IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	No. SC96076
WILLIAM HOPKINS,	)	
Respondent/Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
TENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE JOHN JACKSON, JUDGE

APPELLANT'S 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

Hopkins appeals his commitment to the Department of Mental Health("DMH") as a Sexually Violent Predator("SVP"), following a jury trial in Marion County, Missouri.

This appeal presents questions concerning the constitutionality of provisions of the SVP Act("the Act") reserved for the exclusive jurisdiction of this Court. Mo. Const., art. V, §3.[1]

[1] The Record on Appeal consists of a Transcript(Tr.), a Legal File(L.F.), and Supplemental Legal File(Supp.L.F.). Unless otherwise noted, all statutory references are to RSMo. 2000, cumulative through the 2013 supplement.

FACTS

In 2007, when he was 18 years old, Appellant Greg Hopkins had sexual contact with C.P.2 and T.P., girls ages six and eight, and with eight-year-old M.B.(Tr.433-5,644,646). The contact involved sexual touching and undressing in front of the girls.(Tr.433,435). Hopkins was convicted of domestic assault and first degree child molestation, and sent to prison.(Tr.435,644,646).

At age 15, Hopkins either attempted to have four-year-old N.L. perform oral sex on him, or performed oral sex on N.L.(Tr.430). Hopkins was sanctioned, placed in treatment and released at age 18.(Tr.430-31,433). As a result of statements Hopkins made when in that treatment, he was investigated for watching pornography and performing oral sex on C.P.1 when C.P.1 was 5 and Hopkins was 15 years old.(Tr.429;249). Police interviewed C.P.1, who told them that nothing happened.(524).

There was also an allegation that Hopkins had sexual contact with a five-year-old friend of M.B.(Tr.438). Hopkins viewed child pornography, starting at either age 15 or age 19, but that is not sexually violent behavior.(Tr.432,497).

Missouri DOC statistics demonstrate that in Missouri, sex offenders return to Missouri prison for another Missouri sex offense at an observed rate of 3.3%.(Tr.522, Ex. C).

Treatment

While in prison, Hopkins participated in MoSOP.(Tr.439). Though Hopkins had some problems there, a treatment team of psychologists, psychiatrists, the clinical director

and program director determined that Hopkins completed the program, finishing it to the program's satisfaction.(Tr.440,593). According to DOC statistics, completing MoSOP reduces the risk of recidivating to 2.6%.(Ex.C).

In MoSOP, Hopkins learned that he misunderstood his own childhood sexual abuse as love and affection.(Tr.535). He also learned that sexual contact with children was not an expression of love and was not acceptable behavior.(Tr.535).

Shawn Lee, Hopkins' MoSOP therapist, testified that Hopkins' work was very thorough, going above and beyond what he was asked to do.(Tr.604). Lee testified Hopkins had impulse control issues, which involved getting angry in response to assignments or interactions in MoSOP groups.(Tr.588). He testified Hopkins was able to manage anger and his anger decreased.(Tr.608). Hopkins did not search out images of children, express any intent to commit another offense, did not talk about children outside the context of treatment, did not make inappropriate sexual comments, and did not get any misconduct violations while in MoSOP.(Tr.614-5).He said Hopkins was very well behaved in MoSOP.(Tr.615).

Lee believed Hopkins has the ability to keep from reoffending, it came down to a choice.(Tr.605). He did not assess the SVP trial issues.(Tr.613).

Telander

Randy Telander, DMH psychologist, testified for the State.(Tr.420). Telander had not had contact with Hopkins since November of 2014, and had no information about Hopkins current to the time of trial.(Tr.488,547,573).

Telander diagnosed Hopkins with pedophilia, which he said is "essentially interest and behavior in prepubescent children."(Tr.427). The 2007 conduct was the most recent pedophilic behavior.(Tr.489). Telander did not know if the two 2007 offenses happened more than six months apart, which is a diagnostic criterion for pedophilia.(Tr.485). There was no evidence Hopkins sought out children, engaged in general or sexual conversations about children, expressed any ideas or intent to engage in sex with children while in prison, talked about sex outside of sex offender treatment, he was never viewed masturbating, and was never alleged to have engaged in any sexual activity while in prison.(Tr.491, 503).

Hopkins told Telander that he is not interested in children for sex, that he was never sexually interested in children, and that the offenses happened because the children were around, not because of something specific to children.(Tr.447,486-7). His sexual thoughts involved age appropriate women, 25-40 years old.(Tr.487).

Telander said a diagnosis does not mean that someone has a mental abnormality, is predisposed to do anything, or has serious difficulty controlling behavior.(Tr.494-5,716-7). Each component of the mental abnormality definition has to be supported by evidence.(Tr.492). Determining someone is predisposed or has serious difficulty controlling behavior requires additional evidence beyond the diagnosis.(Tr.717).Telander was not aware of any scientifically valid or reliable way to measure an individual's ability to control behavior.(Tr.496). At the time of trial, he had no evidence Hopkins currently had serious difficulty controlling his sexually violent behavior.(Tr.502).

Telander believed pedophilia was a mental abnormality, based on his review of Hopkins' records, statements about children, and past sexual offenses.(Tr.449,455,493).

Telander said pedophilia both predisposed sexually violent offenses and caused serious difficulty controlling that behavior because pedophilia was difficult for Hopkins to control, and Hopkins had continued sex offending behaviors, knowing it was unlawful.(Tr.453-4).

Telander testified that treatment records indicated Hopkins had fantasies about young children, and had masturbation fantasies about "raping" women.(Tr.442, 445). When Telander interviewed Hopkins, he learned that the "rape" actually entailed consensual, rough sex, but not rape.(Tr.532).

Telander testified that under the Act, the mental abnormality must cause future risk, not some other factor or combination of factors.(Tr.549). He did not rely on scientific literature or an empirically validated method in measuring or predicting risk caused by the mental abnormality of pedophilia.(Tr.550-1). To assess risk, Telander looked at information in the records that might indicate risk, scored the Static-99R and looked to other factors.(Tr.455). The Static is not designed to measure a mental abnormality; it is a compilation of other risk factors.(Tr.549). Telander gave Hopkins a score of 6, meaning "high risk," and a 37% chance of re-offending based on statistics for the high-risk/high-needs reference group, or 20.5% chance based on the routine group.(Tr.471,474,507-8). Based on a score of 6, it is more likely than not an individual is in the 80% of men who do not reoffend than in the 20% predicted to reoffend.(Tr.510). Adding to the Static, Telander said Hopkins' pedophilia diagnosis and sexual preoccupation indicated a risk to "re-offend."(Tr.475,543). These are risk factors that "correlate" with recidivism, but do not cause it.(Tr.546).

"More likely than not" is "better than a 50[%] chance."(Tr.548-9).Telander did not know the probability or likelihood of re-offense based on a pedophilia diagnosis, or the likelihood that someone with a Static score of 6 would recidivate with a sexually violent offense.(Tr.513,550). He could not provide the probability of re-offense based on the Static, sexual preoccupation and pedophilia.(Tr.548). His ultimate opinions was, "That he is more likely than not" and met SVP criteria.(Tr.480).

Kircher

Nena Kircher, DOC psychologist, did a "point-in-time" evaluation looking at whether Hopkins met criteria when he was released on parole, and testified he met criteria for commitment at trial.(Tr.638,640,683-5). She had access to only a limited set of records, not to all of Hopkins' records; she reviewed his MoSOP notes, DOC medical records and probation and parole records.(Tr.641-2,687). She also questioned Hopkins in December of 2013.(Tr.641-2).

Kircher diagnosed Hopkins with pedophilia based on the Diagnostic and Statistical Manual's criteria.(Tr.643-4). Kircher testified child pornography is "not counted diagnostically" in making a pedophilia diagnosis.(Tr.644). She concluded Hopkins had a pedophilia diagnosis because he viewed child pornography and he molested three different children.(Tr.644). Kircher had no current evidence of any symptoms of pedophilia, thoughts or fantasies about children, behaviors involving children, or of personal distress caused by an attraction to children.(Tr.697). The last pedophilic behaviors occurred in 2007.(Tr.698). She had no information about Hopkins since December of 2013.(Tr.698).

According to Kircher, distinguishing between "serious difficulty controlling behavior" and "some difficulty controlling behavior" is different each time she does an evaluation and is determined on a case-by-case basis.(Tr.700). There is no scientifically valid, reliable method of measuring one's degree of control over his behavior.(Tr.700-1). Kircher testified pedophilia caused Hopkins serious difficulty controlling his behavior because he viewed child pornography after some treatment and the two-year-old MoSOP records documented reported fantasies about children.(Tr.646-7). She had no evidence that Hopkins had any current difficulty controlling his behavior.(Tr.701).

Hopkins told Kircher he learned he had an anger problem and was not a nice guy in MoSOP.(Tr.648). Kircher thought his answer meant he did not benefit from treatment.(Tr.648-9). Kircher expected him to talk about treatment concepts, sexual attractions and deviance cycle, triggers, and what he would need to do instead of offending, although she did not specifically ask him about those things.(Tr.646,679,681,690). Hopkins told her about sexual attraction to age-appropriate female partners, situations which might increase his risk of reoffending, problems with computer usage, and his release plan.(Tr.717-8).

Kircher used the Static-99R and the Stable, which she said measured "here and now risk," and considered other factors that increased risk.(Tr.651,655,674-5). Kircher testified that under the SVP statute, the future risk must be caused by the mental abnormality, not the Static or Stable scores.(Tr.715). She gave Hopkins a score of 7 on the Static, which put him in the "high risk" category and 97th percentile, though "high risk" and the percentile did not give information about his probability of reoffending.(Tr.653,702-4). Only absolute

risk supports the likelihood of recidivism and is the most relevant for decision-makers, and there is a tendency to overestimate risk of recidivism, especially for individuals described as "high risk."(Tr.705-6).

The Stable helps treatment providers formulate a case management plan and understand an individual's treatment needs by looking at an individual's expected functioning over the next six to twelve months.(Tr.710). It is to be re-scored every six months, and at least once a year, because its score can change over time.(Tr.655,671,709-10). It does not provide a likelihood or probability of reoffending.(Tr.710). Not all of the Stable factors have been empirically demonstrated to correlate with recidivism.(Tr.707-8). Kircher scored the Stable in April of 2014 and said Hopkins' score of 16 was considered "high."(Tr.671, 710). She admitted it would be "unethical" for her to give a current Stable assessment and score at the time of trial because she had not interviewed Hopkins or reviewed any records about him in the last two years.(Tr.714). She had no "capacity" to assess his current conduct, thoughts, or behaviors.(Tr.714)

Kircher testified to six additional risk factors, only one of which was not already accounted for on the actuarial instruments, and none of which added anything to her risk assessment.(Tr.676,712-3). Kircher testified that she considers "more likely than not" to mean that "The mental abnormality []raises risk to the level that he no longer has emotional and volitional control."(Tr.716). She could not quantify it or explain how she knows when risk has crossed the "more likely than not" threshold.(Tr.717).

Pretrial

Hopkins filed four motions to dismiss the proceedings against him for constitutional deficiencies in the SVP Act prior to the probable cause hearing.(L.F.25-38). Those motions were denied when raised at the hearing, pretrial conference and at trial.(Tr.3,5,14,134-8,151). His case was tried to a jury over his objections and request for a bench trial.(L.F.48-50;Tr.140). His alternate request to use the "beyond a reasonable doubt" burden at trial was also denied.(L.F.54;Tr.139-40,742-4).

Hopkins' motions to exclude Kircher's testimony and his statements to her were denied.(L.F.18-23;87-94;Tr.14,130,134,631-3). Similarly, his motion to exclude and objections to Lee's testimony were overruled.(L.F.138-42,146-7;Tr.152, 159, 577).

Over Hopkins' objections and challenge for cause, Venireperson 18 served on the jury.(Tr.377-8). Venireperson 18 indicated it did not matter what the instructions said, he[2] would find Hopkins to be an SVP because of his two convictions.(Tr.328).

Instructions, Verdict and Commitment

Hopkins objected to instructing the jury on the "clear and convincing" burden of proof at trial and requested the "beyond a reasonable doubt" burden of proof.(Tr.742;L.F.54-55). He also objected to Instruction 6, the verdict director, and to Instructions 9, given pursuant to §632.492.(Tr.742-3;L.F.143-45). His objections were overruled.(Tr.143-5).

[2] Venireperson 18's gender is unknown and will be referred to as "he."

Hopkins did not present evidence at trial.(Tr.739-40). His motions for directed verdict were denied, and the jury returned a verdict finding him to be an SVP.(Tr.738-40,778). His request to stay execution of the order committing him to DMH until resolution of the federal class action lawsuit against the State and DMH SORTS program was denied.(Tr.781). This appeal follows.(L.F.186).

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 erred in denying Hopkins' motion to dismiss, because this violated his rights to due process, equal protection and freedom from *ex post facto* laws, double jeopardy and cruel and unusual punishment, protected by U.S.Const. amends. V, VI, VIII, XIV, art.I, §§9, 10, art.VI, cl.2, and Mo.Const. art.I, §§2, 10, 13, 19, and 21, 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 proceedings in Missouri.

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

Karsjens v. Jesson, 109 F.Supp.3d 1139 (D.Minn.2015);

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

In re Norton, 123 S.W.3d 170 (Mo.banc2003);

U.S.Const., amends.V, VIII, XIV, art.VI, cl.2, art.I, §9,10;

Mo.Const. art.I, §§2, 8, 10, 13,19, 21;

§§475.075, 631.145, 632.300, 632.005, 632.330, 632.335, 632.350, 632.483, 632.484, 632.489, 632.492, 632.495, 632.498, 632.501, 632.505;

§§632.495, 632.498, 632.503, 632.504,RSMo.2000.

II.

The trial court erred in denying Hopkins' motion to dismiss, or in the alternative, in denying his request to use the "beyond a reasonable doubt" standard at trial," because there is no possibility of discharge from State custody once committed, violating his rights to due process, equal protection protected by U.S.Const., amends. V, XIV and Mo.Const. art. I, §§2, 10, in that *Schafer* found that commitment under the Act is punitive lifetime confinement; "discharge" has been replaced with "conditional release;" there is no unconditional release from confinement, or termination of conditions imposed on conditional release; and "beyond a reasonable doubt" is the only burden of proof that protects the interest at stake against the risk of erroneous decision.

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

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

In re Winship, 397 U.S. 358(1970);

In re Van Orden, 271 S.W.3d 579(Mo.banc2008);

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

Mo.Const. art. I, §§2, 10;

§§632.480, 632.495, 632.498, 632.505;

§§632.495, 632.498, 632.503, 632.504, RSMo.2000.

III.

The trial court erred in denying Hopkins' motion to dismiss, because this violated his rights to due process and equal protection guaranteed by U.S.Const., amends. V, 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 a least restrictive treatment environment(LRE), and there is no alternative to confinement in a total lock down facility.

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

Karsjens v. Jesson, 109 F.Supp.3d 1139 (D.Minn.2015);

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

Sherrill v. Wilson, 653 S.W.3d 661 (Mo.banc1983);

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

Mo.Const art. I, §§2, 10;

§§630.115, 632.385, 632.495, 632.498, 632.505;

§§632.495, 632.498, 632.503, 632.504, RSMo.2000.

IV.

The trial court erred in denying Hopkins' 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 the plain language of §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.

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

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

Stanley v. Georgia, 394 U.S. 557 (1969);

Thomas v. State, 74 S.W.3d 789 (Mo.banc2008);

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

Mo.Const. art. I, §§2, 8, 10;

§632.480.

V.

The trial court erred in granting the State's request for a jury trial and in forcing Hopkins to be tried by a jury, because this violated his rights to due process and equal protection, guaranteed by U.S.Const. amend. V, VI, XIV and Mo.Const. art. I §2, 10, 18(a) and 22, in that §632.492 grants the State the right to demand a jury trial, treating Hopkins differently than any other individual subject to involuntary government confinement and loss of liberty.

In re Norton, 123 S.W.3d 170 (Mo.banc2003);

Bernat v. State, 194 S.W.3d 863 (Mo.banc2006);

State ex rel. Nixon v. Askren, 27 S.W.3d 834 (Mo.App.W.D.2000);

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

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

Mo.Const. art. I, §§2, 10, 18(a), 22;

§§475.075, 632.335, 632.350, 632.492.

VI.

The trial court erred in denying Hopkins' motion for a directed verdict and in committing him to indefinite confinement in the custody of DMH 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, XIV, Mo.Const. art. I, §2, 10, and §632.495, in that the State failed to present clear and convincing evidence that Hopkins suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, because expert testimony did not establish he presently suffered from a condition that caused emotional or volitional impairment and predisposed him to commit acts of sexual violence in a degree that caused him serious difficulty controlling that behavior, the experts did not assess for risk caused by a mental abnormality or of predatory sexually violent acts, and the experts did not demonstrate Hopkins' risk was more likely than not to commit predatory acts of sexual violence if not confined.

In re Care and Treatment of Cokes, 107 S.W.3d 317 (Mo.App.W.D.2003);

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

Murrell v. State, 215 S.W.3d 96 (Mo.banc2007);

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

U.S.Const. amends V, XIV;

Mo.Const. art. I, §2, 10;

§§632.480, 632.495

VII.

The trial court erred in overruling Hopkins' objection and admitting Kircher's testimony regarding her determination that Hopkins met the SVP criteria, 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) and §§490.065, and 632.483, in that the EOC determination is inadmissible pursuant to §632.483; Kircher's determination was not reliable because the scope of her evaluation was limited to the finite moment in time Hopkins was paroled and only for the purpose of referring him into the process, was not based on the burden of proof at trial, and was based on incomplete and insufficient information to form a reliable opinion and Hopkins 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; and her two-year-old limited determination could not assist the jury in determining if Hopkins presently met the criteria for commitment under §632.480.

Kivland v. Columbia Orthopaedic Group, LLP, 331 S.W.3d 299 (Mo.banc2011);

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

Murrell v. State, 215 S.W.3d 96 (Mo.banc2007);

State ex rel. State v. Parkinson, 280 S.W.3d 70 (Mo.banc2009);

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

Mo.Const. art. I, §§2, 10, 18(a);

§§475.075, 490.065, 552.050, 632.325, 632.480, 632.483.

VIII.

The trial court erred in denying Hopkins' motions to exclude his statements made to Kircher and in admitting his statements at trial, because this violated his rights to silence, assistance of counsel, due process and equal protection, guaranteed by the U.S.Const. amends. V, VI, XIV, Mo.Const. art. I, §§2, 10, 18(a), 19, and §632.335, in that Hopkins was faced with the adversarial system when questioned by state actor Kircher, the questioning occurred in a custodial interrogation, Hopkins was not advised of his right to remain silent or to an attorney and did not knowingly waive those rights, his statements were not voluntary, Kircher formed opinions and testified against him at the probable cause hearing and at trial based on his statements, and Hopkins' statements were admitted at trial.

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

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

State ex rel. Simanek v. Berry, 597 S.W.2d 718 (Mo.App.W.D.1980);

Bernat v. State, 194 S.W.3d 863 (Mo.banc2006).

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

Mo.Const. art. I, §§2, 10, 18(a), 19;

§§202.123, 202.135, 475.075, 552.050, 632.335, 632.325, 632.320, 632.483, 632.492, 632.495.

IX.

The trial court erred in admitting Shawn Lee's testimony, over Hopkins' objection and invocation of privilege, because that violated his rights to due process, equal protection, a fair trial, and privilege against self-incrimination, guaranteed by U.S.Const. amends V, VI, XIV; Mo.Const. art. I, §2, 10, 18 and 19; and §§337.636, 490.065, in that Hopkins' confidential communications with Lee were privileged under §337.636; that privilege promoted an important social interest and outweighed the need for any probative evidence; Lee was not disclosed or qualified as an expert under §490.065, but gave opinions; Lee refused to provide the documents he testified from during his deposition; Lee did not assess mental abnormality or future risk; and his testimony injected a collateral issue, confused the issues, misled the jury, and was not useful to the jury in examining the two issues before it.

Jaffee v. Redmond, 518 U.S. 1 (1996);

Bohrn v. Klick, 276 S.W.3d 863 (Mo.App.W.D.2009);

St. Louis County v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116 (Mo.banc2013);

State v. Shelton, 314 S.W.3d 769 (Mo.App.E.D.2009);

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

Mo. Const. art. I, §2, 10, 18, 19;

§§337.600, 337.633, 337.636, 490.065, 632.480, 632.483, 632.484, 632.510.

X.

The trial court erred refusing to declare §632.492 unconstitutional, and thereafter submitting Instruction 9, over Hopkins' objection and request to declare §632.492 unconstitutional, because that violated Hopkins' rights to due process, a fair trial, impartial jury and equal protection of the law as guaranteed by U.S. Const., amend. V, VI,XIV and Mo.Const. art. I, §§2, 10, 18(a), in that §632.492 required the trial court to give the instruction; the instruction informed the jury of the legal consequence of its verdict; was an abstract statement of law; there was no evidence to support giving it; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for civil commitment.

Templemire v. W & M Welding, Inc., 433 S.W.3d 371 (Mo.banc2014);

Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co., 449 S.W.3d 16 (Mo.App.W.D.2014);

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

Hayes v. Price, 313 S.W.3d 645 (Mo.banc2010);

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

Mo.Const. art. I, §§2, 10, 18(a), 21;

§§632.305, 632.350, 632.480, 632.492.

XI.

The trial court erred in failing to strike Venireperson 18, because that violated Hopkins' 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 Venireperson 18 was not qualified for service on Hopkins' jury because 18 indicated that they already thought Hopkins was an SVP based on hearing that he had two convictions and it did not matter what the jury instructions said; Hopkins moved to strike Venireperson 18; and in overruling Hopkins' motion to strike, Venireperson 18 sat on the jury panel.

Joy v. Morrison, 254 S.W.3d 885 (Mo.banc2008).

Thomas v. Mercy Hospitals East Communities, --- S.W.3d ---, 2016 WL 4761435, (Mo.App.E.D.2016);

Catlett v. Ill. C.G.R.C., 793 S.W.2d 351 (Mo.banc1990);

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

Mo.Const. art. I §2, 10, 18(a), 22;

§494.470.

ARGUMENT

I.

The trial court erred in denying Hopkins' motion to dismiss, because this violated his rights to due process, equal protection, and freedom from *ex post facto* laws, double jeopardy and cruel and unusual punishment, protected by U.S.Const. amends. V, VI, VIII, XIV, art.I, §§9, 10, art.VI, cl.2, and Mo.Const. art.I, §§2, 10, 13, 19, and 21 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 proceedings in Missouri.

Hopkins' *Motion to Dismiss: Violation of Due Process, Equal Protection, Double Jeopardy and Ex Post Facto* was denied.(Tr.4-5,14,151;L.F.32-8,56-8). He argued the Act was unconstitutional because civil commitment was a punitive, second punishment deferred until the conclusion of a prison sentence; resulted in lifetime custody; failed to provide adequate due process protections; treated him differently than anyone else civilly committed in Missouri in terms of confinement conditions, duration and procedures; and commitment under such a law is cruel and unusual punishment.(L.F.17-21;81-2). U.S.Const.,amends.V, VI, VIII, XIV, art.I, §§9, 10, art.VI,cl.2; Mo.Const. art.I, §§2, 10, 13, 19, 21.

He argued *Van Orden v. Schafer*,129 F.Supp.3d 839(E.D.Mo.2015) [3] in support of his motion, requested a stay of commitment until *Schafer* was fully disposed, and preserved the issue in his new trial motion.(L.F.56-8,181,183;Tr.781-2).

Analysis

SVP commitment has changed drastically since its inception. 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. *In re Norton*,123 S.W.3d 170,174(Mo.banc2003);*In re Care and Treatment of Schottel v. State*,159 S.W.3d 836(Mo.2005). 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 at868-9. *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

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

rights infringed "are rights protected by the constitutional guarantee of liberty, not merely state law." *Id.* at 870.

Federal law is "the supreme law of the land" and "judges in every state shall be bound thereby." U.S.Const. art. VI, cl. 2. 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.banc2012). 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).

An actual conflict exists, because compliance with both the Act and federal law is impossible, and because the Act is an obstacle in the accomplishment of the full purpose and objectives of Congress. *State v. Diaz-Rey*,397 S.W.3d 5,9(Mo.App.E.D.2013). In light of the constitutional deficiencies of the Act, as written and as applied, it is in conflict with the full purpose and objectives of the Due Process Clause. *Id.*; U.S.Const.amend.XIV. It is impossible for the State and its employees to both comply with *Schafer's* directive to make substantial changes, and with prior holdings of this State's courts permitting commitment as-is. *Id*;U.S.Const.amend.XIV;*Van Orden*,271 S.W.3d at 586(clear and convincing burden of proof);*In re Norton*,123 S.W.3d 170,174(Mo.banc2004)(approving secure confinement of SVPs on challenge to failure to consider LREs);*In re Coffman*,225 S.W.3d 439,443(Mo.banc2007)(approving two-step release process; burden on committee; burden of proof).

If this Court accepts the findings of *Schafer*, it will come to the same conclusions and require substantial changes, necessary to meet constitutional standards. *Schafer*, 129 F. Supp.3d at870. This Court must hold the Act is unconstitutional as applied because it results in punitive, lifetime detention. U.S. Const. amend. XIV. Because Missouri's constitution guarantees the same protections as the federal constitution, the Act violates the Missouri Constitution. *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007); Mo. Const. art. I, §§2, 10.

Standard of Review

SVP commitment is a significant deprivation of liberty and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Addington v. Texas*,441 U.S. 418,425(1979); *Murrell v. State*,215 S.W.3d 96,103(Mo.banc2007). Procedural 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; *In re Van Orden*,271 S.W.3d 579,587(Mo.banc2008).

Because commitment impacts fundamental liberty, government action must pass strict scrutiny. *Coffman*, 225 S.W.3d at 445; *Karsjens v. Jesson*, 109 F.Supp.3d 1139, 1166

(D. Minn. 2015);[4] *Vitek v. Jones*, 445 U.S. 480, 492 (1980)("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *but see Schafer*, 129 F. Supp.3d 866-67(confinement did not bear rational relationship to purposes of commitment and law would fail under the heightened "shocks the conscience" test). The burden is on the State to prove a law is narrowly tailored to serve a necessary, compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721(1997); *Coffman*, 225 S.W.3d at 445.

A 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).

SVP Act is Punitive

A "civil label is not always dispositive." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). 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.* *Schafer* held the Act resulted in punitive, lifetime detention in violation of due process, and in unconstitutional punishment. 129 F.Supp.3d at 844, 868-9.

[4] An interim relief order was entered October 29, 2015. --- F.Supp.3d ---, 2015 WL 6561712. The defendants appealed to the Eighth Circuit. *Karsjen v. Jesson*, No. 15-3485. Defendant's request to stay the order pending appeal was denied. 2015 WL 7432333(D.Minn.2015).

Civil commitment in Missouri is "secure confinement," "against one's will," in part, for the purpose of protecting the public by incapacitating an individual who could commit a future crime, and imposed only on men who committed crimes. *Hendricks*,521 U.S. 346 at (Breyer, dissenting); *Norton*,123 S.W.3d at 177(Wolff, concurring). Confinement is imposed by persons(State prosecutors), procedural guarantees(trial by jury, assistance of counsel, psychiatric evaluations), and a higher standard than ordinary civil cases because of the liberty interests implicated. *Hendricks*,521 U.S. at 379-80;§§632.483,.489,.492.

As further proof, the Act punishes Hopkins' underlying offense by extending the term of confinement and inflicting greater punishment than the applicable laws at the time Hopkins committed an underlying criminal offense, imposes a new punitive measure to that crime, and punishes him a second time with lifetime confinement. *Hendricks*, 521 U.S. at 371, 379 (Kennedy, concurring; Breyer, dissenting); *see also Karsjens*, 109 F.Supp.3d at 1168.

Once committed, there is no discharge. Prior to 2006, the SVP Act provided for full, unconditional release of individuals from their commitment, called "discharge." §632.498. Amendments replaced the discharge provision with conditional release and mandated that an individual may only ever be "conditionally released," subject to a host of statutory conditions. §632.505, see §§632.498, 632.503, 632.504, RSMo.2000. The statutory scheme does not provide any mechanism for a person to be liberated from "conditional release." As such, it is impossible for one committed to regain his liberty.

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). Nothing in the plain language of the statute permits conditional release without "conditions," or "unconditional" release. §§632.498, 632.505. The Act is unconstitutional on its face under Mo. Const. art. I, §§2, 10, and 21.

The second purpose of the Act 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. Treatment provisions "were adopted as a sham or mere pretext."*Id.* at 371.

Progressing through the program's multiple phases of indeterminate length "is tortuously slow." *Schafer*, 129 F. Supp.3d at 850-51. The stated goal of the program is "to treat and safely reintegrate committed individuals back into the community." *Id.* at 851. State actors believe that SVP treatment exists, is effective, and includes release. *Id.* at 858-9. However, 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. Top DMH administrators knew the effect of the Act. One 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.

Committees whose risk is below the standard for confinement have not been released, but met with "extra-statutory hurdles" like "indefinite release without discharge." *Id.* The State's failure to comply with the Act has 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.

The Minnesota SVP statute was found facially unconstitutional because it failed to provide a way to obtain release in a reasonable time, once eligible for discharge. *Karsjens*, 109 F.Supp.3d at 1168. 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. *Id.* at 1171-72. Discharge procedures did not work as they should and the statute had the effect of lifetime confinement. *Id.* 1171-3.

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 of the United States Constitution."123 S.W.3d at 177(concurring).

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,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. Missouri's equal protection clause provides the same protections as the federal constitution. *Coffman*, 225 S.W.3d at 445.

Schafer found the law was unconstitutional as applied, because: release procedures have not been implemented; annual reviews are not performed as required; and there is no LRE or a community reintegration plan, resulting in punitive lifetime detention in violation of due process. *Schafer*, 129 F. Supp.3d at 868-9; U.S.Const. amends. V, XIV and Mo.Const. art. I, §§2, 10.

The Act is unconstitutional as applied because annual reviews are not performed in accordance with the statute, case law, or due process. *Id.* "[T]hese annual reviews are the primary tool that courts use to evaluate whether a civilly committed person continues to satisfy the criteria for commitment, or instead whether the person should be conditionally released." *Id.* at 852. "[I]t is nearly impossible to successfully petition for conditional release without an annual review from [DMH] recommending such release." *Id.* However,

reviewers lack training; they misunderstand, are confused and do not consistently apply the correct legal standard in evaluating the need for continued confinement. *Id.* at 582-83, 868.

For example, the State equated the risk threshold for continued commitment with "no more victims," zero risk, and "will not engage in acts of sexual violence if discharged," contrary to the Act's requirements. *Id.* at 848-49. Minnesota's scheme was defective because periodic risk assessments were not conducted, and evaluators did not apply the correct legal standard. *Karsjens*, 109 F.Supp.3d at 1171. Because annual reviews are not required for those men conditionally released, it is impossible to ever obtain unconditional release, even if permissible under the Act as written. §632.498.1. A statute not requiring periodic risk assessments "authorizes prolonged commitment, even after committed individuals no longer pose a danger." *Karsjens*, 109 F.Supp.3d at 1168.

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.

Because DMH had never authorized anyone for conditional release, a committee must prove by "preponderance of the evidence" he "no longer" has a mental abnormality and is not "likely" to reoffend to win a jury trial where he might be released if the State cannot prove its case. *Id.* at 869, §632.498. This is unconstitutional because it shifts the burden to the individual to demonstrate he no longer meets commitment criteria, and 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 v. State*, 159 S.W.3d 836, 842 (Mo.banc2005).

The government interprets release standards to justify commitment "until it was determined he will not engage in acts of sexual violence if released" and that he will create "no more victims," which "essentially require[s] a complete absence of risk before a [committed man] will be released." *Schafer*, 129 F. Supp.3d at 849. But "no adult male has a 0% risk of committing an act of sexual violence;" there will always be some likelihood of reoffending. *Schafer*, 129 F. Supp.3d at 849. Just as the government does not have to prove "*total* or *complete* lack of control" to obtain commitment, a committed man does not have to prove *total* or *complete* lack of risk to be released. *Karsjens*, 109 F.Supp.3d at 1169. The observed application of the release procedures reveals *Schottel's* presumptions were wrong and that the Act is unconstitutional. *Schafer*, 129 F. Supp.3d at 849, 869.

The Act does not provide adequate procedural or substantive protections necessary for punitive proceedings. For example, a committed man is not entitled to be present at a hearing for conditional release, §632.498; subsequent petitions are automatically "frivolous,"§632.504; and a committed person is subject to lifetime custody and

supervision, even when determined he no longer has a mental abnormality or poses a risk. §632.505. But, "due process requires that a person be both mentally ill and dangerous in order to be civilly committed; the absence of either characteristic renders involuntary civil confinement unconstitutional." *Murrell v. State*, 215 S.W.3d 96, 104 (Mo.banc2007).

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. *See* §§632.330, 632.005, 632.495; Point II. There are definite term limits placed on other civil commitments under Chapter 632, but not under the Act. *See* §§632.330, 632.495. Men facing SVP commitment do not have a statutory right against self-incrimination, but persons in other commitment and probate proceedings do. *See* §§631.145, 475.075; Point IX. Men are interviewed to determine if they are SVPs while involuntarily in custody and without the right to counsel. *See* §§632.483-.484; *State ex rel. State v. Parkinson*,280 S.W.3d 70, 7 (Mo.banc2009). Criminal defendants are entitled to due process rights like assistance of counsel and to silence before charges are levied, but Missouri has said an SVP's due process rights do not vest until a petition has been filed. *Norton*, 123 S.W.3d at 172; *see Miranda v. Arizona*, 384 U.S. 436, 467 (1966). In other commitments under Chapter 632, only the respondent may demand a jury, and the proceedings must be as informal as possible to mitigate any harmful effect on the respondent.§§632.335, 632.350; Point V. A guardianship petitioner cannot demand a jury trial.§475.075. However, the Act gives the State and trial court the right to demand a jury trial, irrespective of the wishes or interest of the respondent.§632.492.

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.§632.300. Such detentions are a deprivation of liberty. *Addington*,441 U.S. at 425. Guardianship cases implicate a fundamental liberty interest, are an exercise of *parens patriea* power, and involve rights similar to criminal proceedings. *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.banc2015). But, the government cannot demand a jury trial, deprive liberty without proving its case beyond a reasonable doubt, or compel a defendant to incriminate himself, achieving its goals and interests through 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 current SVP scheme results in punitive, lifetime deprivations 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 Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. It is unconstitutional because its purpose and effect is punitive, lifetime detention and punishment. The trial court erred in denying Hopkins' motion to dismiss. This Court must reverse the order and judgment of the trial court and release Hopkins from custody.

II.

The trial court erred in denying Hopkins' motion to dismiss, or in the alternative, in denying his request to use the "beyond a reasonable doubt" standard at trial," because there is no possibility of discharge from State custody once committed, violating his rights to due process, equal protection protected by U.S.Const., amends. V, XIV and Mo.Const. art. I, §§2, 10, in that *Schafer* found that commitment under the Act is punitive lifetime confinement; "discharge" has been replaced with "conditional release;" there is no unconditional release from confinement, or termination of conditions imposed on conditional release; and "beyond a reasonable doubt" is the only burden of proof that protects the interest at stake against the risk of erroneous decision.

Hopkins moved to dismiss the proceedings because there was no possibility of unconditional release under the Act.(L.F.30-1). He argued that the elimination of unconditional release meant the entire statutory scheme was unconstitutionally punitive in effect or purpose, lacked the procedural and substantive safeguards necessary in punitive proceedings, resulted in lifetime confinement, and violated his right to due process and equal protection.(L.F.31). U.S.Const. amends. V, XIV; Mo.Const. art.I, §§2, 10. His motion was filed before the probable cause hearing and renewed at trial; it was denied each time and preserved in his post-trial motion.(Tr.2-3,14,151;L.F.181).

In the alternative to granting his motion to dismiss because there is no unconditional release, Hopkins requested that the court use the "beyond a reasonable doubt" burden of proof at trial.(LF.54;Tr.139). U.S.Const. amends V, XIV; Mo.Const. art. I, §§2, 10. The trial court denied the request, stating, "Court's going to deny the motion and follow the MAI[,]" though there is no applicable MAI in SVP cases.(Tr.140). Hopkins objected to submitting the case to the jury on "clear and convincing" and tendered alternative instructions, Instructions B, H, I, and L using the "beyond a reasonable doubt" standard.[5](Tr.742;L.F.160,166-7,170). His objections were overruled and his instructions were refused.(Tr.743-4). He preserved the issue in his post-trial motion.(L.F.181).

Standard of Review

Hopkins incorporates Point I's standard of review and discussion in Point I and II. Civil commitment is only constitutional provided that an individual presently 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, citing *O'Connor v. Donaldson*, 422 U.S. 563,575 (1975).

Analysis

[5] After the trial court rejected Hopkins' request to use beyond a reasonable doubt, he did submit other proposed instructions using clear and convincing.(L.F.161,163,168-9).

Until 2006, the State had to prove an individual was an SVP beyond a reasonable doubt. §632.495, RSMo. 2000. Section 632.495 was amended to reduce the burden of proof on the State to clear and convincing evidence. "Clear and convincing" was initially approved for use in Missouri SVP trials because of a criminal/civil distinction and continuing review opportunities that minimized the risk of erroneous commitments. *In re Van Orden*, 271 S.W.3d 579, 585-6 (Mo. banc 2008).

Van Orden relied on *Addington*, wherein the United States Supreme Court found clear and convincing evidence was the appropriate burden of proof in a commitment proceeding. *Id.* at 585, *Addington v. Texas*, 441 U.S. 418, 427-33 (1979). *Addington* reasoned clear and convincing was sufficient in that case because the government was not exercising its power in a punitive sense, and continuing opportunities for review minimized the risk of error. *Id.*, *Addington*, 441 U.S. at 427-31. The burden of proof is ultimately a matter of state law. *Id.*, *Addington*, 441 U.S. at 433. *Addington* did not hold that clear and convincing was a permissible burden in every commitment proceeding, but only where commitment is not punitive and review enabled correction of an erroneous commitment. *Id.* at 592(Teitleman,dissenting);*Addington*, 441 U.S. at 433. That *Addington* left the precise burden of proof to the state, "specifically indicates that the particulars of a civil commitment statute may require some burden of proof that is more stringent than clear and convincing." *Id.* at 593, n.1.

Van Orden rationalized commitment both protects the public, and provides those necessary treatment. *Id.* "Further, if commitment is ordered, the term of commitment is not indefinite. A person committed as a sexually violent predator receives an annual review to

determine if the person's mental abnormality has so changed that commitment is no longer necessary." *Id.* at 586. Whether the Act would be considered civil if the statutes were determined to mean that a person was ineligible to ever receive an unconditional release was not before the Court. *Id.*at n.5.

However, the 2006 amendments to the SVP Act removed the lynchpins relied upon by *Van Orden*. Prior to 2006, the SVP Act provided for full, unconditional release of individuals from their commitment, called "discharge." §632.498. A time when "commitment is no longer *necessary*" means discharge, now an impossibility under the Act. Amendments replaced the discharge provision with conditional release and distinguished between a committed person "conditionally released" and a committed person "who has not been conditionally released." §§632.498, 632.503, 632.504,RSMo.2000. Section 632.505 was added, mandating conditional release, rather than discharge once a committee no longer met criteria for commitment, and that specific conditions apply to that conditional release.

Furthermore, now it does not require continued annual review for those "conditionally released." §632.498.5(4); *Murrell v. State*,215 S.W.3d 96,105(Mo. 2007)("The annual review mechanism ensures involuntary confinement that was initially permissible will not continue after the basis for it no longer exists."). As such, it is statutorily impossible for one committed to regain his liberty. And, §632.505 permits revocation and return to a secure facility by a preponderance finding "the person is no longer suitable for conditional release." The State is not required to prove the individual meets commitment criteria to return him to DMH.

The *Van Orden* appellants only challenged the burden of proof in §632.495 and argued "conditional release" may mean a lifetime loss of liberty, but failed to raise the conditional release statute or "the constitutionality problem of the entire SVP statutory scheme" as a point on appeal. *Id.* at 587, (Cook., J. concurring). The concurring opinion plainly stated the constitutionality of the statutory scheme "may require future review by this Court when the issue is squarely presented." *Id.* at 589. It also warned the conditional release scheme may be unconstitutional for failing to provide sufficient procedural due process protections. *Id.* at 589-90. Any confinement without the opportunity for unconditional release "would raise serious due process concerns." *Id.* at 590. The concurrence predicted that "if called to consider the impact the indefinite conditional release statute has on the entire SVP statutory scheme, this Court may be compelled to find that such indefinite restraint on liberty has made the SVP act so punitive in purpose or effect that it no longer can be considered civil in nature -- requiring a higher burden of proof." *Id.*at 591.

Conditional release after a finding that an individual is no longer dangerous "*does not* result in complete restoration of that person's liberty." *Id.* at 590 (emphasis in original). The terms of conditional release are a form of commitment; due process requires that the person be *fully* released. *Id.* Conditional release, therefore, violates due process, even if the commitment is in a less restrictive environment. *Id.*

Dissenting, Judge Teitleman found Missouri"s SVP law to be *punitive*. *Id.* at 592. If the SVP act were purely remedial, then once no longer mentally ill or dangerous, it should result in unconditional release. *Id.* "Once the remedial purpose has been fulfilled,

the continued deprivation of individual liberty amounts to nothing but a punitive sanction." *Id.* Men civilly committed here "forever will be subject to state oversight," even if no longer dangerous. *Id.* While commitment in *Addington* would have terminated upon successful completion of treatment, that is not so under the SVP law. *Id.* Judge Teitleman concluded, "I would hold that the 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." *Id.* at 593-94.

Warren presented the same burden of proof challenge. 291 S.W.3d 246 (Mo.App.S.D.2009). The Southern District denied the challenge because it was bound to follow the *Van Orden* decision. *Id.* at 249.

Unlike the *Van Orden* appellants, Hopkins challenged the entire statutory scheme, including the release provisions, and argued commitment was *actual* lifetime confinement.(L.F.30-31,56-58). *Id.*at 582, 584-5, 588(Cook, concurring). As a result, he argued the proceedings against him should be dismissed, or in the alternative, beyond a reasonable doubt was the only appropriate standard. He incorporated *Schafer*.(L.F. 56-8).

Schafer means "continuing review opportunities" have not minimized risk of erroneous commitments or led to any releases. *Van Orden v. Schafer*, 129 F. Supp.3d 839, 868 (E.D.Mo.2015), 129 F.Supp.3d at 868(failing to reintegrate anyone turned commitment into "punitive, lifetime detention"). "The adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course." *Templemire v. W &*

M Welding, Inc., 433 S.W.3d 371 (Mo.banc 2014). Missouri Courts must change course and declare the only constitutionally permissible burden of proof is beyond a reasonable doubt.

Where a statutory scheme is punitive either in purpose or effect, it is considered "to have established criminal proceedings for constitutional purposes." *Kansas v. Hendricks*, 521 U.S. 346, 361(1997). The burden of proof implicates due process, and Hopkins is entitled to equal rights under the law. U.S.Const. amend. V, XIV, Mo.Const. art. I, §2, 10; *Addington*, 441 U.S. at 423; *Van Orden*,271 S.W.3d at 585; *Coffman*,225 S.W.3d at 443. 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. Beyond a reasonable doubt is the standard used in all other punitive cases and should be applied in the instant case because of the implication on the defendant's liberty interest. *Id.* at 585. *Winship* established that due process demands the beyond a reasonable doubt standard in juvenile cases because of the resulting loss in liberty. *In re Winship*, 397 U.S. 358, 366 (1970). It does not matter that juvenile proceedings are given the "civil label of convenience," or are "designed not to punish, but to save the child." *Id.* at 365, citing *Application of Gault*, 387 U.S. 1, 50 (1967).

> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable

> doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

Id. at 364.

Just as a criminal defendant "has at stake interest of immense importance," loss of liberty and stigma from a conviction, so does an individual facing commitment. *Id.* at 363. There is no compelling reason to treat him differently than anyone else in such a situation. Using "clear and convincing," as opposed to "beyond a reasonable doubt," is not narrowly drawn to serve a compelling state interest in an SVP case where Hopkins' *lifelong* liberty is at stake, where he cannot be discharged or unconditionally released, and his commitment will not be reviewed if he ever obtains "conditional release." The risk of an erroneous decision could not be higher. Beyond a reasonable doubt is the only appropriate standard. "Both the plain language and actual administration of the SVP law lead to the inescapable conclusion that the initial commitment decision under the SVP law is effectively final. The state should not be able to deprive forever the individual liberty of its citizens without proving beyond a reasonable doubt the necessity of doing so." *Van Orden*, 217 at 593 (Teitlman, J., dissenting).

This Court must reverse the judgment of the probate court and release Hopkins. Alternatively, this Court must reverse and remand for a new trial under the beyond a reasonable doubt standard.

III.

The trial court erred in denying Hopkins' motion to dismiss, because this violated his rights to due process and equal protection guaranteed by U.S.Const., amends. V, 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 a least restrictive treatment environment(LRE), and there is no alternative to confinement in a total lock down facility.

Hopkins' motion to dismiss the proceedings against him because there is no LRE under the Act, in violation of due process and equal protection, was denied.(L.F.28-9;56-58;Tr.3,14,151). U.S.Const. V, XIV; Mo.Const. art I, §§2, 10. He included his complaint in his post-trial motion.(L.F.181). Hopkins incorporates his Standard of Review and analysis in Point I.

Analysis

In *Norton*, the Court rejected an equal protection claim that the trial court erred in not considering less restrictive alternatives to confinement. *In re Norton*,123 S.W.3d 170,174(Mo.banc2003). It identified a compelling State interest in protecting the public from crime, justifying differential treatment and secured confinement of persons adjudicated to be SVPs. *Id.* The Court held the Act was narrowly tailored to achieve this interest, in light of procedural safeguards, specifically including the right to require the State to prove the individual was an SVP beyond a reasonable doubt, mandated annual reviews to determine if the person no longer met criteria, 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.

Each of those safeguards justifying differential treatment no longer exists. Amendments reduced the burden of proof on the State to "clear and convincing," replaced "discharge" with conditional release; mandated only conditional release and terms of that conditional release, and eliminated annual reviews for men who were granted conditional release. §632.495, 632.498 632.505, compared to §§632.495, 632.498, 632.503, 632.504, RSMo. 2000.

Schafer ruled the Act is unconstitutional as applied because there is no LRE or a community reintegration plan, resulting in punitive lifetime detention in violation of due process. *Van Orden v. Schafer*,129 F. Supp.3d 839,868-9(E.D.Mo.2015); U.S.Const. amends. V, XIV; Mo.Const. art.I, §§2, 10. Those civilly committed have a constitutional right to avoid undue confinement, both in duration and in nature. *Schafer*,129 F. Supp.3d at 867.

Justice Breyer warned that a law not requiring consideration of an LRE or "alternative and less harsh methods" to achieve a non-punitive objective can show that the legislature's "purpose ... was to punish." *Kansas v. Hendricks*, 521 U.S. 346,387(1997) (dissenting). The Act's plain language does not require an LRE or consider "less harsh methods," and therefore it is facially unconstitutional. It mandates anyone "committed for control, care and treatment … shall be kept in a secure facility." §632.498.

Where civil commitment accomplishes a constitutional purpose, those committed "are required to be held in the [LRE] compatible with their safety and that of the public."

Sherrill v. Wilson,653 S.W.3d 661,664(Mo.banc1983). If commitment were for a civil purpose, then the Act would provide for placement in a LRE, like any other person civilly committed for non-punitive purposes. *See* §§632.385; 630.115.1(11)(each DMH resident has right "to be evaluated, treated or habilitated in the [LRE]").

The Minnesota Federal Court found fatal failures in that law because of lack of LREs physically existing, practically available because of lack of bed space, and lack of community reintegration. *Karsjens*,109 F.Supp.3d at 1151-53,1172. Minnesota's statute allowed confinement even after an individual no longer met statutory criteria for commitment and did not pose a danger to the public or need further treatment, and when an individual met criteria for a reduction in custody. *Id.* at 1156,1160-61.

Missouri's scheme fails to provide LREs altogether, and there are no procedures in place for community reintegration or placement. *Schafer*,129 F. Supp.3d at 851. 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. *Id.* This is not an LRE, and its bed space is practically unavailable to the 200 plus men committed. Moreover, the only persons placed in the unit are those who have been ordered conditionally released, even though "conditional release" means actually living in the community. *Id.* at 845,855; §632.505.1. 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. U.S.Const. amend. V, XIV; Mo.Const. art.I, §§2,10.

This Court must reverse the trial court's judgment and release Hopkins.

IV.

The trial court erred in denying Hopkins' 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 the plain language of §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.

Hopkins' 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.(Tr.107-8;L.F.3,40-44). Hopkins incorporates the Standard of Review discussed in Point I.

Analysis

The Act is unconstitutional because it permits commitment based on a finding of lack of emotional control and being a "menace,' without a finding of volitional impairment in such a degree that an individual has serious difficulty controlling his predatory, sexually violent behavior. U.S.Const. amends. V, XIV; Mo.Const. art. I, §§2, 10.

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.banc2008). While *Thomas* announced that the definition of "mental abnormality" "means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior,"* the legislature has not amended the definition to comply with the constitutional standard. "Mental abnormality" remains 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, as written, permits a mental abnormality finding based upon 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 v. State*, 215 S.W.3d 96, 105 n.9(Mo.banc2007). This definition does not include a volitional component. One could voluntarily choose to be a menace, exhibiting dangerous and threatening behaviors wholly within his control. One could also be a menace by endorsing dangerous and threatening attitudes and rhetoric, without engaging in any behaviors at all. The plain language of the Act therefore permits a mental abnormality finding, and subsequent commitment, without a finding of volitional impairment. §632.480(2) Commitment laws must "limit confinement to those who suffer from a ***volitional*** impairment rendering them dangerous

beyond their control." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). Neither *Hendricks* nor *Crane* considered the constitutionality of confinement based solely on "emotional" abnormality. *Crane*, 534 U.S. at 872. The mental abnormality requirement is necessary to limit confinement to those who suffer from a volitional impairment. *Hendricks*, 521 U.S. at 358.

Commitment because of an emotional impairment or because someone choses to be a menace cannot be constitutional. The Act is aimed at the risk of future *behaviors*, not future *feelings*. The constitution requires proof of serious difficulty controlling *behavior*. The government cannot regulate one's 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.

The Act, as written and applied, 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, without a finding of volitional impairment, and is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. U.S. Const., amend. V, XIV; Mo. Const. art. I, §§2, 10. This Court must reverse the order and judgment of the trial court and release Hopkins.

V.

The trial court erred in granting the State's request for a jury trial and in forcing Hopkins to be tried by a jury, because this violated his rights to due process and equal protection, guaranteed by U.S. Const. amend. V, VI, XIV and Mo. Const. art. I §2, 10, 18(a) and 22, in that §632.492 grants the State the right to demand a jury trial, treating Hopkins differently than any other individual subject to involuntary government confinement and loss of liberty.

The State demanded a jury trial in this case.(Supp.L.F.1;4). Hopkins opposed the State's jury trial demand, requested that the trial court deny it, waived a jury, and requested a bench trial.(L.F.48-50). He argued §632.492 violated his rights to due process and equal protection, including his right to make decisions regarding trial strategy and forum, like anyone else subject to involuntary government confinement.(L.F.48-50). U.S.Const. amends. V, VI, XIV; Mo.Const. art. I, §2, 10, 18(a), 22. Hopkins' request was denied and he was found to be an SVP by a jury.(L.F.140,176). He preserved the issue in his post-trial motion.(L.F.181).

Hopkins incorporates the standard of review from Point I.

Analysis

In 2000, the Western District upheld the State's right to demand a jury trial under §632.492, but only under a rational basis review. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834. The Missouri Supreme Court has since clarified that rational basis is the wrong

standard for an equal protection challenge in SVP cases. *Norton*, 123 S.W.3d at 173-174. *Askren* should not be followed and is not good law because it did not apply the correct burden on the government.

In criminal cases, the defendant may waive a jury 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. If, as Hopkins contends in previous points, the Act is punitive in effect or purpose, then like every other Missourian subject to criminal proceedings by the State, he may waive his right to a jury trial and his case may be tried to the bench with the Court's consent, and §632.492 must yield to art. I, §22.

Because government action in SVP cases is subject to strict scrutiny, the State must demonstrate that forcing Hopkins to have a jury trial is narrowly tailored to achieve a compelling government interest. *Norton*, 123 S.W.3d at 173; *Bernat v. State*, 194 S.W.3d 863, 868 (Mo.banc2006). The Missouri Supreme Court has identified compelling government interests in protecting the public, in securing cooperation in the diagnosis and treatment of an alleged SVP, and in ensuring the fact finder make a reliable determination at trial. *Norton*, 123 S.W.3d at 174; *Bernat*, 194 S.W.3d at 870. None of those interests are advanced by bestowing the State with power to force a jury trial.

The government also has a compelling interest in protecting the public in criminal cases. *See State v. McCoy*, 468 S.W.3d 892, 891 (Mo.banc2015). Even so, the government may not demand a jury trial in criminal cases. Mo.Const., art. I, §22(a). Criminal defendants may elect to have their case tried by the court alone. *Id.*

Protection of the public justifies involuntary psychiatric commitments and exercise of the government's *parens patriae* power. §632.300. These civil detentions are also a deprivation of liberty. *Addington v. Texas*, 441 U.S. 418, 425 (1979). Psychiatric involuntary commitment cases may be tried by the court; only the respondent may demand a jury. §632.335, 632.350. In fact, the proceedings must be conducted in as informal of a manner and place as possible, for the purpose of mitigating any harmful effect on the respondent. §632.335.2, 632.350.1.

Probate division guardianship cases also implicate a fundamental liberty interest, even though called "civil" cases. *Matter of Korman*, 913 S.W.2d 416, 418 (Mo.App.E.D. 1996), citing *In re Link*, 713 S.W.2d 487 (Mo.banc1986). Such cases are an exercise of *parens patriea* power, and also involve rights similar to criminal proceedings. *Id.* at 418-419, *Link* 713 at 495. The guardianship petitioner may not force the involuntary respondent to a jury trial. §475.075.

The government's interest in protecting the public and individuals is not advanced by Petitioner's jury trial demand. The government is able to exercise both police and *patrens patriae* power in bench trials, both civil and criminal. A government interest in protecting the public does not subject a criminal defendant or psychiatric civil detainee to a forced jury trial. Nor does a government interest in protecting a mentally ill or incompetent person from themselves force a respondent to be tried by a jury.

Moreover, any interest in the fact finder making a reliable determination is not furthered by the government's ability to demand who the fact finder is. Diagnosis and treatment of an alleged SVP has no relationship to the fact finder, either. There is no

narrowly-tailored, compelling interest justifying treating SVPs differently than any other individual prosecuted by the government and subject to a deprivation of liberty, whether denominated "civil" or "criminal." Valid exercise of neither police nor *parens patriae* power justifies differential treatment in this case.

The trial court erred in failing to overrule the State's jury trial demand, forcing Hopkins to be tried by a jury without consideration of his request for a bench trial or what was in his best interests. This Court must reverse and remand for a new trial.

VI.

The trial court erred in denying Hopkins' motion for a directed verdict and in committing him to indefinite confinement in the custody of DMH 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, XIV, Mo. Const. art. I, §2, 10, and §632.495, in that the State failed to present clear and convincing evidence that Hopkins suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, because expert testimony did not establish he presently suffered from a condition that caused emotional or volitional impairment and predisposed him to commit acts of sexual violence in a degree that caused him serious difficulty controlling that behavior, the experts did not assess for risk caused by a mental abnormality or of predatory sexually violent acts, and the experts did not demonstrate Hopkins' risk was more likely than not to commit predatory acts of sexual violence if not confined.

Hopkins moved for a directed verdict, arguing the State failed to provide sufficient evidence for any element of its petition.(Tr.737). He pointed out that the State failed to adduce any evidence about "predatory acts of sexual violence" or his likelihood of committing future such acts, and argued that he was entitled to a directed verdict under *Morgan* and *Cokes*.(Tr.737). The State argued that the jury could infer Hopkins would commit future predatory acts of sexual violence based on his prior conduct.(Tr.738). His

motions for directed verdict were overruled.(Tr.738-40). Hopkins constitutionalized his objections and included them in his post-trial motion.(Tr.740; L.F.180-1).

Standard of Review

SVP commitment is a significant deprivation of liberty and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Addington v. Texas*,441 U.S. 418,425(1979); *Murrell v. State*,215 S.W.3d 96,103(Mo.banc2007), citing *Kansas v. Hendricks*,521 U.S. 346,357(1997). To satisfy due process, the individual must be both mentally ill and dangerous; if one is missing, commitment is unconstitutional. *Murrell*,215 S.W.3d at 104; §§632.480, 632.495. Section 632.495 requires the State to prove by clear and convincing evidence that the appellant was an SVP, defined in §632.480(5). *In re Care and Treatment of Cokes*, 107 S.W.3d 317,321(Mo.App.W.D.2003).

Denial of a motion for a directed verdict is reviewed to determine if the State made a submissible case. *Cokes*, 107 S.W.3d at 321.[6] To make a submissible case, each element must be proven by substantial evidence. *Bradshaw v. State*, 375 S.W.3d 237, 242 (Mo.

[6] This Court uses the same sufficiency of the evidence standard for SVP commitment as in criminal cases. *Amonette v. State*, 98 S.W.3d 593, 600(Mo.App.E.D.2003). A defendant has a due process right compelling the State to produce sufficient evidence to meet its burden of proof for each element of the crime charged. *State v. May***,** 71 S.W.3d 177, 183 (Mo.App.W.D.2002).

App. S.D. 2012)(internal citations omitted). Substantial evidence is competent evidence that enables a jury to reasonably decide the case. *Id.* On review, all evidence and reasonable inferences drawn from the evidence will be viewed in the light most favorable to the State; other evidence and inferences will be disregarded. *Id.* However, this Court does not supply missing evidence, nor give the State the benefit of unreasonable, speculative, or forced inferences. *Id*. This Court will reverse when there is a complete lack of probative facts supporting the verdict. *In re Morgan*, 398 S.W.3d 483, 485 (Mo.App.S.D.2013). If it appears from the record that the State could have made a submissible case, the case will be reversed and remanded for a new trial. *Morgan v. State*, 176 S.W.3d 200, 212 (Mo.App.W.D.2005).

Analysis

To satisfy due process, one right afforded to Hopkins is the right to require the State to prove by clear and convincing that he is an SVP prior to his commitment. *Bradshaw,* 375 S.W.3d at 242; §632.495. Due process requires that the civilly committed person be both mentally ill and dangerous; if one is absent, commitment is unconstitutional. *Murrell*, 215 S.W.3d at 104. Section 632.480, defining SVP, is written in the present tense and requires a finding Hopkins *presently* poses a danger. *Id.* (emphasis in original). "Under 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.*(emphasis in original).

Expert Testimony Did Not Establish Mental Abnormality Criteria

To prove a mental abnormality, the State had to prove Hopkins (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 Kansas v. Crane*, 534 U.S. 407(2002); *Thomas v State*, 74 S.W.3d 789,791-2(Mo.banc2002); §632.480(2).

In civil commitment cases, whether an individual meets the mental illness and dangerous requirements, "turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists." *Addington*, 441. U.S. at 429. Expertise is required to diagnose a psychological condition, determine predisposition, and to assess the degree of control over one's behaviors—all matters beyond the understanding of lay persons. *Cokes*, 107 S.W.3d at 323; §490.065. To be admissible, expert testimony must be supported by the record. *Morgan v. State*, 176 S.W.3d at 210 citing *McGuire v. Seltsam*, 138 S.W.3d 718, 722(Mo.banc2004). When expert opinion is not supported by the record, it is insufficient to create a submissible case. *Id.*

Both Kircher and Telander diagnosed Hopkins with pedophilia and believed that condition was the mental abnormality in this case.(Tr.427,449-50,539,643-4,696). Telander testified that a diagnosis of pedophilia is not enough to find someone is an SVP, there are additional components under the law, and each must be supported by evidence.(Tr.492). The issue is whether there is evidence of all the criteria today, not whether Hopkins had a mental abnormality in the past.(Tr.492). The records Telander

reviewed only told him things about Hopkins' past; the SVP law looks to objective things demonstrated through evidence that tell us about Hopkins today.(Tr. 573-4).

According to Telander, no one has that evidence.(Tr.574). His mental abnormality opinion was based on Hopkins' past.(Tr.493). The most recent evidence supporting his diagnosis came from statements Hopkins made in sex offender treatment a year before Telander did his evaluation and two years before trial.(Tr.488). Hopkins' 2007 convictions were the most recent evidence of actual behavior supporting the diagnosis.(Tr.489). Telander's most recent evidence of Hopkins' sexual interest involved age-appropriate women.(Tr.487). Outside of records discussing Hopkins' treatment-related discussions, there was no evidence suggesting he manifested symptoms or criteria of pedophilia while in DOC.(Tr.490-1).

Telander testified Hopkins was predisposed "because it's so difficult for him to control, that he continues to do it," and that Hopkins had serious difficulty controlling behavior because "the same thing:" "continued sex offending behavior."(Tr.454). This conclusion relied on circular logic which cannot form a reliable basis for an expert opinion and conflated two of the components of the mental abnormality definition. *McGuire*, 138 S.W.3d at 722; §632.480. When pressed, Telander admitted he did not have evidence Hopkins was presently "predisposed."(Tr.493). There is no scientifically-validated or reliable way to measure the degree of control or difficulty over control an individual has and Telander did not rely on any scientific method to evaluate Hopkins' behavioral control.(Tr.469).

Telander said "serious difficulty controlling behavior" is "engaging in behavior that would be harmful to others… even though you know it might be harmful" or unlawful.(Tr.495). 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 crimes of opportunity, and the individual may have been willing to risk punishment. *Id.* 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.

Proof of serious difficulty controlling the sexual behavior targeted by the Act cannot consist of such meager material as engaging in harmful conduct, knowing it was harmful or unlawful. *Id.* at 248-9. Telander's testimony did nothing more than describe a scenario in which Hopkins chose to commit a crime of opportunity in spite of the consequence. *Id.* In fact, he testified Hopkins reported the crimes were opportunistic.(Tr.486-7). He did not provide any facts suggesting Hopkins' conduct was not a choice and was out of Hopkins' control.

Telander's mental abnormality conclusion was not supported by the record. *Morgan*, 176 S.W.3d at 210. He had no evidence of current predisposition or serious difficulty controlling behavior, and no way to measure the latter. He therefore did not apply any specialized training or skill to facts, but rather made a bare assumption based on historical facts he acknowledged did not answer the question of Hopkins' state at the time of trial. §490.065. A forensic psychiatrist's opinion based on an assumption not supported by the record is an opinion based on speculation and conjecture, and cannot form a reliable basis for an expert opinion. *McGuire*, 138 S.W.3d at 722. His testimony was not sufficient to make a submissible case on the mental abnormality issue. *Morgan*, 176 S.W.3d at 210.

Kircher's testimony was in the same vein. She agreed that the Act looks at the present, requiring a mental abnormality to be present at the time of trial, including that Hopkins be presently predisposed and presently have serious difficulty controlling his behavior.(Tr.701). Kircher performed her screening determination in December of 2013, and she had no information or evidence about Hopkins to support any part of her opinions after that date.(Tr. 698). Kircher's two-year-old screening/referral determination could not

assist the jury in determining whether Hopkins *presently* had a mental abnormality making him "more likely than not" at the time of trial. *Murrell*, 215 S.W.3d at 104; §§632.480, 490.065.

Nonetheless she presented her opinions as though they were current and applicable to the jury's determination of whether Hopkins presently met criteria and was an SVP at the time of trial. She diagnosed pedophilia, a condition, based on Hopkins' history.(Tr.644). She had no current evidence at the time of trial about any criteria or symptoms of pedophilia, including thoughts or fantasies about children.(Tr.697). Like Telander, the most recent evidence she had came from statements Hopkins made while in sex offender treatment in 2013, but there had been no behaviors supporting a diagnosis since 2007.(Tr.697-8). She testified, "I believe he's attracted to women," belying her diagnosis.(Tr.732). Likewise, Kircher's opinion that Hopkins was "predisposed" was based on the past.(Tr.698).

"Predisposition" and "serious difficulty controlling behavior" must be supported by additional evidence beyond a diagnosis.(Tr.717). Kircher confirmed there is no scientifically valid and reliable way to measure an individual's degree of behavioral control.(Tr.700-1). She distinguishes between "some difficulty" controlling behavior from someone who has "serious difficulty" controlling behavior under the Act on a case-by-case basis and it is different each time she performs an evaluation.(Tr.700). She had no evidence Hopkins had any difficulty controlling his behavior at the time of trial.(Tr.701). Kircher assumed Hopkins would have future sexual behaviors based upon the fact that she gave him a pedophilia diagnosis.(Tr.698). She also concluded Hopkins had serious difficulty

controlling his sexual behavior "based on his history," which she said included watching child pornography after some treatment and having sexual fantasies.(Tr.647). Again, this could mean nothing more than Hopkins chose to do something he knew he should not do or was unhealthy. *Donald DD*, 21 N.E.3d at 248-9. Kircher assumed why Hopkins acted and fantasized without any evidence in the record demonstrating why he did so; this assumption could not form a reliable basis for expert opinion. *McGuire*, 138 S.W.3d at 722. Kircher's mental abnormality testimony was not supported by the record and was insufficient to make a submissible case on that issue. *Morgan*, 176 S.W.3d at 210.

State Failed to Prove Mental Abnormality Made Hopkins More Likely Than Not

The State also failed to present evidence sufficient to prove Hopkins was ***more likely than not*** to commit future predatory acts of sexual violence because of a mental abnormality.§632.480(5). Due process requires the mental abnormality and the danger of future sexually violent behavior be "inextricably intertwined" so that civil commitment is limited to those "suffering from a volitional impairment rendering them dangerous beyond their control." *Id.*; *Hendricks*, 521 U.S. at 353. In the event this Court finds a sufficient basis in the record to support the experts' mental abnormality opinions, the State's evidence remained insufficient to make a submissible case on the second issue: whether a mental abnormality makes Hopkins "more likely than not."

This issue requires expert testimony because the likelihood of future acts of predatory sexual violence and the assessment of that risk is beyond the understanding of laypersons. *Cokes*,107 S.W.3d at 323; *Addington*, 441. U.S. at 429; §490.065. Both

witnesses summarily testified to conclusions that Hopkins was more likely than not to engage in predatory acts of sexual violence if not confined.(Tr.479-80,683). However, these opinions were not supported by the record and the testimony did not create a factual issue to submit to the jury.

Both experts relied upon actuarial risk assessment and additional factors to predict the likelihood of future re-offense.(Tr.455,651,676). But under the SVP Act, a mental abnormality must cause the risk of future predatory acts of sexual violence, not some other risk factor, combination of factors, Stable or Static score.(Tr.549,715); *Murrell*, 215 S.W.3d at 104. Risk assessment tools are not used to diagnose a mental abnormality.(Tr. 16). The Static-99R does not measure a mental abnormality; it is a combination of other factors.(Tr.549).There is no research or scientific method for how to measure risk caused by a mental abnormality.(Tr.551). Therefore, the witness' ultimate opinions as to Hopkins' statutory future risk were not opinions that pedophilia made him "more likely than not." In fact, Telander called the pedophilia diagnosis could a "risk factor" correlated or associated with recidivism, distinguished from causing recidivism risk.(Tr.475,543,546). As such, expert ultimate opinion was not supported by the record and was not sufficient to make a submissible case. *Morgan*, 176 S.W.3d at 211. There was no basis in the record to support a finding that pedophilia, the only condition offered as a mental abnormality, caused Hopkins to be "more likely than not."

State Failed to Prove Future Predatory Acts of Sexual Violence

Not only did the experts' risk assessment methods fail to determine risk caused by a mental abnormality, they failed to assess for risk of future predatory acts of sexual violence. "Predatory" is a component of the legal standard which must be proven by expert testimony to make a submissible case. *Morgan,* 176 S.W.3d at 211; *Cokes,* 107 S.W.3d at 324*;* 632.480(3). "Predatory" is defined as "acts directed towards individuals, including family members, for the primary purpose of victimization." §632.480(3). It is insufficient to prove a likelihood of sexual acts in general, or even likelihood of sexual violence; "the anticipated future acts of sexual violence [must] be predatory in nature, based on the binding statutory definition of 'predatory acts.'" *Morgan*, 176 S.W.3d at 208; §632.480(5). Therefore, the State was required to prove Hopkins was more likely than not to commit act of sexual violence against individuals, including family members, for the primary purpose of victimization. *Id.*; *Cokes*, 107 S.W.3d at 323); §632.480.

In *Lee v. Hartwig*, an expert was not permitted to testify that a defendant was "negligent" because he did not define that term. 848 S.W.2d 496, 498 (Mo.App.W.D.1992). Experts are allowed to testify to the ultimate factual issues under §490.065, but the legal issue of "negligence" does not become a fact issue until the legal term is defined in accordance with the law. *Id.* Expert testimony is not admissible on issues of law. *Id.* Failure to provide the term rendered questions to the expert "inadequately explored legal criteria." *Id.* at 499. Similarly in *McLaughlin*, the expert's testimony never established the legal criteria and failed to make a submissible case because the expert never established "standard of care" as defined by the law. *McLaughlin v. Griffith*, 220 S.W.3d 319, 321-22, 324 (Mo.App.S.D.2007). An expert who testifies to the "standard of care"

without reference to that term's legal definition, "does not satisfactorily articulate the appropriate legal standard" or prove the legal standard was used. *Id.* at 321.

Neither witness explained "predatory" during their testimony or discussed Hopkins' offending as being for the primary purpose of victimization. *McLaughlin*, 220 S.W.3d at 321; *Lee*, 848 S.W.3d at 489-9; *Morgan*, 176 S.W.3d at 211; §632.480(3). The legal issue of "more likely than not to commit ***predatory acts of sexual violence***" never became an ultimate fact issue because the criteria for future risk were not established in accordance with the law. *Lee*, 848 S.W.2d at 498.

The Western District reversed a commitment in *Cokes*, where the State failed prove Cokes would reoffend in a sexually violent, predatory way. 107 S.W.3d at 323-4. The expert reviewed mental health and police records, rendered a diagnosis, used two actuarial risk instruments predicting a 48% and 92% chance of recidivism, and concluded Cokes was "likely to sexually reoffend." *Id.* at 320, 322. The Court ruled the jury could not reasonably infer from actuarial scores that Cokes would reoffend in a ***predatory sexually violent*** way. *Id.* at 323-4. The State failed to make a submissible case and the trial court erred in denying the motion for a directed verdict. *Id.* at 324.

The Western District reversed an SVP commitment again in *Morgan*, 176 S.W.3d 200. There, experts relied upon past sexual violence and actuarial risk assessments designed to predict the likelihood of reoffending in a sexually violent manner to conclude Morgan was more likely than not to commit future predatory acts of sexual violence. *Id.* at 210-211. There was no evidence of an intent to victimize supporting a finding that the past

acts were "predatory."[7] *Id.* 209. Past sexually violent acts alone do not support an inference of future predatory acts of sexual violence; they can show a likelihood of sexually violent re-offense, but not a likelihood of ***predatory*** acts of sexual violence. *Id.* at 210. Expert reliance on the past act of sexual violence did not support a conclusion of the likelihood of future ***predatory*** sexual violence. *Id.* at 210-11.

Similarly, expert reliance on actuarial risk assessment designed to predict the likelihood of reoffending in a ***sexually violent*** manner did not support an opinion that Morgan was more likely than not to engage in future ***predatory*** acts of sexual violence.*Id.* at 211. Therefore, the Court determined that the expert's ultimate opinion was not supported by the record and was not sufficient to make a submissible case.*Id.* A conclusion that Morgan would engage in ***predatory*** acts of sexual violence required guesswork, speculation or conjecture, and the trial court erred in denying the motion for directed verdict.*Id.*

Cokes was remanded because the State could have made a submissible case by asking the expert whether the likelihood of sexual re-offense would be in a predatory and violent manner.107 S.W.3d at 325. However, asking this specific question did not hold up two years later in *Morgan*.176 S.W.3d 200. The expert in *Morgan did* testify that the

[7] At trial, the State stipulated to using the prior definition of "predatory" and had to prove relationships were established or promoted with the victim for the primary purpose of victimization. *Morgan,* 176 S.W.3d at 205-7. Under the current definition, the State must show the primary purpose of the sexually violent behavior was victimization. §632.480(5).

appellant was "more likely than not to commit future predatory acts sexual violence" at trial, but his conclusions were not supported by the record. *Id*. at 203,211. *Morgan* was remanded because the record demonstrated that the State could have made a submissible case if it had developed a case using the current definition of "predatory." *Id.*

Here, there was no evidence supporting a finding that Hopkins would commit future acts of sexual violence for the primary purpose of victimization. The State argued that the jury could make that inference from Hopkins' prior conduct and draw a reasonable inference that his future conduct would be similar.(Tr.738). But, there was no testimony that Hopkins' prior acts were for the primary purpose of victimization, supporting a finding those acts were "predatory," or evidence that any future acts would be for that purpose. *Morgan*, 176 S.W.3d at 209; §632.480(3). Therefore, Hopkins' past acts, one of which qualified as sexually violent act, did not establish a likelihood of future predatory acts of sexual violence. *Id.* at 210. The State was required to produce additional evidence as to the likelihood of committing future ***predatory*** acts of sexual violence. *Id*.

The risk assessment methods employed by the State's experts did not address ***predatory sexual offending***. Both experts relied upon actuarial risk assessment and additional factors to predict the likelihood of future re-offense.(Tr.455,651,676). The Static-99 actuarial gives a score used to determine the individual's risk to "re-offend in the future."(Tr.456,464). Telander said Hopkins had a Static score of 6, which is "high risk."(Tr.471). The absolute risk "for the likelihood that he would commit another sex offense in 10 years" is 37%.(Tr.474). Kircher gave Hopkins a score of 7 on the Static,

placing him in the "high risk" category; a score of 6 would not make a difference in her opinion.(Tr.653,655).

Kircher also used the Stable-2007, which looks at items "related to sex offense recidivism or re-offending" and was designed to help treatment providers formulate a case management plan.(Tr.655,710). Not all of the Stable factors correlate with recidivism or are considered empirically supported.(Tr.707-9). Hopkins had a "high score" on the Stable.(Tr.672). However, that instrument should be scored every 6-12 months, and Kircher's score was out of date.(Tr.714). She testified it would be unethical for her to give a Stable assessment at trial because she had not reviewed any information about Hopkins' past two years.(Tr.714).

The additional factors Telander considered indicate "a risk to reoffend" or are considered "an aggravator of risk."(Tr.475). Kircher also considered dynamic risk factors from "sexual offense recidivism" studies, many of which overlapped with factors already considered on the actuarial instruments and none of which added to her assessment.(Tr.674;712-3).

Neither the actuarial instruments nor additional dynamic factors measured ***predatory sexual offending***. The testimony established that the Static, Stable, and other factors were related to and predictive of future sexual offending, but not of ***predatory sexual violence***. *Morgan*, 176 S.W.2d at 210; *Cokes*,107 S.W.3d at 323-4. The jury could not infer from testimony about the actuarial scores that Hopkins would reoffend in a ***predatory sexually violent*** way. *Cokes*,107 S.W.3d at 323-324. The record did not support

expert opinion, or inference, of future predatory sexual violence and was insufficient to make a submissible case.*Morgan*,176 S.W.3d at 211;§632.480(3)-(5).

The State failed to prove Hopkins' likelihood of committing ***predatory acts of sexual violence***. *Id.* Hopkins was entitled to a directed verdict and the trial court erred in failing to sustain his motion. *Id.*; *Cokes*,107 S.W.3d at 234.

State Failed to Prove Hopkins "More Likely Than Not" to Commit Any Act

Not only did the State fail to prove Hopkins' likelihood of committing predatory acts of sexual violence, the State failed to prove Hopkins was "more likely than not" to commit a future offense of any kind, because the experts did not quantify any likelihood of re-offense, and any risk fell below "more likely than not."

The experts failed to quantify their assessment of Hopkins' future risk. *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.

Telander testified that "more likely than not" means "better than a fifty percent chance within the remainder of his life that this would happen again."(Tr.549). Kircher

could not quantify "more likely than not."(Tr.717). An expert cannot rely on a personal "more likely than not" standard, and their testimony must demonstrate they based their opinion on a well-recognized standard. *Lee*, 848 S.W.2d at 498-99.

Kircher agreed that, according to the Static-99R developers, absolute recidivism rates are the most relevant information for fact finders and the only way to convey a probability or likelihood of reoffending, but she did not use that likelihood.(Tr.705-6). They also warn there is a tendency to overestimate expected recidivism for individuals described as "high risk."(Tr.705). Sex offenders have the lowest recidivism rates of all criminal offenders.(Tr.711).

The Static-99R has two sets of data from which an evaluator can derive an absolute probability of recidivism.(Tr.506-7). The routine data includes every individual studied in the meta-analysis, including those with the highest and lowest risks; the high risk/high needs group only looks at a subset of men who were considered to be high risk.(Tr.506-7). There is no research or instruction for picking between the two groups to derive an absolute probability of recidivism; Telander choose the high risk/high needs group based on his personal feeling that was best because Hopkins was being considered for civil commitment.(Tr.508).

A Static-99R score of six translates into a 37% chance an individual in the "high risk/high needs" data set would commit a sex offense within 10 years.(Tr.474). This score means that only 37 out of 100 men committed another sex offense.(Tr.474). Using the routine sample, a score of six correlates with a 20.5% chance of re-offense, meaning 80 out of 100 men would not recidivate.(Tr.508-9). This 20.5% likelihood of recidivism was

half the amount of Telander's first prediction of Hopkins' risk.(Tr.512). Telander agreed it is "more likely than not" someone with a score of six would be in the group of 80 men who do *not* recidivate, than in the group of 20 men who do.(Tr.510).

Even a 37% chance of recidivism falls short of the "more likely than not" threshold. To raise Hopkins' level of risk to "more likely than not," the experts considered additional dynamic risk factors. Telander could not explain how any dynamic factor increased Hopkins' risk, nor give a probability of re-offense based on his consideration of those risk factors and the pedophilia diagnosis.(Tr.546,548). Similarly, Kircher could not explain how dynamic factors increased risk above her Static and Stable assessments, neither of which instrument which produced a probability of re-offense in her evaluation.(Tr.722). She admitted that no risk factor added to her assessment of Hopkins' risk.(Tr. 712-13).

There is no research guiding how to increase an individual's risk based on the presence of any given factor.(Tr.546-7,722). However, the Static-99 developers' own research indicates that successful completion of a sex offender treatment program, like Hopkins' completion of MoSOP, reduces risk of recidivism by 40%.(Tr.537).

Furthermore, the SVP Act is only concerned with commission of sexually violent offenses-- acts specifically defined by statute-- whereas the Static-99 looks at all sex offenses.(Tr.513,733); §632.480. Telander did not know the likelihood someone with Static a score of six would recidivate with a sexually violent offense.(Tr.513).

Moreover, the actuarial instrument developers indicate that local data is best, which in this case means data about Missourians who have been convicted of a Missouri crime, imprisoned in Missouri, subject to MoSOP and the SVP Act.(Tr.730). The Missouri

Department of Corrections publishes statistical data about sexual offender recidivism in Missouri.(Tr.522; Ex.C). In Missouri, the observed recidivism rate, measured as a return to Missouri prisons for a sex offense, is 3.3% within five years for men who refused or failed MoSOP.(Tr.522; Ex.C, p.82). The observed recidivism rate is 2.6% for men who, like Hopkins, completed MoSOP.(Ex.C, p.82).

While the witnesses gave ultimate opinions that Hopkins was "more likely than not," neither could quantify Hopkins' risk as a probability of greater than 50%. *Elam*, 765 S.W.2d at 208. Therefore, their testimony was nonprobative of the ultimate issue. *Id.* Telander was the only witness to quantify Hopkins' risk of reoffending, placed at 37% chance according to the Static-99R.(Tr.474). No dynamic factor had a quantifiable value that could increase that absolute recidivism probability. However, because Hopkins completed treatment, his Static risk would reduce by 40%, down to a 22% predicted risk of re-offense.(Tr.537). Of course, that 22% reflects a risk of committing *any* type of sexual offense, not just the narrow class of "sexually violent offenses" under the Act, or the even narrower class of "predatory sexually violent acts."

"More likely than not" is a greater probability than a 37% chance or 22% chance, and is certainly greater than a 3.3% chance Hopkins would re-offend by committing *any* type of sexual crime. It was "more likely than not" Hopkins would ***not*** reoffend.(Tr.510). The State failed to prove Hopkins presently suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined. He was entitled to a directed verdict and the trial court erred in failing to sustain his motion.

There is no evidence in the record indicating the State could make a submissible case if remanded. This Court must reverse and release Hopkins from confinement.

VII.

The trial court erred in overruling Hopkins' objection and admitting Kircher's testimony regarding her determination that Hopkins met the SVP criteria, 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) and §§490.065, and 632.483, in that the EOC determination is inadmissible pursuant to §632.483; Kircher's determination was not reliable because the scope of her evaluation was limited to the finite moment in time Hopkins was paroled and only for the purpose of referring him into the process, was not based on the burden of proof at trial, and was based on incomplete and insufficient information to form a reliable opinion and Hopkins 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; and her two-year-old limited determination could not assist the jury in determining if Hopkins presently met the criteria for commitment under §632.480.

Hopkins moved to exclude and strike Kircher's End of Confinement report and determination from evidence, arguing that admission of the report and her determination were precluded by §§495.065, 632.483 and the *Bradley* decision, 440 S.W.3d 546 (Mo.App.W.D.2014), and to exclude any statements he made to her.(LF18-23;87-94). His request was denied before Kircher testified at the probable cause hearing, because the trial court said *Bradley*'s discussion of the EOC was dicta.(Tr.14;L.F.18-23). Before trial,

Hopkins renewed his request and submitted deposition testimony of Kircher and Dr. Rick Scott in support.[8](LF 87, 95-119; Tr.130; Ex. L, N). The trial court denied the motion, and although it was "troubled" by the State's use of Hopkins' unwarned statements to Kircher, ruled it was "leaving that to a higher court."(Tr.134;631-3).

Hopkins also argued the EOC was: for a limited purpose and time (solely for screening SVP cases); irrelevant to Hopkins' *current* condition at the time of trial; supplanted by the DMH evaluation; irrelevant and prejudicial; based on incomplete information; and that admission of the Kircher's testimony would violate due process and equal protection, and deny a fair trial and the affective assistance of counsel.(L.F.18-23;87-94). U.S.Const. amends. V, VI, XIV; Mo.Const. art. I, §§2, 10, 18(a); §§632.483, 490.065.

Standard of review

Ordinarily, the trial court has discretion whether to admit evidence at trial. *Elliot v. State*, 215 S.W.3d 88, 92-93 (Mo.banc2007). Whether testimony and evidence met the requirements of §490.065 and are therefore admissible is reviewed de novo. *Kivland v.*

[8] Deposition of Dr. Rick Scott, DMH psychologist and certified forensic coordinator, who performed both EOC determinations and post-probable cause compressive SVP evaluations, and had more experience conducting SVP evaluations than any other Missouri evaluator.(L.F. 87-94; Ex. L). Deposition of Nina Kircher.(L.F.109-19; Ex. N). References to their depositions, Exhibits L and N, will be to "Scott" and "Kircher," respectively.

Columbia Orthopaedic Group, LLP, 331 S.W.3d 299, 311 (Mo.banc2011). 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

Section 490.065 sets forth the standard for admissibility of expert opinion testimony. *Kivland,* 331 S.W.3d at 311. In Missouri civil commitment is only constitutional if it follows proper application of §490.065. Under §490.065, the trial court must determine four things prior to the admission of expert testimony: (1)the expert is qualified; (2)the expert's testimony will assist the trier of fact; (3)the expert's testimony is based on facts or data reasonably relied upon by experts in the field; and (4)the facts or data upon which the expert relies are otherwise reasonably reliable. *Kivland,* 331 S.W.3d at 310-111. When inadmissible evidence is received at trial, this Court assumes that the jury considered evidence in reaching the verdict. *Gates v. Sells Rest Home, Inc.,* 57 S.W.3d 391, 396 (Mo.App.S.D.2001).

Determination Was Inadmissible

Kircher's end of confinement 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 v. State*, 440 S.W.3d 546, 557 (Mo. App. W.D. 2014).

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.[9] "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. 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.*at557-8. Hopkins 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, Kircher's determination was not admissible as evidence to prove whether Hopkins was an SVP. §632.483.5.

[9] *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*. at5 88; §632.483("or any member of section 632.483 ***or*** section 632.484.").

An inadmissible determination cannot meet the admissibility requirements for expert testimony §490.065.

Determination Was Unreliable

Exclusion of the EOC determination under §632.483 is a logical conclusion since the determination is part of a pre-trial screening process for the purpose of determining if someone will be referred for SVP commitment or released from DOC custody, and according to her own sworn testimony, Kircher's only role was "to determine whether or not they met criteria for referral" to the MDT and state attorneys. §632.483,(Kircher, p.6-11;Ex. A). Kircher's determination answers a different question than the court-ordered DMH evaluation following a probable cause finding.§632.489. According to Kircher, the subsequent DMH evaluation is an "extensive" and "full evaluation" for the purpose of informing the jury at the time of trial.(Kircher, p.11, 69). Therefore, the scope of the EOC determination is limited to answering a referral question, different from the DMH evaluator's evaluation for ultimate commitment at trial.(Scott, p.14,22,24-25,37). As such, it is not sufficiently reliable or relevant at trial. §490.065. The EOC determination is not intended to be an opinion on the ultimate issues at trial, and Kircher should not have been permitted to testify Hopkins was "more likely than not" because of a mental abnormality.(Scott, p.23-24).

Not only does an EOC determination not answer the trial question, Kircher's opinion was not an opinion made to a reasonable degree of psychological certainty for the heightened clear and convincing burden of proof used at trial.(Scott, p.14,26-27). The

reasonable degree of certainty necessary to make a referral to the MDT and Attorney General, and even for the probable cause phase, is not the same degree of certainty needed to render an opinion at trial.(Scott, p.14-15,26-27). Therefore, it is not reliable or relevant at trial. §490.065.

The reliability of Kircher's opinion is further diminished based on the limited information available to her at the time of her determination. Kircher calls herself a "screener" because she has limited access to only a portion of records available, unlike the court-ordered DMH evaluator who has access to all records obtained during discovery.(Kircher, p.11,13). Not only are the records available to her limited, they are often incorrect and do not include original sources of information such as police reports.(Scott, p.27,36-37). Here, Kircher's limited set of records did not include police reports about any offense or allegation, or juvenile records.(Tr.687-88).

The narrow, limited bases for her opinions limit the reliability of her conclusions.(Scott, p.27,36). The base of information to support an evaluation and make an opinion reliable for trial is too narrow until after the discovery process.(Scott, p.27-28, 36). "There's just too little information to make the [EOC] opinion reliable enough to be admissible at that [trial] level."(Scott, p.37). Experts completing 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. 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. §490.065.

Determination Was Irrelevant

Kircher's "point in time" evaluation only looked to July of 2014.(Tr.684). She had no current evidence to support her diagnosis of pedophilia, nor evidence that Hopkins would engage in pedophilic sexual behaviors in the future.(Tr.697-8). Kircher had not interviewed Hopkins or reviewed any records about him during the past two years.(Tr.714). She had no current information about Hopkins or his mental state or risk at the time of trial. Nonetheless, she presented her opinions as though they were current and applicable to the jury's determination of whether Hopkins was an SVP at that time.

"The language of section 632.480 is written in the present tense and necessarily requires the jury to find an individual *presently* poses a danger to society if released." *Murrell*,215 S.W.3d at 104. Kircher's two-year-old screening/referral determination could not assist the jury in determining whether Hopkins *presently* had a mental abnormality making him "more likely than not" at the time of trial, and should not have been admitted. *Id.;*§490.065.1.

Determination Was Prejudicial

At the time of the EOC evaluation, Hopkins was "not even a Respondent yet." (Scott, p.45). 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; *Norton*, 123 S.W.3d at 172. If Hopkins were being questioned the same way concerning a criminal matter, he would get a lawyer; but at the

EOC, he does not under the Act.(Scott, p.46);U.S.Const. amends. V, XIV; Mo.Const. art.I, §2, 10. Because the SVP Act did not give Hopkins protections like assistance of counsel and other statutory rights at the time of the EOC evaluation, the protection should come at the trial level, limiting Kircher's testimony.(Scott, p.41). The absence of protections at the EOC level "requires protection at the trial level against the misuse of information from the end of confinement evaluation."(Scott, p.47).

Cross-examination cannot distinguish the EOC report and later comprehensive, complete evaluations.(Scott, p.8). There was no way to effectively cross-examine Kircher on the inadequacy and unreliability of her referral determination without informing the jury of the specific purpose of her screening evaluation, its limited scope, and the burden of proof applicable to her opinion. Allowing the EOC reporter to offer her opinion and specifically stating it is for a limited role is insufficient. Explaining the role of the EOC impermissibly and prejudicially informs the fact finder about the screening process, including that there was a probable cause determination by a judge.(Scott, p.33).

Kircher testified at trial that there was a probable cause hearing where she discussed information contained in her report.(Tr.691). Evidence of the screening process was without probative value, was unfairly prejudicial and should have been excluded. *See In re Care and Treatment of Foster*, 127 P.3d 277 (Kan.2006). The jury should not be informed that there was a screening evaluation and a preliminary determination by the court. *Id.* 283, 286-87. Such evidence is "extremely prejudicial," is "inconsistent with substantial justice and affects [] substantial rights." *Id.* at 288. The resulting prejudice is "significant," "because a jury has a natural tendency to look for guidance from those clothed in

authority… even when guidance is not needed." *In re Detention of Stenzel*, 827 N.W.2d 690, 707 (Iowa2013), quoting *Foster*, 127 P.3d at 286. Evidence of the screening process has the effect of commenting on the credibility of the State's witnesses and even the State's attorney's own opinions, in addition to highlighting that the court has already made a probable cause determination. *Id.*

This is precisely why the legislature enacted §632.489.4 requiring a full, comprehensive SVP evaluation by DMH. The EOC determination "essentially now has been supplanted by the new [court-ordered] evaluation" completed by DMH; "It is that [court ordered] evaluation ... that supports further proceedings" *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 77 (Mo.banc2009), *and see Fogle v. State*, 295 S.W.3d 504 (Mo.App.W.D.2009)(EOC "report was supplanted by subsequent evaluations").

Had Kircher's testimony been excluded, the jury would not have heard about a Static-99R score of 7, one point higher than Telander's score, putting Hopkins in the 97th percentile, or about a Stable risk assessment indicating Hopkins had high treatment need.(Tr.653-4,471,655,710). The jury would not have heard about dynamic risk factors purporting to increase Hopkins' risk: general self-regulation problems, poor cognitive problem-solving, grievance, hostility toward women, emotional congruence with children, emotional identification with children, general social rejection, sex as coping, lack of concern for others, or general impulse problems, because Telander did not see evidence of those.(Tr.545-6,660-667,674-8).

More importantly, while Telander testified he diagnosed Hopkins with pedophilia, he did not provide testimony demonstrating Hopkins met the criteria for that diagnosis;

only Kircher testified to the diagnostic criteria and offered evidence to support them.(Tr.427,644,646). Therefore, he provided no factual basis to support a mental abnormality finding. The jury would not have heard testimony that Hopkins told Kircher he viewed child pornography at age 18.(Tr.644). She relied on that information to form her diagnosis, "serious difficulty controlling behavior" opinion, and ultimate mental abnormality conclusion.(Tr.644,647). Therefore, there would have been no fact upon which a mental abnormality finding and verdict could have been based.

Nor would the jury have heard about Hopkins' statements Kircher relied upon to opine he had a higher risk: 1)what he learned in treatment; 2)that he "was an asshole" and did not give Kircher "the sort of answer that you want to hear from somebody" who completed treatment; 3)Hopkins preferred combative relationships and exhibited hostility toward women; and 4)seeking gratification by an "almost obsessive" desire for a relationship.(Tr.644,648-9,662-3,666).

Conclusion

Kircher's testimony was inadmissible under §632.483 and §490.065. We must assume the jury considered it in reaching its verdict. *Gates*, 57 S.W.3d at 396. Hopkins was prejudiced by Kircher's testimony, including evidence of the screening process and probable cause hearing, because he could not adequately cross-examine her without introducing additional prejudicial evidence of the screening process and her testimony gave the false impression it was applicable to the time. The trial court erred in overruling his motion and in admitting Kircher's testimony at trial. This Court must reverse. Because the

record does not demonstrate the State could have made a submissible case without Kircher, there is no justification for remand.

VIII.

The trial court erred in denying Hopkins' motions to exclude his statements made to Kircher and in admitting his statements at trial, because this violated his rights to silence, assistance of counsel, due process and equal protection, guaranteed by the U.S.Const. amends. V, VI, XIV, Mo.Const. art. I, §§2, 10, 18(a), 19, and §632.335, in that Hopkins was faced with the adversarial system when questioned by state actor Kircher, the questioning occurred in a custodial interrogation, Hopkins was not advised of his right to remain silent or to an attorney and did not knowingly waive those rights, his statements were not voluntary, Kircher formed opinions and testified against him at the probable cause hearing and at trial based on his statements, and Hopkins' statements were admitted at trial.

> From Addington and Gault it is clear that before anyone may be deprived of his liberty, whether the proceeding be denominated criminal or civil, the person is entitled to due process of law and is further entitled to the constitutional protection that he shall not be compelled to be a witness against himself, or as sometimes stated, the right not to be required to incriminate himself.

State ex rel. Simanek v. Berry, 597 S.W.2d 718, 720 (Mo.App.W.D.1980).

Facts

Hopkins moved to exclude the EOC report any statements he made to Kircher from evidence at trial.(LF.20-3;91-4). Hopkins argued his statements were unwarned and

elicited for the purpose of seeking his indefinite commitment, and in violation of his rights to counsel, due process, equal protection and against self-incrimination.[10](LF.20-24,92,94).

Kircher interviewed Hopkins while he was imprisoned by the State at Farmington Correctional Center to assist her in her EOC evaluation.(Ex.A, p.3). Kircher was working for the Department of Corrections.(Tr.685).Kircher conducted her §632.483 screening evaluation to determine if Hopkins met the SVP definition and if she would refer him to the Multidisciplinary Team("MDT") and State "for their consideration of whether to proceed with a probable cause hearing for adjudication of the offender as a sexually violent predator."(Ex.A, p.1,8;Tr.46).

According to her report, Kircher gave a "forensic warning" and explained the nature and purpose of the evaluation to Hopkins.(Ex.A, p.3). The report states Hopkins was informed he could refuse to answer any question or stop the interview at any time.(Ex.A, p.3). The report does not indicate Hopkins was advised he had the right to silence, that Kircher would be a witness against him in any proceeding, that refusing to answer questions would not be used against him, that he could consult with an attorney, and that his statements would be used to make a determination as to whether he qualified for commitment, could result in involuntary detention, or could be used against him in a judicial proceeding.

[10] U.S.Const. amends V, VI, XIV; Mo.Const. art. I, §§2, 10, 18(a), 19; §§632.335, 632.325, 632.320; 632.495; 632.492; 632.483.

Kircher did not advise Hopkins he had a right to speak with an attorney before talking to her.(Tr.48). Hopkins signed a DOC "consent form" to be interviewed or photographed.(Tr.49;Ex.K).

Kircher relied on Hopkins' statements in arriving at her diagnosis, risk assessment, classification of a mental abnormality, and ultimate determination.(Tr.45). She testified against him at the probable cause hearing and at trial, both times over his objection.(Tr.14,632-5).

Preservation

Hopkins' motion was denied before Kircher testified at the probable cause hearing. (Tr.5,14;L.F.18-23). Hopkins renewed his request and submitted two exhibits, sworn deposition testimony, in support of his motion to exclude, before trial.(LF 87-119;Tr.130). The trial court denied the motion, noting it was "troubled" by the State's use of Hopkin's unwarned statements to Kircher, but was "leaving that to a higher court."(Tr.134). Hopkins renewed the motion at trial and in his motion for new trial.(Tr.632-5;L.F.181-2).

Hopkins made an offer of proof, which included the two depositions, Exhibits L and N and Exhibit K, and a consent to interview and photograph form.(Tr.635). The offer of proof also included a statement from defense counsel that Hopkins would testify he told Kircher he was uncomfortable and did not want to continue answering her questions; Kircher said he had started the interview and was not allowed to terminate it; and Kircher got a guard to stay in the interview room to force Hopkins to continue giving statements.(Tr.632-3). The trial court denied the motion.(Tr.633).

Hopkins incorporates the standard of review from Point I.

Analysis

Federal Law

Allen v. Illinois, 478 U.S. 364, 375 (1986), held that the Fourteenth Amendment did not require application of the Fifth Amendment right to silence to Illinois' civil statutory sexually dangerous person proceedings. The Court found the Illinois law was civil and not "criminal" for purposes of the Fifth Amendment's privilege. *Id.*at 368-9, 374. Because the Court had never previously held that the Due Process Clause required application of the privilege against self-incrimination, it declined to do so in that case. *Id.* at 374.

It did note, however, the State's argument that denying the privilege would enhance the reliability of a finding of sexual dangerousness did not matter; the right to silence "is not designed to enhance the reliability of the fact finding determination; it stands in the Constitution for entirely independent reasons." *Id.* at 375. It also noted that a civil label is not dispositive. *Id.* at 368. Where the statutory proceedings are punitive, in either purpose or effect, "it must be considered criminal and the privilege against self-incrimination must apply." *Id.*

Allen was decided by a 5-4 majority. The dissenting opinion found the law criminal for purposes of the Fifth Amendment. *Id.* at 379(Stevens, dissenting). The ultimate characterization of the proceeding for Fifth Amendment purposes "remains a federal constitutional question." *Id.*at 380. A treatment goal does not mean proceedings are not "criminal." *Id.* The State's argument that a right to silence would impede a correct mental

disorder diagnosis was rejected. *Id.* at 381. "Experience … has shown that application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid purposes of civil commitment." *Id.*, *citing In re Rizer*, 409 N.E.2d 383, 386 (1980). Similarly, the State's interest in protecting the public in criminal cases does not justify denial of the right to silence, which rests on the nature of free society. *Id.* at 382-3.

> The Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such, it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state.

Id. at 383 (citation omitted).

Gault held that the Due Process Clause required application of criminal protections, including the right to silence, to juvenile proceedings because a juvenile's freedom was curtailed by the State. *Application of Gault*, 387 U.S.1, 41, 49, 55 (1967). 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 43-4. Eliciting and using statements requires careful scrutiny. *Id.* at 44. Even though juvenile proceedings are "civil" and not "criminal," 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— a command which this Court has broadly applied and generously implemented in accordance with the teaching of history of the privilege and its great office in mankind's battle for freedom.

Id.

"[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.Gault's statements were obtained by state actors without first advising him of his right to silence, and the only evidence at his hearing was his admissions. *Id.*at 56.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the United States Supreme Court held that admission of a doctor's testimony in the penalty phase of a murder trial violated the Fifth Amendment 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. The criminal defendant who does not initiate psychiatric evaluation, or attempts to introduce psychiatric evidence,

cannot be compelled to give statements to a psychiatrist if his answers will be used against him in the sentencing proceedings. *Id.* at 468.

The "essence of this basic constitutional principle is the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Id.* at 462(emphasis in original; citations omitted). Smith was interviewed by a doctor as part of a pretrial psychiatric evaluation for competency. *Id.* at 457. The doctor did not have permission from defense counsel, who did not learn about the pretrial evaluation until the jury trial was underway. *Id.* at 459, 458, n.5.

In the second phase of trial, the State had to prove Smith's future dangerous, and the probability he would commit criminal acts in the future. *Id.* at 457, 466. The doctor testified in the sentencing to a diagnosis, an opinion Smith would "continue his previous behavior, Smith's condition would "only get worse," and that Smith would commit other criminal acts if given the opportunity to do so, based on information from the mental examination. *Id.* 459-60, 464. The State's attempt to establish future dangerousness by relying on unwarned statements made to the doctor infringed upon the Fifth Amendment right. *Id.*at 463. 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 fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from reach of the Fifth Amendment." *Id.* at 465.

The Fifth Amendment privilege "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 v. Arizona*, 384 U.S. 436, 467 (1966). Therefore, 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, quoting *Miranda,* 384 U.S. at 467-9. This applies to persons who are *suspected or accused* of wrongdoing. *Miranda*, 384 U.S. at 467. The right to counsel "is indispensable to the protection of the Fifth Amendment privilege;" counsel is required to protect the privilege during interrogation. *Id.* at 469. That right extends to consulting with counsel before questioning, and having counsel present during questioning. *Id.*

The requirement for those custodial warnings also applies to pretrial psychiatric examinations. *Estelle,* 451 U.S. at 467. Smith was in custody in jail when the examination was conducted. *Id.* 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.

Missouri

In recognition of the due process rights of involuntary civil committees, in 1979 the Missouri Legislature enacted §202.135.2 giving rights to individuals subject to involuntary detention and treatment under §202.123, including the right to remain silent.[11] *Simanek*, 597 S.W.2d at 720. That right means an individual cannot constitutionally be compelled to be a witness against himself or incriminate himself. *Id.* That right is violated by requiring an individual to testify, and even in requiring him to file an answer to a petition. *Id.* at 720, 722. "The burden is on the state to prove the mental illness and likelihood of harm and that burden remains with the state." *Id.* at 722.

Though Chapter 202 commitments no longer exist, Chapter 632 recognizes the same fundamental due process rights to silence and the assistance of counsel in involuntary civil commitment proceedings. §632.325. Whenever an individual is going to be evaluated pursuant to Chapter 632, he must be advised both orally and in writing that: he has the right to counsel and to communicate with counsel; the purpose of the evaluation is to determine whether he meets civil detention criteria; his statements may be used in making that determination; his statements may result in involuntary detention proceedings; and his statements may be used against him in court, among others. §632.325.

The Chapter 632 rights also apply to prisoners requiring care in a mental hospital. §552.050. Likewise, anyone subject to incapacity proceedings under §475.075 has the right to silence, to an explanation that the purpose of an evaluation is to produce evidence which

[11] Civil detention is now accomplished under Chapter 632. *See* §632.300-632.455 for general civil detention provisions.

may be used to determine incapacity, and that anything the individual says may be used in court and in making determinations about him or her, all before any evaluation takes place.

At trial, the State contended *Wadleigh v. State*, 145 S.W.3d 434 (Mo.App.W.D. 2004) controlled, telling the trial court there was no *Miranda* warning requirement under that case.(Tr.634-5). Wadleigh challenged the trial court's refusal to give a "statement to doctors" jury instruction, mirroring MAI-CR3d 306.04. *Id.* at 439. But, "[b]ecause treatment, rather than punishment, was the purpose of the proceeding, Mr. Wadleigh's statements to mental health experts were not shielded by the Fifth Amendment privilege" and there was no abuse of discretion in refusing the instruction. *Id.* at 440. *Wadleigh* did not discuss obtaining statements knowingly and voluntarily or *Miranda* warnings.

Two years later, *Bernat* recognized that the alleged SVP has rights not listed within the plain language of the Act, including those in the general civil commitment statutes, case law, rules, and under due process and equal protection. 194 S.W.3d at 867-6. Bernat claimed his right to equal protection was denied when the trial court permitted the State to comment on his failure to testify at trial, though the State chose not to call him as a witness; he did not claim his right to silence arose from the Fifth Amendment. *Id.* at 866. This Court implicitly recognized a Fourteenth Amendment right to silence. *Id.* at 668, 670.

The State asked this Court to declare an affirmative bar on the right to silence in SVP cases since that right is provided in statute to other involuntary detainees in §632.335, but not specifically enumerated in §632.492 or 632.495. *Id.* at 868. The State's assumption that the SVP Act contained all procedures and rules applicable to SVP proceedings, without reference to the general civil commitment statutes, case law or rules, was "inaccurate." *Id.*

The SVP Act "basically set[s] out only those procedures that are different from the procedures that would otherwise apply" and are not comprehensive. *Id.* The statutes do not contain all of a civil detainee's rights, whether he is considered for detainment as an SVP or for other reasons. *Id.*

The Court identified the question before it: did state and federal equal protection clauses "require this Court to imply a right to remain silent and to be protected from adverse inference being drawn from that silence[?]" *Id.* at 869. The Court held that commenting on Bernat's silence was not narrowly tailored, and the trial court abused its discretion in allowing an adverse inference argument. *Id.* at 870-71.

Bernat indicated the State has a compelling interest in an alleged SVP's cooperation in diagnosis and treatment, and in presenting an alleged SVP's mental condition to the jury to enhance the reliability of the proceedings; neither applied in that case *Id.* at 869-70. The Court said the latter rationale would apply to criminal cases, where compelling testimony might enhance the reliability of criminal trials. *Id.* But, the "analogous right" to silence under the Fifth Amendment "is not designed to enhance the reliability of the fact-finding determination; it stands in the Constitution for entirely different reasons." *Id.* at 870, citing *Allen*, 478 U.S. at 375. The latter did not apply because the State's witnesses used Bernat's interaction with treatment providers to argue he needed continued confinement and he was not called as a witness. *Id.* at 870. And, of course, both rationales would apply to other involuntary commitments and incapacity proceedings; however, those individuals, like a criminal suspect, are entitled to silence and to warnings prior to eliciting statements.

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. *In re Norton*, 123 S.W.3d 170, 172 (Mo.banc2003). Section 632.492 guarantees the right to counsel in SVP "proceedings." *Id.* But, civil "proceedings" do not start until the State's petition is filed. *Id.*

Application of Fifth Amendment Right to Proceedings

Wadleigh, *Bernat* and *Norton* presumed the SVP Act was civil, without a punitive effect. When a statutory scheme is punitive in effect or purpose, it is considered to have established criminal proceedings for constitutional purposes. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Allen*, 478 U.S. at 368. The ultimate characterization of the proceeding for Fifth Amendment purposes "remains a federal constitutional question." *Allen*, 478 U.S. at 380(Stevens ,dissenting). Like in *Gault*, the Federal *Schafer* Court was persuaded that the intention or effect of the SVP Act was punishment, even though the proceedings were deemed "civil." *See Allen*, 478 U.S. at 373, *Gault*, 387 U.S. at 49-50; *Van Orden v. Schafer*,129 F.Supp.3d 839, 844 868-9(E.D.Mo.2015). 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.

Hopkins claimed use of his unwarned statements violated the Fifth Amendment.(L.F.20,87,94). Like in *Estelle*, Hopkins was faced with an adversarial system and was not in the presence of someone acting in his interest when Kircher evaluated him.

451 U.S. at 469, *quoting Miranda*¸384 U.S. at 469. During Kircher's psychiatric inquiry, he was in custody. *Id.* at 467-8. Kircher was working for the State, conducting a Chapter 632 evaluation.(Tr.685).Kircher's diagnosis and opinions rested on more than her observations and records review; she drew her conclusions, including those about Hopkins' mental abnormality and future dangerousness, critical issues at trial, from what Hopkins' said. *Id.* at 464, 466. Kircher did more than just report the results to the State, she testified against Hopkins twice, and her report was considered by Telander. *Id.* at 467. Hopkins 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.

"Unless the individual fully comprehends that what they're saying at the screening level will be used against them in the commitment trial, their opinion is not fully informed, and so any agreement to participate, any assent would be lacking."(Scott, p.40). To that end, Kircher could not "accurately describe the purpose of this evaluation and obtain a legitimate, a knowing, intelligent and voluntary, informed assent."(Scott, p.40). Giving an unknown "forensic warning," telling him he could refuse or stop answering and participation would not guarantee an outcome in the evaluation, and obtaining a consent to interview or photograph is not equivalent to *Miranda* or §632.325 warnings.(Ex.A, p.3; Ex.K; Tr.48-9). Those warnings apply to protect him "in all settings" in which his freedom is curtailed in any significant way, whether he was merely suspected or officially accused. *Id.* at 466; *Miranda*, 384 U.S. at 467.

Kircher did not advise him of a right to silence, that his statements would be used against him to secure his commitment, or that he had a right to an attorney before or during the evaluation.(Ex.A; Tr.48-9). At most, Kircher advised Hopkins that "the things we are – will talk about, if he chooses to interview, could end up – will end up in my report, and that my report could up – end up in court at a hearing."(Tr.49). The State did not show that Hopkins was advised: Kircher would be a witness against him in any proceeding or at trial, refusal to answer any questions would not be held against him, his statements would be used to determine confinement, or he had a right to consult with an attorney.

Furthermore, Hopkins made an offer of proof that he told Kircher he did not want to continue answering her questions; Kircher said he had started the interview and was not allowed to terminate it; and Kircher got a guard to stay in the interview room to force Hopkins to continue giving statements.(Tr.632-3). Kircher testified, "I have no recollection of him making that statement to me, so that didn't happen."(Tr.691). She claimed she never brought a guard into an interview room and that she did not tell Hopkins that he already agreed to talk to her, so he could not stop.(Tr.691).

Even so, once Hopkins' raised his challenges, 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.banc1994), overruled on other grounds by *Joy v. Morrison*, 254 S.W.3d 885 (Mo.2008).

Rather, the State argued the constitutional rights under the Fifth Amendment did not apply to Hopkins.(Tr.634-5).

Application of Fourteenth Amendment to Proceedings

Hopkins also claimed the privilege against self-incrimination under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.(L.F.20,87,94); *Bernat*, 194 S.W.3d 863. The Due Process Clause required application of the privilege against self-incrimination to the "civil" proceedings in *Gault*. 387 U.S. at 49, 55. "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418 (1979).

As in *Bernat*, Hopkins pointed out the disparate treatment in the plain language of statutes giving the right to silence to some of those involuntarily committed or subjected to probate proceedings, but not to him under the SVP Act. The State offered no reason at trial justifying differential treatment.(*See* Tr.634-5). No narrowly tailored, compelling reason exists. Like in *Bernat*, Hopkins participated in treatment and interacted with treatment providers and the State used that against him, and his right to silence existed

independently of any fact-finding reliability interest. 194 S.W.3d at 870(*See*, e.g.,Tr.641,577-594,646,650).

Furthermore, the right to silence and to assistance of counsel must apply to Hopkins at the EOC determination stage. *Norton*'s rationale does not apply because the proceedings are punitive, and therefore must be given criminal protections. 123 S.W.3d at 172; *Schafer*,129 F.Supp.3d at 844 868-9. A criminal suspect has those constitutional rights before criminal proceedings are initiated by a filed complaint or indictment. *Miranda*, 384 U.S. at 467-9. Those rights apply during pretrial psychiatric evaluations. *Estelle*, 451 U.S. at 466-67. They also apply when anyone is questioned under Chapter 632 for an evaluation, or subjected to incapacity proceedings. §§632.325, 475.075, 552.050. There is no compelling reason justifying differential treatment of SVPs from other civil committees or criminal suspects.

Conclusion

Because SVP commitment results in punitive, lifetime confinement, the proceedings must be considered criminal and the constitutional right to silence applies to Hopkins, 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; U.S.Const. amend V, XIV; Mo.Const. art. I, §2, 10. Hopkins was prejudiced by admission of Kircher's testimony and evidence about his statements to her, as discussed in Point VII. 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 Hopkins' motions and in admitting his unconstitutionally-obtained statements at trial. This court must reverse. Because the record does not demonstrate the State could have made a submissible case without use of Hopkins' statements, there is no justification for remand.

In the alternative, this Court must remand for factual findings on the voluntariness of Hopkins' statements.

IX.

The trial court erred in admitting Shawn Lee's testimony, over Hopkins' objection and invocation of privilege, because that violated his rights to due process, equal protection, a fair trial, and privilege against self-incrimination, guaranteed by U.S.Const. amends V, VI, XIV; Mo.Const. art. I, §2, 10, 18 and 19; and §§337.636, 490.065, in that Hopkins' confidential communications with Lee were privileged under §337.636; that privilege promoted an important social interest and outweighed the need for any probative evidence; Lee was not disclosed or qualified as an expert under §490.065, but gave opinions; Lee refused to provide the documents he testified from during his deposition; Lee did not assess mental abnormality or future risk; and his testimony injected a collateral issue, confused the issues, misled the jury, and was not useful to the jury in examining the two issues before it.

Shawn Lee was a licensed clinical social worker("LCSW"). §337.600(10);(Tr.576). Lee was a MoSOP therapist in DOC, treating sex offenders "and trying to protect the community."(Tr.576). He worked with Hopkins, providing therapy to him for one year.(Tr.579). During his deposition, Lee was directly asked about a duty to Hopkins by virtue of their therapist/client relationship; Lee testified, "My obligation is not to Hopkins. My obligation is to the community at large."(Resp.Ex.A, p.40). He did not have any authorization from Hopkins to discuss his case with the State.(Resp.Ex.A, p.23).

Hopkins asserted his statutory privilege over all communications and information acquired by Lee, and his motion to prohibit Lee's testimony, pursuant to §337.636, was

denied.(L.F.146-7;Tr.152,159). His motion was renewed during trial, where he also objected under §490.065.(Tr.159,577). U.S.Const. amends V, VI, XIV; Mo.Const. art. I, §2, 10, 18 and 19. He also objected on the basis of late disclosure and preserved his challenges in his post-trial motion.(L.F.138-42,182). Lee testified at trial.(Tr. 575-618).

Standard of Review

Hopkins incorporates the Standard of Review from Point VII. SVP commitment is only constitutionally permissible "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Murrell v. State*, 215 S.W.3d 96, 103(Mo.banc2007) citing *Kansas v. Hendricks*, 521 U.S. 346, 357(1997) and *Foucha v. Louisiana*, 504 U.S. at 71, 80(1992). Therefore, Hopkins' commitment was only constitutional if it followed the proper evidentiary standards set forth in §337.363 and §490.065. The trial court was required to interpret those statutes in determining whether to admit Lee's testimony. *See Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311(Mo.banc2011). Questions of statutory interpretation are reviewed *de novo*. *Id.*

Analysis

Privilege prevented Lee's testimony

Under §337.363, privilege attaches to communications between a LCSW and the client. A LCSW "may not disclose any information acquired from persons consulting them in their professional capacity, or be compelled to disclose such information" under that statute.§337.636. Violating that privilege subjects the LCSW to criminal prosecution.

§337.633. The privilege is controlled by the client, in this case, Hopkins. *Bohrn v. Klick*, 276 S.W.3d 863, 866n.2 (Mo.App.W.D.2009).

In *Jaffee v. Redmond*, the United States Supreme Court ruled that a privilege protecting confidential communications between a psychotherapist and his patient promotes an important interest outweighing the need for probative evidence. 518 U.S. 1, 9-10(1996). The psychotherapist-patient privilege depends on confidence and trust. *Id.* at 10.

> Effective psychotherapy…depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Id. "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11. Therefore, the privilege serves public interest in the provision of treatment to individuals with mental or emotional problems. *Id.*

Denying the privilege would only result in "modest" evidentiary benefit. *Id.*

> If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants

> such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being.

Id. at 1122. The Court declared that all confidential communications between a licensed psychotherapist and his patient are protected from compelled disclosure under the Federal Rules, and extends to the same confidential communications made to a LCSW. *Id.* at 15. Distinguishing between counseling provided by psychotherapists and LCSWs "serves no discernible public purpose." *Id.* at 17. To accomplish the purpose of a privilege, the participants to the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.* at 18(citation omitted).

Section 632.510 seeks to eliminate the application of confidentiality or privilege to "information and records" in an SVP proceeding. That section states:

> In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction or the attorney general for the purpose of meeting the notice requirement provided in section 632.483 or 632.484 and determining whether a person is or continues to be a sexually violent predator.

§632.510. By the plain language of the statute, it applies only to "information and records" which are "confidential or privileged." *Id*. The statute does not modify the application of confidentiality or privileges to *testimony*, the issue in this case.[12]

Likewise, the plain terms of §337.636 prohibit Lee's testimony in this case. The only provision in §337.636 pertaining to "testimony" is subsection 5, which permits the LCSW to testify, even over the client's objection, in a proceeding about adoption, child abuse or neglect, or other matters pertaining to the client. *Id*.; *see Bohrn*, 276 S.W.3d at 865. Otherwise, the privilege is subject to the control of the client who received services. *Id.* at n. 2. These proceedings were about whether Hopkins had a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined; they were not about adoption, child abuse or neglect, or Hopkins' welfare. §632.480; §337.636. Subsection five did not apply to permit Lee's testimony. *Id.*

Even so, abrogating Hopkins' privilege is not narrowly drawn to achieve a compelling state interest, and does not pass strict scrutiny. Hopkins' participation in MoSOP treatment was "a public good of transcendent importance" and the privilege over his confidential communications with Lee served the public interest, outweighing the need

[12] "Testimony" is evidence given by a witness under oath, distinguished from evidence from writings and other sources. *Blacks Law Dictionary Free Online Legal Dictionary 2nd Ed.*(2016), available online at http://thelawdictionary.org/testimony/.

for any probative evidence that may have come from compelled disclosure of those confidences. *Jaffee*, 518 U.S. at 9-11.

Lee's testimony was otherwise inadmissible

Even if Lee's testimony was not privileged, it was both inadmissible and prejudicial because he gave opinion, was not an expert, and his testimony and opinions were not relevant to the two issues to be decided at trial. The State relied on Lee's testimony and opinions to satisfy its burden of proving Hopkins was an SVP.

Lee was never disclosed as a retained or non-retained expert under Rule 56.01(b).(LF.136). The State simply disclosed Lee's identity as a fact witness, never indicating a field of expertise.(LF.136); *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 133(Mo.banc2013). During his deposition, Lee testified that the State did not want him to give an opinion, "they wanted me to give the facts on how I – on my interactions with Hopkins."(Resp.Ex.A, p.13).

Despite repeated assertions by the State that Lee was not an expert and was only a fact witness, and over Hopkins' objections, Lee gave opinions about Hopkins at trial during his direct testimony.(Tr.145,154,581,584,587-8). Some of those opinions included whether Hopkins "internalized treatment concepts," moderated or rid himself of sexual thoughts and fantasies, and had impulse control issues.(Tr.581,584,588). He even testified he was like a doctor.(Tr.581). His testimony went beyond reporting mere observations of what Hopkins said or did, or "the facts" of Lee's interactions with Hopkins, and required the application of specialized skill, knowledge or training to facts. §490.065.

"The purpose of the discovery rules is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." *River Bend*, 408 S.W.3d at 133. Hopkins was surprised by the opinions elicited from and given by Lee at trial, contrary to the State's disclosure and repeated assertions that he was a fact witness only, and contrary to Lee's deposition testimony.

During his deposition, Lee testified he could not give testimony in the deposition, or at trial, without looking at his notes.(Resp.Ex.A, p.14). However, during the deposition Lee refused to provide a copy of the materials he had received from the State's attorneys and was relying upon to give testimony.(Tr.157-160).[13] The State also objected to Hopkins' request for the documents.(Resp.Ex.A, p.35-7;Tr.164). On Wednesday of trial, the trial court ordered production of everything Lee had in front of him during the deposition.(Tr.iv;170). Those records were produced at 7:30 p.m. and defense counsel did not have time to review them all before trial resumed Thursday morning.(Tr.iv;578). Hopkins was not able to ascertain all relevant facts and information in advance of trial. *River Bend*, 408 S.W.3d at 133.

Furthermore, the purpose of Lee's testimony was to present another opinion that Hopkins had impulse control, deviant sexual thoughts, and needed more treatment. Lee was not an expert who could properly give those opinions. §490.065. Whatever Lee's

[13] The trial court ordered the State to produce Lee for a deposition before trial, and ruled that the order would cover producing documents, like a subpoena *duces tecum* would have.(Tr.165).

thoughts about Hopkins were, they were only relative to the time Hopkins was in MoSOP in 2013; Lee could not give testimony about Hopkins' control, thoughts or needs at the time of trial. *Murrell*,215 S.W.3d at 104; §632.480. Lee had no contact with Hopkins since 2013, and did not know what Hopkins thought or had internalized at the time of trial.(Tr.613).

Lee could not make a diagnosis, did not evaluate whether Hopkins had a mental abnormality or whether a mental abnormality made him "more likely than not."(Tr.612-3). Therefore, his testimony could not prove or disprove either fact in issue: the existence of a mental abnormality that cause Hopkins to be "more likely than not." *Nolte v. Ford Motor Company*, 458 S.W.3d 368, 383 (Mo.App.W.D.2014); §632.480. However, he testified under the auspices of a government specialist with expertise.

Lee's testimony injected a collateral issue, treatment, into the trial. *Nolte*, 458 S.W.3d at 382. Evidence that is collateral to the issue at trial should not be admitted into evidence. *Id.* His testimony confused the issues, misled the jury as to the issues, and was not useful to the jury in examining the two issues before it. *Id.* His testimony was prejudicial because it led the jury to decide the case on some basis other than the established propositions in the case. *Id.* Hopkins was not only prejudiced by the admission of privileged, non-expert, irrelevant opinion, he was also denied due process, the opportunity to prepare a defense for trial, the opportunity to present evidence at trial in his defense, and to a fair trial. *In re Norton*, 123 S.W.3d at 175; §§632.489, 632.492.

Hopkins was further prejudiced because Lee's testimony was improper bolstering of Telander's testimony. Improper bolstering occurs when an out-of-court statement is

offered to duplicate or corroborate trial testimony. *State v. McFadden,* 391 S.W.3d 408, 430 (Mo.banc2013). If a party can present the same testimony in multiple forms, he may obtain an undue advantage. *State v. Seever,* 733 S.W.2d 438, 441 (Mo.banc1987). Telander had already testified that Hopkins participated in MoSOP for 365 days because of problems he had there (citation to Telander/Lee; Tr.440/579); completed MoSOP treatment with "much reservation by his treatment providers,"(Tr.441/590); explained had sexual fantasies regarding children to his treatment providers(Tr.427,442,562/586); did not integrate MoSOP treatment principles(Tr.446/581-2); had impulse control issues while interacting with his treatment providers(Tr.562/587-8); and had a violation in MoSOP for talking to a 15-year-old suicidal girl(Tr.441/589). The only purpose in eliciting this testimony from Lee was to bolster Telander's testimony and repeat negative facts to the jury. It was no elicited to rehabilitate Telander, for example in Telander's redirect, or in the face of a claim that he fabricated information or made inconsistent statements. *See McFadden,* 391 S.W.3d at 430. The State presented a new witness to duplicate and corroborate the same facts.

Hopkins asserted a valid statutory privilege over Lee's testimony at trial under §337.636. There were no exceptions to admitting Lee's testimony in §337.636 or §632.510. The trial court erred in admitting the testimony over Hopkins' objections and assertions of privilege. U.S.Const. amends V, VI, XIV, and Mo.Const. art. I, §2, 10, 18, 19; §§337.636, 490.065. This Court must reverse and remand for a new trial without the inadmissible, privileged testimony.

X.

The trial court erred refusing to declare §632.492 unconstitutional, and thereafter submitting Instruction 9, over Hopkins' objection and request to declare §632.492 unconstitutional, because that violated Hopkins' rights to due process, a fair trial, impartial jury and equal protection of the law as guaranteed by U.S.Const., amend. V, VI, XIV and Mo.Const. art. I, §§2, 10, 18(a), in that §632.492 required the trial court to give the instruction; the instruction informed the jury of the legal consequence of its verdict; was an abstract statement of law; there was no evidence to support giving it; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for civil commitment.

Hopkins asked the trial court to find §632.492 unconstitutional because it required instructing the jury on the consequence of finding Hopkins was an SVP, in violation of his rights to due process, equal protection, a fair trial and impartial jury.(L.F.143-5;Tr.151). U.S. Const. amends. V, VI, XIV; Mo. Const. art. I, §2, 10, 18(a), 21. He objected the first time "control, care and treatment" was mentioned, in voir dire.(Tr.199). The trial court said it was going to give Instruction 9 submitted by the State.(Tr.741;L.F.159). Hopkins objected both based on his written motion and because there was no evidence adduced about care, control, and treatment in DMH, therefore there was no factual basis for the instruction.(Tr.743). The trial court overruled the objection and Instruction 9 was given to the jury.(Tr. 743). The error was preserved in Hopkins' motion for new trial.(L.F.183).

Instruction 9 read: "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care, and treatment."(L.F.159).

Standard of Review

Whether a jury is properly instructed is reviewed de novo. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 376 (Mo.banc2014). A reversal is warranted if the instructional error results in prejudice that materially affected the merits of the action. *Id.*

Analysis

Instruction 9, given pursuant to §632.492, was an abstract statement of law requiring no finding by the jury; improperly submitted the consequence of the jury's verdict, which was reserved for the trial court was not supported by a factual basis; misled, confused and distracted the jury; and invited a verdict based on consideration of the very thing it should ignore- control and treatment.(L.F.159;Tr.741). 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."

The consequence of the jury's SVP finding was entirely collateral and outside the scope of the two issues they were to decide at trial. When an individual has plead guilty to an underlying sexually violent offense, as Hopkins did, the only two issues the State must prove at trial are:(1)he suffers from a mental abnormality; (2)that makes him more likely

than not to commit predatory acts of sexual violence if not confined. *In re A.B.*,334 S.W.3d 746,752(Mo.App.E.D.2011);§632.480. The legal consequence of an SVP verdict, mandatory commitment to DMH, is left to the trial judge. §632.495.2.

Instructions are properly refused in civil cases where the instruction would 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.KC1876)(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). Instruction 9 presented an abstract statement of law not requiring any finding by the jury; such instructions mislead and confuse juries and are properly refused. *Mobley v. Webster Elec. Co-op.*, 859 S.W.2d 923, 933 (Mo.App.S.D.1993); *Chism v. Cowan*, 425 S.W.2d 942, 949 (Mo.1967)(refused instruction was "an exact recital of the statute" and "simply an abstract statement of law requiring no finding by the jury.").

The jury should not be informed of a later consequence during the fact finding phase of trial. It is reversible error to submit an instruction in phase one of a bifurcated trial that informs the jury of a matter in phase two of the trial. For example, it was error to instruct the jury it could award punitive damages in the first phase of a bifurcated trial. *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16, 29 (Mo.App.W.D.2014). The instruction misled and confused the jurors, resulting in prejudice warranting reversal. *Id.*at 30.

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). This is even true in cases where a defendant is relying on an NGRI defense and the defendant would go to the Department of Mental Health following a jury verdict. *Id.*

This is consistent with Missouri psychiatric civil commitment law, where confinement and treatment following a verdict is a question of law determined by the probate court. §632.350.5. As such, §632.350.2 directs that "the jury shall determine and shall be instructed only upon the issues of whether or not the respondent is mentally ill, and as a result, presents a likelihood of serious harm to himself or others." Following the trial and a jury's determination of those issues, it is left to the trial court alone to address confinement and treatment. §632.350.5. However, §632.492 requires an instruction advising the jury of the consequence of the verdict. There is no reason for this disparate treatment. Informing the jury of the consequence of the verdict does not protect the public, or enhance the reliability of fact finding at trial. *Norton*, 123 S.W.3d at 174; *Bernat*, 194 S.W.3d at 870.

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). Such was the case here. Instruction 9 produced an "inevitable result," drawing the jury's "attention toward the very thing—the possible consequences of its verdict—it should ignore." *Shannon*, 512 U.S. 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.

The State attorney's conduct in the trial exemplifies the prejudice in giving Instruction 9. The State opened voir dire with: "So welcome to probate court. We've got a mental health case today; a commitment case aiming to commit someone to a mental health facility for control, care and treatment."(Tr.198). But it also acknowledged that control, care and treatment was not up to the jury: "The question will be whether or not he has mental issues as the Judge will instruct you that makes him a danger to the community in a way that the Judge will instruct you."(Tr.203).Hopkins' objections were overruled.(Tr.199).

In closing, the State argued Hopkins met the "threshold" for commitment, and then told the jury:

> Now, Instruction 9 lays out this is what happens. This is what happens. If he's committed, he goes for control, he can't be around children; care, absolutely; and most certainly treatment.(Tr.758)
>
> This is about care, control and treatment. It's a mental health case. This is a mental health case about the safety of the community.(Tr.768).
>
> This individual has some serious impulse controls without some advanced help, and that's what we're seeking to do: get him into a mental health facility for care, control and treatment.(Tr.769).

> There's a real risk and danger to the community, and that's what we're talking about here is getting Hopkins into an environment where he can have the care, control and treatment that the needs.(Tr.770-1).

Without Instruction 9, no such arguments would be possible. The State would be constrained to talking about the two issues: (1)whether Hopkins had a mental abnormality, (2)that made him "more likely than not." *In re A.B.*,334 S.W.3d at 752; §632.480.

Prior SVP appeals have upheld giving the §632.492 instruction because the statute requires it and the instruction followed the substantive law. *See Lewis v. State*, 152 S.W.3d 325 (Mo.App.W.D.2004), *Scates v. State*, 134 S.W.3d 738 (Mo.App.S.D.2004), and 291 S.W.3d 246 (Mo.App.S.D.2009). *Lewis* and *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. 152 S.W.3d at 329;134 S.W.3d at 741-42. Both challenges were overruled because of the statutory mandate, and *the appellants submitted proposed instructions containing the language they complained about*.152 S.W.3d at 329, 134 S.W.3d at 742. *Warren* examined both of those opinions where the appellant challenged the instruction because it did not accurately reflect the duration of confinement. 134 S.W.3d at 250-51. However, those cases are distinguishable because only the instruction – and not the statute– was challenged and the Courts did not apply strict scrutiny. *See Warren*, 134 S.W.3d at 250, n. 6.

There must be substantial evidence supporting an instruction. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo.banc2010)."Substantial evidence is evidence which, if true, is probative of the issues and from which the jury can decide the case." *Id.* This Court reviews

the evidence in the light most favorable to submission of the instruction. *Id.* Submitting an instruction not supported by substantial evidence is an error. *Id.* In *Hayes*, the trial court improperly gave a "failure to look out" instruction because the instruction was not supported by substantial evidence. *Id.* at 652. The driver was prejudiced because he was assessed a percentage of comparative fault as a result of the improper instruction. *Id.* This Court reversed the judgment assessing damages. *Id.*

This Court also reversed for instructional error in *Ross-Paige v. Saint Louis Metropolitan Police Department*, -- S.W.3d ---, 2016 WL 3573250 (Mo.banc June 28, 2016). The trial court submitted an instruction presenting different theories of liability, including a claim that defendants unjustly refused or delayed paying out disability claims. *Id.* at 4. This Court held the instruction was not supported by substantial evidence and the defendants were prejudiced because they were found liable under the instruction. *Id.* at 6,8. "[T]his Court 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.* Submitting the instruction was reversible error, and the case was remanded. *Id.*

In this case, there was no evidence presented at trial concerning DMH control, care or treatment. In SVP cases, the litigants are not generally allowed to present evidence of what happens after the jury's verdict because it is irrelevant to the issues decided by the jury. *See In re Calleja*, 360 S.W.3d 801, 803-4 (Mo.App.E.D.2011)(excluding immigration status, potential deportation), *Cokes v. State,* 183 S.W.3d 281, 285–86 (Mo.App.2005) (excluding medicines, treatment available if not committed), *Lewis v. State,* 152 S.W.3d

325, 328–32 (Mo.App.W.D.2004)(excluding supervised probation if not committed). It is fundamentally unfair that the State is permitted an instruction informing the jury that the consequence of its verdict is commitment for care, control and treatment, while Hopkins is precluded from presenting any evidence or argument at trial about what would happen if he were not found to be an SVP, or even what that DMH commitment would look like. Like in *Ross-Paige*, there is no way to rule out the possibility the jury improperly returned its verdict upon Instruction 9's promise of care, control, and treatment, unsupported by substantial evidence, and misdirecting and confusing them. ---S.W.3d at 6, 8.

Section 632.492 is unconstitutional, and as a result, giving Instruction 9 was error. This Court must reverse the order and judgment of the trial court and remand for a new trial.

XI.

The trial court erred in failing to strike Venireperson 18, because that violated Hopkins' 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 Venireperson 18 was not qualified for service on Hopkins' jury because 18 indicated that they already thought Hopkins was an SVP based on hearing that he had two convictions and it did not matter what the jury instructions said; Hopkins moved to strike Venireperson 18; and in overruling Hopkins' motion to strike, Venireperson 18 sat on the jury panel.

During jury selection, defense counsel asked the panel if anyone would be unable to follow the jury instructions and would commit Hopkins based on his commission of two prior sexual offenses against children. The panel had been informed that Hopkins was convicted of child molestation, first degree, for a contact offense against a seven-year-old girl, and a domestic assault conviction that involved sexually touching another seven-year-old girl and a five- or six-year-old girl.(Tr.323). The trial court had told defense counsel, "unless you get them to commit that he's a sexually violent predator and I won't follow the Court's instructions, I don't see me striking them[;]" and

> if you ask a question along the lines of if you learn that this is the evidence are you going to rule against my client regardless of what any other evidence may be and will you not follow the jury instructions, and they say yes to that, then pretty obviously they're going to get struck.

(Tr.327). The State's attorney agreed.(Tr.327-8). Defense counsel inquired:

> So my question was, hearing those two convictions—and we're starting to see some hands, and I didn't get to write them all down—so based on hearing those two convictions, you already think that my client is a sexually violent predator? Would you raise your hands again? 41, 57, 58, 44, 30, 42, 57, 55, 23, 84, 82, ***18***, 16, 4, 31, 32, 33, 49, 76, 77.
>
> So for the folks that have raised their hand, I think that your answer – your response in raising your hand to me[an], if that is the evidence I hear, those two convictions, I will make up my mind based on those two things and it doesn't matter what the instructions said, I will find he is a sexually violent predator because of those two convictions. If I am mistaken and your response of raising your hand that's something different, would you please stand up?

(Tr. 328). Venireperson 18 did not stand up, or otherwise indicate that his response meant something different.

Venireperson 18 did not respond later when asked if after hearing about the two convictions and additional allegations, anyone had already made up his mind and would disregard the instructions.(Tr.341). Venireperson 18 made only one other response during jury selection, indicating he thought Hopkins' 10-year prison sentence was not enough time in confinement for his convictions.(Tr.342).

Defense counsel moved to strike Venireperson 18 for cause, among others, in response to the question and follow-up question.(Tr.376-7). The trial court overruled the challenge for cause because it believed the venire panel did not understand the

question.(Tr.377-8). Venireperson 18 was seated on the jury that found Hopkins was an SVP.(Tr.399). Hopkins preserved this issue in his post-trial motion.(Tr.378;L.F.18).

Standard of Review

The trial court's decision on a juror's qualification, including whether to strike a juror for cause, is reviewed for abuse of discretion. *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo.banc2008).

> A trial court's ruling on a challenge for cause will be upheld on appeal unless it is clearly against the evidence and is a clear abuse of discretion. The relevant question is whether a venireperson's beliefs preclude following the court's instructions so as to prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A venireperson's qualifications as a prospective juror are not determined by an answer to a single question, but by the entire examination. The trial court is in the best position to evaluate a venireperson's qualifications to serve as a juror and has broad discretion in making the evaluation.

Id.(citations omitted). "And where a venireperson or juror clearly demonstrates a possible bias and is not thereafter rehabilitated by counsel, the trial court's failure to strike the venireperson or juror undercuts any basis for the court's exercise of discretion and constitutes reversible error." *Thomas v. Mercy Hospitals East Communities*, --- S.W.3d ---, 2016 WL 4761435, 1 (Mo.App.E.D.2016).

Analysis

Hopkins had a constitutional right to a fair and impartial jury of twelve qualified jurors who, with an open mind free of bias or prejudice, can decide the case. *Id.*; Mo. Const. art I, §22(a). Section 494.470 provides:

> 1. No witness or person summoned as a witness in any cause, no person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person, and no person who is kin to either party in a civil case or to the injured party, accused, or prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause.
>
> 2. Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case.

The first provision precludes a venireperson from serving if she has "formed or expressed an opinion concerning [specifically] the *matter* or any *material fact in controversy*" that *may* influence her judgment, while the second bars from such service any person who is manifestly *unable to follow the court's instructions* due to her '*opinions or beliefs*' about potentially much broader issues." *Thomas*, at 2.

In *Joy*, the challenged venireman had only basic information about the case and expressed opinions and beliefs about lawsuits and doctors in general, but not about anything specific to the facts of the case. 254 S.W.3d at 889. The venireperson indicated he agreed doctors sometimes make mistakes and you should just live with the result; he believed that verdicts "are way out of line," was troubled that the lawsuit was against a doctor, and the trial court thought he initially expressed bias, but recanted. *Id.* at 887-8.

The trial court would not strike the venireman for cause, and he ultimately ended up serving on the jury. *Id.* at 888. Though the response raised the possibility of prejudice, his general feelings did not indicate clear bias against the litigants and there was no abuse of discretion in denying the challenge for cause. *Id.* at 890-1.

In *Thomas*, the trial court abused its discretion in failing to strike a venireperson for cause who had expressed an opinion about the case which posed "at least some risk of influencing her judgment as a juror." --- S.W.3d at 2. The venireperson indicated she might start off more in favor of one party, which was a clear expression of disqualifying bias. *Id.* at 2, 3. The venireperson was not rehabilitated because she did not provide clear, unequivocal assurance she would be partial; a commitment she would do her best was insufficient. *Id.* at 4. Therefore, the trial court was required to strike the venire person for indicating possible bias, and failure to do so was reversible error. *Id.* at 5.

Here, at the time of voir dire, Venireperson 18 had information that Hopkins was convicted of child molestation, first degree, for a contact offense against a seven-year-old girl, and of domestic assault for sexually touching another seven-year-old girl and a five- or six-year-old girl.(Tr.323). Venireperson 18 made only one other response during jury selection, indicating he thought Hopkins' 10 year prison sentence was not enough time in confinement for his convictions.(Tr.342).

Unlike in *Joy* and in *Thomas*, Venireperson 18's response was not equivocal or an indication of the mere possibility he was unqualified. Venireperson 18's unequivocal response indicated he had already formed an opinion Hopkins was an SVP based on those facts, that opinion would influence his judgment of Hopkins, and precluded him from

following the law as declared by the jury instructions.(Tr.328). This was not equivocal and was not a general opinion, but one specific to the facts of Hopkins' case, and one the venireperson responded would prevent him from following the law. §494.470.

If the trial court believed that Venireperson 18's response was a result of confusion over the question asked, then it was incumbent upon the trial court to independently inquire into his possible prejudice and inability to follow the law given to him in jury instructions. *Joy*, 254 S.W.3d at 891. Failure to do so "may undercut any basis for a trial judge's exercise of discretion and constitute reversible error." *Id*. The trial court denied Hopkins' motion to strike venireperson 18, saying "I do not believe they understood the question [ ] at the time it was asked."(Tr.377). Venireperson 18 was not rehabilitated and the trial court did not make any inquiry into his ability to follow the law of the instructions given.

In *Catlett*, a potential juror first unequivocally answered she could be impartial, but then unequivocally stated she could not be impartial. *Catlett v. Ill. C.G.R.C.*, 793 S.W.2d 351, 353 (Mo. banc 1990). The trial court committed reversible error when it denied a motion to strike her without making independent inquiry. *Id.* Such was the case here.

Denying Hopkins' request to strike Venireperson 18 was reversible error. *Id.*; *Thomas*, at 1; *Joy*, 254 S.W.3d at 891. This Court must reverse and remand for a new trial.

CONCLUSION

This Court must reverse the order and judgement of the trial court and release Hopkins from confinement as demonstrated in Points I, III, IV, VI, and VII. Alternatively, this Court must reverse and remand as demonstrated in Points II, V, IX-XI. This Court should also reverse as demonstrated in Point VIII, alternatively remanding for factual findings on the voluntariness of Hopkins' statements.

Respectfully submitted,

/s/ Chelseá R. Mitchell

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

Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 30,342 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On December 9, 2016 electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell