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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF JOSHUA BUSHONG, Respondent/Appellant.	)))))	No. ED104442

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI
FORTY-FIFTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE JAMES D. BECK, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

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

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

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STATEMENT OF FACTS

Joshua Bushong sexually offended against one person and has not committed a hands-on sexual offense since 2005.(Tr.404,587-38).

In 2002 or 2003, Bushong moved in with his sister, her partner and her partner's children, including K.W.(Tr.321,322). When K.W. was five years old, Bushong began touching her legs and buttocks; eventually he would touch her vagina, kiss her, and on one occasion make her perform oral sex.(Tr.321). The touching continued during the two and a half years Mr. Bushong and K.W. lived together.(Tr.321).

In 2005, Bushong was arrested for possession of child pornography and he pled guilty in 2006.(Tr.322-23). Bushong used the pornography as sexual stimuli and masturbated to it.(Tr.319-21). From 2005 to 2008, Bushong was on probation.(Tr.413). During that time, K.W. disclosed the sexual offenses against her.(415). Bushong ultimately pled guilty to Child Molestation in the First Degree and went to prison until 2011, when he was paroled.(Tr.307-08,415).

Bushong completed the nine-month MoSOP[2] program in DOC.(Tr.636). However, Bushong used child pornography again while on parole.(Tr.330) His parole was revoked after his father found pornography on the home computer and Bushong admitted that to his parole officer.(Tr.346,412,428,647-48).

Bushong acknowledged he continued to have sexual thoughts about children.(Tr.330-31,609). There is no evidence of any unreported victims.(Tr.404).

[2] Missouri Sex Offender Program

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The State petitioned to commit Bushong as an SVP at the conclusion of his prison sentence.(L.F.14-17). A trial on the petition was held in Lincoln County on March 29, 2016.(Tr.1).

DMH psychologist Rick Scott evaluated Bushong and opined he met the definition of an SVP.(Tr.284,301,308). Scott reviewed records, interviewed Bushong, and scored actuarials.(Tr.301). Scott used the Diagnostic and Statistical Manual of Mental Disorders ("DSM") to diagnose Bushong with pedophilic disorder, which he said was a mental abnormality.(Tr.311,313,327). Dr. Scott said the disorder is a life-long condition and may never go away, "but certainly there is hope that they can return to the community."(Tr.326).

According to Scott, not everyone diagnosed with pedophilia has a mental abnormality and a diagnosed mental disorder does not mean someone has a mental abnormality or is more likely than not to commit acts of sexual violence.(Tr.327,398,400). To be a mental abnormality, the condition must "cause" someone to commit a hands-on sexual offense and cause serious difficulty controlling hands-on sexually violent offense behavior.(Tr. 400-1).

Scott said pedophilia affects Bushong's emotional capacity because he has been distressed and aroused by pedophilic images and behaviors.(Tr.328-29). He said it affects Bushong's volitional capacity, his ability to manage his actions, because Bushong viewedchild pornography, had contact with K.W., and his parole was revoked for looking at more pornography.(Tr.329). Scott said it predisposed, or "caused," sexually violent offenses because Bushong committed a sexually violent offense against

K.W.(Tr.329,400). Scott thought Bushong had serious difficulty controlling his behavior because he used child pornography again on parole.(Tr.412). Had Bushong's parole been revoked for drinking or using drugs, rather than pornography, Scott said "I would not have a basis."(Tr.412). Scott testified Bushong, "hasn't demonstrated serious difficulty controlling his behavior by having a second victim"(Tr.411).

Even if suffering from a mental abnormality, an individual is not an SVP unless he is more likely than not to commit a hands-on sexually violent offense, as opposed to watching child pornography.(Tr.336,402-3). Scott testified "more likely than not" means over 50%.(Tr.403). Scott used actuarial instruments to assess future risk, which estimate the likelihood of re-offense and captured all relevant risk factors.(Tr.334-35,340,396). Scott's "more likely than not" opinion is based on his interpretation of actuarial data, Bushong's behavior on parole, and his understanding of Bushong's persisting sexual deviance in fantasizing and masturbating.(Tr.426).

Scott thought Bushong will offend against a child again because he looked at the pornography again.(Tr.413). Scott believed Bushong did not want to commit a sex offense against a child and that it is possible for a person to have a sexual attraction to children but not act on it.(Tr.390,397). Bushong consistently made it clear that he does not want to re-offend or create a new victim.(Tr.390). He also said not all contact-offense sex offenders re-offend.(Tr.396). Scott could not say Bushong will offend or will not offend again.(Tr.426). "We have to protect the public safety, and that's where my opinion is falling as far as this case goes."(Tr.429).

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Psychologist Luis Rosell was a therapist and director of the Iowa Department of Corrections Sex Offender Treatment Program.(Tr.499,501,503). He also reviewed documents, interviewed Bushong, scored actuarial instruments, made a diagnosis, and wrote a report.(Tr.509). Rosell diagnosed pedophilic disorder, but said it did not rise to the level of a mental abnormality or cause serious difficulty controlling behavior.(Tr.510).

Rosell said Bushong had a predisposed attraction to children, by virtue of his diagnosis, but research demonstrated the diagnosis does not mean someone will engage in sex offending behavior.(Tr.511). Bushong did not have serious difficulty controlling his behavior, as evidenced by only one contact victim and time in the community without hands-on offending after being caught.(Tr.511-12). Though Bushong looked at child pornography while on parole, he controlled his behavior; he did not go after a child, set up a situation giving him access to a potential victim, or offend again.(Tr.512). Rosell also determined Bushong was not "more likely than not" based on Bushong's time in the community without re-offense.(Tr.513).

Rosell said the most important thing in treatment is learning how not to engage in behavior that creates a victim.(Tr.507). Treatment teaches that the cycle will happen; the big picture is learning to do anything possible to make sure the offense never happens again.(Tr.521). Rosell said Bushong learned this because there was no evidence he re-offended, but stopped the cycle in looking at the pornography.(Tr.521).

Both experts scored Bushong as a six on the Static-99R, which corresponds to a 20% chance of recidivism within five years.(Tr.386,425,534-35).

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Bushong testified at trial.(Tr.598). He acknowledged his use of pornography and offenses against K.W.(Tr.604,632). Bushong agreed he met the DSM criteria for pedophilia and admitted to continued sexual fantasies.(Tr.325,331). He said, "I have no thoughts about going out and creating another hands-on victim."(Tr.669).

Because of what he learned in MoSOP, Bushong testified he now understands the damage he did and never wants to put another child through what he did to K.W.(Tr.644). He justified prior use of child pornography because he wasn't creating a hands-on victim.(Tr.646). Bushong knew the pornography was illegal and watching it could result in going back to prison.(Tr.647-48). Bushong said viewing the pornography was "a decision I made," and that he could have prevented himself from doing it, "but I chose not to."(Tr.672,674). "It was an act of choice. It wasn't the fact that I could not control myself. It was the fact that at that point I chose not to."(Tr.671-72).

Testimony about Exhibits 27, 31 and 33 was admitted over Bushong's objections.(Tr.315-18;416-20). Bushong's motions to dismiss were overruled and his requests for directed verdicts and a new trial were denied.(L.F.18-22,25-29,67-72;Tr.30-32,431,691). His objections to Instruction 5 and 7 were overruled.(L.F.18-22,35-36;Tr.692-95). The jury returned a verdict finding Bushong was an SVP and the trial court committed him to DMH.(L.F.64,66). This appeal follows.

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

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POINTS RELIED ON

I.

The trial court erred in giving Instruction 5, because it submitted the case to the jury under the "clear and convincing" burden of proof in violation of Bushong's rights to due process and equal protection, guaranteed by U.S.Const. amends. V, XIV, art. IV, cl.2 and Mo.Const. art.I, §§2, 10, 21 in that the elimination of "discharge" and mandatory periodic annual reviews, and imposition of mandatory "conditional release" under the care, control and treatment of DMH renders the proceedings punitive and "clear and convincing" an insufficient burden of proof.

