IN THE
MISSOURI SUPREME COURT

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

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

APPELLANT'S REPLY BRIEF

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INDEX

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

Appellant adopts the Jurisdictional Statement and Statement of Facts from his initial brief.

The State misconstrued Kircher's testimony at trial.(StateBr.13). Kircher testified that Sebastian "discussed with me… that he preferred children because children were simple, in the sense that having interactions and relationships with children were nonstressful and uncomplicated.(Tr.445). Kircher did not testify that Sebastian reported preferring sexual relationships with children.

ARGUMENT

I. Strict Scrutiny Applies

The United States Supreme Court has repeatedly recognized a fundamental right to liberty, which includes freedom from physical restraint, being freed from indefinite confinement in a mental facility, and freedom from imprisonment in government custody and detention, all at issue in involuntary commitment cases. "[L]iberty from bodily restraint has always been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)(examining physical restraint of involuntary committee). "This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment." *Id*. It "can be limited only by an overriding, non-punitive state interest." *Id.*

The Court extended *Youngberg* to indefinite confinement of a man who had committed a crime at one time and could not prove he was not dangerous in *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), noting "[w]e have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty."(*quoting U.S. v. Salerno*, 481 U.S. 739, 750 (1987)).

Kansas v. Hendricks relied on *Foucha*, recognizing that the liberty interest "has always been at the core of the liberty protected" by due process, but is not absolute at all times, in all circumstances. 521 U.S. 346, 356 (1997). Therefore, commitment "in certain narrow circumstances" of certain individuals "provided the confinement takes place pursuant to proper procedures and evidentiary standards" had been upheld. *Id.* at 357. Hendricks did not identify the standard of review, but this language suggests statutes must

be narrowly tailored to achieve compelling government interests. *Hendricks* did not hold that there is no fundamental right implicated in commitments.(StateBr.25).

Again relying on *Foucha*, the Court said: "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [due process] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)(constitutionality of indefinite detention of illegal alien). The Eight Circuit said "[t]he institutionalization of an adult by the government triggers heightened, substantive due process scrutiny" and there must be a 'sufficiently compelling' governmental interest to justify such action." *U.S. v. Neal*, 679 F.3d 737, 40 (2012)(involuntary pretrial commitment for mental examination); *Salerno*, 481 U.S. at 748.

The State's request to abandon strict scrutiny is based on Thomas' dissent in *Foucha*. *See also Karsjens v. Piper*, 845 F.3d 394, 407 (8thCir.2017)(*citing Foucha*, 504 U.S. at 116 (Thomas, dissenting)). Thomas commented on the language used to distinguish *Foucha* from *Salerno*: "the Court states that the Louisiana scheme violates substantive due process not because it is not "reasonably related" to the State's purposes, but instead because its detention provisions are not "sharply focused" or "carefully limited" *Id*. at 117. He explained that "until today" the Court had given differential review to civil commitment laws and never applied strict scrutiny. *Id.* at 199, *citing Jackson v. Indiana*, 406 U.S. 715, 738(1972)("*At the least*, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."). Thomas believed due process did not preclude continued confinement, the law did not violate a fundamental right, and was reasonable. *Id.* at 125-26. The majority rejected

Thomas' position, stating it was "not consistent with our present system of justice." *Id*. at 83, n.6.[1] This Court must continue rejecting it, too.

While not explicitly stating strict scrutiny applied, *Foucha* discussed "certain narrow circumstances" in which the government could confine individuals who posed a danger. *Id.* at 80-81. For example, in *Salerno*, "legitimate and compelling" government interests were implemented by "carefully limited" application of pretrial detention statute, "narrowly focused on a particularly acute problem in which the government interest are overwhelming" and the duration of confinement was "strictly limited." *Id*. at 81; *Salerno*, 481 U.S. at 747-51. The Court said the State did not defeat Foucha's "liberty interest under the Constitution in being freed from indefinite confinement in a mental facility" and "[f]reedom from physical restraint being a fundamental right, the State must have a particularly convincing reason" for discriminating against someone who was no longer mentally ill. *Id.* at 81, 86.

Kennedy's concurrence said the Court applied "heightened due process scrutiny." *Id*. at 93. O'Connor's concurrence called for heightened standard, where commitment was "*tailored* to reflect *pressing* public safety concerns." *Id.* at 87-88. Strict scrutiny is the correct standard.

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[1] There is no formula for identifying the fundamental rights protected by due process. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597 (2015). "History and tradition guide… the inquiry" but do not settle it, and we are to "learn[] from it without allowing the past alone to rule the present." *Id.*

II. Sufficiency

(Reply to Respondent's II & III)

In re Spencer, the State made a submissible case that pedophilia was a mental abnormality predisposing Spencer to commit sexually violent offenses to a degree causing him serious difficulty controlling his behavior and making him more likely than not to commit future predatory acts of sexual violence if not confined. 171 S.W.3d 813, 819 (Mo. App.S.D.2005). The State's expert, Spencer's expert, and Spencer's treatment provider all diagnosed him as "currently suffering from pedophilia." *Id*. at 819. The State's expert said that at the time of his evaluation, there was no evidence Spencer had current fantasies about children. *Id.* He also testified Spencer *still* suffered from pedophilia and that Spencer was predatory because his primary purpose in molesting his daughter was victimization. *Id.* at 818.

Unlike in *Spencer*, there was no testimony Sebastian was *currently diagnosed* with pedophilia or *still* suffered from that diagnosis. Without such, there was no direct testimony that Sebastian presently suffered from pedophilia, or facts in evidence supporting a reasonable conclusion to that effect. Kircher[2] had no current opinion at the time of her testimony; she also testified that pedophilia can change over time, without treatment, and as someone ages.(Tr.478,455,459,482). Her general statements, relative to coping strategies learned in treatment, and taken out of context by the State, was not testimony

[2] Sebastian sought to exclude any testimony from Kircher and contends her testimony was altogether inadmissible.

that Sebastian currently met all diagnostic criteria or was still suffering from it.(Tr.439). There is a complete absence of probative fact supporting a judgment based on pedophilia.

No expert testified that Sebastian was predatory or that he committed any act ***for the primary purpose of victimization***, necessary to make a submissible case. *Spencer*, 171 S.W.3d at 818. Kircher did not have an opinion as to the purpose of Sebastian's conduct.(Tr.405). The State relies on Witcher's[3] testimony that "creating a victim" was a subordinate consequence of Sebastian's behavior, behavior driven by sexual gratification.(Tr.622). But the legislature defined predatory as a mental state and intention, not an unintended consequence. There is a complete absence of probative fact supporting a "predatory" finding.

Pedophilia

The State's evidence failed to make a submissible case that Sebastian had a pedophilia diagnosis. Kircher and Witcher diagnosed pedophilia based solely on age, without reviewing medical records demonstrating the victims' physical maturity and development of pubescent, secondary sexual characteristics.(Tr.476,631;Ex.E).

In *People v. Wright*, 208 Cal.Reptr.3d 686 (Cal.Ap.S.D.2016), the putative SVP challenged the sufficiency of the evidence based on a hebephilia diagnosis rendered without information about the physical characteristics and development of the victims. *Id.* at 688. Hebephilia involves sexual interest in children "in that in-between area from pre-

[3] Sebastian objected to Witcher's testimony as to her diagnosis and diagnostic evidence submits it was inadmissible.

pubescent to post-pubescent," "(generally, girls aged 11 through 13 and sometimes 14)." *Id.* at 689, 691. The State's expert only knew the victims' age and conceded that if the victims were not pubescent, the diagnosis would be inaccurate. *Id*. at 689-91. On appeal, the Court said the diagnosis depended on knowing more than the victim's age because children physically mature differently; it was important to know what the victim looked like, because appearance was the behavioral drive. *Id*. at 690.

> In other words, based purely on age, a 15–year–old victim could easily but inaccurately be characterized as postpubescent; similarly a 14–year–old victim who has matured more rapidly than his or her peers could, for purposes of diagnosis, be properly categorized as postpubescent.

Id. Therefore, without evidence of anything other than age, the expert had to "hypothesize" behaviors were driven by a "presumed" sexual development stage. *Id.* Assumptions without evidentiary support could not the basis of an expert's testimony, and such speculation could not support an involuntary commitment. *Id.* at 693.

The same is true of pedophilia. The diagnosis requires evidence of thoughts or behaviors involving sexual activity with "a prepubescent child or children (generally age 13 years or younger)."(Br.37;Tr.384,632). Both Kircher and Witcher inaccurately characterized an eleven-year-old victim as prepubescent and hypothesized Sebastian was sexually attracted to her presumed development based on age.(Tr.476,631;Ex.E). Similarly, the only information about the alleged seven-year-old was her age. An opinion based on an assumption not supported in the evidence should not be admitted. *McGuire v. Seltsam*, 138 S.W.3d 718 (Mo.banc2004). Kircher implicitly recognized the risks

accompanying her assumptions: "A child who is in Tanner Stage 4… and had begun menses at nine would not meet criteria for a pedophilic victim."(Tr.469,475-76). It was uncontroverted that Angel was ***not*** prepubescent; she had begun her menses at age 9, at least two years before Sebastian's underlying contact with her.(Tr.637;Ex.E). At trial, Witcher testified to her diagnosis *in spite of* physical development.(Tr.637,640). A pedophilia diagnosis made without regard to physical development, and solely on age, is a diagnosis made based on one's own subjective criteria and not the DSM. Such an opinion is not based on facts, data, or diagnostic criteria reasonably relied upon by experts in the field and is insufficient to make a submissible case.

III. Kircher

Exclusion of the EOC determination under §632.483 is a logical conclusion since it is only part of a pre-filing notification. Section 632.483 "sets out the procedure for instituting commitment proceedings against currently incarcerated persons prior to their release" by providing notice and the EOC to the Attorney General and MDT. *State ex rel. Parkinson*, 280 S.W.3d 70, 72-73 (Mo.banc2009). The EOC determination is not intended to be an opinion on the ultimate issues at trial. It is merely part of the "support materials provided with notice" given to the Attorney General. *Id.* at 75-76. It does not determine whether the Attorney General may file a petition and is not "essential" to such considerations. *Id.* Such determination cannot be relevant to the issues at trial. This is precisely why the legislature enacted §632.489.4, requiring a full, comprehensive SVP evaluation by DMH. "It is that [court ordered] evaluation ... that supports further proceedings" and supplants the EOC determination. *Id.* at 77.

Comprehensive evaluations rely on the full range of facts and data and cannot render opinions based only upon the DOC treatment and institutional adjustment records available to the EOC reporter under §632.483, or her counterpart under §632.484.3. "The SVP Act contemplates that additional discovery will be accomplished after the probable cause hearing." *Tyson v. State*, 249 S.W.3d 849, 854 (Mo.banc2008). The DMH evaluator has access to a greater range of data, including interviews with family, associates, victims and eyewitnesses, police reports, and records relied upon by any other prior evaluators. *Id.*; §632.489.

Problems with the EOC determination are not prejudicial, "so long as the prosecution does not attempt to admit it at trial." *Parkinson*, 280 S.W.3d at 77. But that is precisely what occurred here, over Sebastian's objection.

The State fails to appreciate that he claimed the right to silence under the Fourteenth Amendment's Due Process and Equal Protection clauses, too. A criminal conviction and sentence are insufficient to justify less procedural and substantive protection here than generally available to any other person subject to civil commitment. *Jackson,* 406 U.S. at 724. "[A]pplication of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid purposes of civil commitment." *Allen v. Illinois*, 478 U.S. 364, 381(1986)(Stevens,dissenting)(decided by 5-4 majority). Anyone else is entitled to that right-- if deemed "criminal" under the constitution, or otherwise a "civil" commitment, by Missouri statute. *Id.*; §§632.325, 632.483.

Sebastian agreed to speak with Witcher only after obtaining representation, consulting with counsel and being fully informed of his rights and the consequences of talking with her. That does not negate the inadmissibility of unwarned statements to Kircher or the prejudice he suffered from her testimony at trial. Had Sebastian's rights been upheld, and his statements and Kircher's determination relying on them been excluded, the jury would not have heard: a Stable-2007 score; his Static risk was in the 80th percentile; that he needed more treatment; about six dynamic factors only Kircher identified; that Sebastian told her about an intrusive fantasy; and more.(Tr.422,427,443,448,450,497-99,502-3). Due process and equal protection demanded that Sebastian's statements to Kircher be excluded.

IV. Act is Punitive

The provisions of the Act must be considered together and cannot be read in isolation. *Alberici Constructors, Inc. v. Director of Revenue*, 452 S.W.3d 632 (Mo.banc 2015). *Schafer* was presented with "the clearest proof" sufficient to establish that the Act results in punitive, lifetime detention bearing no reasonable relationship to a non-punitive purpose and violating due process, and was before the trial court. 129 F.Supp.3d at 844, 867-68, 870.(L.F.54-56). The initial commitment procedures, safeguards, and protections must reflect the punitive in nature and duration, and minimize the risk of erroneous commitments.

The State ignores that Missouri statutes and constitutional provisions must be interpreted to comply with the federal Constitution, and have no effect where in conflict with federal law. *Johnson v. State,* 366 S.W.3d 11, 27 (Mo.banc2012). Commitment cannot be civil and simultaneously result in unconstitutional punitive punishment. *Van Orden*, 271 S.W.3d at 585-6; *Schafer*, 129 F.Supp.3d at 869. Constitutional commitment cannot require LREs and permit secured confinement in the highest security facility. *Schafer*, 129 F.Supp.3d at 867-69; *Norton*, 123 S.W.3d at 174. And, it cannot require discharge from confinement once the basis for commitment no longer exist, yet permit continued, indefinite custody until death. *O'Connor v. Donaldson*, 442 U.S. 563, 575 (1975); §632.505.

This Court does not consider evidence outside the record on appeal. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 823 (Mo.banc2011); Rule84.04(h); (StateBr.78). If considered, the State's new evidence provides additional proof the Act is punitive: none of

the conditionally released men were discharged or released, though no longer meeting requirements for commitment; the conditions of confinement are more cumbersome now that they have been "conditionally released;" two were ordered to live in a secure nursing home facility; and two continue living in SORTS. *Boone,* 21PR00135062 (St. Louis County Cir. Ct.); *Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.); *Seidt*, 43P040300031 (Daviess County Cir. Ct.); *Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.);[4]§632.505.3.

Sebastian need not petition for release to challenge the statutory scheme under which he has been committed and remains incarcerated.[5] He is constitutionally entitled to discharge in the event that he longer suffers from a mental abnormality or is no longer "more likely than not" as a result of a mental abnormality. *Murrell v. State*, 215 S.W.3d

[4] Mandatory court-ordered conditions include: GPS, mandatory disclosure of privileged/ confidential treatment information, warrantless searches, forced polygraphs/penile plethsymographs, and increases in supervision at any time the State believes he requires it. *Richardson*,06PS-PR00236; §632.505. These conditions apply to Boone, Blanton and Seidt, but not men who are "committed" but not "conditionally released." *See* §632.480,et seq.

[5] If he challenged the procedures/standards applicable to his initial commitment when seeking conditional release or discharge, the State would argue he should have done so in his initial commitment proceeding. *Schottel v. State*, 159 S.W.3d 836, 840 (Mo.banc2005).

96, 104 (Mo.banc2007); *O'Connor*, 442 U.S. at 575. But discharge has been unconstitutionally eliminated and replaced with continued DMH custody. §632.505.

The Act fails to pass strict scrutiny. One remedy necessary is constitutional release procedures. However, the "systemic failures" of the release-portion of the Act require greater protections in the initial commitment process under the Act, like the "beyond a reasonable doubt" standard. Declaring that standard applies to the proceedings and granting a new trial does not remedy the double jeopardy and ex post facto violations, which prohibit application of the law to Sebastian. This Court cannot rewrite the Act; it must strike it down. *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo.banc2001).

V: LRE

"Due process requires the government, when it deprives an individual of liberty, to fetter his freedom in the least restrictive manner." *Neal*, 679 F.3d at 741. In *Neal*, the government's request for the involuntary commitment for evaluation of a criminal defendant, who was on pretrial release, was granted, as opposed to an outpatient evaluation. *Id*. at 738, 741. Because the trial court did not require (and the State did not offer) evidence to establish a compelling interest in involuntary commitment versus outpatient evaluation, hold a hearing, or seriously consider outpatient evaluation, there was no evidence to establish the involuntary commitment complied with due process. *Id.* at 741-42.

The State relies on *Norton*, where This Court accepted the State's justifications that SVPs had high sexual recidivism and "that the annual review process…allowing for discharge" balanced an SVP's rights with protecting the public to deny an LRE equal protection challenge. 123 S.W.3d at 174. The evidence here showed the base rate of sexual offending is low and it doesn't happen very often; U.S. base rates for sexual offense are about 13% and in Missouri, it is about 3%.(Tr.854,862;Exhibit L). Discharge was eliminated.(StateBr.85). Conditional release ***cannot*** "function like a dismissal" because one conditionally released "remains under the control, care and treatment" of DMH.[6] §632.505.5.

[6] The State failed to mention Fennewald and Allison lived inside the secure facility in Farmington at all times, despite adjudicated to no longer meet criteria and "conditionally released." Their cases exemplify the unconstitutionality of the Act and cannot assist the

Others civilly committed have the right to immediate LRE placement and to LREs when in their best interest. §630.115("Each patient, resident or client shall be entitled to the following without limitation:…To be evaluated, treated or habilitated in the least restrictive environment."); §632.365(upon involuntary detention order, the director "shall determine where detention and involuntary treatment ***shall take place in the [LRE],*** *be it in patient or outpatient setting*."); §632.385. "[T]he State cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." *Jackson*, 406 U.S. at 727, *relying on Baxstrom v. Harold*, 383 U.S. 107 (1966).

SVP commitment, where not punitive, is substantially similar to general commitment: both require proof of the likelihood of harm as a result of a mental illness. §§632.300,632.330,632.480; *Humphrey v. Cady*, 405 U.S. 504 (1972). The two are not mutually exclusive; the mental illness and risk of harm under the latter might warrant commitment under the former. *Humphrey*, 405 U.S. at 512. The only difference: commission of a criminal offense. §632.480.

Such was the case in *Humphrey*, where the general commitment statute afforded a jury demand, but the Sex Crimes Act did not. 405 U.S. at 512. The Court rejected the State's argument that discrimination was justified because of a criminal conviction and said

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state, or be considered because outside the record on appeal. *C.M.B.R.*, 332 S.W.3d at 823; Rule84.04(h).

an equal protection claim would be "especially persuasive" if a committee was deprived the right or other protections "merely by an arbitrary decision of the State to seek his commitment under one statute rather than the other" and remanded. *Id.* at 511, 506.

Sebastian has been, and will be, denied an LRE because the State sought SVP commitment, rather than general commitment. Protecting the public is a State interest for both commitments; it cannot justify differential treatment once committed. *Addington*, 441 U.S. at 426; *Norton*, 123 S.W.3d at 174; *Humphrey*, 405 U.S. at 511; *Jackson*, 406 U.S. at 727. Even if it could, the narrowly tailored means *Norton* relied upon no longer exist.(Ap.Br.124).

Section 632.505.1 itself contemplates an LRE: "[t]he ***primary purpose*** of conditional release ***is to provide outpatient treatment and monitoring to prevent*** the person's condition from deteriorating to the degree that the person would ***need to be returned to a secure facility***."

VI: Burden of Proof/Discharge

The State reads "physical commitment" language into *Van Orden* that does not exist.(StateBr.87). This Court said: "if commitment is ordered, the ***term of commitment is not indefinite***. A person committed as a sexually violent predator receives an annual review to determine if the person's mental abnormality has so changed that ***commitment*** is no longer necessary." *Van Orden*, 271 S.W.3d at 586. This does not describe conditional release because "custody" is not limited to physical confinement; a person supervised by the government and subject to conditions is "hardly a free man." *Nicholson v. State*, 524 S.W.2d 106, 109 (Mo.banc1975). If released from immediate physical confinement on conditional release, the Act "imposes conditions which significantly confine and restrain [Sebastian's] freedom." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). There is no government interest or constitutional basis for confining someone who is not mentally ill or who is not dangerous, even if he is mentally ill. *Addington*, 441 U.S. at 426; *O'Connor*, 422 U.S. at 575; *Murrell*, 215 S.W.3d at 104.

Sebastian is not required to make a factual showing that he is entitled to something that is precluded by the plain language of the Act. The Act mandates that when anyone is adjudicated to no longer be mentally ill and/or dangerous, "the court ***shall place the person on conditional release*** pursuant to the terms of this section" and "***shall order*** that the person shall be subject to ***the following conditions*** and other conditions as deemed

necessary."§632.505.1,.3. "The court may ***modify***[7] conditions of release" but not "***remove***" or "***terminate***"[8] them.§632.505. The conditionally released person "remains under the control, care and treatment of the department of mental health." §632.505.5; *State ex rel. Schottel v. Harman*, 208 S.W3d 889, 891 (Mo.banc2006)(Someone "released" under the amended Act "remains committed to custody."). This Court "must interpret the statutory language as written by the legislature." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo.banc2016).

Because confinement continues though no longer mentally ill and dangerous, commitment under the Act is punitive, requiring "beyond a reasonable doubt." This Court cannot rewrite the Act; it must strike it down. *Board of Educ.*, 47 S.W.3d at 371.

[7] "To make less extreme." Modify,MERRIAM-WEBSTER,https://www.merriam-webster.com/dictionary/modify (visited Feb. 23, 2017).

[8] "Coming to an end or capable of ending;" "to come to an end in time or effect." Terminate,MERRIAM-WEBSTER,https://www.merriam-webster.com/dictionary/terminate (visited Feb. 23, 2017).

VII: Mental Abnormality Definition

Where "the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then [Courts] are bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Peters*, 489 S.W.3d at 789. *Thomas* did more than "refine" the mental abnormality definition; it replaced the entire last clause of the statutory definition, "in a degree constituting such person a menace to the health and safety of others" with "*in a degree that causes the individual serious difficulty in controlling his behavior*." *Thomas v. State*, 74 S.W.3d 789, 791, n.1 (Mo.banc2002).

Courts "cannot add statutory language where it does not exist" and "must interpret the statutory language as written by the legislature." *Peters*, 489 S.W.3d at 792. Because commitment is punitive, the Act must be strictly construed against the State. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo.banc2006). The proper remedy was, and is, to strike down the unconstitutional statute. *Board of Educ.*, 47 S.W.3d at 371; *Thomas*, 74 S.W.3d at 793 (Limbaugh, dissenting).

VIII: Jury Demand

The issue in this case is that the Act allows the State to demand a jury. Sebastian's request was denied because the State requested a jury:

THE COURT: Mr. Goodwin, does the Petitioner request to have a jury trial?

STATE ATTORNEY: Yes, Your Honor.

THE COURT: Okay. The motion to have a bench trial is denied.

(Tr.6-7). Sebastian was then tried and committed by a jury.(L.F.174). Sebastian was not required to "make a record" about what could happen if no jury demand was available. The purpose of an offer of proof is to educate the trial judge with hope he will reconsider and to preserve the issue for appellate review. Sebastian's did both.(L.F.49-51,182;Tr.6-7).

State ex rel. Tipler v. Gardner,--- S.W.3d ---, 2017 WL 405805, slip op. at 1 (Mo.2017), dealt with an attempt to use a writ to challenge a pretrial evidentiary ruling and does not apply. This Court said an objection must be timely raised at trial, preserved, and presented on appeal. *Id.* Section 632.492 is at issue and squarely before this Court; Fed. R. Crim. Pro. 23(a) is not.

There is a fundamental difference in the State's ability to demand a jury trial, and the trial court's ability to deny a defendant's jury waiver. The Act allows the State's attorney to override the prerogative of the trial judge to consent to a jury waiver and impose its will on the court and the involuntary respondent. Mo. Const., art. I, § 22(a) does not.

Every other civil committee has an absolute right to a bench trial. Under §632.335, proceedings are only conducted before a jury if the Respondent so requests. *And see*

§632.350. The two different commitment schemes are substantially similar and are not mutually exclusive; the only difference is the predicate prior sex offense.

In *Baxstrom*, a convicted prisoner was involuntarily confined for treatment without a jury trial at the expiration of his sentence. 383 U.S. at 109-10. Equal Protection required the same jury right as granted to all others civilly committed and criminal propensities could not justify discrimination. *Id*. at 115. In *Humphrey*, a sex offense conviction did not justify discriminatory treatment when everyone else in involuntary commitments had the right to a jury. 405 U.S. at 510. If the State cannot discriminatorily deny a jury trial, then it cannot discriminatorily demand one, either.

In fact, the United States Supreme Court said denying a jury trial may be justified by "some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary." *Id.* at 512. That is the case here. Judge Wolff observed that when the State brings an SVP case before a jury, "it is a fairly safe bet that [the individual] will not be seen at large anytime this century." *Parkinson,* 280 S.W.3d at 78 (concurring). He also noted "the reprehensible nature of the offenses makes observance of constitutional safeguards very difficult," "the public's natural revulsion for all sex crimes," and aptly pointed out that "once the state decides to proceed to commit one of these offenders, it can hardly lose." *Norton,* 123 S.W.3d at 177-78, 182(concurring).

> The fact that juries regularly find convicted sex offenders to be sexually violent predators should come as no surprise. Even where there is doubt about whether the offender has a mental abnormality, what juror wants to free someone who may someday molest another child?

Id.

It also violated due process requirement of infringement upon Sebastian's liberty in the least restrictive manner, here a bench trial. *Neal*, 679 F.3d at 741; U.S.Const.amends.V, XIV; Mo.Const.art.I,§§2,10. The State offered no evidence to establish a compelling interest, and the trial court did not require any or seriously consider Sebastian's objections. There is no evidence to establish the State complied with due process or equal protection.

IX: §632.492 & Instruction 8

Sebastian motion for new trial claimed error both in giving Instruction 8 and in denying his motion to declare §632.492 unconstitutional.(L.F.183-84).

In *State v. Erwin*, this Court said pattern instruction MAI-CR3d 310.50 did not misstate the law, but violated due process. 848 S.W.2d 476, 483 (Mo.banc1993). It read: "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct." *Id.* at 481. That instruction did not relate to other instructions, but was a standalone comment on the evidence of intoxication. *Id.* at 483. It created a reasonable likelihood that the jury would believe if the defendant was intoxicated, he was criminally responsible, thereby relieving the State of its burden of proof as to a statutory element and violating his constitutional right to due process. *Id.* The error giving that instruction was not cured by giving a general instruction placing the burden on the State. *Id.* It was impossible to say the error was harmless beyond a reasonable doubt because a substantial issue existed about the defendant's mental state. *Id.*

Just as intoxication is irrelevant to a defendant's mental state, "control, care, and treatment" in DMH custody is irrelevant to an SVP's. *Id.* at 484. Instruction 6 directed the jury to determine if a mental abnormality made Sebastian more likely than not to engage in predatory acts of sexual violence unless confined.(L.F.161). Instruction 8 went beyond the issues for trial, as a standalone comment on "control, care, and treatment" in DMH custody. It created a reasonable likelihood that the jury would believe if Sebastian needed care or treatment, he should be committed as an SVP, thereby relieving the State of its burden of proof as to each element and violating his right to due process. That is precisely

what the State argued: "a vote that Mr. Sebastian is a sexually violent predator results in him being committed for the care that he needs, the control that he needs, and the treatment that he needs."(Tr.926). Giving Instruction 6 did not cure this error.

If anything, Instruction 8 was a roving commission submitting an abstract legal statement that allowed the jury to "to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose" commitment. *City of Harrisonville v. McCall Srvc. Stations*, 495 S.W.3d 736, 746 (Mo.banc2016). The mandated instruction was misleading in the context of the evidence at trial; there was no testimony or evidence about "control, care, and treatment" in DMH at all or what would happen after the jury's verdict. *Id*. It invited the jury to ponder matters not within their province, distracted them from their factfinding possibilities, and created confusion. It did not minimize the risk of erroneous confinements, narrowly limit confinement, or pass strict scrutiny. A commitment based on such an instruction did not take place pursuant to proper procedures and safeguards.

In Missouri the only time a similar instruction might be given upon the request of a criminal defendant who affirmatively raised an NGRI defense. §552.030.6; 552.040; MAI-CR 4th 406.02(Included in Reply Appendix). Sebastian did not raise an affirmative defense or request Instruction 8. There is no justification for §632.492's discrimination. Section §632.492 did not always mandate giving the "control, care and treatment" instruction; that was added in 2001. 2001 Mo. Legis. Serv. S.B. 267. The Kansas commitment scheme, declared civil and constitutional in *Hendricks*, does not include this mandate. §59-29a07, Kan. Stat. Ann.

CONCLUSION

This Court must declare the Act unconstitutional and reverse the order and judgement of the trial court and release Sebastian from confinement, or alternatively remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 5,679 words, which does not exceed the 7,750 words allowed for an appellant's brief.

On March 6, 2017, electronic copies of Appellant's Reply and Appellant's Reply Appendix were placed for delivery through the Missouri e-Filing System to opposing counsel.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell