SC96076

In the Supreme Court of Missouri

In the Matter of the Care and Treatment of

William Hopkins,

Appellant

Appeal from the Circuit Court of Marion County
The Honorable John Jackson, Judge

Respondent's Brief

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STATEMENT OF FACTS

William Hopkins[1] was committed to the custody of the Director of the Department of Mental Health for care, control, and treatment as a sexually violent predator ("SVP") following a jury trial in the Circuit Court of Marion County, Probate Division, the Honorable John Jackson presiding. Tr. 778–79. The jury committed Hopkins upon the following facts:

Hopkins' Offending History

When Hopkins was fifteen, he showed pornography to Cody, a five-year-old boy. Tr. 428. After Hopkins watched pornography with Cody, Hopkins performed oral sex on Cody and had Cody perform oral sex on Hopkins. Tr. 428–29. Subsequent to offending against Cody, Hopkins victimized Noah. Tr. 429. At the time he victimized Noah, Hopkins was still fifteen years old. Tr. 430. Some records indicated that Noah was one-or-two-years old, but other records indicated that Noah was up to five-years-old. *Id*. Hopkins also offended against five-and-seven-year-old girls. Tr. 432. The five-and-the-seven-year-old girls were visiting Hopkins' house, and were in gymnastics. *Id*. Hopkins pulled the girls' pants down while the girls

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[1] Throughout the trial, Hopkins' attorney referred to him as "Greg." Respondent refers to Appellant by his last name.

performed handstands or headstands. *Id*. Hopkins also took the girls to his bed and performed oral sex on them. *Id*.

Hopkins created additional victims after he turned eighteen-years old. Tr. 433. In one instance, Hopkins victimized an eight-year-old girl named Chrissi and a six-year-old girl named Trinity. Tr. 433–34. Hopkins gained access to these children by living with their family and babysitting the victims. Tr. 433. Hopkins gave the girls showers and baths, rubbed them, undressed in front of them, and digitally penetrated one of the girl's vagina. *Id*. He was charged and pleaded guilty to domestic assault for these acts. Hopkins admitted to fondling and molesting these girls. Tr. 434. Around the time that Hopkins was victimizing Chrissi and Trinity, Hopkins was also victimizing a girl named Madisyn by fondling her, rubbing his penis on her, and by digitally penetrating her vagina. Tr. 435. Hopkins was convicted of child molestation for his offenses against Madisyn. *Id*.

Additional testimony indicated that Hopkins "viewed a lot of child pornography." Tr. 432.

Hopkins' Treatment History

As a teenager, Hopkins was placed in juvenile sex offender treatment after he offended against Noah, but before Hopkins offended against the five-and-seven-year-old girls. Tr. 431. After the juvenile sex offender treatment, Hopkins continued to view child pornography. Tr. 644.

Later, Hopkins enrolled in, and eventually completed, the Missouri Sex Offender Program. Tr. 440. Hopkins experienced problems in treatment, and his term in treatment was extended to 365 days. *Id.* While in treatment, Hopkins had telephone contact with a fifteen-year-old girl. Tr. 441. Hopkins self-reported that, while in treatment, he had sexual fantasies about children. Tr. 442. Some of these fantasies involved "S&M" behaviors. Tr. 444. When Hopkins was asked what he learned in treatment, Hopkins responded that he "learned [he] was an asshole and that he was working on some anger problems." Tr. 648. Hopkins did not say that he had addressed his sexual attraction to children, or that he had learned to control his sexual fantasies. Tr. 648.

Dr. Nena Kircher

Dr. Nena Kircher, a licensed psychologist, evaluated Hopkins to determine if he was an SVP. Tr. 638–39. She testified that, at the time she evaluated Hopkins, she had performed 200 and 300 evaluations. Tr. 640. Dr. Kircher reviewed Hopkins' records from the Department of Corrections, records from the Board of Probation and Parole, records from Hopkins' time in MoSOP, and treatment notes from Hopkins' MoSOP therapist, Shawn Lee. Tr. 640–41.

Dr. Kircher testified that she looked for a mental abnormality. Tr. 643. Dr. Kircher testified that Hopkins suffered pedophilia. Tr. 643. Dr. Kircher

also explained that Hopkins' pedophilia caused him serious difficulty controlling his sexual behavior. Tr. 650. Dr. Kircher explained that not every pedophile is a sexually violent predator, but that in her opinion, Hopkins is. Tr. 729.

Dr. Kircher also testified that she performed a risk assessment. Tr. 651. Dr. Kircher scored Hopkins on the Static-99R and the Stable-2007. Tr. 651–57. She scored Hopkins a 7 on the Static-99R. Tr. 651. A score of 7 is in the high risk category. Tr. 653. A score of 7 places Hopkins in the 97th percentile. Tr. 653. Dr. Kircher also scored Hopkins on the Stable-2007. Tr. 655. She scored Hopkins as a 16. Tr. 669. A score of 16 is in the high-risk category. Tr. 671. Dr. Kircher testified that Hopkins' Stable-2007 score before he started MoSOP was 16, and that when she interviewed Hopkins after MoSOP, his score was still 16. Tr. 673.

Dr. Kircher also testified that she considered additional risk factors from the literature. Tr. 674. Dr. Kircher found that Hopkins' risk was increased by his sexual preoccupation, by Hopkins' history of never having been married, by Hopkins' general self-regulation problems, by Hopkins' poor cognitive problem solving, by Hopkins' grievance/hostility, and by Hopkins' emotional congruence with children. Tr. 676. Dr. Kircher also looked at factors which decrease risk: age, physical condition, and successful completion of treatment. *Id.* Dr. Kircher explained that Hopkins was not

entitled to a risk reduction for successfully completing treatment because he could not articulate anything that he had learned in treatment. Tr. 680. After considering the actuarials and the additional risk factors, Dr. Kircher opined that Hopkins was more likely than not to commit a future predatory act of sexual violence unless confined in a secure facility. Tr. 689.

Dr. Kircher's opinion was that Hopkins did meet the criteria as a sexually violent predator under Missouri law. Tr. 683.

Dr. Randy Tealander

Dr. Randy Tealander, a licensed psychologist with the Missouri Department of Mental Health, evaluated Hopkins. Tr. 420. Dr. Tealander testified that he diagnosed Hopkins with pedophilia. Tr. 426–27. Dr. Tealander also explained that in Hopkins' case, pedophilia was a mental abnormality under Missouri law. Tr. 454–55.

Dr. Tealander also performed a risk assessment. Tr. 455. Dr. Tealander scored Hopkins on the Static-99R, and testified that Hopkins had a score of 6. Tr. 471. Dr. Tealander explained that a score of 6 corresponded to the high risk category. Tr. 471. Dr. Tealander also considered Hopkins' additional risk factors from the literature. Tr. 475. Dr. Tealander was asked if he had formed an opinion as to whether Hopkins was "more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility" and Dr. Tealander said that Hopkins was more likely than not. Tr. 479.

Dr. Tealander's opinion was that Hopkins is an SVP. Tr. 480.

Shawn Lee

Mr. Shawn Lee also testified at trial. Tr. 576. Mr. Lee is a licensed clinical social worker. Tr. 576. Mr. Lee provided group therapy treatment to Hopkins as part of the MoSOP program. Tr. 579. Mr. Lee testified that Hopkins completed all the assignments presented to him, but that Hopkins did not internalize the treatment concepts. Tr. 581–82. Mr. Lee testified that during treatment, Hopkins discussed his sexual fantasies and Mr. Lee further explained that "some of [Hopkins' fantasies] were fixated around kids." Tr. 583. Mr. Lee also testified that Hopkins told the group that Hopkins "was going to continue doing what he'd always done...." Tr. 587. Mr. Lee told the jury about Hopkins' history of impulsively acting out, and then Mr. Lee told the jury that "the thing I really enjoyed about Mr. Hopkins was that he would come back around" and Hopkins would admit when he was wrong—but only after the fact. Tr. 588. Mr. Lee also described a situation where Hopkins had revealed that he was having contact with a fifteen-year-old girl while he was in treatment. Tr. 589. Hopkins also told Mr. Lee about his desire to return to high risk offending situations and that Hopkins' desire to do so was why his time in treatment was extended. Tr. 589. Mr. Lee also explained that, although Hopkins "tried his best" in treatment, Hopkins was not able to learn to "intervene on himself in a timely fashion." Tr. 590.

Probate Court's Judgment

The jury found that Hopkins was an SVP. Tr. 778–79. On February 18, 2016, the probate court issued its Judgment and Commitment Order finding that Hopkins was an SVP and committing him to the custody of the Department of Mental Health for control, care, and treatment until such time as Hopkins' mental abnormality had so changed that he was safe to be at large. L.F. 177.

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, Hopkins alleges that he is entitled to relief because, in Hopkins' view, several portions of the SVP Act do not pass strict scrutiny. 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.

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." *Id.* (citations omitted). Under strict scrutiny review, the challenged provision must be narrowly tailored to achieve a compelling state interest. *Norton*, 123 S.W.3d at 174.

Analysis

In *In re Norton*, 123 S.W.3d 170 (Mo. 2003), and *Bernat v. State*, 194 S.W.3d 863 (Mo. 2006), this Court held that the Missouri SVP Act was subject to strict scrutiny review because the SVP Act "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Bernat*, 194 S.W.3d at 867–68 (quoting *In re Norton*, 123 S.W.3d at 173). 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. The State respectfully requests that this Court reconsider its prior rulings.

Recently, the United States Court of Appeals for the Eighth Circuit was asked to decide if the Minnesota SVP act was subject to strict-scrutiny review. *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017) (pet. for r'hrg en banc filed Jan. 31, 2017). The Eighth Circuit held that SVP acts do not implicate a fundamental right to liberty and so are subject to rational basis review. In *Karsjens*, 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. *Karsjens*, 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 United States Supreme Court was confronted with this question in *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Id.*

In *Hendricks*, the United States Supreme Court has 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. *Hendricks*, 521 U.S. at 375. As the United States Supreme Court pointed out, the involuntary commitment of "people who are unable to control their behavior and who thereby pose a danger to the public health and safety" is a long standing practice. *Id.* (citing 1788 N.Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); *see also* A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes)).[2] After reviewing this long standing history, the United States Supreme Court concluded "it thus cannot be said that the involuntary civil confinement of a limited

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

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." *Karsjens*, 845 F.3d at 407 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) (Eighth Circuit's emphasis). After considering these United States 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. *Karsjens*, 845 F.3d at 407–08.

This Court should adopt the Eighth Circuit's reasoning. In *Norton*, this Court found that the SVP Act does implicate 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, 68 (1992), and *Hendricks*, 521 U.S. at 346). In *Bernat*, 194 S.W.3d at 868, this Court reaffirmed its holding in *Norton*. But *Heller*, *Vitek*, *Foucha*, and *Hendricks* do not require the conclusion that the SVP Act implicates a fundamental right.

In *Heller v. Doe*, the United States 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—under different standards than the mentally ill—survived rational basis review even though the mentally retarded lost some measure of liberty when they were committed. *Id*. at 325–26.

Likewise, the United States 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 United States 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*, 504 U.S. 71 (1992), also does not require the application of strict scrutiny. The portion of *Foucha* that discusses the Equal Protection Clause, Part III, is a plurality opinion signed by Justices White, Blackmun, Stevens, and Souter.

Further still, Justice Thomas' dissent[3] aptly points out that the majority "never explains whether we are dealing here with a fundamental right..." in either the due process analysis or the equal protection analysis. *Foucha*, 504 U.S. at 116 (Thomas, J., dissenting). The Eighth Circuit found Justice Thomas' point persuasive, and Respondent urges this Court to as well. *Karsjens*, 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 *Hendricks*, which has been clarified by the United States Court of Appeals for the Eighth Circuit. *Norton* also relies on *Heller*, *Vitek*, and *Foucha*, but as demonstrated *supra*, those decisions do 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.

Conclusion

Because the Missouri Sexually Violent Predator Act does not implicate a fundamental right—that is, a right that is deeply rooted in this Nation's

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

history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed—this Court should overturn its precedents subjecting the SVP Act to strict scrutiny review.

ARGUMENT II

The probate court did not err in refusing to grant Hopkins' pre-trial motions to dismiss (A) because the SVP Act is not punitive; (B) the SVP Act does not violate the Due Process Clause or the Equal Protection Clause; and (C) because even if Hopkins is correct about the release procedures, that only entitles Hopkins to proper application of the release procedures. – Responds to Appellant's Point I.

In his first point, Hopkins presents two separate arguments about why the probate court should have granted his pre-trial motions to dismiss. Hopkins' Br. 31–43. Hopkins first argues that the SVP Act is unconstitutional because the purpose of the act is punitive in violation of the *Ex Post Facto* and Double Jeopardy Clauses. Hopkins' Br. 35–39. Hopkins next argues that the SVP Act violates the Due Process Clause and the Equal Protection Clause because it does not allow for unconditional release. Hopkins' Br. 39–43.

Standard of Review

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. *See State v. Mack*, 66 S.W.3d 706, 710 (Mo. 2002) ("general declarations of law made by lower

federal courts do not bind this Court"). Instead, this Court is bound only by decisions from the United States Supreme Court. *Hanch v. K.F.C. Nat. Management Corp.*, 615 S.W.2d 28, 33 (Mo. 1981).

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

Discussion

Hopkins' first argument is that the SVP Act is unconstitutional because the purpose of the act is punitive in violation of the *Ex Post Facto* and Double Jeopardy Clauses. Hopkins is mistaken. This Court has already explained that the SVP Act *is not punitive*. Hopkins' second argument is that the SVP Act violates the Due Process Clause and the Equal Protection Clause because it does not allow for unconditional release. But the SVP Act does not have to allow for unconditional release. Hopkins also alleges throughout this point that the SVP Act release procedures are being applied unconstitutionally, and he complains that the probate court did not grant his motions to dismiss. But Hopkins *never* presented any evidence about the release procedures to

the probate court. Hopkins cannot convict the probate court of error based on a legal argument Hopkins never presented.

A. The SVP Act is not punitive in nature and therefore does not violate the *Ex Post Facto* Clause or the Double Jeopardy Clause.

In his first argument, Hopkins contends that the United States District Court's decision in *Van Orden v. Schafer*, 129 F.Supp.3d 839 (E.D. Mo. Sept. 11, 2015, *modified* Dec. 22, 2015), means that the SVP Act violates the *Ex Post Facto* Clause and the Double Jeopardy Clause. Hopkins' argument is not persuasive because *Van Orden v. Schafer* is not applicable in this case, and because Hopkins has confused the *purpose* of the SVP Act with what he says is the *implementation* of the SVP Act.

The *Ex Post Facto* and Double Jeopardy Clauses do not apply to SVP acts unless the act is criminal, not civil, in nature. *Hendricks*, 521 U.S. at 361. This Court has previously held that "[a]lthough the proceedings involve a liberty interest, *they are civil proceedings*." *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. 2008) (emphasis supplied). So, the SVP Act is civil, not criminal in nature. Under this Court's ruling in *Van Orden*, Hopkins' argument fails. Hopkins attempts to avoid this Court's ruling in *Van Orden* by relying on the federal case of *Van Orden v. Schafer*, and by arguing that this Court may not question the federal *Van Orden v. Schafer*'s holding.

In *Van Orden v. Schafer*, a group of Sexually Violent Predators filed suit against Missouri and alleged among other things, that the SVP Act was facially unconstitutional, and unconstitutional as applied to them. *Van Orden v. Schafer*, 129 F.Supp.3d at 843. *Van Orden v. Schafer* is not a final decision, but instead represents the United States District Court's findings of fact and conclusions of law after a bench trial on liability. *Id.* Hopkins relies on *Van Orden v. Schafer*'s non-final holding that the release provisions were being unconstitutionally implemented because the Department of Mental Health was making it too difficult to progress through the treatment program. The remedy phase is still on-going, so the district court's fact-finding function is not yet complete. The district court rejected the facial challenge to the SVP Act. *Id.* at 865. The district court also rejected the plaintiff's as-applied challenge to the SVP Act's treatment provisions. *Id.* at 867.

However, the district court did sustain the challenge to the SVP Act's release procedures as-applied to the plaintiffs. *Id.* at 867–870. The district court has not ordered the release of the plaintiffs, but has ordered Missouri to apply the SVP Act in a constitutional manner to the plaintiffs. *Id.* at 871.

The non-final holding in *Van Orden v. Schafer* does not support Hopkins' argument for relief. Hopkins summarily concludes that the SVP Act violates the *Ex Post Facto* and Double Jeopardy Clauses because of the holding in *Van Orden v. Schafer*. Hopkins' Br. 39.

Even if the federal district court was correct that the SVP Act was being improperly implemented, then it does not follow that the Act is punitive in nature now or at the time of Hopkins' trial. *Van Orden v. Schafer* is not final. Missouri is actively engaged in efforts to comply with the district court's order. Hopkins is silent about what developments have happened since the *Van Orden v. Schafer* order was issued in 2015. For instance, Hopkins' brief does not mention that there are at least ten 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 County Cir. Ct.); *In re Claude Hasty*, 12DE-PR00001 (Dent County Cir. Ct.); *In re Larry Lusby*, 39P049900137 (Lawrence County Cir. Ct.); *In re Lou Martineau*, 05NW-PR00096 (Newton County Cir. Ct.); *In re Jessie Moyers*, 02PR323155 (Cole County Cir. Ct.); *In re Wade Turpin*, 17P020100226 (Cass County Cir. Ct.); *In re Jessie Heikes*, 02PR72340 (Buchanan County Cir. Ct.); *In re Joseph Johnson*, 40P059900127 (Newton County Cir. Ct.).

Moreover, Hopkins' brief does not mention that five petitions for conditional release have been granted since August, 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); *In re Steven Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.) (conditional release granted Oct. 26, 2016); *In re Charles St. Clair*, 02PR610339 (Washington County Cir. Ct.) (conditional release granted Feb. 09, 2017).

Regardless of the status of the federal litigation, Hopkins cannot obtain relief from this Court. This is a direct appeal under Article V of the Missouri constitution. MO. CONST. ART. V, § 3. As such, the question for this Court is: did the probate court commit an error of law based on the record? 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, Hopkins has not provided "the clearest proof" because he has provided no proof at all. There is nothing in the record before the probate court—or the record before this Court—about the way in which the SVP Act is implemented.

There is not sufficient evidence, let alone "the clearest proof" that Missouri's SVP Act is punitive in application. The non-final nature of *Van Orden v. Schafer* and the lack of any evidence about what has happened in the months since *Van Orden v. Schafer* demonstrates that this Court cannot rely on the district court's decision.

Without evidence, Hopkins 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. Therefore, this Court should reject Hopkins' first argument.

B. Hopkins has not shown that the SVP Act violates either the Due Process Clause or the Equal Protection Clause.

In his second argument, Hopkins asks this Court to find that the SVP Act is facially unconstitutional under the federal and Missouri constitutions' due process and equal protection guarantees. Hopkins' Br. 39. Specifically, Hopkins complains about the annual review process, Hopkins complains that the Director of the Department of Mental Health has never authorized a conditional release, and Hopkins complains about the standard of proof that is placed on the SVPs in order to seek release. Hopkins' Br. 39–41. As described *supra*, these claims are not reviewable because Hopkins has placed no evidence in the record about them. Hopkins also complains about legal provisions in the act, which are reviewable. Hopkins' Br. 41–42. But these complaints do not merit relief.

In this Court's decision in *In re Van Orden*, two concurring judges and one dissenting judge questioned whether Missouri's SVP Act was constitutional because it did not explicitly provide for unconditional release. *Van Orden*, 271 S.W.3d at 586 n.5. However, the majority pointed out that

issue was not before the Court because the SVPs had failed to "show that they were entitled to unconditional releases." *Id.*

For instance, Hopkins alleges that it is a procedural or substantive due process violation that he is not allowed to appear in person at the pre-trial conditional release hearing and that subsequent petitions for conditional release may be deemed frivolous. Hopkins' Br. 41–42. But as Hopkins admits, those provisions of the act only become problematic *if the act is punitive*. Again, Hopkins has failed to adduce any proof that the SVP Act is punitive in nature.

Hopkins also raises a host of complaints in this section which are repeated throughout his brief in separate points. Hopkins' Br. 43. Respondent provides those claims with separate analysis under their own points. Hopkins' allegation that the SVP Act should be subject to strict scrutiny is discussed in more detail in Point I. In that point, the State demonstrates that this Court should reconsider, and overturn, its past precedent that the SVP Act is subject to strict scrutiny. The SVP Act should be subject to rational basis review, and each of these provisions survives rational basis review.

Moreover, Hopkins has not demonstrated that he would be entitled to unconditional release. Hopkins' main complaint is with the release procedures. If Hopkins wishes to assert he is entitled to unconditional release, he can raise that claim when he files a petition for conditional

release. Hopkins' claim is not ripe on direct appeal because Hopkins *has not* filed any petitions for release. Hopkins cannot attack the commitment procedures in his case by asking this Court to assume that the State will act unconstitutionally in the future.

C. Hopkins is not entitled to a new trial or immediate discharge because if Hopkins' complaints about the SVP Act's release procedures are well-founded, then Hopkins is only entitled to proper application of the release procedures.

Even if Hopkins had placed facts in the record concerning how the release procedures are administered, and even if this Court found a constitutional violation, then the correct remedy would not be to discharge Hopkins. 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*, 404 S.W.3d 232 (Mo. 2013), 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.[4] This Court found a constitutional violation—the

[4] The appellant asked the Court to impose a second-degree murder conviction and sentence. *Id.* at 237. But this was an alternative request for relief. 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 sentence 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*.

The premise in *Hart*—that the scope of relief should only remedy the wrong—means that Hopkins is not entitled to discharge. Hopkins' claim is that the release procedures are unconstitutionally applied (Hopkins' Br. 30–36). The remedy for that alleged wrong is not to invalidate the commitment trial. Instead, if this Court agrees with Hopkins, the proper relief would be an order that the Department of Mental Health properly apply the release procedures.

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appellant's primary request was for complete discharge. *See* Appellant's Br. at 68, *State v. Hart*, SC93153.

Conclusion

The probate court did not err in refusing to grant Hopkins' pre-trial motions to dismiss (A) because the SVP Act is not punitive; (B) the SVP Act does not violate the Due Process Clause or the Equal Protection Clause; and (C) because even if Hopkins is correct about the release procedures, then he is only entitled to proper application of the release procedures. Hopkins is not entitled to relief.

ARGUMENT III

The probate court did not err when it denied Hopkins' motion to dismiss or when it refused to use the beyond a reasonable doubt standard because the clear and convincing evidence standard satisfies the Due Process Clause. – Responds to Appellant's Point II.

In his second point, Hopkins argues that the probate court should have granted his motion to dismiss because the SVP Act requires the use of the clear and convincing evidence standard for the burden of proof. Hopkins' Br. 44–51. This Court should reject Hopkins' argument because the clear and convincing evidence standard satisfies due process.

Standard of Review

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

Analysis

A. The clear and convincing-evidence standard is the proper burden of proof.

In *Addington v. Texas*, the United States Supreme Court explained that the beyond a reasonable doubt standard is not required by the federal

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

This Court followed the United State Supreme Court's guidance when it decided *In re Van Orden*. In *Van Orden*, this Court considered the 2006 amendments to the SVP Act and determined that clear and convincing evidence was the appropriate burden of proof. *Id.* at 586. This Court recognized that the SVP Act implicates a sexually violent predator's liberty interest. *Id.* at 587. But the SVP Act does not totally remove an SVP's liberty. SVPs are *not* subject to indefinite physical commitment. *Id.* If an SVP is committed, they receive an annual review to determine if their mental abnormality has changed to a degree that makes physical commitment no longer necessary. *Id.* A probate court reviews the report. *Id.* Even if the report recommends *against* release, the SVP may still file a petition for release. *Id*. Moreover, if the petition for conditional release is denied, the SVP may obtain appellate review. *See, e.g. Barlow v. State*, 114 S.W.3d 328, 331–

32 (Mo. App. W.D. 2003) (holding that the general appellate statute applies to proceedings under the SVP act).

The SVP Act also provides an alleged SVP with "many of the same rights as a criminal defendant, including a formal probable cause hearing, the right to a jury trial, the right to an attorney, and the right to an appeal." *Van Orden*, 271 S.W.3d at 585.

The *Van Orden* Court also found that the purpose of the SVP Act is to protect society and to provide mental health treatment to SVP's in need of such treatment. *Id*. As this Court noted, the "Missouri General Assembly has identified sexually violent predators as a very real threat to the safety of the people of Missouri." *Murrell*, 215 S.W.3d at 102. In *Van Orden*, this Court considered the effect of the Act on those physically committed, the pre-commitment protections, and the purpose of the SVP Act. Then, this Court concluded that clear and convincing evidence was a permissible burden of proof. *Van Orden*, 271 S.W.3d at 585–86. This Court explained its reasoning, holding that the clear and convincing standard properly allocated the risk between the State and the putative SVP, and that the SVP Act protected the rights of putative SVPs. *Id*.

Missouri is not the only state with a legislative branch that has chosen to use the clear and convincing evidence standard. *See, e.g.,* FLA. STAT. § 394.917(1) ("The court or the jury shall determine by clear and convincing

evidence whether the person is a sexually violent predator"); N.J. STAT. ANN. § 30:4-27.32(a) ("If the court finds by clear and convincing evidence that the person needs continued involuntary commitment as a sexually violent predator..."); VA. CODE ANN. § 37.2-908(C). In fact, the federal government has also adopted the clear and convincing evidence standard. *United States v. Comstock*, 560 U.S. 126, 130–31 (2010).

Hopkins is really arguing that *Van Orden* was wrongly decided. Hopkins argues that *Van Orden* is no longer good law because the SVP Act was amended to remove unconditional release. But the burden of proof was changed in the same bill that replaced discharge with conditional release. So, when the *Van Orden* Court wrote that "if commitment is ordered, the term of commitment is not indefinite," this Court was describing conditional release. *Van Orden*, 271 S.W.3d at 586.

Moreover, Hopkins has committed the same error the SVPs committed in *Van Orden*; Hopkins has not demonstrated that he would be entitled to unconditional release. *Van Orden*, 271 S.W.3d at 586 n.5. The probate court committed Hopkins on February 18, 2016. L.F. 177. Because less than one year has passed (at the time of this filing), Hopkins has not yet received his annual review and has not yet petitioned for conditional release. Accordingly, Hopkins is in the same position as the SVPs in *Van Orden* in that he has not shown that he would be entitled to conditional or unconditional release. That

is a sufficient reason, standing alone, to reject Hopkins' challenge to the burden of proof.

B. The 2006 amendments that replaced "discharge" with "conditional release" are not unconstitutional and do not justify raising the burden of proof.

Hopkins also asserts that the burden of proof must be raised to beyond a reasonable doubt because the 2006 amendments replaced "discharge" with conditional release. Hopkins' Br. 48. But this change does not violate due process protections because the SVP Act allows a court, on its own motion, to remove all of the conditions for release. MO. REV. STAT. § 632.505(6) ("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." MO. REV. STAT. § 632.505.3. That provision empowers the probate court to remove all the conditions of the conditional release if no conditions are necessary for the SVP's treatment or the public safety. If this Court believes that the SVP Act requires at least one condition must remain, then the probate court could impose a single condition: that the SVP never commit a sexually violent offense. Such a condition is a "*de minims* level of imposition

with which the Constitution is not concerned." *Bell v. Wolfish*, 441 U.S. 520, 539 n.21 (1979) (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)).[5] This reasonable construction of the statute saves the SVP Act from Hopkins' facial challenge.

Hopkins also contends that if he is conditionally released, then it is "impossible" for him to regain his liberty because an annual review is not required under the statute. Hopkins' Br. 47. Not so. The plain language of the statute provides that Hopkins or the State can institute proceedings to reduce or remove conditions at any time. Section 632.505.5. Moreover, the probate court can remove conditions *sua sponte*. *Id.* Hopkins is asking this Court to stack inference (that he will someday be safe enough for conditional release) upon inference (that the probate court will ignore its duty under the law) and then conclude that these inferences support his desire for a new trial. This Court should decline to adopt Hopkins' reasoning.

Finally, Hopkins has not demonstrated why he should receive a new trial with a higher burden of proof, even assuming that the release

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[5] This is the authority that Respondent was asked for during oral argument in *In re Jay Nelson*, SC95975. Oral Argument at 15:24, *In re Jay Nelson*, SC95975 (Argued Jan. 12, 2017).

procedures will be improperly implemented. In that scenario, the proper remedy would be for Hopkins to bring suit to enforce the release procedures.

Conclusion

Hopkins was not entitled to the beyond-a-reasonable-doubt instruction in this case. The SVP Act's use of clear and convincing evidence is, on its face, constitutional under *In re Van Orden*. And, the 2006 amendments, which instituted conditional release, did not require the legislature to raise the burden to beyond a reasonable doubt. Moreover, Hopkins cannot bring an as-applied challenge to the use of the clear and convincing evidence standard because the release procedures Hopkins complains about have not yet been applied to Hopkins. This Court should deny this point.

ARGUMENT IV

The probate court did not err when it denied Hopkins' motion to dismiss because this Court has held that the SVP Act is not required to offer treatment in the least restrictive environment. – Responds to Appellant's Point III.

In his third point, Hopkins argues that the probate court should have granted his motion to dismiss because the SVP Act does not allow placement in the least restrictive environment. Hopkins' Br. 52–55. This Court should reject Hopkins' argument because nothing requires the SVP Act to offer the least restrictive environment. And, even if Hopkins was entitled to treatment in the least restrictive environment, the remedy is not to reverse the probate court and release Hopkins into the community.

Standard of Review

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

Analysis

In his third point, Hopkins asserts that Missouri's SVP Act violates the Due Process Clause and the Equal Protection Clause because the Act does

not allow for SVP to be placed in the least-restrictive environment. Hopkins' Br. 52–55. This Court has rejected the least-restrictive environment argument and Hopkins fails to distinguish his situation from this Court's prior opinion. Moreover, even if Hopkins was entitled to treatment in the least restrictive environment, then the remedy is to change the treatment environment, not overturn his commitment.

A. This Court has held that the Due Process Clause does not require the SVP Act to consider the least restrictive environment.

In *In re Norton*, this Court found that "secure confinement of persons adjudicated to be SVPs, as provided in sections 632.480 to 632.513, is narrowly tailored to serve a compelling state interest." *In re Norton*, 123 S.W.3d at 174. This Court explained that the State has a compelling interest in protecting the public from crime. *Id.*[6] The *Norton* Court then explained that the State's interest in protecting the public from crime justified treating SVPs differently from other mental health patients. *Id.*

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

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[6] 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).

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. *Norton*, 123 S.W.3d at 174–75. Hopkins received all those rights. It is true that the *Norton* Court also identified the beyond a reasonable doubt standard[7] as a procedural safeguard. *Id.* at 174. But this Court has subsequently held that an SVP's rights are sufficiently protected by the clear and convincing evidence standard used at Hopkins' trial. *In re Van Orden*, 271 S.W.3d at 586.

The *Norton* Court also found that there were statutory provisions for court review and "dismissal from secure confinement." *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 released to the community. *See, e.g., In re James Fennewald*, 06B7-PR00024 (Boone County Cir. Ct.) (July 13, 2016) (Order revoking conditional release and specifying that SVP be returned to physical

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[7] Other SVPs have argued that the use of the beyond a reasonable-doubt standard was proof that the SVP Act was punitive in nature. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 840 n.5 (Mo. App. W.D. 2000).

custody in a secure facility after having been released to the community); *see also In re Michael Allison*, 04PR124569 (St. Charles County Cir. Ct.) (petition to revoke conditional release filed Jan. 23, 2017).[8]

On balance, the SVP Act has not changed since the *Norton* decision in a way that would require this Court to overrule *Norton*'s holding that the SVP Act is not required to offer treatment in the least restrictive environment. Hopkins' arguments are grounded in the statutory language that was affirmed in *Norton*. This Court should reject Hopkins' argument.

B. Even if Hopkins were right—which he is not—then the proper remedy is to change the treatment environment, not overturn his commitment.

In the alternative, even if the statute was unconstitutionally applied to men who were entitled to a less restrictive environment, Hopkins could not receive the relief he has requested because he asks for the probate court's judgement to be overturned and for his immediate release. Hopkins' Br. 55. Hopkins does not explain why the absence of the "least restrictive

[8] Petition for revocation alleges, in part, that Allison used a secret cellular telephone to access pornography (including child pornography), to modulate his voice, and to uncover personally identifying information of SORTS employees.

environment" language violates his constitutional rights. Further still, Hopkins does not explain why the remedy in this case is to overturn the probate court's judgment and return him to the community. If Hopkins' complaint is that the act does not offer the least restrictive environment, and Hopkins is correct that it must offer the least restrictive environment, then the solution is to impose that requirement, not to declare the entire SVP Act unconstitutional and release men, like Hopkins, who have been found to have a mental abnormality and who have been found to be more likely than not to commit acts of predatory sexual violence unless confined. This Court has rejected arguments like Hopkins' argument in the context of a criminal case.

In *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.[9] 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

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[9] The appellant asked the Court to impose a second-degree murder conviction and sentence. *Id.* at 237. But this was an alternative request for relief. The appellant's primary request was for complete discharge. *See* Appellant's Br. at 68, *State v. Hart*, SC93153.

constitutional violation was that the sentence 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.*

The premise in *Hart*—that the scope of relief should only remedy the wrong—means that Hopkins is not entitled to have his trial invalidated. Hopkins' claim is that the SVP Act is unconstitutional for failure to consider the least restrictive environment. The remedy for that alleged wrong is not to invalidate the commitment trial. Instead, if this Court agrees with Hopkins, the proper relief would be an order that the Department of Mental Health can place men in the least restrictive environment.

Conclusion

Hopkins' claim that the SVP Act is unconstitutional because it does not consider the least restrictive environment is meritless because, as a matter of law, this Court has previously held that the SVP Act does not need to consider a less restrictive environment. And, even if Hopkins' legal argument were correct—which it is not—then the proper remedy is to change the treatment environment, not overturn his commitment.

ARGUMENT V

The probate court did not err when it denied Hopkins' motion to dismiss because the SVP Act does require the State to prove that a putative SVP has serious difficulty controlling his behavior. – Responds to Appellant's Point IV.

In his fourth point, Hopkins contends that the SVP Act violates the Due Process Clause and the Equal Protection Clause because the SVP Act does not always require the State to prove that a putative SVP has serious difficulty controlling his behavior. Hopkins' Br. 56–58. This Court should reject Hopkins' argument because this Court has previously found that Missouri's SVP Act *does* require the state to prove that a putative SVP has serious difficulty controlling his behavior.

Standard of Review

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

Analysis

In *Thomas v. State*, 74 S.W.3d 789 (Mo. 2002), two putative SVPs argued that Missouri's SVP Act was unconstitutional because Missouri's

statute did not define "mental abnormality" so as to include the requirement that the mental abnormality causes "serious difficulty in controlling his behavior." *Thomas*, 74 S.W.3d at 791. This Court agreed that the jury instructions given at the trials did not comply with the United States Supreme Court's instructions in *Hendricks*, 521 U.S. 346, and *Kansas v. Crane*, 534 U.S. 407 (2002). So, this Court remanded the case back to the probate court with the requirement that the probate court include a jury instruction that read, "As used in this instruction, 'mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior." *Thomas*, 74 S.W.3d at 792 (emphasis removed).

In Hopkins' case, the *Thomas* jury instruction was given. L.F. 486. Hopkins' main argument seems to be that the Missouri General Assembly did not amend the SVP Act to require "proof of serious difficulty controlling behavior" after this Court decided *Thomas*. Hopkins' Br. 45. There was no need for the General Assembly to modify the statutory language of the SVP Act because this Court rejected the argument that the SVP Act was constitutionally infirm. *Thomas*, 74 S.W.3d at 791 n.1. The argument that Hopkins makes now was made by the dissent and rejected by the majority. *Id.* at 793 (Limbaugh, C.J. dissenting).

Moreover, Hopkins has reversed the relationship between the judicial and legislative branches. Missouri courts have consistently held that the General Assembly "is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent." *See, e.g., Kolar v. First Student, Inc.,* 470 S.W.3d 770, 777 (Mo. App. E.D. 2015); *see also State v. Rumble*, 680 S.W.2d 939, 943 (Mo. 1984). But Hopkins asks this Court to ignore this well-established rule, and to punish the General Assembly for approving this Court's interpretation of the statute. This Court should decline Hopkins' invitation.

Hopkins also contends that this Court must consider if it is permissible for the definition of mental abnormality to include "emotional or volitional capacity" as a disjunctive test. Hopkins' Br. 45–6. Hopkins argues that neither *Hendricks* nor *Crane* considered this question. Hopkins' Br. 45. The disjunctive construction of the statute does not present a problem for two reasons.

First, the United States Supreme Court found that an identical definition satisfied substantive due process concerns. *Hendricks*, 521 U.S. at 356. Hopkins has not advanced a compelling reason to disregard the *Hendricks* decision.

Second, even if an individual had a condition that affected only the putative SVP's "emotional capacity," Missouri law still requires that

condition to cause the putative SVP "serious difficulty controlling his behavior." *Thomas*, 74 S.W.3d at 792. In other words, even if the problem is emotional in nature, Missouri law still requires the result to be serious difficulty controlling behavior. *Id.* Under that formulation, the definition of mental abnormality passes constitutional muster because it requires a lack of volitional capacity, which Hopkins admits would satisfy constitutional concerns.

Conclusion

The Missouri General Assembly did not need to amend the definition of mental abnormality after this Court's decision in *Thomas*. Under *Thomas*, the SVP Act requires the State to prove that a putative SVP has serious difficulty controlling his behavior. Accordingly, Hopkins has not demonstrated a constitutional violation, and he is not entitled to relief.

ARGUMENT VI

The probate court did not err by holding a jury trial because it is not a constitutional violation to receive a jury trial, and because Hopkins did not establish that, but for the State's request, the probate court would have held a bench trial. – Responds to Appellant's Point V.

In his fifth point, Hopkins contends that the probate court violated his rights to due process and equal protection because he received a jury trial. Hopkins' Br. 59–62. Hopkins is not entitled to relief because he has not demonstrated that, but for the State's request, the probate court would have held a bench trial. Moreover, our system recognizes that a jury is a fair fact-finder; it is not a constitutional violation for Hopkins to receive a jury trial. And finally, Section 362.492 survives both rational basis and strict scrutiny review.

Standard of Review

This Court will not issue an advisory opinion, that is, this Court will not presume that error occurred and then issuing a ruling on that error. *State v. Hartman*, 488 S.W.3d 53, 61 (Mo. 2016); *see also In re Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 841 n.4 (Mo. 2005).

In a civil case, there is a right to a fair trial. *Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 87 (Mo. 2010), *citing Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 875 (2009).

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*, 428 S.W.3d at 640; *In re Norton*, 123 S.W.3d at 173. Under rational basis review, this Court will uphold the statute if it is "justified by any set of facts." *Id.* (citations omitted). Under strict scrutiny review, the challenged provision must be narrowly tailored to achieve a compelling state interest. *Norton*, 123 S.W.3d at 174.

Analysis

A. Hopkins is not entitled to relief because the record does not reflect that the probate court would have consented to a bench trial.

Hopkins is asking this Court to issue an advisory opinion because there is no indication in the record that the probate court would have consented to a bench trial. The SVP Act permits the State, the Respondent, or the probate court to demand a jury trial. MO. REV. STAT. § 632.492 ("The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury"). Although Hopkins is right that the State demanded a jury

trial, that does not end the inquiry. Tr. 141–42. The probate court overruled Hopkins motion for a bench trial, and Hopkins did not ask the probate court to make a record on whether the probate court would have demanded a jury trial. Tr. 141–42. Because Hopkins did not create a record about whether the probate court would have allowed a bench trial, Hopkins is asking this Court to guess what the probate court would have done. In other words, Hopkins is asking for an advisory opinion.

When a party complains of anticipated error, and does not demonstrate that the error would have actually occurred, the party is asking this Court to issue an advisory opinion. *State ex rel. Tipler v. Gardner*, --- S.W.3d ---, 2017 WL 405805, slip op. at 1 (Mo. 2017) (quoting *State ex rel. Westfall v. Gerhard*, 642 S.W.2d 679, 681 (Mo. App. E.D. 1982)). "This Court will not issue an advisory opinion." *Hartman*, 488 S.W.3d at 61; *see also In re Schottel*, 159 S.W.3d at 841 n.4.

Because Hopkins has presented no record of what the probate court would have done if the State had not made a request for a jury trial, Hopkins is asking this Court to render an advisory opinion. This Court should decline to do so.

B. Hopkins' constitutional rights were not violated when he had a jury trial.

If Hopkins has presented a live controversy, then he is not entitled to relief for three reasons. First, Hopkins has not shown how the use of a jury trial violates his constitutional rights. Second, Section 632.492 should receive rational basis review, not strict scrutiny review. And third, Section 632.492 survives either standard of review.

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

Hopkins has contended that his constitutional rights were violated because he had a jury trial. This allegation is without support. A trial by jury is "the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part). The right to a trial by jury is the only right that exists within the Constitution and within the Bill of Rights. U.S. CONST. ART. III, § 2, cl. 3; U.S. CONST. AMEND. VI. In fact, interference with the right to a trial by jury was one of the reasons the Thirteen Colonies left England. Declaration of Independence (U.S. 1776) (listing "For depriving us in many cases, of the benefits of Trial by Jury" as a grievance against the King).

It is against this backdrop that Hopkins asserts his constitutional rights were violated. Hopkins has asserted that forcing him to go to a jury trial against his will is a violation of his federal and state constitutional

rights to due process and a fair trial. Hopkins' Br. 59. But there is no federal constitutional right to avoid a jury trial. In fact, the federal rules provide that a federal criminal defendant may waive a jury trial only with the consent of the prosecutor and the court. Fed. R. Crim. Pro. 23(a). The United States Supreme Court has explained that Fed. R. Crim. Pro. 23(a) does not violate federal constitutional guarantees. *Singer v. United States*, 380 U.S. 24, 36 (1965). In *Singer*, the United States Supreme Court explained:

> 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.

Id. As a result, the United States Supreme Court held that refusing to allow a criminal defendant to waive their right to a jury trial did not violate either due process or the right to a fair trial. *Id*. Hopkins does not—and cannot—explain how *Singer* does not control his federal constitutional claim.

Hopkins also asserts that Section 632.492 violates his Missouri constitutional right to waive a jury trial. Hopkins' Br. 60. Hopkins asserts that if he is right that the SVP Act is punitive, then the Missouri Constitution, art. I, § 22 provides that he may waive a jury trial with the trial court's consent. Hopkins' Br. 60. But the SVP Act is not punitive in nature, so

the traditional rule that either party may request a jury trial applies. MO. CONST. ART. I, § 22. Moreover, Hopkins does not cite any authority for the proposition that, under the Missouri constitution, the prosecutor cannot object to a waiver of the right to a jury trial. Respondent was unable to find a case directly on point. But the Court need not answer this question because the SVP Act is not punitive in nature.

2. Section 632.492 should receive rational basis, not strict scrutiny, review.

Hopkins also asserts that the only Missouri case to consider this issue—*Askren*—decided the issue incorrectly because *Askren* applied rational basis review. Hopkins' Br. 59–60.

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*, 428 S.W.3d at 640; *In re Norton*, 123 S.W.3d at 173. Although Hopkins does not identify the fundamental right at stake, Hopkins does cite to *In re Norton*, 123 S.W.3d at 173 to support his argument that strict scrutiny applies. But, as Respondent demonstrates in Point I, *supra*, this Court should re-examine its holding in *Norton*. Moreover, Hopkins fails to explain how the *Askren* court erred when it wrote "we see no constitutional right to a bench trial in criminal cases or civil commitment cases." *Askren*, 27

S.W.3d at 840. And, Hopkins fails to establish how the *Askren* court erred when it held that there is no fundamental right to choose a bench trial. *Id.* at 842.

Askren is still good law, and Hopkins provides no compelling reason why this Court should overturn the holding of the case. *Askren* observes that the jury-trial provision of Section 632.492 survives rational basis review. *Id.* Under rational basis review, the burden is on Hopkins to demonstrate that Section 632.492 is "wholly irrational." *Amick*, 428 S.W.3d at 640 (citations omitted). This Court must presume that Section 632.492 has a rational basis, and it must be upheld if it is "justified by any set of facts." *Id.* (citations omitted). Hopkins has not made the required showing under the rational basis standard.

3. The jury trial selection portion of Section 632.492 survives strict scrutiny review.

If this Court decides to overturn *Askren*, Hopkins is still not entitled to relief because the jury trial portion of Section 632.492 is narrowly tailored to achieve a compelling state interest. The State has a compelling interest in making sure that both the State and Hopkins receive a fair trial. And, in this context, the State has a compelling state interest in making sure that a Sexually Violent Predator case is adjudicated in the fairest way possible. Under the rule in *Singer*, it is very likely that the United States Supreme

Court would recognize these as compelling state interests. *See Singer*, 380 U.S. at 36. And Section 632.492 is narrowly tailored to achieve those interests. The statute allows the State, the Respondent, or the probate court to demand a jury trial. This construction also allows—if all parties agree—for a bench trial to take place. That is a narrowly tailored provision that achieves a compelling state interest.

Conclusion

This Court should deny Hopkins' fifth point because Hopkins has not demonstrated that the probate court would have consented to a bench trial and because Hopkins has not—and cannot—demonstrate that a jury trial violated his constitutional rights.

ARGUMENT VII

The probate court did not err in committing Hopkins to the custody of the Department of Mental Health as a sexually violent predator because there was sufficient evidence that Hopkins is a sexually violent predator. – Responds to Appellant's Point VI.

In his sixth point, Hopkins raises four distinct claims of error: First, Hopkins asserts that the State did not establish that he suffers from a mental abnormality (Hopkins' Br. 66–71); second, Hopkins asserts that the State did not establish that his mental abnormality caused him to be more likely than not to commit a future act of predatory sexual violence unless confined in a secure facility (Hopkins' Br. 71–72); third, Hopkins asserts that the State failed to prove that he was more likely than not to commit *predatory* acts (Hopkins' Br. 73–78); and fourth, Hopkins asserts that the State failed to prove the necessary level of risk (Hopkins' Br. 78–82). Hopkins is wrong. The State provided sufficient evidence to support the jury's verdict.

Standard of Review

This Court has previously held that the standard of review for a sufficiency of the evidence claim is the same standard of review as in a criminal case. *Murrell*, 215 S.W.3d at 106. Accordingly, the Court must view the evidence in the light most favorable to the verdict and disregard all contrary evidence and inferences. *Id*. "When the sufficiency of the evidence is

the issue, this court 'does not act as a 'super juror' with veto powers,' *State v. Grim*, 854 S.W.2d 403, 414 (Mo. 1993), but instead, gives great deference to the trier of fact." *State v. Butler*, 24. S.W.3d 21, 24 (Mo. App. W.D. 2000) (quoting *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. 1998)).

Analysis

A. The State proved that Hopkins' pedophilia is a mental abnormality.

At trial, the State's evidence, when viewed in the light most favorable to the verdict, showed that Hopkins had pedophilia, and that in Hopkins' case, his pedophilia was a mental abnormality. Dr. Kircher testified that Hopkins had pedophilia, attracted to females, non-exclusive type based on his "interest in child pornography that developed in adolescence," the fact that he received juvenile sex offender treatment but persisted in watching child pornography at the age of 18, and that Hopkins "molested at least three different children, prepubescent children" and that "the oldest of those was roughly 10 years old." Tr. 644. Dr. Kircher also explained that Hopkins' pedophilia was a mental abnormality because it "causes him serious difficulty controlling his behavior." Tr. 650. When asked, Dr. Kircher explained that not every pedophile is a sexually dangerous predator, but that Hopkins is. Tr. 729–30. Dr. Kircher also explained that Hopkins had disclosed a sexual interest in children, aged from 8 to 12 and from 12 to 14. Tr. 646. Dr. Kircher

explained that his pattern of sexual interest in children, which expressed itself over the course of *years*, supported her diagnosis of pedophilia. Tr. 646. And, Dr. Kircher testified that typically, pedophilia is a "lifelong diagnosis and not something that remits on its own without internalized treatment." Tr. 698. Shawn Lee explained that Hopkins did not appear to have internalized the MoSOP treatment concepts. Tr. 581. Dr. Kircher explained that Hopkins demonstrated "very little insight into risk" and did not sound like someone who had successfully completed treatment. Tr. 650. In fact, Dr. Kircher testified that the "typical expectation" is that pedophilia will continue without an intervention, and that there was not an successful intervention in Hopkins' case. Tr. 726–27.

Dr. Tealander testified that pedophilia can be a lifelong and chronic illness, stating that "it may not ever go away; he may always be interested sexually in prepubescent children." Tr. 454. Dr. Tealander testified that Hopkins suffered from pedophilia. Tr. 452. Dr. Tealander further testified that his pedophilia diagnosis was also based on the fact that Hopkins reported to Dr. Tealander that Hopkins had masturbated to fantasies of children while in the Department of Corrections. Tr. 488–89. The jury also heard evidence that Hopkins "continues to act on the pedophilic interests and so that it's difficult for him to control. And once again, so he does this

knowing that it's not lawful, perhaps harmful to children, but continues anyway." Tr. 452.

Additionally, Hopkins argues that because time passed between when Drs. Kircher and Tealander performed their evaluations and the date of trial, then the State failed to make a sufficient case because the State failed to prove a present mental abnormality. Hopkins' Br. 69. Missouri courts have rejected that argument. In *In re Spencer*, the Missouri Court of Appeals explained that the State had produced sufficient evidence when three experts testified that the SVP suffered from pedophilia, even when years had passed between the evaluations and the date of trial. *In re Spencer*, 171 S.W.3d 813, 815–19 (Mo. App. S.D. 2005). Under the rule in *Spencer*, the State met its burden in this case.

The testimony was sufficient evidence for a reasonable juror to find that Hopkins had pedophilia, and that Hopkins' pedophilia is a mental abnormality. Hopkins is not entitled to relief on this point.

B. The State proved that Hopkins' mental abnormality is linked to his future risk.

In this point, Hopkins appears to argue that the State failed to adduce evidence that Hopkins' pedophilia caused him to be more likely than not to commit a predatory act of sexual violence unless confined to a secure facility. Hopkins' Br. 71–72. Hopkins is mistaken.

Dr. Kircher testified that not every person with pedophilia was a sexually violent predator, but that Hopkins was, in her opinion. Tr. 729–30. One reasonable inference from this testimony is that Hopkins' pedophilia—his mental abnormality—caused his risk. Further, on cross examination, Dr. Kircher explained that the "mental abnormality must cause a specific level of risk." Tr. 715. Reading Dr. Kircher's testimony as a whole, it is clear that she explained that in Hopkins' case, the mental abnormality and the risk to reoffend are linked. Dr. Telander gave similar testimony on cross examination. Dr. Tealander was asked:

> Q: What is the probability or likelihood that Greg will re-offend based on your diagnosis and assignment of pedophilia as a mental abnormality, not looking at other risk factors?

Dr. Tealander answered: "It's more likely than not." Tr. 550. And, like Dr. Kircher, Dr. Tealander testified that, under Missouri law, the mental abnormality must cause the risk. Tr. 549.

When Dr. Kircher's testimony and Dr. Tealander's testimony are considered together, the State adduced sufficient evidence for the jury to find that Hopkins' mental abnormality—pedophilia—was connected to his risk to commit a future act of predatory sexual violence unless confined to a secure facility.

C. The State proved that Hopkins is more likely than not to commit a *predatory* act of sexual violence.

In his brief, Hopkins argues that neither of the State's witnesses defined "predatory" as it is used in the statute. Hopkins' Br. 72–78. In support of his argument, Hopkins relies on *Lee v. Hartwig*, 848 S.W.2d 496 (Mo. App. W.D. 1992), *In re Cokes*, 107 S.W.3d 317 (Mo. App. W.D. 2003), *In re Morgan*, 176 S.W.3d 200 (Mo. App. W.D. 2005), and *McLaughlin v. Griffith*, 220 S.W.3d 319 (Mo. App. S.D. 2007).

Milton George recently made the same argument to the Missouri Court of Appeals. *In re George*, 2017 WL 327486 (Mo. App. W.D. Jan. 24, 2017)[10]. In that case, the Missouri Court of Appeals rejected George's argument, calling his analysis "misleading." *George*, 2017 WL 327486, slip op. at *5. The rationale of the *George* case is persuasive and directly on point.

Additionally, the State's questions to the experts always included the caveat that the State was only asking about *predatory* acts. Tr. 479, 689. Moreover, it is a reasonable inference from the evidence that Hopkins committed the acts against the children for the primary purpose of victimizing them. Especially because the term was defined in the jury

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[10] *George* is not yet a final opinion. There is currently a pending motion for rehearing en banc and motion for transfer to this Court.

instructions (L.F. 158), and a jury is presumed to follow the probate court's instructions. *State v. McFadden*, 391 S.W.3d 408, 420 (Mo. 2013).

Reviewing all the evidence in the light most favorable to the verdict, Hopkins cannot demonstrate that the verdict is based on insufficient evidence.

D. The State proved that Hopkins is sufficiently risky.

Hopkins contends that the State's evidence was not sufficient because it did not define the legal standard that Hopkins argues should have been defined. And, the State's experts testified about Hopkins' score on the actuarials and how that score, when considered with additional risk factors, meant that Hopkins was more likely than not to reoffend. That testimony was sufficient.

Dr. Kircher also testified that she performed a risk assessment. Tr. 651. Dr. Kircher scored Hopkins on the Static-99R and the Stable-2007. Tr. 651–57. She scored Hopkins a 7 on the Static-99R. Tr. 651. A score of 7 is in the high risk category. Tr. 653. A score of 7 places Hopkins in the 97th percentile. Tr. 653. Dr. Kircher also scored Hopkins on the Stable-2007. Tr. 655. She scored Hopkins as a 16. Tr. 669. A score of 16 is in the high-risk category. Tr. 671. Dr. Kircher testified that Hopkins' Stable-2007 score before he started MoSOP was 16, and that when she interviewed Hopkins after MoSOP, his score was still 16. Tr. 673.

Dr. Kircher also testified that she considered additional risk factors from the literature. Tr. 674. Dr. Kircher found that Hopkins' risk was increased by his sexual preoccupation, by Hopkins' history of never having been married, by Hopkins' general self-regulation problems, by Hopkins' poor cognitive problem solving, by Hopkins' grievance/hostility, and by Hopkins' emotional congruence with children. Tr. 676. Dr. Kircher also looked at factors which decrease risk: age, physical condition, and successful completion of treatment. Id. Dr. Kircher explained that Hopkins was not entitled to a risk reduction for successfully completing treatment because he could not articulate anything that he had learned in treatment. Tr. 680. After considering the actuarials and the additional risk factors, Dr. Kircher opined that Hopkins was more likely than not to commit a future predatory act of sexual violence unless confined in a secure facility. Tr. 689.

Dr. Tealander also performed a risk assessment. Tr. 455. Dr. Tealander scored Hopkins on the Static-99R, and testified that Hopkins had a score of 6. Tr. 471. Dr. Tealander explained that a score of 6 corresponded to the high risk category. Tr. 471. Dr. Tealander also considered Hopkins' additional risk factors from the literature. Tr. 475. Dr. Tealander was asked if he had formed an opinion whether Hopkins was "more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility" and Dr. Tealander said that Hopkins was more likely than not. Tr. 479.

This testimony was sufficient because the testimony identified variables that distinguished Hopkins from the typical sex offender. The Missouri Court of Appeals determined that "more likely than not" merely requires the State to adduce evidence that distinguishes the respondent from the typical sex offender. *In re Coffel*, 117 S.W.3d 116, 127 (Mo. App. E.D. 2003). In *Coffel*, the State sought to commit a woman as a sexually violent predator. *Id*. at 117. But, the State was unable to present any competent scientific evidence that the respondent was more likely than not to reoffend sexually. *Id*. at 129. Specifically, the State was unable to produce any expert witness who could testify as to the general rate that women reoffend and identify any scientifically supported factor that would increase or decrease a woman's risk. *Id.* at 127–28. One of the State's witnesses had no experience in assessing the risk of re-offense. *Id*. at 127. The other witness used factors that she created and that were not based on scientific research. *Id*. at 128. Thus, the Court of Appeals concluded that the State was unable to "identify some variable that would change the expectation" of the rate of re-offense. *Id*. at 127.

In Hopkins' case, unlike in *Coffel*, the State adduced sufficient evidence for a reasonable juror to find that Hopkins was more likely than not to commit a future act of predatory sexual violence unless confined in a secure facility. Unlike in *Coffel*, the State adduced testimony—through Dr.

Kircher—that Hopkins was in the high risk category *when compared to other sex offenders*. And, the State also adduced testimony from Dr. Kircher that the Static 99-R underestimated Hopkins risk because the Static 99-R measures recidivism, not re-offending. Tr. 724. That testimony must be believed under the standard of review.

When Dr. Kircher's and Dr. Tealander's testimony is considered in the light most favorable to the verdict, it is apparent that the State presented sufficient evidence of some variables that increase Hopkins' risk beyond that of the average sex offender. And, after reviewing thousands of pages of records, using the actuarials, and consulting the literature, both of the State's experts opined that Hopkins was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility. That was sufficient evidence.

Conclusion

When viewed in the light most favorable to the verdict, the State presented sufficient evidence to prove that Hopkins is a Sexually Violent Predator. This point should be denied.

ARGUMENT VIII

The probate court did not abuse its discretion when it allowed Dr. Kircher to testify. – Responds to Appellant's Point VII.

In his seventh point, Hopkins asserts that the probate court abused its discretion when it allowed Dr. Kircher to testify. Hopkins' Br. 83–93. Hopkins advances three legal theories in support of his claim. First, Hopkins asserts that Dr. Kircher's testimony is barred by Section 632.483. Hopkins' Br. 85–87. Second, Hopkins asserts that Dr. Kircher's opinion is not reliable. Hopkins' Br. 87–88. And third, Hopkins asserts that Dr. Kircher's opinion was too old by the time of trial. Hopkins' Br. 89. None of these legal theories have merit.

Standard of Review

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

probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110.

Analysis

A. 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.

Hopkins argues that Dr. Kircher should not have been allowed to testify because, according to Hopkins, her testimony is barred by Section 632.483.5 and *In re Bradley*, 440 S.W.3d 546 (Mo. App. W.D. 2014). Hopkins' Br. 85–6. Hopkins 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." MO. REV. STAT. § 632.483.5 Two elements are required to exclude evidence under Section 632.483.5. 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, but Dr. Kircher was not a "member" for purposes of the statute. *Bradley* examined the question of who is a "member" for purposes of Section 632.483.5 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" *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." *Walker v. State*, 465 S.W.3d 491, 495 (Mo. App. W.D. 2015).

The Missouri Court of Appeal's interpretation of Section 632.483.5 is correct, and under the plain language of the statue, Section 632.483.5 does not apply to Dr. Kircher.

B. Dr. Kircher's opinion was sufficiently reliable.

Hopkins next asserts that Dr. Kircher's opinion is unreliable because a former evaluator at the Department of Mental Health testified—in a deposition in a different case—that he gave the end of confinement evaluation little weight. Hopkins' Br. 87–88. But all of Hopkins' complaints go to the weight of Dr. Kircher's opinion, not the admissibility of Dr. Kircher's opinion.

For instance, Hopkins complains that, in his view, Dr. Kircher's report answers a different question than the question the jury is asked, and that Dr.

Kircher uses a different burden of proof. Hopkins' Br. 87. Importantly, all of Hopkins' citations for these propositions come from either someone other than Dr. Kircher, or Dr. Kircher's deposition in a different case. Dr. Kircher testified at trial that when she does an evaluation, she is looking to see if someone meets the criteria listed in the statute. Tr. 642–43. That is the precise question the jury is asked to answer.

Next, Hopkins complains that Dr. Kircher was not able to give an opinion to a reasonable degree of psychological certainty because of something a different witness said in a deposition in a different case. Hopkins' Br. 87–88. But at trial, Dr. Kircher said she was able to render a diagnosis to a reasonable degree of psychological certainty. Tr. 647. Dr. Kircher was able to testify to a reasonable degree of psychological certainty that Hopkins' pedophilia causes him serious difficulty controlling his behavior. Tr. 650. And Dr. Kircher testified it was her opinion to a reasonable degree of psychological certainty that Hopkins was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility. Tr. 683. In fact, Dr. Kircher testified that Hopkins was a sexually violent predator to a reasonable degree of physiological certainty. Tr. 683. This testimony was received without objection.

Hopkins also complains that Dr. Kircher had limited records available to her at the time of her evaluation. Hopkins' Br. 88. But that sort of

complaint goes to the weight of Dr. Kircher's opinion, not its admissibility. *In re Sohn*, 473 S.W.3d 225, 230 (Mo. App. E.D. 2015). In this case, Dr. Kircher testified that her opinion came from her interview with Hopkins, as well as his MoSOP treatment file, his probation and parole records, and his medical and mental health records from the Missouri Department of Corrections. Tr. 640–41. Dr. Kircher explained that these are the type of records that are reasonably relied upon in her profession, and that she found them reasonably reliable. Tr. 641. Hopkins did not object.

It is only proper for a probate court to exclude an expert's opinion if the "sources relied on by the expert are 'so slight as to be fundamentally unsupported'...." *In re Sohn*, 473 S.W.3d at 230 (quoting *Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo. App. E.D. 2006)). Given the foundation at trial, and given that Hopkins did not object to this foundation, the probate court did not abuse its discretion by allowing Dr. Kircher to testify.

C. Hopkins cannot assert that Dr. Kircher's opinion is too old when he continued the trial.

Hopkins' final legal theory is that Dr. Kircher's report is too old to be admissible. Hopkins' Br. 89. But the reason for the delay in trial was Hopkins' requests for a continuance. Hopkins first asked for a three-day continuance before the probable cause hearing took place. L.F. 2. Then, after the Department of Mental Health filed its evaluation, Hopkins requested a

six-month continuance because of the pending nature of the *Van Orden v. Schafer* lawsuit. L.F. 4–5. By the time the six-month continuance expired, the soonest the probate court could set the matter for trial was February 2016. L.F. 5. An additional one-day continuance was taken by the trial court because the original first day of trial fell on a state holiday. L.F. 5. There was no delay that could be attributed to the Petitioner.

Hopkins should not be allowed to request continuances in order to render expert opinions inadmissible. Moreover, the age of the information Dr. Kircher relied on goes to the weight, not the admissibility of the opinion. *In re Sohn*, 473 S.W.3d at 230. Hopkins cannot demonstrate that it was an abuse of discretion for the probate court to allow Dr. Kircher to testify.

D. Hopkins' assertion that Dr. Kircher's opinion does not demonstrate that the probate court abused its discretion in allowing her to testify.

Hopkins' final complaint about Dr. Kircher's testimony is that it was "prejudicial" under a collection of legal theories. Hopkins' Br. 89–92. None of these reasons merits relief.

For instance, Hopkins complains that he did not have access to a lawyer at the time of Dr. Kircher's evaluation, so her testimony should be excluded. Hopkins' Br. 89–90. Likewise, Hopkins complains that he could not effectively cross examine Dr. Kircher. Hopkins' Br. 90. But Hopkins does not

cite any legal authority for these positions. Instead, he relies on a deposition. Without legal authority, his claims are abandoned. *See, e.g., State v. Nunley*, 341 S.W.3d 611, 623 (Mo. 2011).

Next, Hopkins complains that Dr. Kircher testified about the screening process. Hopkins' Br. 90. Hopkins objected, and the probate court sustained his objection. Tr. 691. Hopkins asked for a mistrial, and the request was denied. Tr. 691–92. Hopkins asked for all of Dr. Kircher's testimony to be stricken from the record. Tr. 692. That request was denied. Tr. 692. Hopkins then asked for the statement to be stricken from the record, and for the proceedings to "move on." Tr. 692–93. That request was granted. Tr. 693. Hopkins has not demonstrated how the probate court abused its discretion in fashioning that relief. This complaint does not merit this Court's intervention.

Hopkins' final argument portion is an allegation that he was prejudiced by Dr. Kircher's testimony. Hopkins' Br. 91–92. This Court does not need to consider these issues because the probate court did not abuse its discretion, as described *supra*.

Conclusion

Because Hopkins has failed to demonstrate that the probate court abused its discretion in allowing Dr. Kircher to testify, this Court should deny Hopkins' seventh point.

ARGUMENT IX

The probate court did not err in denying Hopkins' motion to exclude his statements to Dr. Kircher because Hopkins does not have a right to silence during the end of confinement evaluation. – Responds to Appellant's Point VIII.

In his eighth point, Hopkins asserts that the probate court erred in overruling his motion to exclude the statements that Hopkins made to Dr. Kircher during the end-of-confinement evaluation, because, in Hopkins' view, he had a Fifth Amendment right to silence. Hopkins' Br. 94–110. Hopkins is mistaken; there is no right to refuse to answer questions asked by the psychologist performing the end of confinement evaluation.

Standard of Review

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

probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110.

This Court reviews questions of law *de novo*. *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 353 (Mo. 1995).

Analysis

Hopkins claim that his Fifth Amendment right to silence was violated when he answered questions posed by Dr. Kircher—a psychologist—during the end of confinement evaluation is meritless under precedent from the United States Supreme Court and this Court.

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

This Court, in *Bernat*, adopted the United States Supreme Court's reasoning. *Bernat*, 194 S.W.3d at 869. This Court agreed that the State had a compelling interest in securing the cooperation of alleged SVPs, and that without an alleged SVP's cooperation with doctors, "it would be difficult" to "make an accurate assessment of the alleged SVP's mental state, or to treat him or her." *Id.* This Court's conclusion relied not only on *Allen*, but also on

In re Young, 857 P.2d 989 (Wash. 1993) (superseded by statute). In *Young*, the Washington State Supreme Court also acknowledged the important state interest in having putative SVPs communicate with doctors. *Id*. at 1014.

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

Despite these authorities, Hopkins argues that he had a Fifth Amendment right to refuse to answer Dr. Kircher's questions because the Missouri SVP Act is punitive. Hopkins' Br. 109. But Hopkins provided no evidence to the probate court to prove that the SVP Act is now punitive in nature. And, Hopkins has put no evidence in the record for this Court to review in order to demonstrate that the SVP Act is punitive. Instead, Hopkins merely cites to the United States District Court for the Eastern

District of Missouri opinion in *Van Orden v. Schafer*, 129 F.Supp.3d 839 (E.D. Mo. Dec. 22, 2015). But that decision is not final; the federal court's fact finding has not ended, and the case has not been subjected to appellate review. 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. But Hopkins never provided any proof to the probate court, and he has provided no proof to this Court. Hopkins has failed to meet his burden.

Hopkins also argues that the Equal Protection Clause requires him to have the Fifth Amendment right to silence because that right is granted to others facing involuntary commitment. Hopkins' Br. 108–09. Part of Hopkins justification for this argument is the case *State ex rel. Simanek v. Berry*¸597 S.W.2d 718 (Mo. App. W.D. 1980). But *Simanek* is not helpful to Hopkins because it is no longer good law. As Hopkins points out (Hopkins' Br. 94), *Simanek* relies on *Addington* and *In re Gault*, 387 U.S. 1 (1967). But the portion of *Gault* that *Simanek* relies on was overturned by the United States Supreme Court in *Allen*. In *Allen*, the United States Supreme Court wrote:

> First, *Gault's* sweeping statement that "our Constitution guarantees that no person shall be 'compelled' to be a witness

> against himself when is threatened with deprivation of his liberty," .... *is plainly not good law*.

Allen, 478 U.S. at 372 (emphasis added). Accordingly, *Simanek*'s holding is no longer good law, and this Court should recognize its abrogation.

Hopkins also relies on, and misunderstands, this Court's holding in *Bernat*. Hopkins' Br. 108–109. Assuming, *arguendo*, that this Court's strict scrutiny requirement in *Bernat* is correct, *Bernat* is a case about whether the State can comment on a putative SVP's silence at trial without calling the putative SVP to testify. *Bernat*, 194 S.W.3d at 869–70. In fact, this Court specifically recognized that the State's compelling interest securing the cooperation of alleged SVPs in order to diagnose and treat them did not apply because in *Bernat*'s case, he agreed to speak to cooperate. *Id*. But in this case, Hopkins is asserting that he should not have to cooperate. Hopkins' Br. 108–09. That argument was expressly rejected by the United States Supreme Court in *Allen*, and implicitly rejected by this Court in *Bernat*. This Court should now expressly reject Hopkins' argument and hold that there is no Fifth Amendment right to silence at the end of confinement evaluation.

As a final issue, Hopkins also asserts that his rights were violated because he was not given a *Miranda v. Arizona*, 384 U.S. 436 (1966), warning before the end of confinement evaluation. Hopkins' Br. 105–08. No *Miranda* warning was necessary because the Fifth Amendment does not apply. If

Miranda does apply—which it does not—then Hopkins is still not entitled to relief because he voluntarily gave statements to Dr. Tealander. Dr. Tealander interviewed Hopkins for four hours. Tr. 446. 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* error in this case—and there was not—then the case does not require reversal or remand because Hopkins has not demonstrated prejudice. At trial, Hopkins argued that many of the statements made to Shawn Lee were cumulative of statements made to Dr. Tealander. Tr. 577. Hopkins has not demonstrated how the statements he made to Dr. Kircher are different than statements he made to Dr. Tealander. 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, Hopkins is not entitled to relief, assuming *arguendo*, there was a *Miranda* violation.

Conclusion

In sum, Hopkins is not entitled to relief because the Fifth Amendment right to silence does not apply to the psychologist performing the end of confinement evaluation.

ARGUMENT X

The probate court did not abuse its discretion by allowing Shawn Lee to testify. – Responds to Appellant's Point IX.

In his ninth point on appeal, Hopkins raises six complaints about Lee's testimony at his trial. First, Hopkins complains that Lee's testimony should have been barred because Hopkins invoked privilege. Hopkins' Br. 112–116. Second, Hopkins complains that Lee was not disclosed and was not qualified as an expert witness. Hopkins' Br. 116–117. Third, Hopkins complains that Lee did not produce documents during his telephone deposition. Hopkins' Br. 117. Fourth, Hopkins complains that Lee did not offer an opinion on whether Hopkins had a mental abnormality, or what Hopkins' level of risk was. Hopkins' Br. 118. Fifth, Hopkins' complains that Lee's testimony injected a collateral issue, confused the jury, and was not useful. Hopkins' Br. 118. And sixth, Hopkins complains that Lee's testimony was improper bolstering of Dr. Tealander's testimony, although Hopkins does not include this ground in his point relied on.[11] Hopkins' Br. 118–119. Hopkins' complaints are meritless

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[11] This contention is not set forth in the point relied on so it is not preserved, and Respondent need not address it. *Boeving v. Kander*, 496 S.W.3d 498, 508 n.4 (Mo. 2016). However, the claim is without merit because the probate

because Hopkins does not demonstrate that the probate court abused its discretion in allowing Lee to testify.[12]

Standard of Review

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

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court did not abuse its discretion when it allowed the jury to hear the treatment provider's perspective about Hopkins' progress.

[12] In his point relied on, Hopkins asserts that allowing Lee to testify violated Hopkins' privilege against self-incrimination. Hopkins' Br. 111. But Hopkins did not include any analysis of that claim in the argument portion of the brief. Hopkins' Br. 111–119. So, Hopkins abandoned the claim and Respondent need not address it. *State v. Nunley*, 341 S.W.3d 611, 623 (Mo. 2011). But, for the reasons in Point IX, *supra*, this claim is without merit.

not mere error, the probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110.

Relevant Facts

On January 27, 2016, Hopkins filed a witness endorsement that "notifi[ed] all parties that [Hopkins] may call the witnesses listed below to offer an expert opinion, or other evidence and testimony, at any hearing or trial....Each and everyone [sic] of the individuals identified below was disclosed to Respondent by the State during the discovery process." L.F. 120. Hopkins disclosed Donna Foster (Hopkins' mother) and Shawn Lee. L.F. 120. Two days later, Hopkins filed an amended witness disclosure, removed Shawn Lee, and indicated that Hopkins reserved the right to testify. L.F. 134. Less than one week later, the State endorsed Shawn Lee as a witness. L.F. 136.

Discussion

A. Lee's testimony was not privileged.

In support of his argument that Lee's testimony was privileged, Hopkins relies on two primary authorities: Section 337.636 and *Jaffee v. Redmond*, 518 U.S. 1 (1996). Section 337.636—which creates a patient-licensed social worker privilege—does not assist Hopkins because it is abrogated in an SVP case by Section 632.510. Likewise, *Jaffee* does not assist

Hopkins because that case governs how the federal courts may adopt a new privilege under the Federal Rules of Evidence.

Section 337.363 creates the general rule that a licensed social worker "may not disclose any information acquired from persons consulting them in their professional capacity, or be compelled to disclose such information...." MO. REV. STAT. § 337.363. The statute also provides six exceptions to the general rule, none of which are at issue in this case. The General Assembly, aware of this privilege and others, drafted a provision in the SVP Act that abrogated this privilege. MO. REV. STAT. § 632.510. That provision provides "In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to ... the attorney general for the purpose of ... determining whether a person is or continues to be a sexually violent predator." *Id*.

This Court has explained that "Section 632.510's mention of providing 'relevant information and records' with an intent to 'protect the public' demonstrates that the SVP Act intends a thorough assessment of an alleged offenders history and likelihood to reoffend be considered when making the case for his commitment as an SVP." *Tyson v. State*, 249 S.W.3d 849, 853 (Mo. 2008). Section 632.510's purpose—to inform the factfinder at trial—would be frustrated if this Court accepts Hopkins' argument that the licensed social worker privilege applies to SVP cases. Hopkins makes this argument

by trying to draw a distinction between "information" and "testimony" and then arguing that Section 632.510 does not permit testimony about the information obtained under that section. Hopkins' Br. 114–15. But Hopkins' argument abrogates the entire purpose of both Section 337.636 and Section 632.510. Hopkins argues that Section 632.510 does not permit testimony about the information or records because that statute does not expressly discuss testimony. Hopkins' Br. 115. Yet Section 337.636's general rule against disclosure does not, by its plain terms, prohibit testimony. And under Missouri law, privilege is a creation of statute, it does not exist at common law. *See Randolph v. Supreme Liberty Life Ins. Co.,* 221 S.W.2d 155, 253 (Mo. banc 1949). The only reasonable reading of Section 337.363 and Section 632.510 is that each also applies to testimony. And, because Section 632.510 is the more specific statute, it controls Section 337.363, and abrogates its application in an SVP case. *See State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo. 2014) ("when one statute deals with the subject in general terms, and the other deals in a specific way...the special statute prevails").

Because Hopkins' interpretation would abrogate the purpose of both statutes, because the SVP Act provision was passed in order to inform the factfinder and "to protect the public" and because the SVP Act provision is a special statute, this Court should find that Section 337.363 is abrogated in an

SVP case by Section 632.510. Moreover, the probate court did not abuse its discretion in allowing the testimony.

Before turning to the next point, Hopkins asserts that Section 632.510 violates equal protection because it is not narrowly drawn to achieve a compelling state purpose. Hopkins' Br. 115. As discussed *surpa*, the correct standard of review is rational basis. But Section 632.510 also survives strict scrutiny review as well. The State has a compelling interest in protecting the public from the particularly noxious threat posed by SVPs and the State has a compelling interest in enhancing the reliability of fact finding at trial. *Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008); *Bernat*, 194 S.W.3d at 871. Section 632.510, which abrogates the licensed social worker privilege in SVP commitment and release cases, is narrowly tailored to achieve those interests. The statue survives Equal Protection Clause analysis.

B. The probate court did not otherwise abuse its discretion by allowing Lee to testify.

Hopkins presents four other theories that, in his view, demonstrate that the probate court abused its discretion when it allowed Lee to testify. An abuse of discretion occurs when a probate court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful

consideration. *Murrell*, 215 S.W.3d at 109. None of Hopkins' theories has legal merit.

For instance, Hopkins complains that Lee was not disclosed and was not qualified as an expert witness. Hopkins' Br. 116–117. But Hopkins filed a witness endorsement that not only specifically endorsed Lee, it also said that Lee "was disclosed to Respondent by the State during the discovery process." L.F. 120. Hopkins cannot tell the State and the probate court that Lee was disclosed, and then tell this Court that he was surprised. Hopkins' Br. 117.

Furthermore, Hopkins' witness endorsement indicated that those listed could be called "to offer an expert opinion, or other evidence and testimony...." L.F. 120. The only other witness on the endorsement was Hopkins' mother. Tr. 264. Hopkins now complains that Lee was not qualified as an expert under Section 490.065. Hopkins' Br. 117. But Section 490.065 only requires that the testimony will assist the trier of fact, and that the witness has some specialized knowledge, skill, experience, training, or education. MO. REV. STAT. § 490.065.1. This Court has held that licensed social workers are experts that are qualified to offer an opinion as to whether someone is an SVP. *Bernat*, 194 S.W.3d at 871.

This Court need not consider these questions, however, because Lee did not offer opinions. Hopkins cites to three instances he believes Lee gave an opinion, but in each of those instances the probate court held that Lee *was*

not offering an opinion. Tr. 581, 584, 587–88. Hopkins fails to explain how the probate court's rulings were wrong, let alone how the rulings were so "arbitrary and unreasonable that [they] shock[] the sense of justice...." *Murrell*, 215 S.W.3d at 109.

Next, Hopkins complains that Lee did not produce documents during his telephone deposition. Hopkins' Br. 117. As the State explained, the records that Lee had to refresh his recollection were documents that came from series one of the discovery. Tr. 158. The records were provided to Hopkins, and he does not dispute that the documents came from series one. Hopkins' Br. 117. Hopkins was not able to review the documents Lee used to refresh his recollection during the deposition because Hopkins conducted the deposition by telephone. Tr. 160. Hopkins made this argument to the probate court, and the probate court overruled his objection and allowed Lee to testify. Hopkins has not—and cannot—demonstrate that this ruling was so "arbitrary and unreasonable that it shocks the sense of justice...." *Murrell*, 215 S.W.3d at 109. Accordingly, Hopkins has not demonstrated an abuse of discretion.

Finally, Hopkins complains that Lee did not offer an opinion on whether Hopkins had a mental abnormality, or what Hopkins' level of risk was. Hopkins' Br. 118. So, Hopkins concludes, Lee's testimony injected a collateral issue, confused the jury, and was not useful. Hopkins' Br. 118. But

Hopkins misunderstands the point of Lee's testimony. Lee did not testify that Hopkins needed to be committed so he could receive more treatment. Instead, Lee's testimony demonstrated that Hopkins did not *successfully* complete treatment. Tr. 593. As both experts testified in this case, future risk is reduced only when treatment is *successfully* completed. Tr. 543, 727. Lee's testimony about Hopkins' performance in treatment is testimony that is relevant to the question of whether Hopkins is more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility. If the jury believed that Hopkins had done well in treatment, that fact would reduce Hopkins' risk. But if the jury believed Hopkins had not benefited from prior treatment, then that fact would demonstrate that Hopkins is risky. Thus the testimony was not collateral, it did not confuse or mislead the jury, and it was not unfairly prejudicial. Further still, Hopkins has not shown how the probate court's decision to allow the evidence was so "arbitrary and unreasonable that it shocks the sense of justice...." *Murrell*, 215 S.W.3d at 109.

Conclusion

This Court should deny relief on Hopkins' ninth point because Hopkins has not demonstrated that Lee's testimony was privileged, and because Hopkins has not shown how the probate court's decision to allow Lee to testify was an abuse of discretion.

ARGUMENT XI

The probate court did not err when it denied Hopkins' motion to declare Section 632.492 unconstitutional or when the probate court gave the jury Instruction 9 because the statute is not unconstitutional. – Responds to Appellant's Point X.

In his tenth point, Hopkins complains that Section 632.492 is unconstitutional because the statute requires the probate court to give an instruction which reads: "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care, and treatment." Hopkins' Br. 120–27. This Court should deny the point because Hopkins failed to raise his constitutional challenge at the earliest opportunity. And, Hopkins is not entitled to relief—plain error or otherwise—because Section 632.492 is constitutional, and instruction 9 was properly given.

Standard of Review

"[T]he rule is clearly established that in order to preserve a constitutional issue for appellate review, it must be raised at the earliest time consistent with good pleading and orderly procedure and must be kept alive during the course of the proceedings." *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. 2012) (quoting *Wickizer*, 583 S.W.2d at 523). A constitutional challenge to a statute is waived when it is not made at the earliest possible

opportunity. *Garris v. State*, 389 S.W.3d 648, 651 (Mo. 2012), (quoting *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 225 (Mo. 1998)).

Whether the probate court properly gave an instruction is a question of law, which is reviewed de novo. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 376 (Mo. 2014). But, this Court will deny relief *unless* the Appellant can show that the alleged error was prejudicial. *Id*.

Relevant Facts

Hopkins did not challenge the constitutionality of Section 632.492 until the first day of trial. L.F. 143–145. Hopkins filed a written motion. L.F. 143–145. The copy of the motion included in the legal file is unsigned, and the certificate of service is not dated. L.F. 145. The motion is dated as filed on February 16, 2016 and initialed by Judge John Jackson. L.F. 143.

The transcript does not reflect that Hopkins took his motion up on the record on February 16, 2016. Instead, the first reference to the motion is an objection that Hopkins made during the State's voir dire. Tr. 239. Hopkins first took up the issue during the jury instruction conference. Tr. 743. At that time, the probate court overruled Hopkins' argument and overruled Hopkins' objection to instruction 9. Tr. 743.

In his motion for new trial, Hopkins renewed the objections he made in his written motion (filed the morning of trial), and Hopkins renewed his objections made during trial. L.F. 183.

Discussion

A. Hopkins has failed to preserve his challenge to Section 632.492 because he did not raise it at the earliest opportunity.

Hopkins' constitutional challenge to Section 632.492 was not raised at the earliest opportunity and is not preserved for appellate review. Constitutional challenges "must be raised at the earliest time consistent with good pleading and orderly procedure." *Liberty*, 370 S.W.3d at 546. Hopkins had many opportunities to raise his complaints, but he held them in reserve until the first day of trial. Instead of taking up a pre-trial motion, Hopkins made an oral challenge to the statute during the instruction conference. Tr. 743. By making a last-second challenge, Hopkins deprived the probate court and the State of the opportunity to conduct legal research and fully consider his claim. That is an independent and adequate reason for this Court to deny relief on this point.

In *Wickizer*, this Court explained that a constitutional challenge was not preserved when it was not raised at the earliest possible opportunity. 583 S.W.2d at 523. The *Wickizer* Court's rationale relied, in part, on the fact that the appellant had filed "several motions" before trial, but did not raise the constitutional challenge. *Id.* In this case, Hopkins filed many more pre-trial motions than the appellant filed in *Wickizer*. *See* L.F. i–iii. Even then, Hopkins did not raise this constitutional challenge before the first day of

trial. As such, Hopkins did not raise his constitutional challenge at the earliest opportunity.

It is also true that this Court has found that a constitutional issue may be preserved when it is not raised at the earliest opportunity. *In re Schottel*, 159 S.W.3d at 841 n.3. Under the exception in *Schottel*, the constitutional claim must be raised "sufficiently early in the process to allow the trial court to identify and rule on the issue *and to give adequate notice to the opposing party*." *Schottel*, 159 S.W.3d at 841 n.3 (emphasis added). But, Hopkins' challenge to the constitutionally of Section 632.492 does not fall within this exception. Hopkins gave the probate court an unsigned motion the first day of trial. L.F. 183. And, Hopkins did not take the motion up before the start of voir dire.[13] Instead, Hopkins raised the issue for the first time during voir dire.

The first discussion came two days later at the instruction conference. Tr. 743. Waiting until the instruction conference did not give the probate court enough time to consider Hopkins' arguments. Waiting until the first day of trial gave no notice to the State that it should prepare to refute such a

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[13] In his brief, Hopkins cites to page 151 of the transcript in support of his claim that he took the issue up. Hopkins' Br. 120. Page 151 of the transcript does not reveal any discussion about his motion.

claim—especially in light of the extensive pre-trial motion practice in the case. Accordingly, this Court should decline to find this claim within the *Schottel* exception. This point is not preserved.

Additionally, Hopkins has failed to comply with this Court's rules and so this point is not preserved. Hopkins has not briefed a constitutional challenge to Section 632.492. In the point relied on, Hopkins asserts that the statute violates the Due Process Clause, the right to a fair trial, the right to an impartial jury, and the Equal Protection Clause. Hopkins' Br. 120. But, Hopkins' brief does not set forth any analysis on the Due Process Clause, his right to a fair trial or his right to an impartial jury. Hopkins' Br. 121–27. Likewise, Hopkins does not really set forth any analysis on his Equal Protection Clause challenge, other than to say there is no justification for disparate treatment. Hopkins' Br. 123. Because these claims are not discussed in the argument section, they are abandoned and present nothing for this Court to review.

B. Hopkins' claim is without merit because Section 632.492 and instruction 9 do not violate the Equal Protection Clause.

Hopkins' point is without merit because neither Section 632.492 nor instruction 9 violates the Equal Protection Clause.

Before this Court performs an equal protection analysis, there must be a demonstration that two groups are treated differently. Then, 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*, 428 S.W.3d at 640; *In re Norton*, 123 S.W.3d at 173. Hopkins' challenge fails at each of these three steps.

1. Section 632.492 does not treat putative SVPs differently from others facing psychiatric commitment.

Hopkins asserts that putative SVPs are treated differently because others facing psychiatric commitment are not informed of the consequence of the verdict. Section 632.492 requires the jury to be instructed that if they find the respondent is a sexually violent predator, then he will be confined for control, care, and treatment. Hopkins' Br. 123. Hopkins is wrong; putative SVPs are treated like others facing civil commitment. In other civil commitment cases, the jury *is* informed of the consequence of their verdict. For example, in an involuntary civil commitment case, the verdict director reads:

> *Your verdict must be that respondent should be detained for treatment* if you believe:
>
> First, respondent is mentally ill, and
>
> Second, as a result of such mental illness, respondent presents a substantial risk of serious physical harm to [himself] [others].

MAI-CV 31.14 (emphasis added). In such a case, the only two fact issues for the jury are whether the respondent is mentally ill, and whether that mental illness makes the respondent a danger to himself or others. In that scenario, the jury is still told that the respondent will be detained for treatment. Moreover, in that type of case the verdict form reads:

> We, the undersigned jurors, find:
>
> That respondent _____ (here insert either "*should*" or "*should not*") *be detained for treatment*.

MAI-CV 36.18 (emphasis added).

The approved instruction for a criminal trial where the defendant has pleaded not guilty by reason of mental disease or defect is similar. In a criminal case and only when requested by the defendant, the instructions may include the following:

> When a person is found not guilty by reason of mental disease or defect excluding responsibility, the court must order that person committed to the Director of the Department of Mental Health for custody and care in a state mental health or retardation facility. This person can be unconditionally released from commitment only if and when it is determined by the court that the person does not have, and in the reasonable future is not likely to have, a mental disease or defect rendering him

dangerous to the safety of himself or others. This person can be conditionally released from such custody only if and when it is determined by a court that he is not likely to be dangerous to others while on conditional release.

MAI-CR 4th 406.02[14]. As a result of these instructions—but especially MAI-CV 31.14 & 36.18—Hopkins cannot demonstrate disparate treatment. In fact, if Hopkins wants this Court to preclude instruction 9, then it is Hopkins who must demonstrate why putative SVPs should be treated differently.

2. The SVP Act does not implicate a fundamental right, so the SVP Act is subject to rational basis review, but Section 632.492 survives both strict scrutiny and rational basis review.

Although Hopkins never performs equal protection analysis, he does make a passing citation to *In re Norton* and *Bernat*, which hold that the SVP Act implicates the fundamental right to liberty. Hopkins' Br. 123. As the State demonstrates in point I, *surpa*, the SVP Act should be subject to rational basis review. But instruction 9 survives strict scrutiny review as well.

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[14] This instruction's language was not changed in the transition from MAI-CR 3d to MAI-CR 4th. This text is the same as MAI-CR 3d 306.02A.

Under rational basis review, the burden is on Hopkins to demonstrate that Section 632.492 and instruction 9 are "wholly irrational." *Amick*, 428 S.W.3d at 640 (citations omitted). This Court must presume that Section 632.492 and instruction 9 have a rational basis, and they must be upheld if they are "justified by any set of facts." *Id*. (citations omitted). Hopkins has not made the required showing under the rational basis standard.

Under strict scrutiny review, Section 632.492 and instruction 9 must be justified by a compelling state interest, and narrowly drawn to express the compelling state interest at stake. *Norton*, 123 S.W.3d at 174. The State has a compelling state interest in protecting the public from the "particularly noxious threat of sexually violent predators." *Holtcamp*, 259 S.W.3d at 540. And, the State has a compelling interest in enhancing the reliability of fact finding at trial. *Bernat*, 194 S.W.3d at 871. Section 632.492 and instruction 9 are narrowly tailored to achieve those ends. In an SVP case, the State must present evidence on the putative SVP's future danger to the community. The reliability of the fact finding is increased when the fact finder knows that—if they believe the State has met its burden—then the SVP will receive care, control, and treatment. The instruction does not minimize the jury's decision. *Lewis v. State*, 134 S.W.3d 738, 741–42 (Mo. App. W.D. 2004). In fact, instruction 9 allows the jury more closely focus on the verdict director and the facts of the case.

3. The instruction is not otherwise improper, and the instruction did not prejudice Hopkins.

In the final portion of his argument, Hopkins argues that instruction 9 is otherwise improper, and that giving the instruction prejudiced him. Hopkins' Br. 122, 124–25. Hopkins is mistaken.

First, Hopkins argues that the instruction is an "abstract statement of law." Hopkins' Br. 122. Not so. Hopkins relies on *Mobley v. Wester Elec. Co-op*, 859 S.W.2d 923 (Mo. App. S.D. 1993), which involved proposed instructions that stated, "A person is not entitled to a warning of danger that is already known to him" and "There is no duty to warn a person of a danger of which he knows or that he should know in the exercise of ordinary care." *Mobley*, 895 S.W.2d at 932. Those are abstract statements of law. Those instructions bear no obvious relation to this case. But instruction 9 is different. It is not an abstract statement of law because it directly relates to the facts of Hopkins' case (e.g. the fact that Hopkins is more likely than not to commit a predatory act of sexual violence *unless confined in a secure facility*).

Second, Hopkins argues that it is improper to give an instruction when it is unsupported by the evidence. Hopkins' Br. 125–26. Hopkins has misidentified the issue. The question is not whether instruction 9 is supported by the evidence. The question is whether instruction 9 is required by the law of the case. *See* Mo. Sup. Ct. R. 70.02(a) ("all instructions shall be

submitted in writing and shall be given or refused by the court *according to the law* and the evidence in the case") (emphasis added). Here, the statute required the probate court to give instruction 9. MO. REV. STAT. § 632.492. The Missouri Court of Appeals has held several times that Section 632.492 is a sufficient justification for giving instruction 9. *See, e.g., Smith v. State*, 148 S.W.3d 330 (Mo. App. W.D. 2004); *Lewis v. State*, 152 S.W.3d 325 (Mo. App. W.D. 2004); *Scates v. State*, 134 S.W.3d 738 (Mo. App. S.D. 2004). Although Hopkins tries to distinguish those cases, Hopkins has not demonstrated a compelling reason why the instruction should not be given when the General Assembly passed a statute mandating the instruction. Moreover, this Court has held that it is potentially prejudicial error for a trial court to refuse to give an instruction as required by statute. *State v. Rodgers*, 641 S.W.2d 83, 85 (Mo. 1982).

Third, Hopkins argues that he was prejudiced by instruction 9 because, according to Hopkins, the instruction allowed the State to use the phrase "care, control, and treatment" in closing argument. Hopkins' Br. 123–24. But Hopkins is wrong. Several opinions have noted that instruction 9 is not prejudicial. *See, e.g.*, *Boone v. State*, 147 S.W.3d 801, 808 (Mo. App. E.D. 2004) ("We find that [the instruction] did not have a substantial potential for prejudicial effect"). Moreover, the State could have made the same statements during closing arguments without the instruction. *In re Brasch*,

332 S.W.3d 115, 121 (Mo. 2011) (allowing State to argue that "there would be another name on the list of Brasch's victims if the jury did not stop him").

None of these additional reasons merit this Court's intervention, especially in light of the fact that Hopkins was not prejudiced by instruction 9.

Conclusion

This Court should deny Hopkins' tenth point because Hopkins failed to raise his constitutional challenge at the earliest opportunity, and because Hopkins' claim is without merit.

ARGUMENT XII

The probate court did not abuse its discretion when it denied Hopkins request to strike venireperson 18 because venireperson 18 made no statements, and because Hopkins' voir dire question was confusing. – Responds to Appellant's Point XI.

In his eleventh and final point, Hopkins argues that the probate court erred when it did not sustain his motion to strike venireperson 18 for cause. Hopkins' Br. 128–133. Hopkins is not entitled to relief because his voir dire question was confusing and venireperson 18 did not indicate he was biased.

Standard of Review

A trial court's ruling on a motion to strike a venireperson for cause is reviewed for an abuse of discretion. *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. 2008). A trial court's decision not to strike a venireperson for cause should be upheld "unless it is clearly against the evidence and is a clear abuse of discretion." *Id.* (quoting *State v. Christeson*, 50 S.W.3d 251, 264 (Mo. 2001)). Under the abuse of discretion standard, the trial court's ruling is presumed correct, and the evidence before the trial court is viewed in a light favorable to the trial court's ruling. *Anglim v. Missouri Pacific Ry. Co.*, 832 S.W.2d 298, 303 (Mo. 1992). This is especially true in this scenario because the trial court is in "the best position to observe a venireperson's qualifications...." *Joy*, 254 S.W.3d at 888.

Relevant Facts

Hopkins' challenge to venireperson 18 revolves around this question and statement from Hopkins' attorney:

> So my question was, hearing those two convictions – and we're starting to see some hands, and I didn't get to write them all down – so based on hearing those two convictions, you already think that my client is a sexually violent predator?
>
> Would you raise your hands again? 41, 57, 58, 44, 30, 42, 57, 55, 23, 84, 82, 18, 16, 4, 31, 32, 33, 49, 76, 77.

Tr. 328. Counsel for Hopkins followed up with venireperson 23, who indicated—after clarification from the Court—that they could follow the judge's instructions. Tr. 330. Counsel for Hopkins followed up with venireperson 84, and venireperson 84 told counsel for Hopkins that "[w]hen you first asked me to stand, you said it sounds as though you will ignore the instruction...I would have to see the instruction to make a definition...." Tr. 330.

Counsel for Hopkins then further clarified: "Does anybody hear that, we have two convictions, and there's three other children who are alleged to have been victimized and you would say, 'That is enough for me. No matter what the instructions say, I couldn't vote to let [Hopkins] out'?" Tr. 331. In response, counsel for Hopkins said that venireperson 41 raised his hand. Tr.

331. Venireperson 61 then told counsel for Hopkins that "I don't even know what the issue is anymore. What is the issue?" Tr. 331.

At no point during the voir dire did venireperson 18 make a response on the record. Instead, counsel for Hopkins said that venireperson 18 raised his hand. When counsel for Hopkins asked the probate court to strike venireperson 18, the court refused, explaining that "I do not believe they understood the question at the time it was asked." Tr. 377.

Discussion

Hopkins has failed to demonstrate that the probate court abused its discretion when the probate court denied Hopkins' motion to strike. Hopkins' primary argument is that venireperson 18 "responded" he could not follow the law (Hopkins' Br. 133) and that venireperson 18 gave an "unequivocal response" that venireperson 18 had already formed an opinion about the case (Hopkins' Br. 132). Not so. There is no indication in the record that venireperson 18 responded to any question; venireperson 18 said nothing. Instead of relying on the venireperson's statements, Hopkins relies on the fact that his counsel *said* that venireperson 18 raised his hand. That limited information is simply not enough to demonstrate that the probate court abused its discretion when it denied Hopkins' motion to strike the venireperson. Counsel's statements that a venireperson raised his hand is not a sufficient record to support a challenge to the probate court's decision.

Hopkins attempts to support his position with frequent citations to *Thomas v. Mercy Hospitals East Communities*, 2016 WL4761435 (Mo. App. E.D. 2016). But *Thomas* is not yet final; this Court sustained transfer on December 20, 2016. *Thomas v. Mercy Hospitals East Communities*, SC96034 (Mo. 2016) (argument scheduled for March 8, 2017).

Moreover, the controlling case is *Joy v. Morrison*. Hopkins, relying on *Joy*, faults the probate court for not trying to clarify the venireperson's allegedly ambiguous answer. Hopkins' Br. 133. But Hopkins has misread *Joy*. In *Joy*, the venireperson gave oral responses to questions by counsel for each party to the suit. *Joy*, 254 S.W.3d at 889–90. *Joy* requires that a trial court make its own decision as to whether a venireperson has disqualified himself. In *Joy*, this Court reaffirmed that there are situations when a trial court must independently question a venireperson. *Id*. at 891. *Joy* relies on *Acetylence Gas Co. v. Oliver*, 939 S.W.2d 404, 411 (Mo. App. E.D. 1996), and *Oliver* relies on this Court's decision in *Catlett v. Illinois Cent. Gulf Ry. Co.*, 793 S.W.2d 351, 353 (Mo. 1990). In *Catlett*, this Court explained that a trial court only needs to conduct an independent examination of the venireperson when the venireperson gives "equivocal responses." *Catlett*, 793 S.W.2d at 353. In this case, venireperson 18 did not give "equivocal responses" because

venireperson 18 said nothing[15]. Further, the probate court determined that, if venireperson 18 raised his hand, then the question asked by Hopkins' counsel was confusing and that the venirepanel did not understand the question. Tr. 377. The probate court's determination, made with personal observation of the members of the panel, is entitled to deference because the probate court was in the best position to observe the voir dire. *Joy*, 254 S.W.3d at 888. The probate court's decision to refuse Hopkins' motion to strike was reasonable, entitled to deference, and was not an abuse of discretion.

Conclusion

The probate court did not abuse its discretion in refusing Hopkins' motion to strike venireperson 18. The probate court found that Hopkins' counsel had asked a question that had confused the panel. The record does not reflect that venireperson 18 ever made any statements, let alone statements that were equivocal. This claim should be denied.

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[15] Venireperson 18's only oral statement was that he was present for voir dire. Tr. 309.

CONCLUSION

The probate court did not err. The jury's determination that Appellant is a sexually violent predator and the probate court's order committing him to the custody of the Department of Mental Health 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 23,540 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software.

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