IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF MARTIN REDDIG, Respondent/Appellant.	))))	No. SD34498

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAMDEN COUNTY, MISSOURI
TWENTY-SIXTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE AARON KOEPPEN, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Martin Reddig appeals his commitment to the Department of Mental Health ("DMH") as a Sexually Violent Predator ("SVP"), following a jury trial in Camden County, Missouri. This appeal presents questions concerning the constitutionality of provisions of the SVP Act ("the Act") reserved for the exclusive jurisdiction of the Missouri Supreme Court. Mo. Const., art. V, §3.[1] Therefore, this Court must transfer his appeal accordingly.

[1] The Record on Appeal consists of a Transcript (Tr.), a Legal File (L.F.). Unless otherwise noted, all statutory references are to RSMo. 2006, cumulative through the 2013 supplement.

STATEMENT OF FACTS

Mr. Reddig has not committed a hands-on, sexually violent offense since 2006.(Tr.230,287). Mr. Reddig pled guilty and was convicted of child molestation in the first degree and was sentenced to the Department of Corrections ("DOC").(Tr.149,287). At the time of the offense, Mr. Reddig lived with his girlfriend and eventually assumed babysitting responsibilities for her three granddaughters ages three to four years old.(Tr.170-72,240). Mr. Reddig admitted he touched their genitals while bathing them on multiple occasions and masturbated to thoughts about that contact.(Tr.173-74,240).

Mr. Reddig said he developed sexual thoughts about a four-year-old female cousin and masturbated to those thoughts in 1994.(Tr.155). In 1999, an 18-year-old woman reported to police that she woke up to a man standing over her with a knife who threatened her and ripped off her shorts.(Tr.157). She later recognized the man as Mr. Reddig.(Tr.157-58). Mr. Reddig was not prosecuted, but later admitted to entering the house looking for something to steal and to breaking into homes in order to commit a rape.(Tr.158-60).

Mr. Reddig completed the Missouri Sex Offender Program ("MoSOP") before being paroled.(Tr.174-75). Mr. Redding's treatment notes indicate he had good concept understanding and application, recognized how his actions harmed others, and he identified risk factors, thinking errors and high-risk situations that could lead to future offenses.(Tr.226-27,288). He was also evaluated and determined not to meet SVP criteria.(Tr.266-67).

While on parole, Mr. Reddig reported he was in proximity to children on three occasions: (1) his boss gave him a ride home with children in the car; (2) he saw his nine-

year-old son; and (3) a child was inside a residence while he fixed the plumbing.(Tr.178-79,267-69,292-93). Mr. Reddig admitted he looked at child pornography, including while on parole in 2013-14.(Tr.161,177,243). Viewing/possessing child pornography is not a "sexually violent offense" under Missouri law, nor is it a predatory act of sexual violence.(Tr.212, 218, 262).

Dr. Jeffrey Kline evaluated Mr. Reddig in September of 2015.(Tr.142,174). Dr. Kline reviewed records and interviewed Mr. Reddig.(Tr.147,151-52,154,182). Dr. Kline diagnosed Mr. Reddig with pedophilic disorder because he admitted to fantasies, urges and behaviors involving sexual behaviors with pre-pubescent children.(Tr.183-85). Dr. Kline said pedophilic disorder affects Mr. Reddig's emotional and volitional capacity and predisposes him to commit sexually violent offenses.(Tr.188). Dr. Kline believed Mr. Reddig has serious difficulty controlling his behavior because he continued to engage in behaviors supportive of his sexual attraction after receiving a sanction, watched child pornography, and was around small children.(Tr.189). According to Dr. Kline, Mr. Reddig has a mental abnormality.(Tr.191).

Dr. Nina Kircher completed an end-of-confinement ("EOC") determination. (Tr.236, 266). She testified over Mr. Reddig's objection to admission of her determination and his unwarned statements to her.(L.F.5,18-22;Tr.5). Dr. Kircher reviewed Mr. Reddig's DOC, probation and parole, and MoSOP records.(Tr.238-39). Dr. Kircher diagnosed pedophilic disorder and said that was a mental abnormality.(Tr.244). Mr. Reddig told Dr. Kircher he was attracted to females 8-80 years old and still had sexual thoughts about children, but was not masturbating to them.(Tr.241,244). Dr. Kircher said pedophilic

disorder predisposes Reddig to commit acts of sexual violence based on his prior history and believed it causes him serious difficulty controlling his behaviors because of his use of pornography and proximity to children while on parole.(Tr.246). After being sent to prison for his contact-offense conviction, Mr. Reddig never committed another sexually violent offense against a child and "seems not to have gone to a loss of control" beyond viewing child pornography.(Tr.272-73).

Not all sex offenders reoffend.(Tr.208-09). The average rate of re-offense is 13-15%.(Tr.209,261). Data from the DOC shows that individuals who complete MoSOP return to prison because of a new sex offense at a lower rate, 11-13% of the time, than those who do not complete it.(Tr.213-14). The Static-99R is an actuarial instrument that looks at factors "associated with recidivism;" both evaluators said Mr. Reddig had a score of 4, corresponding to a predicted group recidivism rate of 17% over five years and 27.3% over ten years.(Tr.195,200-01,209,264). Ultimately, Dr. Kline and Dr. Kircher concluded Mr. Reddig was more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.(Tr.204,257-58).

Mr. Reddig testified in his own defense. He admitted an attraction to females age four and older.(Tr.286). Mr. Reddig testified he had not masturbated to thoughts of children since January of 2015, and learned to control his condition with the help of a psychologist by replacing inappropriate thoughts with music, writing down his thoughts and feelings, and talking about them.(Tr.294-95). Now that he understands the harm he caused, he does not want to put anyone else through that and wants to be a good example to his son.(Tr.297).

Mr. Reddig's motions to dismiss and motion for a directed verdict were denied.(Tr.5,358;L.F.23-39,44-64,99-93). The jury was given Instruction 7 over his objections and request to declare §632.492 unconstitutional.(Tr.5,356-57;L.F.79-85). The jury returned a verdict finding Mr. Reddig is a sexually violent predator and he was committed to the custody of DMH.(Tr.379;L.F.106-7). Venireperson #30 participated in the jury deliberations over Mr. Reddig's objections.(Tr.127,130,360-62). His motion for a new trial was denied and this appeal follows.(L.F.109-13).

Additional facts necessary to the disposition of the issues raised on appeal are set forth in the argument portion of the brief.

POINTS RELIED ON

I.

The trial court abused its discretion and erred in failing to replace Juror 30, Saunny Loraine Murray, with the alternate because that violated Mr. Reddig's right to due process, equal protection and an impartial jury as guaranteed by U.S. Const. amends. V, VI, XIV; Mo. Const. art. I §§2, 10, 18(a), 22 and §494.470, in that Juror 30 was not qualified for service because her voir dire responses indicated the possibility of bias and inability to follow the court's instructions, she was not rehabilitated, defense counsel requested to question her or replace her before opening statement, the trial court refused to consider further questioning or replacing her because the jury had been sworn, and Juror 30 sat on the jury that rendered a verdict against Mr. Reddig.

Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo. App. W.D. 2012);

Rupard v. Prica, 412 S.W.3d 343 (Mo. App. W.D. 2013);

Hudson v. Behring, 261 S.W.3d 621 (Mo. App. E.D. 2008),

State v. Amick, 462 S.W.3d 413 (Mo. banc 2015);

U.S. Const. amends. V, VI, XIV;

Mo. Const. art. I §§2, 10, 18(a), 22;

§§494.470, 494.485.

II.

The trial court erred refusing to declare §632.492 unconstitutional, and thereafter giving Instruction 7, over Mr. Reddig's objections, because this violated his rights to rights to due process and a fair trial and equal protection, guaranteed by U.S. Const. amends. V, VI, XIV and Mo. Const. art. I, §§2, 10, in that §632.492 requires the court to instruct the jury that if found to be an SVP, "the person shall be committed to the custody of the director of [DMH] for control, care and treatment;" that consequence is a mandatory matter of law reserved for the judge and irrelevant to the evidentiary issues decided by the jury; there was no evidence to support giving the instruction; the instruction was improper under Rule 70.02; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for civil commitment.

Doe 1631 v. Quest Diagnostics, Inc., 395 S.W.3d 8 (Mo. banc 2013);

Warren v. State, 291 S.W.3d 246 (Mo. App. S.D. 2009);

Care and Treatment of Cokes v. State, 183 S.W.3d 281 (Mo. App. W.D. 2005);

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

U.S. Const. amends. V, VI, XIV;

Mo. Const. art. I, §§2, 10;

§632.492;

Rule 70.02.

III.

The trial court erred in denying Mr. Reddig's motion to dismiss and in committing him to DMH as an SVP, because there is no possibility of discharge from State custody once committed, violating his rights to due process and equal protection protected by U.S. Const. art. VI, cl. 2, amends. V, VI, XIV and Mo. Const. art. I, §§2, 10, in that discharge is constitutionally required once no longer mentally ill or dangerous, but the 2006 amendments to the Act: eliminated discharge from confinement by replacing it with indefinite custody for care, control and treatment on "conditional release," which cannot terminate under the plain language of the Act; imposed punitive conditions on "conditional release;" placed an onerous initial burden on Mr. Reddig; and lack minimum due process guarantees.

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

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

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

Nicholson v. State, 524 S.W.2d 106 (Mo. banc 1975);

U.S. Const. art. VI, cl. 2, amends. V, VI, XIV;

Mo. Const. art. I, §§2, 10;

§§632.480, 632.489, 632.492, 632.495, 632.498, 632.504, 632.505.

IV.

The trial court erred in denying Mr. Reddig's motion to dismiss because there is no least restrictive environment ("LRE"), because this violated his rights to due process and equal protection guaranteed by U.S. Const. amends. V, VI, XIV, art. VI, cl. 2 and Mo. Const. art. I, §§2, 10, in that *Schafer* found the Act is unconstitutional because it does not provide an LRE, and there is no alternative to confinement in a total lock down facility.

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

Sherrill v. Wilson, 653 S.W.3d 661 (Mo. banc 1983);

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

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

U.S. Const. amends. V, VI, XIV, art. VI, cl. 2;

Mo. Const. art. I, §§2, 10;

§§632.495, 632.505.

V.

The trial court erred in denying Mr. Reddig's motion to dismiss and in committing him to DMH as an SVP because this violated his rights to due process and a fair trial, equal protection, freedom from double jeopardy and *ex post facto* laws, proof beyond a reasonable doubt, and to silence and to counsel, protected by U.S. Const. amends. V, VI, XIV, art. I, §9, 10; Mo. Const. art. I, §§2, 10, 13, 18, 19, in that the Federal Court found that commitment under the Act is punitive, lifetime confinement; confinement is a second punishment, and the Act's substantive and procedural protections are inadequate and unjustifiably different from any other civil commitment or punitive proceeding in Missouri.

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

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

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

Board of Educ. of City of St. Louis v. State, 47 S.W.3d 366 (Mo. banc 2001);

U.S. Const. amends. V, VI, XIV, art. I, §9, 10;

Mo. Const. art. I, §§2, 10, 13, 18, 19;

§§632.335, 632.483, 632.492, 632.495, 632.505.

VI.

The trial court erred in denying Mr. Reddig's motion to dismiss, because this violated his rights to due process, and equal protection, protected by U.S. Const. amends. I, V, XIV and Mo. Const. art. I, §§2, 8, 10, in that §632.480(2) permits a mental abnormality finding and commitment because of a condition affecting one's emotional capacity and because a person is a "menace to the health and safety of others," without a showing that the individual has serious difficulty controlling his predatory, sexually violent behavior.

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

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

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

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2002);

U.S. Const. amends. I, V, XIV;

Mo. Const. art. I, §§2, 8, 10;

§632.480.

VII.

The trial court erred in overruling Mr. Reddig' objection and admitting testimony regarding Kircher's EOC determination and Mr. Reddig's statements to her, because this violated his right to due process, assistance of counsel, to silence, and equal protection, guaranteed by U.S. Const., amend. V, VI, XIV, Mo. Const. art. I, §2, 10, 18(a), 19 and §§490.065, and 632.483, in that the EOC determination is inadmissible pursuant to §632.483; Kircher's determination was irrelevant and only a component of statutory notice provided to trigger SVP screening, and was based on incomplete and insufficient information to form a reliable opinion, and Mr. Reddig did not have substantive protections at the time of her questioning, like a criminal defendant subject to investigative questioning or persons subjected to mental examinations in other civil commitment cases.

Application of Gault, 387 U.S. 1 (1967)

Miranda v. Arizona, 384 U.S. 436 (1966);

Estelle v. Smith, 451 U.S. 454, 469 (1981);

Bradley v. State, 440 S.W.3d 546 (Mo. App. W.D. 2014)

U.S. Const., amend. V, VI, XIV;

Mo. Const. art. I, §2, 10, 18(a), 19;

§§490.065, 632.483

VIII.

The trial court erred in denying Mr. Reddig's motion for a directed verdict and in committing him as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S. Const. amends V, VI, XIV, Mo. Const. art. I, §2, 10, and §632.495, in that the State failed to prove he suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, since its experts did not establish pedophilia caused Mr. Reddig serious difficulty controlling sexually violent behavior, predicted a 27.3% chance of any sexual recidivism, and did not demonstrate Mr. Reddig's risk was "more likely than not."

Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo.App.E.D.1998);

In re Coffel, 117 S.W.3d 116 (Mo. App. S.D. 2003);

In the Matter of the State of New York v. Donald DD, 21 N.E.3d 239 (N.Y. App. Div. 2014);

Morgan v. State, 176 S.W.3d 200 (Mo. App. W.D. 2005);

U.S. Const. amends V, VI, XIV;

Mo. Const. art. I, §2, 10;

§§632.480, 632.495.

ARGUMENT

I.

The trial court abused its discretion and erred in failing to replace Juror 30, Saunny Loraine Murray, with the alternate because that violated Mr. Reddig's right to due process, equal protection and an impartial jury as guaranteed by U.S. Const. amends. V, VI, XIV; Mo. Const. art. I §§2, 10, 18(a), 22 and §494.470, in that Juror 30 was not qualified for service because her voir dire responses indicated the possibility of bias and inability to follow the court's instructions, she was not rehabilitated, defense counsel requested to question her or replace her before opening statement, the trial court refused to consider further questioning or replacing her because the jury had been sworn, and Juror 30 sat on the jury that rendered a verdict against Mr. Reddig.

Facts

During voir dire, the State told the jury panel, "[t]his is a sexually violent predator commitment case" involving someone with "psychosexual disorders," and "we're going to be talking about what he did to kids"(Tr.13,15). The State went on to tell the panel:

> but maybe you know something about the case, maybe you know something about the parties involved or maybe you've had something in your life that hits too close to home, so that's what I'm looking for. Precluded. Are you prevented or you've got some substantial impairment. It's something that you can trace back to an event in your life keeping you from following the Court's instructions. That's what I want

you guys to be thinking about as we're plowing through some of the questions here. That's what it's designed to look for.

***

But some people have said, because of an event in their life or people in their life, that actually – they're actually precluded—they're prevented from following the Court's instructions in this case, because one of the instructions is going to deal with being able to listen to all of the evidence and keep an open mind so that you don't decide the case before everybody has a chance to be heard.

(Tr.30-31).

Against this backdrop, the State asked if anyone on the panel, or someone close to them, had been a victim of a sexual crime.(Tr.31). Responding to the State's questions, Juror 30 raised her paddle, indicated "it was a friend I knew," and that she wished to talk about it in private.(Tr.34). Juror 30 did not respond to any other questions during voir dire.(Tr.131).

Juror 30 was never called in to speak with the attorneys and the judge in private. Twelve jurors and one alternate were selected.(Tr.123,126). Juror 30, Ms. Murray, was seated.(Tr.126). Defense counsel asked to approach and advised the court that Juror 30 wanted to speak privately, but was seated without doing so.(Tr.127). The trial court did not believe it mattered because the sheriff asked if anyone wanted to talk to the court, and Juror 30 had the right to change her mind about that.(Tr.127). The seated jury was sworn.(Tr.128).

Before opening statements, defense counsel brought up Juror 30 again.(Tr.130). The trial court again pointed out that no one indicated they wished to speak privately with the court when the sheriff made a general announcement to the panel during a recess and said that Juror 30 had "waived the right to come and speak to the Court in private"(Tr.130-31). Defense counsel requested to question Juror 30 based on concerns that something might keep her from being fair and impartial given her initial indication that she wished to speak privately.(Tr.131). Alternatively, defense counsel asked that she be replaced by the alternate.(Tr.131). The State successfully argued that since the jury had already been sworn and defense counsel did not raise an objection or move to strike Juror 30, any issue had been waived.(Tr.131-32). The judge agreed that it could not reopen voir dire since the jury had been sworn and said that replacing Juror 30 with the alternate "seems to be just inherently an unfair process" unless the parties agreed.(Tr.132). The defense requests were denied.(Tr.132).

Mr. Reddig preserved the trial court's failure to permit addition questioning and failure to substitute the alternate for Juror 30 in his motion for a new trial.(L.F.111-12). He argued the error was prejudicial and violated his rights to due process and a fair trial, equal protection and an impartial jury.[2](L.F.111-12).

Standard of Review

[2] U.S. Const. amends. V, VI, XIV; Mo. Const. art. I, §2, 10, 18(a).

"A trial court's decision whether to replace a regular juror with an alternate during trial is a matter of its discretion." *Rupard v. Prica*, 412 S.W.3d 343, 345 (Mo. App. W.D. 2013); §494.470.3("If the cause of challenge be discovered after the juror is sworn and before any part of the evidence is delivered, the juror may be discharged or not in the discretion of the court."). "An abuse of discretion occurs where the trial court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (internal quotation and citation omitted). Interpretation of juror qualification or juror substitution statutes present a legal issue reviewed de novo. *See State v. Amick*, 462 S.W.3d 413 (Mo. banc 2015)(claim of improper juror substitution under §494.485 reviewed de novo).

Analysis

Mr. Reddig has a constitutional right to a fair and impartial jury of twelve qualified jurors. *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 199 (Mo. App. W.D. 2012); Mo. Const. art. I, §§18(a), 22(a). Counsel should make challenges to a juror's qualifications before submission of the case, whenever practicable. *Id.* at 203. Section 494.470.3 expressly contemplates that challenges may arise after the jury has been sworn and §494.485 "mandates that alternate jurors shall replace jurors who, *prior to the time the jury retires to consider its verdict*, are determined by the trial court to be unable or *disqualified* to perform their duties." *Id.* at 203(emphasis in original).

In *Khoury v. ConAgra Foods, Inc.*, the trial judge asked a seated juror further questions after the jury was sworn, but before opening statements, and struck the juror for

possible bias. *Id.* at 199-201. On appeal, the Court said there was no abuse of discretion. *Id.* at 202. "Replacement of a juror with an alternate is an appropriate remedy when there is a *possibility* of bias." *Id.* at 201. When "there is evidence fairly suggesting intentional nondisclosure to a voir dire question, litigants have a right to bring such alleged nondisclosure to the trial court's attention" *Id.* at 201, n. 11. ConAgra timely objected, doing so before any evidence had been introduced. *Id.* at 203.

In *Rupard*, the jury was sworn on a Friday and on Monday before the trial started, Plaintiffs moved to strike a juror because of information discovered over the weekend. 412 S.W.3d at 346. The trial court ruled that the motion to strike was untimely and denied the request to strike because the information could have been discovered before the jury was sworn and there was no basis to rely on it. *Id.* As such, the Plaintiffs had not shown Juror could not be fair and impartial. *Id.* On appeal, the Court ruled that the motion was *not* untimely, even though the jury had been sworn. *Id.* However, because Plaintiffs' failed to provide the Court with the materials they argued showed bias and nondisclosure, there was no evidence in the record to suggest the trial court abused its discretion in failing to remove the juror. *Id.* Furthermore, the trial court did not err in failing to *sua sponte* bring the juror in for further questioning because the Plaintiffs did not request further questioning. *Id.* at 347-48. "[T]he duty falls on the proponent of removal to conduct examination or to request trial court examination—particularly where voir dire has been completed, preemptive strikes have been made, and the panel has been sworn." *Id.*

In *Hudson v. Behring*, 261 S.W.3d 621, 623 (Mo. App. E.D. 2008), Juror indicated he knew the Hudsons in voir dire, but later did not raise his hand to a question asking if

anyone had knowledge of the family which would influence their decision. *Id*. at 623-24. After hearing Grandfather's testimony during the trial, Juror told Grandfather's daughter to "tell him I love him to death. I could not have done what he did." *Id.* at 624. Plaintiffs moved to replace Juror with an alternate, but declined further questioning of Juror. *Id*. The Court said Juror's "I love you" statement showed the possibility of bias and questioning him would not have diminished the possibility of bias. *Id.* 624-25. The Court held that failure to replace Juror with an alternate in light of statements that clearly indicated a possible bias was an abuse of discretion and granted a new trial. *Id*. at 625.

Here, defense counsel timely requested to question and to replace Juror 30 with an alternate were timely not only before submission of the case, but before opening statements.(Tr.127,130). *Rupard,* 412 S.W.3d at 346; *Khoury,* 368 S.W.3d at 199, 203. Defense counsel made "a specific request that she be inquired—bring up the fact that she did indicate that she wanted to speak privately and was – then she didn't" because of concern "if there's something that she thinks would prevent her from being fair and impartial. I –and if we could have an inquiry on—of her from that, I would – I would request that" and to replace her with the alternate.(Tr.131,132); *Rupard,* 412 S.W.3d at 347-48.

The trial court agreed with the State's argument that any issue had been waived since the jury had been sworn without an objection or motion to strike.(Tr.131-32). The trial court said, "[s]ince we have sworn the jury in, I don't think it's appropriate to reopen voir dire."(Tr.132). The trial court also denied defense counsel's specific request to replace Juror 30 with the alternate without the State's consent because, "I don't think I can do it

since changing the rules after the—the game has been played seems to be just inherently an unfair process."(Tr.131-32). Contrary to the court's ruling, both questioning and replacement can take place after a jury has been sworn. *Rupard*, 412 S.W.3d at 346; *Hudson*, 261 S.W.3d at 624; *Khoury*, 368 S.W.3d at 201; §§494.470(3), 494.485. Although defense counsel did not cite §§494.470(3) or 494.485, he plainly and unequivocally requested to question Juror 30 further about her expressed possible bias before proceeding with the trial and to replace her with the alternate.(Tr.131-32). *Amick*, 462 S.W.3d at 415. The trial judge was presumed to know the law. *Id*. The trial court incorrectly interpreted the juror qualification and substitution laws. *Amick*, 462 S.W.3d at 413. It thereafter erred in refusing to question or consider replacing Juror 30 based on its incorrect interpretation.

Juror 30 responded only once during voir dire. After told to consider questions against "something in your life that hits too close to home," that would prevent or cause some substantial impairment in following the trial court's instructions, including listening to all of the evidence and keeping an open mind until the evidence had been presented, Juror 30 indicated her friend had been the victim of a sexual crime.(Tr.30-31,34).

Juror 30's response indicated at the very least the possibility of bias and an inability to follow the court's instructions. Like in *Hudson*, the trial court's failure to replace Juror 30 with the alternate was an abuse of discretion warranting a new trial. 261 S.W.3d at 625. Juror 30 was not qualified to serve unless she was rehabilitated after further questioning and unequivocal assurances of impartiality. *White v. State*, 290 S.W.3d 162, 166 (Mo. App. E.D. 2009)(jurors responses suggested bias; juror was not rehabilitated where no follow-up questions were asked, and he was not qualified to serve as a juror). Because she asked

to speak to the Court in private, the State's attorney did not ask follow up questions of her.(Tr.34). In light of Juror 30's statements, and no subsequent rehabilitation, the trial court's failure to remove her was reversible error. This Court must reverse and remand for a new trial.

II.

The trial court erred refusing to declare §632.492 unconstitutional, and thereafter giving Instruction 7, over Mr. Reddig's objections, because this violated his rights to rights to due process and a fair trial and equal protection, guaranteed by U.S. Const. amends. V, VI, XIV and Mo. Const. art. I, §§2, 10, in that §632.492 requires the court to instruct the jury that if found to be an SVP, "the person shall be committed to the custody of the director of [DMH] for control, care and treatment;" that consequence is a mandatory matter of law reserved for the judge and irrelevant to the evidentiary issues decided by the jury; there was no evidence to support giving the instruction; the instruction was improper under Rule 70.02; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for civil commitment.

Mr. Reddig's *Motion to Declare Section 632.492 Unconstitutional* and objections to Instruction 7 at trial were overruled.(L.F.79-85,103;Tr.5,356-57). He argued the instruction, required by §632.492, violated his rights to due process, equal protection, a fair trial and impartial jury, and preserved his objections in his motion for new trial.[3](L.F.79,82,112). Instruction 7 read: "If you find Respondent to be a sexually violent

[3] U.S. Const. amends. V, VI, XIV; Mo. Const. art. I, §2, 10.

predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care, and treatment."(L.F.103).

Section 632.492 is unconstitutional in that it requires instructing the jury on a legal issue outside the scope of its function and is not narrowly tailored to serve a compelling state interest. Instruction 7 was unsupported by any evidence in the record and was an abstract statement of law deviating from the non-MAI requirements of Rule 70.02. Mr. Reddig was prejudiced because the instruction misled and confused the jury, distracted jurors from their designated fact-finding responsibility, and impermissibly injected a collateral issue into the case.

Standard of Review

Whether a jury is properly instructed is reviewed de novo. *Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 13 (Mo. banc 2013). "Where there is no applicable MAI, the instruction will be reviewed to determine whether the jury could understand the instruction and whether the instruction follows applicable substantive law by submitting the ultimate facts required to sustain a verdict." *Id.* (citation and quotation omitted). Instructions submitted must be supported by substantial evidence and an instruction that is broader than the evidence is improper "unless it is shown that an accused is not prejudiced thereby." *Id.* at 15. When an improper instruction is given, the burden shifts to the State to show Mr. Reddig was not prejudiced. *Id.* "An error is prejudicial, requiring a new trial, if it materially affects the merits of the action by misdirecting, misleading or confusing the jury." *Id.*

Analysis

There are no applicable MAI instructions in an SVP case. *Warren v. State*, 291 S.W.3d 246, 250 (Mo. App. S.D. 2009). As such, the instructions given must be "simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts," and follow the substantive law. *Id.* at 251, Rule 70.02. Section 632.492 requires the trial court to instruct the jury that "if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment."

This Court has upheld giving the §632.492 instruction because the statute required it and it followed the substantive law. *See Scates v. State*, 134 S.W.3d 738 (Mo. App. S.D. 2004); *Warren*, 291 S.W.3d 246. *Scates* complained the instruction invited the jury to focus on irrelevant treatment rather than whether he was an SVP, and minimized the jurors' responsibility for their verdict. 134 S.W.3d at 741-42. Both challenges were overruled because of the statutory mandate, and *the appellant submitted proposed instructions containing the language he complained about*. *Id.* at 742. In *Warren*, the appellant challenged the instruction because it did not accurately reflect the duration of confinement. 134 S.W.3d at 250-51. This Court said the average juror would understand that an SVP verdict would result in "control, care and treatment" in DMH and the instruction did not have a prejudicial effect. *Id.*

However, those cases are distinguishable because only the instruction – and not the statute– was challenged and the Courts did not apply strict scrutiny. Here, Mr. Reddig

challenged not only §632.492, but also the constitutionality of the entire civil commitment statutory scheme.(L.F.23-64,79-83).

In an SVP trial, the jury determines the ultimate evidentiary issue, that is whether an individual is an SVP as defined by §632.480. *In re Gormon,* 371 S.W.3d 100, 106 (Mo. App. E.D. 2012) (*See* L.F.72). The jury does not decide questions of law. *Id.* "[T]he primary question in an SVP case is whether the [respondent] suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." *Care and Treatment of Cokes v. State*, 183 S.W.3d 281, 285-86 (Mo. App. W.D. 2005). Evidence beyond the two factual issues at trial, mental abnormality and risk, is routinely excluded. *See Id.* (excluding evidence of medicine and treatment available); *Lewis v. State,* 152 S.W.3d 325, 328-29 (Mo. App. W.D. 2004)(excluding evidence of supervision after verdict).

Such was the case here. The trial court granted the State's motion to exclude "external constraint" evidence at trial, including evidence of "support structures in place" and what third parties might do after the verdict.(L.F.72-74). The State argued such evidence would mislead the jury and was irrelevant to whether or not Mr. Reddig met the criteria for commitment.(*Id.*). There is no difference between evidence of what Mr. Reddig would do after the verdict whether he was in the community or in DMH. *See Cokes*, 183 S.W.3d at 285 (trial judge ruled neither party could present evidence of what would happen to Cokes whether committed or released). "The question is not whether some external constraints make it less likely that [he] would engage in" predatory acts of sexual violence. *Id.* at 285*; Lewis*, 152 S.W.3d at 332. Where evidence of post-release supervision,

treatment or medication is irrelevant to the jury's determination in an SVP case, so is evidence of supervision, treatment, medication or other forms of "control, care and treatment" by DMH; neither can inform the jury whether Mr. Reddig suffers from a mental abnormality that makes him more likely than not. *Cokes*, 183 S.W.3d at 285; *Lewis*, 152 S.W.3d at 332. The trial judge properly excluded such evidence in Mr. Reddig's trial.

"The basic principal applicable to the submission of instructions is that they should not be given if there is no evidence to support them." *Doe 1631*, 395 S.W.3d at 15. "Substantial evidence is evidence which, if true, is probative of the issues and from which the jury can decide the case." *Ross-Paige v. Saint Louis Metropolitan Police Department*, 492 S.W.3d 164, 172 (Mo. banc 2016) (citation omitted). This Court reviews the evidence in the light most favorable to submission of the instruction. *Id.*

In *Doe 1631*, there was no evidence that Doe authorized disclosure of his HIV test results. 395 S.W.3d at 14. Therefore, there was no evidence to support the submitted affirmative defense instruction that Defendant was not liable if an authorization was given. *Id.* at 14-15. Because the instruction was improper, the burden shifted to Defendant to show Mr. Doe was not prejudiced, which it could not do. *Id.* at 15. The Court noted the prejudice in misdirecting the jury was "exacerbated" by Defendant's closing argument, where counsel emphasized the authorization claim. *Id.* The Court ruled giving the instruction was reversible error. *Id*

In *Ross-Paige*, the trial court improperly submitted a verdict-directing instruction on a liability theory where there was no testimony presented to support the theory. 492 S.W.3d. at 175. In reversing, the Court said it "cannot rule out the possibility that the jury

improperly returned its verdict upon a theory that was not supported by substantial evidence and that misdirected or confused the jury." *Id.* at 176. Submitting the instruction was reversible error and the case was remanded. *Id.*

Because evidence of what would happen after the verdict, whether imposed by third-party DMH or some other individual in the community, was irrelevant and excluded at trial, there was no evidence to support giving Instruction 7. There was no testimony that Mr. Reddig would be committed to DMH for control, care and custody if found to be an SVP. Without substantial evidence to support it, giving Instruction 7 was an error.

It was also error to give Instruction 7 because the consequence of the jury's SVP finding was entirely collateral and outside the scope of the factual issues it was to decide at trial. The legal consequence of an SVP verdict, mandatory commitment to DMH, is left to the trial judge. §632.495.2. Instructions are properly refused where they submit questions of law for the court to decide. *See Carson-Mitchell, Inc. v. Macon Beef Packers, Inc.*, 544 S.W.2d 275 (Mo. App. KC 1876)(instruction submitting purely legal defense properly refused). Giving such instructions has been held to be prejudicial and reversible error. *See Esmar v. Zurich Ins. Co.*, 485 S.W.2d 417 (Mo. 1972)(giving instruction submitting legal matter for determination by court, and not calling for factual determination of jury, was prejudicial error).

This is particularly true where the jury has no role in determining the consequence of the verdict. "It is well established that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed." *Shannon v. United States,* 512 U.S. 573, 579 (1994)(internal quotation and citation

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

Instruction 7 also presented an abstract statement of law not requiring any finding by the jury. An abstract statement of law, even if "parroting the precise language of [§]632.492" and following the substantive law, is improper in instructions. *See Warren*, 134 S.W.3d at 250. In *Chism v. Cowan*, 425 S.W.2d 942, 949 (Mo. 1967), the Missouri Supreme Court examined an instruction shown "to be an exact recital of the statute, and as such, was simply an abstract statement of law requiring no finding by the jury. Such instructions tend to mislead and confuse the jury and are properly refused." Abstract statement of law instructions deviate from the requirements for instructions when there are no MAIs. *Mobley v. Webster Elec. Co-op.*, 859 S.W.2d 923, 933 (Mo. App. S.D. 1993); Rule 70.02.

There is no narrowly tailored, compelling reason to justify giving an abstract "control, care and treatment" instruction unsupported by substantial evidence, interjecting a collateral issue, and distracting, confusing and misdirecting the jury to consider the consequence and trial court's mandatory duty when undertaking their fact-finding

responsibility. It does not assist the jury to reach a verdict based on the criteria for commitment or to engage reliable fact finding. Rather, it minimized the jury's responsibility in returning a verdict and invited it to consider the very thing it should have ignored. Section 632.492 is unconstitutional, and as a result, giving Instruction 7 was an error. This Court cannot rule out the possibility that Mr. Reddig's jury improperly returned its verdict because he would be committed to the custody of DMH. The prejudice from Instruction 7 was exacerbated during the State's closing argument, where the State's attorney emphasized that Mr. Reddig had not undergone any additional treatment since his parole revocation and return to custody, and argued because of the need for treatment and a secure facility Mr. Reddig was an SVP.(Tr.376).

This Court must reverse the order and judgment of the trial court and remand for a new trial.

III.

The trial court erred in denying Mr. Reddig's motion to dismiss and in committing him to DMH as an SVP, because there is no possibility of discharge from State custody once committed, violating his rights to due process and equal protection protected by U.S. Const. art. VI, cl. 2, amends. V, VI, XIV and Mo. Const. art. I, §§2, 10, in that discharge is constitutionally required once no longer mentally ill or dangerous, but the 2006 amendments to the Act: eliminated discharge from confinement by replacing it with indefinite custody for care, control and treatment on "conditional release," which cannot terminate under the plain language of the Act; imposed punitive conditions on "conditional release;" placed an onerous initial burden on Mr. Reddig; and lack minimum due process guarantees.

Facts

Mr. Reddig's motion to dismiss the proceedings because there is no possibility of discharge, challenging the entire statutory scheme, §632.480-632.513, was denied.(L.F.5,23-24;Tr.5). He preserved the issue in his post-trial motion.(L.F.110). He argued commitment under the Act is punitive, permanent, lifetime confinement because amendments eliminated discharge and created an indefinite, unconstitutional constraint upon his liberty until his death.[4](L.F.23-24).

[4] U.S. Const. amends. V, XIV; Mo. Const. art. I, §§2, 10.

Standard of Review

Denial of a motion to dismiss is generally reviewed for abuse of discretion, while the constitutionality of statute is reviewed *de novo*. *In re Murphy*, 477 S.W.3d 77, 81 (Mo. App. E.D. 2015). Statutes with punitive consequences must be strictly construed against the State and in favor of whom the statute is used against. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy,* 208 S.W.3d 907, 913 (Mo. banc 2006). Missouri statutes and constitutional provisions must be interpreted to comply with the federal Constitution and have no effect where in conflict with federal law. *Johnson v. State*, 366 S.W.3d 11, 27 (Mo. banc 2012); U.S. Const. art. VI, cl.2. The Supremacy Clause "applies with its full force to orders of a federal court" and prevents a state court from reaching the merits on any constitutional attack on a federal judge's order. *Pennell v. Collector of Revenue,* 703 F.Supp. 823, 826 (W.D. Mo. 1989); U.S. Const. art. VI, cl. 2.

Freedom from physical restraint is a fundamental right. *In re Norton*, 123 S.W.3d 170, 173, n. 10 (Mo. banc 2003) citing *Foucha v. Louisiana,* 504 U.S. 71, 86 (1992) and *Vitek v. Jones,* 445 U.S. 480, 491-92 (1980). Because commitment impacts fundamental liberty, government action must pass strict scrutiny. *Norton*, 123 S.W.3d at 173; *Vitek*, 445 U.S. at 492("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *but see Van Orden v. Schafer*, 129 F.Supp.3d 839, 866-67 (E.D. Mo. 2015)[5](confinement under the Act did not bear rational relationship to

[5] The cited opinion addresses only the liability phase of the trial; the remedy phase continues. *Schafer*, 129 F. Supp.3d at 843.

purposes of commitment and fails shocks the conscious test), and *Karsjens v. Piper*, 0:11-cv-03659-DWF-TNL, 2017 WL 24613 (8th Cir. January 3, 2017).[6] This Court is bound to follow the last controlling decision of our State's Supreme Court and must apply strict scrutiny. *In re G.P.C.*, 28 S.W.3d3 57 (Mo. App. E.D. 2000)(must follow standard of review determined by Missouri Supreme Court),overruled on other grounds by *Barker v. Barker*, 98 S.W.3d 532 (Mo. banc 2003). Under that test, the State must prove a law is narrowly tailored to serve a necessary, compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *In re Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007).

Analysis

Commitment Before Amendments

Until 2006, the SVP Act provided for full, unconditional release of individuals from their commitment, called "discharge;" mandatory annual reviews were required for all committed men; and the burden of proof on the State was "beyond a reasonable doubt." H.B. 1290, 93d Gen Assem., 2d Reg. Sess. (Mo. 2006). Under that scheme, Missouri Courts presumed the Act was civil and that confinement was not indefinite.

[6] Overturning *Karsjens v. Jesson*, 109 F.Supp.3d 1139 (D. Minn. 2015)'s application of strict scrutiny to Minnesota's SVP law and remanding for findings on the facial due process challenges under the rational relationship test. That opinion is not final and this Court is not bound by it. *State v. Mack*, 66 S.W.3d 706, 710 (Mo. banc 2002).