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

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

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

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

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

Mo.Const. art.I, §§2, 10;

§632.495, 632.505; and

§632.495, 632.498, 632.504, RSMo.2004.

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II.

The trial court erred in denying Bushong's motion to dismiss and in committing him to DMH as an SVP, because the 2006 amendments eliminated substantive and procedural protections against the risk of erroneous commitment and discharge from confinement once no longer justifiable, in violation of Bushong's rights to due process and a fair trial, equal protection, freedom from double jeopardy, proof beyond a reasonable doubt, and to silence and to counsel, protected by U.S.Const. amends. V, VI, VIII, XIV, art. I, §9, 10; Mo.Const. art. I, §§2, 10, 13, 19, 21, in that mandatory conditional release: replaced discharge of one no longer mentally ill or dangerous; created indefinite custody for care, control and treatment; requires mandatory conditions which cannot be modified; and is for the primary of community-based placement outside of a secure facility without consideration of LREs, creating punitive proceedings.

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

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

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

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

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

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

§§632.325, 632.480, 632.489, 632.492, 632.495, 632.498, 632.505;

§632.498, RSMo. 2000; and

§202.135.2, RSMo. 1979.

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III.

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

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

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

Thomas v. State, 74 S.W.3d 789 (Mo.banc2002);

Peters v. Wady Industries, Inc., 489 S.W.3d 784 (Mo.banc2016);

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

Mo.Const. art. I, §§2, 8, 10; and

§632.480.

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IV.

The trial court erred and in admitting testimony about privileged and confidential statements Bushong made to treatment providers, because this violated his rights to due process, equal protection and confrontation guaranteed by U.S.Const. amends V, VI, XIV, Mo.Const. art. I, §2, 10, 18(a) in that witnesses testified about treatment-related statements contained Exhibits 27, 31 and 33 since those statements were privileged under §337.540.

State v. Wright, 247 S.W.3d 161 (Mo.App.S.D.2008);

State v. Hawkins, 328 S.W.3d 799 (Mo.App.E.D.2010);

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

Gates v. Sells Rest Home, Inc., 57 S.W.3d 391 (Mo.App.S.D.2001);

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

Mo.Const. art. I, §2, 10, 18(a); and

§337.055, 490.065, 632.510.

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V.

The trial court erred in denying Bushong' motion for a directed verdict and in committing him as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S. Const. amends V, XIV, Mo. Const. art. I, §2, 10, and §632.495, in that the State failed to prove Bushong suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, since its expert did not establish pedophilia caused Bushong serious difficulty controlling sexually violent behavior, did not assess for risk caused by a mental abnormality or of predatory sexually violent acts, predicted a 20% chance of any sexual recidivism, and did not demonstrate Bushong's risk was "more likely than not."

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);

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

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; and

§632.480, 632.495.

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VI.

The trial court erred in giving Instruction 7, because it instructed the jury on "treatment," violating Bushong's rights to due process and a fair trial, guaranteed by U.S.Const. amends. V, XIV and Mo.Const. art.I, §§2, 10, in that treatment provided by third party DMH is an inadmissible and irrelevant external constraint, and Bushong was prejudiced by its inclusion in Instruction 7 because it was irrelevant to the issue to be decided: whether he suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Lewis v. State, 152 S.W.3d 325 (Mo.App.W.D.2004);

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

Boone v. State, 147 S.W.3d 801 (Mo.App.E.D.2004);

Nolte v. Ford Motor Company, 458 S.W.3d 368 (Mo.App.W.D.2014);

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

Mo.Const. art.I, §§2, 10;

§632.480, 632.492; and

Rule 70.02(b).

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ARGUMENT

I.

The trial court erred in giving Instruction 5, because it submitted the case to the jury under the "clear and convincing" burden of proof in violation of Bushong's rights to due process and equal protection, guaranteed by U.S.Const. amends. V, XIV, art. IV, cl.2 and Mo.Const. art.I, §§2, 10, 21 in that the elimination of "discharge" and mandatory periodic annual reviews, and imposition of mandatory "conditional release" under the care, control and treatment of DMH renders the proceedings punitive and "clear and convincing" an insufficient burden of proof.

Instruction 5 was given over Bushong's objection, which incorporated his motion to dismiss because unconditional release("discharge") was eliminated.(Tr.692-93;L.F.18-22). Bushong argued prior rationales for deeming the law as "civil" and justifying different due process and equal protection from criminal cases no longer applied.(L.F.18-22,71).[3] Instruction 5 states:

> In these instructions, you are told that your finding depends on whether or not you believe certain propositions of fact submitted to you. The burden is on the petitioner to cause you to believe by clear and convincing evidence that Respondent is a sexually violent predator. In determining whether or not you believe any such proposition, you must consider only the evidence and the

[3] U.S.Const.amends.V,XIV;Mo.Const.artI,§§2,10,18(a).

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reasonable inferences derived from the evidence. If the evidence does not cause you to believe a particular proposition submitted, then you can not return a finding requiring believe of that finding.

(L.F.61).

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. *Id.* The constitutionality of a statute is reviewed *de novo*. *In re Murphy*, 477 S.W.3d 77,81(Mo.App.E.D.2015). Statutes with punitive consequences must be strictly construed against the State and in favor of whom the statute is used against. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907,913(Mo.banc2006). 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); U.S.Const.art. IV,cl.2. The Supremacy Clause "applies with its full force to orders of a federal court" and prevents a state court from reaching the merits on any constitutional attack on a federal judge's order. *Pennell v. Collector of Revenue,* 703 F.Supp. 823,826(W.D.Mo.1989).

Freedom from physical restraint is a fundamental right. *In re Norton*, 123 S.W.3d 170,173,n.10(Mo.banc2003) citing *Foucha v. Louisiana*, 504 U.S. 71,86(1992) and *Vitek v. Jones*, 445 U.S. 480,491-92(1980). Because commitment impacts fundamental liberty,

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government action must pass strict scrutiny. *Norton*, 123 S.W.3d at 173; *Vitek*, 445 U.S. at 492("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *but see Van Orden v. Schafer*, 129 F.Supp.3d 839,866-67(E.D.Mo.2015)[4](confinement did not bear rational relationship to purposes of commitment and fails shocks the conscious test). This Court is bound to follow the last controlling decision of our State's Supreme Court and must apply strict scrutiny. *In re G.P.C.*, 28 S.W.3d3 57(Mo.App.E.D.2000)(must follow standard of review determined by Missouri Supreme Court),overruled on other grounds by *Barker v. Barker*, 98 S.W.3d 532 (Mo.banc2003).

Analysis

Because commitment is a significant deprivation of liberty, it is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Addington v. Texas*, 441 U.S. 418,425,433(1979); *Murrell v. State*, 215 S.W.3d 96,104(Mo.banc2007), citing *Kansas v. Hendricks*, 521 U.S. 346,357(1997) and *Foucha*, 504 U.S. at 80. 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

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

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erroneous decisions. *Addington*, 441 U.S. at 424; *In re Van Orden*, 271 S.W.3d 79,587(Mo.banc 2008).

In 2006, the legislature reduced the burden of proof on the State from "beyond a reasonable doubt" to "clear and convincing." §632.495;§632.495,RSMo.2004. *Van Orden* approved "clear and convincing" because the proceedings were "civil," not punitive, and continuing review opportunities minimized the risk of erroneous commitments and meant commitment was not indefinite. 271 S.W.3d at 584-6, relying on *Addington*, 441 U.S. at 427-31. "[I]f 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(emphasis added). *Van Orden* did not examine a comprehensive challenge to the entire statutory scheme, or whether commitment would be "civil" if a person was unable to ever receive discharge from confinement. *Id.* at n.5,587(Cook,concurring).

A time when "commitment is no longer necessary" must mean discharge. Once committed there is no discharge. Statutory amendments replaced "discharge" with "conditional release" and distinguished between one "conditionally released" and one "who has not been conditionally released." §§632.498,632.504,RSMo.2000. When an individual is no longer be mentally ill or dangerous, §632.505 mandates "the court shall place the person on conditional release pursuant to the terms of this section" and that the person "remains under the control, care and treatment of the department of mental health." After obtaining "conditional release," a man may be returned to secure

confinement if the government decides he "is no longer a proper subject for conditional release" and his status may be revoked if he is "no longer suitable for conditional release," but neither requires a determination that he is suffering from a mental abnormality or is "more likely than not." §632.505. Mandatory annual reviews are now provided only to men "not yet conditionally released" §632.492.1.

There is no constitutional basis for confining someone who is not mentally ill or who is not dangerous, even if he is mentally ill. *Addington*, 41 U.S. at 426; *O'Connor v. Donaldson*, 422 U.S. 563,575(1975). By eliminating discharge and mandating conditional release under the care, control and treatment of DMH, the Act permits continued confining men who do not meet criteria. Conditional release "*does not* result in complete restoration of that person's liberty" and due process requires that the person be *fully* released. *Van Orden*, 271 S.W.3d at 589-90(Cook,concurring). While commitment in *Addington* would have terminated upon successful completion of treatment, men committed under the Act "forever will be subject to state oversight," even if no longer dangerous. *Id.* at 592.(Teitelman,dissenting).

The plain language of the SVP has eliminated the mandatory annual review for men conditionally released and discharge, rendering commitment indefinite and continuing beyond a time that confinement is no longer necessary. The two justifications for classifying the proceedings as "civil" no longer exist under the law. *Id* at 586. The Act is unconstitutional on its face. Mo.Const.art.I,§§2,10,21.

Schafer ruled the Act is unconstitutional as applied, in violation of due process because systemic failures have resulted in punitive, lifetime detention and

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unconstitutional punishment, and continued confinement of men who do not meet criteria for commitment. 129F.Supp.3d839. *Schafer* held the nature and duration of commitment under the Act bears no reasonable relation to any non-punitive purposes for which persons may be civilly committed and said Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id*. at 867,870.

Schafer read §632.505 to "permit full, unconditional release" and to provide a mechanism for conditions to terminate because the probate court may modify the conditions. *Schafer*, 129 F.Supp.3d at864-66. 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.banc2016). Nothing in the plain language of the statute permits conditional release without conditions, "unconditional" release, or "discharge." §§632.498,632.505. This Court must presume the legislature intended to change the existing law when it amended the Act by removing "discharge" and substituting "conditional release." *State v. Osborn*, --- S.W.3d ---,9,2016 WL5888947(Mo.App.W.D.2016). "This Court should never construe a statute in a manner that would moot the legislative changes, because the legislature is never presumed to have committed a useless act. To amend a statute and accomplish nothing from the amendment would be a meaningless act." *Id*.

Elimination of discharge and mandatory annual reviews for all men also means that the procedures do not minimize the risk of erroneous commitments or lead to discharge. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587. Mandatory annual

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reviews were designed to ensure confinement did not continue after the basis for commitment no longer existed. *Van Orden*, 271 S.W.3d at586; *see Murrell*, 215 S.W.3d at 104. They are also "the primary tool that courts use to evaluate … whether the person should be conditionally released;" "it is nearly impossible to successfully petition for conditional release without an annual review from [DMH] recommending such release." *Schafer*,129 F.Supp.3d at 852. Annual reviews are not performed in accordance with the statute, case law, or due process; reviewers lack training, misunderstand, are confused by, and do not consistently apply the correct legal standard in evaluating the need for continued confinement. *Id.* at 582-83,868-69. Failures in the annual review and conditional release processes demonstrate the reviews performed have not minimized risk of erroneous commitments or led to even conditional releases, let alone restoration of liberty. *Schafer*,129 F.Supp.3d.at 868. Rights to "proper risk assessment and release are rights protected by the constitutional guarantee of liberty, not merely state law." *Id.* at 870.

A commitment law is unconstitutional if it "imposes restrictions that are so excessive as to indicate the forbidden purpose to punish." *Id.* at 844. Such is the case with the mandatory conditions of conditional release under §632.505. "The court shall order that the person shall be subject" to twenty-one statutory conditions, "and other conditions as deemed necessary." §632.505.3. The mandatory conditions include constraints like: submission to polygraphs and penile plethysmographs, mandatory treatment participation, forced medication, waiver of privileged and confidential information, and payment for these "services." *Id.* A man "who has not been conditionally released" is not

required to submit to these constraints. "Released" men may only live in housing approved by the government and must be employed, without any exception for the elderly or infirmed. §632.505.3(1)-(2). A court may "modify" some conditions imposed, but it may not "terminate" conditions or confinement and the individual is always subject to the statutorily mandated conditions in subsection 3. §632.505. Where due process requires full release, *any* conditions imposed once no longer meeting criteria are excessive and punish. *Van Orden*, 271 S.W.3d at 590(Cook,dissenting). Mandatory plethysmographs, medications, waiver of privileges and confidences, and forced work are an even greater infringement of liberty. These conditions are so restrictive as to indicate a punitive intent and purpose. *Hendricks*, 521 U.S. at 361; *Schafer*,129 F.Supp.3d at 844.

"[A]gainst the background of gradual assimilation of juvenile proceedings into traditional criminal prosecutions," *In re Winship*, 397 U.S. 358,366(1970), "declined to allow the state's civil labels and good intentions to obviate the need for criminal due process safeguards in juvenile courts" and held due process demanded the "beyond a reasonable doubt" standard because of the resulting loss of liberty. *Addington*, 441 U.S. at 427. Such must be the case here. A "civil label is not always dispositive." *Hendricks*, 521 U.S. at 361. Where there is proof that a statutory scheme is punitive either in purpose or effect, it is considered "to have established criminal proceedings for constitutional purposes." *Id*.

The burden of proof implicates due process, and Bushong is entitled to equal rights under the law. *Van Orden*, 271 S.W.3d at 585; *Addington*, 441 U.S. at 423; *In re Coffman*, 225 S.W.3d 439,443(Mo.banc2007). Due process requires the use of a burden

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of proof that reflects the public and private interests, *and* the risk of an erroneous decision. *Van Orden*, 271 S.W.3d at 585. "There is always a margin of error in fact finding, but where "an interest of transcending value" like one's liberty is at stake, "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." *Winship*, 397 U.S. at 364. 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 Bushong's liberty interest and the elimination of safeguards and procedures that could correct an erroneous commitment. "[T]he SVP law is unconstitutional insofar as it permits the state to commit an individual permanently to the care, custody and control of the department of mental health without having to prove the prerequisites to commitment beyond a reasonable doubt." *Van Orden*, 271 S.W.3d at 593-94(Teitelman,dissenting).

This Court cannot rewrite the statute; the remedy is to strike down the unconstitutional law altogether. *See Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371(Mo.banc2001)(striking down and refusing to rewrite statute).

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II.

The trial court erred in denying Bushong's motion to dismiss and in committing him to DMH as an SVP, because the 2006 amendments eliminated substantive and procedural protections against the risk of erroneous commitment and discharge from confinement once no longer justifiable, in violation of Bushong's rights to due process and a fair trial, equal protection, freedom from double jeopardy, proof beyond a reasonable doubt, and to silence and to counsel, protected by U.S.Const. amends. V, VI, VIII, XIV, art. I, §9, 10; Mo.Const. art. I, §§2, 10, 13, 19, 21, in that mandatory conditional release: replaced discharge of one no longer mentally ill or dangerous; created indefinite custody for care, control and treatment; requires mandatory conditions which cannot be modified; and is for the primary of community-based placement outside of a secure facility without consideration of LREs, creating punitive proceedings.

Bushong moved to dismiss the proceedings because there is no possibility of discharge and challenged the entire statutory scheme, §632.480-632.513.(LF18-22). He argued: commitment is a punitive, permanent, lifetime confinement because of amendments eliminating discharge and creating the current conditional release scheme; the substantive and procedural protections are constitutionally inadequate; and the law violates due process, equal protection, double jeopardy and ex post facto

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prohibitions.[5](L.F.18-22). His motion was denied.(L.F.3;Tr.30). Bushong included the issue in his post-trial motion.(L.F.68).

Bushong incorporates the Standard of Review and Analysis from Point I.

Analysis

A. Commitment Before and After Amendments

Missouri Courts historically presumed the Act was civil, contending confinement was not indefinite and relying on protections including mandated annual examinations and court reviews, and discharge from confinement. *Norton* relied on those protections and the beyond a reasonable doubt burden of proof to uphold the Act under strict scrutiny, rejecting an equal protection claim that the trial court erred in not considering LREs. 123 S.W.3d at 174-76. Judge Wolff warned that if confinement turned out to be additional punishment for the crimes the appellants had committed, it would violate the Double Jeopardy and Ex Post Facto clauses; "experience with the statute may expose serious constitutional problems," and that "if this statute is used simply to impose life sentences of confinement … this Court will have a constitutional duty to take another look." *Id* at 176,182(concurring).

Murrell ruled in a 4-3 split decision that "commitment pursuant to the SVP statute is not necessarily indefinite, nor a life sentence" because the duration of confinement was linked to the purpose of confinement and "the annual review mechanism ensures

[5] U.S.Const.amends.V,VI,VIII,XIV,art.I,§9,10;Mo.Const.art.I,§§2,10,13,19,21.

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involuntarily confinement … will not continue after the basis no longer exists." 215 S.W.3d at 105(and holding actuarial instruments admissible), *citing O'Connor v. Donaldson*, 442 U.S. 563,575(1975). *Van Orden* also said "the term of commitment is not indefinite" and relied upon those protections to approve the "clear and convincing" burden of proof. 271 S.W.3d at 585-86. *Van Orden* only looked at §632.495 and did not consider the constitutionality of the entire statutory scheme. 271 S.W.3d at 587(Cook,concurring). The concurring and dissenting opinions raised concerns about the constitutionality of a law that did not provide unconditional release or discharge and questioned the sufficiency of the due process protections. *Id.* at 589-91(Cook,concurring);592-94(Teitelman,dissenting).

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

Because of the amendments, the entire statutory scheme, §632.480-632.513, is unconstitutional.(L.F.20). Amendments eliminated discharge from commitment and mandatory periodic reviews for all committees; mandate indefinite "conditional release" subject to care, control and treatment of DMH and non-modifiable or terminable statutory conditions; permit "return" and "revocation" of conditional release without findings of mental abnormality and risk required to justify commitment; and permit indefinite deprivation of liberty by "clear and convincing evidence." §§632.492,632.495,632.505. Nothing in the plain language of the statute permits conditional release without conditions, "unconditional" release, or "discharge;" someone "released" under the

amended version of the Act "remains committed to custody." *State ex rel. Schottel v. Harman*, 208 S.W3d 889, 891(Mo.banc2006)(amendments not retrospective); §§632.498,632.505. This Court must presume the legislature intended to change the existing law when it amended the Act in this way, cannot construe the statute to moot the changes, and "must interpret the statutory language as written by the legislature." *Osborn*,---S.W.3d at 9; *Peters*,489S.W.3d784.

Therefore, the procedural and substantive safeguards relied upon to characterize the law as "civil," only "potentially indefinite," that ensured confinement did not continue after the basis for it no longer exists, and resulted in immediate release if adjudged not to meet criteria for commitment, no longer exist. *Van Orden*, 271 S.W.3d at 585-86; *Murrell*, 215 S.W.3d at 105; *Norton*,123 S.W.3d 174-76; *Hendricks*, 521 U.S. at 363-64.

Due process requires full release, "discharge." *Van Orden*, 271 S.W.3d at 590(Cook, concurring). There is no constitutional basis for confining someone who is not both mentally ill and dangerous. *Addington*, 441 U.S. at 426; *O'Connor*, 422 U.S. at 575; *Murrell*, 215 S.W.3d at 105. The law is now punitive and unconstitutional because it permits continued confinement of those who are not both mentally ill and dangerous. *Schafer*, 129 F.Supp.3d at 844; U.S.Const.amends.V,VI,VIII,XIV,art.I,§9,10;Mo.Const art.I,§§2,10,13,19,21. *Schafer* confirmed it is unconstitutional as applied because commitment resulted in punitive, lifetime detention and unconstitutional punishment. *Schafer*, 129 F.Supp.3d 839. *Schafer* found men who did not meet criteria for commitment were subjected to continued confinement, amounting to unconstitutional

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punishment. *Id.* at 869. *Schafer* held the nature and duration of commitment under the Act bears no reasonable relation to any non-punitive purposes for which persons may be civilly committed and said Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id*. at 867,870.

A commitment law is also unconstitutional if "or imposes restrictions that are so excessive as to indicate the forbidden purpose to punish." *Schafer*, 129 F.Supp.3d at 844. Not only is discharge impossible, the mandatory conditions imposed on one conditionally released under §632.505 are excessive and amount to punishment. *Id.*; *Hendricks*, 521 U.S. at 361; *Van Orden*, 271 S.W.3d at 590(Cook,concurring); Point I.

B. Result of Amendments

Least Restrictive Environment

The basis for *Norton*'s rejection of a challenge to failure to consider LREs no longer exists. 123S.W.3d at 174-75. Bushong has a right to avoid undue confinement, in duration and *nature*. *Foucha*, 504 U.S. at 79; *Hendricks*,521U.S. at 388(Kennedy,concurring); *Schafer*,129F.Supp.3d 839. "[T]he state must tailor its confinement to the least restrictive alternative" but "[t]here is no such explicit requirement for the [LRE]" in the Act. *Norton*, 123S.W.3d at 180(Wolff,dissenting); *Sherrill v. Wilson*, 653 S.W.3d 661,664(Mo.banc 1983).

Failure to consider and provide LREs or "alternative and less harsh methods" violates equal protection and double jeopardy because it shows that the legislature's purpose was to punish. *Hendricks*, 521 U.S. at 387(Breyer,dissenting);

Norton,123S.W.3d at 182(Wolff,dissenting). Where a purpose of a commitment law is to provide treatment, "but the treatment provisions were adopted as a sham or mere pretext" also indicates a purpose of punishment. *Hendricks*, 521 U.S. at 371(Kennedy,concurring).

Section 632.505 states: "[t]he primary purpose of conditional release is to provide outpatient treatment and monitoring" and prevent return to a secure facility, while at the same time specifying someone conditionally released "remains under the control, care and treatment" of DMH. Section 632.495 was amended to removed the mandatory secure facility requirement for anyone conditionally released under §632.505. *Schafer* said state actors believe "conditional release" means, and treatment requires, living in the community. 129F.Supp.3d at845,855. However, Missouri's scheme fails to provide LREs altogether, none exist, and there are no procedures or plans in place for community reintegration or placements to accomplish this purpose. *Schafer*,129 F.Supp.3d at 851,868-89. Due process requires an LRE. *Id*. It is now impossible for the State and its employees to comply with *Schafer*'s directive to make substantial changes to remedy this, and with *Norton*. *Id*.; *Norton*, 123 S.W.3d at 175. If commitment were for a civil purpose, then it would provide for placement in a LRE, like any other person 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]"). *Schafer* confirmed the release portion of treatment *is* a "sham." 129 F.Supp.3d at 868.

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Rights to Counsel and Silence

Norton also 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. 123S.W.3d at 172. 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). Because commitment is punitive, criminal protections must apply. *Hendricks*,521U.S. at 361. Criminal rights to silence and counsel attach when someone is suspected of wrongdoing and apply before proceedings are initiated or charges filed. *Norton*, 123 S.W.3d at 172; *see Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Those rights apply to pretrial psychiatric examinations. *Estelle v. Smith*, 451 U.S. 454(1981). And they must apply to suspected SVPs.

Application of Gault, 387 U.S. 1,41,49,55(1967) held that the Due Process Clause required application of the right to silence to juvenile proceedings because a juvenile's freedom was curtailed by the State. Eliciting and using statements requires careful scrutiny. *Id.* at 44. The privilege does not depend on the type of proceeding, "but upon the nature of the statement or admission and the exposure which it invites." *Id.* at 49. "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." *Id.* at 50.

The Missouri Supreme Court refused the State's request to declare an affirmative bar on the right to silence because the Act did not enumerate a right to silence, unlike

other commitment schemes, in *Bernat v. State,* 194 S.W.3d 863,686(Mo.banc2006). The Act "basically set[s] out only those procedures that are different from the procedures that would otherwise apply" and are not comprehensive.[6] *Id.* That case presented an equal protection challenge to differential statutory rights among civil committees. *Id.* at 866-69. 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* presumed the law was civil like *Norton* and *Van Orden* and did not address application of criminal rights to the proceedings due to the now punitive nature of commitment.

Like in *Gault,* the Federal *Schafer* Court was persuaded the Act resulted in punishment, even though the proceedings were deemed "civil." 129 F.Supp.3d at 844,868-9*; See Allen v. Illinois*, 478 U.S. 364,373(1986); *Gault*, 387 U.S. at 49-50.

[6] Recognizing the due process rights of involuntary civil committees, the Legislature gave individuals subject to involuntary detention and treatment the right to silence and the assistance of counsel. *State ex rel. Simanek v. Berry*, 597 S.W.2d 718,720(Mo.App.W.D. 1980);§202.135.2,RSMo.1979;§632.325. Prior to Chapter 632 evaluations, one must be advised 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 detention criteria; and his statements may be used in that determination, may result in involuntary detention proceedings; and may be used against him in court, among others. §632.335.

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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. That right applied to Bushong when faced with the adversarial system and SVP evaluation by the EOC author, who worked for the State and was not acting in his interest when conducting a Chapter 632 evaluation while Bushong was in DOC custody. *Estelle*, 451 U.S. at 469, *quoting Miranda*¸384 U.S. at 469.

Burden of Proof

The elimination of "discharge" and periodic annual reviews, and imposition of mandatory "conditional release" under which a man remains in the care, control and treatment of DMH renders "clear and convincing" an insufficient burden of proof. *Van Orden*, 271 S.W.3d at 585-6, *relying on Addington*, 441 U.S. at 427-31. Because of the nature of indefinite commitment without discharge, SVP proceedings have assimilated into punitive proceedings and criminal protections must apply. *Addington*, 441 U.S. at 427; *Winship*, 397 U.S. at 366; *Hendricks*, 521 U.S. at 361. Beyond a reasonable doubt is the standard used in all other punitive cases and must apply here because of the implication on Bushong's liberty interest and rights to due process and equal protection. *Addington*, 441 U.S. at 423; *Van Orden*, 271 S.W.3d at 585; *In re Coffman*, 225 S.W.3d 439,443(Mo.banc2007).

Jury Trial Demand

In criminal cases, the right to a jury trial belongs exclusively to the defendant, who may waive his right and obtain a bench trial with the consent of the court. Mo.Const.

art.I,§22(a). The prosecution cannot object to the defense's jury waiver. The Western District upheld the State's right to demand a jury trial under §632.492 in *State ex rel. Nixon v. Askren*, 27.W.3d 834(Mo.App.W.D.2000). *Askren* should not be followed and is not good law because it incorrectly applied rational basis review and presumed the law was civil. *Id.* Because the Act is punitive in effect or purpose, then like in every other criminal proceeding in Missouri, the right to a jury belonged exclusively to Bushong; he could waive that right and be tried by the bench by the Court's consent. Section 632.492's attempt to grant a jury right to the State and Court is unconstitutional and must yield to art. I, §22.

There is no narrowly tailored, compelling reason to treat Bushong differently. The government accomplishes its interests in reliable fact finding and protecting the public in bench trials, both criminal and civil. *See State v. McCoy*, 468 S.W.3d 892, 891 (Mo.banc2015)(compelling interest in protecting public in criminal cases); *Matter of Korman*,913S.W.2d416,418(Mo.App.E.D.1996); *In re Link*, 713 S.W.2d 487 (Mo.banc1986)(guardianship cases implicate fundamental liberty, are an exercise of *parens patriae* power).

Release Procedures

In criminal cases, the State always has the burden of proving each and every element. *State v. Taylor*, 126 S.W.3d 2, 4 (Mo.App.E.D.2003). A criminal defendant is never required to prove his innocence. *U.S. v. Teague*, 646 F.3d 1119 (8thCir.2011). However, to obtain conditional release under the Act, a committee must prove by a

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preponderance of the evidence that he should be released to be entitled to a second trial where the State has the burden of proving otherwise. *Coffman*, 225 S.W.3d at 443; §632.498. He is not entitled to be present at a hearing where he bears the burden of initial proof, and if unsuccessful there, subsequent petitions are automatically "frivolous,"§§632.498,632.504.

Initially the committee had to show probable cause, like the burden on the State in initial commitment hearings under §632.489. *Schottel*, 159 S.W.3d at 838; §632.498,RSMo2000. *Schottel* upheld the two-step release process because commitment was not indefinite, because of annual reviews. *Id.* at 839(State's burden "beyond a reasonable doubt" at release trial). *Coffman* found the two-step release procedure was constitutional under the increased "preponderance" burden. 225 S.W.3d at 443;§632.498,RSMo.2004. The State still had to prove continued confinement beyond a reasonable doubt if a release trial was granted, the committee was entitled to release from commitment if he no longer met criteria, and could obtain continued, frequent reviews of his confinement. *Id. Coffman* and *Schottel*'s justifications longer exist; the burden on the government is never "beyond a reasonable doubt" and annual reviews are not required if conditionally released. §632.495,632.489,632.492. Because commitment is now punitive, criminal protections must apply.

Karsjens found the Minnesota SVP scheme facially unconstitutional because the discharge criteria, "no longer dangerous," was more stringent than the commitment

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criteria, "highly likely." *Karsjens v. Jesson*, 109 F.Supp.3d 1139,1166(D.Minn.2015)[7] (facial challenge to statutory discharge standards).It also found the law unconstitutional because it put a burden on the committed man; but the burden to justify continued confinement "should remain on the state at all times." *Id*. Because the release standard was more onerous than the admission standard, and the burden impermissibly shifted away from the government, the law was not narrowly tailored, resulting in punitive effect contrary to the purpose of civil commitment. *Id.*, citing *Hendricks*, 521 U.S. at 361-62.

Imposing a burden on Bushong to demonstrate he does not qualify for confinement violates due process and equal protection. *Taylor*, 126 S.W.3d at 4(Mo.App.E.D.2003); *Teague*, 646 F.3d at 1122; *Simanek*, 597 S.W.2d at 722("The burden is on the state to prove the mental illness and likelihood of harm and that burden remains with the state."). It permits the government to continue confining him though neither basis justifying commitment continues to exist, unless he takes an affirmative action. *See Addington*, 441 U.S. at 426; *O'Connor*, 422 U.S. at 575. Making that burden even greater than the burden on the State to preliminarily seek his initial confinement is illogical and serves no purpose other than to thwart any action he may take and the

[7] The Eight Circuit overturned *Karsjens* and remanded the case to the district court for findings on the facial due process challenges under the rational relationship test. *Karsjens v. Piper*, 0:11-cv-03659-DWF-TNL, 2017 WL 24613(8thCir.January3,2017). That opinion is not final and this Court is not bound by it. *State v. Mack*, 66 S.W.3d 706, 710(Mo.banc2002).

likelihood of success he will have in seeking conditional release. Such a procedure cannot protect against or correct an erroneous commitment. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587.

Conclusion

Because of the 2006 amendments, the entire statutory scheme is unconstitutionally punitive. The procedural and substantive safeguards relied upon to characterize the law as "civil," only "potentially indefinite," that ensured confinement did not continue after the basis for it no longer exists, and which resulted in immediate release if adjudged not to meet criteria for commitment, no longer exist. *Van Orden*, 271 S.W.3d at 585-86; *Murrell*, 215 S.W.3d at 105; *Norton*, 123 S.W.3d 174-76; *Hendricks*, 521 U.S. at 363-64. The procedural and substantive safeguards under the Act do not protect against or correct erroneous commitments, or provide the constitutional protections necessary in punitive proceedings. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587; *Hendricks*, 521 U.S. at 363-64.

The current 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. *Schafe*r, 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. The trial court erred in denying Bushong's motion to dismiss. His commitment must be reversed and he must be released from punitive confinement.

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

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III.

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

Bushong' motion to dismiss arguing the Act was unconstitutional because it did not require proof of serious difficulty controlling behavior and permitted a mental abnormality finding based solely on emotional capacity was denied and preserved in his post-trial motion.[8](Tr.32;L.F.25-29,68). He incorporates the Standard of Review from Point I.

Analysis

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

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

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*, 215 S.W.3d at 105,n.9. 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.

Commitment laws must "limit confinement to those who suffer from a ***volitional*** impairment rendering them dangerous beyond their control;" this is accomplished through the mental abnormality requirement. *Hendricks*, 521 U.S. at 358. Due process requires "proof of serious difficulty controlling behavior" to "distinguish the dangerous sexual offender whose mental illness … subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407,411-3(2002); *Thomas v. State*, 74 S.W.3d 789,791-2(Mo.banc2002). Neither *Hendricks* nor *Crane* considered the constitutionality of confinement based solely on "emotional" abnormality. *Crane*, 534 U.S. at 872.

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

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

Where "the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then [Courts] are bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Peters*, 489 S.W.3d at 789. *Thomas* did more than "refine" this definition; it replaced the entire last clause of the statutory definition with "*in a degree that causes the individual serious difficulty in controlling his behavior*." 74 S.W.3d at 791,n1. Courts "cannot add statutory language where it does not exist" and "must interpret the statutory language as written by the legislature." *Peters*, 489 S.W.3d at 792. Because commitment is punitive, the Act must be strictly construed against the State. *United Pharmacal Co.*, 208 S.W.3d at 913. The proper remedy was, and is, to strike down the unconstitutional statute altogether. *Thomas*, 74 S.W.3d at 793(Limbaugh,dissenting).

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

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

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IV.

The trial court erred and in admitting testimony about privileged and confidential statements Bushong made to treatment providers, because this violated his rights to due process, equal protection and confrontation guaranteed by U.S.Const. amends V, VI, XIV, Mo.Const. art. I, §2, 10, 18(a) in that witnesses testified about treatment-related statements contained Exhibits 27, 31 and 33 since those statements were privileged under §337.540.

Over Bushong's objection, experts testified about Exhibit 27, a timeline of his admitted sexual attractions and convictions involving children was shown to the jury; he argued it was an impermissible conduit for a non-testifying expert's opinion and violated his counselor-patient privilege and confrontation rights.(Tr.315-18).[9] Testimony was admitted about Exhibits 31 and 33 over the same objections.(Tr.416-20). Bushong cited the error in his post-trial motion.(L.F.69-70).[10]

[9] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§2,10,18(a);§337.540.

[10] Bushong's motion mistakenly cited a violation of §337.055, rather than §337.540.(L.F.69). At trial he correctly referenced licensed professional counselors, citing §337.505.(Tr.317).

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Standard of Review

Generally evidentiary rulings are reviewed for abuse of discretion. *State v. Wright*, 247 S.W.3d 161,165(Mo.App.S.D.2008). "This discretion is abused only when the ruling is clearly against the logic of the circumstances, or when it is arbitrary and unreasonable." *Id.* "The standards for admission of expert testimony constitute…a fundamental rule of evidence." *State Bd. of Reg. for Healing Arts v. McDonagh*, 123 S.W.3d 146,155-56 (Mo.banc2003). Bushong's commitment was only constitutional if it followed proper evidentiary standards. *Murrell*, 215 S.W.3d at 103; *Hendricks*, 521 U.S. at 357.

Analysis

Communications made to a licensed professional counselor during treatment "shall be deemed a privileged communication." §337.540; *State v. Hawkins*, 328 S.W.3d 799,809,n.4(Mo.App.E.D.2010). This privilege is not limited to statements pertaining to treatment. *Id*. Exhibits 31 and 33 are privileged and confidential records protected from disclosure under §337.540 because they were written by Bushong's counselor, Rodney Clossum, LPC. Exhibit 27 contained information derived from records of Bushong's treatment with Clossum.(Tr.315-17).

In *Hawkins*, a criminal defendant argued a victim's psychologist-patient and therapist-patient privileges had to yield to his confrontation and due process rights. 328 S.W.3d at 809. This Court disagreed. *Id*. Defendant viewed the records during trial, was able to cross-examine victim without the records, and the State's compelling interest in confidentiality overrode Defendant's need for the mental health records. *Id.* at 810-11.

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In *Jaffee v. Redmond*, the Supreme Court ruled privilege protecting confidential communications between a psychotherapist and patient promotes an important interest outweighing the need for probative evidence. 518 U.S. 1,9-10(1996). The privilege depends on confidence and trust. *Id.* "[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.* The Court said, "[t]he mental health of our citizenry…is a public good of transcendent importance;" therefore, the privilege serves public interest in the provision of treatment to individuals with mental problems. *Id.* at 11. 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 11-12. *Jaffee* held that the communications between patient and therapist, including notes the therapist took, are protected from compelled disclosure, and the privileged extended to licensed clinical social workers. *Id.* at 9-10. Distinguishing between counseling provided by psychotherapists and licensed clinical social workers "serves no discernible public purpose." *Id.* at 17. Neither would an attempt to distinguish licensed professional counselors.

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Section 632.510 seeks to eliminate the application of confidentiality or privilege to "information and records" in SVP proceedings:

> 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.

That section only applies to SVP proceedings. §632.510. The counselor privileged is recognized and the records are confidential in all other civil cases and criminal cases.

Even so, by its plain language, §632.510 applies only to "information and records" which are "confidential or privileged." *Id*. The statute does not modify application of confidentiality or privileges to *testimony* about records, which was admitted in this case. Since commitment is punitive and criminal protections must apply, §490.065 is inapplicable because it only applies to civil cases. *Schafer*, 129 F.Supp.3d at 844; *Hendricks*, 521 U.S. at 361. Expert testimony must be relevant to be admissible. *Wright*, 247 S.W.3d at 166.

Where constitutional rights to confrontation and due process do not trump the compelling public interest in maintaining confidentiality of such records, the State's statutory interest in confining Bushong does not either. *Hawkins*, 328 S.W.3d at 810-11. The privilege over the records and testimony about them serves a transcending public interest and promotes an important interest outweighing the need for probative evidence. *Jaffee*, 518 U.S. at 9-11. Therefore, prejudice outweighs the probative value in denying

the privilege; the records were not subject to disclosure to the State or its expert witness and testimony about them was inadmissible. *Id.*; *Wright*, 247 S.W.3d at 166. Admitting the records was illogical, unreasonable, and an abuse of discretion. Bushong was prejudiced because it is assumed the jury considered the inadmissible evidence in reaching the verdict. *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo.App.S.D.2001).

The cause must be remanded for a new trial without the inadmissible testimony about the privileged records.

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V.

The trial court erred in denying Bushong' motion for a directed verdict and in committing him as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S. Const. amends V, XIV, Mo. Const. art. I, §2, 10, and §632.495, in that the State failed to prove Bushong suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, since its expert did not establish pedophilia caused Bushong serious difficulty controlling sexually violent behavior, did not assess for risk caused by a mental abnormality or of predatory sexually violent acts, predicted a 20% chance of any sexual recidivism, and did not demonstrate Bushong's risk was "more likely than not."

Bushong's motions for directed verdict were denied and preserved in his post-trial motion.(Tr.431,691;L.F.47-51,67). He argued the State failed to establish the elements of its petition and failure to grant his motion violated his constitutional rights to due process, equal protection and a fair trial.[11](L.F.47-51,67,72).

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

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Standard of Review

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

Analysis

Because of due process requirements, §632.495 requires the State to prove the appellant was an SVP, defined in §632.480. *Cokes*, 107 S.W.3d at 321. Section 632.480 is written in the present tense and requires a finding Bushong *presently* meets criteria and poses a danger at trial. *Murrell*, 215 S.W.3d at 104. To satisfy due process, the individual must be both mentally ill and dangerous; if one is missing, commitment is unconstitutional. *Id.*;§§632.480,632.495. Therefore, "[u]nder the plain language of the statute, a person may not be confined absent a finding he '***suffers***' from a mental abnormality that '***makes'*** the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." *Id.*

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Whether an individual meets these requirements "turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists." *Addington*, 441. U.S. at 429. Expert testimony is not admissible on issues of law; it is permissible on ultimate factual issues. *Lee v. Hartwig*, 848 S.W.2d 496, 498(Mo.App.W.D.1992). Expert opinion must be supported by the record to be admissible and if not, it is insufficient to create a submissible case. *Morgan v. State*, 176 S.W.3d 200, 211(Mo.App.W.D.2005); *McGuire v. Seltsam*, 138 S.W.3d 718, 722(Mo.banc2004).

Mental Abnormality

The State failed to prove pedophilia predisposed Bushong to commit sexually violent offenses in such a degree that he had serious difficulty controlling that behavior. §632.480. To prove a mental abnormality, the State had to prove Bushong (1)has a condition, (2)that affects his emotional or volitional capacity, (3)which predisposes him to commit sexually violent offenses, (4)to a degree that causes him serious difficulty in controlling that behavior. *Murrell,* 215 S.W.3d at 106, *citing Crane,* 534 U.S. 407;§632.480(2).

Scott testified Bushong has a mental abnormality in the form of a pedophilia diagnosis.(Tr.311,313,327). Scott said the disorder is a life-long condition and may never go away, "but certainly there is hope that they can return to the community."(Tr.326). According to Scott, not everyone so diagnosed has a mental abnormality and someone who watches child pornography may never have a contact sex offense.(Tr.327). A

diagnosed mental disorder does not mean someone has a mental abnormality or is more likely than not to engage in predatory acts of sexual violence.(Tr.398,400).

Scott testified pedophilia affects Bushong's volitional capacity, that is his ability to manage his actions, as evidenced by viewing child pornography, contact with K.W., and being revoked on parole for looking at more pornography.(Tr.329). It predisposes, or "causes," sexually violent offenses because Bushong committed a sexually violent offense against K.W.(Tr.329,400). That Bushong viewed child pornography, offended against K.W. and was revoked for watching pornography again "demonstrated that he cannot manage his behavior effectively."(Tr.329). Scott testified there are two ways to determine "serious difficulty controlling behavior:" some individuals admit the drive to do the behavior is so great they cannot control it; others continue to do the behavior in the face of negative consequences.(Tr.330). He opined Bushong had "serious difficulty" controlling his behavior because "he returned to using pornography and had his parole revoked. He doesn't stay away from it and makes choices and feels driven enough that he continues to do it."(Tr.330). But, Bushong, "hasn't demonstrated serious difficulty controlling his behavior by having a second victim"(Tr.411).

To be a mental abnormality, the condition must "cause" someone to commit a hands-on sexual offense and cause serious difficulty controlling hands-on sexually violent offense behavior.(Tr.400-1). Section 632.480(4) defines sexually violent offenses, all of which are contact offenses. *In re Gormon*, 371 S.W.3d 100,104(Mo.App.E.D.2012). Offenses not on that list, like possessing or watching child pornography, are not sexually violent offenses as a matter of law. *Id.*(Tr.327). Sufficient

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

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

> Undoubtedly, sex offenders in general are not notable for their self-control. They are also, in general, not highly risk-averse. But beyond these truisms, it is rarely if ever possible to say, from the facts of a sex offense alone, whether the offender had great difficulty in controlling his urges or simply decided to gratify them, though he knew he was running a significant risk of arrest and imprisonment.

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

Scott's testimony did nothing more than describe a scenario in which Bushong "makes choices" to continue using child pornography, a non-contact, non-sexually violent offense, in spite of the consequences. Making a choice to engage in such behavior

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was not conduct beyond Bushong's control and does not support a reasonable inference of serious difficulty controlling hands-on sexually violent offense behaviors. Commitment is limited "to those who suffer from a volitional impairment rendering them dangerous beyond their control" such that they have "serious difficulty controlling behavior," distinguishing them "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 411-13. Even if Scott established Bushong had serious difficulty controlling behaviors related to child pornography, that behavioral difficulty alone is not enough.(Tr.401-2). Therefore, Scott's opinion was not supported by the record, was inadmissible and insufficient to create a submissible case. *Morgan*, 176 S.W.3d at 210.

Predatory Acts of Sexual Violence

The State also failed to prove Bushong was more likely than not to commit future ***predatory acts of sexual violence*** because of the pedophilia mental abnormality. No one is an SVP, even if they have a mental abnormality, if they are *not* more likely than not to commit predatory acts of sexual violence.(Tr.336);§632.480(5).

Scott used three actuarials to assess Bushong's "future risk for sexual offending."(Tr.333-34,340). The Static-99R assessed "long-term risk for a known male sex offender" and "looked at which variable were predictive of higher risk"(Tr.341-42). The Static-2002R is "very like the Static-99R, the same purpose"(Tr.358). They both look at historical and demographic qualities.(Tr.367). The Stable-2007 assesses future sexual violence risk by looking at attitudes, emotions, relationships, and some

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diagnoses.(Tr.367-69). Estimates of future risk must be based on data actually reported and leading to an arrest or conviction.(Tr.337). The Statics predicted a 20% chance Bushong would be "rearrested or reconvicted for a new sex crime."(Tr.386).

But the mental abnormality must cause the risk of future predatory acts of sexual violence under 632.480(5), not actuarial assessment.(Tr.336); *Murrell*, 215 S.W.3d at 104. Due process requires the mental abnormality and the danger of future sexually violent behavior be "inextricably intertwined," limiting commitment to those "suffering from a volitional impairment rendering them dangerous beyond their control." *Id.*; *Hendricks*, 521 U.S. at 353. The actuarials looked at a combination variables, but did not assess for risk *caused* by pedophilia.(Tr.334-36;341-382).

Even then, the three actuarials assessed future risk for "sexual offending" as opposed to the statutorily required risk of "***predatory acts of sexual violence***."(Tr.340);§632.480(5). "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).

Scott's testimony failed to establish "predatory" as defined by §632.480. *Id.* at 208,211. Therefore the legal issue of "more likely than not to commit ***predatory acts of***

sexual violence" never became an ultimate fact issue upon which he could give expert opinion. *Lee*, 848 S.W.2d at 498.

Cokes reversed a commitment where the State failed to prove re-offense in a sexually violent, predatory way.107 S.W.3d at 323-4. The expert used actuarials predicting a 48% and 92% chance of recidivism and concluded Cokes was "likely to sexually re-offend." *Id.* at 320,322. The Court ruled the jury could not reasonably infer ***predatory sexually violent*** **re-offense** from actuarial scores; the State failed to make a submissible case and denying a directed verdict was error. *Id.* at 323-4.

