

**Summary of SC91186, *In the Matter of the Care and Treatment of James Brasch v. State of Missouri***

Appeal from the St. Charles County circuit court, Judge Jon Cunningham  
Argued and submitted Dec. 15, 2010; opinion issued Feb. 8, 2011

**Attorneys:** Brasch was represented by Emmett D. Queener of the public defender's office in Columbia, (573) 888-9855; and the state was represented by Jayne T. Woods and Shaun T. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

*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:** A man found to be a sexually violent predator challenges his involuntary civil commitment to the department of mental health for control, care and treatment. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the trial court's judgment. The man failed to demonstrate that the statute under which he was committed is unconstitutional as applied to him or that the trial court abused its discretion in not excluding part of the state's closing argument or granting a mistrial as a result of that argument.

**Facts:** James Brasch pleaded guilty to third-degree assault and was sentenced to 15 days in jail after entering the house of a former girlfriend in 1993 and fondling her 10-year-old daughter. Two months later, he entered the home of another 10-year-old girl, whom he kissed and fondled. He pleaded guilty to first-degree burglary and was sentenced to five years in prison. In both cases, the prosecutors dismissed charges of sexual abuse. Shortly after Brasch was paroled in 1996, he unlawfully entered or attempted to enter at least four homes, fondled one woman and stood over another woman in her bedroom until she awoke and told him to leave, which he did. He again was arrested but, in 1997, was found incompetent to stand trial. He was diagnosed with schizophrenia and paranoid delusions and, after two years of treatment, was restored to sufficient capacity to stand trial. He pleaded guilty to one count of sodomy and three counts of burglary and was sentenced to 12 years in prison. Before Brasch's scheduled release in 2007, the state petitioned to commit Brasch involuntarily as a sexually violent predator to the department of mental health's custody. Brasch moved to dismiss the petition, arguing that as a result of cognitive problems caused by his schizophrenia, he would be unable to participate successfully in the department's sexually violent predator treatment program and the department would be unable to provide him an adequate medical regimen. He argued, therefore, that the sexually violent predator act, section 632.480 *et seq.*, RSMo Supp. 2009, was unconstitutional as applied to him. The court overruled his motion and ultimately found probable cause to believe he was a sexually violent predator. The department's expert evaluated Brasch, diagnosed him with schizophrenia and antisocial personality disorder, determined that his behavior was caused by his antisocial personality disorder, and concluded that Brasch fit the definition of a sexually violent predator under the law and was more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. Brasch hired another expert to conduct a second evaluation. This second expert determined that Brasch's behavior was caused by his schizophrenia – which the expert believed was not being controlled under Brasch's current treatment and could be treated more aggressively with medication – and concluded there was no way to assess Brasch's

risk of committing future offenses or whether he qualified for commitment as a sexually violent predator. Both experts testified before the jury, which found Brasch was a sexually violent predator. The court committed Brasch to the department's custody for control, care and treatment until his mental abnormality has changed so that he is safe to be released. Brasch appeals.

**AFFIRMED.**

**Court en banc holds:** (1) Brasch has failed to demonstrate that section 632.495.2 is unconstitutional as applied to him. This statute's language – which provides that a sexually violent predator is committed to the department's custody for “control, care and treatment” until the person's mental abnormality “has so changed that the person is safe to be at large” – indicates that its main purpose is to confine sexually violent predators because of the danger they pose to society. The United States Supreme Court has held that the federal constitution permits the civil commitment of sexually violent predators such as Brasch. *Kansas v. Hendricks*, 521 U.S. 346, 365-66 (1997). The language of section 632.495.2 indicates that treatment is at least an ancillary purpose, but such a purpose does not require that all treatment under the statute eventually lead to the individual being reintegrated into society. The United States Supreme Court never has held that the constitution prevents a state from detaining civilly those for whom no treatment is available but who nevertheless pose a danger to others, but it has recognized that it would be of little value to require treatment as a precondition for civil confinement of a dangerous individual for whom no acceptable treatment exists. *Hendricks*, 521 U.S. at 366. Section 632.495.2 does not require the state to provide treatment that will produce a particular outcome, especially given that not all mental conditions are susceptible to treatment. *Whitfield v. State*, 250 S.W.3d 722, 724 (Mo. App. 2008). While the intent of Brasch's involuntary civil commitment is for him to respond to treatment, if he does not, then he remains as much a threat to society as a committed person who refuses to participate in treatment. There is no statutory or constitutional bar to confining a sexually violent predator who cannot or will not respond to treatment. *Whitfield*, 250 S.W.3d at 725. As such, Brasch can be confined permanently if he does not respond to the treatment the department provides him to protect the public from him.

(2) The trial court did not abuse its discretion in overruling Brasch's objection and motion for mistrial when the state argued in closing that it was the jury's responsibility to prevent another victim from being added to Brasch's list. His future dangerousness not only is relevant in a sexually violent predator proceeding, but it also is a necessary element that the state must prove to commit him pursuant to section 632.495.1. The state's suggested inference that Brasch would add another victim to his list if released was supported by the state's expert's testimony that Brasch was more likely than not to commit a predatory act of sexual violence if not confined to a secure facility for control, care and treatment.