Norton relied on those protections and the beyond a reasonable doubt burden of proof to uphold the Act under strict scrutiny. 123 S.W.3d at 174-76. But, Judge Wolff warned: "experience with the statute may expose serious constitutional problems," and that "if this statute is used simply to impose life sentences of confinement … this Court will have a constitutional duty to take another look." *Id* at 176,182(concurring). *Murrell v. State*, 215 S.W.3d 96, 105 (Mo. banc 2007), ruled in a 4-3 split decision that "commitment pursuant to the SVP statute is not necessarily indefinite, nor a life sentence" because the duration of confinement was linked to the purpose of confinement and "the annual review mechanism ensures involuntarily confinement … will not continue after the basis no longer exists." *Citing O'Connor v. Donaldson*, 442 U.S. 563, 575 (1975).

In re Van Orden, 271 S.W.3d 579, 585-86 (Mo. banc 2008), also said "the term of commitment is not indefinite" because annual reviews "determine if the person's mental abnormality has so changed that commitment is no longer necessary" and relied upon those protections to approve the "clear and convincing" burden of proof. *Van Orden* only looked at §632.495 and did not consider the constitutionality of the entire statutory scheme. 271 S.W.3d at 587 (Cook, concurring). The concurring and dissenting opinions raised concerns about the constitutionality of a law that did not provide unconditional release or discharge and questioned the sufficiency of the due process protections. *Id.* at 589-91 (Cook, concurring);592-94 (Teitelman, dissenting).

A time when "commitment is no longer necessary" and when involuntary confinement does not "continue after the basis no longer exists" must mean ***discharge***.

2006 Amendments

Once committed there is no discharge. Statutory amendments replaced "discharge" with "conditional release" and distinguished between one "conditionally released" and one "who has not been conditionally released." H.B. 1290. When an individual is no longer mentally ill or dangerous, §632.505 mandates "the court shall place the person on conditional release pursuant to the terms of this section" and that the person "remains under the control, care and treatment of the department of mental health." Amendments also eliminated the relied-upon mandatory periodic reviews for men conditionally released; added non-modifiable or terminable statutory conditions restricting a "conditionally released" man's liberty; permit "return" and "revocation" of conditional release without findings of mental abnormality and risk required to justify commitment; and permit indefinite deprivation of liberty by "clear and convincing evidence." §§632.492, 632.495, 632.505.

Commitment is Indefinite

There is no constitutional basis for confining someone who is not mentally ill or who is not dangerous, even if he is mentally ill. *Addington v. Texas*, 441 U.S. 418, 426 (1979); *O'Connor*, 422 U.S. at 575. Civil commitment is only constitutional provided an individual both suffers from a mental abnormality, and that mental abnormality causes the individual to be more likely than not to commit predatory acts of sexual violence if not confined. *Murrell*, 215 at 105; §632.480(5). If one of these characteristics abates,

commitment cannot constitutionally continue. *Murrell*, 215 S.W.3d at 104; *O'Connor*, 422 U.S. at 575.

By eliminating discharge and mandating conditional release under the care, control and treatment of DMH, the Act permits continued confinement of men who do not meet criteria. Conditional release "*does not* result in complete restoration of that person's liberty" and due process requires that the person be *fully* released. *Van Orden*, 271 S.W.3d at 589-90 (Cook, concurring). While commitment in *Addington* would have terminated upon successful completion of treatment, men committed under the Act "forever will be subject to state oversight," even if no longer dangerous. *Id.* at 592. (Teitelman, dissenting). Government "custody" is not limited to physical incarceration; a person supervised by the government and subject to conditions is "hardly a free man." *Nicholson v. State*, 524 S.W.2d 106, 109 (Mo. banc 1975)(discussing probationers confinement in habeas context.).

Schafer read §632.505 to "permit full, unconditional release" and to provide a mechanism for conditions of release to terminate because the probate court may modify the conditions of release. *Schafer*, 129 F. Supp.3d at 864-66. However, this Court "cannot add statutory language where it does not exist" and "must interpret the statutory language as written by the legislature." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016). A court may "modify" some conditions imposed, but it may not "terminate" conditions or grant discharge, and the individual is always subject to the statutorily mandated conditions in subsection 3. §632.505. Someone "released" under the amended version of the Act "remains committed to custody." *State ex rel. Schottel v. Harman*, 208

S.W3d 889, 891 (Mo. banc 2006); §§632.498, 632.505. This Court must presume the legislature intended to change the existing law when it amended the Act and cannot construe the statute to moot the changes. *State v. Osborn*, 504 S.W.3d 865, 878 (Mo. App. W.D. 2016). The Act is unconstitutional on its face.

Schafer confirmed it is unconstitutional as applied because commitment resulted in punitive, lifetime detention and unconstitutional punishment. 129 F.Supp.3d 839. *Schafer* found men who did not meet criteria for commitment were subjected to continued confinement, amounting to unconstitutional punishment. *Id.* at 869. *Schafer* held the nature and duration of commitment under the Act bears no reasonable relation to any non-punitive purposes for which persons may be civilly committed and said Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id*. at 867, 870.

Conditional Release Procedures

In criminal cases, the State always bears the burden of proving each and every element. *State v. Taylor*, 126 S.W.3d 2, 4 (Mo. App. E.D. 2003). A criminal defendant is never required to prove his innocence. *U.S. v. Teague*, 646 F.3d 1119 (8th Cir. 2011). However, to obtain conditional release under the Act, a committee must prove by a preponderance of the evidence that he should be released to be entitled to a second trial where the State has the burden of proving otherwise. *Coffman*, 225 S.W.3d at 443; §632.498.

At the initial probable cause hearing prior to his commitment, when the State bears the burden of proof, a man has the right to appear in person with appointed counsel, present evidence on own behalf, and cross-examine witness.§632.489. In contrast he is not entitled to be present at a hearing where he bears the burden of initial proof. §632.498. The plain language of the Act does not afford him an opportunity to present evidence or call witnesses at the hearing in support of his petition, or give any other procedures for the hearing. Only if successful at the initial hearing is he then "entitled to be present and entitled to the benefit of all constitutional protections" §632.498.5(1). And if unsuccessful there, subsequent petitions are automatically "frivolous," and presumptively denied.§632.504.

Initially the committee had to show probable cause, like the burden on the State in initial commitment hearings under §632.489, RSMo. 2000. *Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 838 (Mo. banc 2005). *Schottel* upheld the two-step release process because commitment was not indefinite, because of annual reviews. *Id.* at 839(State's burden "beyond a reasonable doubt" at release trial). *Coffman* found the two-step release procedure was constitutional under the increased initial "preponderance" burden. 225 S.W.3d at 443; §632.498, RSMo. 2004. The State still had to prove continued confinement beyond a reasonable doubt if a release trial was granted, the committee was entitled to release from commitment if he no longer met criteria, and could obtain continued, frequent reviews of his confinement. *Id. Coffman* and *Schottel*'s justifications longer exist; the burden on the government is never "beyond a reasonable doubt" and annual reviews are not required if conditionally released. §632.495, 632.489, 632.492.

Karsjens found the Minnesota SVP scheme facially unconstitutional because the discharge criteria, "no longer dangerous," was more stringent than the commitment criteria, "highly likely." 109 F.Supp.3d at 1166 (facial challenge to statutory discharge standards).It also found the law unconstitutional because it put a burden on the committed man; but the burden to justify continued confinement "should remain on the state at all times." *Id.* Because the release standard was more onerous than the admission standard, and the burden impermissibly shifted away from the government, the law was not narrowly tailored, resulting in punitive effect contrary to the purpose of civil commitment. *Id.*, citing *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997).

Imposing a burden on Mr. Reddig to demonstrate he does not qualify for confinement violates due process and equal protection by unconstitutionally shifting a burden to him. *Taylor*, 126 S.W.3d at 4; *Teague*, 646 F.3d at 1122; *State ex rel. Simanek v. Berry*, 597 S.W.2d 718, 722 (Mo. App. W.D. 1980) ("The burden is on the state to prove the mental illness and likelihood of harm and that burden remains with the state."). It permits the government to continue confining him though neither basis justifying commitment continues to exist, unless he takes an affirmative action. *See Addington*, 441 U.S. at 426; *O'Connor*, 422 U.S. at 575.

The release criteria are more stringent than the initial commitment criteria. §632.501; *see Karsjens*, 109 F.Supp.3d at 1169. The threshold for commitment is "more likely than not," but a committee must show he is no longer "*likely*" at all. §§632.480, 632.498. Our Supreme Court previously presumed §632.498 constitutional, saying the statute was "merely…a shorthand way" of referring to the preliminary showing the

individual must make "that he is not *likely* to engage in further acts of sexual violence." *Schottel*, 159 S.W.3d at 842. Making that burden even greater than the burden on the State to preliminarily seek his initial confinement is illogical and serves no purpose other than to thwart any action he may take and the likelihood of success he will have in seeking conditional release. Such a procedure cannot protect against or correct an erroneous commitment. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587.

Revocation of conditional release is without constitutionally adequate protections. After obtaining "conditional release," a man may be returned to secure confinement if the government decides he "is no longer a proper subject for conditional release" and his status may be revoked if he by a preponderance finding he is "no longer suitable for conditional release," but neither requires a determination that he is suffering from a mental abnormality or is "more likely than not." §632.505. Revocations of conditional release statuses, like probation and parole, are subject to due process protections. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). The Act does not require the State to provide written notice of alleged violations or a hearing of one subject to revocation, disclosure of the evidence against him, an opportunity to be heard in person and present evidence, counsel, confrontation rights, or a written statement by the court if revoked. *Id.* at 489; *Gagnon v. Scarpelli*, 411 U.S. 778, 783 (1973).

Punitive Conditions

A commitment law is also unconstitutional if it "imposes restrictions that are so excessive as to indicate the forbidden purpose to punish." *Schafer*, 129 F.Supp.3d at 844.

The mandatory conditions imposed on one conditionally released under §632.505 are excessive and amount to punishment. *Id.*; *Hendricks*, 521 U.S. at 361; *Van Orden*, 271 S.W.3d at 590 (Cook, concurring). "The court shall order that the person shall be subject" to twenty-one statutory conditions, "and other conditions as deemed necessary." §632.505.3. The mandatory conditions include: submission to polygraphs and penile plethysmographs, mandatory treatment participation, forced medication, waiver of privilege and confidentiality, and payment for these "services." *Id.* A man "who has not been conditionally released" is not required to submit to these constraints. "Released" men may only live in housing approved by the government and must be employed, without any exception for the elderly or infirmed. §632.505.3(1)-(2).

Where due process requires full release, *any* conditions imposed once no longer meeting criteria are excessive and punish. *Van Orden*, 271 S.W.3d at 590 (Cook, concurring). Mandatory plethysmographs, medications, waiver of privileges and confidences, and forced work are an even greater infringement of liberty. These conditions are so restrictive as to indicate a punitive intent and purpose. *Hendricks*, 521 U.S. at 361; *Schafer*,129 F.Supp.3d at 844.

Conclusion

The nature and duration of civil commitment under the Act is no longer linked to the stated purpose of the Act or any constitutional purpose. Amendments eliminating discharge and implementing a regime of lifetime custody under the control, care and treatment of DMH even if "conditionally released" permit continued confinement after

adjudication that a man is no longer mentally ill and/or dangerous and render the Act unconstitutional on its face. The statutory scheme is designed to thwart any petitions for conditional release by imposing an onerous burden on a man with no right to be present or present evidence on his behalf in support of his petition for conditional release. Then, even if he complies with the punitive mandatory conditions of conditional release, the government may return him to secure confinement merely because it believes "is no longer a proper subject for conditional release," and his status may be entirely revoked without a finding that he meets the criteria for civil commitment. The Act is not narrowly tailored to serve a compelling and legitimate state interest in a civil case.

The Act is unconstitutional. The trial court erred in denying Mr. Reddig's motion to dismiss. This Court must reverse and release him.

IV.

The trial court erred in denying Mr. Reddig's motion to dismiss because there is no least restrictive environment ("LRE"), because this violated his rights to due process and equal protection guaranteed by U.S. Const. amends. V, VI, XIV, art. VI, cl. 2 and Mo. Const. art. I, §§2, 10, in that *Schafer* found the Act is unconstitutional because it does not provide an LRE, and there is no alternative to confinement in a total lock down facility.

Mr. Reddig's motion to dismiss because there is no LRE, in violation of due process and equal protection, was denied and renewed in his motion for a new trial.[7](L.F.5,57-59,110;Tr.5). He incorporates his Standard of Review from Point III.

Analysis

Norton rejected an equal protection claim that the trial court erred in not considering LRE to confinement. *Norton*, 123 S.W.3d at 174. It did so because of procedural safeguards, specifically including proof beyond a reasonable doubt, mandated annual reviews, burden on the State to prove the individual was still an SVP and not safe to be released, "and dismissal from secure confinement." *Id.* at 174-5. The basis for *Norton*'s rejection no longer exists and Mr. Reddig has a right to avoid undue confinement, in duration and *nature*. *Foucha*, 504 U.S. at 79; *Hendricks*, 521 U.S. at 388 (Kennedy,

[7] U.S. Const. V, XIV; Mo. Const. art I, §§2, 10.

concurring); *Schafer*,129 F.Supp.3d 839. "[T]he state must tailor its confinement to the least restrictive alternative" but "[t]here is no such explicit requirement for the [LRE]" in the Act. *Norton*, 123 S.W.3d at 180 (Wolff, dissenting); *Sherrill v. Wilson*, 653 S.W.3d 661, 664 (Mo. banc 1983).

Failure to consider and provide LREs or "alternative and less harsh methods" violates equal protection and double jeopardy because it shows that the legislature's purpose was to punish. *Hendricks*, 521 U.S. at 387 (Breyer, dissenting); *Norton*, 123 S.W.3d at 182 (Wolff, dissenting). Where a purpose of a commitment law is to provide treatment, "but the treatment provisions were adopted as a sham or mere pretext" also indicates a purpose of punishment. *Hendricks*, 521 U.S. at 371(Kennedy, concurring).

Section 632.495 mandates anyone confined under the Act "shall be kept in a secure facility," unless conditionally released. Section 632.505.1 states: "[t]he primary purpose of conditional release is to provide outpatient treatment and monitoring" and prevent return to a secure facility, while at the same time specifying someone conditionally released "remains under the control, care and treatment" of DMH. *Schafer* said state actors believe "conditional release" and treatment require living in the community. 129 F.Supp.3d at 845, 855. However, the Act noticeably omits any alternative to "a secure facility" for outpatient monitoring and treatment. *Schafer* found Missouri fails to provide LREs altogether, none exist, and there were no procedures or plans in place for community reintegration or placements to accomplish this purpose. *Id*. at 868-9.

Missouri's two facilities are "high" or "maximum" security, behind prison razor wire, and patrolled by armed guards. *Id.* at 845. One "somewhat less restrictive" eight-bed

"step down" unit exists behind that patrolled perimeter for men who have been ordered "conditionally released. *Id.* at 845, 855; §632.505.1. This is not an LRE, and it is practically unavailable to the 200 plus men confined. Even so, progression through treatment, conditional release, and transfer to the unit are all impossible because the Act is unconstitutionally applied. *Schafer*, 129 F. Supp.3d at 869.

These failures have resulted in continued maximum-security confinement of men who no longer meet criteria for confinement and of those who could be treated in LREs, and amounts to unconstitutional punishment. *Id.* at 869; *Karsjens*, 109 F.Supp.3d at 1172 (finding statute was not narrowly tailored because there are no LREs). Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id.* at 870.

The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. The trial court erred in denying Mr. Reddig's motion to dismiss. This Court must reverse the trial court's judgment and release him.

V.

The trial court erred in denying Mr. Reddig's motion to dismiss and in committing him to DMH as an SVP because this violated his rights to due process and a fair trial, equal protection, freedom from double jeopardy and *ex post facto* laws, proof beyond a reasonable doubt, and to silence and to counsel, protected by U.S. Const. amends. V, VI, XIV, art. I, §9, 10; Mo. Const. art. I, §§2, 10, 13, 18, 19, in that the Federal Court found that commitment under the Act is punitive, lifetime confinement; confinement is a second punishment, and the Act's substantive and procedural protections are inadequate and unjustifiably different from any other civil commitment or punitive proceeding in Missouri.

Mr. Reddig's *Motion to Dismiss: Violation of Due Process, Equal Protection, Double Jeopardy and Ex Post Facto* was denied and renewed in his motion for a new trial.(L.F.5,44-56,110;Tr.5). He argued the entire statutory scheme, §632.480, et seq., is unconstitutional because civil commitment is a punitive, second punishment deferred until the conclusion of a prison sentence; results in lifetime custody; fails to provide adequate due process protections required in punitive proceedings; and treats him differently than anyone else in Missouri in terms of confinement conditions, duration and procedures.[8](L.F.44-66;113).

[8] U.S. Const. amends. V, V XIV, art. I, §§9, 10, art. VI, cl.2; Mo. Const. art. I, §§2, 10, 13, 18, 19.

Mr. Reddig incorporates the Standard of Review from Point III.

Analysis

When the constitutionality of the Act was first examined in 2003, discharge from commitment was possible, proof beyond a reasonable doubt was required, and the release provisions had not been challenged. *Norton*, 123 S.W.3d at 174; *Schottel*, 159 S.W.3d 836. Missouri courts did not have the befit of observing the law in action over sixteen years.

Schafer did. *Schafer* found deficiencies in the annual review process, integration of community release, and release procedures that did not comport with due process.129 F.Supp.3d at 868-9. *Schafer* concluded systemic failures resulted in punitive, lifetime detention and unconstitutional punishment in confining men who do not meet criteria for commitment. *Id.* at 844, 868-9. The Act was deemed unconstitutional as applied, in violation of due process. *Id.* The nature and duration of commitment bears no reasonable relation to any non-punitive purposes for which persons may be civilly committed. *Id.* at 867. The rights infringed "are rights protected by the constitutional guarantee of liberty, not merely state law." *Id.* at 870. If this Court accepts the findings of *Schafer*, it will come to the same conclusions and require substantial changes, necessary to meet constitutional standards. *Id.*

SVP Act is Punitive

A "civil label is not always dispositive." *Hendricks*, 521 U.S. at 361. Where there is proof that a statutory scheme is punitive either in purpose or effect, it is considered "to have established criminal proceedings for constitutional purposes." *Id.*

One purpose of commitment is to protect the public by incapacitating an individual who could commit a future crime. *Id.* at 365-66; *Norton*, 123 S.W.3d at 177 (Wolff, concurring). Mr. Reddig argued the Act was always intended to give "courts and prosecutors the tools to sentence persons found to be sexual predators to life sentences so they could remain under the jurisdiction of our criminal justice system for their natural lives."(L.F.46). To that end, as discussed in Point III, the plain language of the Act precludes discharge, mandates "conditional release" in the indefinite custody of DMH, imposed mandatory conditions, and precludes termination of mandatory conditional release and its statutory conditions. §632.505. Therefore, the Act unconstitutionally and punitively permits continued confinement of men who do not meet criteria, subject to conditions so restrictive as to further indicate punitive intent and purpose. *Murrell*, 215 S.W.3d at 104; *O'Connor*, 422 U.S. at 575; *Addington*, 41 U.S. at 426; *Van Orden*, 271 S.W.3d at 589-90 (Cook, concurring); *Hendricks*, 521 U.S. at 361; *Schafer*, 129 F.Supp.3d at 844.

The second purpose is to provide "necessary treatment." *Van Orden*, 271 S.W.3d at 58; §632.495.2. If an object or purpose of a commitment law is to provide treatment, "but the treatment provisions were adopted as a sham or mere pretext" or delayed until the end of a prison sentence so as to require further incapacitation, it would indicate a purpose of punishment. *Hendricks*, 521 U.S. at 371, 381(Kennedy, concurring; Breyer, dissenting).

The Act "commits, confines and treats[ ]offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate" and confirms a punitive intent. *Id.* at 381, 385(emphasis in original); *see* §632.483. And, while the plain language of the Act claims "conditional release" is for outpatient treatment and monitoring, the Act fails to provide anything less than a "secure facility" or outpatient residency or services, as discussed more fully in Point IV.

The stated goal of commitment is "to treat and safely reintegrate committed individuals back into the community." *Schafer*, 129 F. Supp.3d at 851. State actors believe that SVP treatment exists, is effective, and includes release. *Id.* at 858-9. However, *Schafer* found the State had no plans in place for release into the community, no community-based placement facilities existed, no one had been discharged into the community, or released as a result of completing the program. *Id.* at 845, 857, 859; *Karsjens*, 109 F.Supp.3d at 1147, 1163-64. One top DMH administrators wrote: "no one has ever graduated from [the program] and somewhere down the line, we have to do that or our treatment processes become a sham," and another: "admitted that if no one is released from an SVP civil commitment treatment program into the community within 10 years the 'logical conclusion' is that the treatment is a 'sham.'" *Id.* at 859. *Schafer* confirmed the release portion of treatment *is* a "sham." *Id.* at 868.

It found committees whose risk is below the standard for confinement had not been released, but met with "extra-statutory hurdles" like "indefinite release without discharge." *Id.* The State's failure to comply with the Act resulted in unconstitutional punishment and continued confinement of men who no longer meet criteria. *Id.* at 869; *Karsjens*, 109

F.Supp.3d at 1172. Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id.* at 870. Minnesota's failure to fully discharge anyone, and provisional release of only three individuals, evidenced failed application of the law and lack of meaningful relationship between the program and discharge from custody. *Karsjens*, 109 F.Supp.3d at 1171-72. Discharge procedures did not work as they should and the statute had the effect of lifetime confinement. *Id.* 1171-3.

Unlike other persons committed under Chapter 632, SVPs cannot receive outpatient treatment, unconditional release or treatment in LREs, despite findings of no longer being mentally ill or presenting risk of harm, and there are no time limits placed on commitment. *See* §§632.330, 632.005, 632.495.

Though *Norton* upheld the Act in 2003, Justice Wolff warned that if "the effect of the [SVP] statute were punitive, confinement would violate the Ex Post Facto and Double Jeopardy Clauses." 123 S.W.3d at 177(concurring). He also predicted that "experience with the statute may expose serious constitutional problems," and that "if this statute is used simply to impose life sentences of confinement … this Court will have a constitutional duty to take another look." *Id* at 176,182. Because the SVP Act results in punitive, lifetime detention, confinement *does* violate the prohibition on *ex post facto* laws and double jeopardy. *Schafer*, 129 F. Supp.3d at 868; U.S. Const., art. I, §§9, 10, amend. V, XIV; Mo. Const. art. I, §§2, 10, 13, 19.

Due Process & Equal Protection

Due Process protects an individual from deprivation of life, liberty and property without due process of law, and from wrongful government actions. U.S. Const. amend. V, VI, XIV; Mo Const. art. I, §§2, 10. Equal protection protects him from disparate treatment by the government and entitles him to equal rights. U.S. Const. amend. XIV; Mo. Const. art. I, §2. Civil commitment does not automatically violate due process provided the commitment takes place pursuant to proper procedures and evidentiary standards. *Hendricks*, 521 U.S. at 357, 374 (Breyer, dissenting); *Addington*, 441 U.S. at 425-27; *Foucha*, 504 U.S. at 80; *Murrell*, 215 S.W.3d at 104. Safeguards are necessary to ensure the State confines only a narrow class of particularly dangerous persons, after meeting the strictest procedural standards. *Hendricks*, 521 U.S. at 357, 364. The process must minimize the risk of erroneous decisions. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587.

The procedural and substantive safeguards relied upon to characterize the law as "civil," only "potentially indefinite," that ensured confinement did not continue after the basis for it no longer exists, and resulted in immediate release if adjudged not to meet criteria for commitment, no longer exist. *Van Orden*, 271 S.W.3d at 585-86; *Murrell*, 215 S.W.3d at 105; *Norton*, 123 S.W.3d 174-76; *Hendricks*, 521 U.S. at 363-64. Elimination of discharge and mandatory annual reviews means that the procedures do not minimize the risk of erroneous commitments or lead to discharge. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587.

Mandatory annual reviews were designed to ensure confinement did not continue after the basis for commitment no longer existed. *Van Orden*, 271 S.W.3d at 586; *see*

Murrell, 215 S.W.3d at 104. They are also "the primary tool that courts use to evaluate … whether the person should be conditionally released;" "it is nearly impossible to successfully petition for conditional release without an annual review from [DMH] recommending such release." *Schafer*, 129 F.Supp.3d at 852. *Schafer* found that the annual reviews that are performed are not performed in accordance with the statute, case law, or due process; reviewers lack training, misunderstand, are confused by, and do not consistently apply the correct legal standard in evaluating the need for continued confinement. *Id.* at 868-69.

Schafer also found that release procedures are not performed as required by due process because DMH's director had never authorized a single person to seek conditional release, and the government appeared to be "stalling or blocking" such approval, even where DMH evaluators supported conditional release. *Id.* at 869. As a result, men who did not meet criteria for commitment were subjected to continued confinement, which amounted to unconstitutional punishment. *Id.* at 869. Failures in the annual review and conditional release processes demonstrate the reviews performed have not minimized risk of erroneous commitments or led to even conditional releases, let alone restoration of liberty. *Id.* at 868. Rights to "proper risk assessment and release are rights protected by the constitutional guarantee of liberty, not merely state law." *Id.* at 870.

Burden of Proof

Due process requires the use of a burden of proof that reflects the public and private interests, *and* the risk of an erroneous decision. *Van Orden,* 271 S.W.3d at 585. *Van Orden*

initially approved "clear and convincing" because the proceedings were "civil," not punitive, and continuing review opportunities minimized the risk of erroneous commitments and meant commitment was not indefinite. 271 S.W.3d at 584-6, relying on *Addington*, 441 U.S. at 427-31. *Van Orden* did not examine a comprehensive challenge to the entire statutory scheme, or whether commitment would be "civil" if a person was unable to ever receive discharge from confinement. *Id.* at n. 5, 587 (Cook, concurring). The elimination of "discharge" and periodic annual reviews, and imposition of mandatory "conditional release" under which a man remains in the care, control and treatment of DMH renders "clear and convincing" an insufficient burden of proof. *Van Orden*, 271 S.W.3d at 585-6, *relying on Addington*, 441 U.S. at 427-31.

"[A]gainst the background of gradual assimilation of juvenile proceedings into traditional criminal prosecutions," *In re Winship*, 397 U.S. 358, 366 (1970), "declined to allow the state's civil labels and good intentions to obviate the need for criminal due process safeguards in juvenile courts" and held due process demanded the "beyond a reasonable doubt" standard because of the resulting loss of liberty. *Addington*, 441 U.S. at 427. Because of the nature of indefinite commitment without discharge, SVP proceedings have assimilated into punitive proceedings and criminal protections must apply. *Addington*, 441 U.S. at 427; *Winship*, 397 U.S. at 366; *Hendricks*, 521 U.S. at 361. "[T]he SVP law is unconstitutional insofar as it permits the state to commit an individual permanently to the care, custody and control of the department of mental health without having to prove the prerequisites to commitment beyond a reasonable doubt." *Van Orden*, 271 S.W.3d at 593-94 (Teitelman, dissenting).This Court cannot rewrite the Act; the remedy is to strike down

the unconstitutional law altogether. *See Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001)(striking down and refusing to rewrite statute).

Rights to Counsel and Silence[9]

Under the Act, men are interviewed to determine if they are SVPs while involuntarily in custody and without the right to counsel. *See* §§632.483-.484. Recognizing due process rights, the Legislature gave other individuals subject to involuntary detention and treatment the right to silence and the assistance of counsel. *State ex rel. Simanek v. Berry*, 597 S.W.2d 718, 720 (Mo. App. W.D. 1980); §202.135.2, RSMo. 1979; §§632.325, 631.145, 475.075. Before Chapter 632 evaluations, one must be advised orally and in writing that: he has the right to counsel and to communicate with counsel; the evaluation's purpose is to determine whether he meets detention criteria; his statements may be used in determinations, result in detention proceedings; and be used against him in court, among others. §632.335.

Norton held that an alleged SVP's rights were not violated when he was interviewed by the EOC evaluator without legal counsel because his due process right to assistance of counsel did not vest until the petition was filed. 123 S.W.3d at 172. Because commitment is punitive, criminal protections must apply. *Hendricks*, 521 U.S. at 361. Criminal defendants are entitled to due process rights like assistance of counsel and to silence before charges are levied, when someone is merely suspected of wrongdoing. *Miranda v. Arizona*,

[9] *See also*, Point VII.

384 U.S. 436, 467 (1966). Those rights apply to pretrial psychiatric examinations. *Estelle v. Smith*, 451 U.S. 454 (1981). And they must apply to suspected SVPs because commitment is punitive.

Jury Trial Demand

The right to a jury trial belongs exclusively to the criminal defendant, who may waive his right and obtain a bench trial with the consent of the court. Mo. Const. art. I, §22(a). The prosecution cannot object to the defense's jury waiver. The Western District upheld the State's right to demand a jury trial under §632.492 in *State ex rel. Nixon v. Askren*, 27.W.3d 834 (Mo. App. W.D. 2000). *Askren* incorrectly applied rational basis review and presumed the law was civil. *Id.* Because the Act is punitive, the right to a jury belonged exclusively to Mr. Reddig; he could waive that right and be tried by the bench by the Court's consent. Section 632.492's attempt to grant a jury right to the State and Court is unconstitutional and must yield to art. I, §22.

Conclusion

The current SVP scheme results in punitive, lifetime deprivation of liberty without procedural safeguards to protect liberty and to ensure that only particularly dangerous persons are confined under the strictest standards that minimize the risk of erroneous commitment decisions. *Schafer*, 129 F. Supp.3d at 844, 868; *Addington*, 441 U.S. at 424; *Hendricks*, 521 U.S. at 357, 364; *Van Orden*, 271 S.W.3d at 587. The procedural and substantive safeguards relied upon to characterize the law as "civil," only "potentially

indefinite," that ensured confinement did not continue after the basis for it no longer exists, and which resulted in immediate release if adjudged not to meet criteria for commitment, are gone. *Van Orden*, 271 S.W.3d at 585-86; *Murrell*, 215 S.W.3d at 105; *Norton*, 123 S.W.3d 174-76; *Hendricks*, 521 U.S. at 363-64. The Act does not protect against or correct erroneous commitments, or provide the constitutional protections necessary in punitive proceedings. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587; *Hendricks*, 521 U.S. at 363-64.

There is no reason justifying differential and constitutionally inadequate treatment under the Act. Protecting the public justifies psychiatric commitments and exercise of government's *parens patriae* power. *In re Link*, 713 S.W.2d 487 (Mo. banc 1986); *Matter of Korman*, 913 S.W.2d 416, 418 (Mo. App. E.D. 1996). The government has a compelling interest in protecting the public in criminal cases. *State v. McCoy*, 468 S.W.3d 892, 891 (Mo. banc 2015). But, the government cannot demand a jury trial, deprive liberty without proving its case beyond a reasonable doubt, compel a defendant to incriminate himself, withhold constitutional rights until formal court proceedings are underway, or achieve its goals and interests absent narrowly tailored means comporting with due process and equal protection. U.S. Const., amends. V, VI, XIV; Mo. Const. art. I, §§2, 10.The same should be true in SVP cases.

The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. The trial court erred in denying Mr. Reddig's motion to dismiss. His commitment must be reversed and he must be released from punitive confinement.

In light of the constitutional deficiencies, the Act is in conflict with the full purpose and objectives of the Due Process Clause. *State v. Diaz-Rey*, 397 S.W.3d 5, 9 (Mo.App.E.D.2013). For the State and its employees to comply with *Schafer's* directive to make substantial changes, prior Missouri rulings must give way. *Id.*; *see Van Orden*, 271 S.W.3d at 586(clear and convincing burden of proof); *Norton*, 123 S.W.3d at 174(approving secure confinement of SVPs on challenge to failure to consider LREs); *Coffman*, 225 S.W.3d at 443(approving two-step release process burdening committee); §632.505. Mr. Reddig's appeal must be transferred.

VI.

The trial court erred in denying Mr. Reddig's motion to dismiss, because this violated his rights to due process, and equal protection, protected by U.S. Const. amends. I, V, XIV and Mo. Const. art. I, §§2, 8, 10, in that §632.480(2) permits a mental abnormality finding and commitment because of a condition affecting one's emotional capacity and because a person is a "menace to the health and safety of others," without a showing that the individual has serious difficulty controlling his predatory, sexually violent behavior.

Mr. Reddig's motion to dismiss arguing the Act was unconstitutional because it did not require proof of serious difficulty controlling behavior and permitted a mental abnormality finding based solely on emotional capacity was denied and preserved in his post-trial motion.[10](L.F.5,60-64,110;Tr.5). He incorporates the Standard of Review from Point III.

Analysis

"Mental abnormality" is defined as "a congenital or acquire condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." §632.480(2). The Act unconstitutionally permits a mental abnormality finding based upon

[10] U.S. Const. amends. V, XIV; Mo. Const. art. I, §§2, 10.

a finding that an individual suffers from a condition affecting his emotional capacity that makes him a menace. §632.480(2)("condition affecting the emotional ***or*** volitional capacity"). "A 'menace' is by definition a present danger: threatening import, character, aspect; someone that represents a threat; impending evil." *Murrell*, 215 S.W.3d at 105, n. 9. This definition does not include a volitional component. One could choose to be a menace by exhibiting dangerous and threatening behaviors wholly within one's control, or by endorsing dangerous, threatening attitudes and rhetoric, without engaging in any behaviors at all.

Commitment laws must "limit confinement to those who suffer from a ***volitional*** impairment rendering them dangerous beyond their control;" this is accomplished through the mental abnormality requirement. *Hendricks*, 521 U.S. at 358. Due process requires "proof of serious difficulty controlling behavior" to "distinguish the dangerous sexual offender whose mental illness … subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 411-3 (2002); *Thomas v. State*, 74 S.W.3d 789, 791-2 (Mo. banc 2002). Neither *Hendricks* nor *Crane* considered the constitutionality of confinement based solely on "emotional" abnormality. *Crane*, 534 U.S. at 872.

Commitment because of an emotional impairment or choosing to be a menace cannot be constitutional. "[I]t is not enough to say that a person has impulses or urges to engage in particularly vile behavior;" the issue he can control his behavior. *Norton*, 123 S.W.3d at 180 (Wolff, dissenting). The government cannot regulate thoughts absent some conduct, without violating the First Amendment. *See, e.g., Paris Adult Theatre I v. Slaton*,

413 U.S. 49, 67-68 (1973)("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution."); U.S. Const. amend. I; Mo. Const. art. I, §8; *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969)("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds…"). The Act's disjunctive "or" and "menace" language permit a finding of mental abnormality based solely on emotional capacity.

Where "the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then [Courts] are bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Peters*, 489 S.W.3d at 789. *Thomas* did more than "refine" this definition; it replaced the entire last clause of the statutory definition with "*in a degree that causes the individual serious difficulty in controlling his behavior*." 74 S.W.3d at 791, n. 1. Courts "cannot add statutory language where it does not exist" and "must interpret the statutory language as written by the legislature." *Peters*, 489 S.W.3d at 792. Because commitment is punitive, the Act must be strictly construed against the State. *United Pharmacal Co.*, 208 S.W.3d at 913. The proper remedy was, and is, to strike down the unconstitutional statute altogether. *Board of Educ. of City of St. Louis*, 47 S.W.3d at 371; *Thomas*, 74 S.W.3d at 793 (Limbaugh, dissenting).

The Act is unconstitutional because it does not require proof of serious difficulty controlling behavior, and permits commitment based on a finding of lack of emotional control and choosing to be a menace, is not narrowly tailored to serve a compelling State

interest, and fails to pass strict scrutiny. This Court must reverse the judgment against Mr. Reddig and release him.

VII.

The trial court erred in overruling Mr. Reddig' objection and admitting testimony regarding Kircher's EOC determination and Mr. Reddig's statements to her, because this violated his right to due process, assistance of counsel, to silence, and equal protection, guaranteed by U.S. Const., amend. V, VI, XIV, Mo. Const. art. I, §2, 10, 18(a), 19 and §§490.065, and 632.483, in that the EOC determination is inadmissible pursuant to §632.483; Kircher's determination was irrelevant and only a component of statutory notice provided to trigger SVP screening, and was based on incomplete and insufficient information to form a reliable opinion, and Mr. Reddig did not have substantive protections at the time of her questioning, like a criminal defendant subject to investigative questioning or persons subjected to mental examinations in other civil commitment cases.

Mr. Reddig's motion to exclude and strike Kircher's EOC report and determination from evidence and to exclude any statements he made to her, was denied before the probable cause hearing and again at trial.(L.F.5,18-22;Tr.5). He argued the EOC determination was irrelevant and precluded by §§495.065, 632.483 and *Bradley v. State*, 440 S.W.3d 546 (Mo. App. W.D. 2014), and that his statements were involuntary and unwarned.[11](L.F.18-22).

[11] U.S. Const. amend. V, VI, XIV, Mo. Const. art. I, §2, 10, 18(a), 19.

Standard of review

The constitutionality of statute is reviewed *de novo*. *In re Murphy*, 477 S.W.3d 77, 81 (Mo. App. E.D. 2015). Ordinarily, the trial court has discretion whether to admit evidence at trial. *Elliot v. State*, 215 S.W.3d 88, 92-93 (Mo. banc 2007). Whether an expert's opinion is supported by sufficient facts and evidence is also a question of law. *Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, (Mo. App. S.D. 1995).

Analysis

Dr. Kircher's EOC evaluation was a screening determination. §632.483. Section 632.483.5 provides, *inter alia*: "The *determination* of the prosecutor's 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."(emphasis supplied). That section precludes use of determinations, but not assessments, like the evaluation by the multidisciplinary team ("MDT"). *Bradley*, 440 S.W.3d at 557.

In *Bradley*, the Court was only asked to examine the admissibility of the MDT assessment, not that of the EOC determination. *Id.* at 556-8. Section 632.483 precludes only "determinations" of (1)"the prosecutor's review committee, [(2)]or any member of

section 632.483 or section 632.484." §632.483.5.[12] "Several individuals and entitles…make 'determinations' (e.g., the individual issuing the EOC report, the prosecutors' review committee, the probate court, and the department of mental health). But the MDT is not among these individuals and entities." *Id.* at 557-8; §632.483.5. Dr. Kircher, however, is. *Id.*; §632.483.2. A "member" of §632.483 would be anyone individually identified, like the EOC author and probate court, or belonging to an entity listed, like the PRC or MDT. *Id.* at 557-8. Mr. Reddig correctly argued below that the *Bradley* Court was not distinguishing between the individuals involved, but rather between the duty of the individual to make an "assessment" or a "determination." Therefore, Dr. Kircher's determination was not admissible as evidence to prove whether Mr. Reddig was an SVP. §632.483.5.

Exclusion of the EOC determination under §632.483 is a logical conclusion since the determination is part of a pre-trial, and even pre-filing, screening process for the purpose of determining if someone will be referred to the MDT for further review and the Attorney General for potential SVP commitment, or released from DOC custody. Section 632.483 "sets out the procedure for instituting commitment proceedings against currently incarcerated persons prior to their release" by providing notice and the EOC to the Attorney

[12] *Bradley* misinterpreted the disjunctive "or" as "and" to make a reference to the MDT's absence from §632.484 as support for its holding. *Id*. at 588; §632.483("or any member of section 632.483 ***or*** section 632.484.").

General and MDT. *State ex rel. Parkinson*, 280 S.W.3d 70, 72-73 (Mo. banc 2009). The EOC determination is not intended to be an opinion on the ultimate issues at trial. It is merely part of the "support materials provided with notice" given to the Attorney General. *Parkinson*, 280 at 75-76. The content of the EOC does not determine whether the Attorney General may file a petition and is not "essential" to the State's considerations. *Id.* A determination that is not relevant to the State's determination to file a petition cannot be relevant to the issues at trial. This is precisely why the legislature enacted §632.489.4, requiring a full, comprehensive SVP evaluation by DMH. "It is that [court ordered] evaluation ... that supports further proceedings" and supplants the EOC determination. *Parkinson*, 280 S.W.3d at 77; *and see Fogle v. State*, 295 S.W.3d 504 (Mo. App. W.D. 2009)(EOC "report was supplanted by subsequent evaluations").

Evaluators completing comprehensive SVP evaluations rely on the full range of facts and data and cannot render opinions based only upon the DOC treatment and institutional adjustment records available to the EOC reporter under §632.483. "The SVP Act contemplates that additional discovery will be accomplished after the probable cause hearing." *Tyson v. State*, 249 S.W.3d 849, 854 (Mo. banc 2008). The subsequent DMH evaluator has access to a greater range of data, including interviews with family, associates, victims and eyewitnesses, police reports, and records relied upon by any other prior evaluators. *Id.*; §632.489. These records are generally acquired under the auspices of §632.510, which purports to permit the Attorney General to obtain otherwise privileged or confidential records. Therefore, the facts and data available to Kircher were insufficient to

support her opinion at trial, were not reasonably relied upon in the field for rendering an opinion for trial, and were not otherwise sufficient or reliable.

Prejudice

Problems with the EOC determination are not prejudicial, "so long as the prosecution does not attempt to admit it at trial" *Parkinson*, 280 S.W.3d at 77. But that is precisely what occurred here. Over Mr. Reddig's objections the morning of trial, Dr. Kircher testified against Mr. Reddig and to the substance of her EOC determination at trial and Dr. Kline testified about the EOC determination and contents of that report.(*See* Tr. 5, 152,180-81,238-275).

Mr. Reddig was interviewed by Kircher for the EOC determination while he was in DOC custody. He did not have any protections that are afforded a DOC inmate, DMH insanity acquittee, or Chapter 632 detainee at the time of his EOC interview. *See* §§632.325, 475.075, 552.050. Under the Act, men are interviewed to determine if they are SVPs while involuntarily in custody and without access counsel. *See* §§632.483-.484. *Norton* held that an alleged SVP's rights were not violated when he was interviewed by the EOC evaluator without legal counsel because his due process right to assistance of counsel did not vest until the petition was filed. 123 S.W.3d at 172. Even under that view, because the Act did not afford Mr. Reddig protections like assistance of counsel and the privilege against self-incrimination at the time of Kircher's EOC interview, protections must come at the trial level.

But, because commitment is punitive, lifetime confinement, criminal constitutional protections must apply. *Hendricks*, 521 U.S. at 361. Criminal defendants are entitled to due process rights like assistance of counsel and to silence before charges are levied, when someone is merely suspected of wrongdoing. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). A person in custody must be unequivocally warned before questioning that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." *Id.* at 467-69. Counsel is required to protect the privilege during interrogation. *Estelle v. Smith*, 451 U.S. 454, 469 (1981). That right extends to consulting with counsel before questioning, and having counsel present during questioning. *Id.*

Those rights and warnings apply to pretrial psychiatric examinations. *Id.* In *Estelle*, the United States Supreme Court held that admission of a doctor's testimony in the penalty phase of a murder trial violated the privilege against self-incrimination because Smith was not advised before the pretrial psychiatric evaluation that he had the right to silence and that any statements he made could be used against him in sentencing proceedings. *Id.* To prove Smith's future dangerousness and the probability he would commit future criminal acts, the State presented the doctor's testimony as to a diagnosis and opinion about future behavior based on information from the interview. *Id.* 459-60, 464. The Court said the privilege against self-incrimination "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves;" it is not limited to criminal court proceedings. *Id.* at 466, quoting *Miranda*, 384 U.S. at 467.

That right was "directly involved" because the State used Smith's disclosures to the doctor during the pretrial evaluation against him. *Id.* at 456. The doctor did more than an evaluation and simply reporting the results; he testified for the State on the "crucial issue of respondent's future dangerousness," acting like a State agent recounting unwarned statements. *Id.* "During the psychiatric evaluation, respondent assuredly was faced with a phase of the adversary system and was not in the presence of a person acting solely in his interest." *Id., quoting Miranda*¸ 384 U.S. at 469. Because Smith was in custody when faced with "psychiatric inquiry," his statements were not freely and voluntarily given and could not be used against him absent showing he was advised of his rights and knowingly waived them. *Id.*at 468.

Application of Gault, 387 U.S. 1, 44 (1967) held that due process requires application of criminal protections, including the right to silence, to juvenile proceedings because a juvenile's freedom was curtailed by the State. There, the juvenile made admissions to a juvenile officer and the juvenile court judge, but neither he nor his parents were advised that he did not have to make a statement, did not have to testify, nor that any incriminating statement might result in his "commitment as a delinquent." *Id.* at 43-44. The privilege does not depend on the type of proceeding, "but upon the nature of the statement or admission and the exposure which it invites." *Id.* at 49. Juvenile proceedings "may lead to commitment to a state institution, [and] must be regarded as 'criminal' for purposes of the privilege against self-incrimination." *Id.*

The Supreme Court said the civil label attached to juvenile proceedings ignored the substance of those proceedings. *Id.* at 50. "It is incarceration against one's will, whether it

is called 'criminal' or 'civil.' And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty." "[C]onfessions by juveniles do not aid in 'individualized treatment'" and compelling statements without warnings or advising him of the right to remain silent "does not serve this or any other good purpose." *Id.* at 51.

Like in *Gault*, *Schafer* was persuaded the Act resulted in punishment,, even though the proceedings were deemed "civil." 129 F.Supp.3d at 844, 868-69; s*ee Gault*, 387 U.S. at 49-50; *Allen v. Illinois*, 478 U.S. 364, 373 (1986). Because the result of commitment is punitive, lifetime confinement, the proceedings "must be considered criminal and the privilege against self-incrimination must apply." *Allen*, 478 U.S. at 368; *Hendricks*, 521 U.S. at 361.

Like in *Estelle*, during Kircher's EOC psychiatric inquiry, Mr. Reddig was in custody, faced with an adversarial system, was not in the presence of someone acting in his interest, and was not warned. 451 U.S. at 467-69. Kircher was working for the State, conducting a Chapter 632 evaluation. §632.483. Kircher's diagnosis and opinions rested on more than her observations and records review; she drew her conclusions, including those about mental abnormality and future dangerousness, critical issues at trial, from what Mr. Reddig said. *Id.* at 464, 466. In fact, she could not have known about details of his offenses or current thoughts without Mr. Reddig's statements.(Tr.258-59). Kircher did more than just report the results to the State, she testified against Mr. Reddig twice, and her report was considered and testified to by Dr. Kline. *Id.* at 467. Mr. Reddig did not initiate the psychiatric evaluation or introduce psychiatric evidence at trial. *Id.* at 468. His

statements could not be used against him, whether through admission at trial or as the foundation for expert testimony, absent showing he was advised of his rights and knowingly waived them. *Id.*at 468.

The State did not demonstrate he was sufficiently advised of his rights and knowingly waived them. *Miranda*, 384 U.S. at 475; *Berghis v. Thompkins*, 130 U.S. 370, 382-5 (2010)(heavy burden on government to demonstrate waiver; waiver must be voluntary, the product of free and deliberate choice, rather than intimidation, coercion or deception, and made will full awareness of nature of right and consequence of waiving it); *State v. Collings*, 450 S.W.3d 741, 753 (Mo. banc 2014). Statements not preceded by *Miranda* warnings are subject to suppression at trial. *Collings*, 450 S.W.3d at 753. A knowing and intelligent waiver of the right to silence is normally shown by evidence the individual was advised of his rights, asked whether he understood his rights, and gave an affirmative response. *State v. Wise*, 879 S.W.2d 494, 505 (Mo. banc 1994), overruled on other grounds by *Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008). There is no such evidence in the record.

Conclusion

Because SVP commitment results in punitive, lifetime confinement, the proceedings must be considered criminal and the constitutional right to silence applies to Mr. Reddig, just as it applies to anyone else in criminal proceedings and other civil commitment proceedings in Missouri. *Schafer*, 129 F.Supp.3d at 844, 868-9; *Allen*, 478 U.S. at 368; *Hendricks*, 521 U.S. at 361. Mr. Reddig was prejudiced by admission of

Kircher's testimony, determination, and evidence about his statements to her. We must assume the jury considered this inadmissible evidence in reaching its verdict. *Gates*, 57 S.W.3d at 396.

The trial court erred in denying Mr. Reddig' motion and in admitting his statements at trial. This court must reverse. Because the record does not demonstrate the State could have made a submissible case without use of Mr. Reddig' statements, there is no justification for remand.

VIII.

The trial court erred in denying Mr. Reddig's motion for a directed verdict and in committing him as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S. Const. amends V, VI, XIV, Mo. Const. art. I, §2, 10, and §632.495, in that the State failed to prove he suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, since its experts did not establish pedophilia caused Mr. Reddig serious difficulty controlling sexually violent behavior, predicted a 27.3% chance of any sexual recidivism, and did not demonstrate Mr. Reddig's risk was "more likely than not."

Facts

Mr. Reddig has not committed a hands-on, sexually violent offense since 2006.(Tr.230,287). Mr. Reddig pled guilty and was convicted of child molestation in the first degree and was sentenced to prison.(Tr.149,287). Mr. Reddig completed MoSOP before paroled.(Tr.174-75). He was also examined by an EOC evaluator who determined he did not meet SVP criteria before paroled.(Tr.266-67). He was on parole for over a year before being revoked and returned to DOC in March of 2014.(Tr.211).

While on parole, Mr. Reddig reported he was in proximity to children on three occasions: (1) his boss gave him a ride home with children in the car after seeing him walking home in the cold; (2) he saw his nine-year-old son; and (3) a child was inside a

residence while he fixed the plumbing.(Tr.178-79,267-69,292-93). Mr. Reddig admitted he looked at child pornography while on parole.(Tr.161,177,243).

Everyone agreed that Mr. Reddig had a pedophilic disorder diagnosis, and Drs. Kline and Kircher believed it qualified as a mental abnormality.(Tr.183-84,244,295). Dr. Kline believed Mr. Reddig had serious difficulty controlling his behavior because he continued to engage in behaviors supportive of his sexual attraction after receiving a sanction in that he watched child pornography and was around small children on parole.(Tr.189). Dr. Kircher testified Mr. Reddig had "serious difficulty" because of his use of pornography and proximity to children while on parole.(Tr.246). She agreed Mr. Reddig had never committed another sexually violent offense after being sent to prison and "seems not to have gone to a loss of control" beyond viewing child pornography.(Tr.272-73). Both evaluators agreed viewing and possessing child pornography is neither a "sexually violent offense" under Missouri law, or a predatory act of sexual violence.(Tr.212,218,262).

Both evaluators used the Static-99R to measure Mr. Reddig's risk of future re-offense and agreed his score was a 4, corresponding to a predicted group recidivism rate of 17% over five years and 27.3% over ten years.(Tr.195,200-01,209,264). Not all sex offenders reoffend.(Tr.208-09). The average rate of re-offense is 13-15%.(Tr.209,261). Data from DOC shows that individuals who complete MoSOP return to prison because of a new sex offense at a lower rate, 11-13% of the time, than those who do not complete it.(Tr.213-14). Ultimately, Drs. Kline and Kircher concluded Mr. Reddig was more likely

than not to engage in predatory acts of sexual violence if not confined in a secure facility.(Tr.204,257-58).

Mr. Reddig's motion for a directed verdict was denied and preserved in his motion for new trial.(Tr.358;L.F.91-93,109-10).

Standard of Review

Denial of a directed verdict motion is reviewed to determine if the State made a submissible case, proving each element by substantial evidence that enables a jury to reasonably decide the case. *Care and Treatment of Cokes*, 107 S.W.3d 317, 321, 323 (Mo. App. W.D. 2003). All evidence and reasonable inferences drawn from the evidence are viewed in the light most favorable to the State; other evidence and inferences are disregarded. *Id.* at 321. This Court does not supply missing evidence, nor give the State the benefit of unreasonable, speculative, or forced inferences. *Id*. at 323. This Court will reverse when the State's proof is deficient, but will remand for a new trial if it appears from the record that the State could have made a submissible case. *Id* at 324.

Analysis

Because of due process requirements, §632.495 requires the State to prove the appellant is an SVP, defined in §632.480. *Cokes*, 107 S.W.3d at 321. Section 632.480 is written in the present tense and requires a finding Mr. Reddig *presently* meets criteria and poses a danger at trial. *Murrell*, 215 S.W.3d at 104. To satisfy due process, the individual must be both mentally ill and dangerous; if one is missing, commitment is unconstitutional.

Id.; §§632.480, 632.495. Therefore, "[u]nder the plain language of the statute, a person may not be confined absent a finding he '***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." *Id.*

Whether an individual meets these requirements "turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists." *Addington*, 441. U.S. at 429. Expert opinion must be supported by the record to be admissible and if not, it is insufficient to create a submissible case. *Morgan v. State*, 176 S.W.3d 200, 211 (Mo. App. W.D. 2005); *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004).

Serious Difficulty Controlling Behavior

To prove a mental abnormality, the State had to prove Mr. Reddig (1) has a condition, (2) that affects his emotional or volitional capacity, (3) which predisposes him to commit sexually violent offenses, (4) to a degree that causes him serious difficulty in controlling that behavior. *Murrell*, 215 S.W.3d at 106, *citing Crane*, 534 U.S. 407; §632.480(2). Section 632.480(4) defines sexually violent offenses, all of which are contact offenses. *Gormon*, 371 S.W.3d at 104. Offenses not on that list, like possessing or watching child pornography, are not sexually violent offenses as a matter of law. *Id.*

The State failed to prove pedophilia predisposed Mr. Reddig to commit sexually violent offenses in such a degree that he had serious difficulty controlling that behavior. §632.480. Both experts relied upon non-predatory, non-sexually violent behaviors during Mr. Reddig's time on parole in the community to conclude he had serious difficulty

controlling his behavior at issue under the Act, predatory, sexually violent behavior. Mr. Reddig's parole behavior was particularly important because he was deemed not an SVP when he was paroled.(Tr.266-67).

Dr. Kline believed Mr. Reddig had serious difficulty controlling his behavior because he continued to engage in behaviors supportive of his sexual attraction after receiving a sanction, watched child pornography, and was around small children.(Tr.189). Dr. Kline said Mr. Reddig's behaviors as a whole were indicative of his ability to control sexual behaviors.(Tr.189). "[D]espite arrests, despite going to prison, despite treatment … he continues to engage in this risky behavior that seems to me he can't control that urge."(Tr.189-90).

Dr. Kircher testified Mr. Reddig had "serious difficulty" because of his use of pornography and proximity to children while on parole.(Tr.246). She said: "thinking about his behavior on parole, his difficulty with the pornography and his inability to even keep himself out of situations where children are, I would say it definitely does."(Tr.246). She agreed Mr. Reddig had never committed another sexually violent offense after being sent to prison.(Tr.272). Dr. Kircher explained, "[w]e certainly had high-risk situations, but it seems not to have gone to a loss of control beyond the loss of control with the pornography."(Tr.272-73).

"Serious difficulty controlling behavior" means behaviors committing a sexually violent offense.(Tr.263). Both evaluators agreed viewing and possessing child pornography is neither a "sexually violent offense" under Missouri law, or a predatory act of sexual violence.(Tr.212,218,262). The law is concerned about "sexually violent

offenses," a very specific set of "hands-on," contact offenses enumerated in §632.480.(Tr.212,261). Possessing child pornography would not qualify someone for commitment.(Tr.212). Similarly, being in the presence of children, while "risky behavior" is not a sexually violent offense in §632.480. Therefore, viewing child pornography on parole and being in proximity to children, even though previously sanctioned for a contact offense and the pornography and following treatment, cannot demonstrate that Mr. Reddig had serious difficulty controlling his sexually violent offense behavior.

Moreover, sufficient evidence of serious difficulty controlling behavior requires more than evidence that an individual repeated a harmful behavior, failing to avoid consequences. *In the Matter of the State of New York v. Donald DD*, 21 N.E.3d 239, 248 (N.Y. App. Div. 2014). Past sexual behaviors may have been opportunistic and the individual may have been willing to risk punishment. *Id.* at 249-50.

In *Donald DD*, the expert supported his opinion that the defendant had serious difficulty controlling behaviors that amounted to sex offenses because he committed rapes, was identified by the rape victims, and committed the second rape in spite of being punished for the first. *Id.* at 248. "Serious difficulty" could not be rationally inferred from this evidence, which was consistent with a defendant who could control his behavior, but had strong urges and an impaired conscience, so he chose to force sex upon someone. *Id.*

> Undoubtedly, sex offenders in general are not notable for their self-control. They are also, in general, not highly risk-averse. But beyond these truisms, it is rarely if ever possible to say, from the facts of a sex offense alone, whether the offender had

> great difficulty in controlling his urges or simply decided to gratify them, though he knew he was running a significant risk of arrest and imprisonment.

Id. The expert's testimony was legally insufficient to support a conclusion that a mental condition resulted in serious difficulty controlling sexual conduct, and the petition for commitment was dismissed. *Id.* at 249.

The evaluators' testimony did nothing more than describe a scenario in which Mr. Reddig made choices to continue using child pornography or was inside the same car or house as a child, both non-contact, non-sexually violent behaviors, in spite of the consequences. Making a choice to engage in such behavior was not conduct beyond Mr. Reddig's control and does not support a reasonable inference of serious difficulty controlling hands-on sexually violent offense behaviors. Commitment is limited "to those who suffer from a volitional impairment rendering them dangerous beyond their control" such that they have "serious difficulty controlling behavior," distinguishing them "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 411-13. Even if evaluators established Mr. Reddig had serious difficulty controlling behaviors related to child pornography, that behavioral difficulty alone is not enough. Therefore, Drs. Kircher' and Kline's opinions were not supported by the record, was inadmissible and insufficient to create a submissible case. *Morgan*, 176 S.W.3d at 210.

More Likely Than Not

The State failed to prove Mr. Reddig was "more likely than not" to commit a future offense of any kind. "More likely than not" is not defined by the Act. To meet the "more likely than not" standard, it is necessary to identify some variable that changes the base rate expectation of re-offense to a ***probability of re-offense***. *In re Coffel*, 117 S.W.3d 116, 127 (Mo. App. S.D. 2003). "A probability of re-offense" must be greater than 50%. In Missouri SVP cases, evaluators have testified "more likely than not" means greater than 50%. *See, e.g., In re Morgan*, 398 S.W.3d 483, 488 n. 7, 489 (Mo. App. S.D. 2013); *Smith v. State*, 148 S.W.3d 330, 335 (Mo. App. S.D .2004).

Elam v. Alcolac, Inc. was a toxic tort lawsuit in which the plaintiffs claimed they had an increased risk of cancer due to exposure to a carcinogen. 765 S.W.2d 42 (Mo. App. E.D. 1998). To successfully show an increased risk of cancer required proof of quantified risk through expert testimony. *Id.* at 208. Expert testimony would have to show the estimate of the probability was "more likely than not," quantified as a probability greater than 50%. *Id.* The plaintiffs were at a "very high risk" of future cancer, but the expert could not quantify that risk. *Id.* at 206-7. The expert's inability to quantify the risk rendered his opinions about future risk nonprobative. *Id.* at 208.

Washington,[13] Wisconsin,[14] and Iowa[15] also require proof of risk of re-offense of "more likely than not," or greater than 50%. *See In re Detention of Brooks*, 36 P.3d 1034, 1045-6 (Wash. banc 2001)(overruled on other grounds by *In re Detention of Thorell*, 72 P.3d 708 (Wash. banc 2003)("likely," means a statistical probability of "more likely than not, that is, more than 50[%]"); *State v. Barry L. Smalley*, 741 N.W.2d 286, 287 (Wisc. App. 2007)(jury must find "there was more than a 50% chance");*In re Detention of Shearer*, 711 N.W.2d 733 (Iowa App. 2006)(assumption "more likely than not" required likelihood greater than 50%). A Washington jury decides "whether the probability of the defendant's reoffending exceeds 50[%]" and "when an expert testifies that a person has a likelihood of reoffending, it means that of the persons who suffer from this mental abnormality or personality disorder, more than 50[%] will engage in predatory acts of sexual violence if not confined in a secure facility." *Brooks*, 36 P.3d at 1046. In Wisconsin, "'[m]ore likely than not' is not an obscure or specialized term of art, but a commonly-used expression[,]" and attorneys and experts are permitted to discuss the 50% threshold. *Smalley*, 741 N.W.2d at 289-290.

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[13] Washington's threshold is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." Wash. Rev. Code §71.09.060(1).

[14] In Wisconsin, State must prove it is "likely that the person will engage in one or more acts of sexual violence." Wis. Stat. §980.01(1m), (7).

[15] Iowa requires a finding "the person more likely than not will engage in acts of a sexually violent nature." Iowa Code §229A.2(3) (Supp. 1999).

Like in *Elam*, expert testimony had to quantify Mr. Reddig's future risk as a probability greater than 50% to prove he was "more likely than not." 765 S.W.2d at 208. Both evaluators used the Static-99R to measure Mr. Reddig's risk of future re-offense and agreed his score was a 4, corresponding to a predicted group recidivism rate of 17% over five years and 27.3% over ten years.(Tr.195,200-01,209,264). That means out of 100 men with a score of 4, 17 men were arrested or convicted of a new sex offenses and 83 were not after five years, and 27 men would be rearrested or reconvicted within ten years.(Tr.210,265).

Dr. Kircher testified that "we wouldn't know if he's in the 17—group of 17 that actually committed or was reconvicted or arrested, or would be in the 83 that didn't."(Tr.265). Dr. Kline testified "we don't know if he's going to reoffend in five years or not."(Tr.210). But, based on simple math, we do know that it is more likely than not that someone with a score of 4, like Mr. Reddig, would be in the group of 83 men who do not reoffend. We also know that 27.3%, the greatest quantified estimate of future re-offense, is not 50%.

Dr. Kline nor Dr. Kircher quantified Mr. Reddig's risk as a probability of re-offense, or an estimate greater than 50%. *Coffel*, 117 S.W.3d at 127; *Elam*, 765 S.W.2d at 208. Failure to quantify Mr. Reddig's risk as such meant the evaluators' future risk testimony was non-probative of the ultimate issue, unsupported by the record and insufficient to make a submissible case. *Elam*, 765 S.W.2d at 208; *Morgan*, 176 S.W.3d at 211. There was no basis in the record to support a finding that pedophilia makes the likelihood of committing a future predatory act of sexual violence greater than 50% or a probability of re-offense.

The trial court erred in denying a directed verdict because the State did not make a submissible case, and they could not do so if remanded. This court must reverse and release Mr. Reddig.

CONCLUSION

For the reasons stated herein, this Court must transfer Mr. Reddig's case to the Missouri Supreme Court because it involves questions of the constitutionality of statute, reserved for the exclusive jurisdiction of that court.

As demonstrated in Points III-VIII, Mr. Reddig's commitment must be reversed. Alternatively, for the reasons in Points I and II, his case must be remanded for a new trial.

Respectfully submitted,

/s/ Chelseá R. Mitchell

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Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 19,812 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On February 17, 2017 electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to opposing counsel.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell