IN THE
MISSOURI SUPREME COURT

No. 83186

IN THE MATTER OF THE CARE AND TREATMENT OF EDDIE J. THOMAS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an April 13, 2000, judgment upon a jury verdict, adjudicating appellant Eddie Thomas a sexually violent predator pursuant to § 632.495, RSMo. 2000, and remanding him to the custody of the Missouri Department of Mental Health for custodial treatment. The circuit court denied Thomas' motion for new trial on May 24, 2000. Thomas filed a timely notice of appeal to this Court.

Because Thomas challenges the constitutionality of a statute, this Court has jurisdiction pursuant the Missouri Constitution, Art. V, § 3.

STATEMENT OF FACTS

Appellant's statement of facts goes well beyond a "concise" statement of "facts relevant to the questions presented for determination." Supreme Court Rule 84.04(c). Thus respondent provides the following brief statement of the facts "most favorable to the verdict, disregarding all contrary evidence and inferences." *State v. Meanor*, 863 S.W.3d 884, 890 (Mo. banc 1993).

Procedural History

Eddie Thomas was incarcerated following his 1982 conviction on three counts of forcible rape and two counts of forcible sodomy. L.F. 7-8. Prior to Thomas's scheduled release, Thomas's records were considered by the multidisciplinary committee established to review sexually violent predator ("SVP") cases pursuant to § 632.483.4 RSMo. 2000. *See* L.F. 11. The multidisciplinary committee determined that Thomas appeared to meet the definition of an SVP. LF 11-14.

On July 12, Thomas's status was considered by a prosecutor's review committee, established pursuant to § 632.483.5., RSMo. 2000. L.F. 23. Participating were the prosecuting attorneys for Buchanan, Cape Girardeau, and St. Charles counties, and assistants designated by the prosecutors of the Warren County and City of St. Louis Circuit attorneys. *Id*. That committee, too, determined that Thomas appeared to meet the definition of an SVP. *Id*.

On July 13, pursuant to § 632.486, the Attorney General filed a petition in the probate division of the circuit court for the City of St. Louis to commit appellant to the

custody of the Missouri Department of Mental Health. L.F. 7-10. The Attorney General alleged that sufficient evidence existed to determine that appellant was an SVP. L.F. 8.

On July 15, the probate division reviewed the petition and, under § 632.489.1, found probable cause to believe that appellant was an SVP. L.F. 30. Thomas waived his right to a probable cause hearing within 72 hours. L.F. 1. On August 6, 1999, after holding a probable cause hearing pursuant to § 632.489.2, the probate division again found that probable cause existed that appellant met the definition of an SVP. L.F. 3, Tr. 1-64. The probate division ordered a psychological examination of Thomas pursuant to § 632.489.4.

The probate division conducted a jury trial pursuant to § 632.495 on April 10-12, 2000. Tr. 65-479. The jury determined that Thomas was an SVP. Tr. 170. On April 13, 2000, the probate court committed Thomas to the custody of the Missouri Department of Mental Health for treatment in a secure facility. L.F. 175-76.

Thomas filed a motion for new trial on May 10. LF, 178-96. The court denied it on May 24. L.F. 197. Thomas then filed a timely notice of appeal with this Court. L.F. 199.

Evidence at trial

Victim witnesses

Jacqueline Hall was the first of the victims of Thomas's violent sexual offenses to testify at trial. On October 23, 1974, when she was 13 years old, she was accosted by Thomas as she entered her apartment building in University City. Tr. 216-20. Thomas held a sharp object to her neck, pushed her into the stairwell, and ordered her to pull down her pants. Tr. 220-23. She complied, but when a man coming downstairs interrupted them,

Thomas fled. Tr. 222-23. Thomas pled guilty to the offense of child molestation. Tr. 225-26, 426.

The story continued with the testimony of appellant's stepdaughter, Audrea. In 1974, when she was four years old, she came to live with Thomas when her mother, Lillie, married him. Tr. 267, *see also* Tr. 227-28. About the time Audrea turned six, Thomas first sexually assaulted her. Tr. 229. Over the years, he masturbated and ejaculated on her (Tr. 229-30), performed oral sex upon her and had her do the same to him (Tr. 230-31), and had vaginal and anal sex with her (Tr. 230-31). Thomas first forced her to have vaginal sex when she was nine. Tr. 231. He also engaged in other sexual activities, such as having Audrea relieve herself in his mouth. Tr. 231-32. These acts against Audrea took place while her mother was at work. Tr. 230, 249.

Thomas threatened Audrea that, if she told her mother about their sexual activities, he would "whoop" her, and her mother would not believe her. Tr. 238. One time, when Audrea was about 9, Audrea did tell her mother that Thomas had been "messing with her." Tr. 238-40. But Lillie did not believe her. Tr. 240, 271.

When Audrea was 10, Thomas threatened to abuse her 5-year-old half-sister, Raquel Thomas (daughter of Thomas and Lillie) if Audrea went out of town with her grandfather. Tr. 242-43. Audrea left town, and Thomas fulfilled that threat. Tr. 242-43, 250-51. Thomas's abuse of Raquel involved oral and anal sex as well as masturbation. Tr. 250-51. The first time Thomas sexually abused Raquel, he poured water on her and in her bed while she was sleeping, woke her and told her she had wet the bed, and told her to change her

clothes. Tr. 251. They then engaged in masturbation as well as oral and anal sex. Tr. 251-52. The next day was similar. Tr. 252. The abuse, which continued for about a year, eventually including Thomas inserting a broom or mop handle into Raquel's vagina. Tr. 252-53. Thomas refused to stop even when Raquel told him it hurt. Tr. 255. He threatened to kill her mother and her siblings if she ever told. Tr. 255-56. Sometimes he threatened to hit her with his belt or a switch. Tr. 256. Sometimes he was drunk when the abuse occurred, and when he was drunk, he was more forceful. Tr. 257-58.

When Audrea and Raquel jointly told Lillie about the abuse about a year and a half after the abuse of Raquel began, Lillie removed them from the home and called in the police. Tr. 242-45. Only then did the abuse end, when Thomas was arrested. Tr. 235, 245.

Thomas has admitted to abusing his daughter and step-daughter – not only the times for which he was convicted, but on more than two hundred occasions. Tr. 315. But he hid those acts, not only by acting while Lillie was away from home, but by taking steps to ensure the acts were not revealed or, if they were revealed, the story was not believed. In addition to threatening Audrea and Raquel, he asked Lillie (before she knew of the abuse) not to believe any such accusations because a friend of his went to prison for something similar that he did not do. Tr. 271. He lied about the evidence that Lillie saw. For example, when Audrea was either 9 or 10 years old, in the course of trying to force her to have sex Thomas strangled her, causing her to fall unconscious. Tr. 233. When she awoke in her bed, Thomas was lying on the floor. Tr. 233-34. Thomas told Lillie that someone had broken into the house, hit him on the head, and tried to rape Audrea. Tr. 235.

