IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF JOSHUA BUSHONG, Respondent/Appellant.	)))))	No. SC96221

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 REPLY BRIEF

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JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

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

ARGUMENT

I. Strict Scrutiny Applies

The State asks this Court to reconsider its prior holdings and application of strict scrutiny to SVP cases on the basis that the United States Supreme Court has never said involuntary commitment impinges on a fundamental right. (State's Br. 15).

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

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

Kansas v. Hendricks relied on *Foucha*, recognizing that the liberty interest "has always been at the core of the liberty protected" by due process, but is not absolute at all times, in all circumstances. 521 U.S. 346, 356 (1997). Therefore, commitment "in certain

narrow circumstances" of certain individuals, "provided the confinement takes place pursuant to proper procedures and evidentiary standards," had been upheld. *Id.* at 357. Hendricks did not identify the standard of review, but this language suggests statutes must be narrowly tailored to achieve compelling government interests. *Hendricks* did not hold that there is no fundamental right implicated in commitments. (State's Br. 16).

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

The State's request to abandon strict scrutiny is based on Thomas' dissent in *Foucha*. *See also Karsjens v. Piper*, 845 F.3d 394, 407 (8th Cir. 2017) (*citing Foucha*, 504 U.S. at 116 (Thomas, dissenting)). Thomas commented on the language used to distinguish *Foucha* from *Salerno*: "the Court states that the Louisiana scheme violates substantive due process not because it is not "reasonably related" to the State's purposes, but instead because its detention provisions are not "sharply focused" or "carefully limited" *Id*. at 117. He explained that "until today" the Court had given differential review to civil commitment laws and never applied strict scrutiny. *Id.* at 199, *citing Jackson v. Indiana*, 406 U.S. 715, 738(1972)("*At the least*, due process requires that the nature and duration of commitment

bear some reasonable relation to the purpose for which the individual is committed."). Thomas believed due process did not preclude continued confinement, the law did not violate a fundamental right, and was reasonable. *Id.* at 125-26. The majority rejected Thomas' position, stating it was "not consistent with our present system of justice." *Id*. at 83, n.6.[1] This Court must continue rejecting it, too.

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

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

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

II. Act is Unconstitutional/Motions to Dismiss

Schafer was presented with "the clearest proof" sufficient to establish that the Act results in punitive, lifetime detention bearing no reasonable relationship to a non-punitive purpose and violating due process. *Van Orden v. Schafer*, 129 F.Supp.3d 839, 844, 867-68, 870 (E.D. Mo. 2015). If this Court accepts the findings of Schafer, it will come to the same conclusions.

This Court may also look to the intent of the legislature in drafting the law. The 1998 legislative minutes for House Bill 1405, the proposed SVP Act, confirm punitive intent that SVP commitment be permanent incarceration:

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

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

The provisions of the Act must be considered together and cannot be read in isolation. *Alberici Constructors, Inc. v. Director of Revenue*, 452 S.W.3d 632 (Mo. banc 2015). Because commitment is punitive, the Act must be strictly construed against the State. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. banc 2006). The initial commitment procedures, safeguards, and protections must

reflect the punitive nature and duration of confinement, and minimize the risk of erroneous commitments.

Hendricks upheld the Kansas SVP law as not punitive because: (1) the law did not implicated retributive or deterrent objectives; (2) the duration of confinement was linked to its purpose and an individual was entitled to immediate release if he no longer met criteria, and (3) commitment was not indefinite because a person could only be confined for one year; Kansas was required to prove beyond a reasonable doubt that the individual continued to meet all criteria for commitment each year to continue confinement. 521 U.S. at 361-364. The United States Supreme Court noted the Kansas law "afforded the same status as others who had been civilly committed" and again mentioned it "permitted immediate release" if no longer dangerous or mentally ill. *Id.* at 368. Because resulting commitment was not punitive under the Kansas law, initiating proceedings did not violate constitutional double jeopardy and ex post facto prohibitions. *Id.* at 370-371.

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

reasonable relationship to any non-punitive purpose of confinement. *Schafer*, 129 F.Supp.3d 839. Nor does the Act give Mr. Reddig the "same status as others who had been civilly committed." *Hendricks*, 521 U.S. at 368; *see In re Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007).

