IN THE
SUPREME COURT OF MISSOURI

IN THE MATTER OF THE CARE AND TREATMENT OF MARTIN REDDIG, Respondent/Appellant.	))))	No. SC96244

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

APPELLANT'S REPLY BRIEF

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

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JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

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

ARGUMENT

I. Strict Scrutiny Applies

The United States Supreme Court has repeatedly recognized a fundamental right to liberty, which includes freedom from physical restraint, being freed from indefinite confinement in a mental facility, and freedom from imprisonment in government custody and detention, all at issue in involuntary commitment cases. "[L]iberty from bodily restraint has always been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)(examining physical restraint of involuntary committee). "This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment." *Id*. It "can be limited only by an overriding, non-punitive state interest." *Id.*

The Court extended *Youngberg* to indefinite confinement of a man who had committed a crime at one time and could not prove he was not dangerous in *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), noting "[w]e have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty."(*quoting U.S. v. Salerno*, 481 U.S. 739, 750 (1987)).

Kansas v. Hendricks relied on *Foucha*, recognizing that the liberty interest "has always been at the core of the liberty protected" by due process, but is not absolute at all times, in all circumstances. 521 U.S. 346, 356 (1997). Therefore, commitment "in certain narrow circumstances" of certain individuals "provided the confinement takes place pursuant to proper procedures and evidentiary standards" had been upheld. *Id.* at 357. Hendricks did not identify the standard of review, but this language suggests statutes must

be narrowly tailored to achieve compelling government interests. *Hendricks* did not hold that there is no fundamental right implicated in commitments.

Again relying on *Foucha*, the Court said: "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [due process] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)(constitutionality of indefinite detention of illegal alien). The Eight Circuit said "[t]he institutionalization of an adult by the government triggers heightened, substantive due process scrutiny" and there must be a 'sufficiently compelling' governmental interest to justify such action." *U.S. v. Neal*, 679 F.3d 737, 40 (2012)(involuntary pretrial commitment for mental examination); *Salerno*, 481 U.S. at 748.

The State's request to abandon strict scrutiny is based on Thomas' dissent in *Foucha*. *See also Karsjens v. Piper*, 845 F.3d 394, 407 (8thCir.2017)(*citing Foucha*, 504 U.S. at 116 (Thomas, dissenting)). Thomas commented on the language used to distinguish *Foucha* from *Salerno*: "the Court states that the Louisiana scheme violates substantive due process not because it is not "reasonably related" to the State's purposes, but instead because its detention provisions are not "sharply focused" or "carefully limited" *Id*. at 117. He explained that "until today" the Court had given differential review to civil commitment laws and never applied strict scrutiny. *Id.* at 199, *citing Jackson v. Indiana*, 406 U.S. 715, 738(1972)("*At the least*, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."). Thomas believed due process did not preclude continued confinement, the law did not violate a fundamental right, and was reasonable. *Id.* at 125-26. The majority rejected

Thomas' position, stating it was "not consistent with our present system of justice." *Id.* at 83, n.6.[1] This Court must continue rejecting it, too.

While not explicitly stating strict scrutiny applied, *Foucha* discussed "certain narrow circumstances" in which the government could confine individuals who posed a danger. *Id.* at 80-81. For example, in *Salerno*, "legitimate and compelling" government interests were implemented by "carefully limited" application of pretrial detention statute, "narrowly focused on a particularly acute problem in which the government interest are overwhelming" and the duration of confinement was "strictly limited." *Id.* at 81; *Salerno*, 481 U.S. at 747-51. The Court said the State did not defeat Foucha's "liberty interest under the Constitution in being freed from indefinite confinement in a mental facility" and "[f]reedom from physical restraint being a fundamental right, the State must have a particularly convincing reason" for discriminating against someone who was no longer mentally ill. *Id.* at 81, 86.

Kennedy's concurrence said the Court applied "heightened due process scrutiny." *Id*. at 93. O'Connor's concurrence called for heightened standard, where commitment was "*tailored* to reflect *pressing* public safety concerns." *Id.* at 87-88. Strict scrutiny is the correct standard.

