IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND, TREATMENT OF EDDIE J. THOMAS	)	
Appellant,	)	
vs.	)	Appeal No. SC83186
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE PROBATE DIVISION OF
THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE DENNIS SCHAUMANN, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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Index

Page

Table of Authorities

Cases **Page**

Statutes

Other Authority

Jurisdictional Statement

On July 13, 1999, respondent State of Missouri filed a petition alleging that appellant Eddie Thomas was a sexually violent predator pursuant to Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) and seeking to remand him to the custody of the Missouri Department of Mental Health. On August 6, 1999, the Probate Division of the Circuit Court for the City of St. Louis, Dennis Schaumann, J., presiding, found probable cause to believe that appellant was a sexually violent predator. After a jury trial conducted on April 10-12, 2000, appellant was found to be a sexually violent predator. On April 13, 2000, the court entered judgment in accordance with the jury's verdict and committed appellant to the custody of the Missouri Department of Mental Health. On May 24, the court denied appellant's motion for new trial. Notice of appeal was filed on June 1, 2000.

Appellant challenges the constitutionality of the Missouri statute under which he was confined, Sections 632.480 – Section 632.513. RSMo (Cum. Supp. 1999).[1] Therefore, jurisdiction properly lies in this Court, the Supreme Court of the State of Missouri. Mo. Const., Art. V, Sec. 3.

* * *

The record on appeal will be cited to as follows: trial transcript, "Tr." and legal file, "LF."

[1] Unless otherwise noted, all references shall be to RSMo (1994). All references to Section 632 RSMo shall be to Cum. Supp. 1999, unless specifically noted otherwise.

Statement of Facts

Appellant Eddie Thomas was incarcerated in the custody of the Missouri Department of Corrections, having been convicted in the Circuit Court for the City of St. Louis of three counts of forcible rape and two counts of forcible sodomy in 1982 (LF, 7-8). As a result of those convictions he was sentenced to twenty three years' imprisonment in the Missouri Department of Corrections (Tr. 67). He behaved well in prison, having received only thirteen minor conduct violations during his seventeen years' imprisonment (LF, 15). Appellant's good conduct enabled the Department of Corrections to transfer him from the Jefferson City Correctional Center to Missouri Eastern Correctional Center in Pacific (Tr. 331). He was scheduled to be released from the prison and placed on parole on July 14, 1999 (LF, 8; Tr. 299). In 1995, the Missouri Board of Probation and Parole had recommended that he be released in 1997, but he remained incarcerated (Tr. 439).

On April 2, 1999, the Multidisciplinary Committee that was established to review sexually violent predator ("SVP") cases, convened concerning appellant (LF, 11). On July 6, the Committee reviewed records related to appellant's convictions and his treatment during incarceration and determined that he appeared to meet the definition of an SVP (LF, 11-14).

On July 12, a prosecutor's review committee, which was also established by the SVP statute, met by conference call and voted to find that appellant met the definition of a sexually violent predator (LF, 23). The members of the committee were: Morley Swingle (Cape Girardeau County Prosecuting Attorney), Laura Donelson (Buchannan

County Prosecuting Attorney designee), Michael Wright (Warren County Prosecuting Attorney), Joseph Warzycki (City of St. Louis Circuit Attorney designee) and Jack Banas (St. Charles County Prosecuting Attorney) (LF, 23). Dee Joyce Hayes, Circuit Attorney for the City of St. Louis, did not participate in the meeting and did not vote (LF, 34-35).

On July 13, the State filed a petition to commit appellant to the custody of the Missouri Department of Mental Health (LF, 7-10). In its petition, the State alleged that sufficient evidence existed to determine that appellant was an SVP because he suffered from "a mental abnormality which makes it more likely than not to engage in predatory acts of sexual violence" (LF, 8).

On July 15, the Probate Court for the City of St. Louis, Dennis Schaumann, J., presiding, reviewed the court file and found probable cause to believe that appellant was an SVP (LF, 30). A probable cause hearing was held on August 6, 1999 after which the court again found that probable cause existed that appellant met the definition of an SVP (LF, 3, Tr. 1-64). A jury trial was conducted on the State's allegations on April 10-12, 2000 (Tr. 65-479). The evidence adduced at trial was as follows:

Jacqueline Hall, age 38 at the time of trial, lived in University City in 1974, when she was 13 (Tr. 216-17). On October 23, 1974, she was accosted by appellant as she entered her apartment building (Tr. 217-20). He held what she later determined to be a screwdriver to her neck and pushed her into the stairwell (Tr. 220-23). He directed her to pull her pants down and she complied (Tr. 222-23). A man coming downstairs interrupted them and appellant fled (Tr. 222-23). Hall reported the incident to the police

(Tr. 225). Appellant, who was on probation at the time, pled guilty to the offense of child molestation arising from the incident (Tr. 225-26, 426).

Audrey Thomas, appellant's stepdaughter, also testified at trial (Tr. 227). She was 5 or 6 years old when she came to live with appellant, along with her two brothers and sister (Tr. 227-28). Appellant was nice to her initially, but he subsequently sexually assaulted her, as did appellant's brother (Tr. 229). Appellant would masturbate and ejaculate on her (Tr. 229-30). He also performed oral sex upon her and had her do the same to him (Tr. 230-31). Appellant had vaginal and anal sex with Audrey (Tr. 230-31). He also asked her to relieve herself in his mouth, which she did, but did not perform other scatological acts (Tr. 231-32). The sexual abuse generally took place while her mother, Lillie Mae Thomas, was at work (Tr. 230, 249). She recalled that the abuse continued after she was 9 because, after one of the acts, she had her first period (Tr. 231-32).

Audrey also testified that, when she was either 9 or 10 years old, appellant strangled her, causing her to fall unconscious, because she refused to have sex with him (Tr. 233). She awoke in her bed with appellant laying on the floor (Tr. 233-34). Appellant told her mother that someone had broken into the house, hit him on the head, and tried to rape Audrey (Tr. 235). The acts ended when she was 11 (Tr. 235). Oftentimes, the abuse would occur when appellant was drunk or high, but Audrey testified that he was generally nicer when he was under the influence of drugs and not alcohol (Tr. 236-37). She would ask him to stop having sex with her and he would try to persuade her to do it (Tr. 237). Appellant told her that, if she told her mother about it, he would "whoop" her, and her mother would not believe her (Tr. 238).

On one occasion, she did tell her mother what was happening (Tr. 238). He had left the house and came back to get his key (Tr. 238). He knocked on the door and she would not let him in the house although he pounded on the door and yelled (Tr. 238-39). She eventually opened the door and he attempted to "whoop" her, but she threatened – in front of her brothers and sisters – to tell her mother what he had been doing (Tr. 239-40).

Appellant, Audrey and her siblings then walked to the fast-food restaurant where her mother worked (Tr. 239). He brought her up to her mother in the public part of the restaurant and declared that she had something to tell her mother (Tr. 240). She told her mother that appellant had been "messing with her" (Tr. 240). Audrey's mother did not believe her (Tr. 240). Eventually, after Raquel Thomas, Audrey's half-sister made similar allegations against appellant, their mother took them out of the house and reported him to the authorities (Tr. 242-45).

Raquel, age 25, also testified at trial (Tr. 248). Appellant was her biological father (Tr. 249). When she was 5 appellant started abusing her (Tr. 250). She testified that these acts involved oral and anal sex as well as masturbation (Tr. 250-51). The first time it happened, Audrey was out of town and her mother was at work (Tr. 251). Appellant poured water on her and in her bed to wake her up and make her believe she had wet the bed (Tr. 251). He made her change clothes and he took her out of the bedroom (Tr. 251). They subsequently engaged in masturbation as well as oral and anal sex (Tr. 251-52). Similar events took place the next day (Tr. 252). She testified that he also inserted a broom or mop handle into her vagina (Tr. 252-53).

Raquel testified that the abuse went on for about a year and he refused to stop even when she told him it hurt (Tr. 255). He told her that if she ever told her mother about the abuse that he would kill her mother and her siblings (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 sometimes he was not (Tr. 257). When he was drunk, he was more forceful (Tr. 258).

After appellant was incarcerated, Raquel and her mother visited him (Tr. 260-61). He told her 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 and, after she told her mother about it, they stopped visiting him (Tr. 261).

Lillie Thomas, appellant's ex-wife, testified at trial (Tr. 268). She was 16 years old when she married appellant, and she already had two children, aged 2 and 4 (Tr. 267-68). She subsequently gave birth to appellant's child, Raquel (Tr. 269). She did not know about the sexual abuse until Audrey came to her work and told her about it (Tr. 270). At the time, she did not believe her, but she subsequently became suspicious (Tr. 271). On one occasion appellant asked her not to believe any such accusations because a friend of his went to prison for something similar that he did not do (Tr. 271-72).

Dr. Richard Scott also testified (Tr. 278). He was a psychologist and Unit Director for the Forensic Evaluation Program at the St. Louis Psychiatric Rehabilitation Center, a part of the Missouri Department of Mental Health (Tr. 278). He was a certified forensic examiner and, as part of his job, he conducted examinations of accused criminals

(Tr. 279-80). He participated in a training program for the evaluation of persons suspected of being SVPs (Tr. 281-82).

Pursuant to a court order on August 6, 1999, he evaluated appellant (Tr. 282-83). Scott met with him at the St. Louis City Jail, reviewed his rights – including his right not to participate and consult with his attorney – and appellant declined to participate in the interview (Tr. 283). He did so on advice of his attorney (Tr. 307-08). Scott tried again and, this time appellant – on advise of his new attorney – agreed to talk with him at the City Workhouse (Tr. 283-84, 308).

Scott also reviewed a variety of documents related to appellant – the police reports from his convictions and other charges, his juvenile records, his Department of Corrections records, the results of standardized psychological testing, an interview conducted by Dr. Daniel Cuneo and a pretrial investigation from 1981 (Tr. 285).

In the course of his review, Scott examined the records of appellant's participation in the Missouri Sex Offenders Program ("MOSOP") (Tr. 285). This program begins with a three month assessment and education phase and proceeds to a year-long group therapy regimen, which is conducted several times each week (Tr. 296). The participants are confronted with their behavior in a group setting, which is intended to overcome their denial and rationalization, and they must write about their conduct and criminal thinking (Tr. 296-97). The goal is to turn their thinking away from criminal activity, break down their defenses around their sex offender behavior, develop empathy for their victims, create a relapse prevention plan (Tr. 296).

As early as 1986, Appellant began requesting admission to MOSOP, and eventually successfully completed the program (Tr. 309). His grades in the program – in matters such as promptness, cooperation, appropriateness of responses, effect on group, concept understanding and concept application – ranged from satisfactory to excellent (Tr. 323). The report also reflects that appellant's outward appearance – helpful and cooperative – was not consistent with his inner turmoil (Tr. 330). In group sessions, appellant assisted the other members in problem solving, eliciting difficult information, looking at both the positive and negative aspects of different solutions (Tr. 330). He was also willing to go along with the group consensus even when he disagreed with it (Tr. 330). Appellant also empathized with the other members of the group (Tr. 331).

Scott believed that appellant sought admission to MOSOP either because he genuinely wanted treatment or because he wanted early release from prison, which was not possible without completing MOSOP (Tr. 310). He stated to Scott that he did not get much out of the program (Tr. 297). Scott thought that appellant still had a number of significant problems that posed the risk of relapse (Tr. 297).

The MOSOP report reflects that appellant "gained much knowledge" through his participation in the program (Tr. 328). It also states that appellant acknowledged his problem with sexual deviance, but notes that he is "highly motivated" for treatment (Tr. 328). His success in avoiding recidivism would depend, states the report, upon his willingness to apply what he has learned once he is released (Tr. 328).

Scott employed a number of tools to determine the risk that appellant would reoffend (Tr. 285). Based upon his review and testing, he determined that it was more

likely than not that appellant would commit sexually violent acts (Tr. 287-88). He diagnosed appellant with two clinical conditions that he believed me the statutory definition of "mental abnormality" (Tr. 288). One was pedophilia – a disorder in which a person is sexually attracted to children (Tr. 288). The second was antisocial personality disorder ("ASPD"), in which the person has a high rate of committing crimes, including sexually violent crimes (Tr. 288-89). Anywhere from 30% to 70% of the prison population has ASPD (Tr. 334). The disorder tends to become less evident between the ages of 30 and 40 (Tr. 334). Appellant was 47 at the time of trial (Tr. 335).

One tool that Scott did **not** attempt to use was a "pleythysmograph," a machine that measures penile sexual response (Tr. 300). Using that device, an examiner can determine if the subject is having inappropriate sexual response to situations or images related to sex with children (Tr. 301). Scott did not think that the pleythysmograph was an appropriate instrument because subjects can prevent themselves from having a response by thinking about things other than the sexual matters to which they are being exposed (Tr. 301).

In other words, it can prove that someone is deviant, but it cannot show that they are not deviant, since they could be faking out the machine (Tr. 304). Scott believes that the pleythysmograph is not useful in SVP evaluations – because it is unreliable – and can only be used with individuals who are committed to change (Tr. 301-02). In appellant's MOSOP report, the therapist questioned appellant's sincerity and recommended that he be subject to pleythysmograph testing (Tr. 329).

After appellant's new attorney consented, Scott interviewed appellant for over 4 hours (Tr. 285-87). During his interview with appellant, Scott attempted to discuss the sex acts that appellant committed with Audrey and Raquel (Tr. 289-90). Scott had reports – including appellant's statements to the MOSOP counselors – that appellant had sex with the girls over a hundred times, and that he discussed all his sexual offenses freely (Tr. 290, 324). Appellant 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). Appellant told Scott that he had been questioned about the incidents so often by so many people that he did not feel comfortable talking about it any more (Tr. 313-14). Appellant said, "I've talked about it so much and I want to leave it behind me. I live with enough guilt. It happened almost twenty years ago. You can't change it" (Tr. 316).

Appellant also stated, "Over the years I've taken every step possible to absolve myself of the emotional guilt. The more I absolved myself, the more I'm confronted. We met with each other and talked about it from 1995 to 1997. It isn't a good feeling talking about it. It's like living it over and over again like now we're talking about it. I feel extremely torn apart inside" (Tr. 316). He felt condemned and repeatedly said that he did not understand why he has to keep talking about his offenses (Tr. 316).

According to Scott, one of the "fundamental elements" of sex offender treatment is complete disclosure and discussion of prior sex crimes (Tr. 290). It is an important element in making a determination of whether an offender is successfully changing his behavior (Tr. 290). Appellant was not forthcoming in that regard with Scott, but he had admitted to the MOSOP counselors that he had abused his daughter and stepdaughter

extensively over a period of years (Tr. 290-92, 314-15). In talking with the people in MOSOP estimated he committed over two hundred sex acts his step-daughter, and gave details as to how many of each type (Tr. 315).

Scott determined that alcohol was involved in most of his offenses, but was not the reason they occurred (Tr. 292). Alcohol is a "disinhibitor" as it makes it easier to do things despite knowing it is wrong (Tr. 338). He stated that the acts involved planning and efforts to conceal what he was doing (Tr. 292). Although alcohol and drug abuse increase the rate of recidivism, the primary risk stems from appellant's pedophilia and antisocial personality (Tr. 293).

Scott stated appellant's lack of empathy for the victims, his rationalization of his acts and the lack of an adequate prevention plan render him a continued risk (Tr. 293). He said appellant lacked empathy for the victims even though appellant, during the interview, characterized his actions as "horrifying" and said that his children were cheated out of having a father (Tr. 295). Scott characterized these statements and the ones appellant made during his treatment in MOSOP as being "generic" and indicated that appellant lacked deep emotional understanding of what had happened (Tr. 295). The MOSOP report indicates that appellant behaved empathetically but seemed unable to internalize it, which cast doubt on his sincerity throughout treatment (Tr. 346). Victim empathy, Scott testified, was important in preventing recidivism (Tr. 295).

According to Scott, appellant's ASPD, which was discerned through the personality testing in the Department of Corrections, caused him problems with authority

(Tr. 298). Persons with ASPD do not respond well to direction from police or parole officers (Tr. 298).

In 1986, Appellant was evaluated by doctors and the report that was produced stated that he was adjusting well to his incarceration (Tr. 312). At that time, he had only three conduct violations, and was extensively involved in institutional organizations and programs, including Alcoholics Anonymous, Narcotics Anonymous, vocational training programs and Bible study courses (Tr. 312, 332). Appellant also participated in an anger management program (Tr.340). He was generally not a discipline problem for the prison authorities, receiving a total of fifteen conduct violations during seventeen years of confinement (Tr. 312, 336). Scott did not think this was an excessive number (Tr. 336).

Appellant was to be placed on parole for four years (Tr. 299). Persons under the supervision of probation or parole officers have a "substantially lower" rate of recidivism than people who are unsupervised (Tr. 299). However, the recidivism rate goes up once the offender is released from supervision (Tr. 299). The MOSOP therapist who worked with appellant recommended that appellant be required to attend long term group therapy geared towards avoiding sexually offending behavior because she considered him as having a high risk for reoffending (Tr. 328). He should also be required to avoid liquor and being around children (Tr. 328). The State has out-patient sex offender programs for ex-convicts (Tr. 339).

In general, male pedophiles who are attracted to girls are much less likely to reoffend than those who are interested in boys (Tr. 326). The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") states that "boy object

pedophiles" are twice as likely to reoffend as "girl object pedophiles" (Tr. 327-28). Scott testified that subsequent studies indicate the difference in the recidivism rate is not quite so pronounced as noted in the DSM-IV (Tr. 327).

Dr. Daniel Cuneo testified for the defense (Tr. 362). He was a clinical psychologist with the Illinois Department of Mental Health since 1977 and was licensed in both Illinois and Missouri (Tr. 363). Because of his strong interest in the welfare of children, he was also a 'Court Appointed Special Advocate' for children embroiled in the court system and on the St. Clair County Child Advisory Board, which investigated reports of child sexual abuse (Tr. 364, 374). Cuneo was also Director of Clinical Services for the maximum-security mental institution at Chester, Illinois, which has 300 patients, and coordinator for the Illinois Sexually Violent Persons program (Tr. 366). He ran a sex offender outpatient program, through which he evaluated sexually violent offenders (Tr. 368).

Cuneo saw appellant three times, for a total of 4.5 to 5 hours (Tr. 371). He reviewed 170 pages of appellant's records, including his MOSOP reports, institutional records, and all his evaluations – including the one performed by Scott (Tr. 371). He also spoke with appellant's sister to confirm the information he received about appellant's background (Tr. 372). Cuneo also had appellant perform the MMPI test (Tr. 373).

Cuneo noted that Scott had evaluated appellant using 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). Examining the results of these tests, Cuneo would not recommend that appellant be recommitted (Tr. 379).

Under the DSM-IV's definition, appellant was a pedophile and suffered from ASPD (Tr. 380). Appellant also had recovered from post-traumatic stress disorder stemming from his service in Vietnam, after which his drinking problem began (Tr. 399-401). Cuneo also concluded that appellant's ability to show empathy was more limited than most other individuals (Tr. 383). This impaired ability to display empathy stemmed from appellant's childhood (Tr. 383).

Appellant was raised in a very turbulent environment (Tr. 318). He was born in Portageville (Tr. 384). His mother was a prostitute and appellant's father would beat her (Tr. 384). Appellant would frequently have to comb the blood out of her hair (Tr. 384). She left the family when appellant was 5 years old (Tr. 384). Appellant's father anally raped him and molested all the members of his family (Tr. 384). As a child, Appellant was forced to watch as his sisters and brothers committed sex acts with each other, and he participated in the acts himself (Tr. 318, 384, 427-31).

Appellant's step-mother shot his father after she discovered him raping one of appellant's sisters (Tr. 385). Appellant witnessed the shooting (Tr. 385). Appellant's mother returned after her former husband was killed and brought appellant to St. Louis (Tr. 385). Mother and son lived for a time with a pimp, who beat him, and he ran away frequently (Tr. 385).

In the course of his examination and treatment, appellant never used victimization as an excuse for his conduct (Tr. 325). He also never rationalized his actions and never blamed the victims for what happened (Tr. 325-26).

Cuneo noted that a limited ability to display empathy did not necessarily mean that appellant was incapable of empathizing with the victims (Tr. 385). Also, his reluctance to discuss the details of his offenses could stem from the circumstances under which he was raised – he could trust neither his mother nor his father, so his ability to be forthcoming with sensitive information was impaired (Tr. 386). Also, appellant's drinking impaired his memory of all the incidents (Tr. 386). There is a distinct difference between the treatment setting – such as MOSOP – and the evaluations that Scott and Cuneo performed (Tr. 387). Confidentiality was stressed in treatment, but anything said in the evaluation would be disclosed (Tr. 387). If there were questions about appellant's sincerity in seeking treatment or fully participating, Cuneo thought a pleythysmograph should have been employed (Tr. 388).

Appellant wanted to join a sex offender program that Cuneo offered (Tr. 388). He also wanted to participate in a 6 month program offered through the Veterans Administration (Tr. 389). In 1980, prior to his incarceration, he had been through a program but had relapsed quickly (Tr. 420). Appellant also wanted to remain drug and alcohol free and get a job (Tr. 389). Cuneo considered these realistic goals and believed that it was particularly important that appellant address his drinking problem, because alcohol lowers impulse control (Tr. 389, 392). In addition to facing his alcohol problem, appellant undertook treatment to address his pent-up anger stemming from his

horrendous childhood (Tr. 393). He repeatedly participated in anger management programs during his imprisonment and successfully completed those programs (Tr. 393-94). Cuneo also noted that appellant founded an alcohol treatment program for Vietnam veterans while he was in prison (Tr. 393).

The highest risk of recidivism for sex offenders is within the first three to five years after release on parole (Tr. 390). Cuneo stated that the scientific studies do not support the proposition that most offenders relapse after they are discharged from probation (Tr. 390). Further, appellant's sex drive has declined with his age, as did his ASPD (Tr. 395-98). Cuneo did not think there was a high risk of appellant reoffending, particularly if he continued with treatment for his drug and alcohol problems (Tr. 405, 408-09, 418-19). Appellant's probation could be structured so that his continued release was conditioned upon his active participation in out-patient treatment programs for his anger management and alcohol abuse (Tr. 421). He could also be evaluated using a pleythysmograph, which would help determine if he was still a pedophile (Tr. 422). Appellant could also be prohibited from being alone with children as a condition of his parole (Tr. 422). Cuneo had reviewed MOSOP's parole plan for appellant and considered it appropriate for appellant's situation (Tr. 439). If appellant remained in treatment, Cuneo thought he was not likely to commit sexually predatory acts (Tr. 440).

Cuneo was unsure whether appellant still had deviant sexual fantasies – the absence of which would temper his diagnosis as a pedophile – since he was unable to administer a pleythysmograph (Tr. 402, 410). Appellant denied having such fantasies during his interview (Tr. 410). Unlike Scott, Cuneo did not think it was possible for a

subject to convincingly fake the test – no one could control their response to the point where they would be excited over adults but not children (Tr. 403). In Illinois, the test is used on all subjects who are evaluated for SVP treatment (Tr. 404).

After the close of all the evidence and argument, the jury found for the State, determining that appellant was an SVP (Tr. 170). On April 13, 2000, the probate court committed appellant to the custody of the Missouri Department of Mental Health (LF. 175-76). Appellant filed his motion for new trial on May 10 (LF, 178-96). This motion was denied on May 24 (LF, 197). Appellant's Notice of Appeal was filed on June 1, and appellant now appeals the judgment committing him to the Missouri Department of Mental Health (LF, 199).

Points Relied On

I.

The trial court erred when it (a) denied appellant's motion to dismiss the State's petition or, in the alternative, (b) his objections to Jury Instruction 6, because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The SVP statute violates the guarantees of Due Process because it permits the State to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses. Due Process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he is also unable to control his behavior. Appellant was prejudiced by the trial court's error because there was no evidence whatsoever that he could not control his conduct and there was an abundance of evidence that, if he remained in treatment, he was not likely to reoffend. Thus, appellant was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of Due Process and the jury which convicted him was not instructed that, before finding appellant to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997);

In the Matter of Crane, 7 P.3d 285 (Kan. 2000);

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

In re Hendricks, 912 P.2d 129 (1996);

State v. Roe, 6 S.W.3d 411 (Mo.App. E.D. 1999);

In re Linehan, 557 N.W.2d 171 (Minn. 1996);

In re Linehan, 518 N.W.2d 609 (Minn. 1994);

Linehan v. Minnesota, 522 U.S. 1011, 118 S.Ct. 596 (1997);

Seling v. Young, -- U.S. --, --- S.Ct. ----, 2001 W.L. 37676 (January 17, 2001);

Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990);

United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987);

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780 (1992);

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Hester, 801 S.W.2d 695 (1959);

Section 1.140 RSMo;

Section 630.115.1(10) RSMo;

Section 632.385.1 RSMo;

Section 632.480(2) RSMo;

Section 632.480(5) RSMo;

Section 632.483.1(1)-(3) RSMo;

Section 632.483.4 RSMo;

Section 632.483.5 RSMo;

Section 632.484 RSMo;

Section 632.486 RSMo;

Section 632.489.1 RSMo;

Sections 632.489.4 RSMo;

Section 632.492 RSMo;

Section 632.495 RSMo;

Section 632.498 RSMo;

Section 632.501 RSMo;

Section 632.504 RSMo;

Kan. Stat. Ann. Section 59-29a02(b);

Mo. Sup. Ct. Rule 41.01(b);

Mo. Sup. Ct. Rule 78.07(a)(1);

Mo. Sup. Ct. Rule 84.13(c);

U.S. Const., Amend. 14;

Mo. Const., Art. I, Sec. 10.

II.

The trial court erred when it denied appellant's motion to dismiss the State's petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The guarantee of Equal Protection of the laws requires that similarly situated persons be treated similarly. A court which involuntarily commits a person to confinement within a "secure facility" under the control of the Department of Mental Health for reasons other than a finding that he is a sexually violent predator must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be an SVP is automatically committed to the custody of the Missouri Department of Mental Health. There is no rational basis for the disparate treatment of the two classes of persons. Appellant was prejudiced by the trial court's error because there was an abundance of evidence that, if he received outpatient mental health treatment while he was on parole, he would not likely reoffend. Thus, appellant was deprived of his liberty pursuant to a statute which, on its face, violates the guarantees of Equal Protection of the law.

In re Young, 857 P.2d 989 (Wash. 1993);

Baxtrom v. Herold, 383 U.S. 107, 86 S.Ct. 760 (1966);

Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048 (1972);

Brawner v. Brawner, 327 S.W.2d 808 (Mo. 1959);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

Section 1.140 RSMo;

Section 632.355.1 RSMo;

Section 632.355.3 RSMo;

Section 632.365 RSMo;

Section 632.385.4 RSMo;

Section 632.480(5)(2) RSMo;

Section 632.495 RSMo;

Mo. Sup. Ct. Rule 41.01(b);

Mo. Sup. Ct. Rule 78.07(a)(1);

Mo. Sup. Ct. Rule 84.13(c);

U.S. Const., Amend. 14;

Mo. Const., Art. I, Sec. 2.

III.

The trial court erred when it denied appellant's motion to dismiss on grounds that, as applied to appellant, the SVP statute violates the guarantee against ex post facto punishment provided by Article I, Section 10 of the United States Constitution and Article I, Section 13 of the Missouri Constitution. The Missouri SVP statute is punitive, rather than remedial, in that (a) persons found to be sexually violent predators are subject to far more restrictive terms of confinement and may be confined in prison, rather than in a separate facility provided by the Missouri Department of Mental Health, and (b) the prosecutor's committee, rather than the multidisciplinary committee exercises control over the commencement of SVP proceedings. Since commitment as an SVP constitutes an additional penalty for the offenses to which appellant already pled guilty, it cannot be applied retroactively to appellant without violating the guarantee against increasing the punishment for an offense after it was committed.

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997);

Seling v. Young, -- U.S. --, --- S.Ct. ----, 2001 WL 37676 (January 17, 2000);

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981);

Charles W. v. Maul, 214 F.3d 350 (2d Cir. 2000).

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597 (1995);

State v. Sanders, 842 S.W.2d 170 (Mo.App. E.D. 1992);

State v. Wings, 867 S.W.2d 607 (Mo.App. E.D. 1993);

Section 632.355.1 RSMo;

Section 632.355.3 RSMo;

Section 632.365 RSMo;

Section 632.385.4 RSMo;

Sections 632.480 RSMo;

Section 632.483.4 RSMo;

Section 632.483.5 RSMo;

Section 632.486 RSMo;

Section 632.495 RSMo;

U.S. Const., Art. I, Sec. 10;

Mo. Const., Art. I, Sec. 13;

Mo. Sup. Ct. Rule 41.01(b);

Mo. Sup. Ct. Rule 78.07(a)(1).

IV.

The trial court erred when it denied appellant's motion to dismiss on grounds that, as applied to appellant, the SVP statute violated appellant's right to be free from double jeopardy, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The Missouri SVP statute is punitive, rather than remedial, in that (a) persons found to be sexually violent predators are subject to far more restrictive terms of confinement and may be confined in prison, rather than in a separate facility provided by the Missouri Department of Mental Health, and (b) the prosecutor's committee, rather than the multidisciplinary committee exercises control over the commencement of SVP proceedings. Since commitment as an SVP constitutes an additional penalty for the offenses to which appellant already pled guilty, it cannot be applied to appellant without violating the guarantee against cumulative punishments for the same offense.

Hendricks v. Kansas, 521 U.S. 346, 117 S.Ct. 2072 (1997);

Department of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937 (1994);

Witte v. United States, 515 U.S. 389, 115 S.Ct. 2199 (1995);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

Section 632.480(5)(a) RSMo;

Section 632.495 RSMo;

U.S. Const., Amend. 5;

U.S. Const., Amend. 14.

Mo. Sup. Ct. Rule 41.01(b);

Mo. Sup. Ct. Rule 78.07(a)(1).

V.

The trial court erred when it denied appellant's motion to dismiss on grounds that the Circuit Attorney for the City of St. Louis, Dee Joyce Hayes, did not participate in the prosecutor's review committee which voted to permit the State to commence SVP proceedings against appellant. Section 632.483.5 (Cum. Supp. 1999) provides that one member of the prosecutor's review team "shall be *the* prosecuting attorney of the county in which the person was convicted." The section makes no provision for a designee. Thus, if the State was going to proceed with an SVP commitment against appellant, Dee Joyce Hayes had to be a member of the prosecutor's review committee. Since the assent of the prosecutor's review committee was mandatory prior to the State filing its petition to commit appellant, the committee had to be properly constituted according to the Legislature's plainly expressed mandate. The trial court's error violated appellant's rights to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Budding v. SSM Healthcare, 19 S.W.3d 678 (Mo. banc 2000);

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

Section 56.010 RSMo;

Section 56.151 RSMo;

Section 56.430 RSMo;

Section 56.540 RSMo;

Section 632.483.5 (Cum. Supp. 1998);

Section 632.486 RSMo;

Mo. Sup. Ct. Rule 19.05;

Mo. Sup. Ct. Rule 41.01(b);

Mo. Sup. Ct. Rule 78.07(a)(1).

Argument

I.

The trial court erred when it (a) denied appellant's motion to dismiss the State's petition or, in the alternative, (b) his objections to Jury Instruction 6, because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The SVP statute violates the guarantees of Due Process because it permits the State to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses. Due Process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he is also unable to control his behavior. Appellant was prejudiced by the trial court's error because there was no evidence whatsoever that he could not control his conduct and there was an abundance of evidence that, if he remained in treatment, he was not likely to reoffend. Thus, appellant was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of Due Process and the jury which convicted him was not instructed that, before finding appellant to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.

Appellant filed a motion to dismiss pleadings on July 19, 1999 (LF, 67-79). He asserted, *inter alia*, that the SVP statute violated his right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I,

Section 10 of the Missouri Constitution (LF, 77-78).[2] Among his grounds for arguing that the SVP statute was a penal statute and was unconstitutional was that the statute

> does not limit its application to those who are unable to control their dangerousness, but applies instead to those which [sic] are predisposed to commit sexually violent offenses but not otherwise unable to control their dangerousness and therefore falls outside the permissible limits of civil statutory schemes authorizing detention of individuals

(LF, 76). The court denied appellant's motion (LF, 2). At the jury instruction conference, appellant reasserted his previous motions to dismiss as objections to all the jury instructions, including Instruction 6, the verdict director (Tr. 355-56). The trial court overruled appellant's objections (Tr. 355).

Appellant also raised the denial of his motion to dismiss as a point of error in his motion for new trial (LF, 179-181). To preserve error for appeal in a jury-tried case, Mo. Sup. Ct. Rule 78.07(a)(1) requires that the matter be included in the motion for new trial. However, this cause was tried in the probate division (Tr. 1, 65). Rule 78.07 does not apply to proceedings in the Probate Division of the circuit court unless the judge rules that it shall. Mo. Sup. Ct. Rule 41.01(b). In this case, the probate judge specifically declined to make the rules of civil procedure applicable (Tr. 63-64). Thus, a motion for

[2] Caselaw suggests that Article I, Section 10 provides largely similar due process protections as the U.S. Constitution. See, e.g. State v. Hester, 801 S.W.2d 695, 697 (1959).

new trial was not necessary to preserve the matter for appeal. Should this Court find it not to be preserved, appellant in the alternative requests review for "plain error" resulting in "manifest injustice." Mo. Sup. Ct. Rule 84.13(c). This Court will presume the statute to be valid "unless it clearly contravenes a constitutional provision," and will "adopt any reasonable reading of the statute that will allow its validity" and will "resolve any doubts in favor of constitutionality." State v. Burns, 978 S.W.2d 759, 760 (Mo. banc 1998).

The United States Supreme Court has recognized that an involuntary civil commitment "for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809 (1979). Commitment to a mental institution impinges upon the "[f]reedom from bodily restraint [that] has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha v. Louisiana, 504 U.S. 71, 81, 112 S.Ct. 1780, 1785 (1992). The Supreme Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." Id., quoting United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 2103 (1987).

Not only must the **procedural** safeguards involved in a commitment proceeding satisfy the demands of the Due Process Clause, but the **substantive** basis for the commitment must also pass Constitutional scrutiny. Foucha, supra, at 79-81, 112 S.Ct. at 1784-85. "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them." Id. at 81, 112 S.Ct. at 1785, quoting Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990). In order to involuntarily confine someone to a

mental institution, the State must show "by clear and convincing evidence that the individual is mentally ill and dangerous." Foucha, supra, at 81, 112 S.Ct. at 1786 (internal quotes omitted).

In Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997), the Supreme Court recently addressed the Constitutional strictures on involuntary commitment in the context of a person accused of being a sexually violent predator. In 1994, Kansas enacted a statutory procedure similar to Sections 632.480 RSMo, et seq., which provided for the involuntary commitment to a mental institution of a person who, in a civil proceeding, is found to be an SVP. Id. at 350, 117 S.Ct. at 2076.

Leroy Hendricks, "an inmate who had a long history of sexually molesting children, and who was scheduled for release" from prison, was committed pursuant to the act. Id. The Kansas Supreme Court, in In re Hendricks, 912 P.2d 129, 138 (1996), struck down the act, holding that substantive due process requirements for involuntary civil commitment prohibited the State from confining Hendricks simply because he had a "mental abnormality." Hendricks, 521 U.S. at 350, 117 S.Ct. at 2076. According to the Kansas Supreme Court, due process required that a person could only be confined if he was found to have a "mental illness." Id. Within the Kansas statutory scheme, a "mental abnormality" was defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Id. at 352, 117 S.Ct. at 2077, quoting Kan. Stat. Ann. Section 59-29a02(b).

The Kansas Supreme Court held that the definition of "mental abnormality" failed to satisfy the requirements of substantive due process, which required the State to prove that a person was "(1) mentally ill, and (2) a danger to himself or others." In re Hendricks, supra, at 137. The U.S. Supreme Court disagreed. The majority in Hendricks stated that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.'" Hendricks, supra, at 358, 117 S.Ct. at 2080.

The Supreme Court also held that "[t]hese added statutory requirements **serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control."** Id. at 358, 117 S.Ct. at 2080. The Court upheld the Kansas scheme because it

> require[d] a finding of future dangerousness, and then link[ed] that finding to the existence of a 'mental abnormality' or 'personality disorder' **that makes it difficult, if not impossible, for the person to control his dangerous behavior.** Kan. Stat. Ann. Sec. 59-29a02(b) (1994). The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it **narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.**

Id. at 358, 117 S.Ct. at 2081 (emphasis added). The Court noted that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that **prevents them from exercising adequate control over their behavior.** Such persons are unlikely to be deterred by the threat of confinement." Id. at 362-363, 117 S.Ct. at 2082 (emphasis added).

It was clear that Hendricks himself met this definition – he 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 760, 117 S.Ct. 2078. The Supreme Court concluded:

> To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtlessly satisfies those criteria . . . **The admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.**

Id. at 760, 117 S.Ct. at 2081 (emphasis added). It is clear from the Hendricks opinion that, to meet the strictures of the Due Process Clause, a statute which provides for the indefinite involuntary commitment must limit its sweep to those who, as a result of their mental abnormality, are unable to control their behavior.

The Kansas Supreme Court had the opportunity had the opportunity to apply the Hendricks opinion to its SVP statute. In the Matter of Crane, 7 P.3d 285 (Kan. 2000).

Crane was charged with attempted aggravated criminal sodomy, attempted rape, and lewd and lascivious behavior arising from his attack on a video store clerk. Id. at 286. His convictions for the first two offenses were reversed, and he was incarcerated for the lewd and lascivious behavior. Id. The State of Kansas succeeded in subsequently having Crane found to be a sexually violent predator under the same statute that the U.S. Supreme Court reviewed in Hendricks. Id. at 286-87. At the commitment hearing, the prosecution presented the testimony of a psychologist who stated that Crane was a sexual predator due to his antisocial personality disorder and exhibitionism. Id. at 287. The psychologist "cited the increasing frequency of incidents involving Crane, increasing intensity of the incidents, Crane's increasing disregard for the rights of others, and his increasing daring and aggressiveness" to support his finding. Id.

On appeal, the Crane court had to consider "whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior." Id. The majority examined the U.S. Supreme Court's opinion in Hendricks and determined that Due Process required the State to prove that Crane could not control his behavior before it could involuntarily commit him. Id. at 288-91.

The Crane court stated that the "Kansas' statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Id. The Kansas statute provided for the commitment of those who had a mental condition that affected their "emotional capacity or volitional capacity." Id. This,

the court found, was insufficient to meet the Hendricks standard because the inclusion of "emotional capacity" permitted indefinite confinement of those who could control their behavior:

> **Volitional capacity** is the capacity to exercise choice or will; a condition affecting the capacity to exercise choice or will in this context would be one that adversely affected the capacity, thereby rendering the person unable to control his or her behavior. The legislature identified **emotional capacity** as an alternative faculty that could be affected by the condition. Logic would seem to dictate that the alternative to a capacity involving the exercise of will is one in which the exercise of will is not at issue. Thus, a condition affecting that faculty would not necessarily remove the person's ability to control his or her behavior. **It seems, therefore, that the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior.**

Crane, supra. (emphasis added). The Kansas SVP act also provided that the person could be committed due to a personality disorder, without providing a definition for the term. Id. Therefore, the target of a commitment proceeding could be confined without a finding that the personality disorder made him unable to control his conduct. Id. The Crane court stated that the majority opinion in Hendricks "does not seem to include consideration of willful behavior" and seems "to be much more specific to the application of the Act to Hendricks," who had conceded he could not control his desire to sexually molest children. Id at 290.

A "fair reading" of the Hendricks opinion, the Kansas court held, "leads us to the inescapable conclusion that commitment under the act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in Hendricks." Id. The Kansas court, conducting a similar analysis as appellant did above, determined that Hendricks required a finding that a person could only be committed if the State showed that he could not control his dangerous conduct. Id. at 290-91.

Nor was the Kansas Supreme Court the only court to find that Hendricks mandated commitment only after a finding that the person was unable to control his impulse to commit sexually violent acts. The Minnesota Supreme Court, in the case of In re Linehan, 594 N.W.2d 867 (Minn. 1999), examined the constitutionality of that state's SVP regime, and this case provides a strong indicator that the U.S. Supreme Court intended Hendricks to require a lack of control before permitting commitment as an SVP. In 1965, Linehan killed a fourteen year old girl while attempting to sexually assault her and, before he was arrested, committed two more sexual assaults. Id. at 869. He was convicted and sentenced to 40 years imprisonment, but escaped in 1975 and sexually assaulted a 12 year old, and was again imprisoned. Id. As his release date approached, the state moved to commit him pursuant to the Minnesota SVP act. Id. To be committed under that act, a person "must evidence an 'utter lack of power to control [his or her] sexual impulses." Id. (citations omitted, brackets in the original). The Linehan court referred to this standard as the "utter inability test." Id.

At his commitment hearing, there was no testimony that Linehan either passed or failed the "utter inability test." Id. No evidence supported a finding that Linehan either could or could not control his sexual impulsivity. Id. Linehan was nonetheless committed and, in Linehan's first appeal, the Minnesota Supreme Court reversed for lack of evidence. Id., citing In re Linehan, 518 N.W.2d 609, 614 (Minn. 1994). After Linehan's release, the Minnesota Legislature altered the SVP statute, removing the "utter inability test" and permitting commitment if the defendant "has manifested a sexual, personality, or other mental disorder or dysfunction and . . . as a result, is likely to engage in acts of harmful sexual conduct . . ." Linehan, 594 N.W.2d at 870. After the amendment of the act, Minnesota again moved to commit Linehan. Id. The circuit court found that Linehan "lack[ed] control in connection with sexual impulses." Id. The Minnesota Supreme Court affirmed Linehan's commitment, concluding "that an utter inability to control one's sexual impulses was not integral to narrowly tailoring the SDP Act to meet substantive due process requirements." Id., citing In re Linehan, 557 N.W.2d 171 (Minn. 1996).

Linehan then petitioned the U.S. Supreme Court for certiorari and, before granting the writ, the Court decided Hendricks. Linehan, 594 N.W.2d at 870. The Supreme Court granted Linehan's writ and remanded the cause for further consideration under Hendricks. Linehan, 594 N.W.2d at 871, citing Linehan v. Minnesota, 522 U.S. 1011, 118 S.Ct. 596 (1997). The Supreme Court's acceptance of certiorari and subsequent remand in light of Hendricks is significant. One can reasonably assume that, had the Supreme Court agreed with the Minnesota Supreme Court's original reasoning – that due

process did not mandate a lack of volitional control for civil commitment – it would not have remanded the cause for further consideration. Thus, it can be inferred that the U.S. Supreme Court was disapproving of the initial Linehan decision, and directing that Minnesota bring its law in line with Hendricks by requiring that only persons who lack control of their sexual impulses be committed under its SVP statute.

On remand, the focus of the Minnesota Supreme Court's analysis was Linehan's substantive due process claim that Hendricks required proof of "a lack of volitional control over sexual impulses in order to narrowly tailor a civil commitment law to meet substantive due process." Linehan, 594 N.W.2d at 872. The Linehan court concluded it did, and conducted an extensive review of the Hendricks decision. Id. at 872-75. It noted that the Hendricks court repeatedly pointed to Hendricks' inability to prevent himself from committing sexually violent acts as justification for his commitment. Id.

In Linehan, the court noted that this requirement was not only the holding of the **majority** in Hendricks, but also was agreed to by the **dissent**:

> At no point in its analysis did the Supreme Court state that a civil commitment statute aimed at sexually violent persons could pass substantive due process without a volitional impairment element. Rather the Court's reasoning establishes that some lack of volitional control is necessary to narrow the scope of civil commitment statutes . . . . . Even the dissent in Hendricks subscribed to the notion that some lack of volitional control is necessary for civil commitment statutes to stay within substantive due process bounds. The dissent noted that Hendricks was committed under the Kansas Act not just on the basis of his antisocial behavior,

but also because of Hendricks' "**highly unusual inability to control his actions.**" Hendricks, 521 U.S. at 375, 117 S.Ct. 2072 (Breyer, J., dissenting).

Linehan, supra, at 873 (boldface in Linehan). Thus, like the Kansas Supreme Court, the Minnesota Supreme Court found that, to pass muster under Hendricks, the SVP statute must require that the inmate be found to lack the ability to prevent himself from committing further acts of sexual violence. Id. at 876. The Linehan court held that **"the conclusion that some degree of volitional impairment must be evidenced to satisfy substantive due process garnered nearly unanimous Supreme Court approval."** Id. (emphasis added).

The Linehan court then "clarified" the Minnesota SVP statute to incorporate such a requirement, allowing "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.

The Missouri SVP statute, like the Minnesota and Kansas statutes, do not – on its face – clearly limit its application to those who, because of a mental abnormality, are **unable to control their behavior.** Put another way, one who has the **volitional** capacity to refrain from predatory acts can be committed as an SVP in Missouri. The Missouri statute defines a sexually violent predator as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility . . ." Section 632.480(5) RSMo. Like the Kansas statute, the Missouri statute defines a "mental abnormality" an impairment

"affecting the **emotional *or* volitional** capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others[.]" Section 632.480(2) RSMo (emphasis added).

Very recently, another SVP statutory commitment scheme came to the attention of the U.S. Supreme Court. Seling v. Young, -- U.S. --, --- S.Ct. ----, 2001 W.L. 37676 (January 17, 2001). The substance of the Seling Court's opinion only dealt with double jeopardy and ex post facto issues regarding how the Washington SVP statute was applied. Id. The Court stated that its opinion did not touch on any substantive due process challenge to the initial confinement itself: "This case gives the Court no occasion to consider how a confinement scheme's civil nature relates to other constitutional challenges, such as due process. . . ." Id.

The Missouri statute, like the Minnesota and Kansas statutes, thus permits the confinement of those who are able to control their conduct. The U.S. Supreme Court held in Hendricks that commitment of persons who are able to keep their dangerous actions in check violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Crane, supra. The Missouri SVP statute, by allowing the commitment of persons whose **emotional** but not **volitional** capacity predisposes them to commit sexually violent acts, does not satisfy the requirements of due process that only persons who lack the volitional capacity to control their actions be committed as sexually violent predators.

(a)

Motion to Dismiss

The Crane court decided that, to bring the Kansas SVP statute into compliance with Hendricks, juries in SVP proceedings had to be instructed that they could only find someone to be a sexually violent predator if they found that he could not control his behavior. Crane, supra, at 290. The Linehan court reached a similar conclusion regarding the Minnesota statute. Linehan, supra, at 873. In this case, Missouri law requires that the SVP statute be struck down **in toto** and the case against appellant therefore dismissed. This court cannot change the statute to comply with Hendricks without materially changing the SVP statute's scope and meaning beyond what the Legislature intended, and therefore cannot do as the Linehan and Crane courts did – "clarify" the SVP statute to require a finding of volitional impairment. The Missouri Legislature, in enacting the SVP statute, mandated that enormous resources be dedicated to enforcing its provisions. This Court cannot say that the Legislature would have done so if it knew that the only persons who could be committed were those who could not control their actions.

Section 1.140 RSMo provides that "the provisions of every statute are severable." The severability of Missouri statutes is limited, however, if it cannot be presumed that the Legislature would have enacted the statute without a provision that is found unconstitutional:

> If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that **it cannot be**

presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Section 1.140 RSMo (emphasis added). The entire SVP statute is so tightly intertwined with, connected to, and dependant upon the definition of a sexually violent predator that this Court cannot presume that the Legislature would have established the commitment procedure if its application was limited to persons who could not control their behavior.

When it enacted Sections 632.480 through 632.513 RSMo,[3] the Missouri Legislature created an elaborate, multiplayer process for identifying, evaluating, committing, confining and – if certain conditions are met – releasing persons it designates sexually violent predators. Section 632.483.4 RSMo directs the Directors of both the Department of Mental Health and Department of Corrections to establish a "multidisciplinary team," consisting of seven members to review the records of possible sexually violent predators. The Department of Mental Health and Department of Corrections are directed to identify persons who meet the definition of an SVP and notify the Office of the Attorney General and the multidisciplinary team when it appears they may be released from confinement. Section 632.483.1(1)-(3) RSMo. The

[3] Section 632.484 RSMo concerns the commitment of persons who are not, at the time the proceedings commenced against them, in the custody of the Department of Mental Health or Department of Corrections and was therefore not applicable to appellant.

multidisciplinary team reviews records pertaining to the subject and determines "whether or not he meets the definition of a sexually violent predator." Section 632.483.4 RSMo.

Section 632.483.5 RSMo directs that a five-member prosecutor's committee – made up of the prosecuting attorneys from both rural and urban jurisdictions – be established to review the subject's records and determine "whether or not he meets the definition of a sexually violent predator." If the prosecutor's review committee determines the person meets the definition, the Office of the Attorney General can file a petition requesting commitment as an SVP. Section 632.486 RSMo. In the petition, the Attorney General must allege that the person is a sexually violent predator and state sufficient facts to support such allegation. Section 632.486 RSMo.

Upon the filing of such a petition, the judge shall determine whether probable cause exists to determine whether the subject is an SVP and, if so, order him confined pending further proceedings. Section 632.489.1 RSMo. A formal probable cause hearing is then held, and again the judge must make the same determination. Section 632.489.4 RSMo. The accused has the right to assistance of counsel from this point on and, if he is indigent, counsel must be appointed. Sections 632.489.4, 632.492 RSMo. If a probable cause determination is made after the hearing, the court shall direct that the subject be incarcerated in an appropriate facility. Section 632.489.4 RSMo.

After the accused is confined, the court shall order the Director of the Department of Mental Health to have him examined by a psychiatrist or psychologist. Section 632.489.4 RSMo. The Department of Mental Health has to provide one examination free of charge, but any subsequent examination must be paid for by the party requesting it.

Section 632.489.4 RSMo. The accused may also have himself evaluated by a doctor of his choice at his own expense. Section 632.489.4 RSMo.

The allegations in the petition may be tried to the court or, if either party requests it, to a jury. Section 632.492 RSMo. The finder of fact shall determine whether, beyond a reasonable doubt, the accused is an SVP. Section 632.495 RSMo. If that determination is made, the court shall commit the prisoner to the custody of the Department of Mental Health "until such time that the person's mental abnormality has so changed that the person is safe to be at large." Section 632.495 RSMo.

A prisoner confined as an SVP must be held in a secure facility and segregated from the non-SVP inmates. Section 632.495 RSMo. He may be imprisoned in a Department of Corrections facility, but must be segregated from the offenders. Section 632.495 RSMo. Once a year, the prisoner shall be examined by the Department of Mental Health and a report shall be provided to the committing court. Section 632.498 RSMo. The committing court shall conduct a review of the prisoner's condition and he shall have the right to petition the court for release. Section 632.498 RSMo.

If the prisoner petitions for release, the committing court shall conduct a hearing to determine if probable cause exists to believe that the prisoner's "**mental abnormality** has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged." Section 632.498 RSMo (emphasis added). If the court finds that probable cause exists, it shall set the matter for either a bench or jury trial. Section 632.498 RSMo. The Attorney General, who shall continue to represent the State, may have the prisoner examined by an expert not employed by the Department of Mental

Health and the prisoner, at his own expense, may be examined by an expert. Section 632.498 RSMo. The State shall have the burden of proving beyond a reasonable doubt that the inmate's "**mental abnormality** remains such that the person is safe to be at large and will not engage in acts of sexual violence if discharged." Section 632.498 RSMo (emphasis added)..

If the Director of the Department of Mental Health determines that the inmate's "**mental abnormality** has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged," the Director shall authorize the prisoner to petition for release. Section 632.501 RSMo. A hearing akin to that held pursuant to Section 632.498 RSMo must be held within 30 days and the State must prove that the prisoner's "**mental abnormality** has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged." Section 632.501 RSMo. The inmate may file other petitions for release, which may be denied without a hearing if frivolous. Section 632.504 RSMo.

From the above, it is clear that the unconstitutional definition of "mental abnormality" winds its way through the entirety SVP statute to an extent that it is inextricable therefrom. It is the controlling factual issue at each and every stage of the proceedings. From the notice that the Departments of Corrections and Mental Health give to the Attorney General and Multidisciplinary Committee, to the Prosecutor's Committee and Multidisciplinary Committee's reports and recommendations, to the facts that must be pled in the petition, to the probable cause determinations by the probate court, to the fact-finder's determination after trial, and finally to the issue to be

determined when the prisoner petitions for release – the central matter that must be pled and proved is that the person has a condition which affects "the **emotional *or* volitional** capacity to commit sexually violent offenses." Section 632.480(2) RSMo (emphasis added). At no time in the proceedings is the issue limited to whether the person can control his actions, as required by Hendricks.

There are likely many individuals who have some sort of mental defect that inclines them to sexually molest children but whose behavior is not beyond their control. Persons under the supervision of probation or parole officers have a "substantially lower" rate of recidivism than people who are unsupervised (Tr. 299). The highest risk of recidivism for sex offenders was within the first three to five years after release on parole (Tr. 390). Also, Dr. Cuneo stated that the scientific studies do not support the proposition that most offenders relapse after they are discharged from probation (Tr. 390). This strongly suggests 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 and the offenders can restrain themselves from acting out if motivated to do so. The Legislature clearly intended the SVP statute to deal with this class of offenders **in addition to** those who, like Hendricks, cannot resist what their mental abnormality compels them to do. Under Hendricks, however, this statute can only be constitutionally applied to the latter group and not the former.