Even after Thomas was incarcerated, Thomas attempted to avoid responsibility for his acts. During a prison visit, made when Lillie had been reading the Bible and felt she should try to forgive Thomas, he told her that he didn't force her daughter to have sex with him. Tr. 272. And during a prison conversation with Raquel (who, like Audrea, accompanied Lillie on some visits), Thomas told Raquel that he could get out of prison if she would say that the incident with the mop handle did not happen. Tr. 261. She refused. *Id*.

Expert Witnesses

In addition to fact witnesses, the jury heard from two experts.

Dr. Richard Scott, who testified for the State, is a psychologist and Unit Director for the Forensic Evaluation Program at the St. Louis Psychiatric Rehabilitation Center. Tr. 278-80. Scott reviewed a variety of documents, including police reports, juvenile records, Department of Corrections records, the results of standardized psychological testing, a report of an interview of Thomas conducted by Dr. Daniel Cuneo, a 1981 pretrial investigation, and the records of appellant's participation in the Missouri Sex Offenders Program ("MOSOP"). Tr. 283-85, 307-08. He also interviewed Thomas for over four hours. Tr. 285-87. Thomas declined to discuss with Scott any of the instances besides the five for which he was convicted and the earlier case involving Hall. Tr. 290-91.

Scott used various indices and tests to evaluate Thomas, among them the Rapid Risk Assessment for Sex Offense Recidivism ("RRASOR"), a test called MnSOST, and another related test called the MnSOST-r, all of which are useful to predict sex offender

recidivism. Tr. 373-79. Scott determined that Thomas has two mental abnormalities: pedophilia (he is a sexually attracted to children) and antisocial personality disorder (a pervasion impairment of one's ability to avoid violating the rights of others). Tr. 288-89. And Scott determined that Thomas was more likely than not to reoffend if released from custody. Tr. 300.

Dr. Daniel Cuneo, who testified for the defense, is a clinical psychologist with the Illinois Department of Mental Health. Tr. 363. Cuneo interviewed Thomas for a total of 4.5 to 5 hours (Tr. 371), reviewed 170 pages of Thomas's records, including his MOSOP reports, institutional records, and all his evaluations, including the one performed by Scott (Tr. 371), and spoke with Thomas's sister to confirm the information he received about appellant's background (Tr. 372).

Like Scott, Cuneo determined that Thomas suffered from pedophilia ("not exclusive to females") and antisocial personality disorder. Tr. 380-81. Cuneo also concluded that Thomas suffered from post-traumatic stress disorder (Tr. 399-401), and that he had a below-average ability to empathize – a factor in determining whether

Thomas was likely to reoffend (Tr. 383). Cuneo confirmed that Thomas would say anything he thought people wanted to hear. Tr. 413.

POINTS RELIED ON

I.

The trial court did not err in denying appellant's motion to dismiss the petition nor his objections to Instruction 6 because §§ 632.480-513, RSMo. 2000, do not violate the due process clauses of the constitutions of Missouri and the United States in that under those clauses the state may place a person in involuntary custodial treatment if he has a mental abnormality and is dangerous.

Foucha v. Louisiana, 504 U.S. 71 (1992)

State v. Revels, 13 S.W. 3d 293 (Mo. banc 2000)

In re Gordon, 10 P.3d 500, 502-03 (Wash. App. 2000)

In re Linehan, 594 N.W. 2d 867 (Minn. 1999)

§§ 632.480-513, RSMo. 2000

Minn. Stat. § 526.09 (1992)

Minn. Stat. § 253B.02 subd. 18b

§ 1.140, RSMo. 2000

§ 191.910, RSMo. 2000

II.

The trial court did not err when it denied appellant's motion to dismiss the petition because §§ 632.480-513, RSMo. 2000, do not violate the equal protection clauses of the constitutions of Missouri and of the United States in that he failed to identify any similarly situated person who would be subjected to different treatment

and in that there is a constitutionally adequate basis for requiring the custodial treatment of those meeting the definition of "sexually violent predator" but not necessarily all other persons with mental abnormalities that render them dangerous.

State ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 272 (1940)

Ex Parte Wilson, 48 S.W. 2d 919, 921 (Mo. 1904)

Lloyd v. Dollison, 194 U.S. 445, 447 (1904)

§ 632.365, RSMo. 2000

§§ 632.480-513, RSMo. 2000

Minn. Stat. § 253B.02 subd. 18b

III.

The trial court did not err when it denied appellant's motion to dismiss the petition because involuntary custodial treatment of sexually violent predators does not constitute an additional penalty in violation of the ex post fact clauses of the Missouri and United States constitutions in that the confinement is the result of a civil, rather than a criminal proceeding, and is a proper exercise of the state's police power.

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

Kansas v. Crane, 7 P.3d 285 (Kan. 2000)

Selig v. Young, 121 S.Ct. 727 (2001)

§ 632.495, RSMo. 2000

Kansas Stat. Ann. § 59-29a03(a)

Kansas Stat. Ann. § 59-29a07(a)

Kansas Stat. Ann. § 59-2924(d)

IV.

The trial court did not err when it denied appellant's motion to dismiss because §§ 632.480-513, RSMo. 2000, do not violate the double jeopardy clauses of the United States and Missouri constitutions in that the confinement is the result of a civil, rather than a criminal proceeding, and is a proper exercise of the state's police power.

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

Selig v. Young, 121 S.Ct. 727 (2001)

§§ 632.480-513, RSMo. 2000

V.

The trial court did not err when it denied appellant's motion to dismiss the petition because the St. Louis circuit attorney complied with § 632.483.5, RSMo 2000, when she sent an assistant circuit attorney to the prosecutors' review committee in her place, in that prosecutors may act through their assistants, and in any event, the statutory language is neither mandatory, nor did appellant suffer any prejudice.

State v. Tierney, 584 S.W.2d 618, 620 (Mo.App. W.D. 1979)

State v. Hoover, 719 S.W.2d 812, 816 (Mo.App. W.D. 1986)

§ 56.430, RSMo. 2000

§ 56.540, RSMo. 2000

§ 56.550, RSMo. 2000

§ 632.483.5, RSMo. 2000

STANDARD OF REVIEW

This is the first direct challenge on appeal to the constitutionality of §§ 632.480-513, RSMo. 2000, Missouri's law providing for the evaluation and involuntary custodial treatment of sexually violent predators.[1] Under that statute, persons who suffer from mental abnormalities that make them "more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility" are committed for treatment by the Missouri Department of Health in a secure custodial setting.

In stating the standard of review, appellant Thomas argues that he was not required to preserve his claims of error in a motion for new trail, asserting that Rule 78.07 does not apply to claims of error in the probate courts. He then omits any discussion of the proper standard of review for errors that were not preserved, and proceeds directly to a discussion of "plain error" review of errors that were preserved. Thomas's bifurcated approach may be the result of the absence of a definitive ruling from this court on the meaning of the broad language of Rule 41.01(b), as applied to rules such as 78.07 that affect a matter both in the trial court and on appeal.

That rule exempts proceedings in the probate division from all rules of procedure save those specified, unless the "judge of the probate division . . . order[s] that any or all of

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[1] The issue raised by appellant in Point I, however, has also been raised in *In the Matter of the Care and Treatment of Johnson*, No. 23335, now pending in the Court of Appeals, Southern District.

the other Rule 41 through 101 or specified subdivisions of the rules shall be applicable in a particular matter." Literally read, that exempts the probate division even from such generally applicable rules as 43.01 (service of pleadings), 75.01 (control of judgments), 79.01 (assignment of judges), 81.04 (timing of a notice of appeal), 87.01 (when court may grant declaratory judgment), 91.01 (who may petition for a writ of habeas corpus), and 96.07 (partition or real property contrary to will).

This court has considered the application of Rule 41.04(b), but only as to Rule 55. *Rahman v. Matador Villa Assoc.*, 821 S.W. 2d 102, 103 (Mo. 1991). Otherwise, interpretation of Rule 41.04(b) rule has been the province of the Court of Appeals. That court has consistently read the rule to exempt probate division proceedings even from the most basic of the civil rules pertaining to finality and appeals, such as rules 73.01, *e.g.*, *Ramirez v. Walker*, 16 S.W. 3d 672, 677 n.2 (Mo. Ct. App. E.D. 2000), and 74.01, *e.g.*, *Brown v. Gillespie*, 955 S.W. 2d 940, 941 n. 4 (Mo. Ct. App. S.D. 1997), *Kemp v. Balboa*, 959 S.W. 2d 116, 118 (Mo. Ct. app. E.D. 1997). The prevailing interpretation of Rule 41.04(b), then, is as Thomas suggests: unless the probate judge opts in to some requirement of Rule 74, matters may be brought on appeal from the probate division without fulfilling any of the requirements of that rule. This case demonstrates the wisdom of an alternative reading of rule 41.01(b). The need for complete post-trial motions is no less here than it is in a criminal appeal. There is the same need for other procedures relating to appeals, not at issue here but which the court of appeal's reading of Rule 41.01(b) dictates not to apply to probate. To ensure that such procedures are

followed and the ability of the appellate courts to function effectively is preserved, Rule 41.01(b) should not be read to exempt probate proceedings from the rules that dictate the procedure for making a probate division decision final and ensuring a proper matter for and record on appeal. If, given its broad language, Rule 41.04(b) must be read in that fashion, the State respectfully urges the Court to amend the rule to remove prospectively from the probate judge's authority the ability to exempt proceedings from the scope of Rules 74 through 101, at least in the context of appeals under § 632.495.

ARGUMENT

I.

The trial court did not err in denying appellant's motion to dismiss the petition nor his objections to Instruction 6 because §§ 632.480-513, RSMo. 2000, do not violate the due process clauses of the constitutions of Missouri and the United States in that under those clauses the state may place a person in involuntary custodial treatment if he has a mental abnormality and is dangerous.

A. Involuntary custodial treatment is constitutionally permissible for those whose mental abnormalities make them likely to commit acts of sexual violence, not merely for those whose mental abnormality causes complete volitional impairment.

The constitutional test for involuntary commitment has long consisted of two elements: dangerousness and a serious mental problem. *See, e.g., In re Gordon*, 10 P.3d 500, 502-03 (Wash. App. 2000), citing *Kansas v. Hendricks*, 521 U.S. 346 (1997) (*Hendricks*). This court recognized that test most recently in *State v. Revels*, 13 S.W. 3d 293 (2000). There, the court considered arguments that the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992), had modified the traditional test, and concluded that it had not. 13 S.W.3d at 296. Here, Thomas challenges that conclusion at least in part, arguing for an additional constitutional requirement, at least as to proceedings involving the involuntary custodial treatment of sexually violent predators. In his view, the Constitution of the United States precludes involuntary custodial treatment of sexually violent predators

except for those who entirely lack "the volitional capacity to refrain from predatory acts" (App. Br. at 46; emphasis omitted), regardless of whether they have mental abnormalities that make them dangerous. This court should reject the claim that the constitutional rule requires something more than proof of a mental abnormality, dangerousness, and causation.

This court's conclusion in *Revels* was consistent with the opinion of the Court in *Foucha*. The Court repeatedly stated the due process test for civil commitment as requiring that the state "prove by clear and convincing evidence" just two things: "that the individual is mentally ill and dangerous." 504 U.S. at 80; *see also id*. at 75-76, 86. The Court in *Foucha* prohibited merely "the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others." 504 U.S. at 83, *quoted in Revels*, 293 S.W. 3d at 296. This court thus upheld under *Foucha* the continued custodial treatment of a person who "has, and in the reasonable future is likely to have, a mental disease or defect rendering the person dangerous to self or others." 293 S.W. 3d at 296.

By phrasing the constitutional test in this fashion in *Revels*, this court recognized that the two traditional parts of the test (mental illness and dangerousness) are insufficient if applied independently. Thus the "continued custodial treatment" is permissible if the mental abnormality "render[s] the person dangerous." *Id*. Considering a statute parallel to the one at issue here, the Washington Court of Appeals recently phrased the constitutional test in the same way, insisting on a mental illness, dangerousness, and a link between the two. The court upheld Washington's sexually violent predator statute because it "require[]

the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future." *In re Gordon*, 10 P.3d at 503. The Missouri sexually violent predator law should similarly be upheld. Like the unconditional release statute at issue in *Revels*, it meets the constitutional test.

Thomas does not argue that the Missouri law fails the traditional test. Rather, he argues that the U.S. Supreme Court has added another requirement to the test when the involuntary custodial treatment of a sexually violent predator law is at issue. He claims that in addition to findings of mental abnormality, dangerousness, and causation, the abnormality must make it impossible for the person to control his behavior. Thus Thomas would limit the scope of the statute cases in which the jury finds that the person cannot, rather than merely will not or find it difficult to, restrain his violent behavior. That claim was rejected in Washington, where the court of appeals confirmed that there is no requirement that a jury "make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior." *Id.*

In arguing for this new, stricter test, Thomas cannot rely on any holding of the U.S. Supreme Court – though he purports to do so, citing repeatedly to *Hendricks*. *See* App. Br. at 38-40. In fact, in *Hendricks* the Supreme Court was never asked the question of whether or how the Kansas law (which is, like the Washington statute, largely parallel to Missouri's) could be applied to someone who was not completely volitionally impaired. As Thomas

himself notes, Hendricks "conceded at his hearing that he *could not control* his urge to sexually molest children and the only sure way he could keep from continuing his deviant behavior was 'to die.'" *Id*. at 40 (emphasis added), quoting 521 U.S. at 760.[2] Thus the Supreme Court did not decide whether a sexually violent predator law could extend to persons who may have some control over their behavior. What Thomas thus relies on is not a holding; it is the Court's statements about the undisputed facts of the *Hendricks* case. The language he cites does not purport to define either an existing or a new constitutional rule. If it changed the traditional two-part test at all, *Hendricks* did so by clarifying that "mental abnormality" was constitutionally sufficient, *i.e.*, that states did not need to restrict conditions permitting commitment to those medically defined as "mental illnesses."

Unable to rely on the holding in *Hendricks*, Thomas instead turns to the decisions of two courts that have, like the Washington Court of Appeals, considered the "volitional impairment" question: *Kansas v. Crane*, 7 P.3d 285 (Kan. 2000), *petition for cert. pending*, No. 00-957; and *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999). Both courts carried the *Hendricks* dicta too far – though only the Kansas court carried it as far as Thomas suggests.

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[2]Thomas cites that language as if it were literally true. But that is highly unlikely. Surely not even Hendricks abused every child with whom he came into contact, regardless of time, place, or audience. Obviously, Hendricks was merely near one end of a spectrum. Thomas is at another point on that spectrum.

In *Crane*, the Kansas Supreme Court held that the constitution demands proof of complete volitional impairment. 7 P.3d at 290. Thus the only person who can be constitutionally placed in involuntary custodial treatment is one who "cannot control his dangerous behavior." *Id*. For support, the court relied solely on the *Hendricks* dicta. *See id*. at 288090. But again, such dicta is not sufficient to establish a new constitutional due process requirement. Moreover, the Kansas court did not articulate a rationale for its rule. It failed to articulate any meaningful distinction (much less a constitutionally significant distinction) between a person who *cannot* refrain from harmful behavior, and a person who at least to some degree *can* refrain from harmful behavior, but *will not*. Certainly such a distinction makes no sense to the victim of the next sexual offense. Nor does it make sense to the psychologist or psychiatrist; the mental abnormality merits treatment, regardless of whether it compels the patient to act out or merely makes it likely that he will do so. Nothing in *Hendricks* suggests that the *Crane* line would make sense to the U.S. Supreme Court.[3]

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[3]Since Thomas filed his brief, the Arizona Court of Appeals has followed *Crane* and stricken Arizona's sexually violent predator law. *In re Leon G.*, No. CA-MH00-0004, 2001 Ariz. App. LEXIS 21 (Ariz. App. Feb. 15, 2001). In doing so, court identified a difference between "cognitive" and "volitional" abnormalities, drawing not just on the *Hendricks* dicta and *Crane* (*see* No. CA-MH00-0004 ¶ 19), but also on an article in a psychology journal (*id*. ¶ 20). But like the *Crane* opinion and Thomas' brief, the Arizona decision includes no explanation for using the line between those points

Certainly nothing in *Linehan* suggests that there is any sense to the line drawn in *Crane* and urged by Thomas. In fact, the Minnesota court rejected that line and drew another.

Linehan began as a case arising under Minnesota's "sexual psychopath" law, which covers those persons who have "conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." Minn. State. § 526.09 (1992).[4] Some years before, the Minnesota Supreme Court had interpreted this language to require a finding that the person whose commitment was proposed had "an utter lack of power to control their sexual impulses." *State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*. 309 U.S. 270, 272 (1940).[5] The state's initial effort to commit Linehan failed

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to define a constitutional rule. Again, we are dealing with points on a spectrum, not with clearly segregable classes. *See* note 2, *supra*.

[4] The "sexual psychopath" law, though later amended, is now codified at Minn. Stat. § 253B.02 subd. 18b.

[5] The U.S. Supreme Court, in quoting the Minnesota Supreme court's interpretation of the statute, neither endorsed it nor gave it constitutional significance. Rather, the Court observed that the Minnesota court's interpretation of state law was "binding" upon the Court. 309 U.S. at 272.

because the state did not make the requisite showing that he was completely unable to control his behavior. *In re Matter of Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

The Minnesota legislature then adopted a new law, providing for the commitment of "sexually dangerous persons." They are defined as persons who have "engaged in a course of harmful sexual conduct" (defined elsewhere in the statute) and have "manifested a sexual, personality, or other mental disorder or dysfunction," and as a result are "likely to engage in acts of harmful sexual conduct." Minn. Stat. 253B.02 subd. 18c. The Minnesota Supreme Court contrasted it with the prior law as interpreted in *Pearson*: "Commitment under the SDP Act does not require proof that the proposed patient is unable to control his or her sexual impulses." *In re Linehan*, 557 N.W. 2d 171, 175-76 (1996) (*Linehan II*). The Act thus "created a new class of individuals eligible for civil commitment for treatment." *Id*. at 179.

Linehan challenged the law by arguing, in part, for the rule adopted by the Kansas Supreme Court in *Crane, i.e.*, that "an utter inability to control sexual impulses is required in order to satisfy the narrow tailoring demand of strict scrutiny." *Id.* at 180. The Minnesota Court nonetheless held the statute to be constitutional. *Id.* Walking through the steps required by strict scrutiny, the court first confirmed the state's compelling interests "in protecting the public from sexual assault" and "in the care and treatment of the mentally disordered." 557 N.W. 2d at 181, citing *In re Blodgett*, 510 N.W.2d 910, 914, 916 (Minn. 1994), and *Addington v. Texas*, 441 U.S. 418, 426 (1979). The court then held that those

"intertwined" interests are served by the involuntary custodial treatment of sexually dangerous persons: "Treating sexual predators for the disorders that explain their dangerousness serves and falls within the state's interest in protecting the public from sexual assault." 557 N.W. 2d at 181. Finally, the court referred back to one of its own precedents, *Blodgett,* 510 N.W.2d at 916, where it had similarly concluded that "[s]o long as civil commitment is programmed to provide treatment and periodic review, due process is provided." 557 N.W. 2d at 181.

The court then turned to the last question in the strict scrutiny analysis: "whether the SDP Act is sufficiently narrow . . . to satisfy strict scrutiny." *Id*. The court recognized that the "leading United States Supreme Court case on the subject" was *Foucha*. The court then restated the *Foucha* holding: that a person "may be committed only so long as the patient is both mentally ill and dangerous." 557 N.W. 2d at 182, citing 504 U.S. at 77-78, *Jones v. United States*, 463 U.S. 354, 370 (1983), and *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975). The Minnesota court thus agreed with the Washington court in *Young*: an involuntary commitment statute meets constitutional requirements of due process if it affects only persons who are mentally ill, and who because of that illness are dangerous.

Linehan sought review by the United States Supreme Court, challenging the constitutionality of the Minnesota law. His petition was held pending a decision in *Hendricks*. Once *Hendricks* was decided, the Court did what it typically does in cases being held: granted the petition, vacated the Minnesota Supreme Court's decision, and

remanded the case for consideration in light of *Hendricks*. 522 U.S. 1011.[6]

On remand, the Minnesota Supreme Court addressed various arguments Linehan made based on *Hendricks*. *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999) (*Linehan III*). When it reached substantive due process, the court considered and rejected Linehan's demand that the court follow the *Crane* approach and thus retreat from its conclusion that the constitution did not limit sexually violent predator laws to those who are "utterly unable" to control their behavior. *Id*. at 873 n. 3. The majority criticized the dissent for

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[6] Thomas suggests that the Supreme Court's decision to grant the petition, vacate the decision below, and remand ("GVR") in light of *Hendricks* was "significant." App. Br. at 44. Perhaps, but its precise significance is far from clear. Certainly the GVR did "not amount to a final determination on the merits." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). The significance of a GVR has been variously stated as indicating that the case "remotely involv[es] the principles laid down" in the decision being announced, *Goldbaum v. U.S.*, 348 U.S. 905, 906 (1955); that it is "not certain that a case was free from all obstacles to reversal on an intervening precedent," *Henry v. City of Rock Hill*, 376 U.S. 77 (1964); or that "the intervening decision has shed new light on the law which, if it had been available at the time of the [lower court's] decision, might have led to different results," *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J. dissenting). Evaluating the significance of a GVR is particularly problematic without knowing the precise questions presented in the petition, which Thomas does not provide.

finding in the *Hendricks* dicta the rule later applied in *Crane*. *Id*. Thus the court refused to "insert[] the word 'totally' in front of the word 'control' whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses." *Id*. It is sufficient that a person's mental abnormality merely makes it "difficult . . to control his dangerous behavior." *Hendricks*, 521 U.S. at 358, *quoted at* 594 N.W. 2d at 873 n.3. A commitment law is constitutional, then, if it can be interpreted to allow only the "civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to *adequately control* their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future." *Id*. at 876 (emphasis added). To put it another way, the Minnesota court concluded that the statute must be constitutionally limited to provide for the involuntary custodial treatment only of one who "demonstrates a lack of adequate control over his sexually harmful behavior." *Id*.

If a person can "adequately control" his behavior, then he will not fit the statutory definition of a "sexually violent predator" – *i.e.*, he will not be "more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." § 632.480(5). Anything else is *in*adequate control. Thus Missouri's law goes no further than the *Linehan* rule would permit. But again, the Court need not decide whether that is true. The real test is still the two-part one articulated in *Foucha* and *Revels*, which Thomas never even suggests that the Missouri law fails.

B. Limiting interpretations are available in Missouri.

According to Thomas, the courts in both *Crane* and *Linehan* gave the statute a limiting interpretation, rather than declaring them unconstitutional. *See* App. Br. at 48. That is true in *Crane*, but not in *Linehan*. In *Linehan*, the court merely concluded that the statute, as written, applied only to those who could not "adequately" control their behavior because of their mental condition. But even if it were true that Missouri's law must be given a limited reading, Thomas is wrong when he argues that Missouri's law is so different from those interpreted in *Crane* and *Linehan* that the law must be stricken rather than interpreted in a constitutionally permissible fashion.

Thomas begins by discussing Missouri's severance law, § 1.140, RSMo. 2000. That statute does not directly apply here, for it deals only with the question of whether to retain the remainder of a statute once a portion is deleted, not how to handle statutes that may be constitutionally applied to one person (one who is volitionally impaired) but not to another (one who can but will not refrain from violent acts). Moreover, the analysis that this court has applied under that statute would not be helpful to Thomas. The statute requires the court "to preserve the nonoffending portions of the statute, unless we determine that the legislature would not have enacted the valid provisions without the void one." *Kilmer v. Mun*, 17 S.W. 3d 545, 553 (Mo. banc 2000). The question would be whether the legislature "would not have enacted" the statute if it applied only to those with complete (*Crane*) or partial (*Linehan*) volitional impairment. In this case, as in so many others, the "answer is rather obvious." *National Solid Waste Mgmt. Ass'n v. Director of the Dept. of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998). And here, there is no logical

basis for arguing that the legislature would not have passed the statute if it would only have led to the custodial treatment of the worst of those the existing language sought to reach.

Certainly a contrary conclusion cannot be based, as Thomas suggests, on the fact that the statute defines "sexually violent predator" in one place, then refers back to that place repeatedly. Thomas has no precedent for the premise that repeated use of the term for which a limiting reading is proposed has any impact, much less a dispositive impact, on the availability of severance. And he provides no logical explanation for that claim. Indeed, the consistent use of a single, defined phrase is a legislative tool that should be encouraged, not discouraged by finding it to be the basis for precluding either severance or a limiting reading of the statute.

Thomas achieves no more by pointing to the pre-filing reviews in Missouri – both by the multidisciplinary committee and by the prosecutors' committee. *See* §§ 632.483.4 and 632.484.4. Though such reviews are absent from the statutes at issue in *Crane* and *Linehan*, Thomas's effort to attribute some significance to that absence fails. In fact, those statutes are largely parallel to the Missouri law, except that they leave the pre-filing review to a single prosecutor. Consistent with other Missouri statutes, the legislature has chosen here to place a check on the exercise of authority by the attorney general. *See*, *e.g.*, § 191.910. Such checks mean nothing more than that the legislature wishes to restrain an overzealous attorney general, retain a role for local prosecutors, or give additional protections to those whose liberty is threatened by the statute. They do not show that the legislature would not have acted if the scope of the attorney general's authority were also

limited by the constitution to something less than what the statute contemplates.

That the pre-filing review is done in what Thomas describes as "an elaborate, multiplayer process" (App. Br. at 49-52) is similarly unimportant. The groups performing that function are made up of state employees. They come together only as needed. The legislature thus avoided creating a bureaucracy that would have to be justified by having a large number of cases.

That a retained expert testified at trial that "the **threat** of incarceration – as a result of a new prosecution or resulting from revocation of parole – is effective in deterring child sex abuse" (App. Br. at 53; emphasis in original) similarly fails to support Thomas's claim. He presents no basis for his implicit assertion that the legislature agreed, or that it even had such testimony before it. Moreover, the purpose

of this law is not just to prevent immediate harm, but to ensure intensive treatment for those likely to cause such harm.

But again, the question here is not really one of severance; it is whether a limiting interpretation is possible. And *Linehan*, if not *Crane*, shows that it is. What the court would have to do, in order to retain the law but adopt even the *Crane* interpretation, is no more difficult than what it did recently in *Oliver v. State Tax Commission*, 2001 Mo. LEXIS 15 (Mo. banc 2001) (not final): to add a constitutional gloss to statutory language in a manner that prevents anyone's rights from being violated.

Certainly taking such a step is easier here than in was in *Linehan*. There, the court

required proof of lack of adequate control despite a specific provision in the law stating that "it is not necessary to prove that the person has an inability to control the person's sexual impulses." Minn. Stat. § 253B subd. 18c(b). If Minnesota law can be so read, surely Missouri's could, if it were constitutionally required.

C. The jury instruction conformed to the statute.

Thomas next argues that the jury was improperly instructed. But his argument is merely a reiteration of the ones addressed above. He does not suggest that the instruction failed in any way to conform to the statute. Instead, he argues that the jury was required to find "that appellant was unable to control his actions." App. Br. at 57.

If complete volitional impairment were a constitutional or statutory requirement, then Thomas would be right; the jury instruction should reflect it. But as discussed above, there is no such constitutional requirement.

If inadequate ability to control behavior were a constitutional requirement, the instruction would be sufficient, because it, as the statute required, required the jury to find that appellant was "more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility," and that he is likely to commit such acts because of his "mental abnormality."

D. The record supports the jury's finding that Thomas could not adequately control his behavior, *i.e.*, that he was likely to commit further sexual violent acts unless placed in custodial treatment in a secure facility.

In *Linehan*, after addressing the proper interpretation of the statute, the Minnesota

court next turned to the issue of proof. Again, it rejected Linehan's challenge, finding sufficient evidence in the record to support the conclusion that Linehan "lacks adequate control over his harmful sexual impulses." *Id*. at 878. There is no suggestion that the evidence included an expert opinion using words similar to "volitional impairment." Rather, Linehan's lack of adequate ability to control his impulses was shown by his own behavior. *See id*. 876-78. That behavior established Linehan's "impulsivity" and "lack of control."

There is similar evidence in this case. The evidence presented by Thomas's victims showed impulsive as well as "grooming" behavior. For example, he was unable to control his actions even after Audrea told Lillie that Thomas was "messing with" her. If this court adopts the *Linehan* standard and considers the evidence, the result should be the same as in that case: a "holding that the [SVP] Act is constitutional and appellant's civil commitment under the [SVP] Act is appropriate." *Linehan III*, 594 N.W. 2d at 878.

Thomas does not even address the evidence under the applicable standard, *i.e.*, considering "most favorable to the verdict, disregarding all contrary evidence and inferences." *State v. Meanor*, 863 S.W.3d at 890. He does not even suggest that in this case the jury had anything less than what the Minnesota court found to be sufficient under the tougher standard applied in *Linehan*. Instead, he consistently returns to his demand that the evidence sufficient to satisfy the *Crane* standard. If he were right, the right response would be reversal – though merely for a new trial, not with instructions to dismiss the petition. But again, he is wrong: neither the statute nor any Supreme Court precedent

restricts involuntary custodial treatment to those with complete volitional impairment.

In large part, both in his statement of facts and in later points in his brief, Thomas argues on the premise that the jury was wrong, that he would not be likely to commit further sexually violent acts if not treated in a secure facility because he could be treated equally well in an outpatient setting. That was certainly the testimony of his expert, Dr. Cuneo. But the jury was free to disregard that testimony – either because it did not believe it at all, or because it found the contrary testimony of Dr. Scott to be more credible. To ask even implicitly that this Court conclude that Thomas could adequately control his behavior in a noncustodial setting is to ask that the Court find facts contrary to those found by the jury. Nothing in the sexually violent predator law nor in Thomas's constitutional argument changes the basic rules of practice so as to permit such a reversal.

II.

The trial court did not err when it denied appellant's motion to dismiss the petition because §§ 632.480-513, RSMo. 2000, do not violate the equal protection clauses of the constitutions of Missouri and of the United States in that he failed to identify any similarly situated person who would be subjected to different treatment and in that there is a constitutionally adequate basis for requiring the custodial treatment of those meeting the definition of "sexually violent predator" but not necessarily all other persons with mental abnormalities that render them dangerous.

Thomas next argues that the State violated his constitutional right to equal protection of the laws. "'Equal protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances.'" *Ex Parte Wilson*, 48 S.W. 2d 919, 921 (Mo. 1904), *quoting* BRILL'S CYCLOPEDIA OF CRIMINAL LAW, vol. 1, § 42. An equal protection claim can thus "only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he." *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904).

The equal protection analysis must begin, then, by determining what class of persons is covered by the statute being challenged, then by comparing the law's treatment of that person to its treatment of the challenger. The first question is easy to answer: this law

covers only those persons who have committed criminal sexual acts and who are then found beyond a reasonable doubt to be "likely . . . to engage in predatory acts of sexual violence if not confined in a secure facility." § 632.480(5). Thomas argues his case as if the statute instead covered those who have committed criminal sexual acts and are now likely to engage in predatory acts of sexual violence unless treated in an outpatient setting. But the statute cannot possible be read that way. Thomas has been subjected to involuntary *custodial* treatment by the Department of Mental Health not merely because the jury found that he was "dangerous" or needed treatment, but because it found that he would be dangerous (to others, not just to himself) unless subjected to treatment in a secure facility.

At its second step, equal protection analysis requires that Thomas identify someone who is similarly situated, and show that the law treats that person differently in some constitutionally significant sense. There he fails, for he never identifies anyone – by name, class, or hypothetical circumstance – who is similarly situated but treated differently. Again, his argument is that the state permits some persons civilly committed to be placed in community treatment, even if they are "dangerous." App. Br. at 64. For that proposition he cites § 632.365, though neither that nor any other Missouri statute says that someone who would be dangerous outside a custodial setting could nonetheless be placed outside a custodial setting. Certainly neither that nor any other Missouri statute suggests that someone who is "likely . . . to engage in predatory acts of sexual violence if not confined in a secure facility" could nonetheless be placed in community treatment.

Thomas cannot avoid that deficiency in his argument by jumping to precedents

dealing with classification of sexual offenders and suggesting that in them is a rule that those posing the threat of sexual violence cannot be treated differently from those who are also dangerous, but who pose different sorts of threats. In fact, the U.S. Supreme Court has long recognized that states have the ability, under the Constitution, in the course of drafting statutes dealing with civil commitments, to treat persons who pose threats of sexual violence due to mental conditions differently from others who are dangerous. For example, in *Pearson*, the Court upheld Minnesota's "psychopathic personality" law, which applies only to those persons who are "irresponsible for [their] conduct with respect to sexual matters." Minn. Stat. § 253B.02 subd. 18b, cited at 309 U.S. at 272. The Court rejected Pearson's equal protection claim, finding "no reason for doubt" that the legislature's decision to single out those threatening sexual violence was constitutionally permissible:

> Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its

> discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

Id. at 274-75, *quoting Miller v. Wilson*, 236 U.S. 373, 384 (1915). Applying that test, equal protection challenges to a variety of sexual offender and predator laws have been defeated. *E.g.*, *Peterson v. Gaughan*, 404 F.2d 1375, 1377-78 (1st Cir. 1968); *Martin v. Reinstein*, 987 P.2d 779, 795-99 (Ariz. App. 1999); *Trueblood v. Tinsley*, 366 P.2d 655, 659 (Colo. 1961); *Vanderhoof v. People*, 380 P.2d 903, 904 (Colo. 1963); *State v. Evans*, 245 P.2d 788, 790-91 (Idaho 1952); *State v. Little*, 261 N.W.2d 847, 850-51 (Neb. 1978). That the legislature "could have gone further" and required custodial treatment of persons who threaten the public safety in ways other than through sexual violence does not establish an equal protection violation.

Here, as in *Pearson* and its progeny, the legislature has chosen to "hit[] the evil where it is most felt." The absence of legislative history makes it impossible to ascertain the precise reasons for the lines drawn here. But in Missouri, as in Michigan, "[i]t is reasonable to presume that the legislature concluded that the need for such restraint as the statute imposes was greatest among that group of criminal psychopathic persons apparently predisposed to transgressions against society; that is, those persons charged with other

violations of the criminal law." *State v. Chapman*, 4 N.W. 2d 18, 24-25 (Mich. 1942). Thus, under the rule in *Pearson*, "[t]he legislature, in the exercise of its State police power and in its efforts to afford protection, could limit the scope of a legislative act to the eradication of evil where presumably the need is greatest, even though it might constitutionally have extended the operation of its enactment to a larger class." *Id*.

Rather than dealing with the "similarly situated" problem or with the rule in *Pearson*, Thomas opens his argument by citing *In re Young*, 857 P.2d 989, 1011 (Wash. 1993). There, the Washington Supreme Court cited another U.S. Supreme Court decision, one in which the test for evaluating different methods of committing or treating the mentally ill was articulated as whether the distinction being made has "some relevance to the purpose for which the classification is made." *Baxtrom v. Herold*, 383 U.S. 107, 110 (1966). Unlike *Pearson* and its progeny, the Court in *Baxtrom* did not deal with New York's law in its entirety. Rather, it took that law apart, comparing little pieces of the specific law at issue to comparable pieces of the law regarding civil commitments generally. Thus it held that Baxtrom was deprived of equal protection because he could not invoke "the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York," and because he was committed "without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxtrom, nearing the expiration of a penal sentence." *Id*. at 110. In other words, he was deprived of two procedural protections that were given to other persons subject to

commitment. In the Court's view, though the distinction between sexual offenders and others may meet constitutional requirements for equal protection purposes generally, the distinctions did not justify depriving Baxtrom of these two specific procedural rights.

Obviously neither of those specific rights is at issue here, and *Baxtrom* does not state a general rule that precludes the kind of distinctions Missouri law makes. *See State v. Kee*, 510 S.W.2d 477, 481 (Mo 1974), Missouri's law gives Thomas the right to a jury trial at which both mental abnormality and dangerousness must be proven by the state. In fact, it gives him greater protection than it gives to civil committees generally: the state must make its case "beyond reasonable doubt," and the jury verdict must be "unanimous." § 632.495. Thomas does not, of course, challenge those or the other ways in which Missouri's sexually violent predator law gives him *more* protection than is allocated to civil committees generally. If there were someone who could challenge such procedures in the sexually violent predator law on equal protection grounds, it would be the person who is similarly situated (*i.e.*, equally dangerous absent custodial treatment) but not given the same protections.

Unable to rely on procedural differences in *Baxtrom*, Thomas focuses – as did the Washington court in *In re Young* – on a substantive application of the law: the issue of treatment location. But even there, he ignores the teaching of *Baxtrom*, for he does not consider "the purpose for which the classification is made." The "purpose for which the classification" of sexually violent predators was made is obvious: to protect the public, not only by ensuring the most effective treatment of sexually violent predators, but by

preventing them from gaining access to new victims while their treatment is under way. The risks of premature access to the public are dramatically demonstrated by the facts of *Linehan*. *See* 557 N.W. 2d at 175. The horrible nature of sexual offenses and the vulnerability of victims makes the need for custodial treatment greater than it is for civil committees generally.

But again, this Court need never reach that point in the analysis. Thomas has yet to identify a method under which Missouri law would permit the use of community treatment for a person who is "likely to engage" in other equivalent kind of "violence if not confined in a secure facility." Unless and until he does so, he has no equal protection argument to make.

III.

The trial court did not err when it denied appellant's motion to dismiss the petition because involuntary custodial treatment of sexually violent predators does not constitute an additional penalty in violation of the ex post fact clauses of the Missouri and United States constitutions in that the confinement is the result of a civil, rather than a criminal proceeding, and is a proper exercise of the state's police power.

Thomas recognizes that the U.S. Supreme Court held in *Hendricks* that the Kansas sexually violent predator statute does not violate the ex post facto clause. App. Br. at 72. Thus his effort in his third point is to distinguish the Missouri law from the Kansas model. That effort fails at every turn.

First, Thomas returns to point addressed in Point I, suggesting that the Kansas law does not violate the ex post facto clause because it applies only to those with complete volitional impairment, but that the Missouri law is broader. Whether that is true is addressed above. But it is irrelevant. The point here is that the Supreme Court expressly upheld against an ex post facto clause challenge the Kansas law *as written* – not as it was interpreted in *Crane*. Thomas identifies no any language in the Kansas law that makes it more amenable than the Missouri law to a construction that limits its effect to those with complete volitional impairment. And the Kansas court in *Crane* did not purport to find such language, relying instead exclusively on U.S. Supreme Court precedent. Moreover, in *Crane* itself, the Kansas court rejected the argument that the statute, even as applied to

Thomas (as to whom, remember, there was no proof of volitional impairment) violated the ex post facto clause. 7 P.3d at 292.

Second, Thomas compares the conditions of confinement under the two states' laws. He correctly states that in Kansas those found to be sexually violent predators are "confined to the psychiatric wing of a prison hospital 'where those whom the Act confines and ordinary prisoners are treated alike.'" App. Br. at 73-74, *quoting Hendricks*, 521 U.S. at 379. Then he shifts his argument to reach a very different point. When he speaks of the Kansas law upheld in *Hendricks*, Thomas compares "those whom the Act confines" with "ordinary prisoners." But when he speaks of the Missouri law at issue here, he suddenly wants to compare "[e]veryone committed as an SVP" with "non-SVP persons who are committed to the Department of Mental Health." App. Br. at 74. He omits any explanation for his shift from apples to oranges.

In fact, there is no meaningful distinction between Kansas' approach of placing SVPs in the prison hospital and Missouri's approach of placing them in the custody of the Department of Mental Health but permitting the Director of the Department to enter into "an interagency agreement" under which the Department of Corrections would house the SVPs, who, "except for occasional instances of supervised incidental contact, shall be segregated from" offenders serving prison terms. § 632.495. Moreover, given that in this respect Thomas is making a facial challenge to the statute, the real question is not what Kansas or Missouri is *doing*, but what their statutes *provide*. And in that respect, Thomas does not and cannot articulate any difference between Missouri's decision to place SVPs in

the custody of the Director of its Department of Mental Health and Kansas's decision to place them in a "facility operated by the department of social and rehabilitation services," in a building separated from "any other patient under the supervision of the secretary." Kansas Stat. § 59-29a07(a).

Thomas then returns to his argument in Point II, once again contrasting the custodial treatment of Missouri SVPs with the treatment of other Missouri civil committees. But Kansas law articulates a rule that Thomas fails to distinguish from Missouri's: that a person other than a sexually violent predator cannot be released into the community absent a finding that he "is not likely to cause harm to self or others" during such placement. Kansas Stat. Ann. § 59-2924(d) (1994). The presence of such a rule was not sufficient to convert Kansas' sexually violent predator law into an ex post facto law in *Hendricks*. Nor is it sufficient to convert Missouri's law.

Third, Thomas argues that this must be an ex post facto law because a committee of prosecutors must approve before the attorney general can proceed with a petition. But again, he does not and cannot draw a distinction between the Missouri and Kansas laws. In Kansas the decision is not made by a committee, but it is still made by a prosecutor. Kansas Stat. Ann. § 59-29a03(a). The "veto power" exercised by a large group on the ability of the attorney general to file a petition is not a basis

for distinguishing the two laws, and thus not a basis for finding an ex post facto clause violation where the Supreme Court has said no such violation exists.

Not only is the Missouri law like the one upheld in *Hendricks*, it is also like the one upheld against an ex post facto challenge in *Selig v. Young*, 121 S.Ct. 727 (2001). *Selig* thus deprives Thomas of the ability to assert a facial challenge to Missouri's law on ex post facto grounds. Perhaps it leaves him room for an argument that somehow, in the process of following the dictates of § 632.495, Missouri has violated that clause as to Thomas himself. But Thomas has not asserted such a claim. Nor has he developed the proof necessary to prevail on such a theory.

IV.

The trial court did not err when it denied appellant's motion to dismiss because §§ 632.480-513, RSMo. 2000, do not violate the double jeopardy clauses of the United States and Missouri constitutions in that the confinement is the result of a civil, rather than a criminal proceeding, and is a proper exercise of the state's police power.

Thomas' fourth point, a claim that his custodial treatment violates his right against double jeopardy, is merely a reiteration of his third. It is ruled by Supreme Court's decisions in *Hendricks* and *Selig*, where the Court held that the Kansas and Washington statutes are not (at least on their face) punitive nor punishment, and thus do not implicate double jeopardy. To succeed, then, Thomas would have to distinguish Missouri's law from those in Kansas and Washington. In this point, he makes no effort to do so. Thus his fourth point must fail.

V.

The trial court did not err when it denied appellant's motion to dismiss the petition because the St. Louis circuit attorney complied with § 632.483.5, RSMo when she sent an assistant circuit attorney to the prosecutors' review committee in her place, in that prosecutors may act through their assistants, and in any event, the statutory language is neither mandatory, nor did appellant suffer any prejudice.

Alleging a dispositive, pre-petition procedural defect, Thomas's six-page Point V adds little to the three sentences by which he raised the issue in a motion to dismiss below. LF 34-35. Though use of the article "the" and the preposition "of" in a statute could hypothetically affect the outcome of some case, it does not affect the outcome of this one.

The "circuit attorney" is the prosecutor for the City of St. Louis (§ 56.430), and is empowered to appoint such assistant circuit attorneys as she deems necessary for the proper administration of her office (§ 56.540). Assistant circuit attorneys perform the same duties as the circuit attorney, under the direction, and subject to the control, of the circuit attorney. § 56.550. The Missouri Rules of Criminal Procedure have long equated "prosecutor" with "assistant prosecutor"

> for the reason, no doubt, that the office commands from both the same qualifications and the same duty. Sections 56.151 [Laws of 1973], 56.180, 56.200, 56.240, *56.550*, RSMo 1969.

State v. Tierney, 584 S.W.2d 618, 620 (Mo.App. W.D. 1979) (emphasis added). Though the Rules of Criminal Procedure did not apply to the instant proceeding, as it was civil and

brought in probate, for purposes of § 632.483.5, the legislature simply followed the long-standing convention, as recognized in *Tierney*, of equating prosecutors with their assistants.[7] Certainly nothing in subsection 5 prohibits the elected circuit attorney from delegating prosecutors' review committee function to an assistant circuit attorney.

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[7] In fact, subsection 5, in its current version now begins with explicit reference to a portion of Chapter 56:

> Effective January 1, 2000, the prosecutors coordinators training council established pursuant to section 56.760, RSMo, shall appoint a five-member prosecutor's review committee. . . .

§ 632.483.5, RSMo 2000. (§56.760 creates the Prosecutors Coordinators Training Council.)

Thomas notes, App. Br. 86 n.6, that this amendment became effective after the committee convened in his case; that the amendment simply changed the way in which the committee is appointed; and that it does not impact his argument. But the amendment, made some two years after the sexually violent predator statutes had been in place, and after dozens of prosecutors' review committee had been convened, including Thomas's, suggests that the legislature did not disagree with the application of the long-standing convention in the prosecutors' review committee context.

Moreover, even assuming that subsection 5 called for the personal participation of the circuit attorney, the statute is not mandatory in that respect. Thomas overlooks a particularly relevant cannon of construction:

> [W]hen a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. However, if it merely requires certain things to be done and nowhere prescribes the results that follow, such a statute is merely directory.

State v. Hoover, 719 S.W.2d 812, 816 (Mo.App. W.D. 1986) (*quoting Garzee v. Sauro,* 639 S.W.2d 830, 832 (Mo. banc 1982)). Thus, courts have readily concluded that various statutes containing the word "shall," but lacking a penalty or other provision for failure to comply with its terms, are directory rather than mandatory. *See, e.g., Tooley v. State of Missouri*, 875 S.W.2d 110 (Mo. banc 1994) (insanity acquittee failed to receive hearing within statutorily-prescribed 60-day window; statute nevertheless directory); *Frager v. Director of Revenue,* 7 S.W.3d 555 (Mo.App. E.D. 1999) (Director failed to issue final administrative decision within 90-day window; director not deprived of authority to enter decision after the 90-day period had passed); *State v. Conz,* 756 S.W.2d 543 (Mo.App. W.D. 1988) ("persistent offender" status not proved as specified by statute; conviction stands). *Compare Greenwich Condominium Association v. Clayton Investment Corp.*, 918 S.W.2d 410 (Mo.App. E.D. 1996) (statute specifically provided that tax purchaser "shall apply" for occupancy permit, and that failure to apply within ten days "shall result" in

the sale being set aside; because statute provided result for failure to comply with its terms, it was mandatory.)

Because the prosecutors' review committee statute at issue here provides no penalty or result that would flow from an irregularity in the composition of the committee, the statute is directory. Nothing about the construction of this statute in this civil commitment case distinguishes it, for purposes of this cannon of statutory construction, from the insanity acquittee case, *Tooley, supra*; the administrative review case, *Frager, supra*; or the criminal case, *Conz, supra.*

Regardless, if any directive of subsection 5 could possibly have been violated, Thomas did not suffer any prejudice. *See Conz,* 756 S.W.2d at 546 (even if directive of statute was possibly violated, lack of prejudice was sufficient to overrule the point). In a larger jurisdiction, an assistant prosecuting attorney may have more actual knowledge of the criminal convictions at issue than the elected official. Here, for example, Thomas does not claim that the circuit attorney was personally involved in procuring his convictions. Nor does he claim that the presence of the circuit attorney would have made a difference in the committee's vote, in this case, or even that the circuit attorney would have voted differently than the assistant.[8] And while an elected prosecutor could hypothetically send an inexperienced attorney, "fresh out of law school," as the designee, App. Br. at 89,

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[8] The five-member committee unanimously voted that appellant met the definition of a sexually violent predator. L.F. 23.

Thomas does not claim that the circuit attorney did so here.[9] The composition of the committee simply did not prejudice appellant in any way.

[9] In fact, Joseph Warzycki, Circuit Attorney Hayes' designee in this case, has been with the circuit attorney's office for two decades, and at the time of the committee meeting was Hayes' first assistant circuit attorney.

CONCLUSION

For the reasons stated above, the decision of the trial court should be affirmed and the constitutionality of Missouri's sexually violent predator law upheld.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were mailed, postage prepaid, via United States mail, on this 26th day of February, 2001, to:

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Certification of Compliance with Special Rule No. 1

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Special Rule No. 1(b), and that the brief contains 12403 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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State Solicitor