

Summary of SC89224, *In the Matter of the Care and Treatment of John R. Van Orden*, consolidated with SC89408, *In the Matter of the Care and Treatment of Richard Wheeler, a/k/a Richard D. Wheeler, a/k/a Richard Dale Wheeler*

SC89224 is an appeal from the circuit court of Webster County, the Honorable Kenneth F. Thompson, and SC89408 is an appeal from the circuit court of Adair County, the Honorable Kristie J. Swaim.

Attorneys: Van Orden and Wheeler both were represented by Emmett D. Queener of the public defender's office in Columbia, and in both cases, the state was represented by Alana M. Barragan-Scott of the attorney general's office in Jefferson City.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Two men with multiple prior convictions appeal the determinations that they are sexually violent predators and their involuntary civil commitments. In a 6-1 decision written by Judge William Ray Price Jr., the Supreme Court of Missouri affirms the determinations. The amended statutory requirement that such determinations be made using the "clear and convincing evidence" burden of proof is constitutional. The phrase "clear and convincing evidence" uses words that are common and readily understood, requires no further defining and gives the jury sufficient instruction about the applicable burden of proof. The statute addressing when the attorney general must be given notice that a person in an agency's custody may meet the criteria for a sexually violent predator does not address the timing for filing the commitment petition, does not require a parolee's parole to be revoked formally first and does not prohibit an agency's psychologist from having contact with the attorney general before the agency completes its assessment and recommendation. As to one of the offenders, the trial court did not abuse its discretion in allowing a psychologist's testimony about his use of an actuarial test measuring the offender's likelihood of recidivism because the psychologist also conducted his own independent review of the person's risk factors.

Judge Jacqueline Cook, presiding judge of the 17th Judicial Circuit (Cass and Johnson counties), who sat with the Court by special designation, concurs in the Court's opinion but writes separately to address her concerns, not properly before the Court here, about whether the statute addressing the conditional release of sexually violent predators violates due process and, therefore, whether the statutory scheme is criminal rather than civil in nature, requiring a higher burden of proof. Judge Michael A. Wolff concurs in Judge Cook's opinion.

Judge Richard B. Teitelman dissents. He would hold that the sexually violent predator law is unconstitutional to the extent it effectively permits the state to commit such a

person permanently to the care, custody and control of the department of mental health without having to prove the prerequisites to commitment beyond a reasonable doubt, violating due process.

Facts: John Van Orden and Richard Wheeler each have multiple prior convictions over a number of years for sexually violent offenses against minors.

While incarcerated, Van Orden completed the first two phases of sex offender treatment but stopped attending treatment once released on parole. His parole was revoked once, and he later was granted parole again, but he again was arrested for violating the terms of his parole. The department of corrections subsequently sent notice that he may be a sexually violent predator to the attorney general, who filed a petition for commitment pursuant to section 632.480 *et seq.*, RSMo 2000. The board of probation and parole subsequently revoked Van Orden's parole. During a jury trial on the attorney general's commitment petition, the state presented the testimony of a psychologist who diagnosed Van Orden with pedophilia and anti-social personality disorder based on his own assessment of Van Orden's risk factors as well as the results of the Static-99 actuarial test, which measures a person's likelihood of reoffending. Van Orden objected to the way the burden of proof was explained in the jury instructions and offered additional language. The trial court overruled the objection and submitted the instructions to the jury without the additional language. While incarcerated, Wheeler refused sex offender treatment. Before he was released from his most recent incarceration, a department of corrections psychologist sent notice that Wheeler may be a sexually violent predator to the attorney general, who filed a petition for commitment pursuant to section 632.480 *et seq.*

The jury, in the case of Van Orden, and the trial court, in the case of Wheeler, found that the men met the definition "sexually violent predator" by clear and convincing evidence pursuant to section 632.495, and the courts ordered their involuntary civil commitment. Van Orden and Wheeler appeal.

AFFIRMED.

Court en banc holds: (1) The civil commitment of individuals found to be sexually violent predators using the "clear and convincing evidence" burden of proof in section 632.495(1), as amended, is constitutional. Before the amendment, the court or jury was required to make the finding using the "beyond a reasonable doubt" burden of proof. In *Addington v. Texas*, 441 U.S. 418 (1979), the United States Supreme Court found that clear and convincing evidence was an appropriate burden of proof in civil commitment proceedings. It left the question of which burden to use to the state legislatures. The purpose of these proceedings is to determine whether a person suffers from a mental abnormality that makes the person more likely than not to engage in predatory acts if not confined for necessary treatment. Missouri's statutory requirements and procedures

effectively minimize the risk of erroneous commitment, afford the person many of the same rights as a criminal defendant, permit a committed person to petition for release at any time, and provide for annual reviews to determine if a committed person's mental abnormality has changed so that commitment no longer is necessary. The question of whether the sexually violent predator statute should be considered a civil commitment statute rather than a criminal statute, as applied to a person who has been released conditionally but who wants an unconditional release, is not before this Court as Van Orden and Wheeler have failed to show they would be entitled to unconditional releases.

(2) The trial court did not abuse its discretion in rejecting Van Orden's proposed jury instructions. The phrase "clear and convincing evidence" uses words that are common and readily understood, requires no further defining and gives the jury sufficient instruction about the applicable burden of proof. The additional phrases Van Orden offered only would have complicated the instructions and increased the possibility of confusion.

(3) The trial court properly overruled Van Orden's and Wheeler's motions to dismiss based on their allegations that the state failed to comply strictly with section 632.483.1. This statute addresses when the agency with jurisdiction must send written notice to the attorney general that a person in its custody may meet the criteria for a sexually violent predator. It says nothing about the timing for filing the commitment petition but only affects the timing to the extent the attorney general's office cannot file until it receives notice. Further, as to a person on parole, the statute's plain language provides that the agency's duty to begin the review process for civil commitment is the person's "readmission to prison," not the formal revocation of parole. Van Orden shows no prejudice from the written notice requirements or the date the petition was filed in his case. In Wheeler's case, the record shows no impropriety in or prejudice from the psychologist's contact with the attorney general before the department of corrections completed its assessment and recommendation.

(4) The trial court did not abuse its discretion in admitting the results of the Static-99 in Van Orden's case. In *In the Matter of the Care and Treatment of Murrell*, 215 S.W.3d 96 (Mo. banc 2007), this Court held that testimony as to such results is admissible for the civil commitment of sexually violent predators so long as the instrument is used in conjunction with a full clinical evaluation. Here, the psychologist did not rely solely on the Static-99 to support his belief that Van Orden has a high risk of recidivism but conducted an independent review of Van Orden's risk factors.

Concurring opinion by Special Judge Cook: The author fully agrees with the Court's opinion but writes separately to highlight her concerns, which are not raised here but which may need to be resolved in future cases, about whether the statutory scheme regarding involuntary civil commitment of sexually violent predators, following the 2006

amendments, are constitutionally valid beyond the specific points raised on appeal by Van Orden and Wheeler.

There remains an issue as to whether section 632.505, addressing conditional release of sexually violent predators, violates due process because it provides for a form of commitment or confinement, albeit conditional, without the requisite finding of dangerousness and because it fails to provide sufficient procedural due process protections. Reviewing the statutory scheme prior to the 2006 amendments, this Court found that a person is not committed as a sexually violent predator indefinitely because the scheme provided for an annual examination of the person's mental condition and, even if the director of the department of mental health did not determine the person qualified for release, the person still could petition the circuit court for a discharge, *Schottel v. State*, 159 S.W.3d 836 (Mo. banc 2005), and a person confined under the sexually violent predator statutes could be discharged from confinement altogether. The 2006 amendments, however, specifically provide that an annual review shall not be conducted of a sexually violent predator who has been granted conditional release, and they cast doubts on whether an unconditional release or discharge ever is available to a person committed under the sexually violent predator statutes.

As a result, there remains an issue of whether an evaluation of the legislative history of the sexually violent predator act or other necessary factors would reveal whether the statutes are civil or criminal in nature. If called to consider the impact the indefinite conditional release statute has on the entire sexually violent predator statutory scheme, this Court may be compelled to find that such an indefinite restraint on liberty has made the act so punitive in purpose or effect that it must be considered criminal in nature, requiring a higher burden of proof.

Dissenting opinion by Judge Teitelman: The author would hold that the sexually violent predator law is unconstitutional to the extent it effectively permits the state to commit an individual permanently to the care, custody and control of the department of mental health without having to prove the prerequisites to commitment beyond a reasonable doubt. The text and administration of the law reveals a process that is, in substantial part, punitive in nature. The United States Supreme Court's holding in *Addison* was premised on certain propositions that no longer are present in Missouri's law. Missouri's scheme cannot be said to be remedial rather than punitive, as the statutes provide that sexually violent predators will be subject to permanent state oversight, even if the state determines they no longer pose a danger to others, and they will not receive annual reviews. Due process requires the state's exercise of power to impose a permanent, punitive restraint on individual liberty to be conditioned on proof beyond a reasonable doubt of each of the statutory prerequisites to commitment.