In *Morgan*, experts relied upon past sexual violence and actuarials predicting sexually violent re-offense to conclude Morgan was more likely than not to commit future predatory acts of sexual violence.176 S.W.3d at 210-211. There was no evidence of an intent to victimize supporting a finding that the past acts were "predatory."[12] *Id.* at 209. Expert reliance on the past act of sexual violence did not support a conclusion of the likelihood of future ***predatory*** sexual violence. *Id.* at 209-11. Expert reliance on actuarials predicting ***sexually violent*** re-offense did not support an opinion that Morgan was more likely than not to engage in future ***predatory acts*** of sexual violence. *Id.* at 211. The expert's ultimate opinion was not supported by the record or make a submissible case, and denying the motion for directed verdict was error. *Id.*

[12] The State had to prove relationships were established or promoted with the victim for the primary purpose of victimization under the prior "predatory" definition. *Id.* at 205-7.

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Actuarial instruments predicting a 20% chance Bushong would be "rearrested or reconvicted for a new sex crime," did not support Scott's ultimate opinion or a reasonable inference by the jury that Bushong was more likely than not to commit predatory acts of sexual violence.(Tr.386); *Id.*; *Cokes*, 107 S.W.3d at 323-4. There was no evidence at trial that Bushong's contacts with K.W. were for the primary purpose of victimization as that term is defined by law; Bushong's contact-offenses did not support a conclusion of the likelihood of future predatory sexual violence. *Morgan*, 176 S.W.3d at 210-211.

Scott's 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 proposed mental abnormality, caused Bushong to be more likely than not to commit predatory acts of sexual violence if not confined.

More Likely Than Not

Not only did the State fail to prove Bushong' likelihood of committing predatory acts of sexual violence, the State failed to prove Bushong was "***more likely than not***" to commit a future offense of any kind. "More likely than not" is not defined by the Act. To meet the "more likely than not" standard, it is necessary to identify some variable that changes the base rate expectation of re-offense to a ***probability of re-offense***. *In re Coffel*, 117 S.W.3d 116,127(Mo.App.S.D.2003). "A probability of re-offense" must be greater than 50%.

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.

Like in *Elam*, expert testimony had to quantify Bushong's future risk as a probability greater than 50% to prove he was "more likely than not." 765 S.W.2d at 208. Scott testified "more likely than not" means anything over 50%.(Tr.403). He determined Bushong's quantifiable risk of re-offense was 20% based on actuarials.(Tr.386,425). The actuarial scores mean only 20 out of 100 men with the same actuarial scores "re-offended" and 80 did not.(Tr.405). There was no way to know if Bushong falls into the group of 20 re-offenders or 80 non-re-offenders.(Tr.405-6).

To say Bushong was "more likely than not," Scott looked beyond the empirically supported estimates of the actuarials and claimed the actuarials underestimated risk because they counted only detected arrests and convictions.(Tr.425). But he also testified estimates of future risk must be based on data actually reported and leading to an arrest or conviction.(Tr.337). Scott testified, "if he's in the 51[%] or the 49[%], we can't say for sure. I mean that's the honest answer" but concluded Bushong's risk is greater than "more likely than not."(Tr.425-26).

Scott never quantified Bushong's risk as probability of re-offense, or greater than 50%. *Coffel*, 117 S.W.3d at 127; *Elam*, 765 S.W.2d at 208. Failure to quantify Bushong's

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risk such a probability meant Scott's future risk testimony was non-probative of the ultimate issue, unsupported by the record and insufficient to make a submissible case. *Elam*, 765 S.W.2d at 208; *Morgan*, 176 S.W.3d at 211. There was no basis in the record to support a finding that pedophilia makes the probability of committing a future predatory act of sexual violence greater than 50%.

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

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VI.

The trial court erred in giving Instruction 7, because it instructed the jury on "treatment," violating Bushong's rights to due process and a fair trial, guaranteed by U.S.Const. amends. V, XIV and Mo.Const. art.I, §§2, 10, in that treatment provided by third party DMH is an inadmissible and irrelevant external constraint, and Bushong was prejudiced by its inclusion in Instruction 7 because it was irrelevant to the issue to be decided: whether he suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Bushong's motion in limine arguing Instruction 7 was improper because "treatment" is an inadmissible external constraint at trial was denied.(L.F.35-36;Tr.20-21). Instruction 7, stating, "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," was given at trial over Bushong's objection.[13](Tr.694-95;L.F.63).

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

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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. *Id.*

Analysis

There are no MAI instructions in SVP cases. *Lewis v. State*, 152 S.W.3d 325,329 (Mo.App.W.D.2004). Therefore, any instruction given must be "simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. *Id.*; Rule 70.02(b). The instruction must follow the substantive law and be easily understood. *Id.* Courts have upheld the §632.492 instruction because the statute requires it. *See Id.*; *Boone v. State*, 147 S.W.3d 801,808(Mo.App.E.D.2004). Lewis and Boone complained the instruction invited focus on irrelevant treatment and minimized responsibility for the verdict; both challenges were overruled 152 S.W.3d at 329; 147 S.W.3d at 808. *Boone* ruled that the instruction did not cause substantial prejudice on that challenge, because an average juror would understand that an SVP would be subjected to the "control, care and treatment" of DMH. 147 S.W.3d at 808. In contrast, Bushong challenges the instruction under the external constraint line of cases.

The question at trial is whether Bushong "suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." *Lewis*, 152 S.W.3d at 332;§632.480(5); *and see*(Tr.10). "The question is not whether some external constraints make it less likely that he would

engage in such acts." *Id.* In *Cokes v. State*, 183 S.W.3d 281,285(Mo.App.W.D.2005). The trial court excluded evidence of medical treatment and psychiatric services available to Cokes in the community. Pretrial the court excluded *all* evidence regarding what would happen to Cokes whether committed or released. *Id.* The exclusion was affirmed on appeal because evidence of structures in place was external constraint evidence. *Id.* at 286.

Section 632.492 and Instruction 7 go beyond this issue and mere confinement, informing the jury about "treatment." "Treatment" is no different than mandatory probation supervision, excluded as an external constraint in *Lewis*. 152 S.W.3d at 331-32. "Treatment" in DMH is the same as psychiatric treatment, medication and services excluded in *Cokes:* offered by a third party, and irrelevant to whether or not Bushong had a mental abnormality or was "more likely than not" if not confined. 183 S.W.3d at 258-86.

The State argued evidence of what happened to Bushong after the jury's finding was irrelevant to the legal questions at trial, "may cause a jury to mistakenly base its decision off the likely effectiveness of third party actions," and was inadmissible as external constraints.(L.F.37-39); *Lewis,* 152S.W.3dat 332; *Cokes,* 183 S.W.3d at 285. The State's external constraint motion in limine was granted.(Tr.12). The same argument is true regarding Instruction 7: instructing the jury on "treatment" was irrelevant to the legal question and may have caused the jury to base its decision of the likely effectiveness of third party action.

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With respect to instructional errors, this Court has said, "We should reverse only for defects of substance that have substantial potential for prejudicial effect." *Boone*, 147 S.W.3d at 808. 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). A jury is more likely to find someone is an SVP if they know the result is going for "treatment" rather than incarceration. This is particularly true in a case like this, where the jury heard about a short-term custodial treatment program, community-based treatment, and the reduction of risk based on completion of a treatment program before release.(*See,e.g.*,Tr.391-92,416-18,636). Instructing the jury about "treatment," had substantial potential for prejudicial effect and this Court should reverse.

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CONCLUSION

This Court must transfer this cause to the Missouri Supreme Court. The judgement of the trial court must be reversed and Bushong released from confinement as demonstrated in Points I-III and V. Alternatively, this Court must reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 360. The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 13,568 words, which does not exceed the 15,500 words allowed for an appellant's brief.

On this 27th day of January, 2017, 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