No. SC95681

In the Missouri Supreme Court

IN THE MATTER OF THE CARE AND TREATMENT OF AARON SEBASTIAN,

Appellant.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit, Probate Division
The Honorable Michael Cordonnier, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The State of Missouri filed a petition in the Circuit Court of Greene County on April 8, 2015, seeking a hearing to determine whether Appellant was a sexually violent predator. (L.F. 1, 16-19). Appellant was then serving a sentence in the Missouri Department of Corrections for attempted statutory sodomy in the first degree, section 566.062, RSMo Cum. Supp. 2006. (L.F. 16). Appellant was tried by a jury on April 4-7, 2016, before Judge Michael Cordonnier. (L.F. 13-14). Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

State's Evidence

1. *Dr. Nena Kircher*.

The State's first witness was Dr. Nena Kircher, a licensed clinical psychologist who performed a sexually violent predator evaluation of Appellant. (Tr. 361-62, 364). Dr. Kircher reviewed Appellant's probation and parole records, plus treatment records from Appellant's participation in the Missouri Sex Offender Program, and interviewed Appellant. (Tr. 365-66). She testified that the records she reviewed were of a type reasonably relied on by members of her profession. (Tr. 366).

Dr. Kircher used the diagnostic criteria of the DSM-5 to diagnose Appellant with pedophilic disorder, sexually attracted to females, non-exclusive type. (Tr. 383, 410). She testified to a reasonable degree of

psychological certainty that Appellant's pedophilic disorder rose to the level of a mental abnormality. (Tr. 409-10).

Dr. Kircher testified that pedophilic disorder involved an interest in prepubescent children, generally thirteen years or younger. (Tr. 384). She noted that Appellant had undergone juvenile sex offender treatment after being detected for an offense. (Tr. 385). Appellant committed a subsequent sex offense when he was seventeen-years-old against a seven-year-old child. (Tr. 385). Appellant committed his qualifying sexually violent offense when he was eighteen. (Tr. 385). Dr. Kircher interviewed Appellant while he was going through the MOSOP treatment in late 2014 or early 2015. (Tr. 385). He told her that he was having an intrusive fantasy roughly every other week regarding a female child under the age of twelve. (Tr. 385-86). Dr. Kircher said that history demonstrated that Appellant had either behaviors or fantasies involving prepubescent children for at least a five-year period. (Tr. 386). She said that this met the criteria of having recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children. (Tr. 386).

Dr. Kircher also described information from Appellant's MOSOP records. Appellant had told his therapist that he became very preoccupied and driven to get sexual gratification when he was aroused. (Tr. 390). Appellant had reported being aroused during treatment when listening to

another patient's discussion of his own offense against a teenage girl. (Tr. 392). Appellant had made written disclosures that he had performed oral sex on his sister and two other girls multiple times, and that he had performed oral sex on a seven-year-old girl when he was seventeen. (Tr. 407-08). Appellant told Dr. Kircher that he had a fantasy that the sister whom he had molested had grown up and had a daughter, and that he had molested that imaginary girl. (Tr. 394).

Dr. Kircher performed a risk assessment on Appellant using the Static-99 to look at historical factors and the Stable-2007 to look at dynamic factors. (Tr. 410-12). She testified that both devices are widely used and are reasonably relied on by experts in the field. (Tr. 412-13, 427).

Dr. Kircher gave Appellant a score of four on the Static-99. (Tr. 413). She noted that the developers of the instrument had come up with several options for explaining what the scores meant. (Tr. 413). On the nominal risk category, Appellant's score placed him within the moderate high risk category, meaning the 80th percentile. (Tr. 422). Appellant's relative risk ratio was 1.94, meaning that he was roughly two times as likely as the typical sex offender to reoffend. (Tr. 422-23).

Dr. Kircher said that because the Static only looks at the likelihood of being charged with a sex offense in the next five to ten years, she looked at additional measures that would give Appellant credit for the work he was

doing in treatment. (Tr. 415-16). She used the Stable-2007 to measure those factors that are more likely to change with treatment. (Tr. 424). Appellant's score of 17 placed him in the "high need" nominal risk range. (Tr. 425-26).

Dr. Kircher then performed a meta-analysis that created a list of risk factors associated with sexual offense recidivism. (Tr. 426). She noted that Appellant's age increased his risk, as did his difficulty completing MOSOP. (Tr. 430-31). Dr. Kircher noted that MOSOP is a nine to twelve month program and that it took Appellant nearly the full twelve month period to complete it. (Tr. 439). Dr. Kircher concluded that Appellant had a great deal of trouble internalizing treatment concepts. (Tr. 432). She noted that Appellant had admitted during a MOSOP session that he was attracted to an eleven-year-old girl featured in a music video and that he had not been able to articulate an adequate coping strategy. (Tr. 434-35). Based on her interview of Appellant, Dr. Kircher concluded that he did not have good insight into his own deviancy and did not have a good enough understanding to use the coping tools taught in MOSOP. (Tr. 442). Because of that, Dr. Kircher testified that she could not reduce Appellant's risk based on his completion of MOSOP. (Tr. 443-44).

Dr. Kircher said that Appellant showed indications of sexual preoccupation. (Tr. 444). That included masturbating five to six times a week

while in MOSOP. (Tr. 444). Dr. Kircher testified that required a lot of effort to orchestrate due to the lack of privacy in the prison setting. (Tr. 444).

Appellant had told Dr. Kircher that he preferred sexual relationships with children because they were non-stressful and uncomplicated. (Tr. 445). Appellant told Dr. Kircher that he decided to offend against the victim in the underlying sexually violent offense case because she had not reported him when he had previously offended against her, and thus thought that she was okay with it. (Tr. 445). Dr. Kircher said that Appellant had completed juvenile sex offender treatment after that first incident, and that he should have known from that treatment not to commit the second act. (Tr. 447-48). Dr. Kircher said that would be an indication that Appellant had serious difficulty in controlling his behavior. (Tr. 448).

Dr. Kircher noted that Appellant had difficulty in forming relationships and had trouble receiving feedback during MOSOP sessions. (Tr. 448-49). She said his poor problem solving skills increased his risk, as did his impulsive behavior and problems with self-regulation. (Tr. 449, 452).

Dr. Kircher gave her opinion, within a reasonable degree of psychological certainty, that Appellant was more likely than not to commit a future act of sexual predatory violence unless he was confined in a secure facility. (Tr. 452). She also testified, again within a reasonable degree of

psychological certainty, that Appellant met the criteria to be a sexually violent predator under Missouri law. (Tr. 454).

2. *Dr. Lisa Witcher*.

Also testifying for the State was Dr. Lisa Witcher, a clinical psychologist with the Department of Mental Health who evaluated Appellant in July of 2015. (Tr. 542, 546). Dr. Witcher testified that the records she reviewed as part of that evaluation were reasonably relied on by experts in her field and that she found them reliable. (Tr. 547). She also interviewed Appellant. (Tr. 547-48).

Using the criteria contained in the DSM-5, Dr. Witcher diagnosed Appellant with pedophilia. (Tr. 548). She based that diagnosis on the underlying sexually violent offense, in which Appellant attempted to engage in sexual activity with an eleven-year-old girl; Appellant's admission that he had sexually offended against a seven-year-old girl; Appellant's statements during MOSOP about having sexual fantasies regarding children; and his viewing of a video while in MOSOP that he found to be sexually arousing. (Tr. 549-50, 554-55).

Dr. Witcher testified that Appellant had committed the index offense against the eleven-year-old victim for the purpose of obtaining orgasm. (Tr. 555-56). She based that on Appellant's statements that he had become sexually aroused and then attempted to touch the girl's vagina in order to

allow him easier masturbation. (Tr. 556). In his treatment records, Appellant had indicated that he put his hand down the pants of the eleven-year-old girl for "sexual gratification" and "happiness." (Tr. 557-58).

Dr. Witcher also discussed the two fantasies that Appellant had reported. In one of the fantasies, Appellant imagined that his eleven-year-old victim in the index offense had not told him to stop, and that he was thus able to carry out the intended sexual act. (Tr. 561, 585). Appellant fantasized about that and how it would have felt. (Tr. 585). The other fantasy was one that he had about six weeks before his interview with Dr. Kircher. (Tr. 585). Appellant had told Dr. Kircher that he fantasized that his sister had a child in the future and asked him to babysit her. (Tr. 585). Appellant had told Dr. Kircher that he fantasized about being placed in a sexual situation with this future niece, but he told Dr. Witcher that the fantasy was only about babysitting and nothing more. (Tr. 587).

The video that Appellant reported being aroused by featured a pre-pubescent girl dancing in a nude-colored leotard and nude-colored tights. (Tr. 590-91). Dr. Witcher said that caused her concern because he continued having access to the video after being aroused by it. (Tr. 591-92).

Dr. Witcher also found evidence that Appellant had acted on the sexual urges or had experienced marked distress or interpersonal difficulty as a result of his sexual urges or fantasies. (Tr. 592). That evidence was

Appellant's incarceration for the index offense and his being reprimanded during MOSOP treatment for viewing the music video, which resulted in distress because it resulted in a negative consequence. (Tr. 593-94).

Dr. Witcher said that Appellant's pedophilia rose to the level of a mental abnormality because it predisposed him to commit sexually violent offenses to a degree that caused him serious difficulty controlling his behavior. (Tr. 595-96). Dr. Witcher reached that conclusion based on "all the factors at hand," including the fact that Appellant had reoffended after being involved in juvenile sex offenses and going through juvenile sex offender treatment. (Tr. 596-97). Dr. Witcher testified that while Appellant's actions before age sixteen[1] could not be used as part of the pedophilia diagnosis, they could be used as part of the finding of a mental abnormality because it showed that the behavior had been present throughout his life. (Tr. 597). That, plus Appellant's subsequent offenses against a seven-year-old and an eleven-year-old child after undergoing sex offender treatment, demonstrated a long-term pattern of behavior. (Tr. 597-98).

Dr. Witcher testified that Appellant required an extended amount of time to complete both juvenile sex offender treatment and MOSOP. (Tr. 601,

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[1] Appellant had molested three girls when he was fifteen years old. (Tr. 597). The girls were ages seven, eight, and nine respectively. (Tr. 597).

603-04). It took him eight months to complete what was supposed to be a four month juvenile treatment program. (Tr. 601). It took him twelve months to complete MOSOP, which typically takes nine months to complete. (Tr. 603-04). Dr. Witcher said that in both treatment programs, it took Appellant a little while to get comfortable, to get motivated, and to show that he was making an effort. (Tr. 605). Dr. Witcher said that when she interviewed Appellant, she did not see evidence that Appellant had been able to fully internalize the treatment concepts presented in MOSOP. (Tr. 605). Dr. Witcher found further evidence of that in Appellant's MOSOP records, where he indicated that he did not believe that MOSOP's coping tools could be used in the real world. (Tr. 609-11). Dr. Witcher concluded that Appellant's ability to apply what he learned in MOSOP was limited. (Tr. 611).

Dr. Witcher conducted a risk assessment based on the records and interviews, plus the Static-99R and Static-2002R actuarial instruments. (Tr. 611). Dr. Witcher gave Appellant a score of five on the Static-99R. (Tr. 612). She testified that the Static-2002R looked at more factors than the Static-99R, and that it was reasonably relied on in her field. (Tr. 612-13).

Dr. Witcher gave Appellant a score of seven on the Static-2002R. (Tr. 613). The makers of the instrument used risk category placement, which goes from low to high with different numbers going into different placements. (Tr. (Tr. 614). Appellant's score of seven fell in the moderate high risk category to

reoffend. (Tr. 614). Dr. Witcher said that the only thing that might arguably change a static factor would be the person's age. (Tr. 614).

Dr. Witcher also looked at research on dynamic risk factors that can change through time and found the existence of additional risk factors. (Tr. 614). She said that a big factor was Appellant's lack of social support. (Tr. 615-16). Another was what Dr. Witcher called emotional congruence with children, where Appellant believed that having sex with a child will cause the child to know that he cares about her. (Tr. 616). Dr. Witcher also said that Appellant displayed a lack of emotional maturity by getting irritated and defensive when given feedback during MOSOP treatment sessions. (Tr. 616-17). Other risk factors identified by Dr. Witcher were Appellant's difficulty presenting detailed information about his sex offender treatment and his history of reoffending after being in trouble before. (Tr. 617-19). Dr. Witcher said the fact that Appellant victimized the same girl twice showed a lack of empathy and judgment. (Tr. 620).

Dr. Witcher concluded that: (1) Appellant has pedophilic disorder; (2) that he has a mental abnormality; and (3) that he is more likely than not to engage in future acts of sexually predatory violence unless confined in a secure facility. (Tr. 621). She testified that she had reached all of those conclusions to a reasonable degree of psychological certainty. (Tr. 623-24).

Appellant's Evidence

Appellant presented testimony from his retained expert Dr. John Fabian, a forensic psychologist and neuropsychologist. (Tr. 751, 756). Dr. Fabian testified that Appellant did not suffer from a mental abnormality and did not present as being more likely than not to commit predatory acts of sexual violence if not confined as a result of mental abnormality. (Tr. 841). Dr. Fabian expressed the opinion that Appellant was not a sexually violent predator under Missouri law. (Tr. 841).

Verdict

The jury returned a verdict finding that Appellant was a sexually violent predator. (Tr. 946). The court accepted the verdict and entered judgment on it. (Tr. 949). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

STANDARDS OF REVIEW

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

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

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

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

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

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

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

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

ARGUMENT

I.

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

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

A. Standard of Review

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

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

B. Analysis

This Court has held that the Missouri SVP Act is subject to strict scrutiny review because it impinges upon the fundamental right of liberty. *In re Norton*, 123 S.W.3d 170, 173 (Mo. 2003); *In re Bernat*, 194 S.W.3d 863, 867–68 (Mo. 2006). But the United States Supreme Court has never held that the involuntary commitment of those who are mentally ill and dangerous impinges on a fundamental right, and a recent opinion by the United States Court of Appeals for the Eighth Circuit disagrees with the premise behind *In re Norton* and *In re Bernat*. The State respectfully requests that this Court reconsider its prior rulings.

The Eighth Circuit recently addressed whether the Minnesota SVP act was subject to strict-scrutiny review. *Karsjens v. Piper*, 845 F.3d 394, 406-07 (8th Cir. 2017) (pet. for r'hrg en banc filed Jan. 31, 2017). It held that SVP acts do not implicate a fundamental right to liberty and so are subject to rational basis review. *Id.* at 407-08. While this Court is not bound by the Eighth Circuit's ruling, it may look to that opinion for such aid and guidance as may be found therein. *Hanch v. K.F.C. Mgm't Corp.*, 615 S.W.2d 28, 33 (Mo. 1981). The State finds the Eighth Circuit's analysis to be persuasive and urges this Court to adopt it.

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

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

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

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

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

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

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

Likewise, the Supreme Court's decision in *Vitek* does not compel the use of strict scrutiny because *Vitek* is inapplicable to SVP commitment cases. In *Vitek*, the Supreme Court simply held that a state could not transfer an individual from a prison to a state hospital without procedures that complied with the Due Process Clause. *Vitek*, 445 U.S. at 492–93. The Supreme Court only required an adversarial hearing and the appointment of counsel, which are not at issue in this case. *Id*. at 495–96 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) (procedural, not substantive, due process). *Vitek* never held that involuntary civil commitment required analysis under the strict scrutiny standard.

And finally, this Court's previous reliance on *Foucha v. Louisiana* also does not require the application of strict scrutiny. The portion of *Foucha* that discusses the Equal Protection Clause, Part III, is a plurality opinion signed by Justices White, Blackmun, Stevens, and Souter. Further still, Justice

Thomas' dissent[3] aptly points out that the majority "never explains whether we are dealing here with a fundamental right..." in either the due process analysis or the equal protection analysis. *Foucha*, 504 U.S. at 116 (Thomas, J., dissenting). The Eighth Circuit found Justice Thomas's point persuasive, and Respondent urges this Court to as well. *Piper*, 845 F.3d at 407 (citing *Foucha*, 504 U.S. at 116) (Thomas, J., dissenting).

This Court's decision in *Norton*—that the SVP Act burdens a fundamental right to liberty—is ripe for reconsideration. *Norton* relied on *Hendricks*, which has been clarified by the Eighth Circuit. *Norton* also relies on *Heller*, *Vitek*, and *Foucha*, but as demonstrated *supra*, those decisions do not compel a finding that Missouri's SVP Act operates in such a way that "neither liberty nor justice [] exist." *Glucksberg*, 512 U.S. at 720–21. Accordingly, Respondent requests that this Court find that the SVP Act is properly reviewed under the rational basis standard.

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

II.

The State made a submissible case that Appellant suffers from a mental abnormality as defined by statute (responds to Appellant's Point I).

Appellant argues that the evidence was insufficient to make a submissible case because the State's experts failed to establish that he presently suffered from a condition that caused emotional or volitional impairment and predisposed him to commit acts of sexual violence to a degree that caused him serious difficulty controlling that behavior.

The gist of Appellant's point relied on, and the conclusory portion of his argument, is that the State failed to prove that he presently suffered at the time of trial from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined. (Appellant's Brf., pp. 21, 51). The argument portion of Appellant's brief goes well beyond that theory and attacks the overall sufficiency of the opinions of the State's experts. The function of the point relied on is to give notice to the party opponent of the precise matters which must be contended with and answered, and to inform the court of the issues presented for resolution. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. 1978).

The issue raised in the point relied on is that the State's experts failed to offer evidence showing that Appellant met the criteria at the time of trial,

as opposed to the time they did their evaluation of Appellant. In rejecting a similar argument, the Southern District noted that no expert witness in the case had suggested that the SVP's pedophilia was in remission. *In re Spencer*, 171 S.W.3d 813, 820 (Mo. App. S.D. 2005). One expert testified that the SVP's pedophilia had not gone away due to the mere lapse of time. *Id.* The court found that the jury was entitled to believe the testimony of the State's expert that the SVP was more likely than not to reoffend. *Id.* Both of the State's experts in this case diagnosed Appellant with pedophilia, and neither suggested that his mental abnormality was in remission. Dr. Kircher, in fact, testified that pedophilia does not go away. (Tr. 439). She also testified that Appellant would only need to be retested for dynamic risk factors under the Stable-2007 if he was in treatment. (Tr. 499).

Appellant complains about a lack of evidence of current behaviors, but proof of a recent overt act is not required when a putative SVP is incarcerated when the State's petition was filed. *In re Kapprelian*, 168 S.W.3d 708, 714-15 (Mo. App. S.D. 2005). Consistent with that, both Dr. Kircher and Dr. Witcher testified that a lack of recent pedophilic behavior would be the result of Appellant not having access to children while incarcerated. (Tr. 387, 714). The jury was entitled to find from that testimony that Appellant was then suffering from pedophilia and that he was more likely than not to reoffend.

Respondent will *ex gratia* discuss the other arguments raised in Appellant's brief. The bulk of those arguments are contrary to the standard of review, in that they rely on evidence and inferences contrary to the verdict. *In re A.B.*, 334 S.W.3d at 752. Additionally, any question as to whether proffered expert testimony is supported by a sufficient factual or scientific foundation is one of admissibility, which must be raised by a timely objection or a motion to strike. *In re Turner*, 341 S.W.3d 750, 754 (Mo. App. S.D. 2011). Once an expert opinion has been admitted, as any other evidence, it may be relied on for purposes of determining the submissibility of the case. *Id.* An appellant cannot "backdoor" an issue relating to the admissibility of expert testimony under the guise of a sufficiency of the evidence argument. *Id.*

Expert testimony that relies on facts and data of a type reasonably relied on by experts in their field is sufficient to make a submissible case. *In re A.B.*, 334 S.W.3d at 754. Both Dr. Kircher and Dr. Witcher testified that they based their opinions on information that was reasonably relied on by members of their profession. (Tr. 366). Both experts also testified that they had reached their opinions to a reasonable degree of psychological certainty. (Tr. 454, 623-24).

A sexually violent predator is defined, in relevant part, as any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a

secure facility. § 632.480(5), RSMo Cum. Supp. 2013. "Mental abnormality" is defined as a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. § 632.408(1), RSMo Cum. Supp. 2013. This Court has previously stated that pedophilia is a mental abnormality that necessarily involves a propensity to commit sexual offenses. *In re Murrell*, 215 S.W.3d at 107. Accordingly, a diagnosis of pedophilia satisfies the statutory definition of mental abnormality standing alone. *Id.* Sufficient evidence existed in the record for the jury to find that Appellant suffered from pedophilia.

Both Dr. Kircher and Dr. Witcher used the diagnostic criteria in the DSM-5 in determining whether Appellant had pedophilic disorder. (Tr. 383, 548). One of those criteria is: "Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children, generally 13 years or younger." (Tr. 384, 386, 549). Appellant attacks the diagnosis by arguing that the victim of the index offense was not prepubescent based on her Tanner stage development. Both Dr. Kircher and Dr. Witcher testified that Tanner stages are not included in the DSM-5 criteria, and that age of the victim is still a relevant criteria. (Tr. 536-37, 632, 713-14). The jury was entitled to

believe that testimony. And there was other evidence to support the diagnosis besides the index offense.

Appellant reported molesting a seven-year-old child when he was seventeen. (Tr. 385, 550). Appellant now challenges the veracity of his self-disclosure by arguing that there was no other evidence to support it. Dr. Kircher testified that statements made during an interview are reasonably relied on by experts in her field. (Tr. 504). Case law has also established that a psychologist can rely on a subject's own statements in reaching an opinion. *Elliott v. State*, 215 S.W.3d 88, 94 (Mo. 2007). That is true even if the subject later recants his admissions. *In re Shafer*, 171 S.W.3d 768, 773 (Mo. App. S.D. 2005). An expert can also rely on allegations of abuse made by a third party. *In re Whitnell*, 129 S.W.3d 409, 417 (Mo. App. E.D. 2004).

Dr. Kircher further noted that fantasies, urges, and behaviors did not all have to be present at the same time. (Tr. 387). As noted earlier, Appellant would have had no behaviors during his incarceration in DOC because he would have had no access to children. (Tr. 387). When Dr. Kircher interviewed Appellant about five years after the offense against the seven-year-old, he reported having an intrusive fantasy roughly every other week involving sexual activity with a twelve-year-old child. (Tr. 385-86). Dr. Kircher concluded that Appellant thus demonstrated either behaviors or fantasies involving prepubescent children over a five-year period. (Tr. 386).

Dr. Witcher similarly relied on fantasies reported by Appellant, plus his being sexually aroused by viewing a music video featuring what appeared to be a prepubescent child. (Tr. 549-50, 554-55).

Because sufficient evidence supports the diagnosis of pedophilia, that diagnosis necessarily establishes that the condition affected Appellant's emotional or volitional capacity, that it predisposed him to commit sexually violent offenses, and that it did so in a degree constituting Appellant to be a menace to the health and safety of others. *In re Murrell*, 215 S.W.3d at 107.

Both Drs. Kircher and Witcher testified to the facts that they relied on in finding that Appellant met the various parts of the statutory definition. Appellant's criticisms of the doctors' reasoning, and his reliance on his own expert's testimony lacks legal support and amounts to nothing more than an invitation to this Court to reweigh the evidence and substitute its own credibility determinations for those made by the jury. "Arguments on appeal criticizing an expert's testimony essentially ask us to reweigh the evidence in [the appellant's] favor. We cannot do so." *In re Morgan* 398 S.W.3d 483, 490 (Mo. App. S.D. 2013) (internal quotation marks omitted). The credibility and weight of testimony are for the fact-finder to determine, and any conflicts in the evidence are nothing more than a factual issue for the jury to resolve in determining which expert opinion to credit in making a decision. *In re Turner*, 341 S.W.3d at 754. Because Appellant cannot show a "complete

absence of probative fact" to support the judgment, he is not entitled to reversal, and his point should be denied. *Id.*

III.

The State provided sufficient evidence of future risk (responds to Appellant's Point II).

Appellant claims that the State failed to make a submissible case on the issue of his future risk. As noted previously, a sexually violent predator is defined, in relevant part, as any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. § 632.480(5), RSMo Cum. Supp. 2013. Appellant makes a multi-faceted attack on the sufficiency of the evidence supporting a finding that Appellant is more likely than not to engage in predatory acts of sexual violence.

Analysis.

1. *Risk caused by mental abnormality*.

Dr. Kircher testified about the steps that she goes through in performing an SVP evaluation, with the first step being to determine whether the putative SVP has a conviction for a sexually violent offense. (Tr. 366). Dr. Kircher testified that once she made that determination, she turned to the remaining two questions that the SVP law requires the evaluator to answer, which are: "whether he has a mental abnormality that predisposes him to sexually violent offenses and whether he's more likely than not to commit future sexually violent offenses." (Tr. 367-68). Appellant claims that Dr.

Kircher's use of the word "and" shows that she did not link his future risk to his mental abnormality. That is an overly parsimonious reading of her testimony, particularly since she related the two factors to the statute. When Dr. Kircher later testified about the risk assessment that she performed, she said that she used the standard set forth in the statute. (Tr. 410). On cross-examination, she stated that the statute requires that the mental abnormality must cause the risk to be more likely than not. (Tr. 524-25). She also testified to a reasonable degree of psychological certainty that Appellant met the criteria, under the law, to be a sexually violent predator. (Tr. 454). Dr. Kircher's testimony was sufficient to demonstrate that she linked Appellant's future risk to his mental abnormality.

Dr. Witcher was asked what the next part of her risk assessment was after considering whether the putative SVP has a mental abnormality. (Tr. 608). She answered that, "After deciding if they meet the criteria for the mental abnormality, then we look at Prong 2 which is – gosh – if not contained in a secure environment, is that person more likely than not to engage in sexually violent predatory behavior[.]" (Tr. 608). Dr. Witcher testified to a reasonable degree of psychological certainty that Appellant suffered from a mental abnormality and that he was more likely than not to commit a future act of sexual predatory violence unless confined in a secure facility. (Tr. 624). Dr. Witcher testified on cross-examination that Appellant's

risk had to be caused by his mental abnormality. (Tr. 700). She discussed how the static instrument considered risk in connection with mental abnormality:

> So the items on the static correlate to mental abnormalities, if that makes sense. So while you don't use the static to diagnose, you look at the static to look at risk for items that go with behaviors that you see in people with mental abnormalities.

(Tr. 701). Dr. Witcher's testimony was sufficient to demonstrate that her assessment of Appellant's future risk was based on his mental abnormality.

2. *Future predatory acts of sexual violence.*

Dr. Witcher acknowledged that the statute considers the risk of future predatory acts. (Tr. 621). She testified that "predatory" is an act directed to individuals for the purpose of victimization. (Tr. 622). She also testified that Appellant's offending history showed that the drive for his behavior was sexual gratification. (Tr. 622). She went on to testify that when an adult uses a child to get sexual gratification, they are creating a victim. (Tr. 622). Dr. Witcher testified to a reasonable degree of psychological certainty that Appellant was more likely than not to commit a future act of sexual predatory violence unless confined in a secure facility. (Tr. 624). Contrary to Appellant's assertion, Dr. Witcher's testimony was sufficient to show a future risk of predatory acts of sexual violence.

3. *Past predatory acts*.

Dr. Witcher testified that Appellant had committed predatory acts in the past based on the definition of predatory set forth above. The Court of Appeals has found that an expert's reliance on an appellant's prior acts of sexual violence and the assessment results were sufficient to demonstrate that the appellant's prior acts of sexual violence were predatory in nature. *In re George*, 2017 WL 327486 at *7 (Mo. App. W.D., Jan. 24, 2017) (Mot. for r'hrg filed Jan. 26, 2017).

Appellant's disagreement with Dr. Witcher's definition and conclusions amounts to nothing more than an invitation to this Court to reweigh the evidence and substitute its own credibility determinations for those made by the jury. "Arguments on appeal criticizing an expert's testimony essentially ask us to reweigh the evidence in [the appellant's] favor. We cannot do so." *In re Morgan* 398 S.W.3d at 490 (internal quotation marks omitted). The credibility and weight of testimony are for the fact-finder to determine, and any conflicts in the evidence are nothing more than a factual issue for the jury to resolve in determining which expert opinion to credit in making a decision. *In re Turner*, 341 S.W.3d at 754.

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

Appellant asserts that the SVP Act's use of the term "more likely than not" must be the same as the terms used as a burden of proof. For instance, he cites to cases that have defined "more likely than not," in the context of a burden of proof, as greater than fifty-percent. *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681 (Mo. 1992).

In the context of an SVP case, the term "more likely than not" simply means more likely than not. The Court of Appeals has considered the question and determined that "more likely than not" merely requires the State to adduce evidence that distinguishes the putative SVP from the typical sex offender. *In re Coffel*, 117 S.W.3d 116, 127 (Mo. App. E.D. 2003). Specifically, *In re Coffel* requires the State to "identify some variable that would change the expectation" of the rate of re-offense. *Id.* at 127. In other words, the statute does not require the State to prove some specific probability of reoffending, but instead the State must prove that the putative SVP has a higher than average risk, and that the total level of risk must make the putative SVP more likely to offend than likely not to reoffend.

What Appellant is really asking this Court to do is to require that the State prove a percentage risk of over fifty-percent so that he can then argue that his static score correlates to a risk of less than fifty-percent. In other

words, Appellant is asking the Court to invalidate the State's identification of a variable (the additional risk factors) that would change the expectation of his rate of reoffending. This Court should decline that invitation. "More likely than not" is not a technical legal standard, but a series of words that are given their plain and ordinary meaning. It was not necessary for the State to define the phrase using a percentile.

5. *The State provided sufficient evidence of Appellant's future risk*.

Appellant's argument that the State failed to establish that he was more likely than not to reoffend is based in part on the lapse of time between the expert's evaluations and the time of trial. The age of the information the experts relied on goes to the weight of the opinion. *In re Sohn*, 473 S.W.3d 225, 230 (Mo. App. E.D. 2015). Determining the weight of the evidence is a function properly left to the jury. *Id.* Both of the State's expert's calculated future risk using actuarial instruments that are widely used and are reasonably relied on by experts in the field. (Tr. 410-13, 427, 612-13). Both experts looked at static as well as dynamic risk factors. (Tr. 410-12, 611-14). Both experts did a meta-analysis that looked at additional risk factors. (Tr. 426, 614).

Expert opinions that are based on scientific-derived empirical factors provide sufficient evidentiary support to sustain a jury's verdict. *In re Kapprelian*, 168 S.W.3d at 715, *see also In re Barlow*, 250 S.W.3d 725, 733

(Mo. App. W.D. 208) (expert's opinion based on three different assessment tools was sufficient). Appellant's criticisms of the reasoning behind the opinions of Drs. Kircher and Witcher, and his reliance on his own expert's testimony, are again an impermissible attempt to ask this Court to reweigh the evidence in his favor. *In re Barlow*, 250 S.W.3d at 734; *In re Morgan*, 398 S.W.3d at 490. It also asks this Court to ignore the standard of review by relying on evidence and inferences that are contrary to the verdict. *In re A.B.*, 334 S.W.3d at 752. Once the expert's testimony was admitted, the jurors were free to give it whatever weight they believed it deserved. *In re Morgan*, 398 S.W.3d at 490; *In re Berg*, 342 S.W.3d 374, 383 (Mo. App. S.D. 2011).

Appellant is not entitled to relief because he has failed to show a "complete absence of probative fact" to support the judgment. *In re Turner*, 341 S.W.3d at 754. His point should be denied.

IV.

The trial court did not abuse its discretion in permitting Dr. Witcher's testimony (responds to Appellant's Point III).

Appellant claims that the trial court abused its discretion in permitting Dr. Witcher to testify differently at trial than she did in her deposition. Much of the testimony Appellant complains of was not inconsistent with Dr. Witcher's deposition testimony. And the trial court acted within its discretion in determining that any inconsistencies that did exist did not warrant exclusion, but could be dealt with in cross-examination

A. Underlying Facts.

1. *Dr. Witcher's deposition testimony*.

Dr. Lisa Witcher was asked in a pre-trial deposition what evidence she relied on for her diagnosis that Appellant suffered from pedophilia. (Ex. M, p. 45). Dr. Witcher gave the following answer:

> A. I'm relying on the victim, slash – yeah, victims – victim, I'm sorry – of the victimization in the instant offense, combined with his undisclosed victim, combined with his legalization, his behavior in MoSOP, of the attraction, slash, arousal produced by the video of the 11-year-old girl.
>
> 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.

Q. Okay.

A. Or arousal. I'm sorry. Attraction/arousal.

(Ex. M, p. 45). Dr. Witcher was not asked any follow-up questions to determine if those were the only things in the record that supported the diagnosis of pedophilia.

Dr. Witcher was then asked if the cutoff for a diagnosis of pedophilia was the victim being the age of twelve and under. (Ex. M, p. 45). Dr. Witcher provided the following answer:

A. The 12 – yeah, the age of 12. If it's 13 or over. I believe they – the criteria for hebephilia. I'd have to look for certain, but 12 and under – I think I probably just said 12 and under based on the fact that that's part of the – yeah, prepubescent mark.

Q. Okay. And so I understand it, we're not so much concerned about how old these people are but what their physical development is. Are they prepubescent or have they entered into puberty; correct?

A. Very good, yes.

(Ex. M, pp. 45-46). When asked whether her opinion would change based on evidence that the eleven-year-old victim of the index offense had entered puberty, Dr. Witcher responded that she would have to see the records. (Ex. M, p. 46-47). Appellant questioned Dr. Witcher about records of the victim's SAFE exam and asked Dr. Witcher if she would agree that the victim was not prepubescent. (Ex. M, pp. 49-50). Dr. Witcher said she would have to do more research on it. (Ex. M, p. 50). Dr. Witcher was asked about Appellant's self-report of an undisclosed victim, and agreed that victim was, by all accounts the sister of the victim. (Ex. M, p. 51). When informed that the sister was eleven months younger than the victim of the index offense, Dr. Witcher said that would mean Appellant was mistaken about the girl's age. (Ex. M, p. 51).

2. *Dr. Witcher's trial testimony*.

Dr. Witcher testified at trial that she used the diagnostic criteria in the DSM-5 for pedophilic disorder in reaching her opinion. (Tr. 548-49). She agreed that the diagnostic criteria was the following:

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

(Tr. 549). When asked if she found any evidence in Appellant's case to support that criteria, Dr. Witcher testified that she found evidence of: (1) his

index offense where he attempted to engage in sexual activity with an eleven-year-old girl; and (2) Appellant's own discussions of offending against a seven-year-old girl. (Tr. 550). Dr. Witcher then began to describe notes from Appellant's MOSOP records and his interview with Dr. Kircher, where Appellant discussed having two fantasies regarding children. (Tr. 550).

Appellant objected that Dr. Witcher's trial testimony was inconsistent with her deposition testimony because she had not mentioned the two fantasies in the deposition. (Tr. 551). The State's attorney responded that Dr. Witcher had not changed her opinion, and that any inconsistencies that Appellant believed existed were subjects for cross-examination. (Tr. 552). The trial court reviewed the deposition and concluded that Dr. Witcher had not changed her opinion. (Tr. 553). The court overruled the objection. (Tr. 553).

Dr. Witcher went on to testify, based on the notes from her interview of Appellant, that Appellant had discussed a fantasy that he had at the beginning of his MOSOP treatment, where the victim of his index offense had not told him to stop and he had touched her. (Tr. 584-85). Dr. Witcher said she had asked Appellant in their interview about a fantasy he had relayed to Dr. Kircher about being placed in a sexual situation with a future non-existent niece. (Tr. 587). Dr. Witcher said that Appellant told him that the fantasy was only about babysitting and not about sex. (Tr. 587-88). Dr. Witcher also testified about how Appellant's self-reported behavior of

performing oral sex on a seven-year-old girl supported the diagnosis of pedophilia. (Tr. 559-60, 594-95).

Dr. Witcher acknowledged on cross-examination that she had not mentioned the fantasies in her deposition. (Tr. 625-27). She was also asked about her deposition testimony concerning the age of the victim and prepubescent development. (Tr. 633). Dr. Witcher said that the DSM did not fully state that physical development was more important than age, and that the DSM criteria included that the child generally be under the age of thirteen. (Tr. 632). Dr. Kircher said that she agreed in the deposition that physical development was a good thing to look at, but noted that she had also said in the deposition that there was other information not available to her at the deposition that she would have to look at to see if the diagnosis would change. (Tr. 634-35).

On the subject of Appellant's self-report involving a previously undisclosed victim, Dr. Witcher said she had looked at her notes and determined that the victim of that undisclosed offense was not the ten-year-old sister of the victim of the index offense, but was a seven-year-old girl, as Appellant had reported. (Tr. 640-42). Dr. Witcher said it would have helped if she had been provided names of the girls during the deposition. (Tr. 640).

Appellant's motion for new trial claimed that the trial court erred in allowing Dr. Kircher to testify at trial differently than she testified in her

deposition concerning the evidence she relied upon for her diagnosis and opinions. (L.F. 184).

B. Analysis.

When an expert witness has been deposed and after the deposition, but before trial, either changes her opinion or bases an opinion on new or different facts from those which were disclosed in the deposition, the party intending to use the expert witness must disclose the new information to the adverse party. *Tax Increment Financing Com'n of Kansas City v. Romine*, 987 S.W.2d 484, 487 (Mo. App. W.D. 1999). A trial court has broad discretion when evidence is challenged as not being disclosed in response to discovery. *Id.* The trial court may admit or reject such evidence or impose appropriate sanctions. *Id.* This Court will presume that a ruling within the trial court's discretion was correct. *Id.* The appellant bears the burden of proving that the trial court abused its discretion. *Id.* Furthermore, the appellant must show he was prejudiced by such abuse of discretion. *Id.* Finally, this Court gives great deference to the trial court's rulings on issues involving pre-trial discovery as well as the actions it adopts to remedy any non-compliance with discovery rules. *Id.*

1. *Testimony about fantasies.*

Dr. Witcher testified in her deposition that Appellant's undisclosed victim, the instant offense victim, and the music video in MOSOP all

supported her diagnosis of pedophilia. (Ex. M, p. 44-45). She reiterated those three factors at trial, but also testified that she relied on fantasies that Appellant discussed with her and that he reported to Dr. Kircher. (Tr. 584-85). Dr. Witcher was never directly asked in the deposition whether the three factors she listed were the only factors that supported her diagnosis. Even if Dr. Witcher's deposition testimony was interpreted as an exclusive listing of the factors that supported her opinion, the trial court did not abuse its discretion in allowing testimony about the fantasies.

Testimony that interprets or supports opinions contained in a deposition is not improper. *Blake v. Irwin*, 913 S.W.2d 923, 931-32 (Mo. App. W.D. 1996). Dr. Witcher never changed her ultimate opinion, but merely added one additional fact to the three supporting facts mentioned in her deposition. In *Romine*, the trial court was found not to have abused its discretion in permitting an expert to testify about the fair market value of a piece of property when he relied on an additional piece of information not considered at the time of his deposition, but the ultimate opinion as to fair market value remained unchanged. *Romine*, 987 S.W.2d at 487. It is true that the finding of no abuse of discretion was premised on the court giving opposing counsel the chance to re-depose the witness. *Id.* But Appellant never requested such relief in this case, and instead sought only exclusion of the testimony. The Eastern District has held that a trial court does not abuse its

discretion in rejecting such a request when the appellant could have requested alternative relief, such as a chance to interview the witness about the undisclosed facts before she testified to them. *Stallings v. Washington Univ.*, 794 S.W.2d 264, 273 (Mo. App. E.D. 1990). The Western District has likewise noted that exclusion of testimony is not always the appropriate sanction when an expert renders "surprise" testimony. *Sherar v. Zipper*, 98 S.W.3d 628, 633 n.2 (Mo. App. W.D. 2003). As the court noted, it may be appropriate to order a recess to allow the objecting party to conduct further discovery regarding the expert's opinion. *Id.* That court went on to find that exclusion of testimony was not required where the witness offered essentially the same ultimate opinion at both a discovery deposition and an evidentiary deposition. *Id.*

Dr. Witcher here offered the same ultimate opinion at trial as she did at the deposition. The fantasies that she discussed at trial did not change her opinion, but merely reinforced it. *Cf. Darnaby v. Sundstrom*, 875 S.W.2d 195, 203 (Mo. App. S.D. 1994) (finding that trial court erroneously excluded evidence that reinforced, but did not change, expert's opinion). Appellant had ample opportunity to impeach Dr. Witcher over her failure to discuss the fantasies during her deposition. And Dr. Witcher's opinion would have remained the same had the evidence been excluded. Appellant thus cannot show he was prejudiced by the trial court's ruling.

2. *Testimony about DSM criteria for pedophilia.*

Appellant claims that Dr. Witcher changed her testimony about the criteria for a pedophilia diagnosis. Appellant did not object when Dr. Witcher testified about the DSM-5 criteria that she used in her diagnosis. (Tr. 549). Appellant instead raised the alleged inconsistencies in cross-examination. Appellant complains that Dr. Witcher testified in her deposition that physical development, rather than age, was the important factor in determining pre-pubesence, but stated on cross-examination that anyone under the age of 13 qualified as pre-pubescent. Appellant reads too much into Dr. Witcher's deposition testimony.

Dr. Witcher never explicitly agreed with counsel's suggestion at the deposition that physical development was more important than age in determining whether someone was pre-pubescent. (Ex. M, 46). As Dr. Witcher explained at trial, her response of "Very good," was simply an acknowledgment that physical development was a good thing to look at. (Tr. 634). But Dr. Witcher noted on redirect examination that Tanner stages are not part of the DSM's criteria and that she is not allowed to add to those criteria. (Tr. 713-14). Dr. Witcher's trial testimony was not inconsistent with her deposition testimony.

3. *Testimony about victim of undisclosed offense*.

Appellant also claims that Dr. Witcher changed the identity of the undisclosed victim in order to support her opinion. The record does not support that assertion. This is again not a matter to which Appellant objected, but which was instead explored on cross-examination.

As disclosed in Dr. Kircher's testimony, Appellant had filled out a Sexual Victim's Disclosure form as part of his MOSOP treatment. (Tr. 395). On that form, Appellant had identified the victim of the index offense as Angel. (Tr. 396-97). Appellant had also stated on the form that he had performed an undetected act of oral sex on a seven-year-old girl named Katy, whom he described as the daughter of his mom's friend. (Tr. 408). Dr. Witcher reviewed the records containing that disclosure. (Tr. 550). She also discussed the offense with Appellant when she interviewed him. (Tr. 550).

Dr. Witcher was asked questions in her deposition about a SAFE exam without being told the name of the person to whom the exam was administered, and without having any ability to look at those records. Appellant has filed copies of two SAFE exam reports with this Court – one for Angel and another for a child named Star. (Exs. E, F). It appears that Appellant was questioning Dr. Witcher in the deposition about Star, even though Appellant had consistently identified the seven-year-old victim as

Katy.[4] Dr. Witcher would have been unaware during the deposition that Appellant was questioning her about a different person than Appellant had identified to her. When Dr. Witcher had the ability to review her notes, she reaffirmed that the person whom Appellant had identified as the victim of the undisclosed sex act was a seven-year-old girl named Katy, and not ten-year-old Star. (Tr. 640-42). Dr. Witcher's reliance on Appellant's self-report of an undisclosed act against a seven-year-old girl thus never changed.

The trial court did not abuse its discretion in determining that exclusion of Dr. Witcher's testimony was not warranted and that any inconsistencies were a matter for cross examination, and Appellant cannot show prejudice from the trial court's ruling. Appellant's point should be denied.

[4] Dr. Kircher affirmed during trial that Katy was not Angel's sister. (Tr. 476-77).

V.

The trial court did not abuse its discretion in admitting Dr. Kircher's testimony (responds to Appellant's Point IV).

Appellant claims that the trial court erred in admitting Dr. Kircher's testimony for a multitude of reasons, including that her end of confinement opinion was inadmissible per statute, her opinion was not reliable, that Appellant did not have substantive protections when Dr. Kircher questioned him and those communications were privileged, and that the opinion Dr. Kircher expressed at trial was different than the opinion disclosed during her deposition. None of Appellant's contentions have merit, and Dr. Kircher's testimony was properly admitted.

Analysis.

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

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

Section 632.483.5, RSMo, provides, "The determination of the prosecutors' review committee or any member pursuant to this section or

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

The end-of-confinement report that was generated by Dr. Kircher was a "determination" under section 632.483.2, RSMo, but Dr. Kircher was not a "member" for purposes of the statute. *In re Bradley* examined the question of who is a "member" for purposes of section 632.483.5, RSMo and found that the term "member" included the persons on the prosecutor's review committee and persons on the multidisciplinary team, not the person conducting the end-of-confinement report. "[S]ection 632.483 uses the term 'members' to refer to the individuals comprising both the prosecutors' review committee and the multidisciplinary team" *In re Bradley*, 440 S.W.3d at 557. The court further found that "the only 'members' referred to in section 632.484 are those forming the prosecutors' review committee." *Id.* at 558. The Court of Appeals reaffirmed that holding, writing that "the statute only expressly excludes the PRC report from evidence." *In re Walker*, 465 S.W.3d 491, 495 (Mo. App. W.D. 2015).

The Western District's interpretation of section 632.483.5, RSMo is correct, and under the plain language of the statute, section 632.483.5, RSMo

does not apply to Dr. Kircher. It thus provides no basis for excluding her testimony.

2. *Dr. Kircher's opinion was sufficiently reliable.*

Appellant next asserts that Dr. Kircher's opinion is unreliable. But those arguments are based on a deposition given in a different case by a former evaluator at the Department of Mental Health. Ultimately, all of Appellant's complaints go to the weight of Dr. Kircher's opinion, not the admissibility of that opinion.

For instance, Appellant complains that, in his view, Dr. Kircher's report answers a different question than the question the jury is asked, and that Dr. Kircher uses a different burden of proof. Importantly, all of Appellant's citations for these propositions come from either someone other than Dr. Kircher, or from Dr. Kircher's deposition in a different case. Dr. Kircher testified at trial that when she does an evaluation, she is looking to see if someone meets the criteria listed in the statute. (Tr. 366-68). That is the precise question the jury is asked to answer.

Next, Appellant complains that Dr. Kircher was not able to give an opinion to a reasonable degree of psychological certainty because of something a different witness said in a deposition in a different case. But at trial, Dr. Kircher said she was able to render a diagnosis to a reasonable degree of psychological certainty. (Tr. 409-10, 453-54). And Dr. Kircher

testified that it was her opinion to a reasonable degree of psychological certainty that Appellant was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility. (Tr. 452). In fact, Dr. Kircher testified to her opinion, to a reasonable degree of psychological certainty, that Appellant met the criteria under Missouri law to be a sexually violent predator. (Tr. 454).

Appellant also complains that Dr. Kircher had limited records available to her at the time of her evaluation. But that sort of complaint goes to the weight of Dr. Kircher's opinion, not its admissibility. *In re Sohn*, 473 S.W.3d at 230. In this case, Dr. Kircher testified that her opinion came from her interview with Appellant, as well as his MoSOP treatment file and his probation and parole records. (Tr. 365-66). Dr. Kircher explained that these are the type of records that are reasonably relied upon in her profession, and that she found them reasonably reliable. (Tr. 366).

Appellant raises a complaint that Dr. Kircher testified that the end of confinement report is the first step in the evaluation. (Tr. 459-60). That testimony came in response to Appellant's cross-examination. Appellant objected and moved to strike the answer as non-responsive. (Tr. 460). The probate court granted the motion. (Tr. 460). A party who has received the relief he requested cannot claim reversible error. *State v. Blurton*, 484 S.W.3d 758, 774 (Mo. 2016).

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

3. *Appellant cannot assert that Dr. Kircher's opinion is too old when he continued the trial.*

Appellant argues that Dr. Kircher's report is too old to be admissible. But Appellant asked for a continuance on September 18, 2015, that resulted in the trial being reset from November 23, 2015, to April 4, 2016. (L.F. 6-7).

Appellant should not be allowed to request continuances in order to render expert opinions inadmissible. Moreover, the age of the information Dr. Kircher relied on goes to the weight, not the admissibility of the opinion. *In re Sohn*, 473 S.W.3d at 230. As the State's attorney noted, Appellant's position would require the court to adjourn the trial so that all the experts could talk to him that day. (Tr. 378). Appellant cannot demonstrate that it was an abuse of discretion for the probate court to allow Dr. Kircher to testify.

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

Appellant asserts that his statements made to Dr. Kircher were inadmissible because they violated the Fifth Amendment. Appellant cites no

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

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

As a final issue, Appellant also asserts that his rights were violated because he was not given a *Miranda*[5] warning before the end of confinement evaluation. No *Miranda* warning was necessary because the Fifth Amendment does not apply. If *Miranda* does apply—which it does not—then Appellant is still not entitled to relief because he voluntarily gave statements to Dr. Witcher in an interview that lasted several hours. (Tr. 562). Under *Miranda*, voluntary re-contact with state agents is permissible. And, this is not the sort of two-step interview designed to skirt *Miranda*. *State v.*

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

Collings, 450 S.W.3d 741, 755 (Mo. 2014). Finally, if there was a *Miranda* error in this case—and there was not—then the case does not require reversal or remand because Appellant has not demonstrated prejudice. Appellant has not demonstrated how the statements he made to Dr. Kircher are different than statements he made to Dr. Witcher. In Missouri, the rule is that "evidence challenged on constitutional grounds that is cumulative of other, properly admitted evidence cannot have contributed to a defendant's conviction and so is harmless beyond a reasonable doubt." *State v. Jones*, 369 S.W.3d 77, 81 (Mo. App. E.D. 2012). Thus, Appellant is not entitled to relief, assuming *arguendo*, there was a *Miranda* violation.

5. *Appellant's communications with Dr. Kircher were not privileged and were admissible at trial.*

Appellant argues that his communications with Dr. Kircher were privileged under section 337.055, RSMo, and thus inadmissible. Section 337.055, RSMo does not assist Appellant because it is abrogated in an SVP case by Section 632.510,RSMo.

Section 337.363, RSMo creates the general rule that a licensed psychologist may not be made to testify on any privileged communication without the prior consent of the person who received his services. § 337.055, RSMo 2000. The General Assembly, aware of this privilege and others, drafted a provision in the SVP Act that abrogated this privilege. § 632.510,

RSMo 2000. That provision provides that: "In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to ... the attorney general for the purpose of ... determining whether a person is or continues to be a sexually violent predator." *Id*.

This Court has explained that "Section 632.510's mention of providing 'relevant information and records' with an intent to 'protect the public' demonstrates that the SVP Act intends a thorough assessment of an alleged offender's history and likelihood to reoffend be considered when making the case for his commitment as an SVP." *In re Tyson*, 249 S.W.3d 849, 853 (Mo. 2008). Section 632.510's purpose—to inform the factfinder at trial—would be frustrated if this Court accepts Appellant's argument that the licensed psychologist privilege applies to SVP cases. Appellant makes this argument by trying to draw a distinction between "information" and "testimony" and then arguing that Section 632.510 does not permit testimony about the information obtained under that section because the statute does not explicitly discuss testimony. But Appellant's argument abrogates the entire purpose of Section 632.510.

Under Missouri law, privilege is a creation of statute and does not exist at common law. *Randolph v. Supreme Liberty Life Ins. Co.,* 221 S.W.2d 155, 253 (Mo. banc 1949). The only reasonable reading of Section 632.510 is that it

applies to testimony. And, because Section 632.510 is the more specific statute, it controls Section 337.055, and abrogates its application in an SVP case. *See State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo. 2014) ("when one statute deals with the subject in general terms, and the other deals in a specific way...the special statute prevails").

Because Appellant's interpretation would abrogate the purpose of both statutes, because the SVP Act provision was passed in order to inform the factfinder and "to protect the public," and because the SVP Act provision is a special statute, this Court should find that Section 337.055 is abrogated in an SVP case by Section 632.510.

6. *Differences between trial and deposition testimony*.

At the time she performed her end-of-confinement evaluation of Appellant, Dr. Kircher was employed by a private company that contracted to provide services within the Missouri Department of Corrections. (Tr. 361). By the time Appellant took her deposition, Dr. Kircher had taken a new job at the Missouri Department of Mental Health and, under the federal HIPAA law, no longer had access to the records that she had reviewed in evaluating Appellant. (Tr. 368-69). Dr. Kircher also did not have access at the time of her deposition to the end of confinement report she had written. (Tr. 369). During the deposition, Dr. Kircher stated that she was unable to speak to many of the details of her evaluation of Appellant because she did not have

access to the records of that evaluation. (Ex. D, pp. 7-13, 23, 29-33). Appellant's counsel indicated that she would have questions to ask Dr. Kircher if Dr. Kircher received the records. (Ex. M, p.37). Dr. Kircher was provided access to those records after the deposition and reviewed them prior to trial. (Tr. 369). The record reflects no attempt to re-depose her.

Appellant objected when Dr. Kircher was asked about her diagnosis of Appellant. (Tr. 375). Counsel told the court that Dr. Kircher had been unable in her deposition to provide a current opinion regarding Appellant. (Tr. 375). Counsel stated that Dr. Kircher had clearly stated that she did not have an opinion on the date of the deposition. (Tr. 376). The State's attorney responded that he was asking Dr. Kircher to testify to the diagnosis that she made at the time she wrote her report. (Tr. 376-77). Appellant's counsel acknowledged having that report at the time she took Dr. Kircher's deposition. (Tr. 380). The court ruled that Dr. Kircher could testify about the opinion she had at the time her written opinion was issued. (Tr. 380).

Dr. Kircher did not, as Appellant contends, testify at trial inconsistently with her deposition. Dr. Kircher made clear that her inability to recall details of Appellant's evaluation was due to the fact that she did not have access to the records she relied on in making that evaluation. Appellant was aware of that and could have sought to re-depose Dr. Kircher after she did receive access to those records. Indeed, counsel mentioned that

possibility. But she chose instead to use the deposition as a sword to exclude Dr. Kircher's testimony. *See Sherar*, 98 S.W.3d at 634 (noting concern that pre-trial depositions could be used as a form of sandbagging). Appellant cannot claim surprise from Dr. Kircher's testimony, since it was limited to the opinion given in her end of confinement evaluation that Appellant had access to at the time of the deposition. The probate court did not abuse its discretion in permitting Dr. Kircher to testify to those opinions.

VI.

The trial court did not abuse its discretion in excluding external constraints evidence (responds to Appellant's Point V).

Appellant claims that the trial court erred in excluding evidence of his release plan. Appellant's claim is without merit as the evidence he sought to admit was not relevant.

A. Underlying Facts.

The State filed a motion in limine seeking to exclude evidence of Appellant's post-release plan, including any external constraints that might be placed on him if he was released or relating to a support system that Appellant believed would help prevent him from reoffending. (L.F. 42-44). The motion noted previous court cases holding that such evidence was irrelevant and collateral to the ultimate question before the jury. (L.F. 43-44).

At a pre-trial hearing on the motion, Appellant's counsel stated that she did not plan to offer such evidence for independent reasons, but that it would come in as part of the facts and basis of the expert's opinions. (Tr. 19-20). The State's attorney responded that the experts only look at release plans for the purpose of determining whether the putative SVP has a realistic understanding of what's next, and that putting on evidence of where Appellant would go if not committed would confuse the jury. (Tr. 20-21). The

court agreed and directed Appellant's counsel to approach the bench before offering any specifics of post-release supervision. (Tr. 21).

Dr. Kircher testified on cross-examination that she discussed Appellant's release plan with him during their interview. (Tr. 513-14). Dr. Kircher said that the release plan was "one fractional component" of what she relied on in reaching an opinion. (Tr. 514). The State's attorney objected when Dr. Kircher was asked if she knew that Appellant would be on parole for two years. (Tr. 515). Counsel stated that she planned to ask whether Appellant would be on parole and whether he would go to an honor center, but would not ask about the details of parole supervision or constraints placed on him at an honor center. (Tr. 516-17). The State's attorney noted that Appellant could not be forced to go to an honor center if released. (Tr. 518). The court sustained the objection. (Tr. 519-20).

Appellant made an offer of proof with Dr. Kircher. (Tr. 564). Dr. Kircher testified that she understood that Appellant would be released on parole for two years and that sexually violent offenders are generally subject to lifetime supervision that generally includes GPS ankle monitoring. (Tr. 565). Dr. Kircher said that Appellant had a goal of going to an honor center or a community release center in Kansas City, but that plan was not realistic because the release center in Kansas City was going to close. (Tr. 565-66). Dr. Kircher described Appellant's release plan as very tentative, with the release

center a fallback if his goal of living with someone in the community could not be realized. (Tr. 567). She also described parole supervision as tentative because she did not know the conditions of parole or whether Appellant would be successful. (Tr. 569). Dr. Kircher noted on cross-examination that the jury could not send Appellant to an honor center, which she had earlier described as a "semi-secure facility." (Tr. 568, 570).

The court refused the offer of proof, noting that the statute does not give the jury an option to consider external constraint facilities other than commitment to the Department of Mental Health, and that evidence of external constraints would invite a mini-trial over the details of the kind of supervision Appellant would be subject to if he were released. (Tr. 573-74).

The State's other witness, Dr. Witcher, was not asked about parole supervision or release to an honor center. Appellant later offered portions of Dr. Witcher's deposition as an offer of proof on Appellant's release plan. (Tr. 873-74). Dr. Witcher testified that living in a secured facility and being on parole supervision could help Appellant, but that would depend on how invested his forensic case monitor and parole officer would be. (Appellant's Ex. M, pp. 56-58). The court denied the offer of proof. (Tr. 876).

Appellant made an offer of proof with his expert, Dr. Fabian. (Tr. 869). Dr. Fabian testified that he considered a release plan in every evaluation that he did because supervision and treatment mitigate risk. (Tr. 870). Dr.

Fabian testified that he was aware that Appellant was under parole supervision and was subject to lifetime supervision, and that if released he would go to a community release center or honor center, which he characterized as a secure facility. (Tr. 870-71). Dr. Fabian said those things mitigated the risk a bit, but that it was hard to statistically quantify that. (Tr. 871). Dr. Fabian said that the risk is mitigated more substantially with more layers of supervision. (Tr. 871-72). The court denied the offer of proof. (Tr. 873).

Appellant's motion for new trial contained a claim that the trial court erred in preventing him from adducing evidence about Appellant's release plan. (L.F. 183).

B. Analysis.

1. *The probate court did not err in when it excluded evidence that was not relevant.*

Relevance has two tiers, logical and legal. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002). "Evidence is logically relevant 'if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.'" *State v. Dennis*, 315 S.W.3d 767, 768 (Mo. App. E.D. 2010) (quoting *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. 2002)). If

logically relevant evidence is legally relevant, it is admissible. *Anderson*, 76 S.W.3d at 276. "Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id*. If the costs of logically relevant evidence outweighs its benefits, the evidence is excluded. *Id*. Whether a piece of evidence is relevant depends, in part, on the issues in the case.

"The Missouri legislature created a mechanism to civilly commit sexually violent predators; i.e., 'any person who 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." *In re A.B.*, 334 S.W.3d at 752. "The law seeks, above all else, the protection of society against a particularly noxious threat: sexually violent predators." *In re Holtcamp*, 259 S.W.3d 537, 540 (Mo. 2008). The statutory definition of a "sexually violent predator" is:

> Any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:
>
> (a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect . . . of a sexually violent offense[.]

§ 632.480(5), RSMo Cum. Supp. 2013.

For an offender to be committed, the state must satisfy a three-prong test: (1) the offender must have committed a sexually violent offense; (2) the offender must suffer from a mental abnormality; and (3) that abnormality makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. *In re A.B.*, 334 S.W.3d at 752 (describing a two-step test when the offender has plead guilty to a sexually violent offense).

Appellant's argument is that evidence of his release plan was relevant because he would be placed in an honor center or community release center, which qualifies as a secure facility. The Court of Appeals has rejected a similar argument by an SVP who claimed that the probate court abused its discretion when it prohibited evidence that the SVP would still be under supervised probation even if he were released following the SVP hearing. *In re Lewis*, 152 S.W.3d 325, 330 (Mo. App. W.D. 2004). The SVP contended that the evidence was relevant because the safeguard of rigorous supervision during probation would make it less likely that he would engage in predatory acts of sexual violence if not confined in a secure facility. *Id.* at 330. The Court of Appeals held that the question in an SVP trial was whether the SVP suffered from a mental abnormality that made him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Id. at 332. The question was not whether some "external constraints" make it less likely that he would engage in such acts. *Id*. at 332.

Appellant's proposed evidence further lacks probative value because his stated goal of being placed in a release center was merely aspirational. The jury could not be assured that Appellant would actually go to such a center if he were released. Likewise, the conditions of Appellant's parole supervision could be subject to change at any time, and even the requirement of lifetime supervision could be rescinded by future legislative action.

The Court of Appeals rejected an argument by another SVP that the probate court erred when it excluded evidence about his proposed medication arrangements in the event he was released from secure confinement. *In re Cokes*, 183 S.W.3d 281, 285 (Mo. App. W.D. 2005). The SVP argued that his case was distinguishable from *Lewis* because he did not seek to present evidence about potential supervision if released, but instead that the evidence regarding his medication arrangements would have allowed the jury to consider whether he had a mental disorder that left him unable to pursue treatment voluntarily and therefore made him more likely to reoffend. *Id*. The Court of Appeals disagreed "that the evidence had any relevance in determining the existence of a mental disorder," as the excluded testimony of a prescribing psychiatrist and family member were "precisely the type of

'external constraints'" that *Lewis* had deemed irrelevant in an SVP proceeding. *Id*.

Here, Appellant attempts to distinguish *Lewis* and *Cokes* by arguing that the SVPs in those cases were attempting to introduce external-constraints evidence as "independent, substantive evidence," but that Appellant merely wanted to introduce testimony about external-constraints because the experts considered it. Appellant's argument is not persuasive. In effect, he is arguing that evidence that would be inadmissible on its own becomes admissible merely because an expert considers it. That is not the law. Under Appellant's rule, if an expert relied upon a polygraph examination, then the results of that examination could be discussed in court. That cannot be the rule. And, the Court of Appeals has held that admitting external-constraints evidence "might well confuse and mislead a jury," and that a jury might mistakenly base its determination on "an assessment of the likely effectiveness" of external constraints rather than relevant evidence pertaining to the offender's actual mental condition. *In re Lewis*, 152 S.W.3d at 332 (quoting *People v. Krah*, 7 Cal.Rptr.3d 853, 860 (Cal. App. 2003)). Appellant does not plausibly explain why *Cokes* and *Lewis* should be overturned.

Appellant also relies on this Court's opinion in *In re Brasch*, 332 S.W.3d 115, 118 (Mo. 2011). Appellant argues that *Brasch* cited the absence of parole

supervision; therefore testimony about parole supervision must be admissible. But *Brasch* does not say that external-constraints evidence is admissible. The portion of *Brasch* that Appellant relies on does not say if the evidence was admitted over the State's objection. If so, then the State would have had no way to contest the evidence on appeal because the State prevailed at trial. Moreover, *Brasch* was decided in 2011, while *Cokes* and *Lewis* were decided in 2004 and 2005. If this Court had intended to overrule *Cokes* and *Lewis*, it would have said so. *See, e.g., State v. Honeycutt*, 421 S.W.3d 410, 422–23 (Mo. 2013) (stating that the Missouri Supreme Court disfavors *sub silentio* rulings overturning precedent). *Brasch* does not support Appellant's position.

In sum, the evidence that Appellant wanted admitted could not, by his own admission, have been used to prove or disprove whether he was an SVP. That makes the evidence irrelevant, and the probate court properly excluded it.

2. *Even if the State "opened the door" to the evidence, the probate court properly excluded additional irrelevant evidence.*

Appellant also argues that because the State "opened the door" to external-constraints evidence, it was improper for the probate court to exclude his additional external-constraints evidence. The rule of curative admissibility, however, gives the probate court discretion about whether to

admit or exclude such evidence. *Daniel v. Indiana Mills & Mfg.*, 103 S.W.3d 302, 314 (Mo. App. S.D. 2003).

Appellant relies on *Howard v. City of Kansas City* to argue that his evidence should have been admitted. But *Howard* is a case about rebuttal evidence, not curative admission. *Howard v. City of Kansas City*, 332 S.W.3d 772, 786 (Mo. 2011). It is thus inapplicable to the question presented here. Appellant's point should be denied.

VII.

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

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

A. Underlying Facts.

Appellant filed a motion to dismiss based on alleged violations of his rights to due process and equal protection, and his right to be free from double jeopardy and *ex post facto* laws. (L.F. 20-26). The court overruled the motion. (Tr. 4). After the court accepted the jury's verdict finding Appellant to be an SVP, Appellant made an oral motion to stay judgment based on an order by the United States District Court of the Eastern District of Missouri, which found the SVP Act unconstitutional as applied. (L.F. 14). The court denied that motion. (L.F. 14). Appellant claimed in his motion for new trial

that the court erred in denying the pre-trial motion to dismiss and erred in denying the oral motion for a stay. (L.F. 181, 182).

B. Analysis.

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

1. *SVP Act is not punitive.*

Appellant argues that *Schafer* establishes that the SVP Act is punitive in nature and thus runs afoul of constitutional provisions protecting due process and prohibiting cruel and unusual punishment. In *Schafer*, a group of

sexually violent predators filed suit against the State and alleged, among other things, that the SVP Act was facially unconstitutional and unconstitutional as applied to them. *Shafer*, 129 F. Supp.3d at 843. The district court rejected the facial challenge to the SVP Act. *Id.* at 865. It also rejected the as-applied challenge to the SVP Act's treatment provisions. *Id.* at 867. The district court did, however, sustain the challenge to the SVP Act's release procedures as applied to the plaintiffs. *Id.* at 867-70.

Shafer is not a final decision. It instead represents the district court's findings of fact and conclusions of law after a bench trial on liability. *Id.* at 843. As Appellant acknowledges, the remedy phase of the trial continues. *Id.* The district court has not ordered the release of the plaintiffs, but has ordered the State to apply the SVP Act in a constitutional manner to the plaintiffs. *Id.* at 871. The district court's order will be subject to appellate review once a final judgment has been entered. Indeed, Appellant cites to an order from the United States District Court for the District of Minnesota that found Minnesota's SVP statute to be unconstitutional both facially and as applied. *Karsjens v. Jesson*, 109 F. Supp.3d 1139 (D. Minn. 2015). That order has been overturned on appeal. *Piper*, 845 F.3d at 398.

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

punitive must provide "the clearest proof that the scheme is so punitive in purpose or effect as to negate" the state's intention to deem it civil. *Hendricks*, 521 U.S. at 361. In this case, Appellant has not provided the "clearest proof."

Even though *Shafer* is not final, the State is actively engaged in efforts to comply with the district court's order. Appellant's brief does not mention that there are at least ten pending petitions for conditional release. *In re Richard Berg*, 312P05-00088 (Greene County Cir. Ct.); *In re Stephen Elliott*, 7PR204000306 (Clay County Cir. Ct); *In re George Evans*, 04PR72330 (St. Francois Cir. Ct.); *In re Claude Hasty*, 12DE-PR00001 (Dent County Cir. Ct.); *In re Larry Lusby*, 39P049900137 (Lawrence County Cir. Ct.); *In re Lou Martineau*, 05NW-PR00096 (Newton County Cir. Ct.); *In re Jessie Moyers*, 02PR323155 (Cole County Cir. Ct.); *In re Steven Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.); *In re Charles St. Clair*, 02PR610339 (Washington County Cir. Ct.); *In re Wade Turpin*, 17P020100226 (Cass County Cir. Ct.).

Moreover, Appellant's brief does not mention that three petitions for conditional release have recently been granted. *In re Clifford Boone*, 21PR00135062 (St. Louis County Cir. Ct.) (conditional release granted Aug. 30, 2016); *In re Adrian Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.) (conditional release granted Sept. 30, 2016); *In re David Seidt*, 43P040300031 (Daviess County Cir. Ct.) (conditional release granted Aug. 25, 2016).

There is not sufficient evidence, let alone "the clearest proof" that Missouri's SVP is a criminal law. The non-final nature of *Shafer* and the lack of any evidence of what has happened in the months since that order was issued demonstrates that this Court cannot rely on the district court's decision. Without evidence, Kirk has failed to prove that Missouri's SVP Act is anything other than a civil law. And because Missouri's SVP Act is civil in nature, it cannot violate the *Ex Post Facto* or Double Jeopardy Clauses.

2. *Due Process and Equal Protection challenges are not ripe.*

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

Appellant would not be entitled to discharge even if this Court found a constitutional violation in the release procedures. The correct remedy would

be to order the Department of Mental Health to carry out the release procedures in a constitutional fashion. In *State v. Hart*, this Court considered a claim that the appellant should have his first-degree murder conviction vacated because he was a juvenile sentenced to a mandatory life without parole sentence. *State v. Hart*, 404 S.W.3d 232, 238 (Mo. 2013).[6] This Court found a constitutional violation – the mandatory imposition of a life without parole sentence – but remanded the case to the trial court for a new sentencing hearing. *Id.* a 238. This Court explained that the constitutional violation was that the sentencing court did not conduct the individualized analysis required by the constitution. *Id.* at 238-39. Accordingly, this Court explained, the proper scope of relief was to remand for re-sentencing so that the trial court could correct the unconstitutional application. *Id.*

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

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

3. *Procedural and substantive protections are adequate*.

Appellant also claims that SVP's are subject to different treatment than other individuals committed under Chapter 632, RSMo. This Court has previously held that sexually violent predators are not entitled to "exactly the same rights as persons committed under the general civil standard." *In re Coffman*, 225 S.W.3d 439, 445 (Mo. 2007) (*citing In re Bernat*, 194 S.W.3d at 868-69).

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

While *Norton* construed an earlier version of the statute, the procedural safeguards cited by the Court remain in the current Act, with the exception that the burden of proof for release is now clear and convincing evidence rather than beyond a reasonable doubt. *Id.* at 174-75; *see*, §§ 632.489, RSMo Cum. Supp. 2009; 632.492, RSMo Cum. Supp. 2001; 632.495, RSMo Cum. Supp. 2009; and 632.498, RSMo Cum. Supp. 2013. This

Court has held that the clear and convincing standard of proof can constitutionally be applied to SVP proceedings. *In re Van Orden*, 271 S.W.3d 579, 586 (Mo. 2008).

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

VIII.

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

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

A. Underlying Facts.

Appellant filed a motion to dismiss because the SVP Act does not allow for consideration of the least restrictive environment. (L.F. 29-30). The court denied the motion. (Tr. 4-5). Appellant claimed in his motion for new trial that the court erred in denying the motion. (L.F. 181).

B. Analysis.

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

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

This Court has found that "secure confinement of persons adjudicated to be SVPs, as provided in sections 632.480 to 632.513, is narrowly tailored to serve a compelling state interest." *In re Norton*, 123 S.W.3d at 174. The Court explained that the State has a compelling interest in protecting the public from crime. *Id.*[7] The Court then explained that the State's interest in protecting the public from crime justified treating SVPs differently from other mental health patients. *Id.*

Moreover, the Court found that an SVP is further protected by procedural safeguards such as (1) the right to a preliminary hearing; (2) the right to contest an adverse probable cause determination; (3) the right to counsel at that hearing, and to appear in person at that hearing; (4) the right to present evidence and cross-examine witnesses at the hearing; (5) the right to a jury trial; and (6) the right to a unanimous verdict before commitment. *Id.* at 174–75. Appellant received all those rights. It is true that the Court in *Norton* also identified the beyond-a-reasonable-doubt standard as a procedural safeguard. *Id.* at 174. But the Court has subsequently held that

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

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

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

On balance, the SVP Act has not changed since the *Norton* decision in a way that would require this Court to overrule *Norton.* Appellant's arguments are grounded in the statutory language that was affirmed in *Norton*. The only authority he offers is the non-final, non-binding court order in *Schafer* and the district court order from Minnesota that has been reversed by the Eighth Circuit. Appellant's point should be denied.

IX.

The trial court applied the correct burden of proof at trial (responds to Appellant's Point VIII).

Appellant claims that the trial court erred in denying his motion to dismiss, or alternatively, in denying his request to use the beyond a reasonable doubt standard at trial. But the statutory burden of proof of clear and convincing evidence properly protected Appellant's rights.

A. Underlying Facts.

Appellant filed a motion asking the court to use the "beyond a reasonable doubt" burden of proof at trial. (L.F. 52-53). The court denied the motion, indicating that the statute required the use of the "clear and convincing" standard. (Tr. 5-6). The court also indicated that it would refuse any proffered instruction that used the "beyond a reasonable doubt" standard. (Tr. 6). Appellant did offer such an instruction, and the court refused it. (L.F. 164). Appellant claimed in his motion for new trial that the court erred in denying his motion and in instructing the jury that the burden of proof was "clear and convincing." (L.F. 182).

B. Analysis.

Appellant contends that the 2006 amendments have so transformed Missouri's SVP Act that the only permissible standard is beyond a reasonable doubt. But he is mistaken. The United States Supreme Court has explained

that the burden of proof is a question left to the states. Moreover, Missouri's statutes have not changed since this Court last held that the clear-and-convincing-evidence standard properly protected the rights of putative SVPs.

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

This Court followed the Supreme Court's guidance when it decided *In re Van Orden*. In *Van Orden*, this Court considered the 2006 amendments to the SVP Act and determined that clear and convincing evidence was the appropriate burden of proof. *In re Van Orden,* 271 S.W.3d at 586. This Court recognized that the SVP Act implicates a sexually violent predator's liberty interest. *Id*. at 587. But the Act does not totally remove an SVP's liberty. SVPs are *not* subject to indefinite physical commitment. *Id.* If an SVP is committed, they receive an annual review to determine if their mental abnormality has changed to a degree that makes physical commitment no

longer necessary. *Id*. A probate court reviews the report. *Id*. Even if the report recommends *against* release, the SVP may still file a petition for release. *Id*. Moreover, if the petition for conditional release is denied, the SVP may obtain appellate review. *See, e.g., In re Barlow*, 114 S.W.3d at 331–32 (holding that the general appellate statute applies to proceedings under the SVP act).

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

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

the risk between the State and the putative SVP, and that the SVP Act protected the rights of putative SVPs. *Id*.

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

The SVP act has not changed since *Van Orden* was decided, and Appellant's arguments that this Court should overrule *Van Orden* are not persuasive. Appellant's point should be denied.

X.

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

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

A. Underlying Facts.

Appellant filed a motion to dismiss alleging that the SVP Act does not require that his alleged mental abnormality make him unable to control his dangerous behavior. (L.F. 31-33). The court denied the motion. (Tr. 5). Appellant claimed in his motion for new trial that the court erred in overruling his motion. (L.F. 181).

B. Analysis.

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

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

The *Thomas* jury instruction was given in Appellant's case. (Tr. 161). Appellant's main argument appears to be that the Missouri General Assembly did not amend the SVP Act following the *Thomas* opinion to require proof of serious difficulty controlling behavior. There was no need for the General Assembly to modify the statutory language because this Court rejected the argument that the SVP Act was constitutionally infirm. *Id.* at 791 n.1.

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

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

First, the United States Supreme Court found that an identical definition satisfied substantive due process concerns. *Hendricks*, 521 U.S. at 356. Second, even if an individual had a condition that affected only their "emotional capacity," Missouri law still requires that condition to cause the putative SVP "serious difficulty controlling his behavior." *In re Thomas*, 74 S.W.3d at 792. In other words, even if the problem is emotional and not volitional, the result is still serious difficulty controlling behavior. Under that formulation, the definition of mental abnormality passes constitutional muster because it requires a lack of volitional capacity, which Appellant admits would satisfy constitutional concerns. Appellant's point should be denied.

XI.

State's request for a jury trial was properly granted (responds to Appellant's Point X).

Appellant claims that the trial court erred in granting the State's request for a jury trial because the statute giving the State the right to a jury trial treats Appellant differently than other individuals subjected to involuntary government confinement. But there is no constitutional right to a bench trial, and even a defendant in a criminal case must obtain at least the assent of the court in order to have a bench trial.

A. Underlying Facts.

Appellant filed a motion to strike the State's request for a jury trial and asked that the court hold a bench trial. (L.F. 49-51). The court denied that motion. (Tr. 6-7). Appellant claimed in his motion for new trial that the court erred in denying his motion. (L.F. 182).

B. Standard of Review.

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

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

This Court performs an equal protection analysis in two steps: first, does the statute single out a suspect classification or implicate a fundamental right? Second, this Court applies the appropriate level of scrutiny to the statute. *Amick*, 428 S.W.3d at 640; *In re Norton*, 123 S.W.3d at 173. Under rational basis review, this Court will uphold the statute if it is "justified by any set of facts." *Id.* (citations omitted). Under strict scrutiny review, the challenged provision must be narrowly tailored to achieve a compelling state interest. *In re Norton*, 123 S.W.3d at 174.

C. Analysis.

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

The statute setting forth the trial procedures under the SVP Act states that, "The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury." § 632.492, RSMo Cum. Supp. 2001. Although Appellant is right that the State demanded a jury trial, that does not end the inquiry. The probate court overruled Appellant's motion for a bench trial, and Appellant did not ask the probate court to make a record on whether the probate court would have demanded a jury trial. (Tr. 6-7).

Because Appellant did not create a record about whether the probate court would have allowed a bench trial, he is asking this Court to guess what the probate court would have done. In other words, Appellant is asking for an advisory opinion.

When a party complains of anticipated error, and does not demonstrate that the error would have actually occurred, the party is asking this Court to issue an advisory opinion. *State ex rel. Tipler v. Gardner*, 2017 WL 405805, slip op. at 1 (Mo. Jan. 31, 2017) (Mandate issued Feb. 16, 2017). "This Court will not issue an advisory opinion." *Hartman*, 488 S.W.3d at 61; *see also In re Schottel*, 159 S.W.3d at 841 n.4.

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

2. *Appellant's constitutional rights were not violated when he had a jury trial.*

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

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

Appellant has contended that his constitutional rights were violated because he had a jury trial. This allegation is without support. A trial by jury is "the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part). The right to a trial by jury is the only right that exists within the Constitution and within the Bill of Rights. U.S. Const. art. III, § 2; U.S. Const. amend.VI. In fact, interference with the right to a trial by jury was one of the reasons the Thirteen Colonies left England. Declaration of Independence para. 20 (U.S. 1776) (listing "For depriving us in many cases, of the benefits of Trial by Jury" as a grievance against the King).

It is against this backdrop that Appellant asserts his equal protection rights were violated. To make his equal protection claim, Appellant must show that the government is treating similarly-situated persons differently withous adequate justification. *Dodson v. Ferrara*, 491 S.W.3d 542, 559 (Mo. 2016). Appellant tries to compare his situation to that of criminal defendants. But even criminal defendants have no federal or state constitutional right to avoid a jury trial.

A federal criminal defendant may waive a jury trial only with the consent of the prosecutor and the court. Fed. R. Crim. Pro. 23(a). The United

States Supreme Court has explained that Fed. R. Crim. Pro. 23(a) does not violate federal constitutional guarantees:

> The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

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

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

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

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

demand a jury trial and the government can only veto a waiver in criminal cases, that is a distinction without a difference as the end result in either case is a jury trial. Because there is no meaningful difference in the treatment of putative SVP's and criminal defendants, no equal protection violation exists.

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

Appellant also asserts that the only Missouri case to consider this issue decided it incorrectly because the Court of Appeals applied rational basis review. *See State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 842 (Mo. App. W.D. 20000. This Court performs an equal protection analysis in two steps: First, does the statute single out a suspect classification or implicate a fundamental right? Second, this Court applies the appropriate level of scrutiny to the statute. *Amick*, 428 S.W.3d at 640; *In re Norton*, 123 S.W.3d at 173. Although Appellant does not identify the fundamental right at stake, Appellant does cite to *In re Norton* to support his argument that strict scrutiny applies. But, as Respondent demonstrates in Point I, *supra*, this Court should re-examine its holding in *Norton*. Moreover, Appellant fails to explain how the *Askren* court erred when it wrote "we see no constitutional right to a bench trial in criminal cases or civil commitment cases." *Askren*, 27 S.W.3d at 840. And,

Appellant fails to establish how the *Askren* court erred when it held that there is no fundamental right to choose a bench trial. *Id*. at 842.

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

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

If this Court decides to overturn *Askren*, Appellant is still not entitled to relief because the jury trial portion of Section 632.492 is narrowly tailored to achieve a compelling state interest. The State has a compelling interest in making sure that both the State and Appellant receive a fair trial. And, in this context, the State has a compelling state interest in making sure that a Sexually Violent Predator case is adjudicated in the fairest way possible. Under the rule in *Singer*, it is very likely that the United States Supreme Court would recognize these as compelling state interests. *See Singer*, 380

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

The probate court did not err in granting the State's request for a jury trial. Appellant's point should be denied.

XII.

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

Appellant claims that the trial court erred in refusing to declare section 632.492, RSMo unconstitutional for requiring that the jury be instructed that a finding that a person is an SVP will result in that person's commitment to the Department of Mental Health for control, care, and treatment. Appellant also claims that the trial court erred and in submitting Instruction No. 8 to the jury over his objection because the instruction was misleading, confusing, and invited the jury to reach a determination based on treatment rather than the criteria for commitment. But the instruction followed the substantive law as declared by the legislature, which had the authority to require the instruction.

A. Underlying Facts.

Appellant filed a motion asking the court to declare section 632.492, RSMo unconstitutional because it requires the court to instruct the jury that "if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the department of mental health for control, care, and treatment." (L.F. 145-47). The court overruled that motion prior to trial. (Tr. 18-19, 41).

Appellant renewed his objection during the instruction conference. (Tr. 885-86). The court overruled the objection and submitted the required instruction as Instruction No. 8. (Tr. 886-87; L.F. 163). Appellant's motion for new trial contained a claim that the court erred in giving the instruction. (L.F. 184).

B. Standard of Review.

Whether a jury was instructed properly is a question of law this Court reviews *de novo*. *City of Harrisonville v. McCall Srvc. Stations*, 495 S.W.3d 736, 746 (Mo. 2016). The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction. *Id.* This Court will reverse instructional errors only if the error resulted in prejudice that materially affects the merits of the action. *Id.*

C. Analysis.

If a Missouri approved instruction (MAI) is applicable in a particular case, that instruction must be given to the exclusion of any other instruction on the same subject. *Id.* (citing Supreme Court Rule 70.02(b)). MAI's, however, do not exist for every particular legal issue. *Id.* For instance, there are no applicable MAI instructions in SVP cases. *In re Scates*, 134 S.W.3d 738, 742 (Mo. App. S.D. 2004). When there is no applicable MAI, the instruction given shall be simple, brief, impartial, free from argument, and

shall not submit to the jury or require findings of detailed evidentiary facts. *City of Harrisonville*, 495 S.W.3d at 746. Moreover, in adopting a non-MAI instruction, "the court must adopt an instruction that follows the substantive law and can be readily understood by the jury." *In re Scates*, 134 S.W.3d at 742 (citing *Murphy v. City of Springfield*, 794 S.W.2d 275, 278 (Mo. App. S.D. 1990)). "When reviewing instructions, jurors are presumed to have ordinary intelligence, common sense, and an average understanding of the English language." *In re Boone*, 147 S.W.3d 801, 808 (Mo. App. E.D. 2004).

The SVP Act provides in section 632.492, RSMo that "if the trial is held before a jury, the judge *shall* instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment." § 632.492, RSMo Cum. Supp. 2001 (emphasis added).

The Court of Appeals has found in numerous cases that the giving of the instruction is not error because it parrots the language of the statute and thus follows the substantive law. *See*, *e.g.*,*In re Scates,* 134 S.W.3d at 742; *In re Warren*, 291 S.W.3d 246, 251 (Mo. App. S.D. 2009); *In re Morgan,* 272 S.W.3d 909, 911-913 (Mo. App. W.D. 2009) (also finding that probate court properly rejected Morgan's proffered instruction that a finding that he was an SVP would result in him being in custody "for the rest of his natural life[]"). The court has further determined that the instruction is not misleading and

that giving it did not have a substantial potential for a prejudicial effect and that an average jury would understand that a finding that the appellant was an SVP would subject him to the control, care, and treatment of the Department of Mental Health. *In re Morgan*, 272 S.W.3d at 913; *In re Warren*, 291 S.W.3d at 251.

Appellant raises the argument that juries should not be informed of the consequences of a verdict. But the cases he cites do not support his argument. For instance, the United States Supreme Court found that a jury should not be instructed on the consequences of a verdict of not guilty by reason of insanity in the absence of a statutory requirement to the contrary. *Shannon v. United States*, 512 U.S. 573, 579-84 (1994). The Court did not engage in a constitutional analysis, but examined the issue as a matter of federal statutory and procedural law. Because the statute at issue did not require an instruction, the Court adhered to the general practice that juries not be informed of the consequences of its verdict.[8] *Id.* at 587. But the Court stated

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

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

Appellant also cites to a Missouri decision regarding bifurcated trials in civil cases. *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16, 28 (Mo. App. W.D. 2014). The Western District found reversible error in that case because the instruction at issue was not modified according to MAI and did not follow the applicable statute setting out the procedures for bifurcated trials. *Id.* at 28-29, 31. That case is inapposite because the instruction given here conformed to the substantive law as set forth by statute.

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

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

CONCLUSION

In view of the foregoing, Respondent submits that the judgment of the circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 22,108 words as calculated pursuant to the requirements of Supreme Court Rule 84.06 as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 21st day of February, 2017, to:

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