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

State Raises Evidence for First Time Now On Appeal

This Court does not consider evidence outside the record on appeal. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 823 (Mo. banc 2011); Rule 84.04 (h); (State's Br. 24-25, 33). If considered, the State's new evidence provides additional proof the Act is punitive: none of the conditionally released men were discharged or released from confinement, though no longer meeting requirements for commitment; the conditions of confinement are more cumbersome now that they have been "conditionally released;" two were ordered to live in a secure nursing home facility; and three continue living in SORTS. *In re Fennewald*, 06B7-PR00024 (Boone County Cir. Ct.); *In re Boone*, 21PR00135062 (St. Louis County Cir. Ct.); *In re Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.); *In re Seidt*, 43P040300031 (Daviess County Cir. Ct.); *In re Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.);[2] §632.505.3.

[2] Mandatory court-ordered conditions include: GPS, mandatory disclosure of privileged/ confidential treatment information, warrantless searches, forced polygraphs/penile

No Petition for Release Required to Challenge Unconstitutional Commitment

Bushong need not petition for release to challenge the statutory scheme under which he has been committed and remains incarcerated.[3] He is constitutionally entitled to discharge in the event that he longer suffers from a mental abnormality or is no longer "more likely than not" as a result of a mental abnormality. *Murrell v. State*, 215 S.W.3d 96, 104 (Mo. banc 2007); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). But discharge has been unconstitutionally eliminated and replaced with continued DMH custody. §632.505. The time to challenge the burden of proof and the procedural and substantive protections required in his initial trial is now on appeal.

"Conditional Release" Is Not "Discharge"

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plethsymographs, and increases in supervision at any time the State believes he requires it. *Richardson*, 06PS-PR00236; §632.505. These conditions apply to Boone, Blanton and Seidt, but not men who are "committed" and not "conditionally released." *See* §632.480,et seq.

[3] If he challenged the procedures/standards applicable to his initial commitment when seeking conditional release or discharge, the State would argue he should have done so in his initial commitment proceeding. *Schottel v. State*, 159 S.W.3d 836, 840 (Mo. banc 2005).

The State acknowledges that the 2006 amendments replaced discharge with conditional release, but argues conditional release can function like discharge and that all conditions of release can terminate.(State's Br. 29, 33). The State reads "physical commitment" language into *Norton, Van Orden,* and the Act that does not exist. Conditional release cannot "function like a dismissal" because one conditionally released "remains under the control, care and treatment" of DMH. §632.505. That issue was not presented in *Van Orden*.

"Custody" is not limited to physical confinement; a person supervised by the government and subject to conditions is "hardly a free man." *Nicholson v. State*, 524 S.W.2d 106, 109 (Mo. banc 1975). Confinement and custody continue after the basis justifying an initial commitment no longer exists as "conditional release." If released from immediate physical incarceration on conditional release, the Act "imposes conditions which significantly confine and restrain [Bushong's] freedom." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). Those conditions were not discussed by the prior opinions the State now cites.

The Act does not authorize removal of "all of the conditions for release."(State Br. 29). The Act mandates that when anyone is adjudicated to no longer be mentally ill and/or dangerous, "the court ***shall place the person on conditional release*** pursuant to the terms of this section" and "***shall order*** that the person ***shall be subject to the following conditions***

and other conditions as deemed necessary." §632.505.1,.3. "The court may ***modify***[4] conditions of release" but not "***remove***" or "***terminate***"[5] them. §632.505. The conditionally released person "remains under the control, care and treatment of the department of mental health." §632.505.5; *State ex rel. Schottel v. Harman*, 208 S.W3d 889, 891 (Mo .banc 2006) (Someone "released" under the amended Act "remains committed to custody.").

This type of lifetime confinement does not comport with a constitutional SVP commitment scheme. *Hendricks*, 521 U.S. at 364, 369; Kan. Stat. Ann. §59-29a19 (discussing final discharge); Kan Stat. Ann. §59-29a11 (distinguishing conditional release from final discharge).

Right to Silence

The State fails to appreciate that Bushong also claims the right to silence under the Fourteenth Amendment's Due Process and Equal Protection clauses, like the appellant in *Bernat v. State*, 194 S.W.3d 863, 866-867 (Mo. banc 2006). He claims that since all others subject to criminal proceedings and to civil commitment in Missouri have the right to remain silent, he must as well. §§632.325, 631.145, 475.075, 632.335. A criminal

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

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

conviction and sentence are insufficient to justify less procedural and substantive protection here than generally available to any other person subject to civil commitment. *Jackson*, 406 U.S. at 724. "[A]pplication of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid purposes of civil commitment." *Allen v. Illinois*, 478 U.S. 364, 381(1986) (Stevens, dissenting) (decided by 5-4 majority). Anyone else is entitled to that right-- if deemed "criminal" under the constitution, or otherwise a "civil" commitment, by Missouri statute. Id.; §§632.325, 632.483.

The State claims other jurisdictions refuse to recognize a right to silence, asserting that Californians do not have a right to refuse to speak to doctors during the SVP process.(State Br. 35). This claim is false.

In California, an alleged SVP can refuse to participate in an evaluation interview. *People v. Williams*, 74 P.3d 779, 781 (Cal. 2003) (declined to be interviewed by evaluator after being informed of his right to do so). SVPs are similarly situated to NGRI committees, who have the right to not testify, because: (1) both required commission of a criminal act and mental condition posing danger to others, (2) each is committed to state hospital for treatment, and (3) the purpose of commitments is to protect the public and provide treatment. *People v. Curlee*, 188 Cal.Rptr.3d 421, 428, 430 (Cal. Ct. App. 2015); *Hudec v. Superior Court*, 181 Cal.Rptr.3d 748 (Cal. 2015). *Curlee* ruled that the State did not justify discriminatory treatment denying the right to SVPs. *Id*. at 431. The State's arguments that SVPs were more likely to commit offenses than other committees or were likely to participate in treatment did not show that an SVPs compelled testimony was necessary. *Id*.

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

Jury Demand

Every other civil committee has an absolute right to a bench trial. Under §632.335, proceedings are only conducted before a jury if the Respondent so requests. *And see* §632.350. The Act allows the State's attorney to impose its will on the court and the involuntary respondent. §632.492; a*nd see* Mo. Const., art. I, § 22(a). Otherwise, the two different commitment schemes are substantially similar and are not mutually exclusive; the only difference is the predicate prior sex offense.

In *Baxstrom*, a convicted prisoner was involuntarily confined for treatment without a jury trial at the expiration of his sentence. *Baxstrom v. Harold*, 383 U.S. 107, 109-110 (1966). Equal Protection required the same jury right as granted to all others civilly committed and criminal propensities could not justify discrimination. *Id.* at 115. In *Humphrey*, a sex offense conviction did not justify discriminatory treatment when everyone else in involuntary commitments had the right to a jury. *Humphrey v. Cady*, 405 U.S. 504, 510 (1972). If the State cannot discriminatorily deny a jury trial, then it cannot discriminatorily demand one, either.

In fact, the United States Supreme Court said denying a jury trial may be justified by "some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary." *Id.* at 512. That is the case here. Judge Wolff observed that when the State brings an SVP case before a jury, "it is a fairly safe bet that [the individual] will not be seen at large anytime this century." *State ex rel. Parkinson*, 280 S.W.3d 70, 78 (Mo. banc 2009) (concurring). He also noted "the reprehensible nature of the offenses makes observance of constitutional safeguards very difficult," "the public's natural revulsion for all sex crimes," and aptly pointed out that "once the state decides to proceed to commit one of these offenders, it can hardly lose." *In re Norton*, 123 S.W.3d 170, 177-78, 182 (Mo. banc 2003) (concurring).

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

Id.

LRE

The State relies on *Norton*, where this Court denied an LRE equal protection challenge. 123 S.W.3d at 174. But, it contends that though discharge was eliminated, and the burden of proof on the State reduced, "the SVPA has not changed since the *Norton* decision" so as to require an LRE.(State Br. 33). This argument ignores the fundamental

changes in elimination of discharge, elimination of mandatory annual reviews for men "conditionally released," and the reality of lifetime confinement in DMH.

"Due process requires the government, when it deprives an individual of liberty, to fetter his freedom in the least restrictive manner." *Neal*, 679 F.3d at 741. The Act does not comport with due process because it does not require the State to show a compelling interest in total-lock down confinement versus least restrictive environments, or the court to even consider it. Nor does it comply with equal protection.

Denying an LRE is incongruent with a constitutional SVP scheme that provides "essentially the same conditions as any involuntary committed patient in the state mental institution." *Hendricks*, 521 U.S. at 636. The constitutional Kansas law provides transitional release placement outside of the secure commitment facility. Kan. Stat. Ann. §59-29a02, §59-29a08. Others civilly committed in Missouri have the right to LRE placement. *See* §630.115("Each patient, resident or client shall be entitled to the following without limitation:…To be evaluated, treated or habilitated in the least restrictive environment."); §632.365(upon involuntary detention order, the director "shall determine where detention and involuntary treatment ***shall take place in the [LRE],*** *be it in patient or outpatient setting*."); §632.385.

"[T]he State cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." *Jackson*, 406 U.S. at 727, *relying on Baxstrom*, 383 U.S. 107. Such was the case in Humphrey, where the general commitment statute afforded a jury demand, but the Sex Crimes Act did not. 405 U.S. at 512. The Court rejected the State's argument that discrimination was justified

because of a criminal conviction and said an equal protection claim would be "especially persuasive" if a committee was deprived the right or other protections "merely by an arbitrary decision of the State to seek his commitment under one statute rather than the other" and remanded. *Id.* at 511, 506.

Bushong has been, and will be, denied an LRE because the State sought SVP commitment, rather than general commitment. Protecting the public is a State interest for both commitments; it cannot justify differential treatment once committed. *Norton*, 123 S.W.3d at 174; *Humphrey*, 405 U.S. at 511; *Jackson*, 406 U.S. at 727. Even if it could, the narrowly tailored means *Norton* relied upon no longer exist.

Section 632.505.1 itself contemplates an LRE: "[t]he ***primary purpose*** of conditional release ***is to provide outpatient treatment and monitoring to prevent*** the person's condition from deteriorating to the degree that the person would ***need to be returned to a secure facility***." 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). Such is the case in legislatively declaring a purpose in "conditional release," while conspicuously failing to establish the LRE necessary to accomplish that purpose.

Conclusion

The Act fails to pass strict scrutiny. Of course one remedy necessary is constitutional release procedures. However, the systemic failures of the release-portion of the Act require greater protections in the initial commitment process under the Act, like

the attachment of the right to counsel before interrogation to determine if an SVP referral will be made, the right to silence, and the "beyond a reasonable doubt" standard. Declaring that standard applies to the proceedings and granting a new trial does not remedy the double jeopardy and ex post facto violations, which prohibit application of the law to Bushong. This Court cannot rewrite the Act; it must strike it down. *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001).

III. Mental Abnormality Definition

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 v. Wady Industries, Inc.*, 489 S.W.3d 784, 789 (Mo. banc 2016). *Thomas* did more than "refine" the mental abnormality definition; it replaced the entire last clause of the statutory definition, "in a degree constituting such person a menace to the health and safety of others" with "*in a degree that causes the individual serious difficulty in controlling his behavior*." *Thomas v. State*, 74 S.W.3d 789, 791, n.1 (Mo. banc 2002).

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*, 208 S.W.3d at 913. The proper remedy was, and is, to strike down the unconstitutional statute. *Board of Educ.*, 47 S.W.3d at 371; *Thomas*, 74 S.W.3d at 793 (Limbaugh, dissenting).

IV. Statements to Treatment Providers

Rodney Clossum was a licensed professional counselor and Bushong's treatment provider in the community.(Ex. 31, 33). Exhibits 31 and 33 were letters Clossum wrote, disclosing what he and Bushong discussed in treatment and his opinions.(Ex. 31, 33). Exhibit 27 includes an entry repeating Clossum's disclosure: "Treatment provider noted he 'participated in treatment previously but did not internalize what he needed in order to make changes in his thoughts and behaviors.'"(Ex. 27). Therefore, Bushong's communications with Clossum were privileged under §337.540.

Without any authority, the State claims that §632.510's purpose is to "inform the fact finder at trial."(State Br. 46). The statute does not relate to evidence at trial and has no bearing on the admissibility of evidence presented to the fact finder. The plain language identifies the purpose in releasing records to the agency with jurisdiction or the attorney general, "for the purpose of meeting the notice requirement… and determining whether a person is or continues to be an [SVP]" §632.510. Therefore, the recipient of the information is limited to the agency with jurisdiction and the attorney general. Those two entities may use the records for notice purposes or their own internal determinations about proceeding under the Act.

This interpretation yields a logical result. Under §337.540, an LPC like Clossum "shall not be examined or made to testify to any privileged communication without the prior consent of the person who received his professional services…" Where Clossum is incompetent to testify against Bushong, his testimonial statements reduced to writing must also be inadmissible at trial.