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[1] There is no formula for identifying the fundamental rights protected by due process. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597 (2015). "History and tradition guide… the inquiry" but do not settle it, and we are to "learn[] from it without allowing the past alone to rule the present." *Id.*

II. Act is Punitive

Schafer was presented with "the clearest proof" sufficient to establish that the Act results in punitive, lifetime detention bearing no reasonable relationship to a non-punitive purpose and violating due process, and was before the trial court. *Van Orden v. Schafer*, 129 F.Supp.3d at 844, 867-68, 870 (E.D.Mo.2015).(L.F.54-56). The 1998 legislative minutes for House Bill 1405, the proposed SVP Act, confirm punitive intent that SVP commitment be permanent incarceration:

> This bill is to restructure legislation signed into law in 1996, for previous sex offenders, who sentences are about to be served & released who are yet considered violent offenders to be evaluated before their release, by a panel of mental health personnel & assessed, they will be directed to programs & continued probation on their behaviorial (sic) status, & if the panel decides they are violent sexual offenders, ***their (sic) will be a civil commitment to never be set free*** to repeat this offense.

H.B. 1405, 89th Gen Assem., 2d Reg. Sess. (Mo. 1998)(included in *Appendix*).

The provisions of the Act must be considered together and cannot be read in isolation. *Alberici Constructors, Inc. v. Director of Revenue*, 452 S.W.3d 632 (Mo.banc2015). The initial commitment procedures, safeguards, and protections must reflect the punitive nature and duration of commitment, and minimize the risk of erroneous commitments.

Hendricks upheld the Kansas law as not punitive where: (1) the law did not implicated retributive or deterrent objectives; (2) the duration of confinement was linked to its purpose and an individual was entitled to immediate release if he no longer met

criteria, and (3) commitment was not indefinite because a person could only be confined for one year; Kansas was required to prove beyond a reasonable doubt that the individual continued to meet all criteria for commitment each year to continue confinement. 521 U.S. at 361-364. The Court noted the Kansas law "afforded the same status as others who had been civilly committed" and again mentioned it "permitted immediate release" if no longer dangerous or mentally ill. *Id.* at 368. Because resulting commitment was not punitive under the Kansas law, initiating proceedings did not violate constitutional double jeopardy and ex post facto prohibitions. *Id.* at 370-371.

The Missouri SVP Act is now substantially different than Kansas' law. In Missouri, the burden of proof is never beyond a reasonable doubt. §632.495. Missouri eliminated other strict procedural and substantive safeguards like mandatory annual reviews. For example, the Missouri legislature eliminated continued annual review of men conditionally released. §632.498; *but see* Kan. Stat. Ann. §59-29a18(a). There is no requirement that the State annually prove continued confinement is justified. Under the Act, the State could prove its case once, and then a man be forgotten about in custody. There is no requirement DMH seek conditional release for a man who no longer meets criteria. The nature and duration of commitment is not linked to the purpose, in fact, it bears no reasonable relationship to any non-punitive purpose of confinement. *Schafer*, 129 F.Supp.3d 839.

Commitment is lifetime; a Missourian is not entitled to discharge, but remains in the custody of DMH for the rest of his life, even if adjudicated to no longer suffer from a mental abnormality making him "more likely than not." §632.505. The conditions of confinement suggest a punitive purpose on the State's part; committees are subject to more

restrictive conditions than placed on state prisoners and other civil committees. *See Hendricks*, 521 U.S. at 363(discussing deterrence); §632.505. Like traditional punishment, the Act confines only those who have previously committed a criminal sexual offense. §632.483-.484. Nor does the Act give Mr. Reddig the "same status as others who had been civilly committed." *Hendricks*, 521 U.S. at 368; *see In re Coffman*, 225 S.W.3d 439, 445 (Mo.banc2007).

Missouri's Act no longer resembles Kansas' law, and commitment here cannot be regarded as the same there.

No Petition for Release Required to Challenge Unconstitutional Commitment

Mr. Reddig need not petition for release to challenge the statutory scheme under which he has been committed and remains incarcerated, as the State suggests.[2](State Br. 50, 59). The time to challenge the burden of proof and the procedural and substantive protections required in his initial trial is now on appeal.

Furthermore, he is constitutionally entitled to discharge in the event that he longer suffers from a mental abnormality or is no longer "more likely than not" as a result of a mental abnormality. *Murrell v. State*, 215 S.W.3d 96, 104 (Mo.banc2007); *O'Connor v. Donaldson*, 442 U.S. 563, 575 (1975). But discharge has been unconstitutionally

[2] If he challenged the procedures/standards applicable to his initial commitment when seeking conditional release or discharge, the State would argue he should have done so in his initial commitment proceeding. *Schottel v. State*, 159 S.W.3d 836, 840 (Mo.banc2005).

eliminated and replaced with continued DMH custody. §632.505. He may challenge the constitutionality of the law under which he has been committed in this appeal.

State Raises Evidence for First Time Now On Appeal

This Court does not consider evidence outside the record on appeal. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 823 (Mo.banc2011); Rule 84.04 (h); (State's Br. 54, 58). If considered, the State's new evidence provides additional proof the Act is punitive: none of the conditionally released men were discharged or released from confinement, though no longer meeting requirements for commitment; the conditions of confinement are more cumbersome now that they have been "conditionally released;" three were ordered to live in a secure nursing home facility; and three continue living in SORTS. *In re Fennewald*, 06B7-PR00024 (Boone County Cir. Ct.) (required to live at SORTS); *St. Clair*, 02PR610339 (Washington County Cir. Ct.) (conditionally released for medical reasons to secured skilled nursing facility; no indication Mr. St. Claire has been transferred to date); *Boone*, 21PR00135062 (St. Louis County Cir. Ct.) (transferred to secure skilled care facility); *Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.) (transferred to secure skilled care facility); *Seidt*, 43P040300031 (Daviess County Cir. Ct.); *Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.);[3] §632.505.3.

[3] Mandatory court-ordered conditions include: GPS, mandatory disclosure of privileged/ confidential treatment information, warrantless searches, forced polygraphs/penile plethysmographs, and increases in supervision at any time the State believes he requires it. *Richardson*, 06PS-PR00236; §632.505. These conditions apply to Boone, Blanton and

Remedy

The Act does not result in "civil" confinement and fails to pass strict scrutiny. One remedy necessary is constitutional release procedures. However, the "systemic failures" of the release-portions of the Act and the punitive nature and duration of confinement require commensurate protections in the initial commitment process under the Act, like the "beyond a reasonable doubt" standard. Declaring that standard applies to the proceedings and granting a new trial does not remedy the double jeopardy, ex post facto, due process and equal protection violations, which prohibit application of the law to Mr. Reddig.[4] This Court cannot rewrite the Act; it must strike it down. *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo.banc2001).

Seidt, but not men who are "committed" but not "conditionally released." *See* §632.480, et seq.

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

III. Conditional Release Is Not Discharge

The State acknowledges that the 2006 amendments replaced discharge with conditional release, but argues conditional release can function like discharge and that all conditions of release can terminate.(State's Br. 54, 48-49). The State reads "physical commitment" language into *Norton, Van Orden* and the Act that does not exist. Conditional release cannot "function like a dismissal" because one conditionally released "remains under the control, care and treatment" of DMH. §632.505. That issue was not presented in *Van Orden*.

If released from immediate *physical* incarceration on conditional release, the Act "imposes conditions which significantly confine and restrain [Mr. Reddig's] freedom." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). Those conditions were not discussed by the prior opinions the State now cites. Unlike the State now attempts to read into the Act, the Act does not authorize removal of "all of the conditions for release."(State Br. 49). The Act mandates that when anyone is adjudicated to no longer be mentally ill and/or dangerous, "the court ***shall place the person on conditional release*** pursuant to the terms of this section" and "***shall order*** that the person ***shall be subject to the following conditions*** and other conditions as deemed necessary." §632.505.1,.3. "The court may ***modify***[5]

[5] "To make less extreme." Modify,MERRIAM-WEBSTER,https://www.merriam-webster.com/dictionary/modify (visited Feb. 23, 2017).

conditions of release" but not "***remove***" or "***terminate***"[6] them. §632.505. This is exemplified in the conditional release cases cited by the State.(State's Br. 54, 58).

This type of lifetime confinement does not comport with a constitutional SVP commitment scheme. *Hendricks*, 521 U.S. at 364, 369; Kan. Stat. Ann. §59-29a19 (discussing final discharge); Kan Stat. Ann. §59-29a11 (distinguishing conditional release from final discharge). This Court cannot rewrite the Act; it must strike it down. *Board of Educ. of City of St.* Louis, 47 S.W.3d at 371.

[6] "Coming to an end or capable of ending;" "to come to an end in time or effect." Terminate,MERRIAM-WEBSTER,https://www.merriam-webster.com/dictionary/terminate (visited Feb. 23, 2017).

VI. LRE

Denying an LRE is incongruent with a constitutional SVP scheme that provides "essentially the same conditions as any involuntary committed patient in the state mental institution." *Hendricks*, 521 U.S. at 636. The constitutional Kansas law provides transitional release placement outside of the secure commitment facility. Kan. Stat. Ann. §59-29a02, §59-29a08.

"Due process requires the government, when it deprives an individual of liberty, to fetter his freedom in the least restrictive manner." *Neal*, 679 F.3d at 741. The Act does not comport with due process because it does not require the State to show a compelling interest in total-lock down confinement versus least restrictive environments, or the court to even consider it. Nor does it comply with equal protection. "[T]he State cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." *Jackson*, 406 U.S. at 727, *relying on Baxstrom v. Harold*, 383 U.S. 107 (1966). Criminal conviction, sentences, or propensities do not justify discriminatory treatment. *Baxtrom*, 383 U.S. at 115; *Humphrey v. Cady*, 405 U.S. 504, 510, 511 (1972).

