IN THE
MISSOURI SUPREME COURT

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

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 REPLY BRIEF

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JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

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

ARGUMENT

Reply I: Preservation of Claims

(Argument I, III)

The State's unsupported contention that Nelson did not preserve the issues raised in his brief is a thinly veiled attempt to distract this Court from addressing the significant constitutional deficiencies in the SVP Act and from giving credence to *Schafer*'s findings of constitutional failures, including those in annual reviews, the annual review process, and petitioning for conditional release. 129 F. Supp.3d 839, 845, 848-49, 850-52, 854-55, 857-59, 868-699(E.D.Mo.2015)(StateBr.18-19). *Karsjens* echoed the same concerns and highlighted the constitutionally impermissible burden shifting and degree of proof in release cases. 109 F.Supp.3d 1139, 1169(D.Minn.2015)(facial challenge to statutory discharge standards).

This Court said, "[o]ur rules for preservation of error for review are applied, not to enable the court to avoid the task of review, nor to make preservation of error difficult for the appellant, but, to enable the court—the trial court first, then the appellate court—to define the precise claim made by the defendant." *State v. Amick*, 462 S.W.3d 413, 415 (Mo.banc2015). Nelson raised his constitutional challenges as the earliest opportunity and kept them alive during the course of the underlying proceedings. *State v. Liberty*, 370 S.W.3d 537, 546(Mo banc2012).

Nelson challenged the entire SVP statutory scheme because it violates his constitutional rights to due process and equal protection, and freedom from double jeopardy, ex post facto laws, and cruel and unusual punishment.(L.F.15-53;25: "§632.480,

et seq., RSMo … violates Respondent's constitutional right"). He discussed indefinite incarceration within a secure facility in light of no unconditional release(L.F.19,26,27,29), interpretation of release statutes(L.F.32), petitioning for conditional release(L.F.32), the burden of proof(L.F.19,33), and both a right to silence and jury trial demands(L.F.33,106). Each of these is addressed in provisions of the Act. *See* §§632.498, 632.501, 632.504. This was sufficient to apprise the trial court of the basis for Nelson's objections. *Amick*, 462 S.W.3d at 415.

By challenging the constitutionality of the Act's disparate and inadequate procedural and substantive protections, like the State's jury trial demand and the statutory omission of the right to silence, for example, Nelson presented due process and equal protection claims to the trial court.(L.F.24-35). Overruling Nelson's motion to dismiss meant the trial court did not believe Nelson had those statutory or constitutional rights.(L.F.3;Tr.5-6). Nelson even renewed his motions at trial.(Tr.107-8). But the State argues Nelson did not preserve his claims.(StateBr.29).

This Court rejected a similar preservation argument in *State v. Long*, 140 S.W.3d 27, 32, n.7(Mo.banc2004). There, Defendant attempted to introduce evidence regarding Victim's previous false allegations, but did not cross examine the witness first. *Id.* at 30, 32 n.7. The trial court had already refused Defendant's offer of proof on the matter as irrelevant. *Id.* at 32, n.7. This Court stated, "[i]t would, therefore, likely have been futile for counsel to attempt to cross-examine the victim regarding subject matter that the trial court had already ruled irrelevant." *Id.* "The law does not compel the undertaking of a useless act for the lone aim of complying with a technical requirement." *Id.* Here, given

the trial court's rulings, it would have been futile for Nelson to object again to empaneling a jury or to claim right to silence.[1] *Id.*

Nelson preserved his complaints by incorporating allegations of error denying his motions to dismiss in his motion for a new trial, wherein he also discussed the treatment of other individuals committed to DMH, indefinite state custody, and lack of procedural and substantive safeguards necessary to protect him in punitive proceedings.(L.F.100-107). His points were preserved.

If this Court finds Nelson's arguments were not sufficiently preserved, this Court may nonetheless review the constitutional because they affect his substantial rights and have resulted in manifest injustice and a miscarriage of justice. Rule 30.20.

[1] The State announced it would call Nelson as a witness at trial.(Tr.68). Because the trial court denied his claims, he was left with only one choice: who would call him. Given the court's rulings, it was reasonable for Nelson to agree to testify in his own case-in-chief, rather than be called as an adverse witness by the State to limit adverse inferences and argument suggesting he had something to hide, forcing the State to call him as a witness to show him to the jury.

Reply II: Act is Punitive & Discharge Constitutionally Required

(Argument I, III)

The State claims that even if correct, *Schafer* does not mean the Act is punitive, appearing to argue that *Schafer* does not provide "the clearest proof" the Act is punitive.(StateBr.13-14). *Schafer* was presented with sufficient proof to establish that the Act results in punitive, lifetime detention in violation of due process, that commitment bears no reasonable relationship to a non-punitive purpose, and Missouri's "nearly complete failure to protect" committed men is "so arbitrary and egregious as to shock the conscience." 129 F. Supp.3d at 844, 867-68, 870.

Karsjens echoed many of the same concerns, finding constitutional failures both facially and as applied under strict scrutiny review. This month, the Eight Circuit overturned *Karsjens* and remanded the case to the district court for findings to the facial due process challenges under the rational relationship test. *Karsjens v. Piper*, 0:11-cv-03659-DWF-TNL, 2017 WL 24613 (8th Cir. January 3, 2017), relying on *Jackson v. Indiana*, 406 U.S. 715 (1972).[2] Nelson, the State, and this Court agree strict scrutiny applies in this case. *In re Norton*,123 S.W.3d 170,173(Mo.banc2003);(StateBr.23,30). Arbitrary, egregious, conscience-shocking conduct, fails a rational relationship test, and does not pass heightened strict scrutiny. *See Plyer v. Doe*, 457 U.S. 202, 235, n.3(1982)(Blackmun, concurring)(since statute failed lower scrutiny and did not further substantial state goal, no

[2] That opinion is not final and this Court is not bound by it. *State v. Mack*, 66 S.W.3d 706, 710(Mo.banc2002).(StateBr.10-11,13).

need to determine if heightened scrutiny applied). If this Court accepts the findings of *Schafer*, it will come to the same conclusions no matter what level of scrutiny is applied. Substantial changes must be made to meet constitutional standards. 129 F.Supp.3d at 870.

Arguing *Schafer* has no application or effect ignores that Missouri statutes and constitutional provisions must be interpreted to comply with the federal Constitution, and have no effect where in conflict with federal law.(StateBr.2-13); *Johnson v. State*, 366 S.W.3d 11,27(Mo.banc2012). The Act cannot be civil and simultaneously result in unconstitutional punitive punishment. *In re Van Orden*, 271 S.W.3d 579,585-6(Mo.banc2008); *Schafer*, 129 F.Supp.3d at 869. In light of the constitutional deficiencies of the Act, as written and as applied, it in conflict with the full purpose and objectives of the Due Process Clause. *State v. Diaz-Rey*, 397 S.W.3d 5,9 (Mo.App.E.D.2013). The State and its employees cannot comply with *Schafer's* directive to make substantial changes and prior holdings of this Court permitting commitment as-is. *Id*; *and see Van Orden*,271 S.W.3d at 586(clear and convincing burden of proof); *Norton*, 123 S.W.3d at 174(approving secure confinement of SVPs on challenge to failure to consider LREs).

The State's new evidence boasting four men have been granted conditional release provides additional proof the Act is punitive: none has been discharged or released into the community, though no longer meeting requirements for commitment, and the conditions of confinement are more cumbersome now that they have been "conditionally released."(StateBr.14-15). *See In re Clifford Boone*, 21PR00135062 (St. Louis County Cir.

Ct.);[3] *In re Adrian Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.);[4] *In re David Seidt*, 43P040300031 (Daviess County Cir. Ct.);[5] *In re Steven Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.);[6] and §632.505.3(mandating conditions like: polygraphs,

[3] A judge determined Boone no longer suffered from a mental abnormality and that there was no reasonable likelihood he was "likely" to engage in acts of sexual violence, "conditionally releasing" him subject to 45 different conditions and required residency in a secure nursing home. *Boone*, 21PR00135062.

[4] The State failed to show Blanton continued to suffer from a mental abnormality, had serious difficulty controlling his behavior, and was more likely than not to engage in acts of sexual violence if released from secured confinement; judge determined his mental abnormality changed and he "is not likely" to commit sexually violent acts. *Blanton*, 06E4-PR00063. He was conditionally released to live in a secured nursing facility, but there is no indication DMH has transferred him. *Id.*

[5] Court entered same order as in *Blanton*, but conditions mandated Seidt continue living at SORTS. *Id.*, *Seidt*, 43P040300031.

[6] Though the State stipulated and the Court determined that Richardson's mental abnormality had so changed that he was not likely to commit acts of sexual violence if released, his conditional release orders include a requirement that he continue residing in SORTS. *Richardson*, 06PS-PR00236. Richardson's court-ordered conditions include GPS monitoring (which he must pay for), mandated disclosure of privileged and confidential information with any other treatment providers, warrantless searches on command, forced

plethsmographs, electronic and GPS monitoring, "participation" in treatment, forced medication, disclosure of confidential and privileged records, and payment for these "services"). The State agrees conditional release "encumbers Nelson's liberty interest," but argues this infringement does not justify an adequate burden of proof and Nelson must prove that he and every other SVP are entitled to release.(StateBr.16).

Every individual *is* constitutionally entitled to *discharge* in the event that he no longer suffers from a mental abnormality or is no longer "more likely than not" as a result of a mental abnormality. "[T]he absence of either characteristic renders involuntary civil commitment unconstitutional" under due process; commitment cannot constitutionally continue after one of the basis no longer exists. *Murrell v. State*,215 S.W.3d 96,104(Mo.banc2007), citing *Kansas v. Hendricks*, 521 U.S. 346, 358(1997). As the State's examples show, commitment continues after the bases for commitment no longer exist. *See Richardson*, 06PS-PR00236; §632.505. Furthermore, discharge from confinement is not merely unobserved, it is impossible under the plain language of the Act, which dictates that Nelson may only ever be "conditionally released," subjected to conditions more oppressive and intrusive than when considered "committed." *See* §632.498, 632.505.

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polygraphs and penile plethsymographs, and involuntary increases in supervision strategies if at any time the State believes he requires it. *Id*. The same conditions apply to Boone, Blanton and Seidt. The SVP Act does not mandate these requirements for men who are "committed" but not "conditionally released." *See* §632.480, et seq.

Nelson is not required to petition for release to challenge the statutory scheme, including the burden of proof at trial, under which he has been committed and remains incarcerated.[7](State Br.16-17). There is only one SVP Act; the law permitting initial civil commitment is not separate and distinct from the laws preventing discharge from that confinement. *See* §632.480, et seq. The provisions of the Act must be considered together and cannot be read in isolation. *Alberici Constructors, Inc. v. Director of Revenue*, 452 S.W.3d 632(Mo.banc2015). If the nature and duration of commitment is unconstitutional, then the proceedings leading to that commitment must be tailored to protect him from an erroneous or unjust incarceration and carefully scrutinized.

It is well established that Nelson's initial commitment could only be considered constitutional where it accomplished a civil purpose and took place pursuant to the strictest procedures, standards and safeguards that minimized the risk of erroneous decisions. *Addington v. Texas*, 441 U.S. 418, 425, 433(1979); *Murrell*, 215 S.W.3d at 103; *Hendricks*, 521 U.S. at 357, 364, 379; *In re Van Orden*, 271 S.W.3d 579, 587 (Mo.banc2008). But the law *is* punitive. *Schafer*, 129 F.Supp.3d at 844, 868-70. Failures in the annual review and conditional release processes mean that "continuing review opportunities" have not minimized risk of erroneous commitments or led to any releases and rights to "proper risk

[7] Nelson anticipates that if he waited to challenge the procedures and standards applicable to his initial commitment until seeking conditional release or discharge, the State would argue he should have done so in his initial commitment proceeding. *See Schottel v. State*,159 S.W.3d 836,840(Mo.banc2005).

assessment and release are rights protected by the constitutional guarantee of liberty, not merely state law."*Id.* Moreover, while the State imposes "indefinite release without discharge" on all conditionally released men, there is not a continuing annual review requirement for those conditionally released. *Id.*; §632.498.1. Therefore, annual reviews do not ensure confinement does not continue after the basis for it no longer exists and is no longer necessary. *Murrell*, 215 S.W.3d at 105; *Van Orden*, 771 S.W.3d at 586.

A law that is punitive in purpose or effect creates criminal proceedings for constitutional purposes. *Hendricks*, 521 U.S. at 361. A criminal conviction and criminal sentence are insufficient to justify less procedural and substantive protection against an indefinite civil commitment that generally available to any other person subject to civil commitment. *Jackson*, 406 U.S. at 724. The Act fails to afford the procedural and substantive protections due to alleged criminals or any other civil committees.

The Act is not narrowly tailored to serve a compelling State interest and fails to pass strict scrutiny. The State is correct that one remedy necessary is constitutional release procedures.(StateBr.20). However, the "systemic failures" of the release-portion of the Act require greater protections in the initial commitment process under the Act, like the "beyond a reasonable doubt" standard. Declaring that standard applies to the proceedings and remanding for a new trial does not remedy the double jeopardy and ex post facto violations, which prohibit application of the law to Nelson, and require dismissal and discharge in this case.

Reply III: LRE

(Argument II)

Nelson's conduct should not be conflated with the Act's construction; the issue is *not* whether Nelson chooses to moderate his conduct in such a manner that he is currently eligible for LRE placement.(StateBr.25-6). The issue is that the Act precludes LREs.

The State contends "nothing" requires a LRE under the Act and that the Act "has not changed" since this Court decided *Norton*, ignoring *Schafer*.(StateBr.22,24); 129 F. Supp.3d at 867. Norton challenged the *trial court's* failure to considered LREs. *In re Norton*,123 S.W.3d at 174. Nelson challenges *the Act* because it is punitive, as evidenced by exclusion of LREs, and he has a right to avoid undue confinement. *Hendricks*, 521 U.S. at 387(Breyer,dissenting); *Schafer*, 129 F. Supp.3d at 867. *Norton* justified no LREs because of procedural safeguards, including proof beyond a reasonable doubt at commitment and release trials; multiple opportunities for review, through mandated annual examinations and court reviews; and discharge from secure confinement, but those substantive protections no longer exist.(StateBr.24); *Id.* at 174-75; *see also Van Orden*, 271 S.W.3d at 586; §§632.495, 632.498, 632.505. Because "conditional release" encumbers Nelson's liberty interest and subjects him to lifetime custody and conditions, it cannot function like discharge.(StateBr.24).

When *Nelson* was decided, release provisions had not been challenged and this Court did not have the benefit of observing the law in action over sixteen years. *Schafer* found the constitutional deficiencies in commitment under the Act violate due process and result in punitive, lifetime detention and unconstitutional punishment, specifically because

there is no LRE or community reintegration plan. 129 F.Supp.3d at 844, 868-89. Due process requires an LRE. *Id.* Refusing LRE placement because of Nelson's past conduct, as the State suggests, and not because of his current conduct, mental illness, or risk, is further punishment for past behavior.(StateBr.25-26). It is now impossible for the State and its employees to comply with *Schafer*'s directive to make substantial changes to remedy this, and with *Norton*'s holding permitting confinement without an LRE. *Id*.; *Norton*, 123 S.W.3d at 175. This Court must act.

Reply IV: "Sexually Violent Predator"

(Argument V)

The State claims it could call Nelson a "sexually violent predator," because it was reflected by the evidence and "the ultimate issue in the case."(StateBr.41). But the State, trial court, and even venierpersons used the label twenty five times before any evidence was adduced, and a total of fifty five times before the State rested its case-in-chief.(Tr.72, 76(three times), 77, 78, 80(twice), 85, 87, 88(three times), 92, 93, 94, 95 (twice), 96, 97(twice), 201(twice), 204, 206, 228, 230, 231, 232(four times), 233 (twice), 234, 235, 236(twice), 239, 243, 249 (twice), 250, 277, 281, 296(twice), 310, 311 (twice), 312, 314 (three times), 362).

On direct appeal in *State v. Albino*, 24 A.3d 602, 617 (Conn. Ct. App. 2011), the defendant argued that the prosecutor's repeated use of the terms "victim" and "murder" throughout the trial constituted prosecutorial misconduct. Albino's defense theory was self-defense. *Id*. at 613. The *Albino* Court concluded that the use of such terms was improper in a case like Albino's where the commission of a crime was in dispute because such terms are an opinion on the ultimate issue in the case. *Id*. at 616-17. In *Albino* that Court explained that terms like the one challenged here are permissible in closing argument, but not until then, because the jury would understand such argument was based on evidence presented. *Id.* at 614-15.

Similarly, Missouri courts have permitted closing argument using terms like "victim" and even "child molester" in a child molestation trial. *See Cloud v. State*, 507 S.W.2d 667, 668-69(Mo.App.,K.C.D.1974)(not improper for prosecutor to use "victim" in

closing argument because it was not a "disparagement" of the defendant.); and *State v. Perry*, 275 S.W.3d 237, 248(Mo.banc2009)(clear prosecutor was asking jury to draw inference from evidence presented defendant was a child molester in child molestation case). Unlike *Cloud* and *Perry*, Nelson is not challenging the use of terms in closing argument. Instead, his claim is directed at the use of the SVP term starting in voir dire and continuing throughout the entire proceedings.

It is improper to call someone an SVP until closing argument, after the evidence has shown he possesses the characteristics of one. *Albino*, 24 A.3d at 614-17; *State v. Whitfield*, 837 S.W.2d 503, 513(Mo.1992)(improper to call defendant "mass murderer or serial killer" unless evidence shows committed past murders of that character.). Under *Perry*, it is improper to label anyone as an SVP before he is found to be one. 275 S.W.3d at 246. At the time "sexually violent predator" was first used here, Nelson had not been adjudicated to be an SVP and there was no evidence to show he was one.(Tr.72).

This Court has said that "the concept that individuals and corporations are tried (civilly or criminally) for their acts and not for simply who they are (or are alleged to be)" is fundamental to our system of administering the rule of law. *State v. Banks*, 215 S.W.3d 118, 122(Mo.banc2007). But here, the trial court told the venirepanel the purpose was to decide who Nelson is: "the jury selected today will be asked to determine whether the respondent, Mr. Nelson, is a sexually violent predator as that term will be defined by law."(Tr.72). The State continued, saying "you're going to be asked to decide whether or not Mr. Nelson is or is not a sexually violent predator."(Tr.76; *and see* 77,78,85,87,88, 92,94,95,96,97).

In *Banks*, the prosecutor called a defendant charged with murder the "Devil" in closing argument. *Id.* at 119. The comment was improper, and the trial court's failure to sustain the objection was prejudicial error. *Id.* at 120, 122. This Court went on to say,

> In trial, counsel sometimes seem to believe that zealous advocacy permits, if not demands, that opponents be personally derided and that cases should be decided by appeals to prejudice, fear, envy, and bias, regardless of whether those emotions have anything to do with the facts and law of the case. Rhetoric is too often substituted for logic and reason.

Id. at 122. "[J]uries are to decide cases on the evidence presented-not appeals to unreasoned emotion or name-calling." *Id.* at 123, Rule 4-3.8. Here, the use of "sexually violent predator" before the trial even began set the tone for the entire legal proceeding, impermissibly put Nelson on trial for who he was alleged to be, and appealed to emotions of prejudice, fear and bias. *Id.* But Nelson should be tried for whether he meets commitment criteria, not for who he is alleged to be, and his case decided based on the facts and evidence, not emotions. *Id.*

Though the trial court told the panel it would decide whether Nelson was an SVP, "as that term is defined by law," the legal definition was not given.(Tr.72). In the general sense, "predator" refers to "one that preys, destroys, or devours or one disposed or showing disposition to injure or exploit others for one's own gain" and modified by "sexual," "the term refers to a person that either sexually preys on or is disposed or shows a disposition to sexually exploit others." *Perry*, 275 S.W.3d at 247, n. 6. The jury started out with this

mental impression before the trial began. The term is "inherently prejudicial, *even when used in a non-technical sense*," ergo it was "inherently prejudicial" in this case. *Id.*

Rhetoric was substituted for the legal definition, and later for reason and logic when the jury finally decided the case, and it was 2.63 times more likely that Nelson was committed based on use of that term at trial than he would have been if the phrase was omitted. *Banks*, 215 S.W.3d at 122; 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. The term is prejudicial and should have been excluded at trial.

Reply V: Sufficiency of Mental Abnormality Evidence

(Argument VI)

The State's reply focuses on Nelson's masturbation, vulgar language, and minor assaults in prison, and contends this evidence demonstrates Nelson has a mental abnormality.(StateBr.43-45,47-48). These three things are not evidence of a mental abnormality, as defined by §632.480(5) and *Thomas v State*, 74 S.W.3d 789, 791-2(Mo. banc2002). A mental abnormality must predispose someone to commit sexually violent offenses and cause serious difficulty controlling that behavior. §632.480(2). "Sexually violent offenses" are a specific set of contact sexual offenses listed in §632.480(4). An offense *not* listed in §632.480(4), like masturbation, speech and minor physical assaults, is not a sexually violent offense. *See In re Gormon*, 371 S.W.3d 100, 105(Mo.App.E.D. 2012).

The State mischaracterizes the testimony at trial about Nelson's conduct in prison in efforts to paint incidents as "sexually violent offenses."(StateBr.45-46). First, the State claims Nelson "grabbed the buttocks of a female staff member."(StateBr.45). Testifying on behalf of the State at trial, Simmons said Nelson accidentally brushed up against the woman.(Tr.274-5). Kircher said Nelson touched her bottom, grinned and said "excuse me," and that if it occurred in the community, Nelson potentially could have been charged with sexual harassment.(Tr.325). Now characterizing this a "grabbing" contradicts the State's evidence that it was an accidental contact.

Next, the State relies on Nelson touching the pubic bone of a female DOC staff member in June of 1997.(StateBr.45;Tr.326,473). Kircher testified: a note reported Nelson

brushed his hand across the woman's pubic bone; but, what she recalled from the violation was that "he kind of brushed his hand across her front and made some rude remarks to her;" and Nelson was written up for a minor assault for the conduct, and for sexual misconduct for the comments.(Tr.326).[8] The State's evidence disproved Kircher's testimony because Nelson was not given a sexual misconduct violation in 1997, or a violation for abusive or obscene language.(Ex.4).

Finally, the State argues Nelson "grabbed another female staff member's crotch so forcefully that she had to lock herself in the prison chapel to get away."(StateBr.45). Kircher said: the woman had refused to shake Nelson's hand; contact between guards and inmates is prohibited; the woman reported he reached out, swung his hand back "grabbing my crotch area, then I slammed the door back."(Tr.327). While reviewing the State's copy of the conduct violation on cross, Rosell testified it did not report Nelson grabbed the woman, but rather touched her with the back of his hand, which is different than grabbing.(Tr.474-5). Nelson received a violation for minor assault, but not for sexual misconduct.(Tr.323,331;Ex.4). This evidence only establishes that, wishing to shake the woman's hand, Nelson stuck his hand out, the back of his hand came into contact with the woman, and she shut a door. He did not commit a sexually violent offense.

The legislature deliberately chose to denominate specific criminal offenses as sexually violent offenses. It did not chose to classify "minor assaults" or "sexual

[8] Nelson's sexual misconduct violations (number 15) did not include the three violations for minor assaults (number 10).(Tr.323,331).

misconduct" DOC conduct violations, sexual harassment, masturbation, or lewd comments as such, and Nelson's conduct violations were not sexually violent offenses as a matter of law. *Gormon*, 371 S.W.3d at 105; §632.480(3). Therefore, engaging in the conduct, no matter how inappropriate, unwanted, or involuntary (if that was the case) it may have been, could not be evidence of a condition predisposing him to commit sexually violent offenses or causing him serious difficulty controlling behavior causing sexually violent offenses. §632.480.

Kircher's mental abnormality opinion was based on Nelson's sexual misconduct violations and statements during masturbation.(StateBr.44,46). Simmon's mental abnormality opinion was based on the same non-predatory, non-sexually violent offense conduct.(StateBr.46-8). The State was required to adduce additional proof that a condition predisposed Nelson to commit sexually violent offenses, and that he had serious difficulty controlling sexually violent offense behaviors. §632.480(5) and *Thomas*, 74 S.W.3d at 791-2.

The State misreads the law, claiming that Paraphilia, NOS is a mental abnormality because it predisposes Nelson to commit "acts of sexual violence."(Tr.49). This is not the legal standard; the legal standard is predisposition to commit "sexually violent offenses." §632.480(2). Moreover, an opinion based on the Paraphilia, NOS, non-consent diagnosis does not meet the requirements of §490.065 because it is not a diagnosis reasonably relied upon by experts in the field or otherwise reasonably reliable.

First, Simmons never testified the Paraphilia, NOS non-consent diagnosis is relied upon or otherwise reasonably reliable.(Tr.241). The record does not suggest Simmons was

relying on a fact or data--the Paraphilia, NOS diagnosis-- reasonably relied upon by experts in the fields. Therefore, her opinion was not supported by the record and was insufficient to create a submissible case, even in conjunction with evidence of Nelson's past acts. *Morgan v. State*,176 S.W.3d 200,211(Mo.App.W.D.2005). Second, the record does not suggest the diagnosis is scientifically valid or reliable; therefore it is not otherwise reasonably reliable. *Id.* In fact, *State v. Kareem M.*, 36 N.Y.S.3d 410(Table)(Sup.Ct.,N.Y. County2016), held that Paraphilia, NOS for non-consent is not generally accepted in the relevant scientific community under the *Frye* standard. That standard "exists to prevent the use of scientific methods of questionable reliability and validity." *Id.* at 24.

The *Kareem M* Court said it "has been primarily driven by SVP statutes which require a diagnosis to subject rapists to civil commitment." *Id.* at 7-8, 23. *Kareem M.* held that a non-consent paraphilia diagnosis was not generally accepted because: DSM rejection demonstrates it is not generally accepted in the relevant psychiatric community, it cannot be reliability diagnosed, and "it has been overused and abused in SVP cases." *Id.* at 19. The DSM is "a consensus of experts in psychiatry about those particular disorders that should be treated" and has rejected a non-consent diagnosis five times, for reasons including: lack of empirical research and foundation for the diagnosis, difficulty distinguishing it from other diagnosis, and concerns about false positives. *Id.*at 3, 5, 7-8, 11-14, 23-4. According to experts, the non-consent diagnosis is used most commonly in SVP cases by State evaluators, who represent only one quarter of one percent of the entire psychological/psychiatric community. *Id.* at 5, 7-8, 12-15.

There are no predictive validity or inter-rater reliability studies for Paraphilia NOS, non-consent, few casual studies on why men rape, and no peer-reviewed, published studies examining how the disorder is diagnosed. *Id.* at 15. The Court said nothing has demonstrated the diagnosis is valid or reliable; there are no uniformly applied diagnostic criteria; and it is difficult to distinguish between someone who rapes out of attraction to non-consent from one who rapes because he is not inhibited by coercive cues. *Id.* at 24, 27-8. Assigning a non-consent diagnosis based only on sexually offending behavior is "illegitimate," though experts often claim a coercive sexual behavior was the result of paraphilia NOS. *Id.* at 29.

The evidence at trial was not like that in *In re Cozart*, 433 S.W.3d 483(Mo.App. E.D.2014), and that case does not assist the State here.(StateBr.47). Cozart kidnapped a grandmother and her two grandchildren, sodomized the children, and attacked a jogger, breaking her nose before raping and sodomizing her. *Id.* at 485. Cozart himself disclosed: he had sexual fantasies about raping women who had rejected him, masturbated to rape fantasies, was sexually aroused by aggression, hitting a victim made him want to rape her, and he would have killed someone for excitement if not stopped. *Id.* at 486, 490. The Eastern district found that Paraphilia, NOS, non-consent qualified as a mental abnormality based on that evidence. *Id.*

Cozart's disclosures provided direct evidence of his sexual attraction to violence. Here, there were no such disclosures from Nelson. Simmons' assumed arousal based on Nelson's history and not on any direct evidence. Therefore, an opinion based on a Paraphilia, NOS, non-consent diagnosis was not supported by the record, was not based on

a diagnosis reasonably relied upon in the field or otherwise reasonably reliable, and was insufficient to make a submissible case. *Morgan*, 176 S.W.3d at 211.

The State did not present competent 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. The court erred in overruling Nelson's motion for directed verdict and committing him to DMH.

Reply VI: Sufficiency of Future Risk Evidence

(Argument VII, VIII)

Predatory

The State's argument that evidence of Nelson's rape conviction, prison masturbation and Nelson's testimony that he was not a "sexual predator" was sufficient evidence to find he was more likely than not to commit future predatory acts of sexual violence if not confined must be rejected.(StateBr.53-54).

The State claims that its witnesses need not define "more likely than not" at trial, but makes no such assertion with respect to defining "predatory."(StateBr.59). Testimony that Nelson "would make sure people were able to watch" him masturbate, knowing he would get in trouble, masturbated in that manner because he hoped those who saw him would want to join in with him, or even that Nelson would "seek out individuals that he would like to prey upon" is not testimony satisfying the legal definition of "predatory." (StateBr.52-53;Tr.254-57). Nor does testimony that Nelson's masturbation behaviors suggested "targeted" conduct, rather than not intending to get caught.(State Br.53;Tr.329). There was no testimony Nelson's acts were "for the primary purpose of victimization." The State's closing argument was not evidence.(StateBr.54;Tr.581).

Therefore, there was no competent evidence before the jury permitting them to conclude the State's experts' opinions were that Nelson was more likely than not to commit an act directed at an individual, including family members, for the primary purpose of victimization. §632.480(3), 632.495.

More Likely Than Not

In re Coffel does not assist the State here.(StateBr.60). In *Coffel*, the Eastern District said, "[t]o meet the statutory 'more likely than not' standard, it would be necessary to identify some variable that would change the expectation of the slight chance of re-offense reflected in the base rate to a probability of re-offense." 117 S.W.3d 116, 127(Mo.App.E.D.2003). The Court noted expert testimony that research has shown clinical judgment: is no better or worse than chance in assessing risk of re-offense by male offenders, overestimates risk, and takes into account factors that are more emotional than empirical. *Id.* at 127. There was little research on female sex offense recidivism and the base rates for such re-offense is "very low." *Id.*

Like in *Coffel*, the State failed to distinguish Nelson from the typical sex offender because the State did not: present competent scientific evidence that he was "more likely than not" or expert testimony on the general rate of re-offense; demonstrate a scientifically supported risk factor increased his risk above the general re-offense rate or changed the expectation of a slight chance of re-offense to a probability of re-offense. *Id.* 127-29;(StateBr.63). There was no testimony at trial about the base rate of male sexual offense recidivism. Therefore, the State could not demonstrate any variable changed Nelson's expected rate of re-offense above that of the base rate. *Id.* Research from the Static actuarial developers has demonstrated the base rate for male sexual offense recidivism is also "very low:" 11.6% overall, and five-year rate of 9.8%. Hanson, et al., *What Sexual Recidivism Rates are Associate with Static-99R and Static-2002R Scores*, 28 Sexual Abuse: Journal of Research and Treatment (issue 3) 1, 8 (2015). The evidence suggested Nelson's Static score corresponded to a 10% risk of any sexual recidivism within five years.(Tr.453,462). While

the State's witnesses identified additional factors considered outside of the actuarial instruments, there was no testimony that any of these risk factors, standing alone or in combination with one another, increased Nelson's risk beyond 10%.(StateBr.61-62). In fact, risk factors could not be quantified or combined with the Static's 10% prediction.(Tr.382,458). Therefore, there was no evidence supporting an inference that Nelson's risk of recidivating with any future sexual offense was greater than 10%. Such a conclusion by the jury required impermissible guesswork, speculation and conjecture. *Morgan*, 176 S.W.3d at 211. The State did not prove Nelson "has a higher than average risk" or was "more likely than not" to reoffend.(StateBr.60).

The State's experts' opinions that Nelson was more likely than not to commit future predatory acts of sexual violence was unsupported by competent, substantial evidence in the record, necessary to make a submissible case.

Argument VII: Cooper's Testimony

(Reply IX)

If Nelson's due process right to present a defense in this case is not the same as the constitutional right to present a complete defense, as the State contends, then the SVP Act suffers from additional deficiencies requiring this Court to declare the law unconstitutional.(StateBr.66). *Walkup* is not limited to criminal cases; this Court said that while admission of evidence is generally reviewed for an abuse of discretion, it "is not accurate where an evidentiary principle or rule is violated, *especially* in criminal cases." *State v. Walkup*, 220 S.W.3d 748, 576(Mo.banc2007)(emphasis added). This Court did not say "*only* in criminal cases."

Under the law, a mental condition must cause an individual both predisposition and serious difficulty controlling behavior. §632.480. Kircher testified that predicate condition was ASPD and Simmons said it was Paraphilia, NOS, nonconsent.(Tr.241-2,244-5,242, 318-9,479). Therefore, any evidence that counteracted, disproved, or dispelled testimony that the diagnostic criteria for either condition was met was relevant and material to the mental abnormality issue. *See Walkup,* 220 S.W.3d at 757-58. Similarly, any evidence that disproved diagnostic criteria for a condition Simmons claimed increased risk—exhibitionism-- was relevant and material to the ultimate risk question. *Id.*(Tr.269). Evidence that Nelson did not get in fights or expose himself made the existence of the State's proffered diagnoses less probable. *State v. Anderson*, 76 S.W.3d 275, 276(Mo.banc2002).

The State misreads Simmon's trial testimony and incorrectly argues Cooper's proffered testimony about Nelson's exposing behavior was not legally relevant because it was cumulative.(StateBr.70). Nelson asked Simmons about his prison behavior and sexual misconduct violations, not childhood behavior: "he did not ever expose himself in prison until he was approximately 40 years old; correct?"(Tr.284-85). This was not testimony that Nelson did not expose himself before going to prison.(StateBr.70). It is true Nelson testified he did not expose himself before his incarceration.(Tr.524;StateBr.70). But Cooper's evidence was relevant because it corroborated Nelson's challenged testimony and bore on the principal issues in the case, mental abnormality and risk. *State v. Dennis*, 315 S.W.3d 767, 768(Mo.App.E.D.2010).

The trial court's relevancy determination is reviewed to determine if Nelson received a fair trial. *Walkup*, 220 S.W.3d at 757; *Murrell*, 215 S.W.3d at 110. Excluding evidence that diagnostic criteria for a predicate condition did not exist deprived Nelson of a fair trial. Evidence that he did the diagnostic criteria for ASPD or exhibitionism was both legally and logically relevant to the issue of whether the jury should believe the State's evidence that he met criteria for those diagnosis, and therefore had a mental abnormality and increased risk. *Walkup*, 220 S.W.3d at 757. The trial court had no authority to prevent impeachment of the State's witnesses on matters related to a paramount issue or that affect the witness' accuracy, veracity or credibility. *Black v. State*,151 S.W.3d 49,56(Mo.banc2004).

Exclusion of the evidence was an error and prejudicial. *Id.*; *Walkup*, 220 S.W.3d at 758. Nelson could not be committed absent a finding of both mental abnormality, which

required a finding of one of the two diagnosis offered by the State, and "more likely than not risk." §632.480, 632.495. If the jury did not believe the criteria for ASPD was satisfied, then ASPD could not be a mental abnormality. If the jury believed Simmons' Paraphilia, NOS, non-consent diagnosis was the mental abnormality, they had to believe he also suffered from exhibitionism, which raised his mental abnormality-caused risk to "more likely than not" to commit him.

If Cooper's eye-witness observation is considered "reputation evidence," then her testimony was admissible.(StateBr.71). Reputation evidence is available to impeach any witness in any case, including civil ones, and to rehabilitate a witness who was impeached by bad reputation evidence. *Haynam v. Laclede Elec. Co-op., Inc*., 827 S.W.2d 200, 205 (Mo.banc1992). Therefore, Nelson could impeach Simmons and Kircher and rehabilitate any credibility attacks on his reputation or testimony with Cooper's testimony.

The other type of reputation evidence is "substantive character evidence," used to prove that someone is or is not the type of person who would commit a crime in a criminal case. *Id.* In the SVP context, it would include evidence to prove that someone does or does not meet the civil commitment criteria. If evidence of Nelson's adolescent conduct was substantive character evidence when he sought to introduce it, then the State's evidence of his adolescent behavior was bad character evidence and not admissible in the first place. *Id.* at 205-206;(StateBr.71). Thereafter the trial court could not prevent Nelson from impeaching the State's witnesses' accuracy, veracity or credibility in making diagnoses and their ultimate opinions. *Black,* 151 S.W.3d at 56.

Excluding Cooper's testimony was prejudicial error requiring reversal and a new trial.

Argument VIII: Improper Exclusion of Home Plan

(Reply X)

This Court should reject the State's claim that this point was not preserved for review because Nelson did not make an offer of proof.(StateBr.74). The morning of trial, Nelson objected to the State's motion in limine to exclude his release plan.(Tr.47). Nelson told the court that: Kircher asked Nelson where he would live, work and what he would do if released (collectively "home plan"); Nelson told Kircher he would live with his sister, Cooper; Kircher considered Nelson's home plan in her evaluation; Kircher relied upon his home plan; Kircher thought the home plan was "significant" and it "was not a good one," indicating a negative, risk-enhancing quality; and that Cooper would testify at trial.(Tr.47). The State's motion was granted over Nelson's objection, and the Court admonished the State not to ask any questions that would elicit testimony about Kircher's opinion based on the release plan.(Tr.48).

"Offers of proof may be adequate even when informal and in narrative form, but they still must be sufficient to allow the court to make an informed ruling." *State v. Hunt*, 451 S.W.3d 251, 263(Mo.banc2014), *citing Moore v. Ford Motor Co.*, 332 S.W.3d 749, 766(Mo.banc2011). This record is sufficient to show what the evidence would be: Nelson would live with Cooper and the home plan was considered by State experts; the purpose and object of the evidence: to demonstrate the evidence considered by the experts and to impeach the State's witness's opinion that Nelson's relationship and plan to live with Cooper was not negative or risk-enhancing; and the facts essential to establishing its

admissibility: it was part of the facts and data relied upon by the State's expert in forming her opinions. *Hunt*, 451 S.W.3d at 263.

The trial court's ruling was clear: no one could ask questions about Nelson's home plan. Given this ruling, it would have been futile for Nelson to attempt to question Kircher, Nelson, or Cooper about Nelson's release plan. *Long*, 140 S.W.3d at 32. Nelson was not required to undertake useless acts, like futile questioning or making a second offer of proof, to comply with a technical requirement. *Id.* This issue has been preserved.

The State's claim that Nelson attempted to present this evidence so the jury would infer Cooper would watch him and control his behavior is unfounded and unsupported by the record.(StateBr.79). The record unequivocally shows Nelson sought introduction of his home plan because it was considered and relied upon by Kircher and Cooper's testimony would impeach her.(Tr.47). The trial court had no authority to prevent impeachment of the State's witnesses on matters related to a paramount issue, like assessment of Nelson's risk, or that affect the witness' accuracy, veracity or credibility. *Black*, 151 S.W.3d at 56.

The State also incorrectly claims the home plan evidence was irrelevant, even if it was considered by the experts.(StateBr.77,80). That argument is contrary to settled law. When facts and data relied upon and considered by an expert are reasonably relied upon in the field and otherwise reasonably reliable, "they will necessarily be relevant to the case, and testimony as to the facts and data will be admissible." *Murrell*, 215 S.W.3d at 110.

As part of her evaluation, Kircher reviewed documents and interviewed Nelson, sources of information reasonably relied upon by experts in the field.(Tr.314-15). Based on the facts and data from her records review and interview, she made a diagnosis,

conducted a risk assessment, and formulated ultimate opinions on mental abnormality and future risk.(Tr.315-16,319,321,324,326,332,338,349,360). The State did not claim facts from the records or Nelson's own statements were not reliable or relied upon at trial or in its brief. In fact, the State sought admission of some of these records and intended to present Nelson's testimony.(Tr.68,237,322,361). Therefore, information about Nelson's home plan was relevant to the case, and testimony as to facts about the home plan was admissible. *Id.*

Granting the State's motion and in excluding evidence of Nelson's home plan was prejudicial error.

CONCLUSION

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

Respectfully submitted,

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Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 7,360 words, which does not exceed the 7,750 words allowed for an appellant's brief.

On January 9, 2017 electronic copies of Appellant's Reply and Appellant's Reply Appendix were placed for delivery through the Missouri e-Filing System to Greg Goodwin at gregory.goodwin@ago.mo.gov.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell