IN THE
MISSOURI SUPREME COURT

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

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

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# APPELLANT'S REPLY BRIEF

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

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## JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

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

## ARGUMENT

### Reply I: Fundamental Right

Hopkins has an inherent and 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. He argued strict scrutiny applies from the outset of his case.(L.F.29,31,38). This Court held that because commitment under the Act impinges on a fundamental right of liberty, strict scrutiny applies. *Bernat v. State*,194S.W.3d863,868(Mo.banc2006). It should continue to do so today.

The State's argument is in the same vein as that in *State ex rel. Koster v. Oxenhandler*, where it argued no "due process liberty interest is implicated when a [NGRI] defendant is acquitted of charges." 491S.W.3d576,592(Mo.App.W.D.2016). This "specious" position ignores that commitment to the custody of the director of DMH is mandatory. *Id.* "Commitment proceedings, whether civil or criminal, are subject to both the equal protection and due process clauses of the Fourteenth Amendment." *Id.*

The Fourteenth Amendment provides that: "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fifth Amendment due process guarantee is violated "unless detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v.*

*Davis*,533U.S.678,690(2001); *citing U.S. v. Salerno*,481U.S.739,746(1987); *Foucha v. Louisiana*,504U.S.71,80(1992). Missouri's Constitution states, "That all persons have a natural right to life, liberty and the pursuit of happiness…; that all persons are created equal and entitled to equal rights and opportunity under the law" and "[t]hat no person shall be deprived of life, liberty or property without due process of law." Mo.Const.art.I,§§2,10. It grants the same protections as the federal counterpart. *Bernat*,194S.W.3dat867.

"[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*,457U.S.307,316(1982). "This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment" and "can be limited only by an overriding, non-punitive state interest." *Id*.at313,316. *Foucha* extended *Youngberg* to indefinite confinement of a man who had committed a crime at one time and could not prove he was not dangerous, and said, "[w]e have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." 504U.S.at80*; Salerno*,481U.S.739.

While not explicitly stating strict scrutiny applied, *Foucha* discussed "certain narrow circumstances" in which the government could confine individuals who posed a danger. *Id.*at80-81. For example, in *Salerno,* compelling and legitimate 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." *Id*.at81. The State's evidence did not defeat Foucha's "liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."

*Id.*at82. The Court said, "[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.*at86.

Kennedy's concurrence said the Court applied "heightened due process scrutiny." *Id.*at93. O'Connor's concurrence called for heightened standard, where commitment was "*tailored* to reflect *pressing* public safety concerns." *Id.*at87-88.

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.*at117. He explained that "until today" the Court had given differential review to civil commitment laws and never applied strict scrutiny. *Id.*at199, *citing Jackson v. Indiana*,406U.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.*at125-26. The majority rejected Thomas' position, stating it was "not consistent with our present system of justice." *Id.*at83,n.6.[1] This Court must continue rejecting it, too.

[1] There is no formula for identifying the fundamental rights protected by due process. *Obergefell v. Hodges*,135S.Ct.2584,2597(2015). "History and tradition guide… the

In *Vitek v. Jones*, the Court said stigmatizing consequences of hospitalization and behavior modification therapies made transfer a prison to mental health facility "major change in the conditions of confinement' amounting to a 'grievous loss' to the inmate." 445U.S.480,492(1980). "Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause."*Id.*at493.

*Kansas v. Hendricks* recognized the inherent right to freedom from physical restraint; that "liberty interest is not absolute" at all times and in all circumstances. 521U.S. 346,356-57(1997). Therefore, the Court has upheld involuntary commitment of the dangerous and mentally ill "in certain *narrow circumstances*," "provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id*at357. Hendricks did not identify the standard of review, but this language suggests statutes must be narrowly tailored to achieve compelling government interests. The Eight Circuit has affirmed "[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*,679F.3d737,40(2012); *Salerno*,481U.S.at748.

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inquiry" but do not settle it, and we are to "learn[] from it without allowing the past alone to rule the present." *Id.*

## Reply II: The Punitive Act Violates the Constitution

This Court previously said these proceedings are civil. *In re Van Orden*,271S.W.3d579,85(Mo.banc2008). However, the passage of time and experience demonstrates: (1)commitment under the Act is punitive, lifetime confinement, and (2)that is so in spite of calling it "civil" and following this Court's precedents. *Templemire v. W & M Welding, Inc.*,433S.W.3d371(Mo.banc2014). Experience with the statute has exposed serious constitutional problems, shown the Act is used simply to impose life sentences of confinement, and this Court has a duty to take another look now that the constitutionality of the entire statutory scheme has been squarely presented. *Norton*,123S.W.3d at176,182(Wolff,concurring); *Van Orden*,271S.W.3dat589(Cook,concurring). There is a compelling case for changing course.

The State claims that even if correct, *Schafer* does not mean the Act is punitive, appearing to argue that *Schafer* does not provide "the clearest proof."(StateBr.19-20). *Schafer* was presented with sufficient proof to establish that: the Act results in punitive, lifetime detention in violation of due process; commitment bears no reasonable relationship to a non-punitive purpose; and Missouri's "nearly complete failure to protect" committed men is "so arbitrary and egregious as to shock the conscience." 129F.Supp.3dat844,867-68,870. That case was before the trial court.(Tr.4,135-39,781;L.F.56-58).

