IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED83299

IN THE MATTER OF THE CARE AND TREATMENT OF ALBERT BERNAT,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Albert Bernat appeals from a judgment of the St. Charles County Circuit Court, which entered a jury verdict, finding that Appellant is a sexually violent predator pursuant to §§ 632.480 to 632.513, RSMo (2000). Appellant challenges the Sexually Violent Predator law as violating equal protection and due process under the Missouri and United States Constitutions. While jurisdiction would normally rest in the Missouri Supreme Court under Article V, § 3 of the Missouri Constitution, this Court has jurisdiction because Appellant's claims are not real and substantial. *Wright v. Dept. of Social Services*, 25 S.W.3d 525, 528 (Mo. App. W.D. 2000); § 477.050 RSMo (2000).

STATEMENT OF FACTS

Appellant argues that the sexually violent predator law as implemented violates his rights to equal protection and due process. As the facts are largely ancillary to this appeal, it is curious that Appellant's Statement of Facts includes many facts not relevant to his argument. Respondent sets forth the following facts relevant to this appeal.

Appellant's sad history of sexual perversion (at least that which is documented) begins in the early 1960's, when he forced his wife to have sex with him. (2003 Tr. 258). His transgressions would become more gruesome in the future, including forcing his 13-year old niece on top of him and simulating sex (2003 Tr. 203-04); reaching inside his 11-year old daughter's panties and touching her vagina (2003 Tr. 268); and forcing his daughter's 13-year old friend to simulate intercourse with him while his daughter screamed and prepared to hit her father with a frying pan if necessary (2003 Tr. 268-69).

Then, on a cold December day in 1985, Appellant lured an 18-year old woman into his vehicle, handcuffed her at gunpoint, and forced her to the floor of the vehicle. (2001 Tr. 6-11). He took the woman to his trailer and forced her to engage in intercourse. (13-14). Appellant pled guilty to forcible rape on August 8, 1986. (2001 Tr. 14-15, L.F. 10).

In late 1992, Appellant was paroled and began receiving counseling. (2003 Tr. 380). During this period, Appellant frequented bars, on one occasion tested positive for alcohol, and periodically paid prostitutes for sex. (2003 Tr. 384-87).

Under circumstances eerily similar to previous events, on a cold night in December of 1995, Appellant offered a ride home from work to a waitress at a local bar he patronized.

(2001 Tr. 19). Rather than taking the woman home, Appellant took her to his trailer. (2001 Tr. 21). At this point the woman alleges that Appellant produced a gun and forced her to have sexual intercourse. (Tr. 21-22). Appellant claimed that the woman was a prostitute and that he paid for sex with her. (2001 Tr. 202-03). Appellant was acquitted of the rape charge, but his parole was revoked. (2003 Tr. 333).

Prior to his scheduled release date, the Missouri Attorney General filed a motion on December 11, 2000, to commit Appellant in the custody of the Department of Mental Health as a sexually violent predator. (L.F. 9-12).

At the jury trial in October 30-November 1 2001, Linda Kelly, a certified clinical social worker with a master's degree in social work, who prepared Appellant's end of confinement report, testified "to a reasonable degree of scientific certainty" that Appellant suffered from the mental abnormality of paraphilia not otherwise specified (NOS). (2001 Tr. 195-200). On November 1, 2001, the court declared a mistrial when the jury was unable to reach a unanimous verdict. (L.F. 5).

At his second trial on June 24, 2003, Appellant objected when the State attempted to read the previous testimony into the record. (2003 Tr. 210-14). The court overruled the objection and the testimony was read to the jury. (2003 Tr. 217-218).

Appellant also filed a motion to preclude the State from calling Appellant at trial or from making reference to his failure to testify. (L.F. 78-83). The court overruled the motion. (L.F. 4.) Appellant did not testify. In its closing argument, the State commented that the jury had not had the opportunity "to judge Appellant's credibility" because he had

not testified. (2003 Tr. 611, 616).

Following trial, the jury unanimously found beyond a reasonable doubt that Appellant is a sexually violent predator. (L.F. 137). The court ordered Appellant into the custody of the Department of Mental Health. (L.F. 137). Appellant's timely appeal followed.

ARGUMENT

Appellant argues 1) that the trial court violated his right to equal protection by not granting him an unequivocal right to remain silent at trial, and 2) that the trial court violated his right to due process in allowing the testimony of a licensed social worker at trial. Both contentions are incorrect.

I – Equal Protection does not grant alleged sexually violent predators an unequivocal right to remain silent in civil commitment hearings.

(Responds to Appellant's Point I)

Though there is a statutory right "to remain silent" in other involuntary civil commitment proceedings, (§ 632.355.2(4) RSMo (2000)), equal protection does not require its extension to sexual predator proceedings. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that similarly situated persons be treated in a similar manner. *See State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 841 (Mo. App. W.D. 2000). Because civil commitment of sexually violent predators "impinges on the fundamental right of liberty," the legislative classification must be narrowly drawn and justified by a compelling state interest if similarly situated individuals are treated differently. *In re Norton*, 123 S.W.3d 170, 173 (Mo banc 2004). Sexually violent predators are not similarly situated to other civilly committed persons, and the sexually violent predator statutes are narrowly drawn to serve a compelling state interest.

A. Sexually violent predators are not similarly situated to others civilly committed.

In Missouri, only those persons who "suffer[] 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" qualify for commitment as a sexually violent predator. § 632.480(5), RSMo (Cum. Supp. 2003). And sexual predators are not unusually dangerous only because their mental conditions make them likely to offend, but also because they have offended in the past. To qualify as a sexual predator, a person must have pled guilty or been found guilty, or not guilty by reason of mental disease or defect, of "a sexually violent offense" or have been committed as a criminal sexual psychopath. § 632.480(5)(a), (b), RSMo. Sexually violent offenses are rape, sodomy, child molestation, and sexual abuse and assault felonies. § 632.480(4), RSMo.

The legislature has determined that the mental abnormalities of sexual predators "make[s] them distinctively dangerous because of the substantial probability that they will commit future crimes of sexual violence if not confined in a secure facility." *Norton*,123 S.W.3 at 174. The Western District of this Court has recognized that "sexually violent predators suffer from a mental condition that differs substantially from the mental conditions which are the subjects of the usual civil commitment proceedings." *Askren*, 27 S.W.3d at 842. No constitutional right is violated "when persons who suffer from severe disorders are treated differently from persons with less serious conditions." *Id*., *quoting Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991); *see e.g. Westerheide v. State*, 831 S.2d 93, 112 (Fla. 2002) (noting the "false premise" of similar situations between general civil committees and sexually violent predators).

Because sexual predators are not similarly situated to other dangerous persons civilly committed, granting one group the statutory right to remain silent and not the other does not violate equal protection.

B. The sexually violent predator statutes are narrowly drawn to advance a compelling state interest.

"The State has a compelling interest in protecting the public from crime." *Norton*, 123 S.W.3d at 174. "This interest justifies the differential treatment of those persons adjudicated as sexually violent predators . . . because of the substantial probability that they will commit future crimes of sexual violence." *Id*. In the present case, that differential treatment is that alleged sexually violent predators do not have the statutory right to remain silent that other civil committees do.

The legislature's decision not to extend the right "to remain silent" to sexual predator proceedings is further justified by two other compelling state interests. First, there is the interest in securing the cooperation of alleged sexual predators to diagnose and treat their unusually intractable mental illnesses. *See In re Young*, 857 P.2d 989, 1014-15 (Wash 1993) (refusing to extend to sexual predators other mentally ill persons' statutory right to remain silent). And second, there is the interest of enhanced reliability of fact finding when commitment for treatment will at the outset be indefinite, though not permanent. *See* §§ 632.498 (court conducted annual review, petition for release over Director of Mental Health's objection), 632.501 (challenge with Director's approval) RSMo. Other civil commitments are for definite periods of time. *See* §§ 632.305 (96

hours), 632.335 (21 days), 632.340 (additional 90 days), 632.355, RSMo (additional year).

The alleged sexual predator's testimony would plainly enhance the reliability of fact finding regarding whether the alleged predator has a mental abnormality and is likely to engage in predatory acts of sexual violence if not confined in a secure facility. § 632.480(5), RSMo (Cum. Supp. 2003).

Since 1849, a party has had the statutory right in civil cases to examine an adverse party under the rules of cross examination and to compel him to answer, either in court or on deposition. *See State ex rel. Williams v. Buzard*, 354 Mo. 719, 190 S.W.2d 907, 909 (1945). Currently, the statute provides:

> Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses.

§ 491.030 RSMo; (A1).

No doubt exists now that Missouri's sexually violent predator commitment proceedings are civil in nature. Like the Washington and Kansas procedures examined in

Seling v. Young, 531 U.S. 250, 260 (2001) (Washington), and *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (Kansas), Missouri's procedures on their face are civil in nature. Missouri's procedures are not placed in any criminal code, but rather in Chapter 632 of the Revised Statutes of Missouri that deals with comprehensive psychiatric services, and are described as "civil commitment." A proceeding to adjudicate a person to be a sexual predator can be initiated only in the probate division of the circuit court. *See* § 632.484.1, RSMo (Cum. Supp. 2003) (respondent not presently confined); § 632.486, RSMo (respondent "presently confined"). If adjudicated a sexual predator, the person is not placed in the custody of the director of the department of corrections, but rather in the custody of Director of the Department of Mental Health. *See* § 632.495, RSMo (Cum. Supp. 2003). And confinement is not for any purpose of punishment, but rather for "control, care, and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large." § 632.495 RSMo.

The application of some procedural safeguards traditionally applied to criminal prosecutions to facially civil commitment proceedings does not change the nature of those proceedings. A state's decision "to provide some of the safeguards applicable in criminal trials cannot itself turn [sexually violent predator commitment] proceedings into criminal trials." *Hendricks*, 521 U.S. at 364, quoting *Allen v. Illinois*, 478 U.S. 364, 372 (1986).

Missouri's courts have unanimously recognized that sexually violent predator commitments are civil proceedings. *See Thomas v. State*, 74 S.W.3d 789, 790 (Mo. banc 2002) (Missouri's statutes provide for "continued civil commitment"); *In re Cokes*, 107

S.W.3d 317, 324 (Mo. App. W.D. 2003) (sexual predator commitment proceeding "deemed a civil proceeding"); *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 838 (Mo. App. W.D. 2000) (examining right to bench trial in "civil commitment cases").

Because sexual predator commitments are civil proceedings, the privilege against self incrimination does not bar the state from calling the alleged sexual predator as an adverse witness. *See Allen*, 478 U.S. at 374; *In re Hay*, 263 Kan. 822, 953 P.2d 666, 679–680 (1998); *In re Young*, 857 P.2d at 1014 (1993); *People v. Leonard*, 78 Cal.App.4th 776, 93 Cal.Rptr.2d 180, 188–191 (3rd Dist. 2000). The alleged predator's testimony enhances the reliability of decision making:

> It is difficult, if not impossible, to see how requiring the privilege against self-incrimination in these proceedings would in any way advance reliability. Indeed, the State takes the quite plausible view that denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would *decrease the reliability* of a finding of sexual dangerousness. The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons.

Allen, 478 U.S. at 374–375 (emphasis added)(internal citation omitted).

Appellant asserts that "the best proof that there is no compelling state interest in

denying . . . the right to remain silent is that . . . the State did not call him as a witness at trial." (Brf. App. 29).

Of course, Appellant's conclusion is baseless. "The rule which permits an unfavorable inference to be drawn, against a party, knowledgeable of the facts of the controversy, who fails to testify and which permits such failure so to be used by an opponent in argument to a jury is well established." *Pasternak v. Mashak*, 428 S.W.2d 565, 568 (Mo. 1967). "In such cases the failure of a party to testify raises a presumption that his testimony would have been unfavorable to his cause." *Kelsey v. Kelsey*, 329 S.W.2d 272, 273. "The presumption thus raised may therefore be properly mentioned in the argument." *Id*. This is because Appellant was not "available" as a witness to the State "because of his personal interest . . . in the outcome of the case." *Block v. Rackers*, 256 S.W.2d 760, 764 (Mo. 1953). "It could hardly be anticipated that . . . [the State] could safely vouch for [Appellant's] testimony by placing him on the witness stand." *Id*.

Far from proving that the State has no interest in having Appellant testify, the State's decision not to call Appellant merely reflects the commonly held belief that an attorney should not ask questions to which he does not know the answer. Rather than call Appellant to the stand having no idea what he was going to say, the State appropriately "commented on his failure to testify and called upon the jurors to draw an adverse inference from the fact that he did not do so." (Brf. App. 29).

Appellant finally cites cases from three states, which he claims "reject the notion that depriving a person subject to commitment as a sexually violent predator of the right to

remain silent is either essential or compelling." (Brf. App. 28). "Obviously," Appellant concludes, "these other states do not agree" with Missouri's statute. (Brf. App. 29). The argument is without merit.

As an initial matter, it is not clear that each of the states Appellant cites actually agree with his position. Appellant cites *People v. Singleton*, 2004 WL 1739223 (Cal. App. 3rd Dist. 2004), an unpublished opinion out of California,[1] in support of his contention. (Brf. App. 29). While the case does refer to a "right to remain silent," it is only in passing, and the court does not explicitly hold that such a right exists. Conversely, *People v. Leonard*, Cal.App.4th 776, 191-2, Cal.Rptr.2d 180, 190 (3rd Dist. 2000), a reported case to which citation is appropriate, rejected the claim that there is a right to remain silent in sexually violent predator hearings. Indeed, much as the State argues now, the court found that the statute "provides for the collection of reliable evidence to assist the jury in determining whether the person before the court is a sexually violent predator," and that "the [accused's] participation enhances the reliability of the outcome." *Id*. at 792-93.

While the State agrees that two other states have, by statute, granted the right to remain silent to alleged sexually violent predators, the State fails to see the relevance of this argument. Perhaps Appellant believes that the legislatures of Wisconsin and Illinois

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[1] California has a rule against citing opinions not certified for publication or ordered published, such as those accepted for review. *See* Cal. Court Rules Code Rules 976(d), 977(a) (West 1996).

are more enlightened than that in Missouri. In any event, that two other states "do not agree" with Missouri hardly diminishes Missouri's "compelling interest in protecting the public from crime." *Norton*, 123 S.W.3d at 174. There is no justification for judgments in sexually violent predator commitments to be less reliable than judgments in other civil cases — unless it be that sexual predator proceedings are really criminal prosecutions. *See Allen*, 478 U.S. at 475 (privilege against self–incrimination not intended to enhance reliability of fact finding). They are not.

It is also clear that the limitation is narrowly drawn. The sexually violent predator statutes provide "an elaborate, step-by-step procedure, conferring on the alleged predator a number of rights enjoyed by defendants in criminal prosecutions." *Norton*, 123 S.W.3d at 174. Those rights include: the right to a preliminary hearing (§ 632.489.1); notice and the opportunity to contest a probable cause finding within 72 hours (§ 632.489.2); the right to counsel (§ 632.489.3(1)); the right to present evidence (§ 632.489.3(2)); the right to cross-examine witnesses (§ 632.489.3(3)); the right to a jury trial (§ 632.492); the right to require the State to prove its case beyond a reasonable doubt (§ 632.495); and the right to a unanimous verdict (§ 632.492). *Norton*, 123 S.W.3d at 174. Certainly this multitude of procedural protections, as well as the "multiple opportunities for court review and dismissal from secure confinement" the statutes provide grants adequate protections to alleged predators. *Id*.

II – Ms. Kelly was qualified to diagnose and testify regarding the existence of mental abnormalities causing Appellant to

meet the definition of a sexually violent predator.

(Responds to Appellant's Point II)

Appellant next contends that the trial court erred in allowing Linda Kelly, a licensed clinical social worker, to provide expert testimony about Appellant's mental abnormality. Appellant claims that an amendment to section 632.483.2(3) "should be applied to . . . exclude the testimony" at trial of anyone who is not a psychiatrist or social worker. Appellant's argument badly misconstrues the applicable law.

"In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." § 490.065.1 RSMo, (A2). It is within the trial court's discretion to admit or exclude an expert's testimony. *State v. Davis*, 814 S.W.2d 593, 603 (Mo banc 1991). A reviewing court will not interfere with the trial court's ruling unless an abuse of discretion is plainly shown. *Whitnell v. State*, 129 S.W.3d 409, 413 (Mo. App. E.D. 2004).

Section 632.483.2(3) requires the "agency with jurisdiction" over the alleged sexually violent predator (normally the Department of Mental Health or the Department of Corrections) to "provide the attorney general . . . with . . . [a] determination by either a psychiatrist or psychologist . . . as to whether the person is a sexually violent predator." The information is to be used in making the initial determination of whether the individual meets the definition of a sexually violent predator, and whether a petition for civil

commitment should be filed pursuant to section 643.486. § 632.483.4, 5, RSMo (Cum. Supp. 2003). Section 632.483 says nothing about trial whatsoever, and certainly "does not discuss admissibility at trial." (Brf. App. 34).

Far from supporting his contention, as Appellant claims, *In re Johnson*, 58 S.W.3d 496 (Mo banc 2001), is directly on point and disposes of the case against Appellant. In *Johnson*, the State offered testimony from a purported expert from the Department of Corrections who was not a licensed social worker or counselor, but was working towards becoming a licensed counselor. *Id*. at 497. Referring to the statutory definition of "professional counseling," the court found that the term was "not defined to include 'diagnoses' of any sort." *Id*. at 499, citing § 337.500 RSMo. Any "diagnoses" the purported expert made "had to be approved . . . by a supervising licensed psychologist," so he "should not have been permitted to testify to his 'diagnoses' at trial." *Id*.

The Missouri Supreme Court in *Johnson* made no mention of Appellant's argument that only psychologists or psychiatrists can provide expert testimony. Indeed, the court noted identical language contained in section 632.489.4 mandating that a post-probable cause examination be conducted only by "a psychiatrist or psychologist," and concluded that the statute "makes no such limitations at trial." *Id*. at 498. If any statute could succumb to appellant's strained analysis, it is section 632.489.4, which involves a court ordered examination after the court has found probable cause – as opposed to section 632.483, which comes into effect before a decision to file a petition has even been made.

Yet the Missouri Supreme Court in *Johnson* had no problem determining that the language had no bearing on testimony offered at trial.

Moreover, the court explicitly found that "licensed social workers are permitted by law to evaluate persons and make diagnoses of mental disorders." *Johnson*, 58 S.W.3d at 499. The court's analysis hinged entirely on the absence of the term "diagnosis" from the statutory definition of "professional counseling," as opposed to "practice of psychology" and "clinical social work," whose definitions both do include the term "diagnosis." *Id*; §§ 337.015.3 (practice of psychology); 337.600 (clinical social work); (A-3). Under any reading of *Johnson*, it is plain that licensed clinical social workers, such as Ms. Kelly, are competent to diagnose and testify to the existence of mental disorders in sexually violent predator commitment proceedings.

In re Spencer, 103 S.W.3d 407 (Mo. App. S.D. 2003), upon which Appellant also heavily relies, is similarly unhelpful to his cause. Appellant claims that the *Spencer* court found "a licensed clinical worker's testimony inadmissible." (Brf. App. 35). This claim is false. Quite to the contrary, in *Spencer*, as in the present case, "the licensed clinical social worker who wrote the end of confinement report, also testified for the State" at trial. *Spencer*, 103 S.W.3d at 412. But the court did not disqualify the expert from testifying. In fact, the case contains no further reference to the social worker's qualifications whatsoever – apparently showing that, contrary to Appellant's profound misreading, the court found nothing wrong with a licensed clinical social worker providing expert testimony. The

Johnson case is discussed briefly for the proposition that remand, rather than reversal, was appropriate under certain circumstances when the State had not met its burden. *Id.* at 415-16. But it certainly did not provide the basis, as Appellant contends, for invalidating any expert testimony. Nor, as Appellant concedes, does the language of either statute say anything about admissibility at trial. (Brf. App. 34)

CONCLUSION

For the reasons stated above, the judgment of the circuit court finding appellant to be a sexually violent predator should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,407 words, excluding cover, this certification, signature block and appendix, as determined by WordPerfect 9 software;

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

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 3rd day of November, 2004, to:

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