IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF JAY T. NELSON, Respondent/Appellant.	))))	No. SC95975

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE KATHLEEN FORSYTH, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Nelson appeals his commitment to the Department of Mental Health("DMH") as a Sexually Violent Predator("SVP"), following a jury trial in Jackson County, Missouri.

The issues raised in this appeal present questions concerning the constitutionality of provisions of the SVP Act("the Act") reserved for the exclusive jurisdiction of this Court. Mo.Const., art. V, §3, §477.070.[1]

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

FACTS

Psychologists Jenette Simmons and Nena Kircher testified for the State at trial that Nelson was an SVP because he suffered from a mental abnormality and was more likely than not to commit "sexually violent offenses" if not confined.(Tr.245,359-60). Psychologist Luis Rosell did not find a mental abnormality or that Nelson was an SVP.(Tr.462).

Nelson was convicted of rape in 1989 and sentenced to 25 years in prison.(Tr.236,318,512). Nelson went to retrieve money he lent to a friend, broke into her apartment, beat her, threatened her, and raped her.(Tr.251,318). Kircher testified Nelson raped her "because he felt like this was sort of reasonable way to obtain the money he was owed."(Tr.318). Nelson testified when he went to get the money, there was an altercation, and he said "if she ain't going to give me the money then I'm going to rape you."(Tr.521).

The rape occurred when Nelson was 24 years old; he did not expose himself until 2003 at 40 years old and there were no sexual misconduct incidents in the intervening time(Tr.284-5). In prison, Nelson exposed his penis and masturbated, then later made threats and called women derogatory names when he was written up.(Tr.252,255,321). Kircher said he was "intentionally putting [him]self in this situation" because he stood on a toilet at a count time, knowing an officer would walk by and see him.(Tr.330). Simmons testified Nelson hoped the guards wanted to watch him and join in, and this thinking indicated he sought out individuals "that he would like to prey upon."(Tr.256). She agreed you could say he was hoping for a consensual encounter, not that he wanted someone to be shocked and to run away, and acknowledged the exposing could have just been something

that occurred in that particular, unique prison context, but Nelson would not do so on the streets.(Tr.286-7). "Exposing yourself is not considered sexually violent," is "hands-off," and not a sexually violent offense.(Tr.243-4). Nelson testified he continued exposing himself to stay in administrative segregation where he encountered less problems and had fewer distractions so he could learn to read.(Tr.517, 527).

Simmons testified about an incident "in which he accidentally brushed up against … the female guard's buttocks," making contact with her, which demonstrated "a desire there to have that happen."(Tr.274-5). Kircher thought if that happened in the community "there could be some kind of a charge filed for sexual harassment" and it was "potentially" a contact sex offense.(Tr.325). Kircher said in 1997 Nelson "brushed his hand across [a guard's] pubic bone," "kind of brushed his hand across her front and made some rude remarks" to a female guard.(Tr.326). In 2002 when a guard refused to shake Nelson's hand, "he swung his hand back grabbing my crotch area."(Tr.326-7).

Mental Abnormality

Kircher testified a mental abnormality is "a congenital or acquired condition that affects his emotional or volitional capacity, predisposes him to commit sex offenses as defined under the law and causes him serious difficulty controlling his behavior"(Tr.319-20). Simmons testified there is a "specific legal definition for the term of mental abnormality … and the definition actually involves whether or not that predisposes someone to commit acts of sexual violence."(Tr.238). According to Simmons, the diagnoses of ASPD, paraphilia, or exhibitionism are not mental abnormalities in and of themselves; to be a mental abnormality each condition diagnosed would have to predispose

a person to commit acts of sexual violence *and* cause serious difficulty controlling behavior.(Tr.282).

Kircher and Simmons both diagnosed Nelson with exhibitionism and testified it was not a mental abnormality.(Tr.242, 244, 360). Exhibitionism is an arousal to exposing oneself to other people, but exposing yourself is not sexually violent and does not have anything to do with impulse control.(Tr.242-3). It did not cause Nelson problems with behavioral control.(Tr.367).

Nelson was diagnosed with ASPD.(Tr.242, 318, 479). Someone with ASPD often has a criminal history, lacks empathy, acts out, and had conduct problems before age 15.(Tr.258-9). Nelson was defiant and had trouble before 15; he was sent to Division of Youth Services, did not mind his grandmother, and had a disruptive childhood.(Tr.259). Simmons diagnosed ASPD based on repeated legal problems and "issues conforming with authorities" beginning around age twelve, which spoke to general criminality.(Tr.243-4, 257).

Simmons testified the diagnosis is not an indication someone is going to commit a sex crime or cannot control his behavior.(Tr.281). 60-70% of men in prison have ASPD.(Tr. 281,443). Kircher agreed ASPD is common and the diagnosis does not mean one has a mental abnormality.(Tr.319). The diagnosis does not relate to sexual deviancy or make anyone lack control of his behavior.(Tr.369). Control over behavior is a totally different determination(Tr.370).

Kircher testified ASPD "is a pervasive disregard for the rights of others"(Tr.318) and was Nelson's mental abnormality.(Tr.319). The rape offense was an example of

disregard: Nelson did it to collect money he was owed.(Tr.318). Conduct violations for threats and assaults in prison were relevant to Kircher's diagnosis.(Tr.321, 323). Threats fit into a general pattern of antisocial behavior.(Tr.332). Kircher wanted information about Nelson growing up, at least back to adolescence, in formulating a diagnosis.(Tr.316).

Simmons diagnosed Paraphilia, not otherwise specified("NOS"), because she thought Nelson was aroused by non-consenting partners, and believed that condition was the mental abnormality.(Tr.241, 244-5). Paraphilia, NOS non-consent is a controversial within the field of psychology, is not in the DSM, and was "coined" by SVP psychologists.(Tr.293, 296). Simmons agreed a paraphilia diagnosis by itself is not enough.(Tr.282). The diagnoses of ASPD, Paraphilia, or exhibitionism are not mental abnormalities in and of themselves; to be one, each condition would have to predispose a person to commit acts of sexual violence and cause serious difficulty controlling behavior.(Tr.282).

Ordinarily, paraphilias emerge in adolescence and are lifelong, and normally Simmons would look for a pattern of more than one case of sexual assault against a woman in order to diagnose it.(Tr.283-4). Simmons based this diagnosis on Nelson's rape conviction and his "not hands-on offenses like exhibiting himself" in prison.(Tr.283). Simmons said Nelson's repeated violations and administrative segregation sanctions "demonstrates a lack of impulse control to continue to engage in those behaviors" and agreed she was "implying" Nelson had a desire to commit an actual sexual assault because he exposed himself.(Tr.254, 286).

Risk

According to Simmons, actuarials measure risk of either violent offense or sexual offense.(Tr.297). The Static actuarial contains factors correlated "with someone's risk to have another sexual offense" and the numerical score that tells you "there's a certain percentage likelihood of re-offense."(Tr.267). The Stable actuarial measures unchanging, treatable factors, like attitudes, behaviors, and relationships.(Tr.335). No research studies validate the Stable for use with men who have served lengthy prison sentences; the men studied were in the community or served only two or three years in prison.(Tr.382-3).There are additional factors that "correlate with recidivism"(Tr.268), increase or predict the likelihood of "sexual offense recidivism"(Tr.269-70, 344), or give information about general violence.(Tr.267).

Simmons scored the Static-99R(Tr.267) and acknowledged her score "could go either way, it might or might not be somebody that was more likely than not to reoffend."(Tr.304). Facts from Nelson's childhood indicated increased risk, and difficulty with the law early-on relates to an ability to control behavior throughout life.(Tr.257, 270). Most people think "more likely than not" means 51%, but Simmons doesn't assign a number to the threshold.(Tr.302). She testified Nelson was "more likely than not to commit sexually violent offenses if not confined."(Tr.249).

Rosell testified a Static-99R score of 4 correlated with a 10% rate of recidivism over five years.(Tr.453). Kircher gave Nelson a 4 and put him in a "moderate/high risk category."(Tr.341). Kircher gave Nelson a score of 17 on the Stable, which meant he had "a high need for sex offender treatment."(Tr.343). She combined her Static and Stable scores to get a "high" risk.(Tr.343).

Kircher testified Nelson had increased re-offense risk because he had poor cognitive problem solving(Tr.347); was impulsive, because of unstable employment and housing(Tr.348); had no plan for going home or getting ready to go home(Tr.349); and did not know where he was going to live(Tr.349). She also identified lack of insight, general hostility, negative emotionality, general pattern of not taking responsibility, recklessness and lack of remorse; non-compliance with supervision, supportive attitudes; and lack of emotionally intimate relationships.(Tr.332-33, 346-50). Kircher concluded Nelson met criteria "of being more likely than not" "to commit another sexually violent offense unless placed in a secure facility."(Tr.354,359).

Cooper

Nelson's sister Branetta Cooper testified Nelson dropped out of school around age 15 and worked various jobs since 13.(Tr.402, 406-7). All of the children lived together growing up, shared a bathroom, and had friends over(Tr.403, 409). The State's objections when Nelson asked Cooper if he had ever exposed himself to his sisters, got into fights when a kid, and if she ever observed behavior consistent with Nelson's sexual misconduct violations were sustained.(Tr.409-12, 416-17).

Pretrial Motions

The State successfully excluded evidence of "support structures in place" and any other conditions that might exist if Nelson were released, which it called "external constraints."(L.F.54-56, 60-2; Tr.47).

All of Nelson's motions to dismiss were denied.(Tr.107-8; L.F.3). He argued the Act was unconstitutional, because: it did not require proof of serious difficulty controlling

behavior and it permitted a mental abnormality finding based solely on emotional capacity(L.F.40-44); commitment was a punitive, second punishment deferred until the conclusion of a prison sentence and resulting in lifetime custody, obtained without adequate due process protections and treating him differently than anyone else civilly committed in Missouri(L.F.24-35); there is no Least Restrictive Environment("LRE")(L.F.21-3); and there was no unconditional release, and procedural protections like the burden of proof were inadequate(L.F.15-20).

His motion to dismiss for the State's use of "sexually violent predator" at trial, and alternative request to exclude the term from trial and instructions(L.F.36-48), was denied.(Tr.107-8; L.F.3). At trial, three instructions and the verdict form used the phrase "sexually violent predator."(L.F.88-90).

Verdict & Commitment

Nelson's motion for a directed verdict was denied.(L.F.78-70; Tr.568). The jury found Nelson was an SVP(Tr.609), and the trial court entered an order committing him to DMH.(L.F.108). His motion for a new trial was also denied.(L.F.94-107, 9). This appeal followed.(Tr.112).

POINTS RELIED ON

I.

The trial court erred in denying Nelson's motion to dismiss, because this violated his rights to due process, equal protection, freedom from *ex post facto* laws, double jeopardy, and cruel and unusual punishment, protected by U.S. Const., amends. V, VI, VIII, XIV, art. VI, cl. 2, art I, §§9, 10 and Mo. Const. art. I, §§2, 10, 13, 19 and 21, in that the Federal Court found that commitment under the Act is punitive lifetime confinement; there is no unconditional release from confinement, and the Act fails to provide constitutional procedural protections, such as the "beyond a reasonable doubt" burden of proof.

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

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

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

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

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

Mo. Const. art. I, §§2, 10, 13, 19, 21;

§§632.498, 632.501, 632.505.

II.

The trial court erred in denying Nelson's motion to dismiss, because this violated his rights to due process, equal protection, and freedom from cruel and unusual punishment, protected by U.S. Const., amends. V, VIII, XIV and Mo. Const. art. I, §§2, 10, and 21, in that Federal Court Found the Act is unconstitutional because it does not provide a least restrictive treatment environment(LRE), and there is no alternative to confinement in a total lock down facility.

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

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

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

Sherrill v. Wilson, 653 S.W.3d 661 (Mo. banc 1983);

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

Mo. Const art. I, §§2, 10, 21;

§§630.115, 632.385, 632.498.

III.

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

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

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

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

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

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

Mo. Const. art. I, §§2, 10, 13, 19, 21;

§§475.075, 631.145, 632.005, 632.330, 632.335, 632.350, 632.483-.484, 632.492, 632.495, 632.498, 632.504, 632.505.

IV.

The trial court erred in denying Nelson's motion to dismiss, because this violated his rights to due process, equal protection, and freedom from cruel and unusual punishment, protected by U.S. Const., amends. I, V, VIII, XIV and Mo. Const. art. I, §§2, 8, 10, and 21, in that the Act unconstitutionally permits commitment because of emotional capacity, without any proof of behavioral impairment, and fails to require proof of serious difficulty controlling behavior.

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

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

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

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2008);

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

Mo. Const. art. I, §§2, 8, 10, 21;

§632.480.

V.

The trial court erred in denying Nelson's motion to dismiss based on the use of "sexually violent predator" in the Act, or alternatively in permitting the phrase at trial and in jury instructions given, because this violated his rights to due process of law, a fair trial, an impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Const. amends. V, VI, VIII, XIV, Mo. Const. art. I, §§2, 10, 18, 21, and §632.495, in that the phrase is unfairly and substantially prejudicial because it is inherently pejorative, irrelevant, inflammatory and encourages a verdict based on irrational fears and speculation, rather than on the statutory criteria for civil commitment.

In re Murphy, 477 S.W.3d 77 (Mo. App. E.D. 2015);

Nolte v. Ford Motor Company, 458 S.W.3d 368 (Mo. App. W.D. 2014);

State v. Perry, 275 S.W.3d 237 (Mo. banc 2009);

Kellog v. Skon, 176 F.3d 447 (8th Cir. 1999);

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

Mo. Const. art. I, §§2, 10, 18, 21;

§§632.480, 632.489, 632.495.

VI.

The trial court erred in overruling Nelson's motion for a directed verdict and committing him to DMH, because this violated his right to due process of law and a fair trial, guaranteed by the U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10 and §632.495, in that the evidence was insufficient to prove Nelson had a mental abnormality because the State failed to prove diagnoses of ASPD or Paraphilia, NOS caused him serious difficulty controlling sexually violent behaviors, or that he was predisposed to commit sexually violent offenses.

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

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

Murrell v. State, 215 S.W.3d 96 (Mo. banc 2007);

In the Matter of the State of New York v. Donald DD, 21 N.E.3d 239 (N.Y. App. Div. 2014);

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

Mo. Const. art. I, §§2, 10;

§§490.065, 632.480, 632.495.

VII.

The trial court erred in denying Nelson's motion for a directed verdict, and in committing him to DMH, because that violated his rights to due process of law and a fair trial as guaranteed by the U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10 and §§632.495 and 490.065, in that the State failed to make a submissible case that a mental abnormality made Nelson "more likely than not to commit *predatory acts of sexual violen*ce if not confined" as required by §632.480(5) because the State's experts did not establish the legal standard for risk of future behavior and create an ultimate factual issue, and the experts relied on past acts of sexual violence and assessment methods that did not predict future predatory acts of sexual violence; therefore the opinions were not supported by the record or probative of the ultimate issue.

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

McLaughlin v. Griffith, 220 S.W.3d 319(Mo. App. S.D. 2007);

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

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

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

Mo. Const. art. I, §§2, 10;

§§490.065, 632.480, 632.495.

VIII.

The trial court erred in denying Nelson's motion for a directed verdict, and in committing him to DMH, because this violated Nelson's rights to due process of law and a fair trial as guaranteed by the U.S. Const., amends. V, XIV, Mo. Const. art. I, §§2, 10 and §632.495, in that the evidence was insufficient to prove Nelson was "*more likely than not* to engage in predatory acts of sexual violence if not confined in a secure facility" as required by §632.480(5) because "more likely than not" must mean a probability greater than 50%; the State's experts did not quantify Nelson's future risk; did not articulate what "more likely than not" meant; did not identify how they determined Nelson was "more likely than not;" and without such explanations the jury was unable to evaluate the expert testimony and was left unguided in their application of the standard to the facts of the case.

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

McLaughlin v. Griffith, 220 S.W.3d 319(Mo.App.S.D.2007);

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

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

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

Mo.Const. art.I, §§2, 10;

§§490.065, 632.480, 632.495.

IX.

The trial court erred in sustaining the State's objection and in excluding testimony from Branetta Cooper that Nelson did not expose himself to his sisters or their friends and did not get into fights when he was a child, and that she did not know him to engage in exhibiting behaviors, because this violated his right to due process, a fair trial, and to present evidence in his defense, guaranteed by U.S. Const., amends. V, XIV, Mo. Const. art. I, §§2, 10, and §§632.489 and 632.492, in that the State opened the door to evidence of Nelson's childhood and exhibiting behaviors; experts considered and relied upon those behaviors; Cooper's testimony went directly to the factual basis of opinions held by experts; and if the jury accepted Nelson's evidence, they could have found he was not an SVP.

State v. Walkup, 220 S.W.3d 748 (Mo. banc 2007);

Howard v. City of Kansas City, 332 S.W.3d 777 (Mo. banc 2011);

Lewy v. Farmer, 362 S.W.3d 429 (Mo. App. S.D. 2012);

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

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

Mo. Const. art. I, §§2, 10;

§§632.489, 632.492.

X.

The trial court erred in sustaining the State's objection and excluding evidence of Nelson's home plan, because this violated his right to due process, a fair trial, to present evidence in his defense and to cross-examine witnesses, guaranteed by U.S. Const., amend. V, XIV, Mo. Const. art. I, §§2, 10, and §§632.480, 632.489, 632.495, and 632.492, in that Nelson's future risk of re-offense was an element of the State's case; Kircher considered and relied upon Nelson's home plan in assessing that risk; the State opened the door to the evidence; without it the jury was misled by inaccurate information; and if the jury accepted Nelson's evidence, they could have found he was not an SVP.

Howard v. City of Kansas City, 332 S.W.3d 777 (Mo. banc 2011);

Lewy v. Farmer, 362 S.W.3d 429 (Mo. App. S.D. 2012);

In re Norton, 123 S.W.3d 170 (Mo. banc 2003);

Brasch v. State, 332 S.W.3d 115 (Mo. banc 2011);

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

Mo. Const. art. I, §§2, 10;

§§490.065, 632.480, 632.489, 632.495, 632.492.

ARGUMENT

I.

The trial court erred in denying Nelson's motion to dismiss, because this violated his rights to due process, equal protection, freedom from *ex post facto* laws, double jeopardy, and cruel and unusual punishment, protected by U.S. Const., amends. V, VI, VIII, XIV, art. I, §§9, 10, art. VI, cl. 2, and Mo. Const. art. I, §§2, 10, 13, 18(a) 19 and 21, in that the Federal Court found that commitment under the Act is punitive lifetime confinement; there is no unconditional release from confinement, and the Act fails to provide constitutional procedural protections, such as the "beyond a reasonable doubt" burden of proof.

Nelson's *Motion to Dismiss Due to the Elimination of Any Possibility for Unconditional Release* was denied.(L.F.15-20; Tr.107-8). Nelson argued the Act was unconstitutional because confinement was punitive, did not afford adequate protections such as the beyond a reasonable doubt standard, and there was no unconditional release, in violation of due process, equal protection, a fair trial, double jeopardy and *ex post facto* prohibitions.(L.F.15-20).

The Act is Unconstitutional

The Act was deemed unconstitutional as applied because the "systemic failures" of the commitment program resulted in punitive, lifetime detention in violation of due

process. *Van Orden v. Schafer*, 129 F. Supp.3d 839, 844, 868 (E.D.o. 2015).[2] The nature and duration of commitment bears no reasonable relation to any non-punitive purposes for which persons may be civilly committed. *Id.* at 867.

Federal law is "the supreme law of the land" and "judges in every state shall be bound thereby." U.S. Const. art. IV, cl. 2. "Under the Supremacy Clause, state laws and constitutional provisions are 'preempted and have no effect' to the extent they conflict with federal laws." *Johnson v. State*, 366 S.W.3d 11, 27 (Mo. banc 2012). It "applies with its full force to orders of a federal court" and prevents a state court from reaching the merits on any constitutional attack on a federal judge's order. *Pennell v. Collector of Revenue*, 703 F.Supp. 823, 826 (W.D. Mo. 1989).

This Court is bound to enforce the Federal Court's order, and must hold the Act is unconstitutional as applied because it results in punitive, lifetime detention. U.S. Const., amend. XIV. Because Missouri's constitution guarantees the same protections as the federal constitution, the Act violates the Missouri Constitution. *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007); Mo. Const. art. I, §§2, 10.

Standard of Review

A denial of a motion to dismiss is generally reviewed for abuse of discretion. *In re Murphy*, 477 S.W.3d 77, 81 (Mo. App. E.D. 2015). The constitutionality of statutes is a matter of law reviewed *de novo*. *Id.* Because commitment impacts fundamental liberty,

[2] This opinion was amended in December, and addresses only the liability/penalty phase of the trial; the remedy phase continues. *Schafer*, 129 F. Supp.3d at 843.

government action must pass strict scrutiny. *Coffman*, 225 S.W.3d at 445; *Karsjens v. Jesson*, 109 F.Supp.3d 1139, 1166 (D. Minn. 2015);[3] *Vitek v. Jones*, 445 U.S. 480, 492 (1980)("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *but see Schafer*, 129 F. Supp.3d 866-67(confinement did not bear rational relationship to purposes of commitment and law would fail under the heightened "shocks the conscious" test). The burden is on the State to prove a law is narrowly tailored to serve a necessary, compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721(1997), *Coffman*, 225 S.W.3d at 445.

ANALYSIS

Ex Post Facto & Double Jeopardy

This Court upheld constitutional challenges to the SVP Act in *In re Norton*,123 S.W.3d 170, 177 (Mo. banc 2004). However, Justice Wolff warned that if "the effect of the [SVP] statute were punitive, confinement would violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution." *Id.* at 177(concurring). Because the SVP Act results in punitive, lifetime detention, confinement *does* violate the prohibition on *ex post facto* laws and double jeopardy. *Schafer*,129 F. Supp.3d at 868; U.S.Const., art. I, §9, 10, amend. X, XIV; Mo. Const. art. I, §13, 19.

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

The Act is a "textbook example" of an *ex post facto* law, punishing an offense by extending the term of confinement and inflicting greater punishment than the applicable laws at the time Nelson committed an underlying criminal offense. *Hendricks*, 521 U.S. 346, 371, 379 (1997) (Kennedy, concurring; Breyer, dissenting); *see also Karsjens*, 109 F.Supp.3d at 1168. The prohibition on double jeopardy means no man can be punished for the same offense twice. *Norton*, 123 S.W. 3d at 177, n. 3, *citing Witte v. United States*, 515 U.S. 389, 396 (1995). Missouri's SVP law imposes a "new punitive measure" to sexual crimes already committed. *Hendricks*, 521 U.S. at 371.

SVP commitment is "secure confinement," "against one's will," imposed only on men who committed crimes, and one purpose is incapacitating an individual who could commit a future crime. *Id.* at 379 (Breyer, dissenting); *Norton*, 123 S.W.3d at 177 (Wolff, concurring). Confinement is imposed by persons (State prosecutors), procedural guarantees (trial by jury, assistance of counsel, psychiatric evaluations), and a higher standard than ordinary civil cases because of the liberty interests implicated. *Hendricks*,521 U.S. at 379-80;§§632.483,.489,.492. The second purpose of the Act is to provide "necessary treatment." *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. banc 2008); §632.495.2. State actors believe that SVP treatment exists and is effective. *Schafer*,129 F. Supp.3d at 858. But the SVP Act "commits, confines and treats [ ] offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate" and confirms a punitive intent. *Hendricks*,521 U.S. at 381,385(emphasis in original);*see* §632.483.

Amendments Eliminated Protections

Before 2006, unconditional release from commitment was possible. §632.498. §632.495 was amended, reducing the burden of proof on the State to "clear and convincing evidence," initially approved because "if commitment is ordered, the term of commitment is not indefinite. A person committed as a SVP receives an annual review… [and] the person may file a petition for release with the court at any time." *In re Van Orden*, 271 S.W.3d 579, 586 (Mo. banc 2008). However, the amendments removed these lynchpins. Now an individual can only be "conditionally released," and thereafter annual reviews stop. §632.498. There is no mechanism for a person to be liberated from "conditional release" and the custody of DMH. §§632.498.5(4), 632.505. As such, it is statutorily impossible for one committed to regain his liberty.

Van Orden relied on *Addington v. Texas*, 441 U.S. 418 (1979), which reasoned "clear and convincing" was sufficient because the government was not exercising its power punitively, and continuing opportunities for review minimized the risk of error. *Id.* at 585, citing *Addington*, 441 U.S. at 427-31. The burden of proof is ultimately a matter of state law. *Id.* Nonetheless, commitment is a significant deprivation of liberty and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Id.* at 425. Procedural safeguards are necessary to ensure the State confines only a narrow class of particularly dangerous persons, after meeting the strictest procedural standards. *Hendricks*, 521 U.S. at 357, 364. The process must minimize the risk of erroneous decisions. *Addington*, 441 U.S. at 424; *Van Orden*, 271 S.W.3d at 587.

The *Van Orden* appellants argued "conditional release" meant lifetime loss of liberty, but failed to raise the conditional release statute or "the constitutionality problem of the entire SVP statutory scheme" as on appeal. *Id.* at 587.

The concurrence predicted the constitutionality of the statutory scheme "may require future review…when the issue is squarely presented" and warned conditional release may be unconstitutional for failing to provide sufficient procedural protections. *Id.* at 589-90 (Cook, concurring). Conditional release after a finding that an individual is no longer dangerous "*does not* result in complete restoration of that person's liberty;" terms of conditional release are a form of commitment and due process requires the person be *fully* released. *Id.* at 590-91. Cook predicted that "if called to consider the impact the indefinite conditional release statute has on the entire SVP statutory scheme, this Court may be compelled to find that such indefinite restraint on liberty has made the Act so punitive in purpose or effect that it no longer can be considered civil in nature -- requiring a higher burden of proof." *Id.*at 591.

Judge Teitleman concluded the Act ***was punitive*** without the "beyond a reasonable doubt" standard. *Id.* at 592-4 (Teitleman, dissenting). Those civilly committed here "forever will be subject to state oversight," even if no longer dangerous. *Id.* "Once the remedial purpose has been fulfilled, the continued deprivation of individual liberty amounts to nothing but a punitive sanction." *Id.*

Warren v. State, 291 S.W.3d 246 (Mo. App. S.D. 2009), presented a similar burden of proof challenge, denied because the Southern District followed *Van Orden*, 271 S.W.3d at 586. The Federal Court believed it was bound by the same constitutionality

presumptions, and therefore found the release provisions in §§632.498 and 632.505 did not *facially* violate due process, and read §632.505 to "permit full, unconditional release." *Schafer*, 129 F. Supp.3d at 864-66.

This Court "cannot add statutory language where it does not exist" and "must interpret the statutory language as written by the legislature." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016). Nothing in the plain language of the statute permits conditional release without "conditions," or "unconditional" release. §§632.498, 632.505. The Act is unconstitutional on its face under Mo. Const. art. I, §§2, 10, and 21.

Unconstitutional Practices

Even if the Act is construed to permit unconditional release, progression through treatment, to conditional release, and ultimately unconditional release is impossible because the Act is unconstitutionally applied. This Court must enforce the finding that the Act is unconstitutional because release procedures have not been implemented. *Schafer*, 129 F. Supp.3d at 869.

The second purpose of the Act is to provide "necessary treatment." *Van Orden*, 271 S.W.3d at 585, §632.495.2. Treatment provisions "were adopted as a sham or mere pretext," and statutorily delayed until the end of a prison sentence "so that further incapacitation is therefore necessary[;]" confirming punitive intent. *Hendricks*, 521 U.S. at 371, 381(Kennedy, concurring; Breyer, dissenting). Progressing through the program's multiple phases of indeterminate length "is tortuously slow." *Schafer*, 129 F. Supp.3d at 850-51. The stated goal of the program is "to treat and safely reintegrate committed individuals back into the community." *Id.* at 851. DMH employees and experts believe that

DMH is capable of providing effective treatment, which includes release. *Id.* at 859. However, the State had no plans in place for release into the community, no one had been discharged into the community, or released as a result of completing the program. *Id.* at 845, 857, 859; *Karsjens*, 109 F.Supp.3d at 1147, 1163-64. Top DMH administrators knew the effect of the Act. One wrote "no one has ever graduated from [the program] and somewhere down the line, we have to do that or our treatment processes become a sham," and another "admitted that if no one is released from an SVP civil commitment treatment program into the community within 10 years the 'logical conclusion' is that the treatment is a 'sham.'" *Id.* at 859. The Federal Court confirmed release *is* a "sham." *Id.* at 868.

Committees whose risk is below the standard for confinement have not been released, but met with "extra-statutory hurdles" like "indefinite release without discharge." *Id.* The State's failure to comply with the Act has resulted in unconstitutional punishment and continued confinement of men who no longer meet criteria. *Id.* at 869; *Karsjens*, 109 F.Supp.3d at 1172. Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id.* at 870.

The Minnesota SVP statute was also found to be facially unconstitutional because it failed to provide a way to obtain release in a reasonable time, once eligible for discharge. *Karsjens*, 109 F.Supp.3d at 1168. Minnesota's failure to fully discharge anyone, and provisional release of only three individuals, evidenced failed application of the law and lack of meaningful relationship between the program and discharge from custody. *Id.* at 1171-72. Discharge procedures did not work as they should and the statute had the effect of lifetime confinement. *Id.* 1171-3.

This Court is bound to enforce the Federal Court's ruling that the Act is unconstitutional as applied because annual reviews are not performed in accordance with the statute, case law, or due process. *Schafer*, 129 F. Supp.3d at 869. "[T]hese annual reviews are the primary tool that courts use to evaluate whether a civilly committed person continues to satisfy the criteria for commitment, or instead whether the person should be conditionally released." *Id.* at 852. "[I]t is nearly impossible to successfully petition for conditional release without an annual review from [DMH] recommending such release." *Id.* However, reviewers lack training; they misunderstand, are confused and do not consistently apply the correct legal standard in evaluating the need for continued confinement. *Id.* at 582-83, 868.

For example, the State equated the risk threshold for continued commitment with "no more victims," zero risk, and "will not engage in acts of sexual violence if discharged," contrary to the Act's requirements. *Id.* at 848-49. Minnesota's scheme was defective because periodic risk assessments were not conducted, and evaluators did not apply the correct legal standard. *Karsjens*, 109 F.Supp.3d at 1171. Because annual reviews are not required for those men conditionally released, it is impossible to ever obtain unconditional release, even if permissible under the Act as written. §632.498.1. A statute not requiring periodic risk assessments "authorizes prolonged commitment, even after committed individuals no longer pose a danger." *Karsjens*, 109 F.Supp.3d at 1168.

Even if someone progressed through treatment, obtaining the government's authorization to seek conditional release is "unduly laden with unnecessary procedures." *Schafer*, 129 F. Supp.3d at 854-55. DMH has *never* authorized a single person to seek

release, and State actors "appear to be stalling or blocking" release. *Id.*at 855, 869. Therefore, the individual must prove by "preponderance of the evidence" he "no longer" has a mental abnormality and is not "likely" to reoffend to win a jury trial where he might be released if the State cannot prove its case. *Id.* at 869, §632.498. This is unconstitutional because it shifts the burden to the individual to demonstrate he no longer meets commitment criteria, and the release criteria are more stringent than the initial commitment criteria. §632.501; *see Karsjens*, 109 F.Supp.3d at 1169.

The threshold for commitment is "more likely than not," but a committee must show he is no longer "*likely*" at all. §§632.480, 632.498. Our Supreme Court previously presumed §632.498 constitutional, saying the statute was "merely…a shorthand way" of referring to the preliminary showing the individual must make "that he is not *likely* to engage in further acts of sexual violence." *Schottel v. State*, 159 S.W.3d 836, 842 (Mo. banc 2005). The government interprets release standards to justify commitment "until it was determined he will not engage in acts of sexual violence if released" and that he will create "no more victims," which "essentially require[s] a complete absence of risk before a [committed man] will be released." *Schafer*, 129 F. Supp.3d at 849. But "no adult male has a 0% risk of committing an act of sexual violence;" there will always be some likelihood of reoffending. *Schafer*, 129 F. Supp.3d at 849. Just as the government does not have to prove "*total* or *complete* lack of control" to obtain commitment, a committed man does not have to prove *total* or *complete* lack of risk to be released. *Karsjens*, 109 F.Supp.3d at 1169. The observed application of the release procedures reveals *Schottel's*

presumptions were wrong and that the Act is unconstitutional. *Schafer*, 129 F. Supp.3d at 849, 869.

Conclusion

The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. U.S. Const. amend. V, XIV, Mo. Const. art. I, §2, 10. The SVP Act violates due process, equal protection, double jeopardy, and is an *ex post facto* law, and therefore Nelson's resulting civil commitment under that law is cruel and unusual punishment. U.S. Const. art. I, §§9, 10, amends. V, VI, VIII, XIV; Mo. Const. art. I, §§2, 8, 10, 13, 18(a), 19 and 21. The trial court erred in denying his motion to dismiss. This Court must reverse the judgment and order of the trial court and release Nelson from his continued, illegal confinement.

II.

The trial court erred in denying Nelson's motion to dismiss, because this violated his rights to due process, equal protection, and freedom from cruel and unusual punishment, protected by U.S. Const., amends. V, VIII, XIV and Mo. Const. art. I, §§2, 10, and 21, in that Federal Court Found the Act is unconstitutional because it does not provide a least restrictive treatment environment(LRE), and there is no alternative to confinement in a total lock down facility.

Nelson's motion to dismiss because there is no LRE was denied.(Tr.107-8; L.F.3, 21-3). Nelson argued the Act was unconstitutional because it treated him differently those civilly committed under other provisions of Chapter 632, resulting in cruel and unusual punishment.(L.F.21-23, 106-7).

Nelson incorporates the Standard of Review and analysis from Point I.

Analysis

This Court must enforce the Federal Court's ruling the Act is unconstitutional as applied because there is no LRE or a community reintegration plan, resulting in punitive lifetime detention in violation of due process. *Van Orden v. Schafer*, 129 F. Supp.3d 839, 868-9 (E.D. Mo. 2015); U.S. Const. amends. X, XIV and Mo. Const. art. I, §§2, 10.

Justice Breyer warned that a law not requiring consideration of an LRE or "alternative and less harsh methods" to achieve a non-punitive objective can show that the legislature's "purpose ... was to punish." *Kansas v. Hendricks*, 521 U.S. 346, 387 (1997)(dissenting). The Act's plain language does not require an LRE or consider "less

harsh methods," and therefore it is facially unconstitutional. It mandates anyone "committed for control, care and treatment … shall be kept in a secure facility." §632.498.

Those civilly committed have a constitutional right to avoid undue confinement, both in duration and in nature. *Schafer*, 129 F. Supp.3d at 867. Where civil commitment accomplishes a constitutional purpose, those committed "are required to be held in the [LRE] compatible with their safety and that of the public." *Sherrill v. Wilson*, 653 S.W.3d 661, 664 (Mo. banc 1983). If commitment were for a civil purpose, then the Act would provide for placement in a LRE, like any other person civilly committed for non-punitive purposes. *See* §§632.385; 630.115.1(11)(each DMH resident has right "to be evaluated, treated or habilitated in the [LRE]").

The Minnesota Federal Court found fatal failures in that law because of lack of LREs physically existing, practically unavailable because of lack of bed space, and lack of community reintegration. *Karsjens*, 109 F.Supp.3d at 1151-53, 1172. Minnesota's statute allowed confinement after an individual no longer met statutory criteria for commitment and did not pose a danger to the public or need further treatment, and when an individual met criteria for a reduction in custody. *Id.* at 1156, 1160-61.

Missouri's scheme fails to provide LREs altogether, and there are no procedures in place for community reintegration, or placement. *Schafer*, 129 F. Supp.3d at 851. Missouri's two facilities are "high" or "maximum" security, behind prison razor wire, and patrolled by armed guards. *Id.* at 845. The annex, one "somewhat less restrictive" eight-bed "step down" unit, exists behind that patrolled perimeter. *Id.* The "annex cannot be considered a least restrictive alternative," and its bed space is practically unavailable to the

200 plus men already committed. *Id.* at 845, 856. Moreover, the only persons placed in the unit are those who have been ordered conditionally released, even though "conditional release" means actually living in the community. *Id.* at 845, 855; §632.505.1. Even so, progression through treatment, conditional release, and transfer to the unit are all impossible because the Act is unconstitutionally applied, as discussed in Point I. *Schafer*, 129 F. Supp.3d at 869.

These failures have resulted in continued maximum-security confinement of men who no longer meet criteria for confinement and of those who could be treated in LREs, and amounts to unconstitutional punishment. *Id.* at 869; *Karsjens*, 109 F.Supp.3d at 1172(finding statute was not narrowly tailored because there are no LREs). Missouri's "nearly complete failure to protect" the men committed is "so arbitrary and egregious as to shock the conscience." *Id.* at 870. The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. U.S. Const., amend. V, XIV, Mo. Const. art. I, §§2, 10.

Because the SVP Act does not provide for an LRE and there is no community reintegration or placement, commitment is punitive and violates due process and equal protection, and Nelson's resulting civil commitment under the Act is cruel and unusual punishment. U.S. Const. amends. X, VIII, XIV; Mo. Const. art. I, §§2, 10, and 21. Therefore, the trial court erred in denying his motion to dismiss. This Court must reverse the judgment and order of the trial court and release Nelson from his continued, illegal confinement.

III.

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

Nelson's *Motion to Dismiss: Violation of Due Process, Equal Protection, Double Jeopardy* was denied.(Tr.107-8; L.F.3, 24-35). Nelson argued the Act was unconstitutional because: commitment was punitive, lifetime custody; it failed to provide adequate due process protections; it treated him differently than anyone else civilly committed in Missouri in terms of confinement conditions, duration and procedures; and commitment under such a law is cruel and unusual punishment.(L.F.24-35, 102).

Nelson incorporates the Standard of Review and analysis from Points I-II.

Analysis

Due Process protects an individual from the deprivation of life, liberty and property without due process of law and from wrongful government actions. U.S. Const., amend. V, XIV, Mo. Const. art. I, §§2, 10. SVP commitment is a significant deprivation of liberty and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Addington v. Texas*, 441 U.S. 418, 425(1979);

Murrell v. State, 215 S.W.3d 96, 103 (Mo. banc 2007). Procedural safeguards are necessary to ensure the State confines only a narrow class of particularly dangerous persons, after meeting the strictest procedural standards. *Kansas v. Hendricks*, 521 U.S. 346, 357, 364 379(1997). The process must minimize the risk of erroneous decisions. *Addington*, 441 U.S. at 424; *In re Van Orden*, 271 S.W.3d 579, 587 (Mo. banc 2008).

The Act does not provide adequate procedural or substantive protections necessary for punitive proceedings. For example, a committed man is not entitled to be present at a hearing for conditional release, §632.498; subsequent petitions are automatically "frivolous,"§632.504; and a committed person is subject to lifetime custody and supervision, even when determined he no longer has a mental abnormality or poses a risk. §632.505; (L.F.73-4). *See also* Points I and II discussing the burden of proof, burden shifting, release procedures, and LRE.

Unlike other persons committed under Chapter 632, SVPs cannot receive outpatient treatment, unconditional release or treatment in LREs, despite findings of no longer being mentally ill or presenting risk of harm. *See* §§632.330, 632.005, 632.495; Point II. There are definite term limits placed on civil commitments under Chapter 632, but not under the Act. *See* §§632.330, 632.495. Men facing SVP commitment do not have a statutory right against self-incrimination, but persons in other commitment and probate proceedings do. *See* §§631.145, 475.075. Men are interviewed to determine if they are SVPs while involuntarily in custody and without the right to counsel. *See* §§632.483-.484, *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 77 (Mo. banc 2009).

In other commitments under Chapter 632, only the respondent may demand a jury, and the proceedings must be as informal as possible to mitigate any harmful effect on the respondent in psychiatric commitments. §§632.335, 632.350. A guardianship petitioner cannot demand a jury trial. §475.075. However, the Act gives the State and trial court the right to demand a jury trial, irrespective of the wishes or interest of the respondent. §632.492.

There is no reason to justify differential and constitutionally inadequate treatment under the Act. The purpose of the Act is two-fold: (1) protect the public by incapacitating an individual who could commit a future crime, and (2) provide "necessary treatment" for those committed. *Hendricks*, 521 U.S. at 363-6, 379; §§632.492, 632.495. Protecting the public justifies psychiatric commitments and exercise of government's *parens patriae* power. §632.300. Such detentions are a deprivation of liberty. *Addington*, 441 U.S. at 425. Guardianship cases implicate a fundamental liberty interest, are an exercise of *parens patriea* power, and involve rights similar to criminal proceedings. *Matter of Korman*, 913 S.W.2d 416, 418 (Mo. App. E.D. 1996).

The government has a compelling interest in protecting the public in criminal cases. *State v. McCoy*, 468 S.W.3d 892, 891 (Mo. banc 2015). But, the government cannot demand a jury trial, deprive liberty without proving its case beyond a reasonable doubt, or compel a defendant to incriminate himself, achieving its goals and compelling interests through narrowly tailored means comporting with due process and equal protection. U.S. Const., amends. V, VI, XIV, Mo. Const. art. I, §§2, 10, 18(a),19. The same should be true in SVP cases. The current SVP scheme is easy and convenient for the State. But it also

results in punitive, lifetime deprivations of liberty without procedural safeguards to protect that fundamental liberty and to ensure that only particularly dangerous persons are confined under the strictest standards that minimize the risk of erroneous commitment decisions. *Schafer*, 129 F. Supp.3d at 844, 868; *Addington*, 441 U.S. at 424; *Hendricks*, 521 U.S. at 357, 364; *Van Orden*, 271 S.W.3d at 587. The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. U.S. Const., amend. V, XIV, Mo. Const. art. I, §§2, 10. Commitment, therefore, is cruel and unusual punishment. U.S. Const., amend. VIII, XIV, Mo. Const. art. I, §21.

The trial court erred in denying Nelson's motion to dismiss. This Court must reverse the order and judgment of the trial court and release Nelson from custody.

IV.

The trial court erred in denying Nelson's motion to dismiss, because this violated his rights to due process, equal protection, and freedom from cruel and unusual punishment, protected by U.S. Const., amends. I, V, VIII, XIV and Mo. Const. art. I, §§2, 8, 10, and 21, in that the Act unconstitutionally permits commitment because of emotional capacity, without any proof of behavioral impairment, and fails to require proof of serious difficulty controlling behavior.

Nelson's motion to dismiss arguing the Act was unconstitutional because it did not require proof of serious difficulty controlling behavior and permitted a mental abnormality finding based solely on emotional capacity was denied.(Tr.107-8; L.F.3,40-44). His commitment under such a law is cruel and unusual punishment.(L.F.102).

Nelson incorporates the Standard of Review discussed in Point I.

Analysis

The Act, as written and applied, is unconstitutional because it does not require proof of serious difficulty controlling behavior, and permits commitment based on a finding of lack of emotional control, without a finding of volitional impairment. U.S. Const. amends. V, VIII, XIV; Mo. Const. art. I, §§2, 10, 21.

Due process requires "proof of serious difficulty controlling behavior" to "distinguish the dangerous sexual offender whose mental illness … subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 411-3 (2002); *Thomas v. State*, 74 S.W.3d 789, 791-

2 (Mo. banc 2008). While *Thomas* announced that the definition of "mental abnormality" "means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior,"* the legislature has not amended the definition to comply with the constitutional standard. "Mental abnormality" remains defined as "a congenital or acquire condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses *in a degree constituting such person a menace to the health and safety of others*." §632.480(2).

The Act permits commitment on the basis of emotional capacity, without a finding of volitional impairment. §632.480(2)("condition affecting the emotional ***or*** volitional capacity"). Commitment laws must "limit confinement to those who suffer from a ***volitional*** impairment rendering them dangerous beyond their control." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). Neither *Hendricks* nor *Crane* considered the constitutionality of confinement based solely on "emotional" abnormality. *Crane*, 534 U.S. at 872. The mental abnormality requirement is necessary to limit confinement to those who suffer from a volitional impairment. *Hendricks*, 521 U.S. at 358.

Commitment because of an "emotional" impairment cannot be constitutional. The Act is aimed at the risk of future *behaviors*, not future *feelings*. The constitution requires proof of serious difficulty controlling *behavior*. The government cannot regulate one's thoughts absent some conduct, without violating the First Amendment. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67-68 (1973)("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not

prohibited by the Constitution."), U.S. Const. amend I., Mo. Const. art. I, §8; *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969)("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds…"). The Act's disjunctive "or" permits a finding of mental abnormality based solely on emotional capacity.

The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. U.S. Const., amend. V, XIV, Mo. Const. art. I, §§2, 10. The Act, as written and applied, is unconstitutional because it does not require proof of serious difficulty controlling behavior, and permits commitment based on a finding of lack of emotional control, without a finding of volitional impairment, and commitment under the Act is therefore cruel and unusual punishment. U.S. Const. amends. V, VIII, XIV; Mo. Const. art. I, §§2, 10 and 21. For these reasons, the trial court erred in denying Nelson's motion to dismiss. This Court must reverse the order and judgment of the trial court and release Nelson.

V.

The trial court erred in denying Nelson's motion to dismiss based on the use of "sexually violent predator" in the Act, or alternatively in permitting the phrase at trial and in jury instructions given, because this violated his rights to due process of law, a fair trial, an impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the U.S. Const. amends. V, VI, VIII, XIV, Mo. Const. art. I, §§2, 10, 18, 21, and §632.495, in that the phrase is unfairly and substantially prejudicial because it is inherently pejorative, irrelevant, inflammatory and encourages a verdict based on irrational fears and speculation, rather than on the statutory criteria for civil commitment.

Nelson's motion to dismiss because the use of "sexually violent predator" at trial violated due process, and his alternative request to exclude the term, was denied.(Tr.107-8; L.F.3,36-48). Nelson argued the inflammatory term would encourage jurors to reach a verdict based on fear and speculation, and did not want the term used in trial or in instructions.(L.F.36-48). After the motion was denied, the phrase was used in three instructions and the verdict director

Instruction 5 states:

> In these instructions, you are told that your finding depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the petitioner to cause you to believe by clear and convincing evidence that respondent is a sexually violent predator. In determining whether or not you believe

any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in this case does not cause you to believe a certain proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Clear and convincing evidence is evidence that instantly tilts the scales in the affirmative when weighed against the evidence in opposition, so that you are left with the abiding conviction the evidence is true.

(L.F.88).

Instruction 6 states:

If you believe the evidence clearly and convincingly establishes:

First, that the respondent was found guilty of forcible rape in the Circuit Court of Jackson County, State of Missouri, and

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality, and

Fourth, that this mental abnormality makes the respondent more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility,

then you will find that the respondent is a sexually violent predator.

However, unless you find and believe the evidence has clearly and convincingly established each and all of these propositions, you must find the respondent is not a sexually violent predator.

As used in this instruction, "sexually violent offense" includes the offense of forcible rape.

As used in this instruction, "mental abnormality" means 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 controlling his behavior.

As used in this instruction, "predatory" means acts directed towards individuals, including family members, for the primary purpose of victimization.

(L.F. 89).

Instruction 7: "if you find Respondent to be a sexually violent predator, then Respondent shall be committed to the custody of the director of the department of mental health control, care and treatment."(L.F.90).

And finally, the verdict form:

Note: Complete this form by filling in the word or words required by your verdict.

We, the jury, find that respondent Jay Nelson _____ (here insert either "is" or "is not") a sexually violent predator.

(A51)(also including 12 lines for each juror to sign form).

Nelson challenges the Act's use of the phrase "sexually violent predator," resulting in use of that phrase at trial. Nelson incorporates the Standard of Review from Point I.

Analysis

SVP commitment substantially impacts Nelson's fundamental right of liberty and requires due process protection. *In re Murphy*, 477 S.W.3d 77, 84 (Mo. App. E.D. 2015), *Addington v. Texas*, 441 U.S. 418, 425 (1979). "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010). The Act gives Nelson a right to jury determination that he meets criteria for commitment. §632.495.

Saying "SVP" does not make it any more or less likely that Nelson has any mental abnormality, or that the mental abnormality makes him more likely than not to commit predatory acts of sexual violence if not confined; nor does it make the existence of any fact more or less probable than it would be without use of the phrase. *Nolte v. Ford Motor Company*, 458 S.W.3d 368, 38 (Mo. App. W.D. 2014); §632.480(3). It is not logically relevant. Without logical relevance, the phrase cannot be legally relevant or admissible. *Id.* at 382. The term is the consequence of the verdict, not evidence.

In *State v. Perry*, this Court called the term "inherently pejorative" and said its prejudicial effect outweighed "any minimal probative value." 275 S.W.3d 237 (Mo. banc 2009). Had the defendant objected, it should have been sustained. *Id.* at 247. Names like "monster" and "sexual deviant" create "inflammatory prejudice" and "compel the jury to focus on the grossness of the alleged conduct, rather than whether the defendant engaged in the conduct." *Kellog v. Skon*, 176 F.3d 447, 451-52(8th Cir.1999). Pejorative names like "murderer" and "serial killer" "distort the evidence" and are prejudicial. *State v. Whitfield*, 837 S.W.2d 503, 512 (Mo. banc 1992) "The use of these words is name calling designed to inflame passions of jurors," and is error *Id.* Prejudice can result from overuse of even

admissible, probative evidence, or when the jury is led to decide the case on some basis other than the established propositions of the case. *State v. Davis*, 211 S.W.3d 86, 88 (Mo. banc 2007), *Nolte*, 458 S.W.3d at 383.

The Act uses the phrase throughout its text. §§632.480, 632.489, 632.495. Section 632.492 mandates that the jury be instructed "that if it finds that the person is a sexually violent predator, the person shall be committed" to DMH. Instructions 5, 6, 7 and the verdict form all used the phrase at trial.(L.F. 88-90; A51). Use of the phrase at trial "distorts the evidence," creates "inflammatory prejudice," and "compel[s] the jury to focus on the grossness of the [allegations]," rather than on the criteria for commitment. *Whitfield*, 837 S.W.2d at 512, *Kellog*, 176 F.3d at 451-52. It results in a jury determination based on irrational fear and prejudice, rather than an impartial decision based on the application of the law to the facts of the case. *Nolte*, 458 S.W.3d at 383.

A recent study involving individuals called for jury duty confirmed the label's inherent prejudice and bias. Surich, N., *et al. The Biasing Effect of the "SVP" Label on Legal Decisions*, International Journal of Law and Psychiatry (2016), http://dx.doi.org/101016/j.ijlp.2006.05.002. Participants decided if a man should be released on parole; half were told he served a prison sentence, and half were told he was an SVP. *Id.* at 3. All participants reviewed identical information about the sex offense, criminal history, psychiatric history, treatment, and a risk assessment, and applied identical legal criteria. *Id.* 36% of the prison group voted to release on parole; but only 17% in the SVP group. *Id.* at 3-4. Release was 2.63 times more likely for the "felon," though participants did not find the "SVP" any more dangerous or likely to reoffend. *Id.* at 4.

The trial court erred in denying Nelson's motion to dismiss, including his alternative request to exclude the phrase. The term is so prejudicial it denies Nelson due process of law, a fair trial and a fair, impartial jury and results in cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV, Mo. Const. art. I, §§ 2, 10, 18, 21, and §632.495. If the Act requires use of such a term at trial, then the Act itself then violates the constitutional principles, is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10. This Court should reverse the judgment and order of the probate court and release Nelson from confinement. Alternatively, this Court should remand for a new trial without use of the term.

VI.

The trial court erred in overruling Nelson's motion for a directed verdict and committing him to DMH, because this violated his right to due process of law and a fair trial, guaranteed by the U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10 and §632.495, in that the evidence was insufficient to prove Nelson had a mental abnormality because the State failed to prove diagnoses of ASPD or Paraphilia, NOS caused him serious difficulty controlling sexually violent behaviors, or that he was predisposed to commit sexually violent offenses.

Nelson was diagnosed with exhibitionism, ASPD and paraphilia, NOS.(Tr. 242, 318, 479, 244, 360, 244-5). The State failed to prove that Nelson was predisposed to commit sexually violent offenses and that he had serious difficulty controlling behaviors that lead to such offenses. Therefore, none of the three diagnoses met the constitutional definition of mental abnormality.

Standard of Review

When a motion for directed verdict is denied, this Court reviews whether the State made a submissible case. *Care and Treatment of Cokes*, 107 S.W.3d 317, 321 (Mo. App. W.D. 2003). "To make a submissible case for a SVP commitment under §632.495, the State was required to present substantial evidence to establish each and every element of its petition." *Id.* at 323. The evidence and all reasonable inferences are viewed in the light most favorable to the State's case, and contrary evidence is disregarded. *Id.* This Court does not supply missing evidence or give the State the benefit of unreasonable, speculative

or forced inferences. *Id.* This Court must reverse when there is a lack of probative fact to support the verdict. *Cokes v. State*, 183 S.W.3d 281, 282 (Mo. App. W.D. 2005). The case will be remanded if it appears from the record the State could have made a submissible case. *Morgan v. State*, 176 S.W.3d 200, 212 (Mo. App. W.D. 2005).

SVP commitment is a significant deprivation of liberty and is only constitutional "provided the commitment takes place pursuant to proper procedures and evidentiary standards." *Addington v. Texas*, 441 U.S. 418, 425(1979); *Murrell v. State*, 215 S.W.3d 96, 103 (Mo. banc 2007), citing *Kansas v. Hendricks*, 521 U.S. 346, 357(1997) and *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). To satisfy due process, the individual must be both mentally ill and dangerous; if one is missing, commitment is unconstitutional. *Murrell*, 215 S.W.3d at 104; §§632.480, 632.495. Nelson has a due process right compelling the State to produce sufficient evidence to clearly and convincingly prove each element of its claim that he is a sexually violent predator. §§632.495, 632.480(5); *See State v. May***,** 71 S.W.3d 177, 183 (Mo. App. W.D. 2002).

Analysis

Due process requires the mental abnormality and the danger of future sexually violent behavior be "inextricably intertwined" so that civil commitment is limited to those "suffering from a volitional impairment rendering them dangerous beyond their control." *Murrell*, 215 S.W.3d at 104, *Hendricks*, 521 U.S. at 353. Therefore, the State must prove that a mental abnormality "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). To prove a mental abnormality exists, the State must prove the existence of: (1) a congenital or acquired

condition; (2) that affects the emotional or volitional capacity; (3) that predisposes him to commit sexually violent offenses; (4) in a degree that causes the individual serious difficulty controlling that behavior. *Murrell,* 215 S.W.3d at 106, *citing Kansas v. Crane*, 534 U.S. 407, 412-3 (2002), *Thomas v State*, 74 S.W.3d 789, 791-2 (Mo. banc 2002); §632.480(2).

Murrell recognized that there must be a "link" between the diagnosed condition and sexually violent behavior to establish a mental abnormality. *Murrell*, 215 S.W.3d at 107. In fact, under §632.480(2) and due process, there must be three links. First, the condition must, in and of itself, predispose sexually violent offenses. *Thomas,* 74 S.W.3d at 792, §632.480(2)("a congenital or acquired condition … ***which predisposes the person to commit sexually violent offenses***"). Sexually violent offenses are specific contact offenses listed in §632.480(4). Second, the condition must cause serious difficulty controlling that specific behavior. *Crane*, 534 U.S. at 413, relying on *Hendricks*, 521 U.S. 346; *Thomas*, 74 S.W.3d at 791-2(mental abnormality means condition "…that predisposes the person to commit sexually violent offenses ***in a degree that causes the individual serious difficulty in controlling his behavior***."). Third, it must cause him to be "more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility."§632.480(5).

To the extent *Murrell* means the condition present does not have to predispose sexually violent behavior, it is inconsistent with the plain language of the Act, *Crane*, *Hendricks*, *Thomas,* and due process. 534 U.S. 412-3; 521 U.S. at 357-60; 74 S.W.3d at 791-2; §632.480. It is up to the legislature to define specialized terms, like "mental

abnormality," that define mental health concepts and have legal significance. *Hendricks*, 521 U.S. at 589. The Missouri legislature's definition of mental abnormality requires that the condition "predispose the person to commit sexually violent offenses." §632.480(2), *Thomas*, 74 S.W.3d at 792. *Murrell* not only overlooked the statutory predisposition requirement, it also overlooked that same component of the Kansas statute at issue in *Hendricks*. 215 S.W.3d at 106. The statute in *Hendricks* required evidence of predisposition, past sexually violent behavior and a present mental abnormality that created the likelihood of the same conduct in the future. 521 U.S. at 358-9.

In that case, a "critical distinguishing feature" of the diagnosed disorder "consisted of a special and serious lack of ability to control behavior." *Crane*, 534 U.S. at 412-3, citing *Hendricks*, 521 U.S. at 360. The proof of serious difficulty controlling behavior, when viewed in light of features such as "*the nature of the psychiatric diagnosis*, and the severity of the mental abnormality itself" is what distinguishes between criminals and SVPs. *Id.* at 413. Hendricks' admitted lack of volitional control, and his future dangerousness, justified commitment. *Hendricks*, 521 U.S. at 352. Reading *Hendricks* and *Crane* together, it is clear that the nature of the diagnosis must predispose a person to commit sexually violent offenses so severely that the person has serious difficulty controlling the same conduct. *Id.* at 358-9; *Crane*, 534 U.S. at 413.

Expert testimony is required on the issue of mental abnormality because it requires expertise to diagnose a psychological condition, to determine predisposition to commit sexually violent offenses, and to assess the degree of control over one's behaviors. These are issues beyond the understanding of a lay person. *Cokes*, 107 S.W.3d at 323, §490.065.

For an expert opinion to be admissible, it must be supported by the record; when it is not supported by the record, it is insufficient to create a submissible case. *Morgan*, 176 S.W.3d 211.

Kircher testified a mental abnormality is "a congenital or acquired condition that affects his emotional or volitional capacity, predisposes him to commit sex offenses as defined under the law and causes him serious difficulty controlling his behavior."(Tr.319-20). Simmons testified "the definition actually involves whether or not that predisposes someone to commit acts of sexual violence."(Tr.238). According to Simmons, the diagnoses of ASPD, paraphilia, or exhibitionism are not mental abnormalities in and of themselves; to be a mental abnormality each condition diagnosed would have to predispose a person to commit acts of sexual violence *and* cause serious difficulty controlling behavior.(Tr.282).

Exhibitionism

Kircher and Simmons both diagnosed exhibitionism, and found it was *not* a mental abnormality.(Tr.242, 244, 360). "A party is bound by the uncontradicted testimony of his own witnesses, including that elicited on cross-examination." *Hurlock v Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 879 (Mo. App. 1985). Exposing yourself is not sexually violent and does not have anything to do with impulse control.(Tr.242-3). Nelson had control over the behaviors.(Tr.367). These facts are not probative of predisposition to commit, or of serious difficulty controlling, sexually violent behavior, and no expert opined exhibitionism was a mental abnormality.(Tr.243-5, 319). For the same reasons, it could not be combined with any other diagnosis to form a mental abnormality.(Tr.243-5, 319, 367).

ASPD

Only Kircher testified that Nelson's ASPD diagnosis was a mental abnormality.(Tr.242, 318-9, 479).

ASPD was a mental abnormality in *Murrell* because sufficient evidence linked the disorder to sexually violent behavior in that case. 215 S.W.3d at 108. Murrell was convicted of raping two women multiple times, then he molested a 13 year old girl in front of a witness, though he intended to wait until they were alone. *Id.* Murrell felt like someone else "takes him over" and "behaviors occur due to instinct and you have no control over them." *Id.* "ASPD cannot in every case be enough;" there must be a link to sexually violent behavior to establish a mental abnormality. *Murrell*, 215 S.W.3d at 107. "ASPD is not, in and of itself, sufficient" to establish an individual is "more likely than not" under the Act; it is only sufficient "when combined with *other evidence* of sexually violent behavior." *Id.*

The claim that ASPD is a mental abnormality is based only on the diagnosis and evidence there were sexual behaviors. It is not based on a link between the two because "the nature of the psychiatric diagnosis" has no connection to predisposition or serious difficulty controlling sexually violent behavior at issue. §632.480, *Crane*, 534 U.S. at 413, *Thomas*, 74 S.W.3d at 791. The diagnosis "in and of itself" does not relate to any sexual deviancy or make anyone lack control over behavior.(Tr.369).Simmons testified the ASPD diagnosis is not an indication someone is going to commit a sex crime, or cannot control his behavior.(Tr.281). Kircher agreed behavioral control is "a totally different determination."(Tr.370). "ASPD establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior." *In*

the Matter of the State of New York v. Donald DD, 21 N.E.3d 239, 249-50 (N.Y. App. Div. 2014).

In *Donald DD*, the New York Court of Appeals reviewed the civil commitments of Kenneth T. and Donald DD, both diagnosed with ASPD. 21 N.E.3d at 242, 245. The Court ruled Kenneth T.'s and Donald DD's mental conditions did not result in their having serious difficulty controlling their behavior as required under the law, and reversed their commitments. ***Id.*** at 248-250. Commitment could not be based entirely upon an ASPD diagnosis and prior sexual offenses because ASPD is not enough to separate someone facing commitment from a typical criminal recidivist. *Id.* at 249-250.

Kircher's testimony demonstrated that Nelson's rape offense was an example of disregard for the rights of others: Nelson committed the rape to get the money he was owed.(Tr.318). Nelson's conduct violations for threats and assaults in prison played into that diagnosis, fitting a general pattern of antisocial behavior.(Tr.321, 323, 332). Simmons diagnosed ASPD based on repeated legal problems and "issues conforming with authorities" beginning around age twelve that spoke to general criminality.(Tr.243-4, 257). This evidence was only sufficient to establish Nelson was a criminal. Neither witness testified ASPD predisposed sexually violent behaviors.

Even "when we layer on his sex offending behavior" as Kircher did(Tr.321), ASPD is not enough to support a mental abnormality finding. Nelson had one instance of sexually violent offending; there is no pattern of sexually violent offending behavior to supply a link. The only *other* evidence of *any* sexual behavior was Nelson's violations for exposing and masturbating-- intentional, non-contact, not sexually violent behavior not related to

impulse or behavioral control.(Tr.243, 330, 367), §632.480. This is not probative of a mental abnormality, whether called exhibitionism or ASPD, and does not permit an inference of predatory sexually violent behavior.

The additional factors Kircher cited were diagnostic markers of ASPD, not other evidence of sexually violent behaviors: lack of insight; general hostility; negative emotionality or attitude of grievance; general pattern of not taking responsibility, recklessness and lack of remorse; non-compliance with supervision, poor problem solving; general impulsivity; supportive attitudes; and lack of emotionally intimate relationships.(Tr.332-33, 346-50). Again, these factors are not probative of predisposition to commit, or serious difficulty controlling sexually violent behavior. Kircher's ultimate mental abnormality conclusion was not supported by the record and was not sufficient to create a submissible case. *Morgan*, 176 S.W.3d at 211.

60-70% of prisoners have ASPD.(Tr.281, 443). Case law has identified figures up to 80%. *See, Donald DD*, 21 N.E.3d at 249; *Crane*, 534 U.S. at 412(40-60% of male prisoners diagnosable with ASPD). Such a disorder cannot distinguish between an SVP and the typical, dangerous criminal recidivist. *Crane*, 534 U.S. at 413.

Unlike *Murrell*, Nelson did not have a history of multiple sexually violent offenses, or admit something else "takes over him" or that he had no control over his behaviors. 215 S.W.3d at 108, *see also Hendricks*, 521 U.S. at 352(Hendricks' admitted lack of volitional control, and his future dangerous, justified commitment). Nor was a "critical distinguishing feature" of Nelson's ASPD diagnosis "a special and serious lack of ability to control behavior" at issue under the Act. *Crane*, 534 U.S. at 412-3; §632.480(2),(4). The evidence

at trial was like that in *Donald DD*: an ASPD diagnosis, and a sexually violent offense. 21 N.E.3d at 249-50. "[A]n ASPD diagnosis has so little relevance to the controlling legal criteria… that it cannot be relied upon to show a mental abnormality" *Id.* at 250.

Therefore, without proof that ASPD predisposed Nelson to commit sexually violent offenses, ASPD could not be a mental abnormality. Even if ASPD did cause predisposition, it could not be a mental abnormality because there was no proof it caused serious difficulty controlling the behavior at issue. Because ASPD was not linked to sexually violent behavior in a way that demonstrated both predisposition to commit, and serious difficulty controlling, sexually violent behaviors, it could not reasonably support a mental abnormality finding, whether standing on its own or combined with any other diagnosis or condition.

Paraphilia, NOS, non-consent

Only Simmons diagnosed Paraphilia, NOS, and believed that condition was the mental abnormality.(Tr.241, 244-5). Simmons testified Nelson was aroused by the struggle or unwillingness of non-consenting partners.(Tr.241). Simmons conceded her diagnosis is controversial within the field, "coined" by psychologists doing SVP evaluations, and not in the DSM.(Tr.293, 296). Even though there is criminal behavior, it may not be motivated by a mental abnormality, and in Simmons' experience, most rapists do not suffer from a mental abnormality.(Tr.239).

Kenneth T. was also diagnosed with ASPD and Paraphilia, NOS. *Donald DD*, 21 N.E.3d at 179. The expert did not have "any direct evidence" and was "not sure" that Kenneth T. was aroused by nonconsensual activity, but inferred it from his offense

behaviors. *Id.* He testified Kenneth T. had serious difficulty controlling his behavior, evidenced by allowing his victims to identify him and attempting a rape after being imprisoned for a sex offense. *Id.* Ultimately, *Donald DD* did not decide if Paraphilia, NOS could support commitment because the State did not prove Kenneth T. had serious difficulty controlling his behavior. *Id.*

Sufficient evidence of serious difficulty controlling behavior cannot "consist of such meager material as that a sex offender did not make efforts to avoid arrest and re-incarceration." *Id.* at 188. Past sexual behaviors may have been crimes of opportunity, and the individual may have been willing to risk punishment. *Id.*

> Undoubtedly, sex offenders in general are not notable for their self-control. They are also, in general, not highly risk-averse. But beyond these truisms, it is rarely if ever possible to say, from the facts of a sex offense alone, whether the offender had great difficulty in controlling his urges or simply decided to gratify them, though he knew he was running a significant risk of arrest and imprisonment.

Id.

Simmons only provided "broad criteria that characterized paraphilia in general" as a disorder wherein the person is sexually aroused and the arousal is distressing or causes difficulty.(Tr.340-41). *Id.* at 179. Ordinarily, paraphilias emerge in adolescence, are lifelong and developed over time; normally Simmons looked for a pattern of more than one case of sexual assault against a woman in order to diagnose paraphilia.(Tr.283-4). However, in this case her diagnosis was based on the single rape and subsequent "not hands-on offenses like exhibiting himself" to guards while in prison.(Tr.283). The rape

occurred in 1998 when Nelson was 24 years old; he did not expose himself until 2003 at 40 years old and there were no sexual misconduct incidents in the intervening time.(Tr.284-5). Neither behavior can be said to have emerged in adolescence.

During the offense, Nelson broke into his coworker's home, beat her, and threatened her.(Tr.250-1). Simmons based her Paraphilia, NOS diagnosis on these facts and because Nelson had power and control over the unwilling rape victim.(Tr.251-2). These facts do not establish Nelson had a sexual preference for, or specific attraction to, an unwilling partner, nor arousal to the victim's struggle.(Tr.241). This evidence did not establish predisposition to commit, or serious difficulty controlling, sexually violent offenses. These facts only established that an offense happened.

Simmons said the behaviors with unwilling partners continued because Nelson exposed himself and masturbated in front of guards, and was repeatedly sanctioned with administrative segregation.(Tr.252-3). She said this "demonstrates a lack of impulse control to continue to engage in those behaviors while you're incarcerated for a sexual offense, knowing that I'm going to get in trouble" and it was "significant" that Nelson positioned himself so that he would be visible to others.(Tr.254). Simmons cited no evidence in the underlying sexually violent offense as evidence of serious difficulty controlling behavior or predisposition to commit sexually violent offenses. This prison is not evidence of serious difficulty controlling sexually violent behaviors for several reasons.

First, it was hands-off, not sexually violent, and had nothing to do with impulse control.(Tr.243). Such does not permit an inference of future predatory sexually violent behavior or serious difficulty controlling that behavior. Simmons "implied" Nelson had a

desire to commit an actual sexual assault because he exposed himself.(Tr.286). This was a speculative conclusion, unsupported by the record, and insufficient to create a submissible case. *Morgan*, 176 S.W.3d at 211.

Simmons rested her control conclusion on the fact that Nelson was sent to prison and sanctioned for exposing behaviors, but continued exposing knowing he would be punished.(Tr.254). Failing to avoid punishment is not evidence of serious difficulty controlling behavior. *Donald DD*, 21 N.E.3d at 188. Nelson continued exposing himself to remain in segregation.(Tr.526). The facts established Nelson knew the consequence and chose to act, risking punishment or hoping to be "punished" with continued segregation.(Tr.330), *Id.* Moreover, the behaviors did not start until 16 years after committing his only sexual crime, and stopped two years before trial.(Tr.273, 284-5). These facts are not probative of serious difficulty controlling sexually violent behavior.

Next, Simmons had no direct evidence Nelson was sexually aroused by nonconsenting activity. *Donald DD*, 34 N.Y.3d at 179. Nelson indicated "he hoped people would want to watch him and that they would maybe want to join in with him."(Tr.256). You could say he was hoping for a consensual encounter, not that he wanted someone to be shocked and to run away.(Tr.286-7). The exposing could have been something that occurred in that unique prison context, but Nelson would not do it on the streets.(Tr.287). These facts established an arousal to being seen and a desire for a consenting partner, not to criteria for Simmons' Paraphilia, NOS diagnosis, and did not relate to sexually violent offense behavior.(Tr.241,340-1).

Finally, Simmons agreed Paraphilia, NOS by itself is not enough, because a condition must predispose someone to commit sexually violent offenses, and do so in such a degree that it causes them serious difficulty controlling their behavior.(Tr.282). However, she offered no evidence of predisposition, and, for the reasons discussed above, did not have evidence to demonstrate serious difficulty controlling behavior. She did not link her diagnosis with predisposition or serious difficulty controlling behavior, and her evidence did not establish a mental abnormality that made Nelson "more likely than not." *Murrell*, 215 S.W.3d at 104,106; *Thomas*, 74 S.W.3d at 791-2. Her ultimate mental abnormality conclusion was not supported by the record and was not sufficient to create a submissible case. *Morgan*, 176 S.W.3d at 211.

Conclusion

The State presented no evidence from which a juror could have reasonably found Nelson was predisposed to commit, or had serious difficulty controlling, sexually violent offense behavior. There was no evidence linking ASPD or Paraphilia, NOS to those criteria. Nelson had only one documented sexually violent offense. His non-contact, non-sexually violent exposing did not have anything to do with control; it does not permit an inference of predisposition to commit, or serious difficulty controlling, sexually violent offense behavior and does not permit an inference of future predatory sexually violent behavior.(Tr.243, 367). Therefore, the evidence was not sufficient to satisfy the State's burden of proving Nelson had a mental abnormality, and he was entitled to a directed verdict at the close of the State's case. There is no evidence in the record suggesting the State could have made a submissible case.

The court erred in overruling Nelson's motion for directed verdict and committing him to DMH, violating his rights to due process and a fair trial. U.S. Const. amend. V, XIV, Mo. Const. art. I, §§2, 10, §632.495. This Court must reverse the order and judgment of the trial court and discharge him from custody.

VII.

The trial court erred in denying Nelson's motion for a directed verdict, and in committing him to DMH, because that violated his rights to due process of law and a fair trial as guaranteed by the U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10 and §§632.495 and 490.065, in that the State failed to make a submissible case that a mental abnormality made Nelson "more likely than not to commit *predatory acts of sexual violen*ce if not confined" as required by §632.480(5) because the State's experts did not establish the legal standard for risk of future behavior and create an ultimate factual issue, and the experts relied on past acts of sexual violence and assessment methods that did not predict future predatory acts of sexual violence; therefore the opinions were not supported by the record or probative of the ultimate issue.

Nelson incorporates the Standard of Review from Point VI.

To satisfy due process with respect to the dangerousness requirement, the State had the burden of proving a mental abnormality caused Nelson to be more likely than not to engage in ***predatory acts of sexual violence*** if not confined. *Morgan v. State*, 176 S.W.3d 200, 208 (Mo. App. W.D. 2005); §632.480(5). It is insufficient to prove a likelihood of sexual acts in general, or even likelihood of sexual violence; "the anticipated future acts of sexual violence [must] be predatory in nature, based on the binding statutory definition of 'predatory acts.'" *Id.* Sexually violent acts are identified in §632.480(4). "Predatory" is defined as "acts directed towards individuals, including family members, for the primary

purpose of victimization." §632.480(3). Therefore, the State was required to prove Nelson was more likely than not to commit act of sexual violence against individuals, including family members, for the primary purpose of victimization. *Morgan*, 176 S.W.3d at 211; *Care and Treatment of Cokes*, 107 S.W.3d 317, 323 (Mo. App. W.D. 2003); §§632.495, 632.480(3)-(5).

Experts Testimony Failed to Establish Legal Criteria, Fact Issue

This issue requires expert testimony because the likelihood of future acts of predatory sexual violence, assessing that risk, and interpreting actuarial instruments used to predict that risk is beyond the understanding of laypersons. *Cokes*, 107 S.W.3d at 323; §490.065. "Predatory" is a component of the legal standard which must be proven by expert testimony to make a submissible case. *Morgan*, 176 S.W.3d at 211; *Cokes*, 107 S.W.3d at 324; 632.480(3). Expert testimony is governed by §490.065 and the testimony must prove the proper legal standard was used. *McLaughlin v. Griffith*, 220 S.W.3d 319, 321 (Mo. App. S.D. 2007). For an expert opinion to be admissible, it must be supported by the record; when it is not supported by the record, it is insufficient to create a submissible case. *Morgan*, 176 S.W.3d 211.

In *Lee v. Hartwig*, an expert was not permitted to testify that a defendant was "negligent" because that term was not defined in his testimony. 848 S.W.2d 496, 498 (Mo. App. W.D. 1992). Experts are allowed to testify to the ultimate factual issues under §490.065, but the legal issue of "negligence" does not become a fact issue until the legal term is defined in accordance with the law. *Id.* Expert testimony is not admissible on issues

of law. *Id.* Failure to provide the term rendered questions to the expert "inadequately explored legal criteria." *Id.* at 499.

In *McLaughlin*, the expert's testimony never established the legal criteria and failed to make a submissible case because the expert never established "standard of care" as defined by the law. 220 S.W.3d at 321-22, 324. An expert who testifies to the "standard of care" without reference to the legal definition, "does not satisfactorily articulate the appropriate legal standard" or prove the legal standard was used. *Id.* at 321. When experts use, but do not specify the meaning of, legal terms and criteria, "experts will inevitably tend to rely upon their own views […] rather than applying the objective legal standard." *Id.* at 321-2.

Here, the State recognized expert testimony was necessary to prove their claim Nelson was an SVP. The only two witnesses for the State were both psychologists. (Tr.245, 359-60). Simmons testified, "It is my opinion that Mr. Nelson suffers from a mental abnormality and as a result of that mental abnormality he is more likely than not to commit ***sexually violent offenses*** if not confined in a secure facility."(Tr.249, 245). Kircher testified, "I believe that he meets the criteria within the statute of being more likely than not… to commit another ***sexually violent offense*** unless placed in a secure facility."(Tr.354, 359).

This testimony never satisfied the legal criteria for future risk. *McLaughlin*, 220 S.W.3d at 322; §632.480(5). Neither expert gave an opinion of Nelson's future risk of reoffending with ***predatory acts of sexual violence***, or discussed "predatory," necessary to make a submissible case. *Morgan*, 176 S.W.3d at 211; *Cokes*, 107 S.W.3d at 323. Expert

opinion that is not based on the correct legal standard cannot assist the fact finder in determine the issues at trial. §490.065.

The legal issue of "more likely than not to commit ***predatory acts of sexual violence***" never became an ultimate fact issue because the criteria for future risk was not established in accordance with the law. *Lee*, 848 S.W.2d at 498. Expert testimony is not admissible on a legal issue. *Id.*; §490.065. Testimony about "***sexually violent offenses***" with no mention of "predatory" could not establish the likelihood of ***future predatory sexually violent acts***, based on the statutory definition of predatory. *Morgan*, 176 S.W.3d at 211; §632.480(3). It is insufficient that "predatory" was later defined for the jury in Instruction 6 (L.F.89); the context of the experts' testimony did not prove they based their ultimate opinions on the proper legal standard and not on something else. *McLaughlin*, 220 S.W.3d at 321. An expert cannot rely on a personal standard; therefore, "predatory" should have been explained during testimony so that jurors could know the State's experts used the same standard as required by §632.480(3),(5). *Lee*, 848 S.W.3d at 489-9. There is no information in the record from which the jury could reasonably conclude that the State's experts' "sexually violent offense" testimony meant "***predatory act of sexual violence***" under §§632.480(3), (4).

Ultimate conclusions about Nelson's future risk were inadmissible, and unsupported by the record. *Morgan*, 176 S.W.3d at 210; *Lee*, 848 S.W.2d at 498; §§490.065, 632.480(3),(5). The testimony could not be relied upon by the State to sustain their burden of proving the anticipated future acts of sexual violence would be directed at individuals for the primary purpose of victimization. *Morgan*, 176 S.W.3d at 200, 211; §632.480(3).

"To reach that conclusion, the [trial court] had to engage in guesswork, conjecture or speculation, which it could not do." *Id.* at 211.

State Did Not Establish Likelihood of Predatory Acts of Sexual Violence

Had the experts articulated and employed the correct legal criteria, the State still failed to make a submissible case. The evidence did not establish facts supporting an inference of future predatory acts of sexual violence.

The Western District reversed a commitment in *Cokes*, where the State failed prove Cokes would reoffend in a sexually violent, predatory way. 107 S.W.3d at 323-4. The expert never gave an opinion that Cokes would sexually reoffend in a predatory and violent way. *Id.*at 323. The expert reviewed mental health and police records, rendered a diagnosis, used two actuarial risk instruments predicting a 48% and 92% chance of recidivism, and concluded Cokes was "likely to sexually reoffend." *Id.* at 320, 322. The Court ruled the testimony failed to establish that Cokes would sexually reoffend as required by §632.480(5), because the jury could not reasonably infer that Cokes would reoffend in a ***predatory sexually violent*** way. *Id.* at 323-4. The State failed to make a submissible case and the trial court erred denying the motion for a directed verdict. *Id.* at 324.

The Western District reversed an SVP commitment again in *Morgan*, 176 S.W.3d 200. There, experts relied upon past sexual violence and actuarial risk assessments designed to predict the likelihood of reoffending in a sexually violent manner to conclude Morgan was more likely than not to commit future predatory acts of sexual violence. *Id.* at 210-211. There was no evidence of an intent to victimize supporting a finding the past acts

were "predatory."[4] *Id.* 209. Past sexually violent acts alone do not support an inference of future predatory acts of sexual violence; they can show a likelihood of sexually violent re-offense, but not a likelihood of ***predatory*** acts of sexual violence. *Id.* at 210. Expert reliance on the past act of sexual violence did not support a conclusion of the likelihood of future ***predatory*** sexual violence. *Id.* at 210-11.

Similarly, expert reliance on actuarial risk assessment designed to predict the likelihood of reoffending in a ***sexually violent*** manner did not support an opinion that Morgan was more likely than not to engage in future ***predatory acts of sexual violence***. *Id.* at 211. Therefore, the Court determined that the expert's ultimate opinion was not supported by the record and was not sufficient to make a submissible case. *Id.* A conclusion that Morgan would engage in ***predatory*** acts of sexual violence required guesswork, speculation or conjecture, and the trial court erred in denying the motion for directed verdict. *Id.*

Cokes was remanded because the State could have made a submissible case by asking the expert whether the likelihood of sexual re-offense would be in a predatory and violent manner.107 S.W.3d at 325. However, asking this specific question did not hold up two years later in *Morgan*.176 S.W.3d 200. The expert in *Morgan did* testify that the

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

appellant was "more likely than not to commit future predatory acts sexual violence" at trial, but his conclusions were not supported by the record. *Id*. at 203, 211. *Morgan* was remanded because the record demonstrated that the State could have made a submissible case if it had developed a case using the current definition of "predatory." *Id.*

Here, as in *Cokes*, the experts never gave an opinion that Nelson would reoffend in a predatory and violent way. 107 S.W.3d at 323, (Tr. 245, 249, 354, 359). Their reliance on Nelson's single past act of sexual violence and on risk assessment tools did not support a conclusion on the likelihood of future predatory sexual violence. *Morgan*, 176 S.W.3d at 210-11.

Evidence Did Not Establish Past Sexual Violence Was "Predatory"

There was no testimony that Nelson's past act of sexual violence, a 1989 rape conviction, was for the primary purpose of victimization, nor that any potential future acts would be for that purpose. *Morgan*, 176 S.W.3d at 209; §632.480(3); (Tr.236, 318). Nelson went to get back money he loaned to a friend, broke into her apartment, beat her, threatened her, and raped her.(Tr.251, 318). Nelson testified that when he went to get the money, there was an altercation, and he said, "if she ain't going to give me the money then I'm going to rape you."(Tr.521). That the burglary and rape happened only proved Nelson engaged in an act that is defined as a sexually violent offense, and did not establish he acted with the specific intent, or primary purpose of victimization. To the contrary, Kircher testified Nelson raped the woman "because he felt like this was sort of reasonable way to obtain the money he was owed."(Tr.318). "A party is bound by the uncontradicted testimony of his

own witnesses, including that elicited on cross-examination." *Hurlock v Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 879 (Mo. App. 1985).

The State also relied on Nelson's prison conduct, where he deliberately exposed his penis and masturbated in view of guards, then later made threats and called women derogatory names when he was written up.(Tr.252, 255, 321). Kircher said Nelson's behavior was "intentionally putting [him]self in this situation" to be seen by someone walking by because he stood on a toilet at a count time, knowing an officer would walk by.(Tr.330). The facts only established Nelson was viewed masturbating. His conduct was not a sexually violent act because "exposing yourself is not considered sexually violent" and it is non-contact, "hands-off."(Tr.243-4). Non-contact offenses are not sexually violent offenses. §632.480(4). Nor do the facts of these violations establish "predatory" acts committed for the primary purpose of victimization. §632.480(3). Nelson testified he continued exposing himself to stay in administrative segregation where he encountered fewer problems.(Tr.527).

Simmons testified Nelson hoped the guards wanted to watch and to join in with him, that he might have hoped for a consensual encounter, and he that might not have wanted someone to be shocked and to run away.(Tr.256, 286-7). Simmons was "implying" Nelson had a desire to commit an actual sexual assault because he exposed himself in prison and presumed Nelson "would like to prey upon" guards because he wanted to be seen.(Tr.256, 286). A forensic psychiatrist's opinion based on an assumption not supported by the record is an opinion based on speculation and conjecture, and cannot form a reliable basis for an expert opinion. *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004). Similarly, she

also relied on an incident in which Nelson accidentally brushed up against a female guard, making some contact, which she said demonstrated "a desire there to have that happen."(Tr.274-5). Her conclusion is illogical; accidentally brushing up against someone is not sexually violent, predatory, or probative of a primary purpose to victimize. Simmons' opinion was not supported by facts in the record, and was insufficient to make a submissible case. *Id.; Morgan,* 176 S.W.3d at 211.

Kircher also referenced this incident, noting it was one of three minor assault violations.(Tr.324). She thought if that happened in the community, "there could be some kind of a charge filed for sexual harassment" and that it was "potentially" a contact sex offense.(Tr.325). Kircher recalled a violation in 1997 where Nelson made rude remarks to a guard and brushed his hand across the guard's front or pubic bone.(Tr.326). In 2002, Nelson received the third violation when a guard refused to shake Nelson's hand and he swung his hand back grabbing the guard's crotch area.(Tr.326-7). A conduct violation is not a sexually violent offense, nor is sexual harassment. §632.480(4). The facts do not suggest a purpose for this conduct, let alone establish a primary purpose of victimization. *Id.*

Neither the 1998 conduct nor DOC violations qualified as evidence of *predatory* sexual violence because the facts did not demonstrate Nelson acted with the primary purpose of victimization as required by §632.480(3). The evidence established Nelson committed the rape to obtain money he was owed and that he exposed himself in prison because he wanted to be seen and stay in segregation.(Tr.256, 286-7, 318, 527). The DOC violations were not sexually violent acts. §632.480(3),(4). Expert opinions that Nelson was

more likely than not to commit predatory acts of sexual violence, based on past acts, were not supported by competent evidence in the record, and did not support an inference of future predatory acts of sexual violence. *Morgan*, 176 S.W.3d at 209-11.

Experts Did Not Assess for "Predatory"

To make a submissible case "the State had the burden of adducing additional evidence of the likelihood of [Nelson] committing future ***predatory acts of sexual violence***." *Morgan*, 176 S.W.3d at 210. The risk assessment methods employed by the State's experts did not address ***predatory sexual offending***. *Id.* at 210-11. The actuarials measured risk of either "***violent offense***" *or* "***sexual offense***."(Tr.297). The Static factors correlated "with someone's risk to have another ***sexual offense,***" with "recidivism," and the numerical score that tells you "there's a certain percentage likelihood of ***re-offense***"(Tr.266-7). The Stable measures factors that do change and can be treated.(Tr.335). There are additional factors that "correlate with ***recidivism***" and increase or predict the likelihood of "***sexual offense recidivism***" or general violence.(Tr.267-70,344). This testimony established that the actuarial instruments and other factors were only predictive of future sexual violence, but not of ***predatory sexual violence***. *Id.* at 210; *Cokes*, 107 S.W.3d at 323-4.

Simmons scored the Static-99R(Tr.267), but did not provide a score or recidivism estimate, as done in *Cokes*, to convey any likelihood of general sexual recidivism. *Id.* at 322. She acknowledged that her score was one that "could go either way, it might or might not be somebody that was more likely than not to reoffend," but ultimately concluded Nelson was "more likely than not to commit ***sexually violent offenses*** if not

confined."(Tr.249, 304). Kircher said the Static score put Nelson in a "moderate/high risk category" compared to other sex offenders; the Stable meant Nelson had "a high need for sex offender treatment;" and the two instruments combined to get "high risk."(Tr.341, 343). She concluded Nelson was more likely than not "to commit another ***sexually violent offense*** unless placed in a secure facility."(Tr.354).

Both Kircher's and Simmons' testimony were like that of the expert in *Cokes*. Neither gave an opinion that Nelson would sexually reoffend in a ***predatory and violent way***, only that he was "more likely than not to commit ***acts of sexual violence*** if not confined to a secure facility." (Tr. 249, 245, 354, 359). *Id.* at 323. Their testimony lacked the details necessary for a jury to reasonably infer from actuarial scores or other risk factors considered that Nelson would reoffend in a ***predatory sexually violent*** way. *Cokes*, 107 S.W.3d at 323-324. The record did not support expert opinion, or inference, of future predatory sexual violence and was insufficient to make a submissible case. *Morgan*, 176 S.W.3d at 211; §632.480(3)-(5). The State failed to prove Nelson's likelihood of committing ***predatory acts of sexual violence***, even using the correct statutory definition of predatory. *Id.* Nelson was entitled to a directed verdict and the trial court erred in failing to sustain his motion. *Morgan*, 176 S.W.3d at 211; *Cokes*, 107 S.W.3d at 234.

Conclusion

The State's experts' did not offer opinions of Nelson's future risk in terms of the legal standard, ***predatory acts of sexual violence***, and did not establish an ultimate factual issue. *Morgan*, 176 S.W.3d at 211; *Lee*, 8 48 S.W.2d at 498; §632.480(3),(5). Reliance on Nelson's single past act of sexual violence and on the risk assessment tools employed did

not support a conclusion on the likelihood of future predatory sexual violence. *Morgan*, 176 S.W.3d at 210-11. Their ultimate opinions were not supported by the record, were not probative of a probability that Nelson was more likely than not to commit an act of predatory sexual violence if not confined, and were insufficient to make a submissible case. *Morgan*, 176 S.W.3d at 211; §§632.495, 632.480(3)-(4).

There is no evidence in the record suggesting the State could demonstrate Nelson's primary purpose in committing the sexually violent act was for victimization. The actuarials and other risk factors used to predict his future risk measured risk of *either* violent offense *or* sexual offense, not "sexual violence" or "predatory acts of sexual violence."(Tr.297); *Morgan*, 176 S.W.3d at 211; §§632.495, 632.480(3)-(4). Based on the facts the record, the State cannot make a submissible case if remanded.

Therefore, the trial court erred in denying his motion for a directed verdict at the close of the evidence, violating his rights to due process and a fair trial. U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10, §632.495. This Court must reverse the judgement of the trial court and release Nelson.

VIII.

The trial court erred in denying Nelson's motion for a directed verdict, and in committing him to DMH, because this violated Nelson's rights to due process of law and a fair trial as guaranteed by the U.S. Const., amends. V, XIV, Mo. Const. art. I, §§2, 10 and §632.495, in that the evidence was insufficient to prove Nelson was "*more likely than not* to engage in predatory acts of sexual violence if not confined in a secure facility" as required by §632.480(5) because "more likely than not" must mean a probability greater than 50%; the State's experts did not quantify Nelson's future risk; did not articulate what "more likely than not" meant; did not identify how they determined Nelson was "more likely than not;" and without such explanations the jury was unable to evaluate the expert testimony and was left unguided in their application of the standard to the facts of the case.

Nelson incorporates the Standard of Review from Point VI and analysis from Point VII.

To satisfy due process, one right afforded to Nelson is the right to require the State to prove by clear and convincing that he is a sexually violent predator, including proving he was *more likely than not* to commit predatory acts of sexual violence. §632.495.

More Than 50% Must Be the Legal Standard

"More likely than not," while the threshold level of risk for civil commitment, is not defined by the SVP Act. No Missouri SVP case has specifically defined "more likely than not," but experts have testified it means greater than 50%. *See, e.g., In re Morgan*, 398

S.W.3d 483, 488 n. 7, 489 (Mo. App. S.D. 2013); *Smith v. State*, 148 S.W.3d 330, 335 (Mo. App. S.D. 2004). The Eastern District ruled that to meet the "more likely than not" standard, it is necessary to identify some variable that changes the base rate expectation of re-offense to a ***probability of re-offense***. *In re Coffel*, 117 S.W.3d 116, 127 (Mo. App. S.D. 2003). Other cases have discussed the phrase in terms of statistical probability. *See, e.g. Wollen v. DePaul Health Center*, 828 S.W.3d 681 (Mo banc 1992) (discussed in terms of statistical evidence of greater or less than 50%), *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. E.D. 1988)(requiring expert testimony quantifying probability of occurrence as greater than 50%).[5]

Elam v. Alcolac, Inc. was a toxic tort lawsuit in which the plaintiffs claimed they had an increased risk of cancer due to exposure to a carcinogen. 765 S.W.2d 42. The plaintiffs were at a "very high risk" of developing cancer in the future," but the expert could not quantify that risk. *Id.* at 206-7. A medical opinion that a future result will happen is an estimate of probability, and informs the consequence of the future result is "more likely than not." *Id.* at 208. Recovery required proof of risk through expert opinion quantifying

[5] But see *Matter of Hasty*, 446 S.W.3d 336 (Mo. App. S.D. 2014). A question of expert testimony explaining "more likely than not" was presented, but the appellant was deemed to have abandoned his claim on appeal because he did not allege any prejudice and therefore could not show any error. *Id.*

the probability of occurrence of greater than 50%. *Id.* The expert's inability to quantify the risk rendered his opinions about the future risk nonprobative. *Id.*

Washington,[6] Wisconsin,[7] and Iowa[8] require proof of risk of re-offense of "more likely than not," or greater than 50%. *See In re Detention of Brooks*, 36 P.3d 1034, 1045 (Wash. Banc 2001)(overruled on other grounds by *In re Detention of Thorell*, 72 P.3d 708 (Wash. Banc 2003))("likely," means a statistical probability of "more likely than not, that is, more than 50[%]"), *State v. Barry L. Smalley*, 741 N.W.2d 286, 287 (Wisc. App. 2007)(jury must find "there was more than a 50% chance") and *In re Detention of Shearer*, 711N.W.2d 733(IowaApp.2006)(assumption more likely than not required likelihood greater than 50%). In Washington, the jury must decide "whether the probability of the defendant's reoffending exceeds 50[%]." *Brooks*, 36 P.3d at 1046. "[W]hen an expert testifies that a person has a likelihood of reoffending, it means that of the persons who suffer from this mental abnormality or personality disorder, more than 50[%] will engage in predatory acts of sexual violence if not confined in a secure facility." *Brooks*, 36 P.3d at 1046. In Wisconsin, "'[m]ore likely than not' is not an obscure or specialized term of art,

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

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

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

but a commonly-used expression[,]" and attorneys and experts are permitted to discuss the 50% threshold. *Smalley*, 741 N.W.2d at 289-290.

Expert Testimony

This issue requires expert testimony because the likelihood of future acts of predatory sexual violence is beyond the understanding of lay persons. *Care and Treatment of Cokes*, 107 S.W.3d 317, 323 (Mo. App. W.D. 2003). To be admissible, the testimony must be supported by the record and the proponent must demonstrate the facts and data the expert relied on are reasonably relied upon by experts in the field in forming the relevant opinion, and are otherwise reasonably reliable. *Morgan v. State*, 176 S.W.3d 200, 211 (Mo. App. W.D. 2005), §490.065.3. When the opinion is not supported by the record, it is insufficient to create a submissible case. *Id.* The testimony must prove the proper legal standard was used, by defining operative legal words during the expert's testimony so that jurors can evaluate whether the expert used the same standard as that required under the law. *McLaughlin v. Griffith*, 220 S.W.3d 319, 321 (Mo. App. S.D. 2007). Otherwise, "experts will inevitably tend to rely upon their own views […] rather than applying the objective legal standard." *Id*.

An expert cannot rely on a personal "more likely than not" standard; her testimony must demonstrate they based their opinion on a well-recognized standard. *Lee v. Hartwig*, 848 S.W.2d 496, 498-99 (Mo. App. W.D. 1992). In *Lee*, the plaintiff's expert failed to give the definition of the operative legal word "negligence," and therefore was not permitted to testify to a conclusion the defendant was negligent. *Id.* at 489. Experts are allowed to testify

to the ultimate issues, but the legal issue of "negligence" does not become a fact issue until the legal term is defined in accordance with the law. *Id.*

Experts may even give testimony on complex matters, industry standards, technical statutes and regulations. *See Hill v. City of St. Louis*, 371 S.W.3d 66, 77 (Mo. App. E.D. 2012), and *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 513 (Mo. App. E.D. 2007) overruled on other grounds by, *Badahman v. Catering St. Louis*, 2013 WL 1422187 (Mo. 2013). In *Strong*, the Eastern District affirmed an expert's ability to testify to regulatory requirements, the ultimate issue in the case, and to interpretation of their meanings. *Id.* at 513-14. The expert's explanations of the legal requirements became the definition of negligence in the case and the standard against which the jury determined whether the defendant was negligent. *Id.* Without the expert testimony, the jury would have been unguided in interpreting the regulations at issue. *Id.*, n. 5.

"More likely than not" is a crucial phrase of measurement because it is the threshold for the risk that must be proven to justify civil commitment. As in *Strong*, expert testimony was necessary here to interpret the meaning of the statutory criteria for commitment. *Id.* The experts' explanations of "more likely than not" would become the threshold for risk in Nelson's case and the standard against which the jury would determine whether Nelson was more likely than not. *Id.* A forensic psychologist's opinion estimating the probability that a future predatory, sexually violent offense is "more likely than not" to occur must be quantified as greater than 50%. *Elam*, 765 S.W.2d at 208; §632.480(5). An inability to quantify the risk renders the expert testimony nonprobative. *Id.*

Here, neither of the State's witnesses testified "more likely than not" meant a probability quantified as greater than 50%, or explained what "more likely than not" meant in the context of an SVP risk assessment. Simmons testified most people think "more likely than not" means 50-51%, but she did not assign a number to the threshold.(Tr.302). Therefore, "more likely than not to commit predatory acts of sexual violence" did not become an ultimate fact issue for the jury because that statutory threshold was never identified or explained by the experts. *Lee,* 848 S.W.2d at 498. Without testimony explaining "more likely than not," the State failed to establish that either expert applied the proper legal standard, or relied on reasonably reliable facts or data about what constitutes "more likely than not," in arriving at their opinion. *Morgan,* 176 S.W.3d at 211; *McLaughlin,* 220 S.W.3d at 321; §490.065.3. Jurors could not possibly know the opinions were based on the law, on "well recognized standards," and not on something else, like a personal, unidentified standard. *McLaughlin,* 220 S.W.3d at 321; *Lee,* 848 S.W.2d at 498. The jury was left unguided in interpreting the Act and deciding Nelson's future risk. *Strong,* 261 S.W.3d at 513. Without expert testimony on the matter, lay fact finders may "establish arbitrary standards on matters beyond their common experience and knowledge, and decide crucial issues on speculation, conjecture and surmise." *McLaughlin,* 220 S.W.3d at 323.

Not only did the State's experts fail to demonstrate they used the correct standard, they also failed to demonstrate how they ultimately decided Nelson was "more likely than not." Simmons scored the Static-99R(Tr.267), but she did not provide a Static score or recidivism estimate to convey any likelihood of future offense during her testimony. Even

more, she acknowledged the score she came up with was one that "could go either way, it might or might not be somebody that was more likely than not to reoffend."(Tr.304). Simmons did not explain how or why she ultimately concluded Nelson was "more likely than not." Equivocal "might" or "could have" language is not sufficient to make a submissible case based on that testimony. *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145 (Mo. App. W.D. 2006)(equivocal language does not rise to level necessary for consideration of the evidence by the fact finder)(overruled on other grounds by *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 40 (Mo. banc 2013)); *Abbott v. Haga*, 77 S.W.3d 728, 732–33 (Mo. App. S.D. 2002)(testimony that a given action or failure to act "might" or "could have" yielded a given result is devoid of probative value).

Kircher said a score of 4 on the Static put Nelson in a "moderate/high risk category," the Stable score meant Nelson had "a high need for sex offender treatment," and she combined her Static and Stable scores to get "high" risk.(Tr.341, 343). Like Simmons, she did not provide a recidivism estimate.(Tr.341). These facts only establish Nelson had a Static and Stable score, and could be "moderate/high risk" or "high treatment need." This testimony was nonprobative of "more likely than not" because the experts failed to quantify Nelson's risk. *Elam,* 765 S.W.2d at 208. There was no testimony that "high need" for treatment, "high," or "moderate/high" risk meant "more likely than not." Therefore, any ultimate opinion Nelson was "more likely than not" was not supported by the record or sufficient to make a submissible case. *Morgan,* 176 S.W.3d at 211.

To prove Nelson was "more likely than not," the State put on evidence of additional factors that "correlate with ***recidivism***" and increase or predict the likelihood of "***sex***

offense recidivism" or general violence.(Tr. 267-70, 344). Simmons identified eight such factors and Kircher found seven factors she said increased Nelson's risk of reoffending.(Tr.269-271, 344-50). Neither expert expressed any degree of risk associated with any risk factor, explained how risk factors were combined with the actuarials, or testified that the risk factors increased Nelson's actuarial prediction of risk.

In fact, Kircher testified that she doesn't assign any value to the additional risk factors or add them up in terms of increased risk; she only identified that factors were present.(Tr.382). Rosell testified that the research says the risk factors cannot be added up and combined with a Static score to claim an increased risk.(Tr.458). He also testified that only one of these other risk factors that had any predictive value.(Tr.457). Therefore, any opinion Nelson was "more likely than not" based on combining actuarial risk and risk factors was not supported by the record and was not sufficient to make a submissible case. *Morgan*, 176 S.W.3d at 211.

The only probative evidence of Nelson's future risk of sexual re-offense was Rosell's testimony. Only Rosell quantified Nelson's risk. He testified a Static score of 4, the same score Kircher and Simmons gave, corresponded to a 10% risk of recidivism over five years and was "low risk."(Tr.453,462). Though the State's experts considered other factors that may increase risk, there was no way to quantify that risk, add that risk, or combine that risk with the Static.(Tr. 382, 458). As such, the State was left with an actuarial prediction that Nelson had a 10% chance of recidivating.(Tr.453). Neither of the State's experts explained how a 10% chance of recidivating was "more likely than not." At that rate, there is a 90% probability of *not* recidivating, which means the probability of not

reoffending was greater than the probability of reoffending. Nelson was more likely to *not* reoffend, than to reoffend.

Prejudice

An expert opinion that Nelson was "more likely than not" is meaningless if the expert does not tell the jury why he is "more likely than not" or what makes him so. An expert must explain what he or she means when claiming an individual is "more likely than not" so that opinion can assist the jury in determining the ultimate issues. When experts are allowed to testify to the threshold without identifying what that means, each expert could use a different standard, and the jury has no way to know that, to evaluate the credibility of the expert's opinion, or weigh the conflicting testimony from the experts concerning the likelihood of reoffending. The jury was left unguided in interpreting the legal threshold under the statute. *McLaughlin*, 220 S.W.3d at 321; *Lee*, 848 S.W.2d at 498-99; *Strong*, 261 S.W.3d at 513.

Without an identified threshold, each individual juror was free to assess and use his or her own meaning of "more likely than not," and collectively the jurors could reach a verdict without a consensus as to the threshold required for civil commitment. The statutory threshold is not subject to individual interpretation; it must be definite each time a jury is asked to decide whether someone meets it. Otherwise, SVP determinations would be arbitrary and meaningless.

That "more likely that not" meant a risk exceeding 50% is a critical part of any commitment defense. Nelson did not argue he presented *no* risk, but that the risk he presented was not enough under the SVP Act. All experts gave Nelson the same Static

score, which correlated with a 10% risk of recidivating.(Tr.453,462). When "more likely than not" is undefined and unexplained, Nelson has no meaningful way to defend against commitment and the State is not accountable to proving its case no matter how high or low his risk may be.

Conclusion

The experts' opinions that Nelson was more likely than not to commit future acts of sexual violence was unsupported by competent, substantial evidence in the record, necessary to make a submissible case. *Morgan*, 176 S.W.3d at 208. There were no facts from which the jury could make a reasonable inference that Nelson met all criteria for SVP civil commitment. Therefore, the trial court erred in denying Nelson's motion for a directed verdict, violating his rights to due process and a fair trial, and this Court must reverse. U.S. Const. amends. V, XIV, Mo. Const. art. I, §§2, 10, §632.495.

There is no evidence available in the record enabling to the State to make a submissible case on remand. The record demonstrates all experts arrived at the same actuarial risk score, which predicted at 10% chance of re-offense.(Tr.453,462). It also demonstrates there is no way for the experts to quantify risk attributed to the additional factors considered, and no way to add that unquantifiable risk to the actuarial predictions.(Tr. 382, 458). A 10% chance of a future offense is not a ***probability*** of a future offense and cannot be "more likely than not." Therefore, Nelson is entitled to discharge.

IX.

The trial court erred in sustaining the State's objection and in excluding testimony from Branetta Cooper that Nelson did not expose himself to his sisters or their friends and did not get into fights when he was a child, and that she did not know him to engage in exhibiting behaviors, because this violated his right to due process, a fair trial, and to present evidence in his defense, guaranteed by U.S. Const., amends. V, XIV, Mo. Const. art. I, §§2, 10, and §§632.489 and 632.492, in that the State opened the door to evidence of Nelson's childhood and exhibiting behaviors; experts considered and relied upon those behaviors; Cooper's testimony went directly to the factual basis of opinions held by experts; and if the jury accepted Nelson's evidence, they could have found he was not an SVP.

The trial court sustained the State's objection when Nelson asked Cooper if he had ever exposed himself to any of the sisters.(Tr.409-10). The State contended the question called for inadmissible good character evidence, Cooper was not an expert, and the incidents "have no impact on his ability – on his future likelihood to commit another act of sexual violence."(Tr.409-10). The State's objections were also sustained when Nelson asked whether he got into fights as a child.(Tr.411-12) and if she ever observed behavior consistent with his sexual misconduct violations.(Tr.416-17). Nelson constitutionalized his objections(Tr.411) and raised the issue in his new trial motion.(L.F.95-9).

Standard of Review

Generally, decisions as to the admissibility of evidence are reviewed for an abuse of discretion. *Elliot v. State*, 215 S.W.3d 88, 92-93 (Mo. banc 2007). However, that is not so when an evidentiary principle or rule is violated. *State v. Walkup*, 220 S.W.3d 748, 756 (Mo. banc 2007). Whether there is an evidentiary error is first determined by examining applicable principles and rules of evidence. *Id.* at 757. The evidence must be relevant, and the relevancy determination will be overturned if against the logic of the circumstances, reviewed in context of the entire trial to determine if the defendant received a fair trial. *Id.* If relevant, evidentiary errors are reviewed for prejudice affecting the outcome of the trial. *Id.* In criminal cases, the erroneous exclusion of evidence creates a rebuttable presumption of prejudice, because a defendant has a constitutional right to present a complete defense. *Id.* Nelson had a statutory and constitutional right to present a defense, and evidence in support of his defense. *In re Norton*, 123 S.W.3d 170, 175 (Mo. banc 2003);§§632.489,632.492. Therefore, this Court must presume an erroneous exclusion of evidence was prejudicial. *Walkup*, 220 S.W.3d at 757.

Analysis

Excluding Cooper's testimony was a prejudicial error and deprived Nelson of a fair trial. Cooper's testimony was relevant to the defense; it also disproved evidence offered by the State concerning Nelson's early life and exhibiting behaviors, facts relied upon by the State's witnesses in assigning diagnoses, determining mental abnormality, and assessing Nelson's future risk.

In *Walkup*, the trial court excluded testimony of the only defense witness, an expert who would have testified that the defendant had a mental disorder that affected his ability

to deliberate before committing a murder. *Walkup*, 220 S.W.3d at 751-2. The defense argued that evidence should be considered in determining whether Defendant deliberated, and element of the crime charged. *Id.* at 752. The evidence was legally and logically relevant "to the issue of whether the jury should believe the state's evidence" about Defendant's mental state, and the trial court erred in excluding it. *Id.* at 757-8. The error was prejudicial, because it excluded the evidence of the defense, and because it went directly to Defendant's mental condition and whether he deliberated, an element of the State's case. *Id.* 758. If the jury heard the defense's evidence, it could have found that Defendant did not possess the required mental state and convicted him of a lesser offense. *Id.* It was error to exclude evidence that bore on one of the elements of the offense charged. *Id.*

This case is similar to *Walkup*. Here, Nelson sought to introduce evidence relevant to a mental disorder and two elements of the State's case. The State's experts testified to Nelson's diagnoses of ASPD, Paraphilia, NOS and exhibitionism, Nelson's childhood behaviors, and conduct exposing himself in prison.(Tr.257, 259, 270, 318). An ASPD diagnosis required evidence of conduct problems prior to the age of 15.(Tr.259). Kircher wanted information about Nelson growing up, at least back to adolescence, in formulating a diagnosis.(Tr.316). Nelson was defiant and had trouble before 15; he was sent to Division of Youth Services, did not mind his grandmother, and had a disruptive childhood.(Tr.259). This information purportedly came from interviews with Nelson's grandmother.(Tr.259). The facts from Nelson's childhood indicated increased risk of future recidivism, and difficulty with the law early-on relates to an inability to control behavior throughout

life.(Tr.257, 270). Experts testified about misconduct violations wherein Nelson exposed his penis, claiming that was evidence supporting diagnoses and re-offense risk.(Tr.318, 321-2, 243-4, 257, 340-1, 283).

Nelson had a right to defend himself, and to present evidence in his defense at trial. U.S. Const., amends. V, XIV; Mo. Const. art. I, §§2, 10; §§632.489, 632.492. To defend against the State's claims that Nelson had these diagnoses, a mental abnormality, and risk justifying commitment, Nelson sought to present evidence of his childhood conduct. Nelson called his sister, Cooper, who lived with him at that stage in his life.(Tr.402-3, 409). Her testimony demonstrated she was an eye-witness to Nelson's day-to-day behavior.(Tr.402-9), and was the same type of evidence as the information from Nelson's grandmother.(Tr.259). Whether Nelson got into fights in his childhood bore directly on whether he had a conduct disorder before the age of 15, and therefore whether he could be diagnosed with ASPD.(Tr.411). However, the court excluded Cooper's testimony about her observations and knowledge of that childhood conduct.(Tr.411-12).

Nelson also sought to ask Cooper about her personal knowledge of any exhibiting behaviors in Nelson's history.(Tr.409-10, 417). Exposing oneself is a type of paraphilia, like Paraphilia, NOS.(Tr.244). Ordinarily, paraphilias emerge in adolescence and are lifelong, and normally Dr. Simmons would look for a pattern, more than one case of sexual assault against a woman, in order to diagnose paraphilia.(Tr.283-4). The only evidence of exhibitionism was Nelson's violations for exposing himself in prison.(Tr.283, 330). That Nelson lived in a house with five sisters, who had girlfriends over, without exposing himself is probative of whether any paraphilic behavior "emerged" in adolescence and

whether he could control his behaviors, and was necessary for the jury to assess and weigh the experts' diagnoses and opinions. Cooper was aware of Nelson's exhibiting violations, and her knowledge of consistent behaviors in the community was probative of whether Nelson had a lifelong history of that behavior and of his ability to control his behavior. This was direct evidence defending against any notion that exhibiting behaviors "emerged" in adolescence or were lifelong, and of Nelson's behavioral control.

Furthermore, the State opened the door to evidence of Nelson's early life, adolescence, fighting, and exhibiting behaviors in its case-in-chief.(Tr.242-5, 257-9, 270, 283, 318, 321-2, 340-1, 360). "Any competent testimony that tends to explain, counteract, repel or disprove evidence offered by [one party] may be offered in rebuttal." *Howard v. City of Kansas City*, 332 S.W.3d 777, 785 (Mo. banc 2011). When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible. *Id.* If, as the State argued, testimony about facts and incidents in Nelson's life relating to those matters "have no impact on his ability - - on his future likelihood to commit another act of sexual violence."(Tr.410), and therefore testimony should not have been admitted at all, it was still an error to exclude Cooper's testimony. Evidence that might be otherwise inadmissible cannot be excluded if the objecting party was first to introduce it. *Lewy v. Farmer*, 362 S.W.3d 429, 433 (Mo. App. S.D. 2012), citing *Union Elec. Co. v. Metro. St. Louis Sewer Dist.*, 258 S.W.3d 48, 57 (Mo. banc 2008).

Nelson's questions to Cooper were not about a "specific incident" seeking to demonstrate "general character," and sustaining the State's objection for those reasons was illogical and deprived Nelson of a fair trial.(Tr.409), *Walkup*, 220 S.W.3d at 757. Cooper's

testimony went directly to the issue of Nelson's mental condition because it was probative of the factual behaviors necessary to make the diagnoses the State claimed amounted to mental abnormalities, and went directly to behaviors the State claimed made him "more likely than not." Both were elements of the State's case. Cooper's testimony also impeached the veracity and credibility of the State's experts, rebutted, contradicted and disproved their testimony about Nelson's early life, the factual presence of diagnostic criteria and risk factors, and was admissible rebuttal evidence. *Howard*, 332 S.W.3d at 785. Because the State first opened the door, the State could not complain and Nelson's evidence could not be excluded. *Id.*, *Lewy*, 362 S.W.3d at 433.

Had the jury heard this testimony, it could have determined Nelson did not have a conduct disorder prior to 15 necessary to diagnose Nelson with ASPD, and therefore ASPD was not a mental abnormality. The jury could have determined Nelson did not develop a paraphilia in adolescence, because there would have been testimony that Nelson did not expose himself during that time, nor until he was in DOC, and therefore he did not have a mental abnormality. The jurors could have determined there was no evidence of multiple paraphilias or juvenile conduct problems contributing to a risk of re-offense, and therefore Nelson was not "more likely than not," even if they believed a mental abnormality existed. If the jury accepted the evidence from Cooper as negating any diagnosis, mental abnormality, or risk, they would not have found him to be an SVP.

The trial court erred in sustaining the State's objections and in excluding Cooper's testimony, violating Nelson's rights to due process, a fair trial, and to present evidence in his defense. U.S. Const., amends. V, XIV; Mo. Const. art. I, §§2, 10; §§632.489, 632.492.

This Court must reverse the order and judgment of the trial court and remand for a new trial.

X.

The trial court erred in sustaining the State's objection and excluding evidence of Nelson's home plan, because this violated his right to due process, a fair trial, to present evidence in his defense and to cross-examine witnesses, guaranteed by U.S. Const., amend. V, XIV, Mo. Const. art. I, §§2, 10, and §§632.480, 632.489, 632.495, and 632.492, in that Nelson's future risk of re-offense was an element of the State's case; Kircher considered and relied upon Nelson's home plan in assessing that risk; the State opened the door to the evidence; without it the jury was misled by inaccurate information; and if the jury accepted Nelson's evidence, they could have found he was not an SVP.

The State filed a motion *in limine* and successfully excluded evidence of "support structures in place" and any other conditions that might exist if Nelson were released, which it called "external constraints,"(L.F.54-56, 60-2; Tr.47). That ruling meant Nelson could not tell the jury he would live with Cooper if released,(Tr.47). Nelson claimed that home plan information was relied upon by experts in assessing risk, was relevant, and that excluding the evidence prevented disclosure of the basis of experts' opinions and denied his right to cross-examination.(L.F.97).

Standard of Review

"When a motion in limine is sustained, its propriety is judged by the admissibility or inadmissibility of the excluded evidence." *In re Calleja*, 360 S.W.3d 801, 803 (Mo. App. E.D. 2011). Therefore, Nelson incorporates the Standard of Review set out in Point IX.

Analysis

The SVP Act gives Nelson rights given to criminal defendants, including the right to present evidence in his defense. *In re Norton*, 123 S.W.3d 170, 175 (Mo. banc 2003);§§632.489,632.492. Another protection is the right to hire one's own expert to conduct an evaluation and form an opinion as to the ultimate issues. §632.489.4. An expert may offer opinion testimony on the ultimate issues at trial. §490.065.2, *Lee v. Hartwig*, 848 S.W.2d 496, 498 (Mo. App. W.D. 1992). Expert testimony is required on the issue of future risk for predatory acts of sexual violence because that is beyond the understanding of lay persons, but must be decided by the jury. *Care and Treatment of Cokes*, 107 S.W.3d 317, 323 (Mo. App. W.D. 2003).

Kircher testified Nelson had increased risk for re-offense because he had poor cognitive problem solving, meaning he could not generate solutions to problems of everyday living.(Tr.347). He was impulsive, because of unstable employment and housing, no day-to-day routine, and would wake up every day without a plan.(Tr.348). He had no plan for going home or getting ready to get home "the way you would expect someone to do after spending more than 20 years incarcerated," and did not know where he was going when she talked to him about his home plan.(Tr.349).

The trial court sustained the State's motion, preventing Nelson from presenting evidence that Nelson would live with his sister, Cooper, if released.(Tr.47). The State contended this was inadmissible "external constraint" evidence excluded under *Lewis v. State*, 152 S.W.3d 325 (Mo. App. W.D. 2004), *Care and Treatment of Cokes v. State*, 183

S.W.3d 281, 285–86 (Mo. App. W.D. 2005), and *In re Calleja*, 360 S.W.3d 801, 803 (Mo. App. E.D. 2011)(L.F.124).

In *Lewis*, the trial court prohibited cross examination about continued supervision where Lewis argued "the safeguard of rigorous supervision during probation [made] it less likely that he would engage in predatory acts of sexual violence if not confined in a secure facility." 152 S.W.3d at 330. The issue was not whether some other external constraint would make it less likely that he would engage in the acts. *Id.* at 332. In *Cokes*, the trial court excluded evidence of proposed post-release medication arrangements Cokes claimed would allow the jury to consider whether his mental disorder prevented him from participating in treatment voluntarily. 183 S.W.3d at 285. The excluded evidence was not relevant to determining whether Cokes had a mental abnormality, and the record established Coke's evidence was to show he had support structures in place to keep him medically compliant. *Id*. In *Calleja* the State's motion *in limine* to exclude evidence of immigration status and potential deportation was granted. 360 S.W.3d at 802. Calleja's offer of proof included testimony that depending on federal procedures, a deportation order could be entered and he could be deported. *Id.* at 803. Calleja's proffered evidence that he might be subject to deportation was irrelevant to mental abnormality and future risk issues. *Id.*

These cases demonstrate the excluded evidence was offered as independent, substantive evidence, and there was no testimony that any expert relied on the excluded evidence in formulating an opinion of mental abnormality or risk. In contrast, in *Brasch v. State*, our Supreme Court cited expert testimony noting the absence of protective factors,

specifically supervision, in a risk analysis. 332 S.W.3d 115, 118 (Mo. banc 2011). This case is like *Brasch*, because the evidence was considered in the experts' risk assessments and was relevant to the issue of Nelson's future risk. In the instant case, the State's expert considered Nelson's "home plan" and testified that because Nelson did not know where he would live, had no plan for going home, was not getting ready to go home, had unstable employment and housing, and had no plans for everyday living, his risk of future re-offense was higher.(Tr.347-9).

Moreover, in *Lewis, Cokes* and *Calleja*, the "external constraints" were all things that someone else would force upon the respondent. Evidence that Nelson would live with his sister Cooper was not an external constraint because it was not evidence of a condition that the government would impose upon him, was not evidence of affirmative action by community support members to manage a mental illness for him, and was not potential action the government could take to remove him. It was simply evidence of where Nelson would live.

The evidence was legally and logically relevant "to the issue of whether the jury should believe the state's evidence" about Nelson's future risk. *See State v. Walkup*, 220 S.W.3d 748, 757-8 (Mo. banc 2007). The error excluding it was prejudicial because it was the only evidence in Nelson's defense that he was not more likely than not to reoffend, or was not at an increased risk to reoffend, because of a lack of home plan, as alleged by the State. The evidence went directly to the risk element of the State's case. *Id.* at 758. The error also denied Nelson's right to present evidence in his defense, including an expert opinion, and to cross-examine the State's witnesses. *Norton*, 123 S.W.3d at 175;

§§632.489, 632.492, 490.065. Without hearing Nelson's home plan evidence, the jury was misled by the testimony that he had no home plan. This was factually inaccurate, as both the State's attorneys and witness knew Nelson's plan was to live with his sister.(Tr.47-8). If the jury had heard the defense's home plan evidence, the jury could have found that Nelson did not possess risk factors increasing or contributing to his risk of re-offense, and therefore that he was not "more likely than not." If the jury accepted this evidence, it would not have found him to be an SVP.

Furthermore, even if such evidence could be considered an inadmissible external constraint, it counteracted, repelled and disproved evidence offered by the State's witnesses, and because the State opened the door to the topic, admission of Nelson's evidence was permissible. *Howard v. City of Kansas City*, 332 S.W.3d 777, 785 (Mo. banc 2011). Nelson's home plan was not inadmissible or objectionable because the State was the first party to introduce testimony about it and about its significance to Kircher's opinion. *Lewy*, 362 S.W.3d at 433. Nelson's evidence could not be excluded. *Id.*

The trial court erred in granting the State's motion and in excluding evidence of Nelson's home plan. This Court must reverse the order and judgment of the trial court and remand for a new trial.

CONCLUSION

This Court must reverse the order and judgement of the trial court and release Nelson from confinement as demonstrated in Points I-VIII. The Court must reverse and remand for a new trial as demonstrated in Point IX-X.

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 23,457 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On October 20, 2016 electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Chelseá R. Mitchell

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