No. SC96244

In the Missouri Supreme Court

IN THE MATTER OF THE CARE AND TREATMENT OF MARTIN REDDIG,

Appellant.

Appeal from Camden County Circuit Court
Twenty-Sixth Judicial Circuit, Probate Division
The Honorable Aaron Koeppen, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The State of Missouri filed a petition in the Circuit Court of Camden County on June 11, 2015, seeking a hearing to determine whether Appellant was a sexually violent predator. (L.F. 1, 15-17). Appellant was then serving a sentence in the Missouri Department of Corrections for child molestation in the first degree, section 566.067, RSMo.[1] (L.F. 15). Appellant was tried by a jury on April 21-22, 2016, before Judge Aaron Koeppen. (L.F. 12). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

Dr. Jeffrey Kline, a psychologist and certified forensic examiner with the Department of Mental Health, evaluated Appellant in September of 2015. (Tr. 142, 147). Dr. Kline had performed a minimum of 1,300 court-ordered mental health evaluations since 1999. (Tr. 143-44). Dr. Kline began performing sexually violent predator evaluations in 2003 and had handled about 35 of those cases. (Tr. 144-45). Dr. Kline testified that he was guided by the language of the SVP Act in performing those evaluations, as well as by the training that he had received. (Tr. 147). He read to the jury the criteria

[1] All statutory citations are to RSMo 2000 as updated in the cumulative supplements.

that he used in analyzing whether a person meets the definition of a sexually violent predator:

> Sexually violent predator, "Any person who suffers from a mental abnormality, which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure – secure facility, and who has pled guilty or been found guilty of a sexually violent offense."

(Tr. 147-48).

Dr. Kline said that Appellant's conviction for child molestation in the first degree met the statutory definition of a sexually violent offense. (Tr. 148-49). The next two steps of the evaluation were to determine whether Appellant had a mental abnormality as defined in the statute and whether, as a result of that mental abnormality, Appellant was more likely than not to commit a sexually violent offense if not confined to a secure facility. (Tr. 152).

In performing that portion of the evaluation, Dr. Kline reviewed information received from the Department of Corrections, the Board of Probation and Parole, the Camden County Prosecuting Attorney's office, the Osage Beach Department of Public Safety, the Kids Harbor child advocacy center, the Joplin Police Department, the Missouri Highway Patrol, the Missouri Department of Social Services (including the Camden and Jasper County Children's Divisions), the Jasper County Prosecuting Attorney's

office, and the Pima County, Arizona Sheriff's Department. (Tr. 152). Dr. Kline also interviewed Appellant for nearly three hours. (Tr. 152). Dr. Kline testified that the records he reviewed were the types of documents and data that are reasonably relied on by experts in the field and that he found the records to be reliable. (Tr. 152-53). Dr. Kline proceeded to discuss what he found in those records.

While in the Department of Corrections, Appellant admitted to developing sexual thoughts about a three-year-old female cousin when he was sixteen-years-old, and frequently masturbating to the thoughts and images in his mind about her. (Tr. 155). He fantasized about the girl taking a bath. (Tr. 156). Appellant also made comments during his treatment sessions suggesting that he might have acted on his urges had he had access to the child. (Tr. 156). Dr. Kline testified that Appellant's disclosure was consistent with research which showed that many pedophiles develop urges towards children when they are teenagers. (Tr. 156).

Appellant was living in Arizona when he was twenty-years-old. (Tr. 155-57). He broke into a house and entered the bedroom of a young woman who had just turned eighteen-years-old. (Tr. 157). She awoke to find Appellant leaning over her, holding a large kitchen knife. (Tr. 157). He told the woman to shut up and placed a pillow over her face. (Tr. 157). Appellant put the knife down as he tried to rip off the woman's shorts. (Tr. 157). She

fought back, pulling his hair and biting his arm. (Tr. 157). Appellant ran out of the house. (Tr. 157-58). Appellant was later questioned by police, but was not prosecuted for that offense. (Tr. 158). He did admit to committing the offense both during his treatment at the Department of Corrections and in his interview with Dr. Kline. (Tr. 158). Appellant said in his treatment session that he broke into five or six different homes in order to rape a child or an adult. (Tr. 160). He gave Dr. Kline a contrary statement, saying that his purpose in breaking into the homes was to steal. (Tr. 159).

Appellant moved to Joplin following the incident in Arizona. (Tr. 161). Appellant admitted to viewing child pornography "countless times" between 2000 and 2004. (Tr. 161). The children depicted in the pornography ranged in age from four to twelve. (Tr. 161). Dr. Kline testified that viewing child pornography for sexual pleasure is a "very good measure" that a person has pedophilia. (Tr. 162).

Appellant was married in 2002 to a woman who had a four-year-old daughter from another relationship. (Tr. 163). The girl accused Appellant of touching his penis to her vagina while he took a bath with her. (Tr. 163-64). Appellant denied the accusation when questioned by police,[2] but later

[2] Appellant was arrested and charged, but the charges were dropped later that year. (Tr. 167-68).

admitted that he had sodomized the girl. (Tr. 164). Appellant said during his sex offender treatment that he had penetrated the girl's vagina with both his penis and his finger on multiple occasions. (Tr. 167, 170). He estimated that those acts occurred about twenty times a month. (Tr. 170). Appellant told Dr. Kline that he rubbed his penis against her bare vagina. (Tr. 167). Appellant admitted to fantasizing about the girl for several months before the event, and to masturbating to those fantasies prior to the touching and for several years after the touching. (Tr. 168). Dr. Kline testified that masturbating about thoughts both before and after an incident is an additional indication that Appellant's acts of child molestation are caused by pedophilia and not by something else. (Tr. 168). Dr. Kline said that behavior was also another indicator that Appellant has trouble controlling his urges. (Tr. 168). Dr. Kline said that Appellant was put in fear of being incarcerated for abusing the girl, but continued to masturbate to thoughts of the event for years afterwards and then went on to commit other offenses. (Tr. 168).

That subsequent offense led to Appellant's conviction of the index offense of child molestation in the first degree. Appellant was living with a woman in Camden County who had several grandchildren in her home. (Tr. 170-71). Appellant pled guilty to molesting three granddaughters, ages four, four, and three, and was sent to prison. (Tr. 171, 174). Appellant told Dr. Kline about the behaviors that he engaged in to ensure that he had sexual

access to the victims. (Tr. 172). He found excuses to go in the bathroom while the children were bathing so that he could look at the girls while they were in the bathtub. (Tr. 172). He encouraged the children's mother to get a job and volunteered to babysit them. (Tr. 172). When Appellant did take over the babysitting duties, he gave the children baths. (Tr. 172). Appellant said that he would spend a long time washing the girls' genital area, and that he penetrated their genitals with his finger on multiple occasions. (Tr. 173). Appellant estimated that he penetrated the vaginas of all three girls more than fifty times over a six-month period. (Tr. 174). Appellant masturbated to the thought of molesting the girls both before and after he committed the acts. (Tr. 174).

Appellant was released on parole in 2013. (Tr. 176-77). He admitted that while on parole, he downloaded, viewed, and masturbated to child pornography. (Tr. 177). Appellant said that he initially watched adult pornography but became bored with it and started searching for images of children. (Tr. 177). When Appellant discussed his viewing of child pornography in 2000, he said he was willing to look at children as young as four. (Tr. 181). By 2013, he had lowered that to children around the age of two. (Tr. 181). Appellant was in out-patient sex offender treatment when he viewed the pornography. (Tr. 177). His treatment was increased, but he continued looking at child pornography. (Tr. 178). Dr. Kline said that for

someone who has victimized children and watched child pornography in the past, looking at child pornography again "would be a very bad step towards re-offending in the future." (Tr. 176).

Appellant also put himself in situations while on parole that gave him access to, or contact with, children. (Tr. 178-79). Appellant's boss gave him a ride, and Appellant sat in the back seat with his boss's four children, who were all under the age of nine. (Tr. 179). Appellant also spent time alone with a boy who was about two years old and with a young girl. (Tr. 179).

Appellant was terminated from outpatient treatment due to concerns that he was going to reoffend. (Tr. 179). His parole was revoked, and he was returned to the Department of Corrections. (Tr. 178).

Appellant told Dr. Kline that he had last fantasized about a child and masturbated to that fantasy about six to seven months prior to their interview. (Tr. 180). He attributed some of his sexual offending to feeling distressed or stressed out. (Tr. 180). Appellant said that his deviant thoughts would increase when he felt lots of negative emotions. (Tr. 180).

Dr. Kline discussed the definition of mental abnormality. (Tr. 181). He said that the condition could be congenital, meaning the person was born with it; or acquired, which would be something that happened after they were born. (Tr. 182). Dr. Kline used the criteria in the DSM-V to diagnose Appellant, to a reasonable degree of psychological certainty, with pedophilic

disorder. (Tr. 182-84). Dr. Kline testified that Appellant's pedophilia affects his emotional and volitional capacity and predisposes him to commit sexually violent offenses. (Tr. 188). Dr. Kline also found that Appellant's pedophilia causes him serious difficulty controlling his behavior, in that his sexual urges are very, very strong and he continued engaging in those behaviors even after being sanctioned for them by being sent to prison. (Tr. 189-90). Dr. Kline stated that pedophilia is a life-long condition that remains with a person their entire life, even though the urges may decrease in intensity over time or the person may learn to control the urges. (Tr. 190-91). Dr. Kline testified that, to a reasonable degree of psychological certainty, Appellant has a mental abnormality. (Tr. 191).

Dr. Kline assessed Appellant's actual risk to commit an offense by using the Static-99R actuarial tool. (Tr. 191, 194). He assigned a score of four to Appellant, meaning that his risk to reoffend is about twice that of an average sex offender. (Tr. 200). Dr. Kline testified that the predicted recidivism rate over a ten-year period for a person with a score of four was 27.3 percent. (Tr. 201). But he also said that the Static instrument underestimates risk because it only looks at persons who are caught committing a new sex offense and does not account for those who commit undetected offenses. (Tr. 201). In addition, the Static only measures risk for a

ten-year period and thus does not include anyone who commits an offense after that time. (Tr. 201).

Dr. Kline noted that research has identified additional risk factors beyond the ten risk factors that are contained in the Static. (Tr. 201-02). Dr. Kline says those factors are addressed in a study that contains data of a type reasonably relied on by experts in the field. (Tr. 202-03). Dr. Kline said that the existence of deviant sexual interests, like pedophilia, is meaningful at predicting future risk. (Tr. 202, 203). An emotional attraction to, or identification with, children also increases the risk to reoffend. (Tr. 203-04). Another risk-increasing factor is violation of supervision, such as parole or probation. (Tr. 205).

Dr. Kline formed an opinion that Appellant is more likely than not to engage in predatory acts of sexual violence if he is not confined to a secure facility. (Tr. 206). Dr. Kline also testified that he did not believe that Appellant has the ability to manage his sexual behaviors. (Tr. 206).

The State also called Dr. Nena Kircher, a licensed psychologist for the Department of Mental Health. (Tr. 236). Dr. Kircher had previously worked for a private company that contracted with the Department of Corrections to evaluate sex offenders nearing release from prison in order to determine whether they met the criteria to be considered for commitment as an SVP.

(Tr. 236-37). While working in that position, she evaluated between 800 and 900 persons. (Tr. 237).

Dr. Kircher evaluated Appellant in 2015, using the criteria set forth in the SVP statute. (Tr. 238). She interviewed Appellant and reviewed records concerning the index offense, plus records from the Department of Corrections and Board of Probation and Parole. (Tr. 238). Dr. Kircher said that her sources of information were the types that are reasonably relied on by experts in the field and that she found them reliable. (Tr. 239).

Dr. Kircher said that she had records regarding Appellant's 2006 conviction, plus records of the allegations made against him in 1999 in Arizona and 2002 in Joplin and his later statements concerning those incidents. (Tr. 239). Dr. Kircher discussed Appellant's sexual history with him during their interview and said that his version of events comported with the historical documents. (Tr. 240). He also added some information beyond what was reflected in those documents. (Tr. 240).

Some of that additional information concerned his child molestation conviction. (Tr. 240). Appellant told Dr. Kircher that there were two additional victims besides the one for which he was convicted. (Tr. 240). All three of the girls were his girlfriend's granddaughters. (Tr. 240). Appellant became aroused when the girls, ages three and four, ran nude through the house after bath time. (Tr. 240). He eventually began babysitting them and

giving them baths. (Tr. 240). He fondled the vaginas of all three girls while bathing them. (Tr. 240). Appellant also wrestled with the girls and touched the vagina of one of them both over and under her clothes while she sat on his lap. (Tr. 241).

Appellant told Dr. Kircher that he was attracted to females between the ages of eight and eighty. (Tr. 241). When asked to explain that, Appellant said that age didn't really matter to him. (Tr. 241). He also told Dr. Kircher that he was attracted to females with blond hair, blue eyes, small noses, and stronger, outgoing personalities. (Tr. 241). Appellant's probation and parole records indicated that his search for child pornography was directed towards finding "pre-teen pussy." (Tr. 241-42). He told Dr. Kircher that he was looking more for teenage girls than for little girls. (Tr. 242). Dr. Kircher did not get a sense from Appellant's probation and parole records that he had a good insight into why he was unable to maintain his urges. (Tr. 242).

Dr. Kircher said that she was familiar with the methods used in sex offender treatment programs to educate sex offenders. (Tr. 242). She said that Appellant's conduct while in community-based treatment did not demonstrate that he had benefitted from that treatment, as he was using child pornography within a few months of his release. (Tr. 243). Dr. Kircher noted that the treatment provider had said that Appellant was at too high a risk for continued treatment in a community-based setting because of his

pornography use and his continued preoccupation with children. (Tr. 243). Dr. Kircher was also concerned that Appellant put himself into contact with children while on probation, saying that clearly demonstrated his lack of insight. (Tr. 243). She said Appellant would have learned in MOSOP to avoid being around children as best he could and would have known that being around children would violate his parole stipulations. (Tr. 243).

Dr. Kircher used the criteria in the DSM-V to diagnose Appellant to a reasonable degree of psychological certainty with pedophilic disorder. (Tr. 244). She said that pedophilia is generally thought of as a life-long disorder. (Tr. 244). While the goal is to find ways to manage and control the disorder, it is generally considered something that one will struggle with life-long. (Tr. 244). Dr. Kircher said that Appellant reported during their interview that he was still having fantasies about young children as often as a couple of times a week. (Tr. 244). While Appellant was not masturbating to those fantasies, he had to sing to himself to distract himself from them. (Tr. 244). Dr. Kircher said that the fantasies were thus interfering with Appellant's daily life on a regular basis. (Tr. 244). She said that Appellant had not developed a good plan to deal with his urges. (Tr. 245).

Dr. Kircher expressed the opinion that Appellant's pedophilic disorder predisposes him to commit acts of sexual violence. (Tr. 246). She also opined that the disorder causes Appellant serious difficulty in controlling his

behavior. (Tr. 246). She said that was demonstrated by Appellant's difficulty with pornography and his inability to keep himself out of situations where children are present. (Tr. 246). Dr. Kircher formed an opinion to a reasonable degree of psychological certainty that Appellant's pedophilic disorder rose to the level of a mental abnormality. (Tr. 246).

Dr. Kircher used the Static-99 actuarial tool in performing a risk assessment of Appellant. (Tr. 246). Like Dr. Kline, she gave Appellant a score of four. (Tr. 246-47). Dr. Kircher also used the Stable-2007 actuarial tool to measure dynamic risk factors. (Tr. 247). She described those factors as based more on attitudes than on past events and that are very amenable to change with treatment. (Tr. 247). Appellant received a score of fifteen, which indicated that he was in high need for further treatment. (Tr. 255).

Dr. Kircher also performed a meta-analysis of factors that were determined in several studies to be correlated to future risk. (Tr. 247-48, 256). One factor was completion of sex offender treatment. (Tr. 257). Dr. Kircher found that treatment did not seem to be mitigating due to Appellant's problems after completing MOSOP and returning to the community. (Tr. 257). Appellant's age was a neutral factor, and he did not have any health problems that would inhibit his desire or ability to commit a sexual offense. (Tr. 257). Dr. Kircher testified that she did not think that

Appellant had the ability to effectively manage his sexual urges, given his behavioral history. (Tr. 257).

Dr. Kircher expressed the opinion, to a reasonable degree of psychological certainty, that Appellant is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility. (Tr. 257-58). She also stated her opinion that Appellant is a sexually violent predator. (Tr. 258).

Appellant testified that he came from a difficult family background. (Tr. 279-83). He said that he first viewed pornography when he was four-years-old and had been around it his entire life. (Tr. 284-85). Appellant said he developed a sexual interest in children when he was sixteen-years-old. (Tr. 285). The incident that sparked that interest was Appellant seeing his three-year-old female cousin running around the house in the nude. (Tr. 285). Appellant fantasized about touching her vagina and masturbated to those thoughts. (Tr. 285). Appellant that his sexual interest was limited to females, ages four and up. (Tr. 286). Appellant denied sexually touching any children since his 2006 conviction. (Tr. 287). Appellant said he was taught techniques in MOSOP to prevent re-offending, but did not know how to implement those tools. (Tr. 288).

The jury returned a verdict finding that Appellant was a sexually violent predator. (Tr. 379). The court entered an order committing him to the

Department of Mental Health for care, control, and treatment. (L.F. 107). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

STANDARDS OF REVIEW

Appellant's points relied on fall largely into three categories: (1) constitutional challenges to the SVP Act; (2) sufficiency of the evidence; and (3) errors in the admission or exclusion of evidence. The following standards of review apply to those points.

Appellant's constitutional claims present issues of law which this Court reviews *de novo*. *In re Murrell*, 215 S.W.3d 96, 102 (Mo. 2007). Statutes are presumed to be constitutional. *Id.* This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Id.* If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.*

Appellate review of sufficiency of the evidence in an SVP case is limited to a determination of whether there was sufficient evidence admitted from which a reasonable jury could have found each necessary element by clear and convincing evidence. *In re A.B.*, 334 S.W.3d 746, 752 (Mo. App. E.D. 2011). The appellate court does not reweigh the evidence but determines only whether the judgment was supported by sufficient evidence. *Id.* Matters of credibility and weight of testimony are for the jury to determine. *Id.* For that reason, the evidence is viewed in the light most favorable to the judgment, accepting as true all evidence and reasonable inferences favorable to the

judgment and disregarding all contrary evidence and inferences. *Id.* A judgment will be reversed on insufficiency of the evidence only if there is a complete absence of probative facts supporting the judgment. *Id.*

The determination of whether to admit evidence is within the sound discretion of the trial court. *In re Murrell*, 215 S.W.3d at 109. A trial court will be found to have abused its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* This Court reviews for prejudice and not mere error, and the trial court's decision will be reversed only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* at 109-10. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.* at 110.

Any claims that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. 2009). Review for plain error involves a two-step process. *Id.* The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or a miscarriage of justice has resulted. *Id.* All prejudicial error, however, is not plain error, and plain errors are those which are

evident, obvious, and clear. *Id.* If plain error is found, the Court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* at 607-08.

Any other applicable standards of error not set forth herein shall be set forth in the corresponding point.

ARGUMENT

I.

This Court should reconsider its holding in *In re Norton* and *Bernat v. State*, and hold that the Missouri SVP Act is subject to rational basis review, not strict scrutiny review.

Throughout his brief, Appellant alleges that he is entitled to relief because, in Appellant's view, several portions of the SVP Act do not pass strict scrutiny review. Those claims are specifically set forth in Points III, IV, V, and VI of Appellant's brief. The State maintains that all provisions of the SVP Act 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 SVP Act 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. 2014); *In re Norton*, 123 S.W.3d 170, 173 (Mo. 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. 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 173.

B. Analysis

This Court has held that the Missouri SVP Act is subject to strict scrutiny review because it impinges upon the fundamental right of liberty. *In re Norton*, 123 S.W.3d at 173; *In re Bernat*, 194 S.W.3d 863, 867–68 (Mo. 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 *In re Norton* and *In re 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 filed Jan. 31, 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. Mgm't Corp.*, 615 S.W.2d 28, 33 (Mo. 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).[3] 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

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[3] 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 SVP's who have been released from treatment to appear in person every ninety days to register. *Litman v. Harris*, 768 F.3d 1237, 1241-42 (9th Cir. 2014)

This Court should adopt the reasoning of those courts and apply rational basis review to Missouri's SVP Act. In *Norton*, this Court relied on four cases to find that the SVP Act 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 SVP Act 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[4] 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. *Norton* relied on

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

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 SVP Act operates in such a way that "neither liberty nor justice [] exist." *Glucksberg*, 512 U.S. at 720–21. Accordingly, Respondent requests that this Court find that the SVP Act is properly reviewed under the rational basis standard.

II.

The trial court did not abuse its discretion in declining to further question a juror after the jury was empanelled or to replace that juror with the alternate (responds to Appellant's Point I).

Appellant claims that the trial court erred in failing to replace Juror No. 30 with the alternate, because her voir dire responses indicated the possibility of bias and inability to follow the court's instructions. But the juror's response was not a facially clear indicator of bias, and no evidence was presented to indicate nondisclosure by the juror. To the contrary, any potential bias was apparent to counsel during the voir dire, but counsel failed to follow-up. The trial court thus did not abuse its discretion under the circumstances before it in declining to take further action.

A. Underlying Facts.

The State's attorney asked the venire panel during voir dire whether they or anyone close to them had been the victim of a sex crime. (Tr. 31). Those veniremembers who were willing to publicly answer the question were asked whether that event would keep them from following the court's instructions. (Tr. 32-34). Veniremember 30 said that a friend had been a victim. (Tr. 34). She indicated that she wanted to discuss the matter in private. (Tr. 34).

At the conclusion of the voir dire questioning, the court announced to the venire panel that anyone who wanted to speak in private to the court could do so at that time. (Tr. 112). As it excused the venire panel, the court twice remarked that those jurors wanting to talk privately to the court should stick around. (Tr. 112-13). The bailiff advised the court that it did not get the numbers of anyone wishing to speak in private. (Tr. 113). The court sent the bailiff into the hallway to ask if anyone wanted to speak to the court. (Tr. 113). The State's attorney noted that some people had originally indicated that they wanted to speak in private, but the issue to which they gave that indication had come out anyway. (Tr. 113). Both defense counsel and the bailiff agreed with that. (Tr. 113-14). The bailiff later returned and said that veniremember number 80 was the only person who wanted to speak to the court. (Tr. 115).

Veniremember 30 was seated on the jury following strikes for cause and peremptory strikes. (Tr. 124). Defense counsel approached the bench after the jury was seated:

> MR. STEPHENS: No. 30 was seated. I had a note that she wanted to speak privately to the Court. But, apparently, she changed her mind when they announced that. I don't know if it makes a difference or not, but at one point I know she indicated

that she had a friend that had [been] a victim of sex abuse and she wanted to speak privately.

THE COURT: I don't think it does, because we had the sheriff go out and ask if anyone wanted to approach, and so if she changed her mind, I think she has the right to change her mind. But thank you for pointing that out.

(Tr. 127). The jury was sworn in and excused for lunch without any request by defense counsel for further action. (Tr. 127-30). The court then made an additional record with counsel:

THE COURT: I'm just going to make a quick record, in case it didn't pick up properly. Mr. Stephens brought up the – not so much an objection, just pointing out to the Court that Juror No. 30, I believe, indicated throughout the jury selection process that she wanted to visit in private with the Court.

Is that right, Mr. Stephens?

MR. STEPHEN: That is correct, Your Honor.

THE COURT: Okay. I would note, though, for the record that we asked the sheriff – when we recessed and made the announcement prior to the recess that this is the time to visit with the Court, that when he went out into the hall to see if anyone wanted to visit with the Court, nobody indicated that

they wanted to visit with the Court. So I – I don't know that that was necessarily an objection, Mr. Stephens, but you were just pointing out for the courtesy of the Court, and I appreciate that. That's how we proceeded, and so I – I did not see an issue with that, as I – I guess she waived the right to come and speak to the Court in private, okay?

MR. STEPHENS: Okay.

THE COURT: Yes.

MR. STEPHENS: Judge, if I may, after I've had a little bit more time to think about it, I think I would make a specific request that she be inquired – bring up the fact that she did indicate that she wanted to speak privately and was – she then said she didn't. I mean, my only concern is if there's something that she thinks would prevent her from being fair and impartial. I – and if we could have an inquiry on – of her from that, I would – I would request that. Or I guess I would request that – we've got 13 – we could switch it around and she could become the alternate, but – and I apologize that I didn't make the request sooner because it didn't sink in.

THE COURT: Did she end up answering questions throughout the jury selection process?

MR. PLATZ: She didn't have other questions that applied. She did raise her hand at one point to a private question, but as the Court noted, she, when given the opportunity to address the Court – other people had raised their hand privately as to concerns or matters they wanted to take up, and gradually, as the process proceeded, no one needed to take anything privately, so it's very well that her private matter was resolved. But our position would be that, since the jury has been sworn and this was not raised in an objection form or a strike at some point, that it's been waived and indicates there's no evidence of any kind that there was any prejudice associated with it.

THE COURT: And I – I think I agree. Since we have sworn the jury in, I don't think it's appropriate to reopen voir dire. But that about the request to make her the alternate?

MR. PLATZ: We would also object to that, given that the jurors are numerically seated for random purposes and we would be I think arbitrarily altering that system of fairness to suit our purposes, which I think would take away from the randomness of the process.

THE COURT: And I will tell you that unless it's by agreement of the parties, I don't think I can do it since changing

the rules after the – the game has been played seems to be just inherently an unfair process. So since it's not by agreement, I'm going to leave things the way they are, and I will note your request and – and deny your request at this time, Mr. Stephens.

MR. STEPHENS: All right. Your Honor, then, again, just that would be simply a request to bring Juror No. 30 in, point out the fact that she did have – at one time indicated that she wanted to talk to the Court privately and just simply inquire of her is there anything that would keep her from being a fair and impartial juror. That was – that was my request.

THE COURT: And you're not agreeing to that; is that correct?

MR. PLATZ: Correct. The voir dire is closed. We can no longer be asking about their – questions about their qualifications. We had opportunities to do so.

THE COURT: All right. And if it's not by agreement of the parties, then I – I will deny the request. And so let's break. We'll be off the record till after lunch.

(Tr. 130-32).

After the close of the evidence and before the jury was instructed, Appellant renewed his request to have Juror No. 30 moved to the alternate

juror position. (Tr. 360-61). The court denied the request. (Tr. 362-63). Juror No. 30 participated in deliberations and joined in the verdict. (Tr. 378-80). Appellant's motion for new trial claimed that the trial court erred in denying his requests to replace Juror No. 30. (L.F. 111-12).

B. Standard of Review.

Defense counsel made two requests that the trial court refused, to bring in Juror No. 30 for additional questioning and to have Juror No. 30 moved to the alternate position. A motion to voir dire the jury after the jury has been selected is addressed to the sound discretion of the trial court, whose ruling will be disturbed on appeal only when the record shows a manifest abuse of discretion. *State v. Futo*, 900 S.W.3d 7, 18 (Mo. App. E.D. 1999). The substitution of an alternate juror for a regular juror during trial is likewise a matter entrusted to the discretion of the trial court. *Hudson v. Behring*, 261 S.W.3d 621, 624 (Mo. App. E.D. 2008).

C. Analysis.

Although Juror No. 30 had indicated during voir dire that she had a friend who had been a victim of a sex crime, neither party made an effort to question her further on that topic. Counsel had the opportunity after the venire panel had been excused to have the court recall Juror No. 30 so that she could be questioned privately, but did not do so. Traditionally, failing to ask a question on voir dire waives the right to challenge the juror on any

question not asked. *Wingate by Carlisle v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 914 (Mo. 1993). Furthermore, the qualifications of jurors must be determined and objections made to the jurors before the jury is sworn except where matters which might establish disqualification were covered and false answers given. *State v. Jefferson*, 818 S.W.2d 311, 312-13 (Mo. App. E.D. 1991), *overruled on other grounds by*, *State v. Redman*, 916 S.W.2d 787, 792 (Mo. 1996). While Appellant cites cases where the trial court questioned a juror about his or her qualifications after the jury was sworn or discharged a juror after that time, the facts and circumstances of those cases make them distinguishable from this case.

The juror in *Khoury v. ConAgra Foods, Inc.* had remained silent in the face of questioning designed to disclose a bias against corporations. *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 200 (Mo. App. W.D. 2012). After the jury was empanelled, but before opening statements, counsel for ConAgra brought before the court social media and blog postings by the juror that allegedly referred to "corporate criminals, credit ratings agencies, economic warfare, [and] socialism[.]" *Id.* The court questioned the juror further about his attitude towards corporations and replaced him with an alternate. *Id.* at 200-01. In doing so, the court stated that it was a very close call as to whether the juror should have been removed. *Id.* at 201. The Western

District found that the court had acted within the bounds of its discretion under the circumstances before it.[5] *Id.* at 201-02.

The trial court in *Khoury* was presented with evidence that suggested not only the possibility of bias, but also the possibility of juror nondisclosure. In fact, the Western District later focused on nondisclosure in clarifying the the scope of its holding in *Khoury*. *Rupard v. Prica*, 412 S.W.3d 343, 347 (Mo. App. W.D. 2013). After stating that *Khoury* should not be read as requiring a trial court to discharge a juror in the face of allegations of nondisclosure, the court went on to say: "Rather, we stated that 'when as here, there is evidence fairly suggesting intentional non-disclosure to a voir dire question, litigants "have a right to bring such alleged nondisclosure to the trial court's attention."' *Id.* (citing *Khoury*, 368 S.W.3d at 201 n.11) (emphasis added in *Rupard*).

In another case relied on by Appellant, the trial court was found to have abused its discretion in not replacing a juror who had engaged in a conversation with the daughter of one of the parties during a recess while the

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[5] *Khoury* has been deemed inapposite, based on the procedural posture of the case, in cases where the appellate court is reviewing the trial court's denial of a motion to strike a juror. *J.T. ex rel. Taylor v. Anbari*, 442 S.W.3d 49, 59 (Mo. App. S.D. 2014).

trial was underway. *Hudson*, 261 S.W.3d at 624-25. The juror asked the woman to tell her father that he "love[d] him to death." *Id.* at 624. The Eastern District determined that the statement by the juror, "on its face, clearly shows a possible bias." *Id.*

The fact that Juror No. 30 had a friend who was a victim of a sex crime is not a facially clear indicator of bias. Most of the jurors who were willing to discuss the issue said that it would not affect their ability to keep an open mind about the evidence and follow the court's instructions. (Tr. 32-37).

Even if Juror No. 30's answer was construed as a facially clear indicator of bias, there is another factor that distinguishes this case from *Khoury* and *Hudson*. In both of those cases the facts suggesting a possible bias or nondisclosure came to the attention of the court and counsel after voir dire was completed. Juror No. 30 disclosed her relationship to a sexual assault victim during voir dire. She thus provided counsel with the information necessary to conduct a further inquiry. Because counsel failed to do that, this case is more in line with the rules announced in *Wingate* and *Jefferson*, *supra*, than with those announced in *Khoury* and *Hudson*.

The trial court did not abuse its discretion under the facts and circumstances before it in declining either further questioning of Juror No. 30 or moving Juror No. 30 to the alternate position. Appellant's point should be denied.

III.

No error in submitting mandatory instruction on consequence of finding Appellant to be an SVP (responds to Appellant's Point II).

Appellant claims that the trial court erred in refusing to declare section 632.492, RSMo unconstitutional for requiring that the jury be instructed that a finding that a person is an SVP will result in that person's commitment to the Department of Mental Health for control, care, and treatment. Appellant also claims that the trial court erred in submitting Instruction No. 7 to the jury over his objection because the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for commitment. But the instruction followed the substantive law as declared by the legislature, which had the authority to require the instruction.

A. Underlying Facts.

Appellant filed a motion asking the court to declare section 632.492, RSMo unconstitutional because it requires the court to instruct the jury that "if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the department of mental health for control, care, and treatment." (L.F. 11, 79-83). The motion also asked the court to refuse to submit the instruction to the jury. (L.F. 79). The court overruled that motion prior to trial. (Tr. 5).

Appellant renewed his objection during the instruction conference. (Tr. 356). The court overruled the objection and submitted the required instruction as Instruction No. 7. (Tr. 357-58; L.F. 103). Appellant's motion for new trial contained a claim that the court erred in overruling his motion and in giving the instruction. (L.F. 110, 112).

B. Standard of Review.

Whether a jury was instructed properly is a question of law this Court reviews *de novo*. *City of Harrisonville v. McCall Srvc. Stations*, 495 S.W.3d 736, 746 (Mo. 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.*

C. Analysis.

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 Supreme Court Rule 70.02(b)). MAI's, 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. *City of Harrisonville*, 495 S.W.3d at 746. 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." *In re Boone*, 147 S.W.3d 801, 808 (Mo. App. E.D. 2004).

The SVP Act 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 Cum. Supp. 2001 (emphasis added).

The Court of Appeals has found in numerous cases that the giving of the instruction is not error because it parrots the language of the statute and thus follows the substantive law. *See*, *e.g.*, *In re Scates,* 134 S.W.3d at 742; *In re Warren*, 291 S.W.3d 246, 251 (Mo. App. S.D. 2009); *In re Morgan,* 272 S.W.3d 909, 911-913 (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 and

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. *In re Morgan*, 272 S.W.3d at 913; *In re Warren*, 291 S.W.3d at 251.

Appellant raises the argument that juries should not be informed of the consequences of a verdict. But the cases he cites do not support his argument. For instance, the United States Supreme Court found that a jury should not be instructed on the consequences of a verdict of not guilty by reason of insanity in the absence of a statutory requirement to the contrary. *Shannon v. United States*, 512 U.S. 573, 579-84 (1994). The Court did not engage in a constitutional analysis, but examined the issue as a matter of federal statutory and procedural law. Because the statute at issue did not require an instruction, the Court adhered to the general practice that juries not be informed of the consequences of its verdict.[6] *Id.* at 587. But the Court stated

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[6] One rationale underlying that principle is that juries in the federal system have no role in determining the sentence in a criminal case, making the consequences of a verdict irrelevant to the jury's decision. *Id.* at 579. By contrast, the commitment of an SVP to the Department of Mental Health is

that "Congress certainly could have included a provision requiring the instruction Shannon seeks." *Id.* And the Court was careful to point out that its decision "[should] not be misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict." *Id.* at 587-88. *Shannon* does not establish any constitutional prohibition on the type of instruction at issue here and supports the legislative prerogative to require the instruction at issue here.

Appellant raises the argument that the instruction should not have been given because it was not supported by the evidence. As an initial matter, that argument was not presented to the trial court. (Tr. 356-57). Allegations of error not presented to or expressly decided by the trial court shall not considered in any civil appeal from a jury tried case. *Barkley v. McKeever Enterprises, Inc.*, 456 S.W.3d 829, 839-40 (Mo. 2015) (citing Supreme Court Rule 84.13(a)). Secondly, the cases that Appellant cites are inapposite because none of them involve a statutorily-mandated instruction.

The trial court did not err in denying Appellant's constitutional challenge and in submitting the required instruction. Appellant's point should be denied.

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the mandatory consequence of the jury's verdict. § 632.495.2, RSMo Cum. Supp. 2009.

IV.

The trial court did not err in denying Appellant's motion to dismiss based on the elimination of the possibility of unconditional release (responds to Appellant's Point III).

Appellant claims that the court erred in denying his motion to dismiss because there is no possibility of discharge from state custody once a person is committed as an SVP. But the statutory scheme has been interpreted by both this Court and by a federal district court to provide for the possibility of unconditional release.

A. Underlying Facts.

Appellant filed a motion to dismiss due to the elimination of any possibility for unconditional release. (L.F. 2-3, 23-29). The court denied the motion. (L.F. 5; Tr. 5). Appellant included a claim of error in his motion for new trial. (L.F. 110).

B. Analysis.

Appellant claims that the entire SVP Act is unconstitutional because amendments enacted in 2006 replaced discharge with conditional release. This Court has previously found that commitment under the 2006 amendments is not indefinite. *In re Van Orden*, 271 S.W.3d 579, 586 (Mo. 2008). Even the federal district court case that Appellant relies on in subsequent points rejected a facial challenge to the SVP Act by finding that

the Act can be read to permit the full, unconditional release of persons committed under its provisions. *Van Orden v. Schafer*, 129 F. Supp.3d 839, 865 (E.D. Mo. 2015).

Shafer based that finding on the provisions of section 632.505, RSMo. *Id.* That statute allows a court, on its own motion, to remove all of the conditions for release. § 632.505.6, RSMo Cum. Supp. 2013 ("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."). Further, the Act 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 Cum. Supp. 2013 (emphasis added). That provision empowers the probate court to remove all conditions of the conditional release if no conditions are necessary for the SVP's treatment or for the public's safety. If this Court believes that the Act 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 would be a "'*de minimis* level of imposition with which the Constitution is not concerned.'" *Bell v. Wolfish*, 441 U.S. 520, 539 n.1 (1979) (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)). This reasonable construction of the statute saves the SVP Act from Appellant's facial challenge.

Appellant also raises several complaints about the procedures for obtaining conditional release. Appellant 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. In *Van Orden*, this Court declined to address the constitutionality of the statute if it did prohibit an SVP from ever receiving a conditional release, because the appellants had failed to show that they would be entitled to unconditional releases. *In re Van Orden*, 271 S.W.3d at 586 n.5. This appeal is from the circuit court judgment finding that Appellant met the criteria for a sexually violent predator. If Appellant 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.

Appellant 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*, this 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. 2013).[7] This 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.* at 238. This 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, this 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 the scope of relief should only remedy the wrong – means that Appellant 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.

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[7] While the appellant made an alternative request for imposition of a conviction for second-degree murder, his primary request was for complete discharge. *Id.* at 237, *see* SC93153 Appellant's Brf. at 68.

V.

The trial court did not err in denying Appellant's motion to dismiss based on a claim that the SVP Act is unconstitutional for failing to provide for a least restrictive environment (responds to Appellant's Point IV).

Appellant claims that the trial court erred in denying his motion to dismiss based on a determination by a federal trial court that the SVP Act is unconstitutional because it does not provide a least restrictive environment and there is no alternative to confinement in a total lock down facility. But Appellant fails to distinguish this Court's prior opinion that rejected the least-restrictive-environment argument.

A. Underlying Facts.

Appellant filed a motion to dismiss because the SVP Act does not allow for consideration of the least restrictive environment. (L.F. 2, 57-59). The court denied the motion. (L.F. 5; Tr. 5). Appellant claimed in his motion for new trial that the court erred in denying the motion. (L.F. 110).

B. Analysis.

Appellant asserts that Missouri's SVP Act violates the Due Process Clause and the Equal Protection Clause because the Act does not allow for SVP's to be placed in the least-restrictive environment. This Court has

rejected the least-restrictive-environment argument, and Appellant fails to distinguish this Court's opinion.

This Court has 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. The Court explained that the State has a compelling interest in protecting the public from crime. *Id.*[8] The 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 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 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. Appellant received all 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 the Court has subsequently held that

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

an SVP's rights are sufficiently protected by the clear-and-convincing-evidence standard. *In re Van Orden*, 271 S.W.3d at 586.

The 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 County Cir. Ct.) Order Revoking Conditional Release (July 13, 2016) (ordering that SVP be returned to physical custody in a secure facility).

On balance, the SVP Act has not changed since the *Norton* decision in a way that would require this Court to overrule *Norton.* Appellant's arguments are grounded in the statutory language that was affirmed in *Norton*. The only authority he offers are non-final, non-binding orders issued by federal district courts that, as discussed in more detail in the next point, do not support Appellant's arguments. Appellant's point should be denied.

VI.

SVP Act is not punitive, and it provides adequate procedural protections (responds to Appellant's Point V).

Appellant claims that the trial court erred in denying his motion to dismiss based on a determination by a federal trial court that the commitment under the SVP Act is punitive, lifetime confinement, is a second punishment, and that the Act's substantive and procedural protections are inadequate and differ from other civil commitment or punitive proceedings. But the non-final order of the federal court is not binding on this Court, whose previous findings that the Act is non-punitive and provides adequate procedural protection are still valid.

A. Underlying Facts.

Appellant filed a motion to dismiss based on alleged violations of his rights to due process and equal protection, and his right to be free from double jeopardy and *ex post facto* laws. (L.F. 3, 44-56). The court overruled the motion. (L.F. 5; Tr. 5). Appellant included a claim of error in his motion for new trial. (L.F. 110).

B. Analysis.

Appellant's arguments under this point have been raised in other cases currently pending before the Court. *In re Sebastian*, SC95681 (submitted Mar. 8, 2017); *In re Kirk*, SC95752 (submitted Nov. 16, 2016); and *In re*

Nelson, SC95975 (submitted Jan. 12, 2017). As in those cases, Appellant bases much of his argument on the order issued by the United States District Court for the Eastern District of Missouri in the *Schafer* case cited in Point IV. 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. 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.").

1. *SVP Act is not punitive.*

Appellant argues that *Schafer* establishes that the SVP Act is punitive in nature and thus runs afoul of constitutional provisions protecting due process and prohibiting cruel and unusual punishment. In *Schafer*, a group of sexually violent predators filed suit against the State and alleged, among other things, that the SVP Act was facially unconstitutional and unconstitutional as applied to them. *Shafer*, 129 F. Supp.3d at 843. The district court rejected the facial challenge to the SVP Act. *Id.* at 865. It also rejected the as-applied challenge to the SVP Act's treatment provisions. *Id.* at

867. The district court did, however, sustain the challenge to the SVP Act's release procedures as applied to the plaintiffs. *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 Appellant acknowledges, the remedy phase of the trial continues. *Id.* The district court has not ordered the release of the plaintiffs, but has ordered the State to apply the SVP Act 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. Indeed, Appellant cites to an order from the United States District Court for the District of Minnesota that found Minnesota's SVP statute to be unconstitutional both facially and as applied. *Karsjens v. Jesson*, 109 F. Supp.3d 1139 (D. Minn. 2015). That order has been overturned on appeal. *Piper*, 845 F.3d at 398.

Even if the district court in *Shafer* is correct that the SVP Act is being improperly implemented, that does not mean the Act is punitive. The United States Supreme Court has held that the party challenging an SVP Act 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, Appellant has not provided the "clearest proof."

Even though *Shafer* is not final, the State is actively engaged in efforts to comply with the district court's order. Appellant's brief 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).

There is not sufficient evidence, let alone "the clearest proof" that Missouri's SVP is a criminal law. The non-final nature of *Shafer* and the lack of any evidence of what has happened in the months since that order was

issued demonstrates that this Court cannot rely on the district court's decision. Without evidence, Appellant has failed to prove that Missouri's SVP Act is anything other than a civil law. And because Missouri's SVP Act is civil in nature, it cannot violate the *Ex Post Facto* or Double Jeopardy Clauses.

2. *Due Process and Equal Protection challenges based on release procedures are not ripe.*

Appellant argues that the SVP Act violates due process and equal protection as applied to him because of various alleged infirmities in the release procedures. Appellant 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 circuit court judgment finding that Appellant met the criteria for a sexually violent predator. If Appellant 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. Appellant 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.

Appellant 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*, this 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. *Hart*, 404 S.W.3d at 238. This 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.* at 238. This 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, this 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 the scope of relief should only remedy the wrong – means that Appellant 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.

3. *Procedural and substantive protections are adequate.*

Appellant also claims that SVP's are subject to different treatment than other individuals committed under Chapter 632, RSMo. This Court has previously held that sexually violent predators are not entitled to "exactly the same rights as persons committed under the general civil standard." *In re*

Coffman, 225 S.W.3d 439, 445 (Mo. 2007) (*citing In re Bernat*, 194 S.W.3d at 868-69).

Even under strict scrutiny review, this Court has held that the State's compelling interest in protecting the public from crime justifies the differential treatment of those persons adjudicated as sexually violent predators. *In re Norton*, 123 S.W.3d at 174. The Court also found that the statute was narrowly tailored to promote that interest. *Id.* at 175. The Court noted that the Act provided "additional procedural safeguards" that confer on the putative SVP a number of rights enjoyed by defendants in criminal prosecutions. *Id.* at 174, 175.

While *Norton* construed an earlier version of the statute, the procedural safeguards cited by the Court remain in the current Act, with the exception that the burden of proof for release is now clear and convincing evidence rather than beyond a reasonable doubt. *Id.* at 174-75; *see*, §§ 632.489, RSMo Cum. Supp. 2009; 632.492, RSMo Cum. Supp. 2001; 632.495, RSMo Cum. Supp. 2009; and 632.498, RSMo Cum. Supp. 2013. This Court has held that the clear and convincing standard of proof can constitutionally be applied to SVP proceedings. *In re Van Orden*, 271 S.W.3d at 586.

4. *Burden of proof argument was not included in the motion.*

Appellant argues that the Act is unconstitutional for using the clear and convincing standard of proof. That argument was not included in the motion that is the subject of this point. As noted, *supra*, allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury-tried case. *Barkley*, 456 S.W.3d at 839-40. Appellant's claim fails even if it were properly before the Court. The clear and convincing standard of proof has been previously deemed constitutional by the Court. *In re Van Orden*, 271 S.W.3d at 586. Appellant's contrary argument is based solely on his mistaken assertion that the SVP Act is punitive in nature, rather than a civil action.

5. *Right to counsel and silence.*

As Appellant notes, this Court found in *Norton* found that the right to counsel under the SVP Act did not vest until a petition was filed, and that an offender was thus not entitled to counsel during the end of confinement interview. *In re Norton*, 123 S.W.3d at 172. Appellant's sole challenge to that proposition is based on his argument that the SVP Act is punitive, and thus subject to protections afforded under criminal law. As noted above, that assertion is incorrect.

6. *Jury trial demand.*

The statute setting forth the trial procedures under the SVP Act states that, "The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury." § 632.492, RSMo Cum. Supp. 2001. Appellant, again proceeding on the mistaken basis that the SVP law is punitive, attempts to distinguish that provision from the protections given to criminal defendants. That argument would fail even if the SVP law were punitive, as criminal defendants have no federal or state constitutional right to avoid a jury trial.

A federal criminal defendant may waive a jury trial only with the consent of the prosecutor and the court. Fed. R. Crim. P. 23(a). The United States Supreme Court has explained that Rule 23(a) does not violate federal constitutional guarantees:

> 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.

Singer v. United States, 380 U.S. 24, 36 (1965).

Similarly, while Missouri's criminal procedure does not allow the prosecution to object to a bench trial in criminal cases, the defendant's choice to waive a jury still requires approval by a government actor:

> [A]nd that in every criminal case any defendant may, *with the assent of the court*, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.

Mo. Const., art. I, § 22(a) (emphasis added). This Court has previously stated that an accused "has no absolute right, either by constitution, statute, or court rule, to elect that he shall be tried by the court without a jury." *State v. Taylor*, 391 S.W.2d 835, 837 (Mo. 1965). Putative SVP's, just like criminal defendants, are entitled to a jury trial and possess only a conditional right to waive a jury. While the SVP statute allows the government to affirmatively demand a jury trial and the government can only veto a waiver in criminal cases, that is a distinction without a difference as the end result in either case is a jury trial.

Appellant offers no compelling argument for this Court to turn away from its prior precedents as discussed above. His point should be denied.

VII.

The State is required to show proof of serious difficulty controlling behavior in order to commit someone as an SVP (responds to Appellant's Point VI).

Appellant claims that the trial court erred in denying his motion to dismiss because the SVP Act unconstitutionally permits commitment because of emotional capacity, without any proof of behavioral impairment, and fails to require proof of serious difficulty controlling behavior. Appellant's claim is contrary to previous decisions of this Court and the United States Supreme Court.

A. Underlying Facts.

Appellant filed a motion to dismiss alleging that the SVP Act fails to require a finding of serious difficulty in controlling behavior and permits a finding of a mental abnormality grounded solely in an emotional condition. (L.F. 3, 60-64). The court denied the motion. (L.F. 5; Tr. 5). Appellant included a claim of error in his motion for new trial. (L.F. 110).

B. Analysis.

In *In re Thomas*, two putative SVP's argued that the Act was unconstitutional because the statute did not define "mental abnormality" so as to include the requirement that the mental abnormality cause "serious difficulty in controlling his behavior." *In re Thomas*, 74 S.W.3d 789, 791 (Mo.

2002). This Court agreed that the jury instructions given at the trials did not comply with the United States Supreme Court's instructions in *Hendricks*, *supra*; and *Kansas v Crane*, 534 U.S. 407 (2002). This Court remanded the case to the probate court with the requirement that the probate court submit 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." *In re Thomas*, 74 S.W.3d at 792 (emphasis removed).

The *Thomas* jury instruction was given in Appellant's case. (Tr. 102). Appellant's main argument appears to be that the Missouri General Assembly did not amend the SVP Act following the *Thomas* opinion to require proof of serious difficulty controlling behavior. There was no need for the General Assembly to modify the statutory language because this Court rejected the argument that the SVP Act was constitutionally infirm. *Id.* at 791 n.1.

Appellant also contends that the Act is unconstitutional because it permits commitment on the basis of emotional capacity, without a finding of volitional impairment. *See* § 632.480(2), RSMo Cum. Supp. 2013 (defining mental abnormality as a congenital or acquired condition affecting the

emotional or volitional capacity). Appellant argues that neither *Hendricks* nor *Crane* considered this question. The disjunctive construction of the statute does not present a problem.

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 their "emotional capacity," Missouri law still requires that condition to cause the putative SVP "serious difficulty controlling his behavior." *In re Thomas*, 74 S.W.3d at 792. In other words, even if the problem is emotional and not volitional, the result is still serious difficulty controlling behavior. Under that formulation, the definition of mental abnormality passes constitutional muster because it requires a lack of volitional capacity, which Appellant admits would satisfy constitutional concerns. Appellant's point should be denied.

VIII.

The trial court did not plainly err in permitting Dr. Kircher's testimony (responds to Appellant's Point VII).

Appellant claims that the trial court erred in admitting testimony regarding Dr. Kircher's end of confinement determination and his statements to her. But the statutory and constitutional provisions relied on by Appellant are not applicable, and the testimony was properly admitted.

A. Underlying Facts.

Appellant filed a pre-trial motion to exclude evidence of the end of confinement determination and Appellant's statements made to the examiner. (L.F. 2, 18-22). The court overruled the motion prior to trial. (L.F. 5). Appellant renewed his motion prior to trial, and the court again denied it. (Tr. 5). No objection was lodged during Dr. Kircher's testimony. Appellant's motion for new trial included a claim that the court erred in denying his motion to exclude the end of confinement determination. (L.F. 110). The motion did not claim error in the actual admission of the testimony.

B. Standard of Review.

Appellant's claim is not preserved. His motion to exclude evidence was essentially a motion in limine. A motion in limine, in and of itself, preserves nothing for appellate review. *Stewart v. Partamian*, 465 S.W.3d 51, 55 (Mo. 2015). To properly preserve an issue for appeal, a timely objection must be

made during trial. *Id.* Appellant did not object during Dr. Kircher's testimony. He has therefore waived his argument that the court erred in admitting the evidence at trial. *Id.* At most, he can only receive plain error review of his claim as set forth in the Standards of Review section.

C. Analysis.

1. *Dr. Kircher's testimony is not prohibited by Section 632.483 because that statute bars "determinations" made by "members," and Dr. Kircher is not a "member" under the statute.*

Appellant argues that Dr. Kircher should not have been allowed to testify because, according to Appellant, her testimony is barred by section 632.483.5, RSMo and under *In re Bradley*, 440 S.W.3d 546 (Mo. App. W.D. 2014). Appellant has misread the statute and the case law.

Section 632.483.5, RSMo, provides, "The determination of the prosecutors' review committee or any member pursuant to this section or section 632.484 shall not be admissible evidence in any proceeding to prove whether or not the person is a sexually violent predator." § 632.483.5, RSMo Cum. Supp. 2002. Two elements are required to exclude evidence under Section 632.483.5, RSMo. First, the evidence must be a "determination," and second, it must be made by a "member."

The end-of-confinement report that was generated by Dr. Kircher was a "determination" under section 632.483.2, RSMo, but Dr. Kircher was not a

"member" for purposes of the statute. *In re Bradley* examined the question of who is a "member" for purposes of section 632.483.5, RSMo and found that the term "member" included the persons on the prosecutor's review committee and persons on the multidisciplinary team, not the person conducting the end-of-confinement report. "[S]ection 632.483 uses the term 'members' to refer to the individuals comprising both the prosecutors' review committee and the multidisciplinary team" *In re Bradley*, 440 S.W.3d at 557. The court further found that "the only 'members' referred to in section 632.484 are those forming the prosecutors' review committee." *Id.* at 558. The Court of Appeals reaffirmed that holding, writing that "the statute only expressly excludes the PRC report from evidence." *In re Walker*, 465 S.W.3d 491, 495 (Mo. App. W.D. 2015).

The Western District's interpretation of section 632.483.5, RSMo is correct, and under the plain language of the statute, section 632.483.5, RSMo does not apply to Dr. Kircher. It thus provides no basis for excluding her testimony.

2. *The Fifth Amendment privilege against self-incrimination does not apply in this civil commitment case.*

Appellant asserts that his statements made to Dr. Kircher were inadmissible because they violated the Fifth Amendment. Appellant cites no case which has expressly held that the Fifth Amendment applies to Missouri

Sexually Violent Predator proceedings. This Court has explained that SVP proceedings are not criminal proceedings and that the Fifth Amendment applies only to criminal proceedings. *In re Bernat*, 194 S.W.3d at 866 (citing *Allen v. Illinois*, 478 U.S. 364, 374 (1986)).

Additionally, Missouri follows the United States Supreme Court in finding there is no right against self-incrimination in civil commitment proceedings. *In re Wadleigh*, 145 S.W.3d 434, 439-40 (Mo. App. W.D. 2004). Treatment, rather than punishment, is the purpose of SVP proceedings, and statements to mental health experts are not shielded by the Fifth Amendment privilege. *Id.* at 440.

As a final issue, Appellant also asserts that his rights were violated because he was not given a *Miranda*[9] warning before the end of confinement evaluation. No *Miranda* warning was necessary because the Fifth Amendment does not apply. If *Miranda* does apply—which it does not—then Appellant is still not entitled to relief because he voluntarily gave statements to Dr. Witcher in an interview that lasted several hours. (Tr. 562). Under *Miranda*, voluntary re-contact with state agents is permissible. And, this is not the sort of two-step interview designed to skirt *Miranda*. *State v. Collings*, 450 S.W.3d 741, 755 (Mo. 2014). Finally, if there was a *Miranda*

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9 *Miranda v. Arizona*, 384 U.S. 436 (1966).

error in this case—and there was not—then the case does not require reversal or remand because Appellant has not demonstrated prejudice. Appellant has not demonstrated how the statements he made to Dr. Kircher are different than statements he made to Dr. Witcher. In Missouri, the rule is that "evidence challenged on constitutional grounds that is cumulative of other, properly admitted evidence cannot have contributed to a defendant's conviction and so is harmless beyond a reasonable doubt." *State v. Jones*, 369 S.W.3d 77, 81 (Mo. App. E.D. 2012). Thus, Appellant is not entitled to relief, assuming *arguendo*, there was a *Miranda* violation.

IX.

Sufficient evidence supports the jury's verdict (responds to Appellant's Point VIII).

Appellant claims that the evidence was insufficient to support his commitment as an SVP because the State failed to prove that his pedophilia caused him serious difficulty in controlling his behavior and did not demonstrate that his risk of committing future predatory acts of sexual violence was "more likely than not." But the opinions of the State's experts were based on scientifically-derived empirical factors that provided sufficient evidentiary support to sustain the jury's verdict.

1. *Serious difficulty controlling behavior*.

A sexually violent predator is defined as any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. § 632.480(5), RSMo Cum. Supp. 2013. Mental abnormality is defined 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. § 632.480(2), RSMo Cum. Supp. 2013. The Missouri Supreme Court has engrafted onto that definition the requirement that the mental abnormality

cause the offender serious difficulty controlling his behavior. *In re Thomas*, 74 S.W.3d at 792.

Appellant contends that the phrase "serious difficulty controlling behavior" means the behavior of committing a sexually violent offense. He argues that evidence of behaviors not constituting sexually violent offenses are insufficient to establish "serious difficulty." Appellant cites no authority for the proposition. To the contrary, this Court has stated that the SVP statute does not require the presence of a mental abnormality that, in and of itself, predisposes a person to commit sexually violent offenses. *In re Murrell*, 215 S.W.3d at 106. Since "serious difficulty controlling behavior" is part of the definition of mental abnormality, it follows that the State is not limited to proving the continuing commission of sexually violent offenses to establish "serious difficulty."

A finding of serious difficulty can be based on expert testimony about the offender's emotional capacity, even where there is no evidence that the offender had committed any offenses during the six years that he was living in the community on probation. *In re Collins*, 140 S.W.3d 121, 126 (Mo. App. E.D. 2004). In at least one case, a finding of serious difficulty controlling behavior was based, in part, on the SVP's actions of waiting near a school for the arrival of buses, and then hugging and holding hands with ten to twelve year old girls. *In re Amonette*, 98 S.W.3d 593, 601 (Mo. App. E.D. 2003). That

activity does not constitute a sexually violent offense. Non-sexual behaviors have also been used in forming an opinion that an offender had serious difficulty controlling behavior. *See*, *e.g.*, *In re Pate*, 137 S.W.3d 492, 497-98 (Mo. App. E.D. 2004).

The evidence presented in this case is similar to that which has been found sufficient in other cases. All three districts of the Court of Appeals have found that evidence of a pattern of sexually deviant behavior permits a reasonable inference that a mental abnormality has caused, and can be expected to cause, an offender serious difficulty controlling his behavior. *In re Bemboom*, 326 S.W.3d 857, 861 (Mo. App. S.D. 2010) (citing cases).

Appellant's history of deviant behavior begins with his masturbating to fantasies about a three-year-old cousin when he was sixteen-years-old, and his admission that he might have acted on the urges had he had access to the child. (Tr. 155-56). Appellant went on to attempt to rape a teenager at knifepoint and admitted to breaking into other homes with the intent to commit rape. (Tr. 157, 160). Appellant was arrested after accusations that he molested a four-year-old girl. (Tr. 163-64, 167-68). He later admitted to sodomizing the girl on multiple occasions. (Tr. 164). Despite being arrested, Appellant masturbated to fantasies about that victim over the course of several years. (Tr. 168). Appellant went on to commit his index offense after that arrest. (Tr. 168, 170-71). Continuing to offend after legal interventions is

indicative of serious difficulty controlling behavior. *In re Dunivan*, 247 S.W.3d 77, 78 (Mo. App. S.D. 2008).

Appellant viewed child pornography while in out-patient sex offender treatment after becoming bored with adult pornography. (Tr. 177). Appellant continued looking at child pornography even after his treatment was increased. (Tr. 178). Appellant was discharged from treatment and returned to the Department of Corrections due to concerns that he would reoffend. (Tr. 178-79). Failing to benefit from treatment is another factor supporting a finding of serious difficulty controlling behavior. *Id.* Appellant continued masturbating to fantasies about children and told Dr. Kline that his deviant thoughts would increase when he felt lots of negative emotions. (Tr. 180). Dr. Kline concluded that Appellant's pedophilia causes him serious difficulty controlling his behavior because his sexual urges are very, very strong and he continued engaging in behaviors even after being sanctioned for them. (Tr. 189-90). Dr. Kircher likewise opined that Appellant's difficulty with pornography and his inability to keep himself out of situations where children are present demonstrated that Appellant had serious difficulty in controlling his behavior. (Tr. 246). Activities that demonstrate a preoccupation with sex can support a finding of serious difficulty controlling behavior. *In re Doyle*, 428 S.W.3d 755, 763 (Mo. App. E.D. 2014).

Drs. Kline and Kircher based their opinions on information reasonably relied on by experts in their field. (Tr. 152-53, 239). Expert opinions that are based on scientifically-derived empirical factors provide sufficient evidentiary support to sustain a jury's verdict. *In re Kapprelian*, 168 S.W.3d 708, 715 (Mo. App. S.D. 2005), *see also In re Barlow*, 250 S.W.3d 725, 733 (Mo. App. W.D. 2008) (expert's opinion based on three different assessment tools was sufficient). Appellant's criticisms of the reasoning behind the opinions of Drs. Kline and Kircher are an impermissible attempt to ask this Court to reweigh the evidence in his favor. *In re Barlow*, 250 S.W.3d at 734; *In re Morgan*, 398 S.W.3d at 490. It also asks this Court to ignore the standard of review by relying on evidence and inferences that are contrary to the verdict. *In re A.B.*, 334 S.W.3d at 752. Once the expert's testimony was admitted, the jurors were free to give it whatever weight they believed it deserved. *In re Morgan*, 398 S.W.3d at 490; *In re Berg*, 342 S.W.3d 374, 383 (Mo. App. S.D. 2011).

2. *"More likely than not" does not require a showing of greater than fifty-percent*.

Appellant asserts that the SVP Act's use of the term "more likely than not" requires a showing that the probability of re-offense is greater than fifty-percent. 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, *In re 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 Appellant 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 fifty-percent. In other words, Appellant 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.

Appellant is not entitled to relief because he has failed to show a "complete absence of probative fact" to support the judgment. *In re A.B.*, 334 S.W.3d at 752. His point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that the judgment of the circuit court 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 Supreme Court Rule 84.06, and contains 16,478 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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