V. Sufficiency

There is no evidence in the record tending to prove Underwood was/would be "predatory," a fact necessary to sustain the trial court's judgment as a matter of law. *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). That term is defined by the legislature. "[W]hen the legislature construes its own language by providing definitions, that construction supersedes the commonly accepted dictionary or judicial definition, and it is binding on the courts." *Id.* at 203.

In re Spencer, the State made a submissible case that pedophilia was a mental abnormality predisposing Spencer to commit sexually violent offenses to a degree causing him serious difficulty controlling his behavior and making him more likely than not to commit future predatory acts of sexual violence if not confined. 171 S.W.3d 813, 819 (Mo. App. S.D. 2005). The State's expert testified Spencer was predatory because his primary purpose in molesting his daughter was victimization. *Id.* at 818. Here there was no testimony about Underwood's purpose in any past act, or anticipated future act. Therefore, the State failed to adduce substantial evidence of a fact necessary to sustain the trial court's judgment. *Ivie*, 439 S.W.3d at 199.

VI. "Care, control, treatment" Instruction under §632.492

An instruction mirroring a statute may be erroneous. In *State v. Erwin*, this Court said pattern instruction MAI-CR3d 310.50 did not misstate the law, but violated due process. 848 S.W.2d 476, 483 (Mo. banc 1993). It read: "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct." *Id*. at 481. That instruction did not relate to other instructions, but was a standalone comment on the evidence of intoxication. *Id*. at 483. It created a reasonable likelihood that the jury would believe if the defendant was intoxicated, he was criminally responsible, thereby relieving the State of its burden of proof as to a statutory element and violating his constitutional right to due process. *Id.* The error giving that instruction was not cured by giving a general instruction placing the burden on the State. *Id.* It was impossible to say the error was harmless beyond a reasonable doubt because a substantial issue existed about the defendant's mental state. *Id.*

Just as intoxication is irrelevant to a defendant's mental state, "control, care, and treatment" in DMH custody is irrelevant to an SVP's. *Id.* at 484. Instruction 6 directed the jury to determine if a mental abnormality made Bushong more likely than not to engage in predatory acts of sexual violence unless confined.(L.F.62). Instruction 8 went beyond the issues for trial, as a standalone comment on "control, care, and treatment" in DMH custody. It created a reasonable likelihood that the jury would believe if Bushong needed care or treatment, he should be committed as an SVP, thereby relieving the State of its burden of proof as to each element and violating his right to due process. That is precisely what the State argued:

- "Finally, you get to decide whether he now needs to be made to go to treatment and learn how to apply these concepts and keep him off the path of re-offending…" (Tr.699).
- "So you have the opportunity now. He says he doesn't need treatment. He says he doesn't need treatment."(Tr.725).
- "He needs to be made to go to treatment. You're the only ones that are left to make him go."(Tr.726).

Giving Instruction 6, and even Instruction 5, the general burden of proof instruction, did not cure this error.(L.F.61-62).

If anything, Instruction 7 was a roving commission submitting an abstract legal statement that allowed the jury to "to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose" commitment and "treatment." *City of Harrisonville v. McCall Srvc. Stations*, 495 S.W.3d 736, 746 (Mo. banc 2016). The mandated instruction was misleading in the context of the evidence at trial; there was no testimony or evidence about "control, care, and treatment" in DMH at all or what would happen after the jury's verdict. *Id*. It invited the jury to ponder matters not within their province, distracted them from their factfinding responsibilities, and created confusion. It did not minimize the risk of erroneous confinements, narrowly limit confinement, or pass strict scrutiny. A commitment based on such an instruction did not take place pursuant to proper procedures and safeguards.

In Missouri the only time a similar instruction might be given upon the request of a criminal defendant who affirmatively raised an NGRI defense. §552.030.6; 552.040; MAI-

CR 4th 406.02. Bushong did not raise an affirmative defense or request Instruction 7. There is no justification for §632.492's discrimination. Section §632.492 did not always mandate giving the "control, care and treatment" instruction; that was added in 2001. S.B. 267, 91st Gen. Assem., 1st Reg.Sess. (Mo. 2001). The Kansas commitment scheme, declared civil and constitutional in *Hendricks*, does not include this mandate. Kan. Stat. Ann. §59-29a07.

CONCLUSION

As demonstrated in Appellant's Brief and the supporting arguments contained within this Reply Brief, Bushong's commitment must be reversed. Alternatively, his case must be remanded for a new trial.

Respectfully submitted,

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Certificate of Compliance

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Including the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 5,660 words which does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell