No. SC96221

In the
Supreme Court of Missouri

IN THE MATTER OF THE CARE AND TREATMENT OF JOSHUA D. BUSHONG,

Appellant,

Appeal from the Circuit Court of Lincoln County
Forty-Fifth Judicial Circuit
The Honorable James D. Beck, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Joshua D. Bushong, appeals a Lincoln County Circuit Court judgment committing him to the care, custody, and treatment of the Department of Mental Health as a sexually violent predator (SVP).

On December 16, 2013, the State filed a petition seeking the civil commitment of Bushong as an SVP. (L.F. 1, 14-17.) On March 28-30, 2016, a jury trial was held in the Lincoln County probate court. (Tr. 9-246; Tr.II 2-250; Tr.III 2-233.)[1] Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

When Bushong was 15 years old, he began to realize that he was attracted to younger children. (Tr.II 73.) Between then and when he was 19 years old, he began to view general pornography, such as Playboy magazines and adult pornography on the internet. (Tr.II 73.) Around the time Bushong was 19, he became bored with general adult pornography, so he began to view child pornography. (Tr.II 73-74.) Bushong reported masturbating to child pornography up to 12 times per week. (Tr.II 74.)

Soon thereafter, Bushong began living with his sister, his sister's partner, and his sister's partner's children. (Tr.II 75.) While living with all of these people, Bushong became attracted to one of the children, K.W., who was

[1] The trial transcript is split into three volumes.

five years old at the time. (Tr.II 75.) Over the next two-and-a-half years, Bushong had sexual contact with K.W. (Tr.II 75.) The contact began with Bushong fondling the child over her clothes on her thighs and butt, and it progressed to fondling under the clothes on those areas and on the child's vagina. (Tr.II 75.) Eventually, Bushong put his finger inside K.W.'s vagina, made K.W. kiss him or he would kiss her, made K.W. masturbate him with her hand, and made her perform oral sex on him. (Tr.II 75.) Some of these contacts occurred on a regular basis, two-to-three times per week while Bushong lived with K.W. (Tr.II 75.)

While living in the house with K.W., her family, and Bushong's sister, Bushong also viewed child pornography on a regular basis. (Tr.II 76.) In 2005, one of the other children found child pornography on the family computer, the police were called, and Bushong admitted the child pornography was his. (Tr.II 76.) Bushong then pleaded guilty to possession of child pornography. (Tr.II 77.)

Two years later, K.W. disclosed the sexual abuse, and Bushong was convicted of first-degree child molestation. (Tr.II 119, 62.) Bushong was placed on parole after serving time in prison, but his parole was revoked when he admitted to viewing child pornography. (Tr.II 83.) Even after receiving treatment, Bushong admitted that as recently as five months before trial, he was masturbating to fantasies of children. (Tr.II 77.)

Dr. Richard Scott, a psychologist with the Missouri Department of Mental Health, reviewed records, interviewed Bushong, and applied three actuarial instruments in making a determination about whether Bushong was a sexually violent predator. (Tr.II 55-56.) Dr. Scott determined that Bushong was a sexually violent predator. (Tr.II 62.) In making this determination, Dr. Scott testified that there are three elements to consider in determining whether someone is a sexually violent predator: 1. Whether the person suffers from a mental abnormality; 2. Whether the mental abnormality makes it more likely than not that he will engage in predatory acts of sexual violence if not confined to a secure facility; and 3. Whether he had been found guilty or pleaded guilty to a sexually violent offense. (Tr.II 63.)

The parties stipulated that Bushong pleaded guilty to a sexually violent offense when he pleaded guilty to first-degree child molestation. (Tr.II 63.)

Dr. Scott testified that in order to determine whether a person has a mental abnormality, he considers whether a person has a congenital or acquired condition that affects his emotional or volitional capacity that predisposes him to commit sexually violent offenses in a degree that causes him serious difficulty controlling his behavior. (Tr.II 64.) Dr. Scott testified that Bushong suffers from pedophilic disorder. (Tr.II 65.) He testified that the pedophilia has affected Bushong's ability to manage his actions. (Tr.II 83.)

Dr. Scott also testified that the pedophilia predisposes Bushong to a degree that causes him serious difficulty controlling his behavior in that he makes choices and feels driven to continue to act on his attraction to children. (Tr.II 84-85.) Therefore, Dr. Scott testified that it was his opinion, within a reasonable degree of psychological certainty, that Bushong's condition meets the definition of a mental abnormality. (Tr.II 85.)

Dr. Scott also testified that it was his opinion that as a result of his mental abnormality, Bushong is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. (Tr.II 87.) In order to make this determination, Dr. Scott performed three risk assessment actuarials: the Static 99, the Static 2002, and the Stable 2007. (Tr.II 87-88, 94.) On the Static 99, Bushong received a raw score of 6, which put him in the high-risk category and in the 94th percentile. (Tr.II 109.) On the Static 2007, Bushong also got a score of 6, which put him in the 88th percentile. (Tr.II 120.) Finally, on the Stable 2007, Bushong received a score of 14 out of 26, which put him in the high-risk category. (Tr.II 136-37.) Based on these numbers, the actuarials showed that 20.5 percent of people with similar scores to those Bushong received were rearrested or reconvicted in five years. (Tr.II 140.)

Dr. Scott further testified that it was important to consider that a very low percentage of sex crimes are reported and even fewer are prosecuted and

result in a conviction. (Tr.II 141-42.) Therefore, Dr. Scott determined that the 20 percent reconviction rate over five years was a significant underestimate. (Tr.II 142.) Dr. Scott also testified that he expected the reconviction rate to be around 30 percent after ten years and would continue to grow slightly as time went on. (Tr.II 143.)

Finally, Dr. Scott testified that he believed that Bushong did not want to victimize another child, but based on the risk factors and Bushong's behavior when he had an opportunity to apply the treatment he received, "I don't believe that he's going to be able to manage his behavior in a way that's going to protect potential victims." (Tr.II 144-45.) Dr. Scott noted that although Bushong completed treatment, he re-accessed child pornography by finding a key to a room in his parents' house where the computer was kept or by entering the room when it was left unlocked. (Tr.II 146.) Dr. Scott also testified that although accessing child pornography is not a hands-on offense, Bushong began his deviant cycle by viewing the pornography and then fantasizing about children he saw in the community and when he went to church. (Tr.II 148.) Therefore, Dr. Scott found Bushong to be a sexually violent predator in that "he suffers from a mental abnormality and that that mental abnormality does make him more likely than not to commit predatory acts of sexual violence if not confined to a secure facility." (Tr.II 148.)

Bushong called his pastor and his father as witnesses and testified on his own behalf. (Tr. 432-496; Tr.III 102-94.) Bushong also called Dr. Louis Rosell, a forensic psychologist. (Tr.III 3.) Dr. Rosell testified that Bushong does have pedophilic disorder, but Dr. Rosell did not believe that it rose to the level of mental abnormality. (Tr.III 14.) Dr. Rosell testified that he did not believe that Bushong demonstrated a serious difficulty controlling his behavior during his most recent time in the community and that Bushong would not have a serious difficulty controlling his behavior in the future. (Tr.III 45.) Dr. Rosell further testified that he believed Bushong was not more likely than not to engage in other acts of sexually violent offending. (Tr.III 45.)

The jury found that Bushong was a sexually violent predator, and the probate court ordered that Bushong be "committed to the custody of the director of the Department of Mental Health for control, care and treatment until such time as [Bushong]'s mental abnormality has so changed that he is safe to be at large. (Tr.III 232; L.F. 66.)

ARGUMENT

I. (Strict-scrutiny review)

This Court should reconsider its holding in *In re Norton*, and *Bernat v. State*, and hold that the Missouri Sexually Violent Predator Act (SVPA) is subject to rational basis review.

Throughout his brief, Bushong alleges that he is entitled to relief because, in Bushong's view, several portions of the SVPA do not pass strict scrutiny. The State maintains that all provisions of the SVPA do pass strict scrutiny. But, given a recent decision of the United States Court of Appeals for the Eighth Circuit—which held that SVP acts do not implicate a fundamental right—this Court should only subject the SVPA to rational basis review.

A. Standard of review

This Court performs an equal protection analysis in two steps: first, does the statute single out a suspect classification or implicate a fundamental right? Second, this Court applies the appropriate level of scrutiny to the statute. *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014); *In re Norton*, 123 S.W.3d 170, 173 (Mo. banc 2003). Under rational basis review, this Court will uphold the statute if it is "justified by any set of facts." *Amick*, 428 S.W.3d at 640 (citations omitted). Under strict scrutiny review, the

challenged provision must be narrowly tailored to achieve a compelling state interest. *In re Norton*, 123 S.W.3d at 174.

B. Rational-basis review should apply

This Court has held that the Missouri SVPA is subject to strict scrutiny review because it impinges upon the fundamental right of liberty. *In re Norton*, 123 S.W.3d at 173; *Bernat v. State*, 194 S.W.3d 863, 867-68 (Mo. banc 2006). But the United States Supreme Court has never held that the involuntary commitment of those who are mentally ill and dangerous impinges on a fundamental right, and a recent opinion by the United States Court of Appeals for the Eighth Circuit disagrees with the premise behind *Norton* and *Bernat*. The State respectfully requests that this Court reconsider its prior rulings.

The Eighth Circuit recently addressed whether the Minnesota SVP act was subject to strict-scrutiny review. *Karsjens v. Piper*, 845 F.3d 394, 406-07 (8th Cir. 2017) (pet. for r'hrg en banc denied Feb. 22, 2017. It held that SVP acts do not implicate a fundamental right to liberty and so are subject to rational basis review. *Id.* at 407-08. While this Court is not bound by the Eighth Circuit's ruling, it may look to that opinion for such aid and guidance as may be found therein. *Hanch v. K.F.C. Nat. Mgmt Corp.*, 615 S.W.2d 28, 33 (Mo. banc 1981). The State finds the Eighth Circuit's analysis to be persuasive and urges this Court to adopt it.

In *Piper*, the Eighth Circuit explained that the United States Supreme Court has never held that involuntary civil commitment burdens a fundamental right to liberty such that strict scrutiny must apply. *Piper*, 845 F.3d at 407. In its analysis, the Eighth Circuit followed United States Supreme Court precedent, which defined "fundamental rights" as those rights that are "'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The Eighth Circuit observed that the Supreme Court was confronted with this question in *Kansas v. Hendricks*. *Id.*

In *Hendricks*, the Supreme Court held that SVP acts do not implicate a fundamental right to liberty that is "deeply rooted in this Nation's history and tradition" because involuntary civil commitment was permitted at the time of the founding. *Kansas v. Hendricks*, 521 U.S. 346, 375 (1997). As the Supreme Court pointed out, the involuntary commitment of "people who are unable to control their behavior and who thereby pose a danger to the public health and safety" is a long standing practice. *Id.* (citing 1788 N.Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); *see also* A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American

civil commitment statutes).[2] After reviewing this long-standing history, the Supreme Court concluded that "it thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Hendricks*, 521 U.S. at 357.

The Eighth Circuit also observed that, in the context of a due process challenge, involuntary civil commitment requires only "some *reasonable relation* to the purpose for which the individual is committed." *Piper*, 845 F.3d at 407 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) (Eighth Circuit's emphasis). After considering these Supreme Court cases and others, the Eighth Circuit held that the Minnesota SVP act *does not* implicate a fundamental right, so the appropriate level of scrutiny is whether the statute bears a rational relationship to a legitimate government purpose. *Piper*, 845 F.3d at 407-08.

Respondent has been unable to locate any cases from other jurisdictions applying strict scrutiny review to SVP acts. By contrast, both the First and Fourth Circuits have applied rational basis review to the federal SVP act codified at 18 U.S.C. § 4248. *United States v. Carta*, 592 F.3d 34, 44 (1st Cir. 2010); *United States v. Timms*, 664 F.3d 436, 444-47 (4th Cir. 2012). The Seventh Circuit has applied rational basis review to Illinois's SVP

[2] This citation originally appeared in *Hendricks*, 521 U.S. at 357.

law. *Vernor v. Monohan*, 460 F.3d 861, 865 (7th Cir. 2006). The Ninth Circuit has applied rational basis review to a provision in California's law that requires SVPs who have been released from treatment to appear in person every ninety days to register. *Litmon v. Harris*, 768 F.3d 1237, 1241-42 (9th Cir. 2014).

This Court should adopt the reasoning of these courts and apply rational basis review to Missouri's SVPA. In *In re Norton*, this Court relied on four cases to find that the SVPA implicates a fundamental right to liberty. *In re Norton*, 123 S.W.3d at 173 n.10 (citing *Heller v. Doe*, 509 U.S. 312 (1993); *Vitek v. Jones*, 445 U.S. 480 (1992); *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Hendricks*, 521 U.S. at 346). But those cases do not require the conclusion that the SVPA implicates a fundamental right.

In *Heller v. Doe*, the Supreme Court refused to apply strict scrutiny because both parties litigated the case under the rational basis standard below. *Heller*, 509 U.S. at 319. Moreover, in *Heller*, Kentucky's involuntary commitment of the mentally retarded survived rational basis review even though the mentally retarded lost some measure of liberty when they were committed. *Id*. at 325-26.

Likewise, the Supreme Court's decision in *Vitek* does not compel the use of strict scrutiny because *Vitek* is inapplicable to SVP commitment cases. In *Vitek*, the Supreme Court simply held that a state could not transfer an

individual from a prison to a state hospital without procedures that complied with the Due Process Clause. *Vitek*, 445 U.S. at 492-93. The Supreme Court only required an adversarial hearing and the appointment of counsel, which are not at issue in this case. *Id.* at 495-96 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) (procedural, not substantive, due process). *Vitek* never held that involuntary civil commitment required analysis under the strict scrutiny standard.

And finally, this Court's previous reliance on *Foucha v. Louisiana* also does not require the application of strict scrutiny. The portion of *Foucha* that discusses the Equal Protection Clause, Part III, is a plurality opinion signed by Justices White, Blackmun, Stevens, and Souter. Further still, Justice Thomas' dissent[3] aptly points out that the majority "never explains whether we are dealing here with a fundamental right . . ." in either the due process analysis or the equal protection analysis. *Foucha*, 504 U.S. at 116 (Thomas, J., dissenting). The Eighth Circuit found Justice Thomas's point persuasive, and Respondent urges this Court to as well. *Piper*, 845 F.3d at 407 (citing *Foucha*, 504 U.S. at 116) (Thomas, J., dissenting)).

This Court's decision in *Norton*—that the SVP Act burdens a fundamental right to liberty—is ripe for reconsideration. The *Norton* court

[3] Joined by Justice Scalia and Chief Justice Rehnquist.

relied on *Hendricks*, which has been clarified by the Eighth Circuit. *Norton* also relies on *Heller*, *Vitek*, and *Foucha*, but as demonstrated *supra*, those decisions do not compel a finding that Missouri's SVPA operates in such a way that "neither liberty nor justice [ ] exist." *Glucksberg*, 512 U.S. at 720-21. Accordingly, the State requests that this Court find that the SVPA is properly reviewed under the rational basis standard.

II. (Instructional error)

The probate court did not err in submitting Instruction No. 5 to the jury because the SVPA is not punitive, and "clear and convincing" is the correct burden of proof [Responds to Bushong's Point I].

A. The record pertaining to this claim.

The State submitted Instruction No. 5, which stated the burden of proof:

> 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 upon the petitioner to cause you to believe by clear and convincing evidence that [Bushong] is a sexually violent predator. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in this case does not cause you to believe a particular proposition submitted, then you can not return a finding requiring belief of that proposition.

(L.F. 61.)

Bushong objected to this instruction, arguing that the SVPA was unconstitutional due to the elimination of any possibility for unconditional

release and due to the SVPA's failure "to require finding of serious difficulty controlling behavior and providing an unapproved basis for finding mental abnormality grounded solely in a mental condition." (Tr.III 196-97.)

The probate court overruled Bushong's objection and submitted Instruction No. 5 to the jury. (Tr.III 197.) Bushong included this issue in his motion for new trial. (L.F. 71.)

B. Standard of review.

Whether a jury was instructed properly is a question of law that this Court reviews *de novo*. *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 736, 748 (Mo. banc 2016). The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction. *Id*. This Court will reverse instructional errors only if the error resulted in prejudice that materially affects the merits of the action. *Id*.

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007). All doubts are resolved "in favor of the act's validity" and this Court will "make every reasonable intendment to sustain the constitutionality of the statute." *Id*. (quoting *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (citation omitted)).

C. The probate court did not err in submitting Instruction No. 5

Bushong argues that the SVPA is punitive and that, therefore, it requires a "beyond a reasonable doubt" burden of proof. (Bushong's brief at 23-29.) This argument is without merit, however, because the Act is not punitive, and "clear and convincing evidence" is the appropriate standard of review.

1. The SVPA is not punitive

Bushong's argument about the allegedly punitive nature of the SVPA has been raised in other cases currently pending before this Court, including *In re Sebastoam*, SC95681 (submitted Mar. 8, 2017); *In re Kirk*, SC95752 (submitted Nov. 16, 2016); and *In re Nelson*, SC95975 (submitted Jan. 12, 2017). Like in those cases, Bushong bases much of his argument on an order issued by the United States District Court for the Eastern District of Missouri in *Van Orden v. Schafer*, 129 F.Supp.3d 839 (E.D. Mo. 2015). But *Shafer* should not control. On questions of whether a state statute violates the federal constitution, this Court is not bound by the decisions of a United States District Court or the United States Court of Appeals. *State v. Mack*, 66 S.W.3d 706, 710 (Mo. banc 2002). Instead, this Court is bound only by decisions from the United States Supreme Court. *Hanch*, 615 S.W.2d at 33; *see also Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 959 (8th Cir. 2015) (stating that state courts "are not bound by federal law to

accept the decision of an inferior federal court on the meaning of the federal Constitution.").

In *Schafer*, a group of SVPs filed suit against Missouri alleging, among other things, that the SVPA was facially unconstitutional and unconstitutional as applied to them. *Schafer*, 129 F.Supp.3d at 843. The disctrict court rejected the facial challenge to the SVPA. *Id*. at 865. It also rejected the as-applied challenged to the SVPA's treatment provisions. *Id*. at 867. The district court did, however, sustain the challenge to the SVPA's release procedures as applied to the specific SVPs in that case. *Id*. at 867-70.

Shafer is not a final decision. It instead represents the district court's findings of fact and conclusions of law after a bench trial on liability. *Id*. at 843. As Bushong notes, the remedy phase of the trial is ongoing. *Id*. The district court has not ordered the release of the plaintiffs, but has ordered the State to apply the SVPA in a constitutional manner to the plaintiffs. *Id*. at 871. The district court's order will be subject to appellate review once a final judgment has been entered.

Even though *Shafer* is not final, the State is actively engaged in efforts to comply with the *Shafer* court's order. For example, Bushong does not mention that there are at least seven pending petitions for conditional release. *In re Richard Berg*, 312P05-00088 (Greene County Cir. Ct.); *In re Stephen Elliott*, 7PR204000306 (Clay County Cir. Ct); *In re George Evans*,

04PR72330 (St. Francois Cir. Ct.); *In re Claude Hasty*, 12DE-PR00001 (Dent County Cir. Ct.); *In re Larry Lusby*, 39P049900137 (Lawrence County Cir. Ct.); *In re Jessie Moyers*, 02PR323155 (Cole County Cir. Ct.); *In re Wade Turpin*, 17P020100226 (Cass County Cir. Ct.).

Moreover, Appellant's brief does not mention that five petitions for conditional release have recently been granted. *In re Charles St. Clair*, 02PR610339 (Washington County Cir. Ct.) (conditional release granted Feb. 8, 2017); *In re Steven Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.) (conditional release granted Oct. 26, 2016); *In re Clifford Boone*, 21PR00135062 (St. Louis County Cir. Ct.) (conditional release granted Aug. 30, 2016); *In re Adrian Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.) (conditional release granted Sept. 30, 2016); *In re David Seidt*, 43P040300031 (Daviess County Cir. Ct.) (conditional release granted Aug. 25, 2016).

Further, regardless of the status of the federal litigation, this is a direct appeal under Article V of the Missouri Constitution. Mo. Const. Art. V, § 3. The issue for this Court to determine is whether the probate court committed an error of law based on the record. Even if the *Shafer* court is correct that the release procedures of the SVPA were improperly implemented as to certain individuals, that does not mean that the act is punitive. The United States Supreme Court has held that the party challenging an SVPA as punitive must provide "the clearest proof that the scheme is so punitive in

purpose or effect as to negate" the state's intention to deem it civil. *Hendricks*, 521 U.S. at 361. In this case, Bushong has not provided the "clearest proof." There is nothing in the record before the probate court about the way the SVPA is implemented. Therefore, there is not sufficient evidence, let alone "the clearest proof," that the SVPA is punitive.

2. "Clear and convincing" is the proper burden of proof

Bushong next argues that the proper burden of proof in an SVP case should be "beyond a reasonable doubt" instead of "clear and convincing evidence." This argument is without merit.

In *Addington v. Texas*, the United States Supreme Court explained that the "beyond a reasonable doubt" standard is not required by the federal constitution because a state may not be able to meet that burden "given the uncertainties of psychiatric diagnosis. . . ." 441 U.S. 418, 432 (1979). The Supreme Court also held that the "preponderance" standard was constitutionally deficient and that "clear and convincing evidence" satisfied federal constitutional concerns. *Id.* at 431. Invoking federalism, the Court explained that each state was free to impose a burden higher than "clear and convincing evidence," if the state wanted to do so. *Id.*

This Court followed the United States Supreme Court's guidance when it decided *In re Van Orden*. In *Van Orden*, this Court considered the 2006 amendments to the SVPA and determined that "clear and convincing

evidence" was the appropriate burden of proof. *In re Van Orden*, 271 S.W.3d 579, 586 (Mo. banc 2008). This Court recognized that the SVPA implicates a sexually violent predator's liberty interests, but the SVPA does not totally remove an SVP's liberty. *Id.* at 587. SVPs are not subject to indefinite physical commitment. *Id.* If an SVP is committed, they receive an annual review to determine if their mental abnormality has changed to a degree that makes physical commitment no longer necessary. *Id.* A probate court reviews the report, and even if the report recommends against release, the SVP may still file a petition for release. *Id.* Moreover, if the petition for conditional release is denied, the SVP may obtain appellate review. *See, e.g.,* B*arlow v. State,* 114 S.W.3d 328, 331-32 (Mo. App. W.D. 2003) (holding that the general appellate statute applies to proceedings under the SVPA). The SVPA also provides an alleged SVP with "many of the same rights as a criminal defendant, including a formal probable cause hearing, the right to a jury trial, the right to an attorney, and the right to an appeal." *In re Van Orden*, 271 S.W.3d at 585.

The *Van Orden* Court also found that the purpose of the SVPA is to protect society and to provide mental health treatment to SVPs in need of such treatment. *Id.* As this Court noted, the "Missouri General Assembly has identified sexually violent predators as a very real threat to the safety of the people of Missouri." *Murrell*, 215 S.W.3d at 102. In *Van Orden*, this Court considered the effect of the Act on those physically committed, the pre-

commitment protections, and the purpose of the SVPA. Then, this Court concluded that clear and convincing evidence was a permissible burden of proof. *In re Van Orden*, 271 S.W.3d at 585-86. This Court explained its reasoning, holding that the clear-and-convincing standard properly allocated the risk between the State and the putative SVP, and that the SVPA protected the rights of putative SVPs. *Id*.

Bushong is really arguing that *Van Orden* was wrongly decided. He argues that *Van Orden* is no longer good law because the SVPA was amended to remove unconditional release. But the burden of proof was changed in the same bill that replaced discharge with conditional release. So, when the Court wrote that "if commitment is ordered, the term of commitment is not indefinite," this Court was describing conditional release. *Id.* at 586.

Further, Missouri is not the only state with a legislature that has chosen the clear-and-convincing-evidence standard. *See*, *e.g.*, Fla. Stat. § 394.917(10) ("The court or the jury shall determine by clear and convincing evidence whether the person is a sexually violent predator"); N.J. Stat. Ann. § 30:4-27.32(a) ("If the court finds by clear and convincing evidence that the person needs continued involuntary commitment as a sexually violent predator . . ."); Va. Code Ann. § 37.2-908(C). In fact, the federal government also has adopted the clear-and-convincing-evidence standard. *United States v. Comstock*, 560 U.S. 126, 130-31 (2010).

Moreover, Bushong's assertion that his due process rights were violated by using a burden of proof less than "beyond a reasonable doubt" because the 2006 amendments to the SVPA replaced "discharge" with conditional release also is without merit. The change in language does not violate due process protections because the SVPA allows a court to remove all of the conditions for release. § 632.505(6), RSMo ("The court may modify conditions of release upon its own motion or upon the petition of the department of mental health, the department of corrections, or the person on conditional release").

The SVPA also provides that "the court shall review the plan and determine the conditions it deems necessary to meet the person's need for treatment and to protect the safety of the public." § 632.505.3, RSMo. That provision empowers the probate court to remove all of the conditions of the conditional release if no conditions are necessary for the SVP's treatment or the public safety. If this Court believes that the SVPA requires that at least one condition remain, then the probate court could impose a single condition: that the SVP never commit a sexually violent offense. Such a condition is a "*de minimis* level of imposition with which the Constitution is not concerned." *Bell v. Wolfish*, 441 U.S. 520, 539 n.21 (1979) (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)). This reasonable construction of the statute saves the SVP act from Bushong's facial constitutional challenge.

Therefore, the SVPA's use of the clear-and-convincing-evidence burden of proof is constitutional under *Van Orden*. And, the 2006 amendments, which instituted conditional release, did not require the legislature to raise the burden to "beyond a reasonable doubt." Because "clear and convincing evidence" was the proper burden of proof, the probate court did not err in submitting Instruction No. 5 to the jury.

III. (Constitutionality of the SVP act)

The probate court did not err in overruling Bushong's motion to dismiss and in committing him to the Department of Mental Health as an SVP because the SVPA is constitutional [Responds to Bushong's Point II].

A. Standard of Review

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell*, 215 S.W.3d at 102. All doubts are resolved "in favor of the act's validity" and this Court will "make every reasonable intendment to sustain the constitutionality of the statute." *Id*. (quoting *King*, 664 S.W.2d at 5 (citation omitted)).

B. The SVP act is constitutional

Bushong argues that the SVPA is unconstitutional because it is punitive, because it does not require the least restrictive environment, because it required him to submit to an interview without the right to silence, because the burden of proof violated due process, because the act grants a jury trial right to the State, and because the burden is on him to demonstrate that he does not qualify for confinement. (Bushong's brief at 31-42.) These arguments are without merit.

1. The SVP act is not punitive

Bushong has provided no evidence that the SVP act is punitive. *See supra*, Point I(C)(1).

2. There is no requirement that treatment be offered in the least restrictive environment

This Court has rejected the least-restrictive environment argument. In *Norton*, this Court found that "secure confinement of persons adjudicated to be SVPs, as provided in sections 632.480 to 632.513, is narrowly tailored to serve a compelling state interest." *In re Norton*, 123 S.W.3d at 174. This Court explained that the State has a compelling interest in protecting the public from crime. *Id.*[4] The *Norton* Court then explained that the State's interest in protecting the public from crime justified treating SVPs differently from other mental health patients. *Id.*

Moreover, the *Norton* Court found that an SVP is further protected by procedural safeguards such as (1) the right to a preliminary hearing; (2) the right to contest an adverse probable cause determination; (3) the right to counsel at that hearing, and to appear in person at that hearing; (4) the right

[4] This Court reaffirmed its finding that protecting the public from crime is an important state interest in *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. banc 2015).

to present evidence and cross-examine witnesses at the hearing; (5) the right to a jury trial; and (6) the right to a unanimous verdict before commitment. *Id*. at 174-75. Bushong received all of those rights. It is true that the Court in *Norton* also identified the beyond-a-reasonable-doubt standard as a procedural safeguard. *Id*. at 174. But this Court has subsequently held that an SVP's rights are sufficiently protected by the clear-and-convincing-evidence standard. *In re Van Orden*, 271 S.W.3d at 586.

This Court also found in *Norton* that there were statutory provisions for court review and "dismissal from secure confinement." *In re Norton*, 123 S.W.3d at 175. It is true that after *Norton*, the Missouri General Assembly replaced the dismissal provision with a conditional release provision. *In re Van Orden*, 271 S.W.3d at 586. But conditional release can function like a dismissal in that some SVPs have been given physical access to the community. *See*, *e.g.*, *In re James Fennewald*, 06B7-PR00024 (Boone Cnty Cir. Ct.) (July 13, 2016) (Order revoking conditional release and specifying that SVP be returned to physical custody in a secure facility after having been released to the community).

Therefore, the SVPA has not changed since the *Norton* decision in a way that would require this Court to overrule *Norton's* holding that the SVPA is not required to offer treatment in the least restrictive environment.

3. There is no right to silence in a civil case

Again, as stated in Point II, the SVPA is not punitive and does not require the same constitutional protections as criminal laws. *See supra*, Point II(C)(1). In addition, this Court and the United States Supreme Court have held that there is no right to silence during evaluations under the SVPA.

In *Allen v. Illinois*, the United States Supreme Court reviewed the Illinois sexually dangerous person act and found that the Fifth Amendment right to silence did not apply to those proceedings. 478 U.S. 367, 375 (1986). The Supreme Court refused to extend the Fifth Amendment to sexually-dangerous-person proceedings because the proceedings were not punitive or criminal in nature. *Id*. at 373-74.

This Court, in *Bernat v. State*, adopted the United States Supreme Court's reasoning. 194 S.W.3d at 869. This Court found that the State had a compelling interest in securing the cooperation of alleged SVPs and that, without an alleged SVP's cooperation with doctors, "it would be difficult" to "make an accurate assessment of the alleged SVP's mental state, or to treat him or her." *Id*. This Court's conclusion relied not only on *Allen*, but also on *In re Young*, 857 P.2d 989 (Wash. 1993) (superseded by statute). In *Young*, the Washington Supreme Court also acknowledged the important state interest in having putative SVPs communicate with doctors. *Id*. at 1014.

Other jurisdictions also have refused to recognize a Fifth Amendment right to silence in the context of alleged SVPs speaking with doctors. For example, in California, people detained under the California version of the SVP act do not have a Fifth Amendment right to refuse to speak to doctors performing evaluations. Judge Joan Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 San Diego L. Rev. 1057, 1111-12 (2000). This is because California has adopted the United States Supreme Court's view that "denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would decrease the reliability of a finding of sexual dangerousness." *Id.* (quoting *Allen*, 478 U.S. at 374-75).

Despite these authorities, Bushong argues that Missouri's SVPA requires these protections because it is punitive. (Bushong's brief at 36-38.) But the act is not punitive, and Bushong has provided no evidence to the contrary. *See supra*, Point II(C)(1). Instead, Bushong cites to *Shafer*, which is not a final decision. Bushong also argues that the Equal Protection Clause requires Fifth Amendment rights because those rights are guaranteed to others facing involuntary confinement. (Bushong's brief at 36-37.) Bushong cites *State ex rel. Simanek v. Berry*, 597 S.W.2d 718 (Mo. App. W.D. 1980), in a footnote to support his argument. Bushong also relies on *In re Gault*, 387 U.S. 1 (1967). The United States Supreme Court overruled portions of *Gault*

in *Allen*, though, and *Simanek* relied on portions of *Gault*. In *Allen*, the United States Supreme Court stated:

> First, *Gault's* sweeping statement that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty" . . . is plainly not good law.

Allen, 478 U.S. at 372. Therefore, *Simanek* is no longer good law.

Bushong also relies on this Court's holding in *Bernat*, but that case was about whether the State could comment on a putative SVP's silence at trial without calling the putative SVP to testify. *Bernat*, 194 S.W.3d at 869-70. Moreover, this Court recognized that the State's compelling interest in securing the cooperation of alleged SVPs in order to diagnose and treat them did not apply because Bernat agreed to cooperate. *Id*.

Therefore, the SVPA is not punitive and there is no Fifth Amendment right to silence.

4. The correct burden of proof in an SVP case is clear and convincing evidence

Bushong next argues that the burden of proof in an SVP case should be beyond a reasonable doubt. This argument was addressed in Point II. Because the SVP act is civil, the appropriate burden of proof is clear and convincing evidence. *See supra*, Point II(C)(2).

5. A jury trial is not a violation of constitutional rights

Bushong argues that the SVP act grants the right to a jury trial to the State, and it is, therefore, unconstitutional under the Missouri Constitution. This argument is without merit. First, as stated throughout this brief, the SVP law is not punitive, so the rule that either party may request a jury trial applies. Mo. Const. Art. I, § 22.

Bushong asserts that the only Missouri case to address this issue, *State ex rel. Nixon v. Askren*, 27 S.W.3d 834 (Mo. App. W.D. 2000), was wrongly decided because that case applied rational basis review. (Bushong's brief at 39.) As stated in Point I, this Court should reexamine its holding in *Norton* and find that rational basis review applies to the SVPA.

Moreover, Bushong does not explain how it was error when the *Askren* court stated that "we see no constitutional right to a bench trial in criminal cases or civil commitment cases." *Askren*, 27 S.W.3d at 840. *Askren* is still good law, and Bushong provides no compelling reason why this Court should overturn the holding of that case. *Askren* observed that the jury-trial provision of section 632.492 survives rational basis review, and the burden is on Bushong to demonstrate that section 632.492 is "wholly irrational." *Askren*, 27 S.W.3d at 840; *Amick*, 428 S.W.3d at 640 (citations omitted). This Court must presume that section 632.492 has a rational basis, and it must be upheld if it is "justified by any set of facts." *Amick*, 428 S.W.3d at 640

(citations omitted). Bushong has not made the required showing under the rational basis standard.

Further, even if this Court decides to overturn *Askren*, Bushong is still not entitled to relief because the jury-trial portion of section 632.492 is narrowly tailored to achieve a compelling state interest. The State has a compelling interest in making sure that both the State and Bushong receive a fair trial. In this context, the State has a compelling interest in making sure that an SVP case is adjudicated in the fairest way possible. Under the rule in *Singer v. United States*, 380 U.S. 24, 36 (1965) ("The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result"), it is likely that the United States Supreme Court would recognize the State's interest in the fairness of a jury trial in SVP cases to be a compelling interest. Section 632.492 is narrowly tailored to achieve that interest. The statute allows the State, the respondent, or the probate court to demand a jury trial. This construction also allows for a bench trial if all parties agree. Therefore, section 632.492 is a narrowly-tailored provision that achieves a compelling state interest.

6. Due Process and Equal Protection challenges are not ripe

Bushong argues that the SVPA violates due process and equal protection as applied to him because of various alleged infirmities in the release procedures. (Bushong's brief at 39-42) Bushong has failed to demonstrate that he is eligible for conditional or unconditional release or that he has actually been denied the benefit of any release procedures to which he is entitled. This appeal is from the probate court judgment finding that Bushong met the criteria for a sexually violent predator. If Bushong wants to assert a challenge to the release procedures, he can do so when he files a petition for release. His claim is not ripe because he has filed no such petition. Bushong cannot attack the commitment and release procedures in his case by asking this Court to assume that the State will act unconstitutionally in the future.

Bushong would not be entitled to discharge even if this Court found a constitutional violation in the release procedures. The correct remedy would be to order the Department of Mental Health to carry out the release procedures in a constitutional fashion. In *State v. Hart*, the Missouri Supreme Court considered a claim that the appellant should have his first-degree murder conviction vacated because he was a juvenile sentenced to a mandatory life-without-parole sentence. *State v. Hart*, 404 S.W.3d 232, 238

(Mo. banc 2013).[5] The Court found a constitutional violation—the mandatory imposition of a life-without-parole sentence—but remanded the case to the trial court for a new sentencing hearing. *Id.* a 238. The Court explained that the constitutional violation was that the sentencing court did not conduct the individualized analysis required by the constitution. *Id.* at 238-39. Accordingly, the Court explained, the proper scope of relief was to remand for re-sentencing so that the trial court could correct the unconstitutional application. *Id.*

Hart's premise—that that the scope of relief should only remedy the wrong—means that Bushong is not entitled to discharge. The remedy for the alleged wrong here—the unconstitutional application of the release procedures—is not to invalidate the commitment trial. Instead, the proper relief would be to order proper application of the release procedures.

[5] While the appellant made an alternative request for imposition of a conviction for second-degree murder, his primary request was for complete discharge. *Hart*, 404 S.W.3d at 237.

IV. (Requirement for mental abnormality finding)

The probate court did not err in overruling Bushong's motion to dismiss because the SVPA requires a finding that a person has serious difficulty controlling his predatory, sexually violent behavior [Responds to Bushong's Point III].

A. Standard of review

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell*, 215 S.W.3d at 102. All doubts are resolved "in favor of the act's validity[,]" and this Court will "make every reasonable intendment to sustain the constitutionality of the statute." *Id*. (quoting *King*, 664 S.W.2d at 5) (quotations omitted).

B. The SVPA requires serious difficulty controlling behavior

Bushong argues that the SVPA violates the Due Process Clause and the Equal Protection Clause because the SVPA does not require the State to prove that an alleged SVP has serious difficulty controlling his behavior. (Bushong's brief at 44-47.) This Court, however, has previously found that Missouri's SVPA does require the State to prove that an alleged SVP has serious difficulty controlling his behavior.

In *Thomas v. State*, two putative SVPs argued that Missouri's SVPA was unconstitutional because Missouri's statute did not define "mental abnormality" so as to include the requirement that such mental abnormality

causes "serious difficulty in controlling his behavior." 74 S.W.3d 789, 791 (Mo. banc 2002). This Court agreed that the jury instructions given at trial did not comply with the United States Supreme Court's instructions in *Hendricks*, 521 U.S. 342, and *Kansas v. Crane*, 534 U.S. 407 (2002). Therefore, this Court remanded the case back to the probate court so that the probate court could include a jury instruction that read, "As used in this instruction, 'mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior." *Thomas*, 74 S.W.3d at 792 (emphasis removed). In the instant case, the definition required by *Thomas* was submitted to the jury in Instruction No. 6. (L.F. 62.)

Bushong argues that the SVPA itself does not include the appropriate language, and it was not amended by the legislature. (Bushong's brief at 46.) There was no need for the legislature to change the language in the SVPA, however, because this Court rejected the argument that the SVPA's language was unconstitutional in *Thomas*. 74 S.W.3d at 791 n.1. The argument that Bushong makes also was made by the dissent in *Thomas*, and it was rejected by the majority. *Thomas*, 74 S.W.3d at 793 (Limbaugh, C.J. dissenting).

Moreover, Missouri courts have consistently held that the legislature "is presumed to have acted with a full awareness and complete knowledge of

the present state of the law, including judicial and legislative precedent." *Kolar v. First Student, Inc.*, 470 S.W.3d 770, 777 (Mo. App. E.D. 2015); *State v. Rumble*, 680 S.W.2d 939, 943 (Mo. banc 1984). This Court should find that the legislature knew and approved of this Court's interpretation of the SVPA.

Bushong also argues that neither *Hopkins* nor *Crane* considered whether the Act was unconstitutional based on the disjunctive of "emotional or volitional capacity" in the definition of mental abnormality. (Bushong's brief at 45.) The disjunctive definition is not problematic for two reasons. First, the United States Supreme Court found that an identical definition satisfied substantive due process concerns. *Hendricks*, 521 U.S. at 356. Second, even if an individual had a condition that affected only his "emotional capacity," Missouri law still requires that condition to cause the alleged SVP "serious difficulty controlling his behavior." *Thomas*, 74 S.W.3d at 792. In other words, even if the SVP's problem is emotional in nature, the law still requires a lack of volitional capacity in that it requires there to be serious difficulty controlling behavior. Therefore, the definition of mental abnormality is constitutional. The State was required to, and did, prove that Bushong had serious difficulty controlling his behavior.

V. (Statements to treatment providers)

The probate court did not err in admitting testimony about statements Bushong made to treatment providers because such evidence was not privileged [Responds to Bushong's Point IV].

A. The record pertaining to this claim

During Dr. Scott's testimony, Bushong objected to testimony about the opinion of another psychologist because such opinion was privileged. (Tr.II 69-72.) The probate court overruled the objection, and Dr. Scott testified about how he diagnosed Bushong with pedophilic disorder. (Tr.II 72-73.) Bushong included this issue in his motion for new trial. (L.F. 69.)

B. Standard of review

In a sexually violent predator case, the standard of review for the admission of evidence is for abuse of discretion. *Murrell*, 215 S.W.3d at 109-10. The probate court has broad discretion to admit or exclude evidence, and appellate courts will not reverse the probate court's ruling absent an abuse of discretion. *Id*. at 109. An abuse of discretion occurs when a probate court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Id*. Because review is for prejudice, not mere error, the probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id*. at 109-10.

C. Expert testimony about Bushong's sexual attractions and convictions was not privileged

Bushong argues that expert testimony about his communications with licensed professional counselors was privileged and should have been excluded at trial. (Bushong's brief at 49-52.) To support this argument, Bushong relies on *State v. Hawkins*, 328 S.W.3d 799 (Mo. App. E.D. 2010), and *Jaffee v. Redmond*, 518 U.S. 1 (1996). *Hawkins* is a case about whether a criminal defendant can have access to and cross-examine a victim about her mental-health records. *Jaffee* governs how the federal courts may adopt a new privilege under the Federal Rules of Evidence. Both of these cases are inapposite.

Section 337.540, RSMo, states that "[a]ny communication made by any person to a licensed professional counselor in the course of professional services rendered by the licensed professional counselor shall be deemed a privileged communication and the licensed professional counselor shall not be examined or be made to testify to any privileged communication without the prior consent of the person who received his professional services, except in violation of the criminal law." The legislature, aware of this privilege and others, drafted a provision in the SVPA that abrogated this privilege. § 632.510, RSMo. That provision states, "[i]n order to protect the public, relevant information and records which are otherwise confidential or

privileged shall be released to . . . the attorney general for purposes of . . . determining whether a person is or continues to be a sexually violent predator." *Id.*

This Court has explained that "Section 632.510's mention of providing 'relevant information and records' with an intent to 'protect the public' demonstrates that the SVPA intends a thorough assessment of an alleged offender's history and likelihood to reoffend be considered when making the case for his commitment as an SVP." *Tyson v. State*, 249 S.W.3d 849, 853 (Mo. banc 2008). Section 632.510's purpose—to inform the factfinder at trial—would be frustrated if this Court accepts Bushong's argument that testimony about privileged communications with a licensed professional counselor applies in SVP cases. Therefore, the probate court did not err in admitting testimony from Dr. Scott about another treating psychologist's opinion.

VI. (Sufficiency)

The probate court did not err in committing Bushong as an SVP because there was sufficient evidence showing that Bushong suffered from a mental abnormality that made him more likely than not to commit a predatory act of sexual violence [Responds to Bushong's Point V].

A. Standard of review

This Court has held that the standard of review for a sufficiency of the evidence claim in an SVP case is the same as in a criminal case. *Murrell*, 215 S.W.3d at 106. Therefore, this Court must view the evidence in the light most favorable to the verdict and disregard all contrary evidence and inferences. *Id*. When reviewing a sufficiency of the evidence claim, "the Court does not act as a 'super juror' with veto powers[,]" but instead "gives deference to the trier of fact." *State v. Miller*, 372 S.W.3d 455, 463 (Mo. banc 2012) (citing *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993)).

B. Bushong has a mental abnormality

"Mental abnormality" is defined by statute as a congenital or acquired 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. § 632.408 (1), RSMo.

Bushong argues that the State did not prove that his pedophilia predisposed him to commit sexually violent offenses such that he had difficulty controlling that behavior. (Bushong's brief at 55.) Bushong relies on *In the Matter of the State of New York v. Donald DD*, 21 N.E.3d 239, 248 (N.Y. App. Div. 2014). This argument is without merit and *Donald DD* is inapposite.

In *Donald DD*, the defendant was diagnosed with paraphilia NOS, which the court noted was a "controversial diagnosis." 24 N.Y.3d at 174. Based only on this "controversial diagnosis," "the fact that [the defendant] carried out both [sexual offenses] in a way that would allow for identification by his victims, and the fact that he attempted the second rape despite having spent many years in prison for the earlier crime[,]" the expert in *Donald DD* found that the defendant had a mental abnormality. *Id*. at 187-88. The appellate court found that this was insufficient evidence because such testimony was legally insufficient to support the conclusion that the defendant's mental conditions resulted in his having serious difficulty controlling conduct constituting a sex offense. *Id*. at 188. *Donald DD* is nothing like Bushong's case.

In the instant case, Dr. Scott testified that Bushong suffered from pedophilic disorder. (Tr.II 67.) In diagnosing Bushong with pedophilic disorder, Dr. Scott testified that he considered Bushong's child-molestation

conviction, the facts underlying the conviction, and his interest in younger children and child pornography as a primary sexual stimulus. (Tr.II 73-77.) Dr. Scott also testified that he considered Bushong's use of child pornography and masturbating to his own fantasies of children even after going through treatment. (Tr.II 77.) Bushong admitted to Dr. Scott that he met the criteria for pedophilic disorder. (Tr. II. 79.) Dr. Scott also testified that Bushong was distressed and aroused by pedophilic images and behaviors. (Tr.II 82.) Dr. Scott testified that Bushong's pedophilia has affected his ability to manage his actions and that "[t]he viewing of child pornography, the actions against [Victim], the failure on parole with more pornography, all of these things have demonstrated that [Bushong] cannot manage his behavior effectively." (Tr.II 83.)

Dr. Scott further testified that despite the fact that Bushong has been in prison for child pornography and child molestation, when he was on parole, he returned to using child pornography. (Tr.II 84.) Dr. Scott testified, "[h]e doesn't stay away from it and he makes choices and feels driven enough that he continues to do it." (Tr.II 84.) Dr. Scott testified that Bushong "admitted in his deposition recently that he still has the urges, still has the fantasies. So, you know, it's a persistent pattern for him of getting into very significant trouble as a result of this condition. Not being able to manage it." (Tr. 84-85.)

Therefore, Dr. Scott testified that Bushong's condition met the definition of mental abnormality.

This Court has previously stated that pedophilia is a mental abnormality that necessarily involves a propensity to commit sexual offenses. *Murrell*, 215 S.W.3d at 107. Accordingly, a diagnosis of pedophilia satisfies the statutory definition of mental abnormality standing alone. *Id. See also In re Muston,* 350 S.W.3d 493, 497 (Mo. App. S.D. 2011); *Turner v. State*, 341 S.W.3d 750, 753 (Mo. App. S.D. 2011) (finding no dispute that pedophilia constitutes a mental abnormality). Therefore, the evidence was sufficient to prove that Bushong suffered from a mental abnormality.

C. Bushong was more likely than not to commit predatory acts of sexual violence

There was sufficient evidence to prove that Bushong was more likely than not to commit predatory acts of sexual violence.

Dr. Scott testified that it was his opinion that as a result of his mental abnormality, Bushong is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. (Tr.II 87.) In order to make this determination, Dr. Scott performed three risk assessment actuarials: the Static 99, the Static 2002, and the Stable 2007. (Tr.II 87-88, 94.) On the Static 99, Bushong received a raw score of 6, which put him in the high-risk category and in the 94th percentile. (Tr.II 109.) On the Static 2007, Bushong

also got a score of 6, which put him in the 88th percentile. (Tr.II 120.) Finally, on the Stable 2007, Bushong received a score of 14 out of 26, which put him in the high risk category. (Tr.II 136-37.) Based on these numbers, the actuarials showed that 20.5 percent of people with similar scores to those Bushong received were rearrested or reconvicted in five years. (Tr.II 140.)

Dr. Scott testified that it was important to consider that a very low percentage of sex crimes are reported and even fewer are prosecuted and result in a conviction. (Tr.II 141-42.) Therefore, Dr. Scott determined that the 20 percent reconviction rate over five years was a significant underestimate. (Tr.II 142.) Dr. Scott also testified that he expected the reconviction rate to be around 30 percent after ten years and would continue to grow slightly as time went on. (Tr.II 143.)

Dr. Scott also testified that, "I don't believe that he's going to be able to manage his behavior in a way that's going to protect potential victims." (Tr.II 144-45.) Dr. Scott noted that although Bushong completed treatment, he re-accessed child pornography by finding a key to a room in his parents' house where the computer was kept or by entering the room when it was left unlocked. (Tr.II 146.) Dr. Scott testified that although accessing child pornography is not a hands-on offense, Bushong began his deviant cycle by viewing the pornography and then fantasizing about children he saw in the community and when he went to church. (Tr.II 148.)

Bushong argues that Dr. Scott's testimony failed to establish that any future risk of sexual offending was "predatory." (Bushong's brief at 59.) This argument is without merit.

Section 632.480(3), RSMo defines "[p]redatory" as "acts directed towards individuals, including family members, for the primary purpose of victimization." Dr. Scott testified that Bushong would not be able to manage his behavior in a way that would protect potential victims because Bushong began his deviant cycle almost immediately after he reentered the community.

Bushong relies on *In re Cokes*, 107 S.W.3d 317, 324 (Mo. App. W.D. 2003), in which the court reversed a commitment because the expert testified only that Cokes was "likely to sexually reoffend" as opposed to testifying that he would reoffend in a predatory sexually violent way. The present case is distinguishable from *Cokes* because Dr. Scott testified that Bushong was more likely than not to reoffend by committing predatory acts of sexual violence if not confined to a secure facility for care, custody and treatment.

Bushong also cites to *In re Morgan v. State*, 176 S.W.3d 200 (Mo. App. W.D. 2005), but that case is distinguishable because in that case the State stipulated that it would have to prove the prior definition of "predatory act" which required proof that the individual established or promoted relationships with victims for the purpose of victimization, and no such

evidence was produced. *Id*. at 206-07. The higher standard to which the State stipulated in *Morgan* is inapplicable here. *See In re George v. State*, 2017 WL 327486 *7 (Mo. App. W.D. January 24, 2017). The critical issue in *Morgan* was not whether the defendant was likely to reoffend in a sexually violent manner, but rather which version of the definition of "predatory act" was used. *See id*. That is not an issue in the present case; rather, this case is like *George*, wherein there was sufficient evidence, based on Dr. Scott's reliance on Bushong's prior acts of sexual violence and the assessment results, to demonstrate that Bushong was more likely than not to commit predatory acts of a sexual nature in the future if not confined.

Finally, Bushong argues that the State failed to prove that he was more likely than not to commit predatory acts of sexual violence because the State did not prove empirically that Bushong's likelihood of re-offense was greater than 50 percent. (Bushong's brief at 61-63.) Bushong cites to *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. E.D. 1998), which was a toxic tort case, to support his argument. In the context of an SVP case, however, the term "more likely than not" simply means more likely than not.

The Court of Appeals has considered the question and determined that "more likely than not" merely requires the State to adduce evidence that distinguishes the putative SVP from the typical sex offender. *In re Coffel*, 117 S.W.3d 116, 127 (Mo. App. E.D. 2003). Specifically, *Coffel* requires the State

to "identify some variable that would change the expectation" of the rate of re-offense. *Id.* at 127. In other words, the statute does not require the State to prove some specific probability of reoffending, but instead the State must prove that the putative SVP has a higher than average risk, and that the total level of risk must make the putative SVP more likely to offend than likely not to reoffend.

What Bushong is really asking this Court to do is to require that the State prove a percentage risk of over fifty-percent so that he can then argue that his static score correlates to a risk of less than 50 percent. In other words, Bushong is asking the Court to invalidate the State's identification of a variable (the additional risk factors) that would change the expectation of his rate of reoffending. This Court should decline that invitation. "More likely than not" is not a technical legal standard, but a series of words that are given their plain and ordinary meaning. It was not necessary for the State to define the phrase using a percentile.

VII. (Instructional error)

The probate court did not err in submitting Instruction No. 7 to the jury because the instruction was required by the SVPA, and Bushong was not prejudiced [Responds to Bushong's Point VI].

A. The record pertaining to this claim

The State submitted Instruction No. 7, which read:

> If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care and treatment.

(L.F. 63.) Bushong objected to this instruction, arguing that the word "treatment" was an external constraint that was prohibited by the caselaw. (Tr. III 198-99.) The probate court overruled Bushong's objection. (Tr. III 199.) Bushong included this claim in his motion for new trial. (L.F. 71.)

B. Standard of review

Whether a jury was instructed properly is a question of law that this Court reviews *de novo*. *McCall Serv. Stations*, 495 S.W.3d at 748. The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction. *Id*. This Court will reverse instructional errors only if the error resulted in prejudice that materially affects the merits of the action. *Id*.

C. The probate court did not err in submitting Instruction No. 7

Bushong argues that "instructing the jury on 'treatment' was irrelevant to the legal question and may have caused the jury to base its decision on the likely effectiveness of third party action." (Bushong's brief at 66.) This argument is without merit.

If a Missouri approved instruction (MAI) is applicable in a particular case, that instruction must be given to the exclusion of any other instruction on the same subject. *Id.* (citing Rule 70.02(b)). MAIs, however, do not exist for every particular legal issue. *Id.* For instance, there are no applicable MAI instructions in SVP cases. *In re Scates*, 134 S.W.3d 738, 742 (Mo. App. S.D. 2004). When there is no applicable MAI, the instruction given shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. *McCall Serv. Stations*, 495 S.W.3d at 748. Moreover, in adopting a non-MAI instruction, "the court must adopt an instruction that follows the substantive law and can be readily understood by the jury." *In re Scates*, 134 S.W.3d at 742 (citing *Murphy v. City of Springfield*, 794 S.W.2d 275, 278 (Mo. App. S.D. 1990)). "When reviewing instructions, jurors are presumed to have ordinary intelligence, common sense, and an average understanding of the English language." *Boone v. State*, 147 S.W.3d 801, 808 (Mo. App. E.D. 2004).

The SVPA provides in section 632.492, RSMo that "if the trial is held before a jury, the judge *shall* instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment." § 632.492, RSMo (emphasis added).

The Court of Appeals has found in numerous cases that the giving of the instruction is not error because it mirrors the language of the statute and thus follows the substantive law. *See*, *e.g.*, *In re Scates,* 134 S.W.3d at 742; *Warren v. State*, 291 S.W.3d 246, 251 (Mo. App. S.D. 2009); *Morgan v. State,* 272 S.W.3d 909, 911-13 (Mo. App. W.D. 2009) (also finding that probate court properly rejected Morgan's proffered instruction that a finding that he was an SVP would result in him being in custody "for the rest of his natural life[ ]"). The court has further determined that the instruction is not misleading, that giving it did not have a substantial potential for a prejudicial effect, and that an average jury would understand that a finding that the appellant was an SVP would subject him to the control, care, and treatment of the Department of Mental Health. *Morgan*, 272 S.W.3d at 913; *Warren*, 291 S.W.3d at 251. Therefore, Instruction No. 7 was required, and the probate court did not err in submitting it to the jury.

CONCLUSION

The Missouri SVPA is constitutional, and the probate court's judgment and order finding that Bushong was a sexually violent predator and committing him to the custody of the director of the Department of Mental Health for control, care and treatment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that it contains 12,012 words excluding the cover, certificate required by Rule 84.06(c), signature block, and appendix.

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