IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF AARON SEBASTIAN, Respondent/Appellant.	))))	No. SC95681

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY FIRST JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE MICHAEL CORDONNIER, JUDGE

APPELLANT'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

Sebastian appeals his commitment to the Department of Mental Health("DMH") as a Sexually Violent Predator("SVP"), following a jury trial in Greene County, Missouri. This appeal present questions concerning the constitutionality of provisions of the SVP Act("the Act") reserved for the exclusive jurisdiction of this Court.Mo.Const.,art.V,§3.[1]

[1] Unless noted, statutory references are to RSMo.2000, cumulative through the 2013 supplement. The Record on Appeal is a Transcript(Tr.) and a Legal File(L.F.).

STATEMENT OF FACTS

There is no evidence Sebastian engaged in sexually violent or pedophilic behaviors after 2011.(Tr.484,714). In 2011, 18-year-old Sebastian entered the room where 11-year-old Angel was sleeping, unbuttoned her pants, and started to put his hand down her pants when she awoke and told him to stop.(Tr.385,387,396-7,640,675,715). Angel's SAFE examination confirmed she was 5'4", weighed 136 pounds, presented with Tanner Stage 4 breast and pubic hair development, had an estrogenized hymen, and was pubescent.(Tr.637,640,Ex.E). Sebastian had been wasting time around the house, became sexually aroused, and then decided to attempt to touch Angel so that he could think about feeling a vagina later during masturbation.(Tr.556). No one caught him or intervened and Sebastian stopped on his own accord.(Tr.483). As a result, Sebastian was criminally charged and plead guilty to attempted statutory sodomy first degree.(Tr.367).

Sebastian completed MoSOP[2] group sex offender therapy in prison.(Tr.390,439,511,601). To complete MoSOP, an individual must take responsibility for offending behaviors, demonstrate empathy for his victim and insight into his deviant cycle, and identify risky situations to avoid and how to get out of them.(Tr.511-13). In MoSOP, Sebastian reported he offended against Angel, his sister, and another girl "in the same way" when he was 14 or 15, and against a 7-year-old girl when he was 17 by

[2] Missouri Sex Offender Program

performing oral sex on her.(Tr.407-8).[3] Outside of Sebastian's reporting, there was no evidence of the latter occurring.(Tr.477,643,645).

Witnesses at Trial

Working for DOC, psychologist Nena Kircher evaluated Sebastian in December 2014; she testified at trial over Sebastian's objections.(Tr.361,332-38,359,365,375-80,455-6,482;L.F.34-8,85-118,139-41).When Kircher was deposed before trial, she had no memory of Sebastian, aside from one incident, no opinions, and no evidence to support prior diagnosis or risk assessments.(Tr.457-8;Ex.D,p.7,17,23,28-30). At trial, Kircher testified the purpose of trial was to decide Sebastian's condition and risk "today."(Tr.361,456,499). She did not evaluate Sebastian for "today" or have current opinions; her opinion only applied to the time of her evaluation.(Tr.455-6,482). Kircher could not give an opinion based on current evidence that Sebastian met SVP criteria.(Tr.541).

Sebastian told Kircher what he learned in MoSOP: using "thought stoppers" to change behavior when confronted with a negative thought; avoiding isolating; relapse prevention plan strategies; and how to identify and not act on unhealthy fantasies.(Tr.505-7). His treatment focused on isolation, and he developed a plan for not withdrawing, but interacting with others.(Tr.509).

[3] Some records this as 7-year-old Katy, some as 10-year-old Star, and the incident happened "about the same time" as the offense against Angel.(Tr.640-1;644).

DMH psychologist Lisa Witcher evaluated Sebastian.(Tr.543,546). During the evaluation, Sebastian was shy, quiet, uncomfortable, and anxious about being interviewed.(Tr.669). He was ashamed about his past, nervous, and expected to fail.(Tr.670). Witcher's determination was partly based on her opinion that Sebastian did not do a good job during the interview.(Tr.670).

Sebastian explained to Kircher how he rationalized and justified offending against Angel: the girls previously had not told on him, so he talked himself into trying to it again.(Tr.445-6,506,676). It was important that Angel said "stop," because then he understood she was saying no.(Tr.446). Witcher said this demonstrated Sebastian learned to consider someone else's interest.(Tr.677).

Neuropsychologist John Fabian specializes in mental illness and brain-based behaviors.(Tr.751). Psychologists typically look at behaviors rather than the root of behaviors, which may be brain-based.(Tr.764). Brain function and development affect impulsivity, behavior and appreciation of consequences.(Tr.764). Fabian examined Sebastian's brain because of Sebastian's significant history of trauma, including physical, sexual and emotional abuse and neglect.(Tr.762,766-7,780). Sebastian's drug-addicted mother offered to sell him for $5,000; he was placed into foster homes where: he was forced to sleep naked, hung from hooks until he turned purple; choked; and abused.(Tr.772-4,776).

Fabian explained at birth the brain has a lot of gray matter; as it develops, white matter increases, which allows problem solving, reasoning, and appreciation of consequences.(.(Tr.788-9). The amygdala and limbic system control emotional processing,

impulse control, fear, gratification, and also sexual/hormonal activity when someone is during teenage development.(Tr.789). When someone is subject to a lot of early trauma, like Sebastian, the limbic system and amygdala are aroused and susceptible.(Tr.792). The prefrontal cortex is the "brakes of the brain," responsible for judgment, problem-solving, reasoning, inhibiting impulses, and appreciating consequences; it develops last, not reaching the highest level of functioning until one's early 20's.(Tr.788,790). As a result, adolescents have less ability to appreciate consequences, control impulses, put the brakes on behavior, and are at greater risk for acting out and risky activity.(Tr.790).

Mental Abnormality Criteria

Diagnosed Condition

Kircher and Witcher both diagnosed Sebastian only with pedophilic disorder("pedophilia"), and believed it was a mental abnormality.(Tr.383,410,466,523, 595-6,625). The Diagnostic and Statistical Manual("DSM") identifies three standard criteria for pedophilia.(Tr.374-5,384-5,388-9,466,549,593,597). According to Fabian, it warns against diagnosing pedophilia based on adolescent conduct, because of the things happening during brain development and puberty, and difficulty distinguishing developmentally-appropriate sexual interest with acting-out behaviors from sexual deviancy.(Tr.800-1).

At trial, Kircher had no current evidence of any pedophilia criteria.(Tr.459,552). Witcher diagnosed pedophilia because Sebastian had sexual contact with Angel, discussed offending against a 7-year-old, viewed a music video in MoSOP, and had two fantasies involving children.(Tr.550,555). Sebastian objected to Witcher's testimony because her

opinion, diagnostic criteria and diagnostic evidence had changed after depositions.(Tr.550-3,555,558-9,625-7,631,640-43;Ex.M).

According to Kircher, sexual behavior with a pubescent individual is a marker for a pedophilia diagnosis, despite the individual's age.(Tr.467). A female with Tanner Stage 4 breast development and pubic hair growth, who had begun menses, would not be prepubescent or meet criteria the diagnosis.(Tr.469,475-6). Kircher testified Sebastian had "intrusive fantasies" of a female under 12, which was not something he focused on or masturbated to, and did not seek out images of children.(Tr.385-6). Witcher testified Sebastian fantasized about his criminal offense going differently and not getting caught, and about being asked to babysit his imaginary niece.(Tr.393-5,585).

Witcher described the music video Sebastian watched as featuring a dancing girl in a nude-colored leotard; it was neither sexually explicit nor provocative.(Tr.590,733). According to Kircher, the music video played on a television in an open common room shared by several men; Sebastian was not in charge of the television, and when the video played he looked towards the ceiling.(Tr.464-484).

Fabian did not diagnose pedophilia.(Tr.792). He believed Sebastian's offenses were the result of maladaptive behaviors in adolescence.(Tr.793). Fabian described Sebastian's conduct as opportunistic behavioral acting out that was sexual, not an enduring pattern of deviance or interest in children.(Tr.793-4). Fabian testified Sebastian had no interest or deviant sexual arousal to children; the behaviors were linked to sexual gratification in the moment.(Tr.798-9,801-2).

Predisposition & Predatory Acts of Sexual Violence

Kircher did not have any current evidence of predisposition.(Tr.523,397-400,404-5). Kircher said that when Sebastian was aroused, he sought satisfaction and gratification, which led to his offending.(Tr.390). According to Witcher, a pedophilia diagnosis does not mean someone has emotional or volitional impairment or evidence of predisposition; one can have it without having a mental abnormality.(Tr.477,645). Witcher opined Sebastian was "predisposed" based on his behaviors, the conviction, and self-disclosed offense from 2011.(Tr.646).

According to Witcher, Sebastian's offending was not predatory and never intended to hurt someone when he committed any offense, including the juvenile conduct or self-disclosed behavior when he was 17 years old.(Tr.622,708-9). Rather, the "drive" for his behavior was sexual in nature.(Tr.556-8,622,728). Watching the music video was not sexually violent offense behavior, predatory, or evidence of "predisposition." (Tr.485,645,651,703). Fabian agreed Sebastian's acts were for sexual gratification and were not predatory.(Tr.820).

Serious Difficulty Controlling Behavior

Kircher and Witcher agreed that: the Act targets serious difficulty controlling sexually violent behavior—a statutory list of specific offenses; there is a difference between "some" and "serious" difficulty controlling behavior; and there is no scientific, empirical support for distinguishing the two.(Tr.478-9,646-49). Kircher testified "serious difficulty controlling behavior" means a disorder is "running a person's life" and he is controlled by the disorder.(Tr.374). She had no evidence Sebastian had serious difficulty controlling his behavior at the time of trial.(Tr.484,552-3).

Witcher agreed difficulty with behavioral control is a continuum; "serious difficulty controlling behavior" is near to complete loss of control.(Tr.647-8;L.F.186). She said pedophilia caused "some" difficulty controlling behavior.(Tr.650,661;Ex.M). Witcher relied on the music video as her evidence of "serious difficulty controlling behavior" and believed it was possible Sebastian had control over his behavior but made a poor choice.(Tr.651,662).

Fabian testified Sebastian had no mental abnormality or condition, and there was no evidence of emotional or volitional impairments.(Tr.814,796-8,836,841). Fabian's neuropsychological testing of Sebastian's decision-making capacity, problem-solving and judgment, and impulse control, concluded Sebastian had the ability to inhibit impulses, problem-solve, reason and make decisions appropriately.(Tr.815). Fabian also testified that Sebastian's conduct with Angle girl demonstrated control because Sebastian stopped himself.(Tr.819).

Risk Assessment

Kircher used the Static-99R and Stable-2007, which look at factors that correlate with sex offending.(Tr.523,410-11). A Static-99R score of 4 falls in the "moderate high risk" category(.Tr.422,494). The Stable-2007 is rescored every six-twelve months and does not determine the likelihood of re-offense.(Tr.424,497-8). Kircher said the Stable-2007 score meant Sebastian was in the "high need range."(Tr.426,498). At the time of trial, Kircher said Sebastian's Stable-2007 score was a zero, "because it would be unethical for me to try to evaluate a man I haven't seen in over a year."(Tr.499,502-3). Kircher assessed

other factors associated with sexual offense recidivism, but did not have current evidence to support them.(Tr.426,503).

Witcher used the Static-99R and Static-2002R, assigning scores of 5 and 7, respectively.(Tr.611-3,700). A Static 2002-R score of 7 is in the "moderate high risk" category.(Tr.614). A Static-99R score of 5 predicted a 21.5% chance of reconviction.(Tr.652). It was statistically more likely someone with a score of 5 would be in the 78.5% of men predicted not to reoffend.(Tr.654-5). Witcher took additional risk factors into account, but they did not increase Sebastian's risk above the Static scores.(Tr.614,664,699).

Fabian testified base rates-- the probability of a particular outcome, happening within a particular population, within a particular period of time-- are part of risk assessment.(Tr.825-6). Internationally, the base rate for sexual re-offense is 13% over five years.(Tr.826). In Missouri, the overall base rate for sexual recidivism is 3% over five years, and more specifically, 4.2% for individuals who failed or refused to participate in MoSOP and 2.6% for individuals who completed MoSOP.(Tr.862,827;Ex.L,p.82).

More Likely Than Not

According to Kircher and Witcher, "more likely than not" is the threshold of risk to find someone meets criteria for commitment.(Tr.486,703). Witcher testified that the Act requires that it is more likely than not that an individual will do a specific act that is both predatory and constitutes a sexually violent offense.(Tr.703).

Both agreed SVP risk could be thought of as a spectrum.(Tr.489,704; L.F.187). Kircher cannot identify where "more likely than not" falls on the spectrum or quantify

Sebastian's future risk; to her it is not numerical "because my instruments don't give me that."(Tr.490,523). Kircher would not consider a 25% chance of rain to be "more likely than not."(Tr.491). Witcher could not quantify "more likely than not" or identify where on the risk spectrum it would fall; she believed "more likely than not" was different for every person."(Tr.706). Witcher identified Sebastian's Static risk of 21% as more than 0%, and less than 50%.(Tr.704-5;L.F.187). Based on actuarial scores, risk factors, and Sebastian's history, Witcher concluded he was more likely than not to engage in sexually violent predatory behavior if not confined to a secure facility.(Tr.621).

Fabian testified that "more likely than not means" 51% and risk factors cannot be added to actuarial scores to predict a likelihood of re-offense above 51%.(Tr.838-9). In Fabian's opinion, Sebastian was not likely to commit another sex offense, was "low risk," and was not "more likely than not."(Tr.836,841).

Release Plan

Each doctor asked about and considered Sebastian's release plan.(Tr.514-5,688,870). The State successfully excluded evidence that Sebastian's release plan included two years of parole supervision and residency in a secured community release/honor center.(Tr.515,525). Sebastian made an offer of proof: he had two years of parole and lifetime supervision as a sexual offender; a community release center is a secure facility; the existence of supervision is a protective factor; and his release plan was a protective factor.(Tr.568,573-4,870-3,873,875-6;Ex.M,p.56-58).

Motions, Instructions, Argument, Verdict, & Commitment

Sebastian's motions to dismiss the proceedings against him for constitutional deficiencies in the Act and motions for a directed verdict were denied.(Tr.4;L.F.20-56; Tr.742-5,877-8;L.F.148-51,179-81). His request to use the "beyond a reasonable doubt" burden at trial was denied and he was tried by a jury over objection.(L.F.49-51,52-53;Tr.4-5). Instruction 8 was given over his objections.(Tr.880-3,885-7;L.F.160,161,168).

In closing, the State admitted Sebastian's acts were for the primary purpose of sexual gratification and argued if the jurors voted to commit, Sebastian would be committed to DMH, and that "a vote that Mr. Sebastian is a sexually violent predator results in him being committed for the care that he needs, the control that he needs, and the treatment that he needs."(Tr.900-1,907,926).

The jury returned an SVP verdict.(Tr.946;L.F.174). Sebastian's request for a stay of execution was denied and he was committed to DMH.(Tr.950,L.F.14,175). This appeal follows.(L.F.188).

Additional facts necessary to the disposition of the issues are set forth in the argument portion of the brief.

POINTS RELIED ON

I.

The trial court erred in denying Sebastian' motion for a directed verdict and committing him to DMH as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S.Const.amendsV,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21;§632.495, in that the State failed to prove Sebastian suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, because expert testimony did not establish he presently suffered from a from a condition that caused emotional or volitional impairment and predisposed him to commit acts of sexual violence in a degree that caused him serious difficulty controlling that behavior.

Murrell v. State,215 S.W.3d 96(Mo.banc2007);

Care and Treatment of Cokes,107 S.W.3d 317(Mo.App.W.D.2003);

Morgan v. State,176 S.W.3d 200(Mo.App.W.D.2005);

McGuire v. Seltsam,138 S.W.3d 718(Mo.banc2004);

U.S.Const.amends.V,VI,XIV;

Mo.Const.art.I,§§2,10,18(a),21;

§§490.065,632.480,632.495.

II.

The trial court erred in denying Sebastian' motion for a directed verdict and committing him to DMH as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S.Const.amendsV,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21 and §632.495, in that the State failed to prove Sebastian suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined, as required by §632.480, because the experts did not assess for risk caused by a mental abnormality or for risk of future of predatory sexually violent acts, did not quantify "more likely than not," and the evidence did not demonstrate Sebastian' risk was "more likely than not."

Care and Treatment of Cokes,107 S.W.3d 317(Mo.App.W.D.2003);

Morgan v. State,176 S.W.3d 200(Mo.App.W.D.2005);

Lee v. Hartwig,848 S.W.2d 496(Mo.App.W.D.1992);

Elam v. Alcolac, Inc.,765 S.W.2d 42(Mo.App.E.D.1988);

U.S.Const.amends.V,VI,XIV;

Mo.Const.art.I,§§2,10,18(a),21;

§§490.065,632.480,632.495.

III.

The trial court erred and abused its discretion in ruling Witcher did not change her opinion and permitting her to testify differently at trial than in her deposition, because this resulted in fundamental unfairness, prejudiced Sebastian in preparing and trying his case, impacted the jury's deliberations, and affected the outcome of trial, violating his rights to due process, a fair trial, discover expert opinions, cross-examine witnesses, and present evidence in his defense, guaranteed by U.S.Const.amends.V,VI,XIV, Mo.Const.art.I,§§2,10,18(a), §§632.489,632.492, and Rule 51.06, in that Witcher testified to her opinions and the basis for them when deposed; testified to an opinion relying on new/different facts as evidence of pedophilia, new sources of information, and different diagnostic criteria related to victims; testified she changed part of her opinion since deposition; and the State failed to disclose those changes or supplement Witcher's deposition testimony.

Bradford v. BJC Corp. Health Services,200 S.W.3d 173(Mo.App.E.D.2007);

Green v. Fleishman,882 S.W.2d 219(Mo.App.W.D.1994);

State ex rel Jackson County Prosecuting Attorney v. Prokes,363 S.W.3d 71(Mo.App.W.D.2011);

State v. Scott,943 S.W.3d 730(Mo.App.W.D.1997);

U.S.Const.amends.V,VI,XIV;

Mo.Const.art.I,§§2,10,18(a);

§§632.489,632.492,632.510;

Rule 51.06.

IV.

The trial court erred in overruling Sebastian' objection and admitting Kircher's testimony, because this violated his right to due process, assistance of counsel, to silence, and equal protection, guaranteed by U.S.Const.amend.V,VI,XIV, Mo.Const. art.I,§§2,10,18(a) and §§490.065,632.483, in that the EOC determination is inadmissible under §632.483; Kircher's determination was not reliable because the scope of her evaluation was limited to the finite moment in time Sebastian was paroled and only for the purpose of referring him into the process, was not based on the burden of proof at trial, and was based on incomplete and insufficient information to form a reliable opinion; Sebastian did not have substantive protections at the time of her questioning, like a criminal defendant subject to investigative questioning or persons subjected to mental examinations in other civil commitment cases; his statements to Kircher were unwarned and involuntary; her two-year-old limited determination could not assist the jury in determining if Sebastian presently met the criteria for commitment under §632.480; his communications with her were privileged under §337.055, she failed to produce any documents in response to a subpoena *duces tecum*; and any opinion at trial was different than her opinion disclosed during her deposition.

Estelle v. Smith,451 U.S. 454(1981);

Application of Gault,87 U.S.1(1967);

Kivland v. Columbia Orthopaedic Group, LLP,331 S.W.3d 299(Mo.banc2011);

Bradley v. State,440 S.W.3d 546(Mo.App.W.D.2014);

U.S.Const.amend.V,VI,XIV;

Mo.Const.art.I,§§2,10,18(a);

§§217.075,337.010,337.055,337.101,337.636,475.075,490.065,552.050,632.325,
632.480,632.483,632.484,632.489.

V.

The trial court erred in excluding evidence of Sebastian's release plan, because this violated his rights to due process and a fair trial, to present evidence and cross-examine witnesses against him, and to counsel, guaranteed by U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a);§632.492,632.489,632.495, 490.065, in that each expert relied on release plans, release plans reduce risk, an honor center or community release center is a "secure facility," and Sebastian could only be committed if he suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence *if not confined in a secured facility*.

Black v. State,151 S.W.3d 49(Mo.banc 2004);

Brasch v. State,332 S.W.3d 115(Mo.banc2011);

Murrell v. State, 215 S.W.3d 96(Mo.banc2007);

Whitnell v. State,129 S.W.3d 409(Mo.App.E.D.2004);

U.S.Const.amends.V,VI,XIV;

Mo.Const.art.I,§§2,10,18(a);

§§490.065,632.492,632.489,632.492, 632.495.

VI.

The trial court erred in denying Sebastian's motion to dismiss, because this violated his rights to due process, equal protection, and freedom from *ex post facto* laws and double jeopardy, protected by U.S.Const.amends.V,VI,VIII,XIV, art.I,§§9,10, art.VI,cl.2, and Mo.Const.art.I,§§2,10,13,19,21 in that the Federal Court found that commitment under the Act is punitive, lifetime confinement; confinement is a second punishment, and the Act's substantive and procedural protections are inadequate and unjustifiably different from any other civil commitment or punitive proceedings.

Van Orden v. Schafer,129 F. Supp.3d 839(E.D.Mo.2015);

Karsjens v. Jesson,109 F.Supp.3d 1139(D.Minn.2015);

Kansas v. Hendricks,521 U.S. 346(1997);

In re Norton,1 S.W.3d 170(Mo.banc2003);

U.S.Const.amends.V,XIV art.VI,cl.2,art.I,§9,10;

Mo.Const.art.I,§§2,8,10,13,19;

§§475.075,631.145,632.300,632.005,632.330,632.335,632.350,632.483,632.484, 632.489,632.492,632.495,632.498,632.501,632.505;

§§632.495,632.498,632.501,632.504,RSMo.2000.

VII.

The trial court erred in denying Sebastian's motion to dismiss, because this violated his rights to due process and equal protection guaranteed by U.S.Const.amends.V,XIV,art.VI,cl.2, and Mo.Const.art.I,§§2,10, in that *Schafer* found the Act is unconstitutional because it does not provide a least restrictive treatment environment(LRE), and there is no alternative to confinement in a total lock down facility.

Van Orden v. Schafer,129 F. Supp.3d 839(E.D.Mo.2015);

Karsjens v. Jesson,109 F.Supp.3d 1139(D.Minn.2015);

Kansas v. Hendricks,521 U.S. 346(1997);

Sherrill v. Wilson,653 S.W.3d 661(Mo.banc1983);

U.S.Const.amends.V,VIII,XIV; art.VI,cl.2;

Mo.Const art.I,§§2,10;

§§630.115,632.385,632.495,632.498,632.505;

§§632.495,632.498,632.501,632.504,RSMo.2000.

VIII.

The trial court erred in denying Sebastian's motion to dismiss, or in the alternative, in denying his request to use the "beyond a reasonable doubt standard at trial," because there is no possibility of discharge from State custody once committed, violating his rights to due process, equal protection protected by U.S.Const.amends.V,XIV and Mo.Const.art.I,§§2,10, in that *Schafer* found that commitment under the Act is punitive lifetime confinement; "discharge" has been replaced with "conditional release," there is no unconditional release from confinement, or termination of conditions imposed on conditional release, and "beyond a reasonable doubt" is the only burden of proof that protects the interest at stake and against the risk of erroneous decision.

Van Orden v. Schafer,129 F. Supp.3d 839(E.D.Mo.2015);

Addington v. Texas,441 U.S. 418(1979);

In re Winship,397 U.S. 358(1970);

In re Van Orden,271 S.W.3d 579(Mo.banc2008);

U.S.Const.amends.V,XIV;

Mo.Const.art.I,§§2,10;

§§632.480,632.495,632.498,632.505;

§§632.495,632.498,632.501,632.504,RSMo.2000.

IX.

The trial court erred in denying Sebastian's motion to dismiss, because this violated his rights to due process, and equal protection, protected by U.S. Const.amends.I,V,XIV and Mo.Const.art.I,§§2,10, in that the Act unconstitutionally permits commitment because of emotional capacity, without any proof of behavioral impairment, and fails to require proof of serious difficulty controlling behavior.

Kansas v. Hendricks,521 U.S. 346(1997);

Kansas v. Crane,534 U.S. 407(2002);

Stanley v. Georgia,394 U.S. 557(1969);

Thomas v. State,74 S.W.3d 789(Mo.banc2008);

U.S.Const.amends.I,V,XIV;

Mo.Const.art I,§§2,8,10;

§632.480.

X.

The trial court erred in granting the State's jury trial request and forcing Sebastian to be tried by a jury, because this violated his rights to due process and equal protection, guaranteed by U.S.Const.amend.V,VI,XIV and Mo.Const.art.I §§2,10,18(a),22, in that §632.492 grants the State the right to a jury trial, treating Sebastian differently than other individuals subjected to involuntary government confinement and loss of liberty.

In re Norton,123 S.W.3d 170(Mo.banc2003);

Bernat v. State,194 S.W.3d 863 Mo.banc2006);

State ex rel. Nixon v. Askren, 7 S.W.3d 834(Mo.App.W.D.2000);

Addington v. Texas,441 U.S. 418(1979);

U.S.Const.amends.V,VI,XIV;

Mo.Const.art.I,§§2,10,18(a),22;

§§475.075,632.335,632.350,632.492.

XI.

The trial court erred refusing to declare §632.492 unconstitutional, and submitting Instruction 8 over Sebastian's objection, because that violated Sebastian's rights to due process, a fair trial and equal protection as guaranteed by U.S.Const.amend.V,XIV and Mo.Const.art.I,§§2,10, in that §632.492 required the trial court to give Instruction 8; the instruction informed the jury of the legal consequence of their verdict; there was no evidence to support giving the instruction; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for commitment.

Templemire v. W & M Welding, Inc.,433 S.W.3d 371(Mo.banc2014);

Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.,449 S.W.3d 16 (Mo.App.W.D.2014);

Shannon v. United States,512 U.S. 573 1994);

Hayes v. Price,313 S.W.3d 645(Mo.banc2010);

U.S. Const.,amend.V,VI,VIII,XIV;

Mo.Const.art.I,§§2,10,18(a),21;

§§632.305,632.350,632.480,632.492.

ARGUMENT

I.

The trial court erred in denying Sebastian' motion for a directed verdict and committing him to DMH as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S.Const.amendsV,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21;§632.495, in that the State failed to prove Sebastian suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence, as required by §632.480, because expert testimony did not establish he presently suffered from a from a condition that caused emotional or volitional impairment and predisposed him to commit acts of sexual violence in a degree that caused him serious difficulty controlling that behavior.

Sebastian's motions for a directed verdict were denied and preserved in his post-trial motion.(Tr.742-5,877-8;L.F.148-51,179-81). Sebastian argued that the State's evidence failed to establish any element of its petition, including that he currently suffered from a mental abnormality at the time of trial that predisposed him to commit sexually violent offenses, or that a mental abnormality caused him serious difficulty controlling his behavior.(Tr.742-5,877-8;L.F.148-51,179-81). He alleged failing to grant a directed

verdict violated his constitutional rights to due process, equal protection and a fair trial, and resulted in cruel and unusual punishment.(L.F.179).[4]

Standard of Review

SVP commitment is a significant deprivation of liberty and only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards."*Addington v. Texas*,441 U.S. 418,425(1979);*Murrell v. State*,215 S.W.3d 96,103(Mo.banc2007), citing *Kansas v. Hendricks*,521 U.S. 346,357(1997) and *Foucha v. Louisiana*,504 U.S.71, 80(1992). Because of due process requirements, §632.495 requires the State to prove the appellant was an SVP, defined in §632.480.*Care and Treatment of Cokes*,107 S.W.3d 317,321(Mo.App.W.D.2003). Section 632.480 is written in the present tense and requires a finding Sebastian *presently* meet criteria and pose a danger at trial.*Murrell*,215 S.W.3d at 104. "Under the plain language of the statute, a person may not be confined absent a finding he '***suffers***' from a mental abnormality that '***makes'*** the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility."*Id.* To satisfy due process, the individual must be both mentally ill and dangerous; if one is missing, commitment is unconstitutional.*Id.*;§§632.480,632.495.

Whether an individual meets these requirements "turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists."*Addington*,441. U.S. at 429. Expert testimony is governed by §490.065 and the testimony must prove the proper legal standard was used.*McLaughlin v. Griffith*,220 S.W.3d 319,321(Mo.App.S.D.2007).

[4] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21.

For admission, an expert opinion must be supported by the record; when it is not, it is insufficient to create a submissible case.*Morgan v. State*,176 S.W.3d 200, 211(Mo.App.W.D.2005);*McGuire v. Seltsam*,138 S.W.3d 718,722(Mo. banc2004).

Denial of a directed verdict motion is reviewed to determine if the State made a submissible case, proving each element by substantial evidence that enables a jury to reasonably decide the case.*Cokes*,107 S.W.3d at 321,323. All evidence and reasonable inferences drawn from the evidence are viewed in the light most favorable to the State; other evidence and inferences are disregarded.*Id.*at321. This Court does not supply missing evidence, nor give the State the benefit of unreasonable, speculative, or forced inferences.*Id*.at323. This Court will reverse when the State's proof is deficient, but will remand for a new trial if it appears from the record that the State could have made a submissible case.*Id*at324.

Analysis

To prove a mental abnormality, the State must prove Sebastian: (1)has a condition, (2)that affects his emotional or volitional capacity, (3)which predisposes him to commit sexually violent offenses, (4)to a degree that causes him serious difficulty in controlling that behavior. *Murrell*,215 S.W.3d at 106, *citing Kansas v. Crane*,534 U.S. 407(2002); *Thomas v State*,74 S.W.3d 789,791-2(Mo.banc2002);§632.480(2). Then the State must prove this four-component mental abnormality makes Sebastian more likely than not to engage in predatory acts of sexual violence if not confined.§632.480(5). Expertise is required to diagnose a psychological condition, assess emotional and volitional capacity,

determine predisposition, and assess behavioral control—all matters beyond the understanding of lay persons.*Cokes*,107 S.W.3d at 323;§490.065.

Condition: Pedophilia

Mental abnormality is a diagnostic question.(Tr.368). Both Kircher and Witcher diagnosed Sebastian with pedophilia and nothing else.(Tr.383,466,523,548,595-6625). Both experts testified pedophilia was a mental abnormality.(Tr.466,625). If the diagnosis was not present there would not be a mental abnormality in Sebastian's case.(Tr.625).

DSM criteria for diagnosing pedophilia is:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).

B. The individual has acted on sexual urges, or sexual urges or fantasies cause marked distress or interpersonal difficulty.

C. The individual is at least age 16 years and at least 5 years older than the child or children in Criterion A.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 697(5thed.,2013);(Tr.374-5,384-5,388-9,466,549,593,597). The DSM warns against diagnosing pedophilia based on conduct during adolescent development; it is difficult to diagnose pedophilia then because of brain development and puberty, and ability to distinguish developmentally age-appropriate sexual interest with acting-out behaviors from sexual deviancy.(Tr.800-1,804-5). Pedophilia can change over time, with or without treatment, including decreasing with age.(Tr.478).

After turning 16, Sebastian was convicted in 2011 for having sexual contact with Angel.(Tr.385,387,396-7,640,675,715). Sebastian said he had sexual contact with a girl when he was 17; outside of his report, there was no evidence of that incident.(Tr.407-8,477,643,645). These two incidents happened around the same time and there were no pedophilic behaviors after 2011.(Tr.644,714).

According to Kircher, diagnostic criteria looks at behavior or interest in prepubescent children, "children who are not fully entered into puberty yet;" and physical development controls, not age.(Tr.384,467,549). Sexual behavior with a pubescent person would not meet criteria, despite the individual's age.(Tr.467). A female who is Tanner Stage 4 breast development and pubic hair growth, who had begun menses, would not be prepubescent or meet criteria.[5](Tr.469,475-6). Kircher said "marked distress or interpersonal difficulty" is "the idea that these thoughts or behaviors are sort of what's running your life," you are not in control of them.(Tr.389-90).

Sebastian described attraction to slim, athletic females; he said she would be his age, and her personality was most important.(Tr.694-5). Kircher said Sebastian's "type" was the physical description, which could sound like younger girls, and therefore the

[5] The Tanner Stages are a uniform system for describing pubertal maturation. For more information, *see Puberty and Tanner Stages*, available at http://www.childgrowthfoundation.org/CMS/FILES/Puberty_and_the_Tanner_Stages.pdf

dancer in a video, an 11-year-old and a 7-year-old would all fit his type.(Tr.434).[6] Sebastian told Kircher he was attracted to adult females, 20-25 years old.(Tr.395,509).

To diagnose pedophilia, Kircher relied on Sebastina's self-reported incident at 17, conviction in 2011, and his discussion of a fantasy during her interview with him.(Tr.385-6). Though Kircher testified Sebastian was having "an intrusive fantasy" about a 12-year-old female while in MoSOP; he did not focus on it or masturbate to the thoughts.(Tr.386). Kircher did not testify that: this imaginary 12-year-old was prepubescent; the fantasy involved sexual contact; the thought was "running [Sebastian's] life" or he was not in control of his thoughts; or was experiencing fantasies, distress or difficulty at the time of trial. Therefore, this fantasy did not meet Kircher's own explanation of pedophilia criteria or DSM present-tense "causes" distress requirements, leaving only the two incidents occurring prior to Sebastian's incarceration. Kircher's testimony did not establish the two incidents occurred more than six months apart.

Kircher did not have current evidence of any pedophilia criteria.(Tr.459,552). Her diagnostic opinion and her conclusions were not supported by the record, and her testimony was insufficient to make a submissible case.*Morgan*,176 S.W.3d at 211. Kircher's evaluation was 16 months old and could not assist the jury in determining whether

[6] To illustrate that this "type" did not describe a little girl, and the 5'4, 136-pound, pubescent Angel and her 5', 126-pound sister involved in the self-report, did not appear to be little girls, evidence was adduced at trial that defense counsel was 5'1" and weighed 114 pounds; therefore both girls were taller and bigger than her.(Tr.639;Ex.E,F).

Sebastian *presently* had a mental abnormality making him "more likely than not" at the time of trial.(Tr.445).*Murrell*,215 S.W.3d at 104;§§632.480,490.065. Kircher also testified that pedophilia diagnosis did not mean someone had a mental abnormality.(Tr.477).

Witcher diagnosed pedophilia because Sebastian attempted sexual contact with Angel, discussed offending against another girl, viewed a music video in MoSOP, and records referred to two fantasies involving children.(Tr.550,555). Witcher relied on (1)the two incidents that happened in the same time frame and (2)watching the music to meet the six-month requirement.(Tr.644). Witcher said the activity with Angel supported Criterion A because Sebastian committed the act for the purpose of obtaining an orgasm when he masturbated later.(Tr.554-6). She said the self-disclosure met the criterion because it was "a sexual behavior committed against a child."(Tr.559).

Next, Sebastian thought about the offense against Angel "going differently," she did not tell him to stop, and the touching happened.(Tr.585). The second fantasy involved a report to Kircher that Sebastian was asked to babysit his sister's future daughter.(Tr.585). Witcher testified Kircher recorded the babysitting fantasy as involving a sexual situation, but Sebastian told her the thought stopped at babysitting.(Tr.585,587). Sebastian said he thought about that scenario to "feel out how he would react to it" and know what to do if in that situation; there was nothing sexual; and he would not babysit rather than offend again.(Tr.587,630). Fabian testified Sebastian had this "fantasy" because he needed to look at his offense and identify high-risk situations in MoSOP, and thought it was the high-risk situation he was most likely to be in.(Tr.807).

Witcher assumed the girls were prepubescent because she used a cut-off age of 12 to determine prepubescence.(Tr.632-3). She was cross-examined with her deposition testimony that the criteria was concerned with physical development, whether they had entered into puberty or were prepubescent.(Tr.634;Ex.M,p.46). When she made her diagnosis, Witcher did not know the physical development of Angel and did not look at the medical records she had received.(Tr.631). Angel's SAFE exam demonstrated she was 5'4"; 136 pounds; presented with Tanner Stage 4 breast and pubic hair development; had an estrogenized hymen; and began her period a year and a half before the incident.(Tr.637,640,Ex.E). This meant Angel was not prepubescent.(Tr.637). A pubescent 11-year-old does not satisfy Criterion A.

Witcher's only evidence remaining to support the six-month duration requirement was the music video and self-reported contact with the 7-year-old. Witcher said the video featured a dancing girl in a nude-colored leotard; it was not sexually explicit nor provocative.(Tr.589-90,733). Witcher guessed the dancer was 11-years-old and "prepubescent – within the early pubescent stages, just looking at her."(Tr.589, 591,730). Records indicate that when Sebastian's therapist insisted he was attracted to children and the girl in the video, Sebastian said, "yeah, I guess I am, if I'm attracted to her."(Tr.434,811-2). Witcher testified Sebastian did not know it was an 11-year-old, in MoSOP he said was surprised the video was arousing, and would look away to not watch the video when it played.(Tr.589,591-2). An individual within early pubescent stages is not prepubescent. Furthermore, watching a music video does not imply sexual behavior, urges, or a fantasy involving sexual activity with a prepubescent child and is not engaging in

sexual behavior. There was no evidence Sebastian had recurrent, intense sexually arousing fantasies or urges to have sexual activity with a prepubescent child as a result of viewing the video.

Witcher was left with Sebastian's self-disclosure involving a 7-year-old. Witcher testified that there was no evidence of the offense occurring outside of Sebastian's MoSOP disclosure, and to believe it happened, she had to believe what Sebastian said.(Tr.643,645).She said the disclosure involving the 7-year-old met the criterion because it was "a sexual behavior committed against a child."(Tr.559). However, saying a behavior happened is not the same as actually *doing* the behavior. Witcher's conclusion rests on the assumption that Sebastian had sexual contact with the 7-year-old girl, though she has no evidence any behaviors took place beyond Sebastian's statements.(Tr.643,645). A forensic psychiatrist's opinion based on an assumption not supported by the record is an opinion based on speculation and conjecture, and cannot form a reliable basis for an expert opinion. *McGuire*,138 S.W.3d at 722. One incident involving fantasies or sexual activity with a prepubescent child would not satisfy the six-month requirement.

While Witcher also testified about fantasies, she unequivocally testified that her evidence for meeting the six-month requirement was the behaviors before 2011 and the music video; the video was the *only* evidence to support her diagnosis after 2011.(Tr.644). Even so, she did not testify fantasies caused Sebastian marked distress or interpersonal difficulty. Witcher's diagnostic opinion and her conclusions were not supported by the record and her testimony was insufficient to make a submissible case.*Morgan*,176 S.W.3d at 211. Witcher also testified that not every pedophile has a mental abnormality.(Tr.596).

Fabian did not diagnosis pedophilia.(Tr.792). He believed Sebastian's sexual offenses resulted from maladaptive behaviors in Sebastian's adolescence and brain development.(Tr.793). Fabian described Sebastian's conduct as opportunistic behavioral acting out that was sexual, not an enduring pattern of deviance or sexual interest in children.(Tr.793-4). He said Sebastian's sexual arousal was not specifically about children at the time of his offense.(Tr.802). Fabian testified there was no enduring quality to Sebastian's prior sexual offenses, or evidence that Sebastian had current sexual interest or arousal to children.(Tr.798).

Even if Sebastian's past conduct, self-disclosed conduct, fantasies, the music video supported pedophilia criteria, the State failed to establish that Sebastian was actively suffering from the diagnosis at the time of trial. Kircher did not know anything about Sebastian's thoughts, fantasies or desires at the time of trial, or have any current evidence of pedophilia.(Tr.459,552). There were no pedophilic behaviors since 2011.(Tr.644,646,714). Without evidence of current behaviors, urges, or fantasies involving sexual activity with prepubescent children at the time of trial, the State could not prove the present-tense requirements of the SVP Act or that Sebastian presently suffered from a condition that could be the basis for a mental abnormality.*Murrell*,215 S.W.3d at 104. At most, the evidence may have supported a finding that Sebastian ***had*** pedophilia in the past. But, as the State's own witnesses attested to and the DSM advised, pedophilia can change course over time, with or without treatment, including decreasing with age.(Tr.478).

Emotional or Volitional Capacity

To be a mental abnormality, a condition must affect one's emotional or volitional capacity.§632.480. Most pedophiles do not have mental abnormalities.(Tr.538). A pedophilia diagnosis does not mean that someone has emotional or volitional impairment.(Tr.645).

Kircher testified that emotional capacity looks at one's ability to regulate emotions and mood, like anger and depression and volitional capacity is one's ability to regulate behaviors.(Tr.372). She said that means managing sexual preoccupation, deviant fantasies, and acting-out behaviors; if fantasies are present, are they managed, or are they "so intense they're being acted out on."(Tr.372-3). Kircher never testified that pedophilia, or any other condition, caused Sebastian to be sexually preoccupied, have acting-out behaviors, or deviant fantasies so intense Sebastian was acting out on them. Kircher was asked if Sebastian ever acted out on a sexual fantasy after MoSOP therapy; Kircher testified Sebastian was aroused by a story another person in treatment told.(Tr.392). She did not testify Sebastian had fantasies or acted out on a fantasy. Kircher testified Sebastian's babysitting fantasy suggested he was preoccupied or fantasizing about a prior offense, but again did not testify the fantasy was intense, that Sebastian acted on it, or was not managing his thoughts.(Tr.394).

Later, when testifying about her risk assessment, Kircher testified she saw Sebastian's masturbation practices as sexual preoccupation.(Tr.444). However, she did not suggest Sebastian was masturbating as a result of urges for, or fantasies involving, sexual activity with prepubescent children, or otherwise link this with a mental abnormality. Witcher testified pedophilia was a mental abnormality because, "it is a condition which

affects a person's volitional capacity…"(Tr.595). Witcher did not offer any evidence to support that conclusion or explain how pedophilia affected Sebastian's volitional capacity. Neither witness' conclusions nor opinions were supported by the record, and their testimony was insufficient to make a submissible case.*Morgan*,176 S.W.3d at 211.

Fabian testified there was no evidence of emotional or volitional impairment, Sebastian had a healthy brain, and appropriate emotional and volitional capacity.(Tr.814). Sebastian responded normally and did well on impulse control and impulsive decision-making testing, and the frontal lobe of his brain appeared "very sound."(Tr.815-18). Because of neuropsychological testing, Fabian concluded Sebastian "had the ability to inhibit impulses," make decisions, reason and problem-solve appropriately.(Tr.818-19).

Furthermore, that Sebastian stopped when Angel told him to demonstrated intact behavioral control.(Tr.819). If someone was emotionally or volitionally impaired, they may have persisted or forcibly completed a sex act.(Tr.819). In contrast, Sebastian chose to stop.(Tr.819).

Predisposition to Commit Acts of Sexual Violence

Next, the condition must "predispose the person to commit sexually violent offenses," which are defined by the Act.§632.480(2),(4);*Thomas*,74 S.W.3d at 792;(Tr.373).

While she gave an ultimate opinion that pedophilia was a mental abnormality, Kircher testified that a pedophilia diagnosis is not evidence that someone is predisposed to any behavior.(Tr.410,477). She offered no evidence of pedophilia predisposing Sebastian

to commit any type of act and did not have current evidence that Sebastian was predisposed.(Tr.522-3).

Witcher testified pedophilia was a mental abnormality because, in part, it "predisposes the person to commit sexually violent offenses."(Tr.595). Witcher's reasoning was flawed and the record does not support her conclusion. Witcher herself testified that "pedophilia itself does not necessarily predispose a person to commit a sexually violent offense[,]" or any type of behavior; "however, in this case, it has shown to be such."(Tr.595-6,646). Nothing from Witcher's interview with Sebastian suggested he was "predisposed."(Tr.646). Witcher said Sebastian's prior offenses, including juvenile conduct and offending after juvenile sex offender treatment, "adds to the idea that this is predisposing him."(Tr.596). She did not have current evidence of "predisposition."(Tr.736-7).

Witcher appears to have been relying on the fact that offenses happened—"his history of juvenile offenses … then reoffending"—as her evidence.(Tr.596). Evidence that sexual contact happened does not support an inference of predisposition to commit sexually violent offenses. First, it could mean nothing more than Sebastian chose to act. There was no evidence that Sebastian was unable to prevent himself from engaging in any past conduct. Second, the Act requires the "condition," here pedophilia, to be the predisposition causing factor, not something else. Witcher unequivocally testified her "predisposition" opinion was based on behavior occurring when Sebastian was age 17-18.(Tr.645-5). Witcher testified that juvenile conduct could not be used to give a pedophilia diagnosis, but also that juvenile offending contributed to predisposition.(Tr.596-7). It is illogical that

conduct which is not evidence of a diagnosis is evidence the diagnosis causes the conduct. Furthermore, her conclusion again rests on the assumption that Sebastian had sexual contact with the 7-year-old, though she has no evidence any behaviors took place beyond statements.(Tr.643,645).*McGuire*,138 S.W.3d at 722.

Kircher's nor Witcher's opinions were supported by the record or sufficient to make a submissible case.*Morgan*,176 S.W.3d at 211.

Serious Difficulty Controlling Behavior

The condition must cause serious difficulty controlling behavior.*Murrell*,215 S.W.3d at 106;*Thomas,* 4 S.W.3d at 791-2;§632.480(2). Neither Kircher nor Witcher provided sufficient testimony to make a submissible case. Both agreed the Act looks specifically to "serious difficulty" controlling sexually violent behavior—offenses that are defined by the law; there is a difference in "some" and "serious" difficulty; and there is no scientific, empirical support for distinguishing between the two.(Tr.478-9,646-49). Without a scientific basis for determining Sebastian had "serious difficulty," their opinions were merely subjective conclusions, not expert opinions under §490.065, and were inadmissible.*Morgan*,176 S.W.3d at 211.

Kircher could not provide evidence to support her definition of "serious difficulty controlling behavior." Kircher testified "serious difficulty controlling behavior" means that a disorder or thoughts are "running a person's life," the person is not "managing [his] life," and he is being controlled by the disorder/thoughts.(Tr.374,482). She did not know what Sebastian's thoughts were or if he ever had thoughts controlling his life.(Tr.482).

To attempt to prove "serious difficulty," Kircher was asked if the offense against Angel, "might be an indication of serious difficulty controlling behavior" and answered, "[y]es, it would."(Tr.448). It is equally true it might be an indication Sebastian deliberately and consciously chose to engage in the behavior. The possibility that one instance might have been an indication of serious difficulty controlling behavior does not support a conclusion that Sebastian had serious difficulty controlling his sexually violent offense behavior at the time of trial.

Sufficient evidence of serious difficulty controlling behavior requires more than evidence an individual engaged in or repeated a harmful behavior, failing to avoid consequences. *In the Matter of the State of New York v. Donald DD*,21 N.E.3d 239, 248(N.Y.App.Div.2014). Past sexual behaviors may have been crimes of opportunity, and the individual may have been willing to risk punishment.*Id.*at249-50. "Serious difficulty" could not be rationally inferred from evidence that Sebastian committed the offense, even after having been previously caught and punished for committing an offense against the same girl once before. *Id.* at 248-249. This evidence was consistent with an individual who could control his behavior, but chose to force sex on someone.*Id.*at248. "[I]t is rarely if ever possible to say, from the facts of a sex offense alone, whether the offender had great difficulty controlling his urges or simply decided to gratify them," though running a risk of consequences.*Id.* Kircher's testimony was legally insufficient to support a conclusion that a mental condition resulted in serious difficulty controlling sexual conduct.*Id.*

Kircher never testified pedophilia caused Sebastian to have serious difficulty controlling sexually violent offense behavior, and had no evidence Sebastian had serious

difficulty controlling his sexually violent behavior at the time of trial.(Tr.484,552-3). Her opinion was not supported by the record and failed to make a submissible case.*Morgan*,176 S.W.3d at 211. The same is true of Witcher's ultimate conclusions and opinions.*Id.* She acknowledged she made a subjective determination about serious difficulty controlling behavior, which is different for each individual when she does an evaluation.(Tr.649). A subjective determination which is not based on science is not an expert opinion, does not satisfy §490.065, and was inadmissible.*Id.*

Witcher testified pedophilia caused "***some***" difficulty controlling behavior, but the Act explicitly requires the mental abnormality to cause "***serious***" difficulty.§632.480;(Tr.650,661;Ex.M). Behavioral control could be a continuum of various degrees of control: "we would have no problem, little problem, some problem, major problems, serious" problem and "total dyscontrol" or complete loss of control.(Tr.647-9;L.F.186).[7] "Serious difficulty controlling behavior" would be in the third

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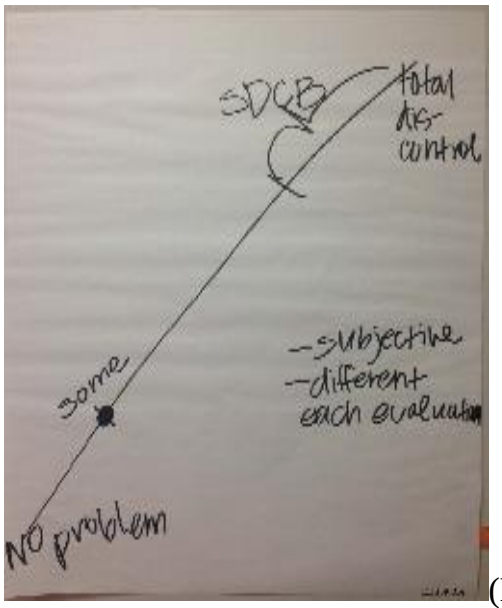
[7] 

(L.F.186, included in *Appellant's Appendix*).

closest to complete loss of control; "some difficulty" is closer to no behavioral control problem and does not fall within the range Witcher testified would be "serious difficulty."(Tr.648,661-2;L.F.186). Her opinion was not supported by the record and was not sufficient to make a submissible case.*Morgan*,176 S.W.3d at 211.

Witcher relied on the music video, not pedophilia, as her evidence of "serious difficulty controlling behavior" and believed it was "totally possible" Sebastian had control over his behavior but made a poor choice.(Tr.651,662). This evidence does not support her conclusion. First, because watching the music video was not sexually violent offense behavior, it could not exemplify difficulty controlling sexually violent behavior.(Tr.485,651,645-7);§632.480.

Next, sufficient proof of this component cannot consist of such meager material as watching a music video knowing it was not okay to do so according to your treatment provider and group members.*Donald DD*,21 N.E.3d at 248-9. Witcher testified she cannot "necessarily know" if someone had the ability to control his behavior, but made a choice, versus did not have any ability to control his behavior.(Tr.662). Because it was possible Sebastian could control his behavior, but poorly choose to watch the video, her conclusion that watching the video meant serious difficulty controlling behavior was based on an assumption not supported by the record or her own testimony; it was based on speculation and conjecture, and could not form a reliable basis for an expert opinion.*McGuire*,138 S.W.3d at 722.

Fabian had scientific support for his conclusion that Sebastian did not have serious difficulty controlling his behavior. Fabian's neuropsychological testing revealed that

Sebastian had impulse control, the ability to reason, problem-solve and make decisions, and that Sebastian's prefrontal cortex functioning was sound.(Tr.815-19). Sebastian stopped when Angel told him to, demonstrating behavioral control.(Tr. 819). Someone with serious difficulty controlling his behavior would have persisted or forcibly completed a sex act, but Sebastian chose to stopped himself.(Tr.819). Fabian testified there was no evidence of a mental abnormality linked to volitional impairment or serious difficulty controlling behavior.(Tr.861-2).

Conclusion

The State's expert opinions and mental abnormality conclusions were not supported by the record and were not sufficient to make a submissible case.*Morgan,*176 S.W.3d at 211. Neither witness offered evidence that at the time of trial: (1)Sebastian presently suffered from pedophilia, (2)his emotional or volitional capacity was presently impaired, (3)he was presently predisposed by pedophilia to commit acts of sexual violence, or (4)pedophilia presently caused him serious difficulty controlling sexually violent offense behavior. Therefore the jury could not reasonably infer Sebastian presently suffered from a mental abnormality that made him more likely than to commit predatory acts of sexual violence if not confined.*Murrell,*215 S.W.3d at 104,106; Thomas,74 S.W.3d at 791-2;§632.480(2). "To reach that conclusion, the jury would have had to engage in guess, conjecture, or speculation, which it could not do."*Morgan,*176 S.W.3d at 211. The trial court erred in denying his motion for a directed verdict, requiring reversal.*Id.* Nothing suggests the State could have made a submissible case; this Court must release Sebastian.*Id.*

II.

The trial court erred in denying Sebastian' motion for a directed verdict and committing him to DMH as an SVP because the evidence was insufficient to make a submissible case, violating his rights to due process of law and a fair trial as guaranteed by U.S.Const.amendsV,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21 and §632.495, in that the State failed to prove Sebastian suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined, as required by §632.480, because the experts did not assess for risk caused by a mental abnormality or for risk of future of predatory sexually violent acts, did not quantify "more likely than not," and the evidence did not demonstrate Sebastian' risk was "more likely than not."

Sebastian's motions for a directed verdict were denied and preserved in his post-trial motion.(Tr.742-5,877-8;L.F.148-51,179-81). Sebastian argued the State's evidence failed to establish any element of its petition and its experts could not quantify "more likely than not," and failing to grant a directed verdict violated his constitutional rights to due process, equal protection and a fair trial, and resulted in cruel and unusual punishment.(Tr.742-5,877-8;L.F.148-51,179-81).[8]

Sebastian incorporates the Standard of Review and Analysis from Point I.

Analysis

[8] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21.

The State's evidence was insufficient to make a submissible case on whether a mental abnormality makes Sebastian more likely than not to commit predatory acts of sexual violence if not confined.§632.480. Due process requires the mental abnormality and the danger of future sexually violent behavior be "inextricably intertwined" so that civil commitment is limited to those "suffering from a volitional impairment rendering them dangerous beyond their control."*Murrell*,215 S.W.3d at 104;*Hendricks*,521 U.S. at 353. Therefore, the State must prove that a four-part mental abnormality presently: (1)is the cause, (2)of "more likely than not" risk, (3)of committing predatory acts of sexual violence, (4)if the individual is not confined in a secure facility.*Id.*;§632.480(5).

This issue requires expert testimony because the likelihood of future acts of predatory sexual violence and the assessment of that risk is beyond the understanding of laypersons.*Cokes*,107 S.W.3d at 323;*Addington*,41. U.S. at 429;§490.065. "Predatory" is a component of the legal standard which must be proven by expert testimony to make a submissible case.*Morgan*,176 S.W.3d at 211;*Cokes*,107 S.W.3d at 324;§632.480(3).

Both Kircher and Witcher testified that Sebastian's risk was "more likely than not." (Tr.452).

Risk Caused by Mental Abnormality

During her direct, Kircher did not discuss Sebastian's future risk as being caused by a mental abnormality.(Tr.403,410,414,452). Kircher spoke about mental abnormality and risk in the disjunctive: whether he has a mental abnormality *and* whether he's "more likely than not."(Tr.367). She calculated all of the risk factors to determine if risk crossed the "more likely than not" threshold.(Tr.,410,486).She assessed risk with: the Static-99R and

Stable-2007, which measure factors correlating with sex offending and do not measure mental abnormality causing risk, and other risk factors associated with sexual reoffense.(Tr.523,426). Kircher conceded the Act requires the mental abnormality to be the cause of the future risk, not other factors, and never testified she assessed mental abnormality-caused risk.(Tr.523-5).

Witcher never testified that Sebastian's risk was caused by a mental abnormality.(Tr.608,621,624). After determining a person has a mental abnormality, she looks at "if not contained in a secure environment, is that person more likely than not to engage in sexually violent predatory behavior"(Tr.608-9). Witcher concluded Sebastian "is more likely than not" based on "the [Static] scores, looking at all the factors, taking into account his history."(Tr.621). Her evidence did not include pedophilia, and she never testified pedophilia caused Sebastian's risk. Witcher conceded a mental abnormality must cause the future risk, and neither Static measured mental abnormality-caused risk.(Tr.700). Because she could not measure the risk caused by a mental abnormality, she used the Static instruments.(Tr.700).

The State failed to connect "more likely than not" to a mental abnormality at trial. In voir dire, the State explained the jury would hear evidence "about whether Mr. Sebastian has a mental abnormality or not and whether he's more likely than not to commit a future act of sexual predatory violence."(Tr.220). In opening, the State said experts used actuarials and additional risk factors "to answer the question: Is Mr. Sebastian more likely than not to commit a future act of sexual predatory violence."(Tr.346). Again in closing, the State separated future risk: "the fourth element is that [Sebastian] is more likely than

not to engage in a predatory act of sexual violence if he is not confined," and discussed risk in terms of actuarials.(Tr.906-7).

The Act states an SVP is "any person who suffers from a mental abnormality ***which makes*** the person more likely than not…"§632.480(5). It does not define an SVP as a person whose Static or Stable-2007 score makes him more likely than not, or consideration of his scores, risk factors and history makes him meet that risk level. Rather, it requires the mental abnormality to cause or produce the risk of harm. Kircher never testified she assessed mental abnormality-caused risk; Witcher admitted she could not do so.(Tr.700). Neither testified that pedophilia, the only alleged mental abnormality, caused Sebastian to be "more likely than not." Only Fabian discussed the connection between risk and mental abnormality, testifying that Sebastian was not "more likely than not" as a result of a mental abnormality.(Tr.841).

The actuarial tools do not measure any cause of sexual offense risk; they measure factors which *correlate* with sexual offending.(Tr.410-11,701). Correlation does not imply causation; the Static and Stable test a correlation, but cannot lead to a causal conclusion.[9] *See* Rebecca Goldin, *Causation vs. Correlation*, Stats.org, Aug. 19, 2015,

[9] For example, the number of people who drown by falling into a pool correlates with the films Nicholas Cage appeared in, and per capita cheese consumption correlates with the number of people who died by becoming tangled in their bedsheets.Tyler Vigen, *Spurious Correlations*, http://www.tylervigen.com/spurious-correlations, last checked December 12, 2016.

http://www.stats.org/causation-vs-correlation/. "When the stakes are high, people are much more likely to jump to a causal conclusion."*Id.* "Without clear reasons to accept causality, we should only accept the existence of a correlation. Two events occurring in close proximity does not imply that one caused the other, even if it seems to makes perfect sense."*Id.*

The State's evidence failed to: establish a causal link between mental abnormality and future risk; demonstrate pedophilia was "inextricably intertwined" with the danger of future predatory, sexually violent behavior; and show Sebastian was suffering from a volitional impairment rendering him dangerous beyond his control at trial.*Murrell*,215 S.W.3d at 104;*Hendricks*,521 U.S. at 353.

Future Predatory Acts of Sexual Violence

The State's experts failed to assess for risk of future ***predatory acts of sexual violence***. It is insufficient to prove a likelihood of sexual acts in general, or even likelihood of sexual violence; "the anticipated future acts of sexual violence [must] be predatory in nature, based on the binding statutory definition of 'predatory acts.'"*Morgan*,176 S.W.3d at 208;§632.480(5). "Predatory" is defined as "acts directed towards individuals, including family members, for the primary purpose of victimization."§632.480(3). Therefore, the State must prove Sebastian was more likely than not to commit act of sexual violence against individuals, including family members, for the primary purpose of victimization.*Id.*;*Cokes*,107 S.W.3d at 323;§632.480.

"Predatory" is part of the legal standard which must be proven by expert testimony to make a submissible case and Kircher's testimony was not reliable because she did not

explain or incorporate that component.*Morgan*,176 S.W.3d at 211;*Cokes*,107 S.W.3d at 324;§632.480(3).

In *Lee v. Hartwig*, an expert was prohibited from testifying a defendant was "negligent" because he did not define that term. 848 S.W.2d 496, 498 (Mo.App.W.D.1992). Experts can testify to ultimate factual issues under §490.065, but the legal issue of "negligence" does not become a fact issue until the term is defined in accordance with the law.*Id.* Expert testimony is not admissible on issues of law and failure to provide the term rendered questions to the expert "inadequately explored legal criteria."*Id.*at498-9. In *McLaughlin*, the expert's testimony never established the legal criteria and failed to make a submissible case because the expert never established "standard of care" as defined by the law.220 S.W.3d at 321-22,324. An expert testifying to "standard of care" without reference to the legal definition, "does not satisfactorily articulate the appropriate legal standard" or prove the legal standard was used.*Id.*at321.

Without defining "predatory," Kircher could not demonstrate she relied on the legal standard.(Tr.367,410,452).*Id.* Expert opinion testimony not based on correct legal standards cannot assist the fact finder in determining the issues.§490.065. It is insufficient that "predatory" was later defined in the jury instructions and by Witcher; the context of Kircher's testimony did not prove *she* based her opinion on the legal standard in §632.480(3) and the jury could not know whether she used the same standard required by law and the instructions.*McLaughlin*,220 S.W.3d at 321;*Lee*, 48 S.W.3d at 489-9. No information supports a conclusion that Kircher's opinion meant that she believed Sebastian was more likely than not to commit acts of sexual violence directed towards individuals,

including family members, for the primary purpose of victimization. Kircher's failure to define "predatory" meant that whether or not Sebastian was more likely than not to commit ***predatory acts of sexual violence*** did not become factual issue during her testimony. Her conclusion on the legal issue was inadmissible and could not assist the State in making a submissible case.*Lee*,848 S.W.2d at 498;*McLaughlin*,220 S.W.3d at 321;§490.065.

Even considering Kircher's inadmissible testimony, the State's evidence failed to establish Sebastian was more likely than not to commit ***predatory acts of sexual violence***. The State's expert's risk assessments did not assess for future ***predatory acts*** or ***sexually violent offenses***.

Cokes reversed a commitment where the State failed to prove Cokes would reoffend in a sexually violent, predatory way.107 S.W.3d at 323-4. The expert reviewed mental health and police records; interviewed Cokes; rendered a diagnosis, using actuarials predicting a 48% and 92% chance of recidivism, which he said SVP evaluators used; looked at other risk factors; and concluded Cokes was "likely to sexually reoffend."*Id.*at 320,322. The Court ruled the jury could not reasonably infer from actuarial scores that Cokes would reoffend in a ***predatory sexually violent*** way.*Id.*at323-4. The State failed to make a submissible case and the trial court erred in denying a directed verdict.*Id.*at324.

.In *Morgan*, experts relied upon past sexual violence and actuarial risk assessments designed to predict the likelihood of reoffending in a sexually violent manner to conclude Morgan was more likely than not to commit future predatory acts of sexual violence.76 S.W.3d at210-211. There was no evidence of an intent to victimize supporting a finding

that the past acts were "predatory."[10]*Id.*at209. Expert reliance on the past act of sexual violence did not support a conclusion of the likelihood of future ***predatory*** sexual violence.*Id.*at210-11. Expert reliance on actuarials designed to predict the likelihood of reoffending in a ***sexually violent*** manner did not support an opinion that Morgan was more likely than not to engage in future ***predatory acts*** of sexual violence.*Id.*at211. Therefore, the Court determined the expert's ultimate opinion was not supported by the record or to make a submissible case, and the trial court erred in denying the motion for directed verdict.*Id.*

To assess risk, Kircher relied on actuarial assessments, the Static-99R and Stable-2007R, and dynamic risk factors she testified "correlate with sex offending" and "sex offense recidivism."(Tr.410-11,426-7). She said the Static measures "how likely someone is to get charged with a sex offense -- not specifically a sexually violent offense as the law asks us, but a sex offense"(Tr.415). The Stable-2007 was not designed to, and did not address, the likelihood of sexual re-offense.(Tr.497-8). Witcher scored the Static-99R and Static-2002R, "to see about a level of risk to reoffend in the future."(Tr.611). Witcher's dynamic factors did not increase risk above the Static scores.(Tr.614,664,699).Both

[10] The State stipulated to using the prior definition of "predatory" and had to prove relationships were established or promoted with the victim for the primary purpose of victimization.*Morgan,*176 S.W.3d at 205-7. Under the current definition, the State must show the primary purpose of the sexually violent behavior was victimization.§632.480(5).

witnesses agreed that the SVP law looks specifically at the risk to commit future sexually violent offenses—specific offenses defined by statute.(Tr.479,703).

Kircher said: Sebastian's Static-99R score of 4 was in the "moderate high risk" category; the score nor risk category conveyed a likelihood of re-offense; only absolute risk conveyed the likelihood of reoffending; and she did not use absolute risk.(Tr.422,494-6). Witcher said Sebastian's score on the Static-2002R was a 7, and that his Static-99R score of 5 meant a 21.2% chance of re-offense over five years.(Tr.614, 652).

The jury could not reasonably infer from Static raw scores, categories, or quantified probabilities of re-offense that Sebastian was not only more likely than not to sexually reoffend, but to do so in a predatory and violent manner.*Cokes*,107 S.W.3d at 324. "It goes without saying that a jury of laypersons would lack sufficient knowledge and understanding to draw any reasonable conclusions solely from the raw scores of testing instruments employed by forensic experts," in this case the Static-99R and Static-2002R. *Id.*at323. Like in *Cokes*, Kircher's and Witcher's testimony lacked the detail necessary for the jury to reasonably infer from the actuarial raw scores that Sebastian would reoffend as required by §632.480(5).*Id.*at232-4.

A jury could not reasonably ascertain what type of behavior Witcher's risk assessment method examined. That she used actuarials and dynamic factors "to see about a level of risk to reoffend in the future" did not establish assessment for predatory acts of sexual violence. To so conclude, the jury would engage in impermissible guesswork, conjecture and speculation.*Morgan*,176 S.W.3d at 211. The Stable-2007 is unrelated to any likelihood of re-offense.(Tr.497-8). This testimony, taken as a whole, established that

only the Static-99R actuarial instrument and dynamic factors had a relationship to the likelihood of re-offense.

The Statics did not measure if someone would commit a sex offense, only if they would be charged with one.(Tr.415). Being charged does not create an inference that an offense was committed or the individual charged is guilty of an offense.*State v. Kilgore*,771 S.W.2d 57,63(Mo.banc1989);MAI-CR 3d 300.02. Furthermore, the Statics did not contemplate charges for sexually violent offenses, conduct under the SVP Act.(Tr.415);§632.480. If evidence of possibly being charged with any sexual offense sufficed, the legislature would not have specified the commitment threshold as "more likely than not to commit predatory acts of sexual violence."§632.480(5). A jury could not reasonably infer from the evidence that actuarial scores or dynamic risk factors predicted predatory, sexually violent re-offense.

Past Act Was Not Predatory

Even if the experts had testified that the actuarials and dynamic factors determined the likelihood of sexually violent re-offense, the issue is whether Sebastian was likely to reoffend in a ***predatory*** sexually violent manner; the State had the burden of producing additional evidence of Sebastian's likelihood of future ***predatory*** acts of sexual violence.*Morgan*,176 S.W.3d at 210-11. Like in *Morgan*, to prove the likelihood of future predatory acts of sexual violence, the State relied on evidence of Sebastian's past acts and failed to establish they were ***predatory acts*** of sexual violence.*Id.*at208. Sebastian plead guilty and was convicted of attempted statutory sodomy, a sexually violent offense.(Tr.367);§632.480. That act was not predatory as defined by law.

The statutory definition of "predatory" "is an act directed to individuals for the purpose of victimization[,]" and specifically requires that victimization is the "***primary purpose***."(Tr.622,710). According to Witcher, whether an act was "predatory" depended on the "driving factor" behind the behavior, or why someone did it.(Tr.707). Kircher did not define "predatory," or offer testimony about acts for the primary purpose of victimization. At deposition, she did not know Sebastian's purpose in committing any offense and did not think that was something she could ever know.(Tr.397-400). Following Sebastian's objection to her trial testimony, the Court instructed the jury that Kircher had no opinion as to the purpose of Sebastian's conduct.(Tr.397-400,404-5). Therefore, her conclusion that Sebastian was more likely than not to commit predatory acts of sexual violence was not supported.*Morgan*,176 S.W.3d at 211.

Like in *Morgan*, Sebastian's past act of sexual violence did not qualify as a past act of ***predatory*** sexual violence because the evidence did not demonstrate that he acted with the primary purpose of victimization, as required by §632.480(3).*Id.*at209. Witcher testified Sebastian offended against Angel "for the purpose of obtaining–obtaining orgasm;" she repeatedly affirmed that the "drive" was sexual in nature, for "sexual gratification."(Tr.555-6,622). When asked if that act was "done for the primary purpose of victimization," Witcher replied, "he went in to commit a sexual act, in order to assist with his own sexual gratification"(Tr.558). When the State asked if she saw Sebastian's offending history as predatory, she testified:

> Not consciously, no. So I believe that he did not go in saying 'I am going to do this in order to hurt someone.' I do not believe that was the drive of his behavior; however that's what the behavior ended up doing.

(Tr.622). She never thought Sebastian committed an act thinking "I am going to do something to physically or emotionally hurt someone[,]" including when he acted as a juvenile, in 2011, or in the self-disclosed incident at 17.(Tr.622,708).

Witcher attempted to paint Sebastian's past behavior as predatory because offending against Angel created a victim, stating "the act itself is victimizing and is predatory" and "it doesn't have to be necessarily a conscious decision to go out and victimize someone; the victimization happens secondary."(Tr.622,710). She knew of people who committed sex offenses specifically with the intent to hurt someone, which would be a primary purpose of victimization.(Tr.710-11). In contrast, though Sebastian created a victim when he put his hand on Angel, he acted because of a desire for sexual gratification.(Tr.728).

The jury could not reasonably infer from the State's evidence of Sebastian's past act of sexual violence that he was more likely than not to engage in future ***predatory*** acts of sexual violence, because the only past act described as an act of sexual violence was not "predatory" per §632.480(3).*Id.*at209. Witcher's testimony established Sebastian's primary purpose, what she called the "drive" behind his behavior, was for personal sexual gratification.(Tr.555-6,558,662,710-11,728). That "victimization happens secondary" is not the statutory criteria.(Tr.710);§632.480(3). Witcher even testified Sebastian may not have realized his actions would create a victim.(Tr.728). Unintended and "secondary" consequences can never be the "primary purpose" of one's behavior. The only reasonable

inference from the evidence is that Sebastian committed an offense for the primary purpose of obtaining sexual gratification, and the fact a contact-offense created a victim was secondary.(Tr.555-6,558,662,710-11,728).

The record shows Kircher and Witcher only relied upon Sebastian's prior criminal offense and assessment results.(Tr.486,621);*Morgan*,176 S.W.3d at 211. Because their opinions were not supported by the record, they were insufficient to create a submissible case as to whether Sebastian was more likely than not to commit future ***predatory acts*** of sexual violence.*Id.* The jury was left to guess, conjecture, or speculate to conclude that Sebastian was more likely than not to engage in future predatory acts of sexual violence, which is improper.*Id.*;*Cokes*,107 S.W.3d at 323.

"More Likely Than Not"

The evidence failed to establish Sebastian was ***more likely than not*** to commit predatory acts of sexual violence because the experts did not quantify any ultimate likelihood of re-offense, and any risk of future re-offense fell below "more likely than not."§632.480(5).

"More likely than not," the threshold level of risk, is not defined by the Act. No Missouri SVP case has specifically defined "more likely than not," but experts have testified it means greater than 50%.*See, e.g.*,*In re Morgan*,398 S.W.3d 483,488 n. 7,489 (Mo.App.S.D.2013);*Smith v. State*,148 S.W.3d 330,335(Mo.App.S.D.2004). Other cases have discussed the phrase in terms of statistical probability.*See,e.g.*,*Wollen v. DePaul Health Center*,828 S.W.3d 681(Mo.banc1992)(statistical evidence of greater or less than

50%);*Elam v. Alcolac, Inc.*,765 S.W.2d 42(Mo.App.E.D.1988).[11] To meet the "more likely than not" standard, it is necessary to identify some variable that changes the base rate expectation of re-offense to a ***probability of re-offense***.*In re Coffel*,117 S.W.3d 116,127(Mo.App.S.D.2003). A probability of re-offense must be greater than 50%.

In *Elam*, the plaintiffs claimed they had an increased risk of cancer due to exposure to a carcinogen.765 S.W.2d 42. To successfully show an increased risk of cancer required expert testimony the estimated probability was "more likely than not," quantified as a probability greater than 50%.*Id.* at 208. The expert said the plaintiffs were at a "very high risk" of future cancer, but could not quantify that risk.*Id*.at206-7. Inability to quantify risk rendered expert opinion about future risk nonprobative.*Id*.at208.

Washington,[12] Wisconsin,[13] and Iowa[14] require proof of risk of re-offense of "more likely than not," or greater than 50%. *See In re Detention of Brooks*,36 P.3d 1034, 1045-6

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[11] But see *Matter of Hasty*,446 S.W.3d 336(Mo.App.S.D.2014)(question of expert testimony explaining "more likely than not" presented, but claim abandoned because appellant did not allege prejudice, therefore could not show error).

[12] Washington's threshold is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." Wash.Rev.Code§71.09.060(1).

[13] In Wisconsin, State must prove it is "likely that the person will engage in one or more acts of sexual violence." Wis.Stat.§980.01(1m),(7).

[14] Iowa requires a finding "the person more likely than not will engage in acts of a sexually violent nature." IowaCode§229A.2(3)(Supp.1999).

(Wash.banc2001)(overruled on other grounds by *In re Detention of Thorell*,72 P.3d 708 (Wash.banc2003)("likely," means a statistical probability of "more likely than not, that is, more than 50[%]");*State v. Barry L. Smalley*,741 N.W.2d 286, 287(Wisc.App.2007)(jury must find "there was more than a 50% chance");*In re Detention of Shearer*,711N.W.2d 733(IowaApp.2006)(assumption "more likely than not" required likelihood greater than 50%). A Washington jury decides "whether the probability of the defendant's reoffending exceeds 50[%]" and "when an expert testifies that a person has a likelihood of reoffending, it means that of the persons who suffer from this mental abnormality or personality disorder, more than 50[%] will engage in predatory acts of sexual violence if not confined in a secure facility."*Brooks*,36 P.3d at 1046. In Wisconsin, "'[m]ore likely than not' is not an obscure or specialized term of art, but a commonly-used expression[,]" and attorneys and experts are permitted to discuss the 50% threshold.*Smalley*,741 N.W.2d at 289-290.

Experts cannot rely on personal "more likely than not" standards; expert testimony must demonstrate an opinion is based on well-recognized standards.*Lee*,848 S.W.2d at 496. "More likely than not" does not become a factual issue for expert testimony until it is defined.*Id.* In *Strong*, the Court affirmed expert ability to testify to regulatory requirements, the ultimate issue in the case, and interpretation of their meanings.*Strong v. American Cyanamid Co.*,261 S.W.3d 493,513-14(Mo.App.E.D.2007) overruled on other grounds by *Badahman v. Catering St. Louis*,395 S.W.3d 29(Mo.2013). Expert explanations of the legal requirements become the definition of negligence in the case and the standard against which juries determine whether the defendant was negligent.*Id.* Without the expert testimony, juries would be unguided in interpreting the regulations..*Id.*,n.5.

As in *Strong*, expert explanations of "more likely than not" would become the threshold for risk in Sebastian's case and the standard against which the jury would determine whether he was more likely than not.*Id.* A forensic psychologist's estimate of the probability of re-offense with a predatory, sexually violent act as "more likely than not" to occur must be quantified as greater than 50%.*Elam*,65 S.W.2d at 208;*Coffel*,117 S.W.3d at 127;§632.480(5). Inability to quantify the risk renders the expert testimony nonprobative.*Id.*

SVP risk can be thought of as a spectrum ranging from no risk(0%) to absolute("guaranteed" risk of 100%), and "more likely than not" is the statutory threshold that must be met.(Tr.486,489,703-4;L.F.187).[15] Kircher could not explain the threshold, quantify it or identify where on the spectrum it fell, testified it is not a number or percentage

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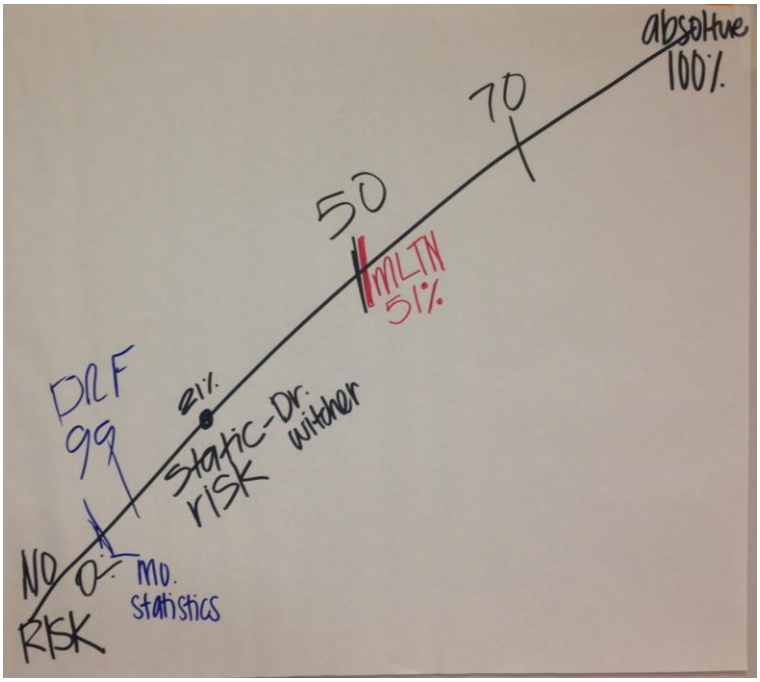
15 

(L.F.187, included in *Appellant's Appendix*).

"because my instruments don't give me that," and could not quantify Sebastian's future risk.(Tr.527,490,523). Kircher would not consider a 25% chance of rain to be "more likely than not."(Tr.491). Witcher testified "more likely than not" means that a person is more likely to engage in a behavior than to not engage in that behavior.(Tr.706). She could not quantify "more likely than not" or identify it on the risk spectrum, "because I believe it's different for every person;" and did not quantify Sebastian's risk.(Tr.706-7). Only Fabian testified that "more likely than not means" 51%, which is recognized in research.(Tr.838;L.F.187).

Neither State's witness testified "more likely than not" meant a probability quantified as greater than 50%, rendering their testimony and ultimate opinions on Sebastian's risk non-probative.*Id.* Kircher nor Witcher quantified the threshold or Sebastian's risk, or identified the threshold on the spectrum. "More likely than not to commit predatory acts of sexual violence" did not become an ultimate fact issue for the jury because that statutory threshold in the context of an SVP determination was never identified or explained by the experts.*Lee,*848 S.W.2d at 498.

Without testimony explaining "more likely than not" as greater than 50%, the State failed to establish that either expert applied the proper legal standard, or relied on reasonably reliable facts or data about what constitutes "more likely than not," in arriving at their opinion.*Morgan,*176 S.W.3d at 211;*McLaughlin,*220 S.W.3d at 321;§490.065.3. Jurors could not know whether the opinions were based on the law, on "well recognized standards," or something else, like a personal, unidentified standard, particularly where Witcher testified the threshold is different in her evaluation of different individuals.

*McLaughlin,*220 S.W.3d at 321;*Lee,*848 S.W.2d at 498. The jury was left unguided in interpreting the Act and deciding Sebastian's future risk.*Strong,*261 S.W.3d at 513. Without expert testimony, fact finders may "establish arbitrary standards on matters beyond their common experience and knowledge, and decide crucial issues on speculation, conjecture and surmise."*McLaughlin,*220 S.W.3d at 323.

Evidence Did Not Establish "More Likely Than Not"

To prove "more likely than not," the State adduced evidence of actuarial scores and dynamic factors. Both a Static-99R score of 4 and Static-2002R score of 7 fall in the "moderate high risk" category, but neither the score or category conveys the likelihood of reoffense.(Tr.422,494,652). There was no quantified probability of re-offense for the Static-2002R. The Stable-2007 did not address the likelihood of re-offense, Kircher had no evidence to support a score, and at the time of trial, Sebastian's Stable-2007 score was a zero, "because it would be unethical for me to try to evaluate a man I haven't seen in over a year."(Tr.426,798,499,502-3). The actuarial instruments did not give Kircher any quantifiable or numerical measure of Sebastian's risk.(Tr.490,523). Unable to quantify the probability of reoffense meant Kircher's "more likely than not" opinion and testimony was non-probative, as was opinion based on the Static-2002R.*Elam,*765 S.W.2d at 208.

Kircher did not quantify dynamic factor risk and did not have current evidence to of any dynamic factor at trial.(Tr.503). Witcher considered whether dynamic factors were present, but they did not increase risk predicted by the Statics.(Tr.614,664,699). Dynamic factors have no weight, with the exception of treatment completion, which research demonstrated reduced risk by 40%.(Tr.696-97). Fabian confirmed risk factors cannot be

added to actuarial scores to predict likelihood of re-offense above 51%.(Tr.839).Therefore, any "more likely than not" opinion based on combining actuarial risk and risk factors was unsupported and not sufficient to make a submissible case, and any opinion based on unquantified dynamic risk was non-probative.*Id*.;*Morgan*,176 S.W.3d at 211.

The State's only evidence with potential probative value in determining "more likely than not" was Witcher's Static-99R score. The Static-99R was the best measure of recidivism or reoffending available, a score of 5 predicted a quantifiable 21.5% chance of reconviction, and that risk could be considered "low."[16](Tr.404-5,652). Sebastian's Static risk of 21% was more than 0%, but less than 50% and meant that only 21 out of 100 men, were predicted to recidivate; 79 men were not.(Tr.71654,04-5;L.F.187). There is no scientifically valid way to determine if Sebastian is in the group of 21 or group of 79.(Tr.663-4). It is statistically more likely than a man with a score of 5 would be in the group of 79 men who do no reoffend.(Tr.655). Fabian charted the 11% likelihood of re-offense associated with a Static-99R score of 4("DR F 99") and the Missouri DOC base rate of 3%("Mo. statistics") on the demonstrative in blue.(Tr.837;L.F.187).

This evidence supported only one conclusion: Sebastian was not "more likely than not." It was more likely than not that Sebastian would ***not*** reoffend because his Static score correlated with a 79% probability that he would not reoffend, and a 21% chance he may

[16] "Reconviction" means any type of penalty, including non-sexual convictions or penalties, and technical violations of supervision.(Tr.653). "Reconviction" is broader than "reoffending."(Tr.653).

reoffend in the future was less than 50%. A 21% chance that Sebastian would reoffend could not meet Witcher's explanation of "more likely than not" because only an estimated probability of re-offense greater than 50% would mean that "a person is more likely than not to engage in a behavior than not engage in said behavior."(Tr.706). Moreover, because Sebastian's successful completion of MoSOP reduced his risk by 40%, accounting for his treatment completion meant Witcher's actuarial-predicted risk fell to 12.9%.

Any prediction of re-offense must be examined in light of the base rates, the probability of the particular outcome happening, within a particular population, within a particular timeframe.(Tr.825-6). Internationally, the base rate for sexual re-offense is 13% over five years.[17](Tr.826). A 12.9% chance of re-offense is the sexual re-offense base rate. This prediction of future dangerousness did not change the base rate expectation to a probability, or distinguish Sebastian from other typical, dangerous, persons who commit subsequent sexual offenses.*Coffel*,117 S.W.3d at 127;*Hendricks*,521 U.S. at 360;*Crane*,534 U.S. at 413. Of course, 12.9% reflects a risk of being charged for *any* type of sexual offense, not "sexually violent offenses" under the Act, or the even narrower class of "predatory sexually violent acts."

Conclusion

[17] Missouri's base rate is dramatically lower: a combined 3% over five years; 4.2% for individuals who failed or refused MoSOP and 2.6% for individuals who completed MoSOP.(Tr.862,827;Ex.L,p.82).

No evidence supported a reasonable inference that pedophilia caused Sebastian to be "more likely than not." Risk caused by pedophilia could not be measured and the State's experts could not quantify "more likely than not" or Sebastian's risk. Risk assessment methods did not assess for the probability of a future ***predatory act of sexual violence***. Any quantifiable risk of committing a future act was less than 51%. The experts' opinions were not supported the record, were inadmissible and insufficient to make a submissible case, and nonprobative of the issue.*Morgan*,176 S.W.3d at 211;*Elam*,765 S.W.2d at 208. The State failed to prove Sebastian suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined. The trial court erred in denying his motion. The State could not make a submissible case if remanded. This Court must reverse and release Sebastian.

III.

The trial court erred and abused its discretion in ruling Witcher did not change her opinion and permitting her to testify differently at trial than in her deposition, because this resulted in fundamental unfairness, prejudiced Sebastian in preparing and trying his case, impacted the jury's deliberations, and affected the outcome of trial, violating his rights to due process, a fair trial, discover expert opinions, cross-examine witnesses, and present evidence in his defense, guaranteed by U.S.Const.amends.V,VI,XIV, Mo.Const.art.I,§§2,10,18(a), §§632.489,632.492, and Rule 51.06, in that Witcher testified to her opinions and the basis for them when deposed; testified to an opinion relying on new/different facts as evidence of pedophilia, new sources of information, and different diagnostic criteria related to victims; testified she changed part of her opinion since deposition; and the State failed to disclose those changes or supplement Witcher's deposition testimony.

Witcher testified to new, undisclosed bases for her pedophilia diagnosis, which differed from the evidence she disclosed during her deposition.(Tr.550,555,625-7,631,640-43). She acknowledged changing her opinion, adding evidence, to meet the pedophilia criteria.(Tr.625-6). Sebastian's objections were overruled and Witcher's new opinions and bases for them were admitted.(Tr.550-3,558-9). Sebastian argued failure to disclose Witcher's opinion changed was a discovery violation and prejudiced him, preserving the issue in his post-trial motion.(Tr.551;L.F.184).

Standard of Review

The trial court has discretion in controlling discovery and the remedy for non-disclosure.*Gallagher v. DaimlerChrysler Corp.*,238 S.W.3d 157, 162(Mo.App.E.D.2007). This court reviews for an abuse of discretion, the same standard applied to discovery violations and sanctions in criminal cases.*Id.;State v. Scott*,943 S.W.3d 730, 735(Mo.App.W.D.1997). On appeal, this Court gives deference and "accept[s] as true the factual findings that underpin the trial court's order imposing a remedy or sanction for a discovery violation, unless the factual findings are not supported by substantial evidence or are against the weight of the evidence."*State ex rel Jackson County Prosecuting Attorney v. Prokes*,363 S.W.3d 71,75(Mo.App.W.D.2011),*citing Murphy v. Cannon*,536 S.W.2d 30,32(Mo.banc1976). Discovery rules are rooted in due process, therefore compliance is mandatory.*Prokes*,363 S.W.3d at 75. Where the State fails to comply, "the question is whether the failure has resulted in fundamental unfairness or prejudice to the defendant."*Id.* An abuse of discretion occurs when the remedy resulted in fundamental unfairness or the outcome of the case was altered.*Scott*,943 S.W.3d at 735.

Analysis

Commitment is a significant deprivation of liberty requiring due process protection.*Addington*, 441 U.S. at 425. The Act grants rights afforded to criminal defendants, including the rights to counsel, a trial, to present evidence, and cross-examine adverse witnesses.*Norton*,123 S.W.3d at 175;§§632.489,632.492. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."*Fleshner v. Pepose Vision Institute, P.C.*,304 S.W.3d 81,87(Mo.banc2010)(internal quotations and citation omitted). Commitment is only constitutionally permissible "provided the commitment takes place

pursuant to proper procedures and evidentiary standards."*Murrell*, 215 S.W.3d at 103;*Hendricks*,521 U.S. at346,357;*Foucha*,504 U.S. at80. The Act contemplates discovery and retention of experts.*Tyson v. State*,249 S.W.3d 849,853(Mo.banc2008);§§632.489, 632.510. When the state hires an expert to support an SVP verdict, it has a duty "to be reasonable and fair, not deceitful or underhanded."*In re Doyle*,428 S.W.3d 755(Mo.App.E.D.2014).

An expert's identity, opinion, and the facts she relied upon in forming opinions, is discovered by interrogatory or deposition.Rule 56.01. If the State's expert changes his opinion after interrogatories or deposition, but before trial, it has a duty to disclose the new information.*Bradford v. BJC Corp. Health Services*¸200 S.W.3d 173, 180(Mo.App. E.D.2007), *citing Green v. Fleishman*,882 S.W.2d 219, 221(Mo.App.W.D.1994);Rule 56.01(e). The State also has a duty to disclose when the expert bases his trial opinion ***on new or different facts from those disclosed in the deposition*** or interrogatory responses.*Green*,882 S.W.2d at 221. Failure to disclose changed expert testimony frustrates the rules of discovery and results in concealment and unfair surprise.*Bradford*,200 S.W.3d at 180.

When an expert testimony differs at trial, the trial court may exclude it or impose other sanctions.*Green*,882 S.W.2d at 222. Appropriate sanctions include excluding testimony about some or all matters,*Id.* at 181; granting a new trial,*Pasalich v. Swanson*,89 S.W.3d 555,564(Mo.App.W.D.2002); and striking the expert's new opinion and instructing the jury disregard,*Bailey v. Norfolk and Western Railway Company*, 942 S.W.2d 404, 413(Mo.App.E.D.1997).

Supplemental Disclosure Required

Consistent with Sebastian's discovery and trial rights, Witcher was deposed before trial.(Ex.M;Tr.625). At that time, Witcher relied upon three facts to support a pedophilia diagnosis: (1)the 2011 offense, (2)the uncorroborated self-reported offense when Sebastian was 17 years old against Angel's sister, and (3)the music video; she said physical development of the child was decisive diagnostic criteria, and she did not rely on Kircher's evaluation.(Tr.626-27,634,641;Ex.M,p.41-2,45-6,51).

Sebastian objected when Witcher's trial testimony deviated from her deposition.(Tr.550). The State argued Witcher's opinion had not changed and although Sebastian specifically asked what she relied upon for the pedophilia diagnosis, he did not ask "is this everything?"(Tr.552). The deposition transcript refutes this claim.

The trial court agreed and said it was a matter of whether she supported her opinion with different information.(Tr.553). The State successfully argued that was an issue for cross examination; the objection was overruled.(Tr.533).

The trial court reviewed Witcher's deposition, where Sebastian asked what evidence Witcher relied upon, clarifying after her answer:

> Q: Okay. So the undisclosed victim, the instant offense victim, and then the music video in MoSOP, those three things?
>
> A: Yes, ma'am. Those three things show his attraction and behavior.

(Tr.552:Ex.M,p.45). In deposition, Witcher testified she looked at Kircher's report, but did not rely on Kircher's evaluation and Kircher affirmed the same at trial.(Ex.M,p.41-2;Tr.627).

At deposition, Witcher: used age 12 as the "prepubescent mark;" said pedophilia diagnostic criteria was concerned with the individual's development—whether they are prepubescent or pubescent, not age; and relied on Angel's sister as the "undisclosed victim" (Tr.634,641;Ex.M,p.46,51;Ex.F). Witcher's trial testimony differed, including: her opinion two fantasies met diagnostic criteria, one coming from Kircher's report; pedophilia could be diagnosed based on age; and the undisclosed victim was an unrelated girl for whom there were no medical records.(Tr.549-50,627,631,641,643).

This evidence demonstrates that while Witcher's *diagnosis* did not change, her *opinion* as to the diagnostic criteria and evidence did. She acknowledged changing her opinion to add more evidence to meet the pedophilia criteria.(Tr.625-6). Overruling Sebastian's objection--that Witcher had changed the basis for her opinion-- because "she is not changing her opinion" was not supported by substantial evidence, was against the weight of the evidence and was a ruling that no discovery violation occurred.*Prokes*,363 S.W.3d at75. Concluding that basing an opinion on different facts did not require supplemental disclosure was legally incorrect. "When an expert witness has been deposed and later changes that opinion before trial or bases that opinion on new or different facts from those disclosed in the deposition, 'it is the duty of the party intending to use the expert witness to disclose that new information to his adversary, thereby updating the responses made in the deposition.'"*Green*,882 S.W.2dat221.

In *Bradford*, a medical negligence case, a physician was deposed about his opinions, including those about plaintiff's injury.200 S.W.3d at180. Later, the doctor reviewed an MRI film and changed his opinion on the injury's location, but not on the standard of care

and appropriate treatment due.*Id.* The doctor reviewed an MRI report, not the MRI itself; testified he did not need to review the MRI at deposition; and the MRI was available to him before trial, therefore the trial court determined testimony about reviewing the MRI would be excluded.*Id.* The injury's location was a significant, disputed issue at trial and the focus of plaintiff's experts' opinions as to standard of care; permitting the doctor's new opinion testimony about the injury's location would have resulted in unfair surprise.*Id.* Exclusion of the doctor's testimony was affirmed.*Id.*at181.

Like the *Bradford* expert, Witcher gave her opinions about pedophilia criteria and what evidence supported those criteria, but she changed those opinions before trial.*Id.*at180. Witcher nor the *Bradford* doctor viewed newly discovered or obtained evidence.*Id.* Kircher's report and records about fantasies were available before Witcher'sdeposition.(Tr.552). While Witcher's diagnosis did not change, the facts supporting it, the diagnostic criteria, and the sources of information she relied upon did. These were significant, disputed issues at trial, and whether Sebastian met the criteria for a pedophilia diagnosis was a focus Sebastian's defense and expert's testimony.*Id.*

Unlike in *Bradford*, Witcher's changes were never disclosed before trial.*Id.* Eliciting the changed opinion during trial was not a seasonable disclosure providing reasonable notice.*Pasalich*,89 S.W.3d at564;Rule56.01(e)(2). Because the trial court incorrectly concluded there had been no change to Witcher's opinion, it exercised no discretion with respect admitting her or fashioning a remedy for the discovery violation.

Fundamental Unfairness & Prejudice

Sebastian was entitled to discover Witcher's opinions and the basis for them before trial, and to supplemental disclosure if they changed after depositions, to ensure a fair trial. The State's noncompliance with the mandatory discovery rules resulted in concealment unfair surprise, fundamental unfairness, and prejudice to Sebastian.*Prokes*,363 S.W.3d at78;*Bradford*,200 S.W.3d at180. "Untimely disclosure or nondisclosure of expert witnesses is so offensive to the underlying purposes of the discovery rules that prejudice may be inferred."*Wilkerson v. Pretlutsky*,943 S.W.2d 643,649(Mo.banc1997). Prejudice also results when failure to disclose new opinion impacts trial strategy and presentation of one's case, requiring a new trial.*Pasalich*,89 S.W.3d at564. The *Pasalich*, a plaintiff was prejudiced and the trial court granted a new trial because a changed opinion may have affected the jury's deliberations on an element, and the way the plaintiff prepared for trial and presented her case.*Id.*

Sebastian was also prejudiced by denial of his due process rights to prepare for trial, cross-examine witnesses, and present defense evidence in light of the undisclosed opinion change; therefore, his trial was unfair. *Norton*,123 S.W.3d at 175;*Fleshner*,304 S.W.3d at 87. Because his commitment did not take place pursuant to proper procedures and standards, it was not constitutionally permissible.*Murrell*,215 S.W.3d at 103.

Sebastian was further prejudiced because the changes to Witcher's opinion were substantial and impacted significant, disputed issues. First, the criteria for Witcher's diagnosis changed. Whether the subject of Sebastian's behaviors and thoughts had to be prepubescent was a significant issue, disputed for the first time at trial. At her deposition, Witcher used age 12 as the "prepubescent mark" and said was diagnostic criteria was

concerned with the individual's development—whether they are prepubescent, not age, and that whether the 11-year-old was pubescent matter, not chronological age.(Tr.634;Ex.M, p.46). This was consistent with both Kircher's and Fabian's testimony.(Tr.467-9,794). An 11-year-old female with Tanner Stage 4 development, who had begun menstruation, would not be prepubescent or meet pedophilia criteria.(Tr.468-9). At trial, Witcher reneged, claiming the DSM did not "fully" state that and what was important was that the individual was generally under the age of 13.(Tr.631). Her testimony suggested anyone under 13 qualified.(Tr.631).

This was a significant departure from her pretrial opinion. At deposition, Witcher had no evidence about Angel's physical development; believed she was prepubescent; and had reviewed medical records given to her by the State demonstrating Angel was 5'4", weighed 136 pounds, presented at Tanner Stage 4, and began menstruation at 9.(Tr.631;Ex.M,p.46-7;Ex.E). Witcher testified at trial Angel was not prepubescent.(Tr.640). Any contact with her was not evidence of pedophilia, unless puberty no longer mattered. Witcher acknowledged as much in deposition, testifying she looked to the "prepubescent mark;" diagnostic criteria looked to physical development, not age; she assumed Angel was prepubescent; the medical records could change her diagnosis; and if Angel was prepubescent, her diagnostic evidence would be the self-disclosed conduct with Angel's sister and the music video.(Ex.M,p.46-7,49-51).

Next, Witcher changed who the undiscovered girl was in order to support her diagnostic opinion. At deposition, Witcher believed that the self-reported conduct involved Angel's sister; the sister's 2011 SAFE report showed she was five-foot-tall, 126-pound 10

years-old and was physically developed like Angel.(Tr.641Ex.M,51;Ex.F).[18] During her deposition, Witcher said this information required reconsidering if Sebastian met a paraphilia diagnosis, but it would not change the Static scores.(Ex.M,p.51-2).

At trial, Witcher agreed she changed her testimony and the self-reported offense involved a different girl, for whom there were no medical records.(Tr.641,643). Witcher testified the conduct with this 7-year-old met the criteria because "it's a sexual behavior committed against a child," but never testified she was prepubescent.(Tr.559). Without this girl's medical records, no one could refute Witcher's prepubescence assumption and Witcher could not demonstrate prepubescence. Therefore, Witcher again assumed prepubescence, without evidence to support her assumption. Medical records in the case demonstrated using an arbitrary cutoff age, rather than physical maturation, permitted different conclusions about prepubescence. Conveniently, Witcher no longer believed development was decisive. Without these two changes in Witcher's testimony, the evidence at trial would have established neither sister met pedophilia criteria, and that Witcher lacked sufficient evidence, including a six-month duration of conduct, to support a diagnosis.[19]

[18] Sebastian had reported the sister was 7 years old.(Tr.550). Witcher was also confused about Angel's age in 2011, believing before deposition Angel was 8.(Ex.M,p.46).

[19] Witcher relied on the two incidents, which happened around the same time, and the music video to satisfy the six-month criteria.(Tr.644).

Finally, Witcher decided at trial that two fantasies were evidence of pedophilia.(Ex.M,p.45;Tr.550,555,626-7). One from MoSOP records involved the offense against Angel going differently, and the other involved a fantasy from Kircher's report about babysitting a non-existent niece.(Tr.550,561,585-87,627). The babysitting fantasy was only contained in Kircher's report.(Tr.627). However in her deposition and at trial, Witcher testified that she did not rely on Kircher's evaluation.(Ex.M,p.41-2;Tr.627). Sebastian was entitled to rely on Witcher's deposition representation that she did not rely on Kircher's evaluation, and therefore nothing in Kircher's report served as the basis for her opinions. However, using the fantasy as evidence of pedophilia required reliance on Kircher's report; Witcher changed both the evidence to support her diagnosis and the sources of information she relied upon.

Witcher's deposition impacted how Sebastian prepared for trial and cross-examined Kircher during trial. Prior to Witcher's surprise fantasy evidence, Sebastian had no reason to believe any expert relied on the babysitting fantasy as evidence of pedophilia. Kircher testified Sebastian's offenses after turning 17 and a fantasy they discussed about "a female child under the age of 12" were evidence of Criterion A.(Tr.358-6). Later she explained Sebastian "also" reported a fantasy to her about babysitting his hypothetical niece, which suggested he thought about prior offending.(Tr393-4). Kircher's testimony established the fantasy she relied upon as evidence of diagnostic criteria was not the babysitting fantasy.

The only evidence about a fantasy about the criminal conviction offense going differently came from Witcher.(*See*Tr.385,393-4,585). Had Witcher testified consistently at trial, the jury would not have heard it, or about differences between the account in

Kircher's report about the babysitting fantasy, what Sebastian said to Witcher about it, and evidence that Sebastian minimized.(Tr.629,585-87).

Without changing the criteria, the supporting evidence, and the sources of that evidence, Witcher's testimony would not have established a mental abnormality. Under Witcher's deposition testimony, she would not have had behaviors with two prepubescent girls and the only evidence to support her diagnosis would have been watching the music video, behavior she testified was not predatory or sexually violent.(Tr.645,651). Therefore, permitting Witcher to give her changed opinion may have affected the jury's deliberations and impacted the outcome of trial.*Pasalich*,89 S.W.3d at564.

The jury could not reasonably conclude from Kircher's testimony alone that Sebastian suffered from a mental abnormality causing him to be "more likely than not." To meet Criterion A and the six month criteria, Kircher testified "when he was 17, he committed a subsequent sex offense" against a 7-year-old, "we have a victim there," the conviction offense against Angel, and the fantasy Sebastian reported to her about the 12-year-old.(Tr.385-6). Kircher called the self-report involving the 7-year-old and the offense against the 11-year-old "our two behaviors."(Tr.468).

Under Criterion A, what matters is if the person to whom the sexual behavior or interest was directed to had entered puberty.(Tr.467). "A child who is Tanner Stage 4 in both breast development and pubic hair and had begun menses at nine would not meet criteria for a pedophilic victim."(Tr.469). Such was Angel's development.(Ex.E). Kircher's diagnosis relied on an assumption that Angel was prepubescent, which was not

supported by the record; her assumption did not form a reliable basis for an expert opinion.*McGuire*,138 S.W.3dat722;*Morgan*,176 S.W.3d at211;§490.065.

Her diagnosis, like Witcher's, also relied on an assumption that Sebastian *actually committed* an offense against the 7-year-old, and not just that he said he did. The pedophilia diagnosis required evidence of "behavior or the interest in children;" Kircher did not include self-reported statements in that list.(Tr.384). She had no actual evidence this offense occurred, only Sebastian's words.(Tr.477). Admissions by an accused must be corroborated by independent evidence showing the *corpus delicti* of the alleged offense; slight corroborating facts are sufficient to establish the *corpus delicti*.*State v. Jones*,427 S.W.3d 191(Mo.banc2014). Nonetheless, Kircher affirmatively testified that Sebastian committed a sexual offense at 17, created a victim, and there was a behavior.(Tr.385,468). Kircher's reliance on statements as evidence of pedophilia required her to assume that the behaviors happened, which was not supported by the record and did not form a reliable basis for an expert opinion.*McGuire*,138 S.W.3d at 722;*Morgan*,176 S.W.3d at 211; §490.065.

The only evidence Kircher had that a fantasy involved "marked distress" or acted out on a fantasy, necessary to satisfy Criterion B, involved an incident where Sebastian became aroused about a story involving an older teenage girl and did not involve a prepubescent individual.(Tr.389,391-2). That is not an example of a fantasy, urge, or behavior involving a prepubescent child or evidence of pedophilia.(Tr.384,389). Therefore, Kircher did not have evidence of behaviors involving prepubescent children, marked distress caused by fantasies involving prepubescent children, or evidence spanning more

than six months. She had no evidence to support the only diagnosis she testified could have been a mental abnormality in this case.(Tr.455,459,462-3,466,468-9,481-2,484,522). Her opinion was not supported by the record and her testimony was insufficient to make a submissible case.*Morgan*,176 S.W.3d at 211.

Remedy

In *State v. Scott*, the defendant's conviction was overturned on appeal where the State failed to disclose evidence of the defendant's inculpatory statements until the second day of trial.943 S.W.3d at 730. While the trial court sanctioned the State during trial and excluded the new testimony, the Western District said it "must rule" exclusion of the new evidence "was not sufficient to remove the prejudice to the defendant in preparing and trying the case."*Id.*at 739. Discovery violations can result in due process violations.*Id.* While the evidence of the defendant's guilt was strong, a new trial was required, even if the same verdict would result at the new trial.*Id.* The State's failure to disclose denied the defendant his right to an opportunity to prepare a defense before trial.*Id.* "[A] new trial is a small price to pay for preserving the integrity of a fair trial."*Id.*

Sebastian was denied a fair trial by the failure to disclose Witcher's new opinion and inherently prejudiced in preparing and trying his case, requiring a reversal and, at minimum, a new trial.*Id.* The State could not have made a submissible case without the changed testimony. This court must reverse and release Sebastian from confinement.

IV.

The trial court erred in overruling Sebastian' objection and admitting Kircher's, because this violated his right to due process, assistance of counsel, to silence, and equal protection, guaranteed by U.S.Const.amend.V,VI,XIV, Mo.Const. art.I,§§2,10,18(a) and §§490.065,632.483, in that the EOC determination is inadmissible pursuant to §632.483; Kircher's determination was not reliable because the scope of her evaluation was limited to the finite moment in time Sebastian was paroled and only for the purpose of referring him into the process, was not based on the burden of proof at trial, and was based on incomplete and insufficient information to form a reliable opinion; Sebastian did not have substantive protections at the time of her questioning, like a criminal defendant subject to investigative questioning or persons subjected to mental examinations in other civil commitment cases; his statements to Kircher were unwarned and involuntary; her two-year-old limited determination could not assist the jury in determining if Sebastian presently met the criteria for commitment under §632.480; his communications with her were privileged under §337.055; she failed to produce any documents in response to a subpoena *duces tecum*; and any opinion at trial was different than her opinion disclosed during her deposition.

Facts

Sebastian moved to exclude and strike Kircher's End of Confinement("EOC") report and determination from evidence, arguing that admission of the report and her

determination were precluded by §§495.065, 632.483 and the *Bradley* decision, 440 S.W.3d 546(Mo.App.W.D.2014), and to exclude any statements he made to her and her testimony from trial.(L.F.34-8,85-118,131-38,139-41). His request was denied before Kircher testified at the probable cause hearing.(L.F.4). Before trial, Sebastian renewed his request and submitted deposition testimony of Kircher and Dr. Rick Scott in support of his motion.[20](L.F.85-119;Tr.332-38;Ex.A,B,C). The trial court denied the motion.(Tr.134, 631-3).

Sebastian argued the EOC was: for a limited purpose and time(solely for screening SVP cases); irrelevant to his *current* condition; supplanted by the DMH evaluation; irrelevant and prejudicial; and based on incomplete information.(L.F.34-8,85-118,131-38,139-41). Sebastian also argued because Kircher had no current opinion, could not give evidence of any diagnostic criteria, risk assessment instrument, or dynamic risk factor, and did not produce documents in response to a subpoena *duces tecum* at her deposition, she could give an opinion at trial.(Tr.332-335,365,375-80). His objections were overruled.(Tr.365,379-80). He claimed that admission of Kircher's testimony would

[20] Kircher's deposition in the instant case was Exhibit D.(Tr.338). Prior Deposition of Nina Kircher.(L.F.107-118;Ex.A). Deposition of Dr. Rick Scott, DMH psychologist and certified forensic coordinator, who performed both EOC determinations and post-probable cause comprehensive SVP evaluations, and had more experience conducting SVP evaluations than any other Missouri evaluator.(L.F.93-106;Ex.B). References to their depositions, Exhibits A and B, will be to "Kircher" and "Scott," respectively.

violate due process and equal protection, and deny a fair trial and the effective assistance of counsel, and violate privilege.(L.F.85-119,142-44,183-85;Tr.380-1).[21]

Standard of Review

Ordinarily, the trial court has discretion whether to admit evidence at trial.*Elliot v. State*,215 S.W.3d 88,92-93(Mo.banc2007). Whether testimony and evidence met the requirements of §490.065 and are admissible is reviewed de novo.*Kivland v. Columbia Orthopaedic Group, LLP*,331 S.W.3d 299,311(Mo.banc2011). Whether an expert's opinion is supported by sufficient facts and evidence is a question of law.*Robinson v. Empiregas Inc. of Hartville*,906 S.W.2d 829(Mo.App.S.D.1995). Sebastian also incorporates the Point III's Standard of Review and analysis.

Analysis

In Missouri, commitment is only constitutional if it follows proper application of §490.065 and the trial court must determines: (1)the expert is qualified; (2)her testimony will assist the trier of fact; (3)her testimony is based on facts or data reasonably relied upon by experts in the field; and (4)the facts or data upon which she relies are otherwise reasonably reliable.*Id.*at310-111. When inadmissible evidence is received, this Court assumes that the jury considered the evidence in reaching the verdict.*Gates v. Sells Rest Home, Inc.*,57 S.W.3d 391,396(Mo.App.S.D.2001).

Determination Was Inadmissible, Unreliable, Irrelevant, & Prejudicial

[21] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a);§§632.483,490.065,337.636.

Kircher's evaluation was a screening determination.§632.483. Section 632.483.5 provides, *inter alia*: "The *determination* of the prosecutor's 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." That section precludes use of determinations, but not assessments, like the evaluation by the multidisciplinary team("MDT").*Bradley*,440 S.W.3d at557.

In *Bradley*, the Court examined the admissibility of the MDT assessment, not the EOC determination.*Id.*at556-8. Section 632.483 precludes only "determinations" of (1)"the prosecutor's review committee, [(2)]or any member of section 632.483 or section 632.484."§632.483.5.[22] "Several individuals and entities… make 'determinations' (e.g., the individual issuing the EOC report, the prosecutors' review committee, the probate court, and the department of mental health). But the MDT is not among these individuals and entities."*Id.*at557-8;§632.483.5. Kircher, however, is.*Id.*;§632.483.2. A "member" of §632.483 is anyone identified, like the EOC author and probate court, or belonging to an entity listed, like the PRC or MDT.*Id.*at557-8. The *Bradley* Court was not distinguishing between individuals involved, but between the duty of the individual to make an "assessment" or a "determination." Therefore, Kircher's determination was not admissible

[22] *Bradley* misinterpreted the disjunctive "or" as "and" to make a reference to the MDT's absence from §632.484 as support for its holding.*Id.*at558;§632.483("or any member of section 632.483 ***or*** section 632.484.").

to prove whether Sebastian was an SVP.§632.483.5. An inadmissible determination cannot meet the admissibility requirements of §490.065.

Exclusion of the EOC determination under §632.483 is a logical conclusion since it is part of a pre-trial screening process to determine if someone will be referred for commitment or released from custody, and according Kircher, her only role was "to determine whether or not they met criteria for referral" to the MDT and state attorneys.§632.483;(Kircher,p.6-11). Kircher's determination answers a different question than the court-ordered DMH evaluation following probable cause.§632.489. That DMH evaluation is an "extensive" and "full evaluation" for the purpose of informing the jury at trial.(Kircher,p.11,69). Therefore, EOC scope is limited to answering a referral question, not ultimate commitment questions at trial, and is not sufficiently reliable or relevant at trial.§.(Scott,p.14,22,24-25,37);§490.065. The EOC determination is not intended to be an opinion on the ultimate trial issues, and Kircher should not have been permitted to testify Sebastian was "more likely than not" because of a mental abnormality.(Scott,p.23-24).

Furthermore, Kircher's opinion was made to a reasonable degree of psychological certainty for the heightened clear and convincing burden of proof used at trial.(Scott,p.14,26-27). The reasonable degree of certainty necessary to make a referral to the MDT and Attorney General, and even for the probable cause phase, is not the same degree of certainty needed to render an opinion at trial.(Scott,p.14-15,26-27). Therefore, it is not reliable or relevant at trial.§490.065.

The EOC reliability is further diminished based on the limited information available at the time of that determination. Kircher calls herself a "screener" because she has limited

access to only a portion of records available, unlike the DMH evaluator who has access to all records.(Kircher,p.11,13;Tr.459-60). Records available to Kirchre are often incorrect and are not original sources of information like police reports.(Scott,p.27,36-37). Kircher primarily relied on probation and parole records, which were second-hand accounts; she did not have police reports about any allegation, juvenile records, or documentation made at the time of any of prior behaviors.(Tr.460-61).

The narrow, limited bases for her opinions limit the reliability of her conclusions, and there is not enough information to support a reliable trial opinion until discovery is completed.(Scott,p.27-28,36). "There's just too little information to make the [EOC] opinion reliable enough to be admissible at [trial] level."(Scott,p.37). Experts completing SVP evaluations rely on the full range of facts and data and cannot render opinions based only upon the DOC treatment and institutional adjustment records available to the EOC reporter.§632.483. Therefore, the facts and data available to Kircher were insufficient to support her opinion and not reasonably relied upon in the field for rendering an opinion for trial, and were not otherwise sufficient or reliable.§490.065.

The purpose of trial was to determine Sebastian's mental condition and risk at the time of the trial.(Tr.456). Kircher had no opinion for "today," the time of trial; Kircher's opinion was only applicable to January, 2015.(Tr.455-6). She had no current evidence: to support her diagnosis, predisposition, or serious difficulty controlling behavior; of dynamic factors or of Stable-2007 items; or that Sebastian had sexual thoughts he could not control.(Tr.481-2,484,499,502-3,522).Therefore, she lacked information about Sebastian's mental state and risk at the time of trial. "The language of section 632.480 is written in the

present tense and necessarily requires the jury to find an individual *presently* poses a danger to society if released."*Murrell*,215 S.W.3d at 104. Kircher's out of date screening/referral determination could not assist the jury in determining whether Sebastian *presently* had a mental abnormality making him "more likely than not" at trial, and was inadmissible *Id.;*§490.065.1.

At the time of the EOC evaluation, Sebastian was "not even a Respondent yet." (Scott,p.45). He did not have any protections are afforded a DOC inmate, DMH insanity acquittee, or Chapter 632 detainee at the time of Kircher's interview.*See* §§632.325,475.075,552.050;*Norton*,123 S.W.3d at172. If questioned the same way concerning a crime or in any other civil commitment/incapacity evaluation, he would get a lawyer and *Miranda* warnings; but not at the EOC, under the plain language of Act.(Scott,p.46);*Id.*;*Miranda v. Arizona*,384 U.S. 436, 467, 469(1966); *Estelle v. Smith*, 451 U.S.454(1981);U.S.Const.amends.V,XIV;Mo.Const.art.I,§2,10. Because the Act does not grant protections like assistance of counsel, the right to silence, and other statutory rights at the time of the EOC evaluation, the protection should come at the trial level, limiting Kircher's testimony.(Scott,p.41). The absence of protections at the EOC level "requires protection at the trial level against the misuse of information from the end of confinement evaluation."(Scott,p.47).

Cross-examination cannot distinguish the EOC report from later comprehensive evaluations.(Scott,p.8). Kircher cannot be effectively cross-examined Kircher on the inadequacy and unreliability of her referral determination without informing the jury of the purpose of her evaluation, its limited scope, and the burden of proof applicable to her

opinion. Allowing the EOC reporter to offer her opinion, specifically stating it is for a limited role, is insufficient. Explaining the role of the EOC impermissibly and prejudicially informs the fact finder about the screening process, including a probable cause determination by a judge.(Scott,p.33).

Kircher testified her evaluation was the "first step" in the process.(Tr.459-60). Evidence of the "first step" screening she performed was without probative value, was unfairly prejudicial and should have been excluded.*See In re Care and Treatment of Foster*,127 P.3d 277(Kan.2006). Such evidence is "extremely prejudicial," is "inconsistent with substantial justice and affects []substantial rights."*Id.*at288. The resulting prejudice is "significant," "because a jury has a natural tendency to look for guidance from those clothed in authority… even when guidance is not needed."*In re Detention of Stenzel*,827 N.W.2d 690,707(Iowa2013), quoting *Foster*,127 P.3d at286. Evidence of the screening process has the effect of commenting on the credibility of the State's witnesses and even the State's attorney's own opinions, in addition to highlighting that the court has already made a probable cause determination.*Id.*

This is why the legislature enacted §632.489.4 requiring a comprehensive DMH evaluation. The EOC determination "essentially now has been supplanted by the new [court-ordered] evaluation" completed by DMH; "It is that [court ordered] evaluation ... that supports further proceedings."*State ex rel. State v. Parkinson*,280 S.W.3d 70,77(Mo.banc2009),*and Fogle v. State*,295 S.W.3d 504(Mo.App.W.D.2009)(EOC "report was supplanted by subsequent evaluations").

Right to Silence

Kircher was conducting an evaluation pursuant to Chapter 632 at the time of the EOC interview, she worked for DOC, and Sebastian was in custody.(Tr.365);§632.483 (EOC evaluation conducted by DOC, prior to individuals release from custody). Whenever an individual evaluated under Chapter 632, he must be advised orally and in writing that: he has the right to counsel and to communicate with counsel; the evaluation is to determine whether he meets criteria; his statements may be used in making that determination; his statements may result in involuntary detention proceedings; and his statements may be used against him in court.§632.325.

Unwarned statements made during a pretrial psychiatric examination cannot be used against an individual who does not initiate the psychiatric evaluation, and he cannot be compelled to give statements to a psychiatrist if his answers will be used against him in the proceedings.*Estelle*,451 U.S. at469. Attempting to establish future dangerousness with the unwarned statements infringes upon the right to silence; "[t]he fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from reach of the Fifth Amendment."*Id.*at463,465. The privilege "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves;" it is not limited to criminal court proceedings.*Id.*at466, quoting *Miranda*,384 U.S. at467. The right to counsel "is indispensable to the protection of the Fifth Amendment privilege;" counsel is required to protect the privilege during interrogation.*Miranda*,384 U.S. at469. That right extends to

consulting with counsel before questioning, and having counsel present during questioning.*Id.*

The Due Process Clause required application of the privilege against self-incrimination to the "civil" proceedings in *Gault* because a juvenile's freedom was curtailed by the State.*Application of Gault*,87 U.S.1,41,49,55(1967). The privilege does not depend on the type of proceeding, "but upon the nature of the statement or admission and the exposure which it invites."*Id.*at49. Juvenile proceedings "may lead to commitment to a state institution, [and] must be regarded as 'criminal' for purposes of the privilege against self-incrimination."*Id.*

Because Sebastian was in custody when faced with "psychiatric inquiry," his statements were not freely and voluntarily given and could not be used against him absent a showing he was advised of his rights and knowingly waived them.*Estelle*,451 U.S. at468. Kircher's diagnosis and opinions rested on more than her observations and records review; she drew her conclusions, including those about Sebastian's mental abnormality and future dangerousness, critical issues at trial, from what he said.*Id.*at464,466. Kircher did more than just report the results, she testified against Sebastian.*Id.*at467. Kircher could not "accurately describe the purpose of this evaluation and obtain a legitimate, a knowing, intelligent and voluntary, informed assent."(Scott,p.40).

Despite challenging the admissibility of Sebastian's statements, the State did not demonstrate that Kircher gave Sebastian §632.483 or *Miranda* warnings.(L.F.89-92, challenging compelled statements under U.S.Const.amendsV,XIV).*Berghis v. Thompkins*,130 U.S. 370,382-5(2010)(heavy burden on government to demonstrate

waiver; waiver must be voluntary, the product of free and deliberate choice, rather than intimidation, coercion or deception, and made with full awareness of nature of right and consequence of waiving it);*State v. Collings*,450 S.W.3d 741,753(Mo.banc2014). But over Sebastian's objections, the State used his unwarned statements to Kircher to show his future dangerousness and obtain his commitment to a State institution.*Estelle*,451 U.S. at467;*Gault*,387 U.S. at41,49,55.

Privilege & Witness Incompetency

Sebastian asserted privilege over his communications with Kircher, and did not consent to Kircher's tetimony about his protected health information or any communications made to her.(L.F.142-3);§§337.636,217.075(DOC medical records are "closed");45 C.F.R. parts160,162,164. Kircher was a licensed psychologist under §337.101(4).(Tr.362). Her role is "as a clinician" and the respondent is "the patient" in SVP matters.(Ex.D,p.12). Therefore, Kircher rendered professional services when she interviewed and evaluated Sebastian.

Section 337.055 states:

> Any communication made by any person to a licensed psychologist in the course of professional services rendered by the licensed psychologist ***shall be deemed a privileged communication*** and the licensed ***psychologist shall not be examined or*** be made to ***testify to any privileged communication without the prior consent*** of the person who received his professional services.

Futhermore, Kircher was incompetent to testify in the proceedings.§491.060(a licensed psychologist shall be incompetent to testify "...concerning any information which he or she

may have acquired from the patient while attending the patient in a professional character…"). Because the legislature did not limit the scope of this privilege, "it applies to all circumstances in which a physician or psychologist is called on to give testimony or produce records concerning information that was acquired from a patient…"*State ex rel. Stinson v. House*,316 S.W.3d 915,919-20(Mo.banc2010). The privilege prevents disclosure of records and documents to third parties.*Id.*at920. Even if this Court construes §632.510 to override the privilege, §632.510 is specifically limited to records and documents and does not apply to Kircher's *testimony*.

Sebastian did not place his mental health condition in issue or waive the privilege over his communications with Kircher; denying and defending against the State's SVP allegation does not constitute a waiver.*Id.*at 918. Kircher's testimony was inadmissible.

Opinion Changed After Deposition

Kircher was subpoenaed to a deposition and to produce the documents she relied upon; she did not produce documents at her deposition because she did not have any.(Ex.D,p.12). The following exchange happened during the deposition:

Attorney: Okay. Do you have any current evidence to support a diagnosis in Mr. Sebastian's case?

Kircher: I have no current anything in Mr. Sebastian's case.

Attorney: Do you have a current opinion in Mr. Sebastian's case?

Kircher: I'm unable to.

Attorney: So that would be a "no, you don't"?

Kircher: That's correct.

….

Attorney: So just to be abundantly clear, you have no opinion as to a diagnosis today?

Kircher: That's correct. I cannot have an opinion as to a diagnosis today, because I've had no access to Mr. Sebastian or his records since sometime in early 2015.

(Ex.D,p.29-30). Kircher also testified she could not: give a Stable-2007 score, offer an opinion that Sebastian had sexual thoughts he could not get out of his head, or give any information about allegation or DOC conduct.(Ex.D,p.7,17,23). She could not give evidence of a dynamic factor or to support any item on the Stable-2007 "because my scoring form would be a year out of date at this point."(Ex.D,p.32).She could remember only that treatment providers were concerned Sebastian watched a music video, which indicated sexual preoccupation and deviant arousal, but said, "I can't give you the evidence" that this meant Sebastian was ruminating on the video "because I don't have it."(Ex.D,p.9-11).

At the conclusion the deposition, Sebastian informed Kircher and the State that if Kircher were subpoenaed for trial and received records, he would have more questions..(Ex.D,p.37). Kircher was subpoenaed for trial, where she testified she received records.(L.F.11;Tr.369). The State claimed that Sebastian was notified Kircher was given her report and records is not supported by the record and Sebastian advised he was not informed Kircher had records or would testify to opinions differently than in her deposition(Tr.335-6). At trial, Kircher testified about her opinions, diagnosis, Sebastian's

conviction and alleged sexual behaviors, Sebastian's conduct in DOC, and risk assessment.(Tr.383-86,390,393-95,410-15,422-6,466,505-9,523).

The trial court found Kircher "had reviewed some additional records she did not have at the time" of her deposition.(Tr.337). It did not make a ruling on the discovery violation, and overruled Sebastian's motion to exclude Kircher's testimony because it said, "this is different material than what I was presented [with] at the pretrial conference," and taking up the matter during trial, before Kircher, testified was "not the time to be going over pretrial matters and motions *in limine*."(Tr.337). This ruling ignored that *motions in limine* preserve nothing for appellate review and Sebastian was obligated to object to Kircher's testimony at trial.*Stewart v. Partamian*,465 S.W.3d 51,55(Mo.banc2015).

The trial court said it would take up a timely objection if Kircher's testimony differed from her deposition, but when Sebastian objected again, his objection was summarily denied and his objection to Kircher's diagnosis testimony was overruled.(Tr.337,365,375-81). The trial court said that Sebastian easily could have re-deposed Kircher.(Tr.380). Sebastian was entitled to rely on Kircher's deposition testimony unless and until the State supplied a supplemental response.*Pasalich*,89 S.W.3d at563. Sebastian was not obligated to ask for a second deposition; the duty fell upon the state to seasonably supplement Kircher's deposition testimony.*Id.* The ruling that Sebastian could have re-deposed Kircher absolved the State of its mandatory duty to supplement her deposition under Rule 51.06(e) and impermissibly burdened Sebastian with the duty to ask for a second deposition without reason to do so.*Prokes*,363 S.W.3d at75;*Bradford*,200 S.W.3d at180;*Green*,882 S.W.2d at221.

Prejudice

Sebastian was prejudiced by Kircher's testimony and his trial was fundamentally unfair. Sebastian's commitment could only be considered constitutional if it followed proper evidentiary standards and procedures, like §§337.010 and 490.065, and relevancy requirements.*Murrell*,215 S.W.3d at103. His due process rights were violated when the State failed supplement Kircher's deposition testimony, and he was unfairly surprised at trial.*Prokes*,363 S.W.3d at75. Sebastian was further prejudiced because he could not adequately cross-examine Kircher without introducing additional prejudicial evidence of the screening process and her testimony gave the false impression it was applicable to the time of trial. His right against self-incrimination was violated and he was prejudiced when his unwarned and involuntary statements were used against him.*Estelle*,451 U.S. at 467;*Gault*,387 U.S. at41,49,55;*Miranda*,384 U.S. at466-9;§632.325. We must assume the jury considered this inadmissible evidence in reaching its verdict.*Gates*,57 S.W.3d at 396.

Had Kircher's testimony been properly excluded, the outcome of trial would have been different. The State's only evidence would have been Witcher's testimony, which also should have been excluded because she, too, changed her opinion, and her opinions were unsupported by the record and insufficient to make a submissible case, as discussed in Point III.*Prokes*,363 S.W.3d at75;*McGuire*,138 S.W.3d at722;*Morgan*, 76 S.W.3d at211;§490.065. Therefore, there would have been no evidence to support a verdict.

Absent Kircher's testimony, the jury would not have heard about a Stable-2007 score(which did not measure re-offense likelihood; was not peer-reviewed or publication reliable; contained unsupported factors for which Kircher had no evidence; and at the time

of trial, Sebastian's score was zero); that Sebastian's Static risk was in the 80th percentile, "fairly unusual," and meant he was two times as likely as the typical sex offender to reoffend; that Sebastian needed more treatment and should not be credited with MoSOP completion; or had dynamic factors like sexual preoccupation(for masturbating privately while in MoSOP), offense supportive attitudes(because he explained to Kircher what justifications he used at the time of his offending), lack of relationships with adults, poor problem-solving, aggression, and general impulsivity(which was "biased" because of his age and incarceration).(Tr.422,427,443,448,450,497-99,502-3).

Conclusion

Kircher's testimony was inadmissible.§§632.483,490.065,337.010. We must assume the jury considered it in reaching its verdict.*Gates*,57 S.W.3d at 396. The trial court erred in admitting Kircher's over objection. This Court must reverse. Because the State cannot make submissible case without Kircher, there is no justification for remand.

V.

The trial court erred in excluding evidence of Sebastian's release plan, because this violated his rights to due process and a fair trial, to present evidence and cross-examine witnesses against him, and to counsel, guaranteed by U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a);§632.492,632.489,632.495, 490.065, in that each expert relied on release plans, release plans reduce risk, an honor center or community release center is a "secure facility," and Sebastian could only be committed if he suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence *if not confined in a secured facility*.

Each doctor asked Sebastian about his release plan and relied upon that information in their evaluations.(Tr.514-5,688,870). Evidence Sebastian's release plan included two years of parole supervision and residence in a secure facility was excluded as "external constraints."(Tr.515,519,525). Sebastian's refused offers of proof included testimony from all three experts that a community release/honor center was a "secure facility" and the release plan reduced Sebastian's risk.(Tr.568,573-4,871,873,875-6;Ex.M,p.56-58). Sebastian argued this evidence bore on that issue because Sebastian would be confined in a secure facility; was what Sebastian and experts knew; impeached Kircher's direct testimony; was admissible as the basis of expert opinion; and excluding it violated constitutional provisions.(Tr.516-22;L.F.183,185).[23]

[23] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a);§490.065.

Sebastian incorporates the Standard of Review concerning expert testimony from Points I, IV.

Analysis

The SVP Act gives Sebastian rights given to criminal defendants, including the right to present evidence in his defense.*Norton*,123 S.W.3d at 175;§§632.489,632.492. Another protection is the right to hire one's own expert to conduct an evaluation and form an opinion as to the ultimate issues.§632.489.4.

The facts and data on which an expert rely need not be independently admissible, so long as the evidence is reasonably relied upon the field and otherwise reasonably reliable.*Whitnell v. State*,129 S.W.3d 409,419-8(Mo.App.E.D.2004);§490.065. If the facts and data meet the two criteria, "they will necessarily be relevant to the case, and testimony as to the facts and data will be admissible."*Murrell*,215 S.W.3d at110. Expert testimony is required on the issue of future risk for predatory acts of sexual violence because that is beyond the understanding of lay persons, but must be decided by the jury.*Cokes*,107 S.W.3d at323.

Kircher reviewed records and interviewed Sebastian and both sources of information are considered reasonably relied upon in the field and Kircher found them reliable.(Tr.364-366). Kircher knew about Sebastian's release plan from her evaluation.(Tr.51-5). Witcher also relied on records and an interview, recorded notes during the interview, and testified the records are reasonably reliable and relied upon by experts in the field.(Tr.547,561). Witcher and Kircher both asked about Sebastian's release plans.(Tr.514-6,688). Kircher asked because it gave her information about social

relationships and information for her risk assessment, the release plan was part of the facts and data she relied upon in formulating her ultimate opinions, and research says having a release plan reduces risk.(Tr.514-5). Part of Sebastian's plan was to get a job, continue with treatment and work on building his support group by including people like his parole officer, treatment leader, members of his treatment group, expanding to co-workers and friends that he would meet.(Tr.689-90).

In the offer of proof, Witcher testified she considered what Sebastian told her about his release plan and that the release plan was a protective factor; knew Sebastian would live in a community release/honor center; a community release/honor center is a secure facility; Sebastian would on parole and lifetime supervision; and those factors would be positive in a risk assessment.(Ex.M,p.56-8;Tr.875-6). Kircher testified Sebastian would be on parole for two years and lifetime sex offender supervision; Sebastian and his parole officer planned for him to live in a community release center or "honor center;" and that according to research, these were protective factors.(Tr.566-7). Fabian's proffered testimony confirmed release plans are considered in assessing risk; parole, lifetime supervision, and residency in a community release/honor center "mitigate risk quite a bit;" and a community release/honor center is a secure facility operated by DOC.(Tr.870-2).

This testimony established experts relied upon the facts and data of Sebastian's release plans from records and their interviews, experts in the field reasonably rely on the information from records and interviews, and the records and interview were otherwise reasonably reliable.§490.065. Sebastian's release plan, including parole supervision and residency in the secured facility, was not an external constraint. The experts in this case

relied upon what Sebastian told them and knew about his release plan, not upon what someone else would do. Because §490.065 criteria was met, Sebastian's release plan was necessarily relevant to the case and testimony as to the release plan was admissible even if it would otherwise be an inadmissible external constraint.*Murrell*,215 S.W.3d at110;*Whitnell*,129 S.W.at419-8.

In *Lewis v. State*, the trial court prohibited evidence about supervision where Lewis argued "the safeguard of rigorous supervision during probation [made] it less likely that he would engage in predatory acts of sexual violence if not confined in a secure facility."152 S.W.3d 323,305(Mo.App.W.D.2004). In *In re Cokes*, the trial court excluded evidence of proposed post-release medication arrangements Cokes claimed would allow the jury to consider whether his mental disorder prevented him from participating in treatment voluntarily because it was not relevant to whether Cokes had a mental abnormality, and the record established Coke's evidence was to show he had support persons would keep him medically compliant.183 S.W.3d 281,285–86(Mo.App.W.D.2005). In *In re Calleja* the State's motion *in limine* to exclude evidence of immigration status and potential deportation was granted because Calleja's proffered evidence that he might be subject to deportation was irrelevant to mental abnormality and risk issues.360 S.W.3d 801,802-3(Mo.App.E.D.2011).

These cases demonstrate the excluded evidence was offered as independent, substantive evidence, without testimony any expert relied on it in formulating an opinion of mental abnormality or risk. In contrast, in *Brasch v. State*, this Court cited expert testimony noting the absence of protective factors, specifically supervision, in a risk

analysis.332 S.W.3d 115,118(Mo.banc2011). This case is like *Brasch*, because the evidence was considered in the experts' risk assessments, was relevant to the issue, and established the SVP criteria could not be met because he would be confined in a secured community release/honor center. *Lewis* even recognized community supervision "is viewed by experts as a protective element that would lower risk."*Id.*at331, citing *Commonwealth v. Beeso*,No. 011649, 2003 WL 734415, *7(Mass.Super.2003). But, because *Beeso* did not identify the source of that proposition, *Lewis* did not find it persuasive.*Id.*[24]

[24] Other states have determined supervision is a risk factor.*See In re Civil Commitment of R.S.*, --- A.3d ---,2013 WL 3367641 at 2(N.J.Super.Ct.App.Div. 2013)(individual was high risk without protective factors, supervision in place); *Doe v. Sex Offender Registry Bd.*,857 N.E.2d 492,496(Mass.2006)(examiner evaluated risk factors for sexual recidivism, including probation supervision and home situation)(law identifies risk factors, including parole/probation supervision, conditions of supervision, residence in home setting providing guidance and supervision);*People v. Davenport*,833 N.Y.2d 116,117(N.Y.App.Div.2007)(the absence of parole or probation supervision is risk factor for reoffending);*J.J.F. v. State*,132 P.3d 170(Wyo.2006)(statute requires consideration of probation/parole supervision and residency in risk assessment).

Here, experts testified that research demonstrates release planning, parole, lifetime supervision and residency in a community release center mitigate risk.(Tr.514-5,566-7,870-2,875-6;Ex.M,p.56-8).*See, e.g.*, Willis & Grace, *The Quality of Community Reintegration Planning for Child Molesters, Effects on Sexual Recidivism*, 20 Sexual Abuse: A J of Res. & Treat. 2,218 (2008)(accommodation significantly related to sexual recidivism; poor reintegration planning risk factor for recidivism); Scoones, Willis & Grace, *Beyond Static and Dynamic Risk Factors: The Incremental Validity of Release Planning for Predicting Sex Offender Recidivism*, 27 J. Interpers. Violence 2, 222 (2012)(release planning associated with reduction in recidivism; examining accommodation, employment, social support planning); Bonta, et al., *Exploring the Black Box of Community Supervision*, 47 Journal of Offender Rehabilitation 3, 248-270 (2008)(community supervision decreased recidivism). The evidence was admissible under §490.065 and it was an error to exclude expert testimony about the facts they relied upon.

The State argued Sebastian's evidence was external constraint evidence and inadmissible "because the question for the jury is, is he more likely than not unless confined in a secure facility."(Tr.516). Sebastian's proffered evidence was legally and logically relevant "to the issue of whether the jury should believe the state's evidence" about whether Sebastian was "more likely than not," about "unless confined in a secure facility," and went directly to the risk element of the State's case.*See State v. Walkup*,220 S.W.3d 748,757-8(Mo.banc2007). The experts agreed Sebastian would live in a "secured facility." If the jury had heard this evidence, they would have heard unrefuted evidence that Sebastian would have lived in a secured facility, and \ supervision and his arranged residency were

factors reducing any risk. The jury could have found that his risk was mitigated below the State's expert's opinions of "more likely than not," or that the law did not apply to him because he would have been in a secured facility contemplated by the Act. If the jury accepted this evidence, it would not have found Sebastian to be an SVP.

Furthermore, the evidence counteracted, repelled and disproved evidence offered by the State's witnesses, and because the State opened the door to the topic of Sebastian's future risk, admission of Sebastian's evidence was permissible. The State asked Kircher about risk factors impacting Sebastian's future risk of reoffending during her direct testimony and specifically about factors decreasing risk; however, Kircher failed to mention release planning, supervision and residency in a secure environment in her answer.(Tr.425-29). "When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible."*Howard v. City of Kansas City*,332 S.W.3d 777,785(Mo.banc2011). Testimony "that tends to explain, counteract, repel or disprove evidence offered by [one party] may be offered in rebuttal."*Id.* The trial court has no authority to prevent impeachment of the State's witnesses on matters related to a paramount issue or that affect the witness' accuracy, veracity or credibility.*Black v. State*,151 S.W.3d 49,56(Mo.banc2004). Sebastian was entitled to cross-examine Kircher with information explaining the basis of her risk assessment and the factors decreasing omitted on direct, to counteract, repel or disprove conclusions that risk factors made him "more likely than not," and to impeach her accuracy, veracity and credibility.*Id.*;*Howard*,332 S.W.3d at785.

Witcher was allowed to tell the jury that part of Sebastian's release plan included continuing with treatment and to build a support group which included his parole officer,

treatment leader, and treatment group members.(Tr.689-90). She, too, was asked about risk factors that both increased and reduced Sebastian's risk, was permitted to testify on direct about factors that she found, and failed to mention release planning, supervision and residency in the community release center secured facility.(Tr.615-20). In light of receipt of evidence that Sebastian would have been on parole, Sebastian should have been allowed to adduce testimony that the existence of parole was a factor reducing his risk. Sebastian had a right to impeach her using his proffered evidence, to explain the basis for her risk assessment, disprove her risk conclusion and challenge her accuracy, veracity and credibility.*Howard*,332 S.W.3d at785;*Black*,151 S.W.3d at56.

Sebastian was entitled to explain *why* his expert believed he was not "more likely than not," to demonstrate the basis for that opinion, to impeach the State's experts, and to rebut the State's evidence. The trial court erred in excluding Sebastian's evidence. If this Court finds the excluded evidence was inadmissible external constraint evidence, the State opened the door. Admission of Sebastian's evidence was necessary to rebut, counter and disprove the State's evidence and to cure the prejudice Sebastian suffered from admission of evidence of his release plan and parole supervision in the first place. This court must reverse and remand for a new trial.

VI.

The trial court erred in denying Sebastian's motion to dismiss, because this violated his rights to due process, equal protection, and freedom from *ex post facto* laws and double jeopardy, protected by U.S.Const.amends.V,VI,VIII,XIV, art.I,§§9,10, art.VI,cl.2, and Mo.Const.art.I,§§2,10,13,19,21 in that the Federal Court found that commitment under the Act is punitive, lifetime confinement; confinement is a second punishment, and the Act's substantive and procedural protections are inadequate and unjustifiably different from any other civil commitment or punitive proceedings.

Sebastian's motion to dismiss was denied.(Tr.4;L.F.20-26,54-56). He argued the Act was unconstitutional because civil commitment was a punitive, second punishment deferred until the conclusion of a prison sentence; resulted in lifetime custody; failed to provide adequate due process protections; treated him differently than anyone else civilly committed in Missouri in terms of confinement conditions, duration and procedures; and commitment under such a law is cruel and unusual punishment.(L.F.20-26,179,181-5).[25]

[25] U.S.Const.amend.V,VI,VIII,XIV,art.I,§§9,10,art.VI,cl.2;Mo.Const.art.I,§§2,10,13,19, 21.

He argued *Van Orden v. Schafer*,129 F.Supp.3d 839(E.D.Mo.2015) [26] in support of his motion, requested a stay of commitment until *Schafer* was resolved, and preserved the issue in his post-trial motion.(L.F.54-56,181;Tr.950-945).

Analysis

SVP commitment has changed drastically since its inception. When the Act's constitutionality was first examined in 2003, discharge from commitment was possible, proof beyond a reasonable doubt was required, and the release provisions had not been challenged.*Norton*,123 S.W.3d at174;*In re Care and Treatment of Schottel v. State*,159 S.W.3d 836(Mo.2005). Missouri courts did not have the benefit of observing the law in action over sixteen years.

Schafer did, finding deficiencies in the annual review process, integration of community release, and release procedures that did not comport with due process.129 F.Supp.3d at868-9. *Schafer* concluded systemic failures resulted in punitive, lifetime detention and unconstitutional punishment in confining men who do not meet criteria for commitment.*Id.at*844,868-9. The Act was deemed unconstitutional as applied, in violation of due process.*Id.* The nature and duration of commitment bears no reasonable relation to any non-punitive purposes for which persons may be civilly committed.*Id.*at867. The rights infringed "are rights protected by the constitutional guarantee of liberty, not merely state law."*Id.*at870.

[26] This opinion addresses only the liability phase of the trial; the remedy phase continues. *Schafer*,129 F. Supp.3d at843.

Federal law is "the supreme law of the land" and "judges in every state shall be bound thereby."U.S.Const.art.IV,cl.2. Missouri statutes and constitutional provisions must be interpreted to comply with the federal Constitution, and have no effect where in conflict with federal law.*Johnson v. State*,366 S.W.3d 11,27(Mo.banc2012). The Supremacy Clause "applies with its full force to orders of a federal court" and prevents a state court from reaching the merits on any constitutional attack on a federal judge's order.*Pennell v. Collector of Revenue*,703 F.Supp. 823,826(W.D.Mo.1989).

An actual conflict exists because compliance with the Act and federal law is impossible, and the Act is an obstacle in the accomplishment of the full purpose and objectives of Congress.*State v. Diaz-Rey*,397 S.W.3d 5,9(Mo.App.E.D.2013). In light of the constitutional deficiencies of the Act, as written and as applied, it is in conflict with the full purpose and objectives of the Due Process Clause.*Id.*;U.S.Const.amend.XIV. It is impossible for the State and its employees to both comply with *Schafer's* directive to make substantial changes, and with prior holdings of this State's courts permitting commitment as-is.*Id*;U.S.Const.amend.XIV;*Van Orden*,271 S.W.3d at586(clear and convincing burden of proof);*Norton*,123 S.W.3d at74(approving secure confinement of SVPs on challenge to failure to consider LREs);*In re Coffman*,225 S.W.3d 439,443(Mo.banc2007)(approving two-step release process; burden on committee; burden of proof).

If this Court accepts the findings of *Schafer*, it will conclude the same and require substantial changes to meet constitutional standards.*Schafer*,129 F. Supp.3d at870. This Court must hold the Act is unconstitutional as applied because it results in punitive, lifetime detention.U.S.Const.amend.V,XIV. Because Missouri's constitution guarantees the same

protections as the federal constitution, the Act violates the Missouri Constitution.*Coffman*, 225 S.W.at445;Mo.Const.art.I,§§2,10.

Standard of Review

SVP commitment is a significant deprivation of liberty and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards."*Addington*,441 U.S. at425;*Murrell*,215 S.W.3d at103. Procedural safeguards are necessary to ensure the State confines only a narrow class of particularly dangerous persons, after meeting the strictest procedural standards.*Hendricks*,521 U.S. at357,364. The process must minimize the risk of erroneous decisions.*Addington*,441 U.S. at424;*In re Van Orden*,271 S.W.3d 579,587(Mo.banc2008).

Because commitment impacts fundamental liberty, government action must pass strict scrutiny.*Coffman*,225 S.W.3d at445;*Karsjens v. Jesson*,109 F.Supp.3d 1139,1166 (D. Minn. 2015);[27]*Vitek v. Jones*,445 U.S. 480,492(1980)("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *but see Schafer*,129 F. Supp.3d 866-67(confinement did not bear rational relationship to purposes of commitment and law would fail under the heightened "shocks the conscious" test). The burden is on the State to prove a law is narrowly tailored to serve a necessary, compelling

[27] An interim relief order was entered October 29, 2015. --- F.Supp.3d ---, 2015 WL 6561712. The defendants appealed to the Eighth Circuit. *Karsjen v. Jesson*,No. 15-3485. Defendant's request to stay the order pending appeal was denied.2015 WL 7432333(D.Minn.2015).

state interest.*Washington v. Glucksberg*,521 U.S. 702,721(1997);*Coffman*,225 S.W.3d at445.

A denial of a motion to dismiss is reviewed for abuse of discretion and the constitutionality of a statute is reviewed *de novo*.*In re Murphy*,477 S.W.3d 77,81 (Mo.App.E.D.2015).

SVP Act is Punitive

A "civil label is not always dispositive."*Hendricks*,521 U.S. at361. Where there is proof that a statutory scheme is punitive either in purpose or effect, it is considered "to have established criminal proceedings for constitutional purposes."*Id. Schafer* held the Act resulted in punitive, lifetime detention in violation of due process, and in unconstitutional punishment.129 F.Supp.3d at844,868-9.

Commitment in Missouri is "secure confinement," "against one's will," in part, for the purpose of protecting the public by incapacitating an individual who could commit a future crime, and imposed only on men who committed crimes.*Hendricks*,521 U.S at 379(Breyer,dissenting);*Norton*,123 S.W.3d at177(Wolff,concurring). Confinement is imposed by persons(State prosecutors), procedural guarantees(trial by jury, assistance of counsel, psychiatric evaluations), and a higher standard than ordinary civil cases because of the liberty interests implicated.*Hendricks*,521 U.S. at379-80;§§632.483,632.489, 632.492. The Act punishes Sebastian' underlying offense by extending the term of confinement and inflicting greater punishment than the applicable laws at the time Sebastian's committed that offense, imposes a new punitive measure to that crime, and punishes him a second time with lifetime confinement, which is inherently cruel and

unusual.*Hendricks*,521 U.S. at371,379(Kennedy,concurring;Breyer,dissenting);*see also Karsjens*,109 F.Supp.3d at1168.

Prior to 2006, the Act provided for full, unconditional release of individuals from their commitment, called "discharge."§632.498. Amendments replaced the discharge provision with "conditional release" and mandated an individual may only ever be "conditionally released," subject to statutory conditions.§632.505, see §§632.498,632.498,632.501,632.504,RSMo.2000. The statutory scheme does not provide any mechanism for a person to be liberated from "conditional release." As such, it is impossible for one committed to regain his liberty.

Schafer read §632.505 to "permit full, unconditional release" and to provide a mechanism for conditions of release to terminate because the probate court may modify the conditions of release.129 F. Supp.3d at864-66. However, this Court "cannot add statutory language where it does not exist" and "must interpret the statutory language as written by the legislature."*Peters v. Wady Industries, Inc.*,489 S.W.3d 784(Mo.banc2016). Nothing in the plain language of the statute permits conditional release without "conditions," or "unconditional" release.§§632.498,632.505. The Act is unconstitutional on its face.Mo.Const.art.I,§§2,10,21.

The second purpose of the Act is to provide "necessary treatment."*Van Orden*,271 S.W.3d at58;§632.495.2. If an object or purpose is to provide treatment, "but the treatment provisions were adopted as a sham or mere pretext" or delayed until the end of a prison sentence so as to require further incapacitation, it would indicate a purpose of punishment. *Hendricks*,521 U.S. at371,381(Kennedy,concurring;Breyer,dissenting). The Act

"commits, confines and treats[ ]offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate" and confirms punitive intent or effect.*Id.*at381,385(emphasis in original);*see*§632.483. Treatment provisions "were adopted as a sham or mere pretext."*Id.*at371.

Progressing through the program's multiple phases of indeterminate length "is torturously slow."*Schafer*,129 F. Supp.3d at850-51. The stated goal of the program is "to treat and safely reintegrate committed individuals back into the community."*Id.*at851. State actors believe that SVP treatment exists, is effective, and includes release.*Id.*at858-9. However, the State had no plans in place for release into the community, no community-based placement facilities existed, no one had been discharged into the community, or released as a result of completing the program.*Id.*at845,857,859;*Karsjens*,109 F.Supp.3d at1147,1163-64. DMH administrators knew the effect of the Act. One wrote "no one has ever graduated from [the program] and somewhere down the line, we have to do that or our treatment processes become a sham," and another "admitted that if no one is released from an SVP civil commitment treatment program into the community within 10 years the 'logical conclusion' is that the treatment is a 'sham.'"*Id.*at859. *Schafer* confirmed the release portion of treatment *is* a "sham."*Id.*at868.

Committees whose risk is below the standard for confinement have not been released, but met with "extra-statutory hurdles" like "indefinite release without discharge."*Id.* The State's failure to comply with the Act has resulted in unconstitutional punishment and continued confinement of men who no longer meet criteria.*Id.*at869;*Karsjens*,109 F.Supp.3d at1172. Missouri's "nearly complete failure to

protect" the men committed is "so arbitrary and egregious as to shock the conscience."*Id.* at870.

The Minnesota SVP statute was found facially unconstitutional because it failed to provide a way to obtain release in a reasonable time, once eligible for discharge.*Karsjens*, 109 F.Supp.3d at1168. Minnesota's failure to fully discharge anyone, and provisional release of only three individuals, evidenced failed application of the law and lack of meaningful relationship between the program and discharge from custody.*Id.*at1171-72. Discharge procedures did not work as they should and the statute had the effect of lifetime confinement.*Id.*at1171-3.

In *Norton*, Justice Wolff warned if "the effect of the [SVP] statute were punitive, confinement would violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution."123 S.W.3d at177(concurring). Because the SVP Act results in punitive, lifetime detention, confinement *does* violate the prohibition on *ex post facto* laws and double jeopardy.*Schafer*,129 F. Supp.3d at868;U.S.Const.,art.I,§§9,10,amend. V,VI,VIII,XIV;Mo.Const.art.I,§2,10,13,19,21.

Due Process & Equal Protection

Due Process protects an individual from deprivation of life, liberty and property without due process of law, and from wrongful government actions.U.S.Const.,amend. V,XIV;Mo.Const.art.I,§2,10. Equal protection protects him from disparate treatment by the government and entitles him to equal rights.U.S.Const.,amend.XIV;Mo.Const.art.I,§2.

Schafer found the law was unconstitutional as applied, because: release procedures have not been implemented; annual reviews are not performed in accordance with the

statute, case law, or due process; and there is no LRE or a community reintegration plan, resulting in punitive lifetime detention in violation of due process.*Schafer*,129 F. Supp.3d at868-9;U.S.Const.amends.V,XIV;Mo.Const.art.I,§§2,10.

The Act is unconstitutional as applied because annual reviews are not performed in accordance with the statute, case law, or due process.*Id.* "[T]hese annual reviews are the primary tool that courts use to evaluate whether a civilly committed person continues to satisfy the criteria for commitment, or instead whether the person should be conditionally released."*Id.*at852. "[I]t is nearly impossible to successfully petition for conditional release without an annual review from [DMH] recommending such release."*Id.* However, reviewers lack training; they misunderstand, are confused and do not consistently apply the correct legal standard in evaluating the need for continued confinement.*Id.*at582-83,868.

For example, the State equated the risk threshold for continued commitment with "no more victims," zero risk, and "will not engage in acts of sexual violence if discharged," contrary to the Act's requirements.*Id.*at848-49. Minnesota's scheme was defective because periodic risk assessments were not conducted, and evaluators did not apply the correct legal standard.*Karsjens*,109 F.Supp.3d at1171. Because annual reviews are not required for those men conditionally released, it is impossible to ever obtain unconditional release, even if permissible under the Act as written.§632.498.1. A statute not requiring periodic risk assessments "authorizes prolonged commitment, even after committed individuals no longer pose a danger."*Karsjens*,109 F.Supp.3d at1168.

Release procedures are not performed as required by due process because DMH's director had never authorized a single person to seek conditional release, and the

government appeared to be "stalling or blocking" such approval, even where DMH evaluators supported conditional release.*Id.*at869. As a result, men who did not meet criteria for commitment were subjected to continued confinement, which amounted to unconstitutional punishment.*Id.*

Because DMH had never authorized anyone for conditional release, a committee must prove by "preponderance of the evidence" he "no longer" has a mental abnormality and is not "likely" to reoffend to win a jury trial where he might be released if the State cannot prove its case.*Id.*at869;§632.498. This is unconstitutional because it shifts the burden to the individual to demonstrate he no longer meets commitment criteria, and the release criteria are more stringent than the initial commitment criteria.§632.501;*see Karsjens*,09 F.Supp.3d at1169. The threshold for commitment is "more likely than not," but a committee must show he is no longer "*likely*" at all.§§632.480,632.498. This Court previously presumed 632.498 constitutional, saying the statute was "merely…a shorthand way" of referring to the preliminary showing the individual must make "that he is not *likely* to engage in further acts of sexual violence."*Schottel v. State*,159 S.W.3d 836, 842(Mo.banc2005).

The government interprets release standards to justify commitment "until it was determined he will not engage in acts of sexual violence if released" and that he will create "no more victims," which "essentially require[s] a complete absence of risk before a [committed man] will be released."*Schafer*,129 F. Supp.3d at849. But "no adult male has a 0% risk of committing an act of sexual violence;" there will always be some likelihood of offending.*Schafer*,129 F. Supp.3d at849. Just as the government does not have to prove

"*total* or *complete* lack of control" to obtain commitment, a committed man does not have to prove *total* or *complete* lack of risk to be released.*Karsjens*,109 F.Supp.3d at1169. The observed application of the release procedures reveals *Schottel's* presumptions were wrong and that the Act is unconstitutional.*Schafer*,129 F. Supp.3d at849,869.

The Act does not provide adequate procedural or substantive protections necessary for punitive proceedings. For example, a committed man is not entitled to be present at a hearing for conditional release,§632.498; subsequent petitions are automatically "frivolous,"§632.504; and a committed person is subject to lifetime custody and supervision, even when determined he no longer has a mental abnormality or poses a risk.§632.505. But, "due process requires that a person be both mentally ill and dangerous in order to be civilly committed; the absence of either characteristic renders involuntary civil confinement unconstitutional."*Murrell*,215 S.W.3d at104.

Unlike other persons committed under Chapter 632, SVPs cannot receive outpatient treatment, unconditional release or treatment in LREs, despite findings of no longer being mentally ill or presenting risk of harm.*See*§§632.330,632.005,632.495;Point VII. There are definite term limits placed on other civil commitments under Chapter 632, but not under the Act.*See*§§632.330,632.495. Men facing SVP commitment do not have a statutory right against self-incrimination, but persons in other commitment and probate proceedings do. *See*§§631.145,475.075;Point IV. Men are interviewed to determine if they are SVPs while involuntarily in custody and without the right to counsel.*See*§§632.483-.484;*State ex rel. State v. Parkinson*,280 S.W.3d 70,7(Mo.banc2009). Criminal defendants are entitled to due process rights like assistance of counsel and to silence before charges are levied, but

Missouri has said an SVP's due process rights do not vest until a petition has been filed. *Norton*,123 S.W.3d at 172;*see Miranda*, 384 U.S. at467. In other commitments under Chapter 632, only the respondent may demand a jury, and the proceedings must be as informal as possible to mitigate any harmful effect on the respondent.§§632.335,632.350; Point X. A guardianship petitioner cannot demand a jury trial.§475.075. However, the Act gives the State and trial court the right to demand a jury trial, irrespective of the wishes or interest of the respondent.§632.492.

There is no reason justifying differential and constitutionally inadequate treatment under the Act. Protecting the public justifies psychiatric commitments and exercise of government's *parens patriae* power.§632.300. Such detentions are a deprivation of liberty. *Addington*,441 U.S. at425. Guardianship cases implicate a fundamental liberty interest, are an exercise of *parens patriae* power, and involve rights similar to criminal proceedings. *Matter of Korman*,913 S.W.2d 416,418(Mo.App.E.D.1996).

The government has a compelling interest in protecting the public in criminal cases. *State v. McCoy*,468 S.W.3d 892,891(Mo.banc2015). But, the government cannot demand a jury trial, deprive liberty without proving its case beyond a reasonable doubt, or compel a defendant to incriminate himself, achieving its goals and interests through narrowly tailored means comporting with due process and equal protection. U.S.Const.amends.V,VI,XIV;Mo.Const.,art.I,§§2,10.The same should be true in SVP cases. The current SVP scheme results in punitive, lifetime deprivations of liberty without procedural safeguards to protect that fundamental liberty and to ensure that only particularly dangerous persons are confined under the strictest standards that minimize the

risk of erroneous commitment decisions. *Schafer*,129 F. Supp.3dat 844,868;*Addington*,441 U.S. at424;*Hendricks*,521 U.S.at 357,364;*Van Orden*,271 S.W.3d at587.

The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. It is unconstitutional because its purpose and effect is punitive, lifetime detention and punishment. The trial court erred in denying Sebastian's motion to dismiss. This Court must reverse and release Sebastian from custody.

VII.

The trial court erred in denying Sebastian's motion to dismiss, because this violated his rights to due process and equal protection guaranteed by U.S.Const.amends.V,XIV, art.VI,cl.2 and Mo.Const.art.I,§§2,10, in that *Schafer* found the Act is unconstitutional because it does not provide a least restrictive treatment environment(LRE), and there is no alternative to confinement in a total lock down facility.

Sebastian's motion to dismiss the proceedings against him because there is no LRE under the Act, in violation of due process and equal protection, was denied and preserved in his post-trial motion.(L.F.29-30,181;54-56;Tr.4).[28] Sebastian incorporates Point VI's Standard of Review.

Analysis

Norton rejected an equal protection claim that the trial court erred in not considering less restrictive alternatives to confinement.123 S.W.3d at174. It identified a compelling State interest in protecting the public from crime, justifying differential treatment and secured confinement of persons adjudicated to be SVPs.*Id.* This Court held the Act was narrowly tailored to achieve this interest, in light of procedural safeguards, specifically including the right to require the State to prove the individual was an SVP beyond a reasonable doubt, mandated annual reviews to determine if the person no longer met

[28] U.S.Const.amendsV,VIII,XIV;Mo.Const.art I,§§2,10,21.

criteria, placed the burden on the State to prove the individual was still an SVP and not safe to be released, "and dismissal from secure confinement."*Id.*at174-5.

Each of those safeguards justifying differential treatment no longer exists. Amendments reduced the burden of proof on the State to "clear and convincing;" replaced "discharge" with "conditional release;" mandate only conditional release and terms of that conditional release, and eliminated annual reviews for men who were granted conditional release.§§632.495,632.498,632.505, compared to §§632.498,632.498,632.501,632.504, RSMo.2000.

Schafer ruled the Act is unconstitutional as applied because there is no LRE or a community reintegration plan, resulting in punitive lifetime detention in violation of due process.129 F. Supp.3d at868-9;U.S.Const.amends.V,XIV;Mo.Const.art.I,§§2,10. Those civilly committed have a constitutional right to avoid undue confinement, both in duration and in nature.*Id* at867.

Justice Breyer warned that a law not requiring consideration of an LRE or "alternative and less harsh methods" to achieve a non-punitive objective can show that the legislature's "purpose ... was to punish."*Hendricks*,521 U.S. at387(dissenting). Where civil commitment accomplishes a constitutional purpose, those committed "are required to be held in the [LRE] compatible with their safety and that of the public."*Sherrill v. Wilson*,653 S.W.3d 661,664(Mo.banc1983). The Act's plain language does not require an LRE or consider "less harsh methods," and therefore it is facially unconstitutional. It mandates anyone "committed for control, care and treatment … shall be kept in a secure facility." §632.498. If commitment were for a civil purpose, then it would provide for placement in

a LRE, like any other person civilly committed for non-punitive purposes.*See* §§632.385;630.115.1(11)(each DMH resident has right "to be evaluated, treated or habilitated in the [LRE]").

The Minnesota Federal Court found fatal failures in that law because of lack of LREs physically existing, practically available because of lack of bed space, and lack of community reintegration.*Karsjens*,109 F.Supp.3d at1151-53,1172. Minnesota's statute allowed confinement even after an individual no longer met statutory criteria for commitment and did not pose a danger to the public or need further treatment, and when an individual met criteria for a reduction in custody.*Id.*at1156,1160-61.

Missouri's scheme fails to provide LREs altogether, and there are no procedures in place for community reintegration or placement.*Schafer*,129 F. Supp.3d at851. Missouri's two facilities are "high" or "maximum" security, behind prison razor wire, and patrolled by armed guards.*Id.*at845. One "somewhat less restrictive" eight-bed "step down" unit exists behind that patrolled perimeter.*Id.* This is not an LRE, and its bed space is practically unavailable to the 200 plus men committed. Moreover, the only men who have been ordered conditionally released live there, even though "conditional release" means living in the community.*Id.*at845,855;§632.505.1. Even so, progression through treatment, conditional release, and transfer to the unit are all impossible because the Act is unconstitutionally applied.*Id.*at869.

These failures have resulted in continued maximum-security confinement of men who no longer meet criteria for confinement and of those who could be treated in LREs, and amounts to unconstitutional punishment.*Id.*at869;*Karsjens*,109 F.Supp.3d at

1172(finding statute was not narrowly tailored because there are no LREs). Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience."*Id.*at870. The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. This Court must reverse and release Sebastian.

VIII.

The trial court erred in denying Sebastian's motion to dismiss, or in the alternative, in denying his request to use the "beyond a reasonable doubt standard at trial," because there is no possibility of discharge from State custody once committed, violating his rights to due process, equal protection protected by U.S.Const.amends.V,XIV and Mo.Const.art.I,§§2,10, in that *Schafer* found that commitment under the Act is punitive lifetime confinement; "discharge" has been replaced with "conditional release," there is no unconditional release from confinement, or termination of conditions imposed on conditional release, and "beyond a reasonable doubt" is the only burden of proof that protects the interest at stake and against the risk of erroneous decision.

Sebastian moved to dismiss the proceedings because there was no possibility of unconditional release under the Act.(L.F.27-28,54-56). He argued that the elimination of unconditional release meant the entire statutory scheme was unconstitutionally punitive in effect or purpose, lacked the procedural and substantive safeguards necessary in punitive proceedings, resulted in lifetime confinement, and violated his right to due process and equal protection.(L.F.27-28).[29] His motion was filed before the probable cause hearing and renewed at trial; it was denied each time and preserved in his post-trial motion.(Tr.4;L.F.181).

[29] U.S.Const.amendsV,XIV;Mo.Const.art.I,§§2,10.

In the alternative to granting his motion to dismiss because there is no unconditional release, Sebastian requested that the court use the "beyond a reasonable doubt" burden of proof at trial.(LF.52-53;Tr.5-6).[30] Sebastian objected to submitting the case to the jury on "clear and convincing" and tendered alternative instructions using the "beyond a reasonable doubt" standard.(Tr.880-1). His objections were overruled and his instructions were refused.(Tr.880-1). He preserved the issue in his post-trial motion.(L.F.181-2).

Standard of Review

Sebastian incorporates Point VI's Standard of Review and discussion in Point VI and VII. Civil commitment is only constitutional provided that an individual presently suffers from a mental abnormality, and that mental abnormality causes the individual to be more likely than not to commit predatory acts of sexual violence if not confined.*Murrell*,215 at105;§632.480(5). If one of these characteristics abates, commitment cannot constitutionally continue.*Id.*at104, citing *O'Connor v. Donaldson*,422 U.S. 563,575(1975).

Analysis

Until 2006, the State had to prove an individual was an SVP beyond a reasonable doubt.§632.495, RSMo.2000. Section 632.495 was amended to reduce the burden of proof on the State to clear and convincing evidence. "Clear and convincing" was initially approved for use in Missouri SVP trials because of a criminal/civil distinction and

[30] U.S.Const.amendsV,XIV;Mo.Const.art.I,§§2,10.

continuing review opportunities that minimized the risk of erroneous commitments. *Van Orden*, 271 S.W.3d at585-6.

Van Orden relied on *Addington*, wherein the United States Supreme Court found clear and convincing evidence was the appropriate burden of proof in a commitment proceeding.*Id.*at585;441 U.S. at427-33. *Addington* reasoned clear and convincing was sufficient in that case because the government was not exercising its power in a punitive sense, and continuing opportunities for review minimized the risk of error.*Id.*;*Addington*, 441 U.S. at427-31. The burden of proof is ultimately a matter of state law.*Id.*;*Addington*, 441 U.S. at433. *Addington* did not hold that clear and convincing was a permissible burden in every commitment proceeding, but only where not punitive and review enabled correction of an erroneous commitment.*Id.*at592(Teitleman,dissenting);*Addington*,441 U.S. at433. That *Addington* left the precise burden of proof to the state, "specifically indicates that the particulars of a civil commitment statute may require some burden of proof that is more stringent than clear and convincing."*Id.*at593,n.1.

Van Orden rationalized commitment both protects the public, and provides those necessary treatment.*Id.* "Further, if commitment is ordered, the term of commitment is not indefinite. A person committed as a sexually violent predator receives an annual review to determine if the person's mental abnormality has so changed that commitment is no longer necessary."*Id.*at586. Whether the Act would be considered civil if the statutes were determined to mean that a person was ineligible to ever receive an unconditional release was not before the Court.*Id.*,n.5.

However, the 2006 amendments to the SVP Act removed the lynchpins relied upon by *Van Orden*. Prior to 2006, the SVP Act provided for full, unconditional release of individuals from their commitment, called "discharge."§632.498. A time when "commitment is no longer *necessary*" means discharge, now an impossibility under the Act. Amendments replaced the discharge provision with conditional release and distinguished between a committed person "conditionally released" and a committed person "who has not been conditionally released."§§632.498,632.501,632.504, RSMo.2000. Section 632.505 was added, mandating conditional release and that specific conditions apply to that conditional release.

Furthermore, now it does not require continued annual review if one is "conditionally released."§632.498.5(4);*Murrell*,215 S.W.3d at105("The annual review mechanism ensures involuntary confinement that was initially permissible will not continue after the basis for it no longer exists."). As such, it is statutorily impossible for one committed to regain his liberty. And, §632.505 permits revocation and return to a secure facility by a preponderance finding "the person is no longer suitable for conditional release." The State is not required to prove the individual meets commitment criteria to return him to DMH.

The *Van Orden* appellants only challenged the burden of proof in §632.495 and argued "conditional release" *may* mean a lifetime loss of liberty, but failed to raise the conditional release statute or "the constitutionality problem of the entire SVP statutory scheme" as a point on appeal.*Id.*at587(Cook.,J.,concurring). The concurring opinion plainly stated the constitutionality of the statutory scheme "may require future review by

this Court when the issue is squarely presented."*Id.*at589. It also warned the conditional release scheme may be unconstitutional for failing to provide sufficient procedural due process protections.*Id.*at589-90. Any confinement without the opportunity for unconditional release "would raise serious due process concerns."*Id.*at590. The concurrence predicted that "if called to consider the impact the indefinite conditional release statute has on the entire SVP statutory scheme, this Court may be compelled to find that such indefinite restraint on liberty has made the SVP act so punitive in purpose or effect that it no longer can be considered civil in nature -- requiring a higher burden of proof."*Id.*at591.

Conditional release after a finding that an individual is no longer dangerous "*does not* result in complete restoration of that person's liberty."*Id.*at590. The terms of conditional release are a form of commitment; due process requires that the person be *fully* released.*Id.* Conditional release, therefore, violates due process, even if the commitment is in a less restrictive environment.*Id.*

Dissenting, Judge Teitelman found Missouri's SVP law to be *punitive*.*Id.*at592. If the SVP act was purely remedial, then once no longer mentally ill or dangerous, it should result in unconditional release.*Id.* "Once the remedial purpose has been fulfilled, the continued deprivation of individual liberty amounts to nothing but a punitive sanction. *Id.* Men civilly committed here "forever will be subject to state oversight," even if no longer dangerous.*Id.* While commitment in *Addington* would have terminated upon successful completion of treatment, that is not so under the SVP law.*Id.* Judge Teitelman concluded, "I would hold that the SVP law is unconstitutional insofar as it permits the state to commit

an individual permanently to the care, custody and control of the department of mental health without having to prove the prerequisites to commitment beyond a reasonable doubt."*Id.*at593-94.

Warren presented the same burden of proof challenge.291 S.W.3d 246 (Mo.App.S.D.2009). The Southern District denied the challenge, because it was bound to follow the *Van Orden* decision.*Id.*at249.

Unlike the *Van Orden* appellants, Sebastian challenged the entire statutory scheme, including the release provisions, and argued commitment was *actual* lifetime confinement.(L.F.30-31,56-58).*Id.*at582,584-5,588(Cook,concurring). As a result, he argued the proceedings against him should be dismissed, or in the alternative, beyond a reasonable doubt was the only appropriate standard. He incorporated *Schafer*.(L.F.56-8).

Schafer means "continuing review opportunities" have not minimized risk of erroneous commitments or led to any releases. 129 F. Supp.3d at 868(failing to reintegrate anyone turned commitment into "punitive, lifetime detention"). "The adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.*"* *Templemire v. W & M Welding, Inc.*,433 S.W.3d 371(Mo.banc2014). Missouri Courts must change course and declare the only constitutionally permissible burden of proof is beyond a reasonable doubt.

Where a statutory scheme is punitive either in purpose or effect, it is considered "to have established criminal proceedings for constitutional purposes."*Hendricks*,521 U.S. at361. The burden of proof implicates due process, and Sebastian is entitled to equal rights

under the law. U.S.Const.amend.V,XIV;Mo.Const.art.I,§§2,10;*Addington*,441 U.S. at423; *Van Orden*,271 S.W.3d at585;*Coffman*,225 S.W.3d at443. Due process requires the use of a burden of proof that reflects the public and private interests, *and* the risk of an erroneous decision. *Van Orden*,271 S.W.3d at 85. Beyond a reasonable doubt is the standard used in all other punitive cases and should be applied in the instant case because of the implication on the defendant's liberty interest.*Id.*at585. *Winship* established that due process demands the beyond a reasonable doubt standard in juvenile cases because of the resulting loss in liberty. *In re Winship*,397 U.S. 358,366(1970). It does not matter that juvenile proceedings are given the "civil label of convenience," or are "designed not to punish, but to save the child." *Id.*at 365, citing *Gault*, 387 U.S. at50.

> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

*Id.*at364.

Just as a criminal defendant "has at stake interest of immense importance," loss of liberty and stigma from a conviction, so does an individual facing commitment.*Id.*at363.

There is no compelling reason to treat him differently than anyone else in such a situation. Using “clear and convincing,” as opposed to “beyond a reasonable doubt,” is not narrowly drawn to serve a compelling state interest in an SVP case where Sebastian’s *lifelong* liberty is at stake, where he cannot be discharged or unconditionally released, and his commitment will not be reviewed if he ever obtains "conditional release," the risk of an erroneous decision could not be higher. Beyond a reasonable doubt is the only appropriate standard. "Both the plain language and actual administration of the SVP law lead to the inescapable conclusion that the initial commitment decision under the SVP law is effectively final. The state should not be able to deprive forever the individual liberty of its citizens without proving beyond a reasonable doubt the necessity of doing so."*Van Orden*,217 at593 (Teitelman,J.,dissenting).

This Court must reverse and release Sebastian, or alternatively, reverse and remand for a new trial under the beyond a reasonable doubt standard.

IX.

The trial court erred in denying Sebastian's motion to dismiss, because this violated his rights to due process, and equal protection, protected by U.S.Const.amends.I,V,XIV and Mo.Const.art.I,§§2,10, in that the Act unconstitutionally permits commitment because of emotional capacity, without any proof of behavioral impairment, and fails to require proof of serious difficulty controlling behavior.

Sebastian's motion to dismiss arguing the Act was unconstitutional because it did not require proof of serious difficulty controlling behavior and permitted a mental abnormality finding based solely on emotional capacity was denied.(Tr.4;L.F.31-33). His commitment under such a law is cruel and unusual punishment.(L.F.181,185).

Sebastian incorporates Point VI's Standard of Review.

Analysis

The Act, as written and applied, is unconstitutional because it does not require proof of serious difficulty controlling behavior, and permits commitment based on a finding of lack of emotional control, without a finding of volitional impairment.U.S.Const.amends.V, XIV;Mo.Const.art.I,§§2,10.

Due process requires "proof of serious difficulty controlling behavior" to "distinguish the dangerous sexual offender whose mental illness … subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*,534 U.S. at 411-3 (2002);*Thomas*,74 S.W.3d at 791-2. While *Thomas*

announced that the definition of "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,"* the legislature has not amended the definition to comply with the constitutional standard. "Mental abnormality" remains defined as "a congenital or acquire condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses *in a degree constituting such person a menace to the health and safety of others*."§632.480(2).

The Act permits commitment on the basis of emotional capacity, without a finding of volitional impairment. §632.480(2)("condition affecting the emotional ***or*** volitional capacity"). Commitment laws must "limit confinement to those who suffer from a ***volitional*** impairment rendering them dangerous beyond their control." *Hendricks*,521 U.S. at 358. Neither *Hendricks* nor *Crane* considered the constitutionality of confinement based solely on "emotional" abnormality. *Crane*, 34 U.S. at 872. The mental abnormality requirement is necessary to limit confinement to those who suffer from a volitional impairment. *Hendricks*,521 U.S. at 358.

Kircher testified "emotional capacity" is one's ability to regulate emotions and mood, like anger, and depression.(Tr.372). "Volitional capacity" is about managing behaviors and acting out.(Tr.372-3). "Serious difficulty controlling behavior" speaks to volitional capacity.(Tr.373).

Commitment because of an "emotional" impairment cannot be constitutional. The Act is aimed at the risk of future *behaviors*, not future *feelings*. The constitution requires

proof of serious difficulty controlling *behavior*. The government cannot regulate one's thoughts absent some conduct, without violating the First Amendment. *See*, *e.g.*, *Paris Adult Theatre I v. Slaton*,413 U.S. 49, 67-68(1973)("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution."); U.S.Const.amend.I.; Mo.Const.art.I,§8; *Stanley v. Georgia*,394 U.S. 557, 565-66(1969)("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds…"). The Act's disjunctive "or" permits a finding of mental abnormality based solely on emotional capacity.

The Act, as written and applied, is unconstitutional because it does not require proof of serious difficulty controlling behavior, and permits commitment based on a finding of lack of emotional control, without a finding of volitional impairment, and is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. This Court must reverse and release Sebastian.

X.

The trial court erred in granting the State's jury trial request and forcing Sebastian to be tried by a jury, because this violated his rights to due process and equal protection, guaranteed by U.S.Const.amend.V,VI,XIV and Mo.Const.art.I §§2,10,18(a),22, in that §632.492 grants the State the right to a jury trial, treating Sebastian differently than other individuals subjected to involuntary government confinement and loss of liberty.

Sebastian's request to deny the State's jury trial demand, and for a bench trial, arguing §632.492 violated his rights to due process and equal protection, including rights to make decisions regarding trial strategy and forum, were overruled; jury returned an SVP verdict.(L.F.49-51,176;Tr.6-7).[31] He preserved the issue in his post-trial motion.(L.F.182).

Sebastian incorporates Point VI's Standard of Review.

Analysis

In 2000 the Western District upheld the State's right a jury trial under §632.492 under a rational basis review.*State ex rel. Nixon v. Askren*,27 S.W.3d 834. However, strict scrutiny, not rational basis, applies to an SVP equal protection challenge.*Norton*, 123 S.W.3d at 173-174. *Askren* should not be followed and is not good law because it did not apply the correct burden on the government.

[31] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a),22.

In criminal cases, Defendant may waive a jury and obtain a bench trial with the consent of the court.Mo.Const.art.I,§22(a). The prosecution cannot object to Defendant's jury waiver. If, as Sebastian has argued, the Act is punitive, then like every other Missourian subjected to criminal proceedings, he may waive his right to a jury trial and be tried by the bench with the Court's consent, and §632.492 must yield to art. I,§22.

The State must demonstrate forcing Sebastian to have a jury trial is narrowly tailored to achieve a compelling government interest.*Norton*,123 S.W.3d at173;*Bernat v. State*,94 S.W.3d 863,868(Mo.banc2006). This Court has identified compelling government interests in: protecting the public, securing diagnosis and treatment cooperation, and ensuring the fact finder make a reliable determination.*Norton*,123 S.W.3d at174;*Bernat*,194 S.W.3d at870. These interests are not advanced by a governmental jury demand.

The government also has a compelling interest in protecting the public in criminal cases.*State v. McCoy*,468 S.W.3d 892, 891(Mo.banc2015). Even so, the government may not demand a jury trial in criminal cases and defendants can elect to be tried by the court.Mo.Const.,art.I,§22(a). Public protection justifies involuntary psychiatric commitments and exercise of the government's *parens patriae* power.§632.300. These civil detentions are a deprivation of liberty. *Addington*,441 U.S. at425. Psychiatric involuntary commitment cases may be tried by the court; only the respondent may demand a jury; and the proceedings must be conducted in as informal of a manner and place as possible, for the purpose of mitigating any harmful effect on the respondent.§§632.335,632.350.

Probate guardianship cases also implicate fundamental liberty, though "civil" cases.*Korman*,913 S.W.2d at418, citing *In re Link*,713 S.W.2d 487(Mo.banc1986). Such cases are an exercise of *parens patriae* power, and involve rights similar to criminal proceedings.*Id.*at418-419;*Link*,713 at495. The guardianship petitioner may not force the involuntary respondent to a jury trial.§475.075.

Government interest in protecting the public and individuals is not advanced by Petitioner's jury trial demand. The government exercises police and *parens patriae* power in civil and criminal bench trials. Government interest in protecting the public does not subject a criminal defendant or psychiatric civil detainee to a forced jury trial. Nor does a government interest in protecting a mentally ill or incompetent person from themselves force a respondent to be tried by a jury.

Moreover, any interest in a reliable determination is not furthered by the government's ability to demand who the fact finder is. Diagnosis and treatment of an alleged SVP has no relationship to the fact finder, either. There is no narrowly tailored, compelling interest justifying treating SVPs differently than any other individual prosecuted by the government and subject to a deprivation of liberty, whether denominated "civil" or "criminal." Valid exercise of police nor *parens patriae* power justifies differential treatment in this case.

The trial court erred in granting the State's jury trial demand, forcing Sebastian to be tried by a jury without consideration of his jury waiver or best interests. This Court must reverse and remand for a new trial.

XI.

The trial court erred refusing to declare §632.492 unconstitutional, and submitting Instruction 8 over Sebastian's objection, because that violated Sebastian's rights to due process, a fair trial and equal protection as guaranteed by U.S.Const.amend.V,XIV and Mo.Const.art.I,§§2,10, in that §632.492 required the trial court to give Instruction 8; the instruction informed the jury of the legal consequence of their verdict; there was no evidence to support giving the instruction; and the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for commitment.

Sebastian's request to declare §632.492 and objections to Instruction 8 were overruled.(L.F.163,145-7,183-5;Tr.4,40,885-7).[32] The trial court said it was compelled to give Instruction 8 by statute.(Tr.886-7). Instruction 8 read: "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care, and treatment."(L.F.163).

Standard of Review

Whether a jury is properly instructed is reviewed de novo.*Templemire v. W & M Welding, Inc.*,433 S.W.3d 371,376(Mo.banc2014). Reversal is warranted if the instructional error results in prejudice that materially affected the merits of the action.*Id.*

[32] U.S.Const.amends.V,VI,XIV;Mo.Const.art.I,§§2,10,18(a),21.

Analysis

Instruction 8 was an abstract statement of law requiring no jury finding; improperly submitted the consequence of an SVP verdict, reserved for the trial court; was not supported by a factual basis; misled, confused and distracted the jury; and invited the jury to consideration of the very thing it should ignore- control and treatment.(L.F.159;Tr.741). Under §632.492, trial court must instruct the jury that "if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment."

The consequence of an SVP finding was collateral and outside the scope of the two issues at trial, whether: (1)Sebastian suffers from a mental abnormality; (2)that makes him more likely than not to commit predatory acts of sexual violence if not confined. *In re A.B.*,334 S.W.3d 746,752(Mo.App.E.D.2011);§632.480. The consequence of an SVP verdict, mandatory commitment to DMH, is left to the trial judge.§632.495.2.

Instructions should be refused where they submit questions of law for the court to decide.*See Carson-Mitchell, Inc. v. Macon Beef Packers, Inc.*,544 S.W.2d 275 (Mo.App.KC1876)(legal defense instruction properly refused). Giving such instructions is prejudicial and reversible error.*See Esmar v. Zurich Ins. Co.*,485 S.W.2d 417(Mo.1972)(giving instruction submitting legal matter for determination by court, and not calling for factual determination of jury, prejudicial error). Instruction 8 presented an abstract statement of law not requiring a jury finding; such instructions mislead and confuse juries and are properly refused.*Chism v. Cowan*,425 S.W.2d 942,949(Mo.1967)(refused

instruction "an exact recital of the statute" and "simply an abstract statement of law requiring no finding by the jury.").

The jury should not be informed of a later consequence during the fact-finding phase of trial. It is reversible error to submit an instruction in phase one of a bifurcated trial that informs the jury of a matter in phase two. For example, instructing the jury it could award punitive damages in the first phase of a bifurcated trial misled and confused jurors, resulting in prejudicing requiring reversal.*Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*,449 S.W.3d 16,29(Mo.App.W.D.2014).

This is particularly true where the jury has no role in determining the consequence of the verdict. "It is well established that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed." *Shannon v. United States*,512 U.S. 573,579(1994). This is even true in cases where a defendant is relying on an NGRI defense and the defendant would go to DMH following an adverse jury verdict.*Id.* Informing the jury of the consequence of the verdict does not protect the public, or enhance the reliability of fact finding at trial.*Norton*,123 S.W.3d at 174;*Bernat*,194 S.W.3d at 870.

Instruction 8 because led the jury to decide the case on some basis other than the established propositions of the case and prejudiced Sebastian.*Nolte v. Ford Motor Company*,458 S.W.3d 368,383(Mo.App.W.D.2014). Instruction 8 produced an "inevitable result," drawing the jury's "attention toward the very thing—the possible consequences of its verdict—it should ignore."*Shannon*,512 U.S. at 586. The jurors were invited to consider custody in DMH for care, control and treatment. This was a matter "not within their

province," that "distract[ed] them from their fact finding responsibility," was confusing and minimized their responsibility in returning a verdict.*Id.*at579.

The State's conduct in the trial exemplifies the prejudice in giving Instruction 8. The State told the jury in voir dire there would be evidence about mental abnormality and risk, "Those are going to be the subjects you'll hear evidence on."(Tr.220). In closing, the State said, "And when you write 'is a sexually violent predator,' this instruction tells you what happens;" read Instruction 8; and argued, "a vote that Mr. Sebastian is a sexually violent predator results in him being committed for the care that he needs, the control that he needs, and the treatment that he needs."(Tr.907-8,926).Without Instruction 8, no such arguments would be possible. The State would be constrained to talking about whether Sebastian has a mental abnormality that makes him "more likely than not."*In re A.B.*,334 S.W.3d at 752;§632.480.

Prior appeals have upheld giving the instruction because §632.492 requires it and the instruction followed the substantive law.*See Lewis v. State*,152 S.W.3d 325;*Scates v. State*,134 S.W.3d 738(Mo.App.S.D.2004). Lewis and Scates complained the instruction invited the jury to focus on irrelevant treatment rather than whether he was an SVP, and minimized the jurors' responsibility for their verdict.152 S.W.3d at329;134 S.W.3d at741-42. Both challenges were overruled because of the statutory mandate, and *the appellants submitted proposed instructions containing the language they complained about*.152 S.W.3d at329;134 S.W.3d at742. *Warren v. State* examined both opinions, where the appellant challenged the instruction as not accurately reflecting the duration of confinement.134 S.W.3d at 250-51. However, those cases are distinguishable because only

the instruction–and not the statute–was challenged and the Courts did not apply strict scrutiny.*See Id.*at250,n.6.

Instruction 8 was not supported by any evidence. There must be substantial evidence supporting an instruction; submitting an instruction not supported by such evidence is an error.*Hayes v. Price,*313 S.W.3d 645,650(Mo.banc2010). In *Hayes,* the trial court improperly gave a "failure to look out" instruction because the instruction was not supported by substantial evidence.*Id.*at652. The driver was prejudiced when he was assessed a percentage of comparative fault as a result of the improper instruction, and this court reversed.*Id.* This Court also reversed for instructional error in *Ross-Paige v. Saint Louis Metropolitan Police Department,*-- S.W.3d ---,2016 WL 3573250(Mo.banc June 28,2016). The trial court submitted an instruction presenting different theories of liability, including a claim that defendants unjustly refused or delayed paying out disability claims.*Id.*at4. The instruction was not supported by substantial evidence and the defendants were prejudiced because they were found liable under the instruction.*Id.*at6,8.

Here, there was no evidence about DMH control, care, or treatment. The litigants are not generally allowed to present evidence of what happens after the jury's verdict unrelated to the issues decided by the jury. *See Calleja,*360 S.W.3d at 803-4;*Cokes,*183 S.W.3d at 285–86;*Lewis,*152 S.W.3d at 328–32. It is fundamentally unfair to give an instruction informing the jury the consequence of its verdict is commitment for care, control and treatment, while Sebastian was precluded from presenting any evidence or argument at trial about what would happen if he were not found to be an SVP, or even what that DMH commitment would look like. Like in *Ross-Paige,* there is no way to rule out the

possibility the jury improperly returned its verdict upon Instruction 8's promise of care, control, and treatment, unsupported by substantial evidence, and misdirecting and confusing them.---S.W.3d at 6,8.

This Court must reverse and remand for a new trial.

CONCLUSION

This Court must reverse the order and judgement of the trial court and release Sebastian from confinement as demonstrated in Points I-IV;VI-IX. Alternatively, this Court must reverse and remand for a new trial as demonstrated in Points V,X-XI.

Respectfully submitted,

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Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Including the cover page, the signature block, and this certificate of compliance and service, the brief contains 30,848 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On December 21, 2016 electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Chelseá R. Mitchell

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