The State ignores that Missouri statutes and constitutional provisions must be interpreted to comply with the federal Constitution, and have no effect where in conflict with federal law.(StateBr.17-18); *Johnson v. State*,366S.W.3d11,27(Mo.banc2012). Commitment cannot be civil and simultaneously result in unconstitutional punitive

punishment. *Van Orden*,271S.W.3dat585-6; *Schafer*,129F.Supp.3dat869. Constitutional commitment cannot require LREs and permit secured confinement in the highest security facility. *Schafer*,129 F.Supp.3dat867-69; *Norton*,123S.W.3dat174. And, it cannot require discharge from confinement once the basis for commitment no longer exist, yet permit continued, indefinite custody until death. *O'Connor v. Donaldson*,442U.S.563,575 (1975);§632.505.

This Court does not consider evidence outside the record on appeal. *In re Adoption of C.M.B.R.*,332S.W.3d793,823(Mo.banc2011);Rule84.04(h);(StateBr.19-20). The State's new evidence provides additional proof the Act is punitive: none of the conditionally released men were discharged or released, 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 two continue living in SORTS. *Boone*,21PR00135062 (St.LouisCountyCir.Ct.); *Blanton*, 06E4-PR00063 (FranklinCountyCir.Ct.); *Seidt*,43P040300031 (DaviessCountyCir.Ct.); *Richardson*,06PS-PR00236(St.LouisCountyCir. Ct.);[2]§632.505.3.

[2] Court-ordered conditions include: GPS, mandatory disclosure of privileged/ confidential treatment information, warrantless searches, forced polygraphs/penile plethsymographs, and increases in supervision at any time the State believes he requires it. *Richardson*,06PS-PR00236. These conditions apply to Boone, Blanton and Seidt, but not men who are "committed" but not "conditionally released." *See* §632.480,et seq.

The provisions of the Act must be considered together and cannot be read in isolation. *Alberici Constructors, Inc. v. Director of Revenue*,452S.W.3d632(Mo.banc 2015). If the nature and duration of commitment is unconstitutional, then the proceedings leading to that commitment must be narrowly tailored and carefully scrutinized. Hopkins' initial commitment could only be considered constitutional where it accomplished a civil purpose and took place pursuant to the strictest procedures, standards and safeguards that minimized the risk of erroneous decisions. *Addington v. Texas*,441U.S. 418,425,433(1979);*Hendricks*,521U.S.at357,364,379;*In re Van Orden*,271S.W.3d579,587 (Mo.banc2008). But the law *is* punitive. *Schafer*,129F.Supp.3dat844,868-70.

Failures in the annual review and conditional release processes mean that "continuing review opportunities" have not minimized risk of erroneous commitments or led to any releases and rights to "proper risk assessment and release are rights protected by the constitutional guarantee of liberty, not merely state law." *Id.* Annual reviews do not ensure confinement does not continue after no longer necessary or the basis for it no longer exists. *Murrell* 215S.W.3dat105; *Van Orden*,771 S.W.3dat586. A criminal 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*,406U.S.at724. The Act fails to afford the procedural and substantive protections due to alleged criminals or any other civil committees.

Hopkins 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.3d96,104(Mo.banc2007); *O'Connor*,442U.S.at575. But discharge has been unconstitutionally eliminated and replaced with continued DMH custody. §632.505.

The Act fails to pass strict scrutiny. One remedy necessary is constitutional release procedures.(StateBr.23-24). However, the "systemic failures" of the release-portion of the Act require greater protections in the initial commitment process under the Act, like the "beyond a reasonable doubt" standard. Declaring that standard applies to the proceedings and granting a new trial does not remedy the double jeopardy and ex post facto violations, which prohibit application of the law to Hopkins. This Court cannot rewrite the Act; it must strike it down. *Board of Educ. of City of St. Louis v. State*,47S.W.3d366,371(Mo. banc2001).

[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*,159S.W.3d836,840(Mo.banc2005).

## Reply III: Burden of Proof/Discharge

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.*,489S.W.3d784(Mo.banc2016). "The court may ***modify***[4] conditions of release" but not "***remove all of the conditions of release***" as the State asserts without legal authority, or "***terminate***"[5] them.§632.505. Instead, the Act mandates that when a person 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. Even if language is read into §632.505.6 permitting elimination of §632.505.3's twenty-one conditions, an individual remains in custody because 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*,208S.W3d889,891(Mo.banc2006)(Someone "released" under the amended Act "remains committed to custody.").

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[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).

"Custody" is not limited to physical incarceration; a person supervised by the government and subject to conditions is "hardly a free man." *Nicholson v. State*,524S.W.2d106,109(Mo.banc1975). Conditional release from *physical* confinement does not restore liberty or comply with due process. *Van Orden*,271S.W.3dat589-90(Cook,concurring).

The State reads "physical commitment" language into Van Orden that does not exist. This Court said: "if commitment is ordered, the ***term of commitment is not indefinite***. A person committed as a sexually violent predator receives an annual review to determine if the person's mental abnormality has so changed that ***commitment*** is no longer necessary." *Van Orden*,271S.W.3dat586. There is no government interest or constitutional basis for confining someone who is not mentally ill or who is not dangerous, even if he is mentally ill. *Addington*,441U.S.at426;*O'Connor*, 422U.S.at575;*Murrell*,215S.W.3dat104. When an individual is no longer be mentally ill and/or dangerous, confinement unconstitutionally continues as "conditional release."§632.505. Hopkins is not required to make a factual showing that he is entitled to something that is precluded by a facially unconstitutional statute.

Because confinement continues though no longer mentally ill and dangerous, commitment under the Act is punitive, requiring "beyond a reasonable doubt." This Court cannot rewrite the Act; it must strike it down. *Board of Educ.*,47S.W.3dat371.

## Reply IV: LRE

The argument that "nothing requires the SVP Act to offer the [LRE]" ignores that Hopkins has a fundamental right to liberty and right to avoid undue confinement.(StateBr.33;ReplyI).

Second, it ignores that "[d]ue process requires the government, when it deprives an individual of liberty, to fetter his freedom in the least restrictive manner." *Neal*,679F.3d at741. In *Neal*, the government's request for the involuntary commitment for evaluation of a criminal defendant, who was on pretrial release, was granted, as opposed to an outpatient evaluation. *Id*.at738,741. Because the trial court did require (and the State did not offer) evidence to establish a compelling interest in involuntary commitment versus outpatient evaluation, hold a hearing, or consider outpatient evaluation, there was no evidence to establish the involuntary commitment complied with this due process requirement. *Id*.at741-42.

The State offered no evidence establishing a compelling interest in confining an SVP without LRE here. It relied entirely on *Norton*. *Norton* examined an equal protection challenge to LREs. 123S.W.3dat174. This Court accepted the State's argument that SVPs had high sexual recidivism and "that the annual review process…allowing for discharge" balanced an SVP's rights with protecting the public. *Id.* The evidence in Hopkins' case shows that sex offenders have the ***lowest rates of recidivism*** of all types of criminals.(Tr.522,711;ExhibitC,p.82). And discharge was eliminated.(StateBr.35). The State has offered no evidence to establish preclusion of LREs complies with the due

process requirement to curtail Hopkins' liberty in the least restrictive manner or equal protection. *Neal*,679F.3dat742.

"[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. at727, *relying on Baxstrom v. Harold*,383U.S.107(1966). Section 632.495 mandates Hopkins "at all times ….shall be kept in a secure facility designated by the director" of DMH unless conditionally released. Others civilly committed have the right to immediate LRE placement and to LREs when in their best interest. §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.

SVP commitment, when not punitive, is substantially similar to general commitment: both require proof of the likelihood of harm as a result of a mental illness. §§632.300,632.330,632.480; *Humphrey v. Cady*,405U.S.504(1972). The two are not mutually exclusive; the mental illness and risk of harm under the latter might warrant commitment under the former. *Humphrey*,405U.S.at512. The only difference: commission of a criminal offense. §632.480.

Such was the case in *Humphrey*, where the general statute afforded a jury demand, but the Sex Crimes Act did not. 405U.S.at512. 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.*at511,506.

Hopkins 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 in both commitments; it cannot justify differential treatment once committed. *Addington*,441U.S.at426;*Norton*,123S.W.3dat174;*Humphrey*,405U.S.at511;*Jackson*,406 U.S.at727. Even if it could, the narrowly tailored means *Norton* relied upon no longer exist. 123S.W.3dat174-75.

Section 632.505.1 contemplates an LRE. It states: "[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***." Conditional release ***cannot*** "function like a dismissal" because one conditionally released "remains under the control, care and treatment" of DMH.§632.505.5.The State failed to mention Fennewald and Allison lived inside the secure facility in Farmington at all times, despite adjudicated to no longer meet criteria and "conditionally released."[6] Their cases exemplify the unconstitutionality of the Act.

Denying an LRE infringes upon Hopkins' liberty, subjects him to undue confinement, now and in the future, is not the least restrictive means, and deprives him of

[6] This new "evidence" cannot be considered or assist the State because it is outside the record on appeal. *C.M.B.R.*,332 S.W.3dat823;Rule84.04(h).

the right to LREs given to all other committees. U.S.Const.amends.V,XIV;Mo. Const.art.I,§§2,10;*Humphrey*,405U.S.at511. There is no alternative permitted by statute. This is the only Court with authority to determine the constitutionality of the Act. The remedy is to strike down the unconstitutional law. *Board of Educ.*,47S.W.3dat371.

## Reply V: Jury Trial Demand

The State successfully argued "the statute gives us the State the right to a jury trial in this case…and the State is going to exercise its statutory option to a jury trial."(Tr.140). The morning of trial Hopkins' objection was renewed; the trial court asked, "State hasn't reconsidered that, have they?," to which the State replied "no."(Tr.177). Accepting this argument was a ruling the State court force Hopkins to be tried by a jury. The constitutionality of §632.492 is a concrete issue that will persist until resolved by this Court.

*State ex rel. Tipler v. Gardner*,--- S.W.3d ---,2017WL405805,slip op. at1 (Mo.2017), dealt with an attempt to use a writ to challenge a pretrial evidentiary ruling and does not apply. This Court said an objection must be timely raised at trial, preserved, and presented on appeal. *Id.* There is no question Hopkins objected to the State's jury trial demand and §632.492 at trial, preserved the issue, was committed, and presented the issue on appeal.(L.F.48-50,140,147,177,181;Tr.140-142,151).

*Singer v. United States*,380U.S.24(1965), examined an inapplicable federal rule. "Missouri's criminal procedure does not allow the prosecution to object to a bench trial in criminal cases." *State ex rel. Nixon v. Askren*,27S.W.3d834,838(Mo.App.W.D.2000);[7]

[7] Askren argued a fundamental due process right to waive a jury; he did not raise equal protection or the State's obligation to fetter liberty in the least restrictive manner. 27S.W.3dat838.

Mo.Const.art.I,§22(a). The court does not have to grant a criminal defendant's waiver and the law does not give the State a jury trial demand. *Id.*

If the Act is civil, then Hopkins equal protection rights were violated by the State's jury demand.U.S.Const.amend.XIV;Mo.Const.art.I,§2. Everyone else civilly committed in Missouri has the exclusive option of a jury.§§632.335,632.350. If guardianship is thereafter sought, "he shall have the following rights…the right to have a jury trial."§475.075.8. The two different commitment schemes are substantially similar and are not mutually exclusive; the only difference is the predicate prior sex offense.(ReplyIV).

In *Baxstrom*, a convicted prisoner was involuntarily confined for treatment without a jury trial at the expiration of his sentence. 383U.S.at109-10. The Court said that having made that jury demand generally available, New York could not arbitrarily withhold it from others consistent with equal protection, rejecting argument that dangerous criminal propensities justified discrimination. *Id.*at762-63. "For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.*at111-12. Equal Protection required the same jury review right as granted to all others civilly committed. *Id.*at115.

A sex offense conviction did not justify discriminatory treatment under the Sex Crimes Act when everyone else in involuntary commitments had the right to a jury. *Humphrey*,405U.S.at510. If the State cannot discriminatorily deny a jury trial, then it cannot discriminatorily demand one, either. In fact, the 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.*at512. That is the issue 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,*280S.W.3d70,78(Mo.banc2009)(concurring). He also warned: "[g]iven the public's natural revulsion for all sex crimes, the temptation to apply the law indiscriminately must be resisted to avoid embarking on a collision course with due process." *Norton,*123S.W.3dat182(concurring).

It also violated due process requirement of infringement upon Hopkins' liberty in the least restrictive manner, here a bench trial. *Neal,*679F.3dat741; U.S.Const.amends.V, XIV; Mo.Const.art.I,§§2,10. The State offered no evidence to establish a compelling interest, and the trial court did not require any or seriously consider Hopkins' objections. There is no evidence to establish the State complied with due process or equal protection.

## Reply VI: Sufficiency

*In re Spencer* did not establish a "rule" about a lapse in time between evaluations and trial. 171S.W.3d813(Mo.App.S.D.2005). Spencer was evaluated and re-tried in 2004. *Id*.at815,817. Because Harry testified there was no indication Spencer had sexual thoughts about children at the time of his evaluation, Spencer argued the State did not prove pedophilia created a present danger of predatory acts of sexual violence. *Id*.at819. Harry and Spencer's expert both diagnosed ***current*** pedophilia, as well as Englehart who had treated Spencer since 2001. *Id*.at816,819. Harry testified "Spencer ***still*** suffered from pedophilia." *Id*.at818.

No witness said that at Hopkins' trial or testified he was currently suffering from pedophilia. Kircher's general statement that typically pedophilia is lifelong and doesn't remit without internalized treatment is not testimony that Hopkins was ***currently diagnosed*** with or ***still*** suffered from pedophilia, or that pedophilia was lifelong ***for Hopkins***. Nor was Telander's testimony that "it ***may*** not ever go away; he ***may*** always be interested."(Tr.454). *Abbot v. Haga*,77S.W.3d728,732-33(Mo.App.S.D.2002)(expert testimony that given result might or could happen devoid of evidentiary value for trier of fact). Neither had any current evidence to support their diagnosis or mental abnormality conclusions.(Tr.493,502,697-98,701). Serious difficulty controlling sexual behavior must also be current.(Tr.502,701). While Telander said Hopkins "continues to act of pedophilic interests," he clarified that was past behavior and "I have nothing today."(Tr.453,502). Kircher testified she had no evidence Hopkins had current serious difficulty controlling his behavior.(Tr.701).

A "reasonable inference" is "a logical *a priori* conclusion drawn by reason from proven or admitted facts." *Morgan v. State*,176S.W.3d200,210(Mo.App.W.D.2005). In asking the Court to draw a reasonable inference that pedophilia made Hopkins more likely than not to commit predatory acts of sexual violence, the State tacitly recognized there was no testimony that pedophilia causes him to be "more likely than not" at trial.(StateBr.55).

That is because Kircher's risk conclusion came from combining the Static-99R, Stable-2007, and dynamic factors.(Tr.651,674,701,706,711). Telander's opinion came from combining the Static-99R and other factors and considering everything in the record that he looked at.(Tr.543,545,548). From this testimony, it is not reasonable to conclude that *pedophilia* caused Hopkins to be "more likely than not." According to Telander, there is no scientific basis for determining pedophilia alone caused future risk, ***it is not a factor that causes recidivism***, and he did not know how it contributed to Hopkins' risk.(Tr.475,550-51,543,545-46). The State is bound by the uncontradicted testimony of its own witnesses, including their testimony elicited on cross-examination. *Erdman v. Condaire, Inc.*,97S.W.3d85,88(Mo.App.E.D.2002). One cannot reasonably infer that a diagnosis which does not cause recidivism caused "more likely than not" risk of recidivating with a predatory act of sexual violence. No testimony directly claimed, or supported a reasonable inference, that pedophilia actively caused Hopkins to be more likely than not to commit a predatory act of sexual violence if not confined. That conclusion required impermissible speculation and guesswork. Telander's blanket ultimate conclusion was not supported by science or the record and was insufficient to make a submissible case. *Morgan*,176S.W.3dat211;§490.065.

The State also asks the Court to draw a reasonable inference that Hopkins prior offenses were "predatory," for the primary purpose of victimization.(StateBr.56). A jury instruction's definition is not a proven or admitted fact on the record required to support a reasonable inference. At trial, the State speculatively argued Hopkins' established relationships with families to victimize children and that his past acts were for victimization, and therefore the jury could infer his future conduct would be similar.(Tr.378). "So they can draw the inference whether somebody tells them or not."(Tr.378). But a jury's reasonable inferences must flow from facts on the record, not an attorney's baseless claims outside the hearing of the jury. There were no facts admitted, or suggestions raised in the evidence, that Hopkins established relationships or touched children for the purpose of victimization. In contrast, in *Spencer*, Harry *testified* Spencer was predatory because his primary purpose in molesting his daughter was victimization. 171S.W.3dat818. Without such facts in the record, the jury could not reasonably conclude that any future act Hopkins might possibly commit would be for the primary purpose of victimization. *Morgan*,176S.W.3dat210. To do so required impermissible guesswork and speculation. *Id.*

To make a submissible case that Hopkins was "more likely than not," the State relies on testimony that his actuarial scores were "in the high risk category" and percentiles.(State Br.57-58). The State's position disregards the uncontroverted testimony from its witnesses that percentiles and saying "high risk" did not convey a likelihood of re-offense or answer the "more likely than not" question; only absolute risk communicates the likelihood of re-offense.(Tr.505,508,702,705). In spite of the fact Kircher testified no risk factor added to

her assessment of Hopkins' risk, the State inexplicably argues additional risk factors meant Hopkins was more likely than not to commit predatory acts of sexual violence if not confined.(StateBr.58-59). Factors that did not add anything to Kircher's risk assessment are not evidence of variables increasing his risk and distinguishing him from the average sex offender.(StateBr.60). The State made no attempt to address the uncontroverted testimony that "more likely than not" means, and Hopkins' risk did not exceed, a likelihood greater than 50%.(Tr.474,508-9,537,717). It was, and remains, "more likely than not" Hopkins would ***not*** reoffend.(Tr.510).

## Reply VII: EOC Testimony & Constitutional Rights

Hopkins timely objected to Kircher's testimony, renewed his motion to exclude her at trial, and included an offer of proof.(Tr.130,631-35;L.F.18-23,87-119). His objections and motion to exclude included argument that Kircher could not render a reliable opinion at trial under §490.065.(L.F.87,91,94,95-119;Tr.131). Kircher testified to her opinions at trial over Hopkins' objections.(StateBr.64).

Exclusion of the EOC determination under §632.483 is a logical conclusion since the determination is part of a pre-filing screening process to determining if someone will be referred to the MDT for further review and the Attorney General for potential SVP commitment, or released from DOC custody. Section 632.483 "sets out the procedure for instituting commitment proceedings against currently incarcerated persons prior to their release" by providing notice and the EOC to the Attorney General and MDT. *Parkinson*, 280S.W.3dat72-73. The EOC determination is not intended to be an opinion on the ultimate issues at trial. It is merely part of the "support materials provided with notice" given to the Attorney General. *Id.*at75-76. The EOC does not determine whether the Attorney General may file a petition and is not "essential" to such considerations. *Id.* Such determination cannot be relevant to the issues at trial. This is precisely why the legislature enacted §632.489.4, requiring a full, comprehensive SVP evaluation by DMH. "It is that [court ordered] evaluation ... that supports further proceedings" and supplants the EOC determination. *Id.*at77.

Comprehensive SVP evaluations rely on the full range of facts and data and cannot render opinions based only upon the DOC treatment and institutional adjustment records

available to the EOC reporter under §632.483, or her counterpart under §632.484.3. "The SVP Act contemplates that additional discovery will be accomplished after the probable cause hearing." *Tyson v. State*,249S.W.3d849,854(Mo.banc2008). The DMH evaluator has access to a greater range of data, including interviews with family, associates, victims and eyewitnesses, police reports, and records relied upon by any other prior evaluators. *Id.*; §632.489. The facts and data available to Kircher were insufficient to support trial opinions, not reasonably relied upon in the field for trial opinions, and not otherwise sufficient or reliable.

Problems with the EOC determination are not prejudicial, "so long as the prosecution does not attempt to admit it at trial." *Parkinson*,280S.W.3dat77. But that is precisely what occurred here. Over Hopkins' objections, Kircher testified against Hopkins and to the substance of her EOC determination.

Hopkins discussed the inadequacy of the constitutional protections provided to him under the Act during the time of Kircher's evaluation in his brief.(PointVIII). Because commitment pursuant to the Act is punitive, lifetime confinement, criminal constitutional protections must apply. *Hendricks*,521U.S.at361. Criminal defendants are entitled to due process rights like assistance of counsel and to silence before charges are levied, when someone is merely suspected of wrongdoing. *Miranda v. Arizona*,384U.S 436 467(1966).

In California, an alleged SVP *can* refuse to participate in an evaluation interview. *People v. Williams*,74P.3d779,781(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*,188Cal.Rptr.3d421,428,430(Cal.Ct.App.2015); *Hudec v. Supreior Court*,181Cal.Rptr.3d748(Cal.2015). *Curlee* ruled that the State did not justify discriminatory treatment denying the right to SVPs. *Id*.at431. 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*.

Hopkins spoke with Telander, after consulting with counsel and being fully informed of his rights and the consequences of doing so. That does not negate the inadmissibility of his unwarned statements to Kircher. Had Hopkins' rights been upheld, and his statements and her determination relying on them been excluded, the jury would not have heard: her Static-99R score, Stable-2007, ten dynamic factors only she found, Hopkins viewed child pornography at 18; or Kircher's opinions that because of what he said to her he was at higher risk and an SVP.(Tr.653-55,710,545-6,660-667,674-8,644,648-49). Due process and equal protection demanded that Hopkins statements to Kircher be excluded, regardless of the witness who testified to them or relied upon them.

## Reply VIII: Shawn Lee

One of Hopkins' complaints is that Lee was not disclosed *as an expert witness* by the State, and therefore his opinions were inadmissible at trial.(Br.116). The State contends Lee did not offer opinions at trial, and that the point of his testimony was to demonstrate that Hopkins did not "successfully" complete treatment.(StateBr.80,82). Hopkins completed MoSOP treatment.(Exhibit H;Tr.440,593,581).

The State concedes Lee's testimony could not assist in determining if Hopkins had a mental abnormality.(StateBr.82). Telander testified treatment is not a component of pedophilia and has nothing to do with a mental abnormality.(Tr.539-40). Lee testified he was not able to make a diagnosis in an SVP case.(Tr.612).[8] He did not make a diagnosis, evaluate for a mental abnormality, or assess whether a mental abnormality caused Hopkins to be "more likely than not."(Tr.613). Nor could Lee assist the jury in determining if a mental abnormality made Hopkins more likely than not to commit future predatory acts of sexual violence if not confined. No one testified that completing MoSOP, but "unsuccessfully," made Hopkins "risky," as the State now contends.(StateBr.82). Completing MoSOP, according to Telander and Kircher, just did not have the effect of mitigating any existing risk.(Tr.746-77,680).

Telander explained treatment was not mitigating because "there was much reservation from his treatment providers in graduating him, and – they were very concerned

[8] In *Bernat*, a licensed clinical social worker's diagnostic opinion was admitted at trial. 194S.W.3dat865,871.

about his future risk, even though he completed the program, and --."(Tr.477). The trial court sustained Hopkins' objection to testimony about his treatment provider's opinions of risk.(Tr.477-78). The State agreed these were opinions.(Tr.477-78). But, then asked Lee questions to elicit the same answers.(Tr.581,584,587-88). If answers to these questions were opinions when Telander sought to explain them, then they were opinions when Lee testified, too. Attempting to distinguish the content based on the speaker is arbitrary and unreasonable.

Because treatment was not relevant to a diagnosis, mental abnormality determination or Hopkins' risk, testimony about it injected a collateral issue, was confusing and not useful. But, review is for prejudice, not just error.(StateBr.75-76). Hopkins discussed improper bolstering as an example of prejudice he suffered and to demonstrate the State's true purpose in offering Lee's testimony, contrary to its argument that Lee was necessary to show "unsuccessful" treatment.[9]

[9] In general, it is the policy of reviewing courts to decide a case on the merits, rather than on technical deficiencies in a brief. *Jefferson City Apothecary, LCC v. Mo. Bd. of Pharmacy*,499S.W.3d321(Mo.App.W.D.2016). Hopkins' claims are discernable and omitting improper bolstering from his point relied on does not impede review and resolution of his claims; this Court should exercise its discretion to review it. *Id.* Alternatively, he requests consideration now under plain error. *Brizendine v. Conrad*,71 S.W.3d587,n.5(Mo.banc2002);Rule84.04.

## Reply IV: §632.492 & Instruction 9

### *Preservation*

Hopkins raised his constitutional challenges as the earliest opportunity and kept them alive during the course of the underlying proceedings. *State v. Liberty*,370S.W.3d 537,546(Mo.banc2012). On February 4, twelve days before trial, Hopkins argued the only two issues for the jury would be whether he had a mental abnormality and if that mental abnormality caused future risk; he contended that treatment was not an issue.(Tr.ii,106). The State argued SORTS was "not part of the question the jury has."(Tr.106). The parties took up Hopkins' motion about closing arguments, including discussing the anticipated "care, control, treatment" instruction.(Tr.122-23;L.F.71-76).

Hopkins filed a written motion the morning of trial, February 16, two days before the instruction conference.(L.F.143-45;StateBr.84,86). During voir dire, Hopkins' request to find §632.492 unconstitutional was overruled for the first time.(Tr.199). The State successfully argued it could voir dire on commitment to DMH because of §632.492's instruction.(Tr.238). Hopkins objected to the constitutionality of §632.492 and corresponding instruction.(Tr.239;StateBr.84). Before seating the jury and opening statements, the trial court noted that there had been a conference off the record about instructions.(Tr.395). Hopkins objected to "care, control and treatment" again.(Tr.396,398). Hopkins renewed his objections and motion during the instructions conference on February 18 and they were overruled.(L.F.143-45;Tr.741-43).

Constitutional violations are timely raised in the form of pretrial motions and preserved in post-trial pleadings. *Garris v. State* 389S.W.3d648,651(Mo.banc2012).

Objections to jury instructions must be raised before the jury retires to deliberate in order to put the trial court on notice of the objection and reasons for the objection. *Blunkall v. Heavy and Specialized Haulers, Inc.*,398S.W.3d534,543,n.13(Mo.App.W.D.2013); Rule70.03. Hopkins' motion and objections were raised sufficiently early to allow the trial court to identify and rule on his constitutional objections to a mandatory jury instruction and gave adequate notice to the State. *Schottel*,159S.W.3dat 841,n.3. In contrast, in *State v.Wickizer*, the appellant raised his constitutional challenge *for the first time on appeal*. 583S.W.2d519,523(Mo.banc1979).

***Due Process and Equal Protection***

Hopkins discussed the requirements that to be constitutional, commitment must take place pursuant to proper procedures, including the due process requirement of proof by the State of every fact necessary to establish he is an SVP as defined by §632.480(5). *Cokes*, 107S.W.3dat321;*Addington*,441U.S.at425;U.S.Const.amends.V,XIV;Mo.Const.art.I,§§2, 10.(Br.64-65). He discussed the constitutional requirements of minimizing the risk of erroneous decisions, limiting confinement to a particularly narrow class of dangerous persons, and government action passing strict scrutiny. *Addington*,441U.S.at 424;*Hendricks*,521U.S.at357,364;*Bernat*,194S.W.3dat868.;(Br.34-35,45,52,56,59). His claims should not be considered abandoned because they were timely raised and preserved, his brief clearly sets forth the legal issues to be determined and applicable law, and he did not duplicitously repeat the law in order to comply with this Court's word limits.

An instruction that requires no finding by the jury, but misleads, confuses, distracts and invites a verdict based on the mandatory legal consequence which it should ignore

increases the risk of an erroneous decision and fails to narrowly limit confinement. *Addington*,441U.S.at424;*Hendricks*,521U.S at357,364. Such an instruction is contrary to the carefully crafted safeguards and proper procedures necessary for commitment to be constitutional and inherently violates due process. *Addington*,441U.S.at425;U.S.Const. amends.V,XIV;Mo.Const.art.I,§§2,10. Where a jury decides the case on some basis other than the established propositions, the State has been relieved of its burden of proving all of the statutory elements required for commitment, violating due process. *Nolte v. Ford Motor Company*,458S.W.3d368,383(Mo.App.W.D.2014); *Shannon v. United States*,512U.S. 573,579,586(1994).

In *State v. Erwin*, this Court said pattern instruction MAI-CR3d 310.50 did not misstate the law, but did violate due process. 848S.W.2d476,483(Mo.banc1993). The instruction said, "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct." *Id*.at481. That instruction did not relate to other instructions, but was a standalone comment on the evidence of intoxication. *Id*.at 483. The instruction 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, treatment is irrelevant to an SVP's. *Id.*at484. Instruction 9 went beyond the issues for trial, as a standalone comment on commitment to DMH custody as a result of an SVP verdict.(L.F.157). It did not relate to any other instruction. It created a reasonable likelihood that the jury would believe that by finding Hopkins an SVP, he would be committed for care, control and treatment in DMH, which was exactly what the State wanted and argued in closing.(Tr.758,768,770-71). It implicitly relieved the State of meeting its burden of proving statutory elements of both a mental abnormality and future risk. It was not cured by giving a general verdict director, Instruction 6, or general instruction on the State's burden, Instruction 5.(L.F.155-56). It violated Hopkins' constitutional rights to due process and equal protection of the law, just like anyone else involuntarily subjected to State prosecution or commitment.

Instruction 6 directed the jury to determine if a mental abnormality made Hopkins more likely than not to engage in predatory acts of sexual violence unless confined.(L.F.156). To that end, the instruction is similar to MAI-CV31.14.[10] But, Instruction 9 went further to direct the jury that Hopkins "shall be committed" to DMH if they found him to be an SVP. Upon Hopkins's review of applicable civil instructions and

[10] As the State points out, treatment is not an issue in other commitment issues, either.(StateBr.89). It appears other committees would be well served to object to instructing the jury about treatment and commitment and the verdict director, but that is beyond the scope of this appeal.

commitment laws in Missouri, there is no other case in which an instruction parallel to Instruction 9 is required by statute. The State's brief highlights the discriminatory treatment of the Act. In an NGRI case, only the defendant, after raising the affirmative defense, may request an instruction advising the jury that he would be committed to DMH. MAI-CR4th 406.02;(StateBr.89-90). It is the State's burden to demonstrate this discriminatory treatment by §632.492 is narrowly tailored to advance a compelling government interest, not Hopkins' burden to prove otherwise. *Bernat*,194S.W.3dat868.

Without legal authority, the State claims Instruction 9 enhances the reliability of fact finding because jurors knew Hopkins would be committed after reviewing it, and that it allows the jury to "more closely focus on the verdict director and facts of the case." The State offered no evidence to establish §632.492 complies with due process and equal protection. *Neal*,679F.3d at741;U.S.Const.amends.V,XIV;Mo.Const.art.I,§§2,10. Rather, it cites to a criminal case wherein the trial court erred in failing to give required definitions of terms used in a verdict director, thereby failing to inform the jury of all elements.(StateBr.93; *State v. Rodgers*,641S.W.2d83,85-86(Mo.1982)). Prejudicial error will occur where the jury "may have been adversely influenced by an erroneous instruction or by the lack of an instruction required by the statute." *Rodgers*,641 S.W.2dat85. Prejudice was presumed and the cause remanded. *Id*. Here, prejudicial error occurred because the jury was adversely influenced by the erroneous Instruction 9. *Id.*at85.

Prejudice also occurred because there was no evidence to support the instruction. In *Doe 1631 v. Quest Diagnostics, Inc.*, there was no evidence that Doe authorized disclosure of his HIV test results required to support the submitted affirmative defense instruction that

Defendant was not liable if an authorization was given. 395S.W.3d8,14-15(Mo.banc2013). Because the instruction was improper, the burden shifted to Defendant to show Doe was not prejudiced, which it could not do. *Id.*at15. The prejudice in misdirecting the jury was "exacerbated" by Defendant's closing argument, where counsel emphasized the authorization claim. *Id.* The Court ruled giving the instruction was reversible error. *Id*. The same was true here. The State cannot cure this error by ignoring it.(StateBr.92).

## Reply X: Venireperson 18

It is disingenuous to claim a statement on the record reflecting that Venireperson 18 raised his hand in response to a question was not a response.(StateBr.97). The trial court instructed venirepersons they should raise their hand if a question asked required a response from them, asked questions, and demonstrated responses by stating aloud that hands were not raised.(Tr.183-85). The State started its questions with "would you raise your hand?"(Tr.198).

The trial court overruled Hopkins' request to strike Venireperson 18 on the basis that it did not believe he understood the question, accepting a raised hand as a response, albeit a confused one.(Tr.376-77). But 18's subsequent participation in voir dire did to resolve whether this response was merely made out of confusion or reflected potential bias and possible prejudice.[11] The only way he could be qualified to serve as a juror was upon subsequent questioning demonstrating unequivocal assurances of impartiality. *White v. State*,290S.W.3d162,166(Mo.App.E.D.2009). But the trial court did fulfill its duty to question Venireperson 18 to explore possible bias and potential prejudice. *Joy v. Morrison*,254S.W.3d885,891(Mo.banc2008). The State emphasizes Venireperson 18 "said nothing" during voir dire; but failure to speak or respond to subsequent questions did not address his attitude or unequivocally indicate that he would be fair and impartial. *Acetylence Gas Co. v. Oliver*,939S.W.2d404,411-12(Mo.App.E.D. 1996). The trial court

[11] His only other response was to raise his hand indicating he thought a ten-year prison sentence was not enough time in confinement.(Tr.342).

erred in denying the strike for cause without making an independent inquiry to obtain unequivocal assurances Venireperson 18 could be impartial and was qualified to serve.

## CONCLUSION

This Court must declare the Act unconstitutional and reverse the order and judgement of the trial court and release Hopkins from confinement, or alternatively remand for a new trial.

Respectfully submitted,

***/s/ Chelseá R. Mitchell***

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

## Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 7,541 words, which does not exceed the 7,750 words allowed for an appellant's brief.

On March 1, 2017, electronic copies of Appellant's Reply and Appellant's Reply Appendix were placed for delivery through the Missouri e-Filing System to opposing counsel.

***/s/ Chelseá R. Mitchell***

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Chelseá R. Mitchell