Such was the case in Humphrey, where the general commitment statute afforded a jury demand, but the Sex Crimes Act did not. 405 U.S. at 512. The Court rejected the State's argument that discrimination was justified because of a criminal conviction and said an equal protection claim would be "especially persuasive" if a committee was deprived the right or other protections "merely by an arbitrary decision of the State to seek his commitment under one statute rather than the other" and remanded. *Id.* at 511, 506.

Others civilly committed in Missouri have the right to LRE placement. *See* §630.115("Each patient, resident or client shall be entitled to the following without limitation:…To be evaluated, treated or habilitated in the least restrictive environment."); §632.365(upon involuntary detention order, the director "shall determine where detention and involuntary treatment ***shall take place in the [LRE],*** *be it in patient or outpatient setting*."); §632.385.

Mr. Reddig has been, and will be, denied an LRE because the State sought SVP commitment, rather than general commitment. Protecting the public is a State interest for both commitments; it cannot justify differential treatment once committed. *In re Norton*, 123 S.W.3d 170, 174 (Mo.banc2003); *Humphrey*, 405 U.S. at 511; *Jackson*, 406 U.S. at 727. Even if it could, the narrowly tailored means *Norton* relied upon – discharge, "beyond a reasonable doubt," and annual examinations and mandatory court review that lead to release– no longer exist. 123 S.W.3d at 174.

V. Burden of Proof

The United States Court has never approved the clear and convincing burden of proof in SVP proceedings. The burden of proof in the constitutional version of the law presented in *Hendricks* was beyond a reasonable doubt. 521 U.S. at 353.

Because there is no discharge and confinement is punitive, beyond a reasonable doubt is the only acceptable burden of proof. Mr. Reddig challenged the entire statutory scheme, and argued the 2006 amendments rendered the Act punitive.(L.F.23-26, 44). He specifically argued the Act lacked "the procedural and substantive safeguards required in criminal prosecutions" and included HB 1290, which reduced the burden of proof to "clear and convincing."(L.F.24, 32). Mr. Reddig argued that due the Act violated his rights to substantive and procedural due process, and to equal protection.(L.F.53). His complaint is preserved.

Where a law is punitive in purpose or effect, it creates criminal proceedings for constitutional purposes. *Hendricks*, 521 U.S. at 361. "In criminal proceedings, because of the implication on the defendant's liberty interest, the state has the burden of persuading the factfinder of guilt beyond a reasonable doubt, a burden that imposes almost the entire risk of error on the state." *In re Van Orden*, 271 S.W.3d 579, 585 (Mo.banc2008). This Court cannot rewrite the Act to require the appropriate burden of proof; it must strike it down. *Board of Educ. of City of St. Louis*, 47 S.W.3d at 371.

VI. Jury Trial

Every other civil committee has an absolute right to a bench trial. Under §632.335, proceedings are only conducted before a jury if the Respondent so requests. *And see* §632.350. The two different commitment schemes are substantially similar and are not mutually exclusive; the only difference is the predicate prior sex offense.

In *Baxstrom*, a convicted prisoner was involuntarily confined for treatment without a jury trial at the expiration of his sentence. 383 U.S. at 109-10. Equal Protection required the same jury right as granted to all others civilly committed and criminal propensities could not justify discrimination. *Id*. at 115. In *Humphrey*, a sex offense conviction did not justify discriminatory treatment when everyone else in involuntary commitments had the right to a jury. 405 U.S. at 510. If the State cannot discriminatorily deny a jury trial, then it cannot discriminatorily demand one, either. The right to waive a jury must extend to SVPs.

In fact, the United States Supreme Court said denying a jury trial may be justified by "some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary." *Id.* at 512. That is the case here. Judge Wolff observed that when the State brings an SVP case before a jury, "it is a fairly safe bet that [the individual] will not be seen at large anytime this century." *State ex rel. Parkinson*, 280 S.W.3d 70, 78 (Mo.2009)(concurring). He also noted "the reprehensible nature of the offenses makes observance of constitutional safeguards very difficult," "the public's natural revulsion for all sex crimes," and aptly pointed out that "once the state decides to

proceed to commit one of these offenders, it can hardly lose." *Norton*, 123 S.W.3d at 177-78, 182(concurring).

> The fact that juries regularly find convicted sex offenders to be sexually violent predators should come as no surprise. Even where there is doubt about whether the offender has a mental abnormality, what juror wants to free someone who may someday molest another child?

Id.

It also violated due process requirement of infringement upon Mr. Reddig's liberty in the least restrictive manner, here a bench trial. *Neal*, 679 F.3d at 741.The State offered no evidence to establish a compelling interest, and the trial court did not require any or seriously consider Mr. Reddig's objections. There is no evidence to establish the State complied with due process or equal protection.

VII. Rights to Silence & Counsel

The State fails to appreciate that Mr. Reddig claimed the right to silence under the Fourteenth Amendment's Due Process and Equal Protection clauses, in addition to the Fifth Amendment. It also incorrectly claims Mr. Redding's only argument is that the act is punitive.

Mr. Reddig's Fourteenth Amendment due process and equal protection argument is like that in *Bernat v. State*, 194 S.W.3d 863, 866-867 (Mo.banc2006): he claims that since all others subject to criminal proceedings and to civil commitment in Missouri have the right to remain silent, he must as well. §§632.325, 631.145, 475.075, 632.335. (*And see* Appellant's Br. 61). A criminal conviction and sentence are insufficient to justify less procedural and substantive protections for Mr. Reddig than generally available to any other person subject to civil commitment. *Jackson*, 406 U.S. at 724. And at the time of the EOC interview, Mr. Reddig was similarly situated to anyone else facing a pretrial psychiatric inquiry that could lead to commitment in DMH. "[A]pplication of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid purposes of civil commitment." *Allen v. Illinois*, 478 U.S. 364, 381 (1986) (Stevens, dissenting)(decided by 5-4 majority).

Recognizing the liberty interest at stake and constitutional protections necessary in SVP proceedings, Kansas law requires a putative SVP to be informed prior to any evaluation, including the screening evaluation, of the nature and purpose of the evaluation and that the individual's statements will not be kept confidential and may be used in any SVP proceeding. Kan. Stat. Ann. §59-29a03(c)(2), §59-29a05(e).

VIII. Kircher

The rules of preservation of error are not to enable the appellate court to avoid review or make preservation of error difficult for the appellant, but instead to enable this Court to define the precise claim made. *State v. Pointer*, 887 S.W.2d 652, 654 (Mo.App. W.D.1994). Mr. Reddig's claims of error are clear from the record: he challenged the admission of the ECO author's determination and testimony under §632.483; his statements to Dr. Kircher; and argued admission of the same would prejudice him and violate his rights to silence, counsel, due process and equal protection because §632.335 provides the right to silence to involuntary committees, §632.325[7] requires pre-evaluation notification of rights, and the proceedings had become punitive in purpose or effect.[8](L.F.18-22).

Denying the motion was a ruling that those statutory and constitutional rights did not apply to Mr. Reddig. He renewed his objection the morning of trial.(Tr.5). Therefore, it likely would have been futile for defense counsel to have made any further objections and request. *State v. Long*, 140 S.W.3d 27, 32, n.7 (Mo.banc2004). "The law does not compel the undertaking of a useless act for the lone aim of complying with a technical requirement." *Id.* (citation omitted). In the event that this Court finds Mr. Reddig's request

[7] Appellant's brief contains a typographical error; "§632.335" should read §632.325 on page 37. Section 632.325 pertains to pretrial rights at the time of an examination, discussed in Appellant's brief; §632.335 applies to hearings.

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

to exclude Dr. Kircher and his statements to her was not preserved, then he requests plain error review under Rule 84.13(c) because the errors in admitting this evidence affected his substantial rights and resulted in a manifest injustice and/or miscarriage of justice.

IX. Juror 30

In *Wingate by Carlisle v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 914 (Mo. 1993), the appellant complained that a trial judge erred in denying a new trial based on a juror's purported nondisclosure of prior lawsuits on an unauthorized juror qualification form. The appellant did not ask any questions about prior lawsuits in voir dire. The Court held there was no error in denying a new trial based on an unauthorized questionnaire. *Id.* at 915.

Unlike in *Wingate*, the record here conclusively demonstrates that the State's attorney specifically asked questions about the issue at hand: whether jurors were precluded from serving because they, or someone close to them, had been the victim of a sexual crime. The State's framed the question in terms of being precluded from service:

> If you walk in here, you're over 18, you can understand the English language, so you can at least read the jury instructions and a few other basic things, you get to -- you can be eligible to serve on just about anything, but maybe you know something about the case, maybe you know something about the parties involved *or maybe you've had something happen 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.***

(Tr.30, excerpt included in Appendix). In any event, Mr. Reddig requested, but was denied, the opportunity to ask questions of Juror 30, because the trial court incorrectly interpreted

and applied the laws relating to juror qualification and substitution.(Tr.131-132); *see* §§494.470.3, 494.485.. "A court can abuse its discretion through the application of incorrect legal principles, and when the issue is a purely legal one, our review is *de novo.*" *In re Doyle*, 428 S.W.3d 755 (Mo.App.E.D.2014), *citing State v. Taylor*, 298 S.W.3d 482, 492 (Mo.banc2009).

State v. Jefferson, 818 S.W.2d 311, 312-13 (Mo.App.E.D.1991) does not assist the State, either. There a criminal defendant used a peremptory strike on a juror, and discovered midway through trial that juror was not a resident of the county, and therefore was not qualified for service; he requested a mistrial. *Id.* On appeal, the court noted that, unlike the case at hand, "Nothing in the record indicates any attempt was made at trial to determine the residence of the venireman." *Id.* at 313.

X. §632.492 Jury Instruction

In Missouri, the only time a similar instruction might be given upon the request of a criminal defendant who affirmatively raised an NGRI defense. §552.030.6; 552.040; MAI-CR 4th 406.02 (included in Reply Appendix). Mr. Reddig did not raise an affirmative defense or request Instruction 8. There is no justification for §632.492's discrimination. Section §632.492 did not always mandate giving the "control, care and treatment" instruction; that was added in 2001. S.B. 267, 91st Gen. Assem., 1st Reg.Sess. (Mo. 2001). The Kansas commitment scheme, declared civil and constitutional in *Hendricks*, does not include this mandate. §59-29a07, Kan. Stat. Ann.

In *State v. Erwin*, this Court said pattern instruction MAI-CR3d 310.50 did not misstate the law, but violated due process. 848 S.W.2d 476, 483 (Mo.banc1993). It read: "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct." *Id.* at 481. That instruction did not relate to other instructions, but was a standalone comment on the evidence of intoxication. *Id.* at 483. It created a reasonable likelihood that the jury would believe if the defendant was intoxicated, he was criminally responsible, thereby relieving the State of its burden of proof as to a statutory element and violating his constitutional right to due process. *Id.* The error giving that instruction was not cured by giving a general instruction placing the burden on the State. *Id.* It was impossible to say the error was harmless beyond a reasonable doubt because a substantial issue existed about the defendant's mental state. *Id.*

Just as intoxication is irrelevant to a defendant's mental state, "control, care, and treatment" in DMH custody is irrelevant to an SVP's. *Id.* at 484. Instruction 6 directed the

jury to determine if a mental abnormality made Mr. Reddig more likely than not to engage in predatory acts of sexual violence unless confined.(L.F.102). Instruction 7 went beyond the issues for trial, as a standalone comment on "control, care, and treatment" in DMH custody.(L.F.103). It created a reasonable likelihood that the jury would believe if Mr. Reddig needed care or treatment, he should be committed as an SVP, thereby relieving the State of its burden of proof as to each element and violating his right to due process. That is precisely what the State argued: "It's because he has these urges, these uncontrollable urges, ***and he needs treatment, and he needs to be in a secure facility***."(Tr.376). Giving Instruction 6 did not cure this error, nor giving the general burden of proof instruction in Instruction 5.(L.F.101).

If anything, Instruction 7 was a roving commission submitting an abstract legal statement that allowed the jury to "to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose" commitment. *City of Harrisonville v. McCall Srvc. Stations*, 495 S.W.3d 736, 746 (Mo.banc2016). The mandated instruction was misleading in the context of the evidence at trial; there was no testimony or evidence about "control, care, and treatment" in DMH at all or what would happen after the jury's verdict. *Id*. It invited the jury to ponder matters not within their province, distracted them from their factfinding possibilities, and created confusion. It did not minimize the risk of erroneous confinements, narrowly limit confinement, or pass strict scrutiny. A commitment based on such an instruction did not take place pursuant to proper procedures and safeguards. This Court cannot rewrite the Act; it must strike it down. *Board of Educ. of City of St*. Louis, 47 S.W.3d at 371.

XI. Sufficiency of the Evidence

Mental Abnormality: Serious Difficulty Controlling Sexually Violent Behavior

The State essentially argues that it need not prove an individual has serious difficulty controlling sexually violent behavior in order to commit them under the Act.(State's Br. 74-75). This argument not only ignores the testimony of the State's witnesses at trial that the behavioral control at issue means sexually violent offense behaviors (Tr.263), it also ignores the plain language of the "mental abnormality" definition.

"Mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior." *Thomas v. State*, 74 S.W.3d 789, 792 (Mo.banc2002)(modifying §632.480(2) definition with "serious difficulty" language). The "serious difficulty" language expresses the degree of lack of control over the behavior specified in the plain language of the Act: sexually violent offenses. §632.480(2). Thus, it is clear that the condition serving as the basis of a mental abnormality must "*predisposes the person to commit sexually violent offenses*," and it must do so in a degree causing him serious difficulty in controlling that behavior.

Adopting the State's interpretation leads to an absurd result. Under its formulation, a person could have a mental abnormality if the State proved he had serious difficulty controlling his drug use, doughnut-eating, or game-show watching behaviors. This is nonsensical. The issue at trial was whether Reddig was a sexually violent predator, not an addict or sweets-fiend or fan of bad television.

The cases relied upon by the State do not assist it. In *Amonette v. State*, 98 S.W.3d 593, 601 (Mo.App.E.D.2003), the Court said, "We find that there was sufficient evidence to support a finding that appellant was a sexually violent predator in that he had "*serious difficulty in controlling his sexually violent behavior*." (SVP committed various sexual acts on children, sexually acted out during treatment; as well as observed hugging and holding hands with girls at a bus stop).

In re Collins, 140 S.W.3d 121, 126 (Mo.App.E.D.2004), the Court said the following evidence supported a finding of "serious difficulty controlling behavior:" testimony the respondent was predisposed "to-reoffending" and describing his volition "as being so affected that he will continue and continue for many years to molest children;" and evidence he sought out situations in which to be isolated with children.

Pate's criminal history included attacking and sexually assaulting women on the street; abducting women and teenage girls by force, then sexually assaulting them; and raping an 8-year-old while on drugs. *In re Pate*, 137 S.W.3d 492, 494 (Mo.App.E.D.2004). Pate resumed using drugs immediately upon parole release and was arrested for forcible rape. *Id.* Therefore, experts testified Pate was predisposed to commit sexually violent offenses, and cited his frequent arrests for sexual and nonsexual offenses and ongoing substance abuse, as evidence of difficulty in controlling his behavior." *Id.* at 497-98.

In re Dunivan, 247 S.W.3d 77, 78 (Mo.App.S.D.2008), the expert cited Dunivan's combination of 12 charges and convictions for sexual offending behavior, interventions that entailed "significant prison terms," and that he continued to sexually act out and make sexualized threats while incarcerated. *In re Doyle*, 428 S.W.3d 755, 763 (Mo.App.E.D.

2014), referenced expert testimony that preoccupation with sex was a *risk factor* increasing risk of re-offending; it does not stand for the proposition that sexual preoccupation is related to a mental abnormality determination or serious difficulty controlling behavior.[9]

In these cases, it is clear that expert opinions were based on evidence consisting of sexually violent offense behaviors: repeated arrests for abducting and sexually assaulting women, sexually acting out or threatening sexual assaults, having physical contact with children, seeking out one-on-one contact with children where a sexually violent act could occur. In contrast, here the experts cited to Mr. Reddig's behavior on parole as evidence of "serious difficulty controlling behavior."[10]

Dr. Kline testified that "People can learn to control their urges, but that's different than the actual urges disappearing."(Tr.191). "It just doesn't work that way" for the disorder to disappear.(Tr.191). Dr. Kline said he looks at whether someone learns from

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[9] The State appears to confuse a mental abnormality finding with a future risk finding. (State Br. 76-77). In any event, there was no testimony that experts in the field rely on incidental proximity to children and child pornography use in determining whether someone has serious difficulty controlling their sexually violent behavior.

[10] The State cites to facts that occurred before Mr. Reddig was sanctioned for the underlying sexually violent offense, which were *not* relied upon by the experts as evidence of serious difficulty controlling behavior.(State Br. 75). The experts' testimony made it clear that the evidence of serious difficulty controlling behavior occurred *after* sanction with imprisonment.(Tr.189).

treatment to stop their urges before going on to offend.(Tr.189). He said Mr. Reddig watched child pornography after going to prison.(Tr.189). Mr. Reddig reported this to his parole officer. (Tr.178). This is nothing more than an example of learning to control one's behavior so as not to reoffend against children. In fact, after going to prison for the underlying sexually violent offense, Mr. Reddig never committed another sexually violent offense against a child.(Tr.272-273).

Dr. Kline and Dr. Kircher also said Mr. Reddig was around children after prison.(Tr.189). Kline did not know the details.(Tr.179). There was evidence that Mr. Reddig was in proximity to children on three occasions while on parole: (1) Mr. Reddig told his parole officer that his boss gave him a ride while the boss's wife and children were in the car, after seeing Mr. Redding walking on the road in the wintertime (Tr.267,292); (2) Mr. Reddig went to a friend's house to fix the plumbing and a child was incidentally in the home, along with other four other adults (Tr.268-269); and (3) Mr. Reddig saw his own son (Tr.268,293). There was no testimony Mr. Reddig sought out these incidental contacts with children, or that he behaved inappropriately around them.

These incidental contacts do not rise to the level of deliberately seeking out opportunities to be alone with children like in *Collins*, 140 S.W.3d at 126. In fact, there was no testimony he had physical contact with any child, let alone intimately hugged or held one's hand. *Id*. Mr. Reddig did not make threats of sexual violence against anyone, nor was he arrested upon suspicion of committing a sexually violent offense while on parole. *Dunivan*, 247 S.W.3d at 79; *Pate*, 137 S.W.3d at 494. No expert testified his volition was so impaired that "he will continue and continue for many years to molest

children." *Collins*, 140 S.W.3d at 126. There was no claim he sexually acted out. *Amonette*, 98 S.W.3d at 601; *Dunivan*, 247 S.W.3d at 79.

More Likely Than Not

In discussing his risk assessment, Dr. Kline testified "we want to look at the person's actual risk to commit an offense."(Tr.191). "Actual risk" is conveyed by percentages and expressing the chance or likelihood of re-offense. *See In re Nelson*, 375 S.W.3d 885, 889 (Mo.App.S.D.2012). Therefore, the State's witness put quantifiable risk at issue in Mr. Reddig's case.

Dr. Kline continued: "*So it's not just the pedophilia*; it is other factors that drive whether or not somebody commits a sexual offense."(Tr.191). He said, "I look for all factors that – that might affect the person's chance that they're going to recidivate in the future or commit new future – future sexual offenses."(Tr.192). But that is not what the SVP law requires. Once the State proves an individual suffers from a condition predisposing sexually violent offenses in such a degree that he has serious difficulty controlling his behavior, the State must then prove that *that* mental abnormality makes the person "more likely than not." §632.480(5); *Murrell*, 215 S.W.3d at 104. Dr. Kline's assessment method cannot prove *pedophilia* makes Mr. Reddig "more likely than not."

Dr. Kircher employed the same method, using actuarial instruments and other factors, to make a conclusion about future risk.(Tr.264). At trial, she agreed pedophilia has to cause the future risk:

> Q. All right. So in addition to having a mental abnormality, *that mental abnormality actually has to make the person more likely than not* to commit again predatory acts of sexual violence if he's not held in a secure facility, correct?
>
> A. That is the requirement of the statute, yes.

(Tr.263)(emphasis added).

The State failed to prove by clear and convincing evidence that the mental abnormality of pedophilia makes Mr. Reddig more likely than not to commit predatory acts of sexual violence if not confined. The State failed to adduce any evidence about the degree of risk caused by the alleged mental abnormality of pedophilia.

At most the State proved that actuarials predicted a combination of risk factors made the likelihood Mr. Redding would reoffend with any sexual offense 17%.(Tr.195,200-01,209,264). That actual estimate of risk is not a probability of re-offense, or as the State now contends, does not make him "more likely to offend than likely not to offend."(State Br. 78). When the percentage of risk is under fifty percent as determined by an assessment, other variables may be considered to reach a conclusion that the defendant is "more likely than not" to engage in predatory acts of sexual violence." *In re Underwood,* WD79194, *20 (May 2, 2017). But, there was no testimony explaining how any dynamic risk factor, or combination of factors, combined to increase Mr. Reddig's risk by 34%, to permit a conclusion that he was "more likely than not." And there was no testimony that pedophilia caused any particular degree of risk at all.

The State failed to prove the mental abnormality of pedophilia makes the likelihood that Mr. Reddig will commit future predatory acts of sexual violence greater than 50%. In

terms of "actual risk" discussed at trial, the evidence showed an 83% chance Mr. Reddig would *not* reoffend.(Tr.210,265). In the face of this evidence, the State could not prove that pedophilia made Mr. Reddig "more likely to offend than likely not to offend." There was a complete absence of probative fact to support the judgment.

CONCLUSION

As demonstrated in Points III-VIII of Appellant's Brief and the supporting arguments contained within this Reply Brief, Mr. Reddig's commitment must be reversed. Alternatively, for the reasons in Points I and II of his brief, his case must be remanded for a new trial.

Respectfully submitted,

/s/ Chelseá R. Mitchell

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

Certificate of Compliance

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 7,348 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell