliable." *Murrell*, 215 S.W.3d at 111. Second, even if this Court were inclined to look at other jurisdictions for guidance, many courts have rejected the penile plethysmograph.

The Texas Court of Appeals has excluded the penile plethysmograph because there is a lack of "uniform administration and scoring guidelines" and because the penile plethysmograph is "susceptible to user manipulation." *Mitchell v. Texas*, 420 S.W.3d 448, 452–53 (Tex. Ct. App. 2014). The State's expert testimony showed the same thing. Moreover, the penile plethysmograph is not admissible in Georgia, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Fourth Circuit, and Virginia. *Gentry v. Georgia*, 443 S.E.2d 667, 669 (Ga. App. 1994); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000); *United States v. Powers*, 59 F.3d 1460, 1472–73 (4th Cir. 1995); *Billips v. Virginia*, 652 S.E.2d 99 (Va. 2007). And, recently the United States District Court for the District of Colorado has ordered that the penile plethysmograph no longer be included as a condition of probation. *United States v. Cheever*, 2016 WL 3919792 (D. Colo. Jul. 18, 2016), *appeal docketed United States v. Cheever* (10th Cir. Jul. 25, 2016). The district court explained

that the penile plethysmograph should not be admitted because of problems with a lack of standardization and instances of test failure. *Cheever*, 2016 WL 3919792, slip op. at *14–15.

## Conclusion

The probate court did not abuse its discretion on the evidence before it. Kirk failed to demonstrate that the penile plethysmograph has been cross-validated. Kirk failed to demonstrate that the penile plethysmograph was "otherwise reasonably reliable." The State took the additional step of affirmatively proving that the penile plethysmograph is *not* "otherwise reasonably reliable." The probate court did not abuse its discretion, and this Court should refuse to grant relief.

## CONCLUSION

The probate court did not err. The jury's determination that Appellant was a sexually violent predator and the probate court's order committing him to the custody of the Department of Mental Health should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 21,481 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on October 18, 2016, to:

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