In enacting the SVP statute, the Legislature placed the burden of identifying, evaluating, and incarcerating sexually violent predators on state governmental institutions such as the Department of Mental Health and the Attorney General's Office, as well as

local probate courts, prosecutors and jurors. Also, the Missouri State Public Defender System has been charged with defending persons accused of being sexually violent offenders. For all the people who are confined as SVPs, all these entities must continue to work indefinitely on their cases as petitions for release are filed, evaluated and ruled on. Both the initial commitment proceedings and the ongoing detention process doubtlessly taxes the time and resources of all the entities involved, a fact that the Legislature presumably considered when it enacted the legislation. However, to comply with the Due Process Clause of the United States Constitution, the SVP statute cannot be applied to the broad range of persons that the Legislature intended to be incarcerated.

This Court cannot say that the Legislature would have placed all these burdens on the Department of Mental Health, the Office of the Attorney General, the courts, the local prosecutors, the jurors and the Public Defender System if the only people that could be confined pursuant to the SVP statute were those who could not control themselves. Clearly, this is a smaller subset of those that the Legislature targeted, and it is impossible to determine if the Legislature would still have enacted the SVP statute in its present form – if at all – if it knew its reach would be constricted.

Because the SVP statute is invalid on its face, since it does not require that a target of the commitment proceeding be unable to control his actions. For that reason, the trial court erred when it denied appellant's motion to dismiss. This Court cannot both change what the State needs to charge and prove to bring the statute into compliance with Hendricks and effectuate the Legislature's intent in enacting it. Therefore, the statute

must be invalidated **in toto** and this cause remanded with directions that the case against appellant be dismissed.

(2)

Jury Instruction

In the alternative, should this Court – like the court in Crane and Linehan – find that Hendricks only requires an additional element be added to the jury instructions, this Court should reverse appellant's commitment and remand with directions for a new trial with a corrected verdict director. At a minimum, Hendricks requires that the jury be instructed that appellant's mental abnormality renders him unable to control his actions to the point where he is more likely than not to commit acts of predatory sexual violence. The verdict director given in this case read as follows:

INSTRUCTION NO. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that respondent pled guilty to forcible rape and forcible sodomy in the Circuit Court of the City of St. Louis, State of Missouri on June 25, 1982;

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

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

Fourth, that as a result of this abnormality, the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find that the respondent is a sexually violent predator.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you may not find respondent to be a sexually violent predator.

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

As used in this instruction, "mental abnormality" means a congenital or acquired condition affecting the **emotional *or* volitional** capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

As used in this instruction, "predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(LF, 165-66) (emphasis added). The verdict director in Crane was virtually identical to the one submitted to the jury in appellant's case:

[T]he jury was instructed that in order to establish Crane is a sexually violent predator, the State had to prove (1) that Crane had been convicted of aggravated sexual battery and (2) that he "suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility. "Likely" was defined as

"more probable to occur than not to occur." "Mental abnormality" was defined for the jury in accordance with K.S.A. Supp. 59-29a02(b) as a "condition affecting the **emotional *or* volitional** capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." "Personality disorder" was defined for the jury as a "condition recognized by the . . . [DSM IV] and includes antisocial personality disorder." Crane, supra, at 288 (emphasis added). Jury instruction 6 did not encompass personality disorders as the instruction in Crane, but it is not a material difference.

As noted in **Point I(a)** above, the focus of the analysis in Crane was on whether the instruction permitted the accused to be found an SVP without a determination that he is unable to control his actions, as was required by Hendricks. Crane, supra, at 289. The court noted that, while having a "volitional" disorder implies that the person cannot control his actions, but having an "emotional" impairment does not. Id. Thus, the defect with the instruction in Crane was not that it included a "personality disorder," but that it – like Instruction 6 in this case – also included an "emotional" disorder. Id. Like the instruction in Crane, the instruction in this case did not require the jury to find that appellant was unable to control his actions before finding him to be an SVP and violated the strictures of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as enunciated in Hendricks.

The failure of Instruction 6 to require a finding that appellant was unable control his actions prejudiced appellant. There was absolutely no evidence that appellant had lost volitional control of his actions. Appellant's MOSOP report reflects that appellant

"gained much knowledge" through his participation in the program (Tr. 328). It also states that appellant acknowledged his problem with sexual deviance, but notes that he is "highly motivated" for treatment (Tr. 328). His success in avoiding recidivism would depend, states the report, upon his willingness to apply what he has learned once he is released (Tr. 328).

The State's expert, Dr. Scott, diagnosed appellant with two clinical conditions that he believed met the statutory definition of "mental abnormality" (Tr. 288). One was pedophilia – a disorder in which a person is sexually attracted to children (Tr. 288). The second was antisocial personality disorder, in which the person has a high rate of committing crimes, including sexually violent crimes (Tr. 288-89).

Dr. Daniel Cuneo testified for the defense (Tr. 362). Under the DSM-IV's definition, he also diagnosed appellant as a pedophile and suffering from ASPD (Tr. 380). However, if appellant remained in treatment, Cuneo thought he was not likely to commit sexually predatory acts (Tr. 440).

Thus, the jury was presented with two diagnoses by testifying experts as well as the MOSOP report – **none** of which found that appellant was **unable** to refrain from committing the acts for which he was charged, convicted and imprisoned. Cuneo expressly believed that appellant **could** control his behavior and was not likely to reoffend if he continued with his treatment. Scott differed from Cuneo in his **conclusion** from the diagnosis, not in the disorders that he found. Cuneo gave appellant more credit for pursuing treatment, whereas Scott was skeptical that appellant was actively and sincerely seeking help (Tr. 290-95, 297, 310; 388-89).

Appellant submits that the omission from the verdict director of the element required by Hendricks – that appellant was unable to control his behavior – is akin to the submission of an erroneous jury instruction in a criminal case which does not contain an element of the offense. In both cases, the jury is charged with finding every element beyond a reasonable doubt and in both cases, a finding in favor of the State results in the involuntary confinement of the defendant. The stakes are higher in an SVP proceeding than in a criminal cause. In most criminal cases, the court has the option of declining to imprison the defendant and grant probation. Not so in an SVP proceeding – incarceration for an indefinite period of time inexorably follows a verdict in favor of the State. Thus, the result of an erroneous jury verdict is a greater violation of the defendant's liberty in an SVP case than in a criminal cause. An instruction that misdirects the jury thus is more dangerous in an SVP case than in a criminal case.

In criminal cases, reviewing courts routinely reverse convictions where the verdict director permits conviction absent a finding of an essential element of the offense – even reviewing for "plain error" resulting in "manifest justice" – unless the State's evidence proved the missing element "beyond serious dispute." State v. Roe, 6 S.W.3d 411, 415-16 (Mo.App. E.D. 1999). Here the State did not even **attempt** to prove that appellant was unable to stop committing sexually violent acts. Thus, the jury certainly found against appellant without determining that he lacked the ability to restrain himself from such conduct. The jury could very well have found that appellant had an **emotional** but not a **volitional** defect. This is particularly true since the verdict director did not define "volitional," a word that is not so commonplace that a person of ordinary intelligence

would have a clear understanding of what it meant. "Emotional," on the other hand, is virtually self-explanatory. It is therefore likely that the jury focused on appellant's emotional capacity and gave no heed to whether his volitional capacity was such that he could control his actions.

As the Crane court noted, only an impairment of the volitional capacity raises the implication that the person's behavior is beyond his control and in this case, the jury was not required to find that appellant could not control his behavior before finding that he was an SVP and permitting him to be involuntarily confined. The erroneous jury instruction prejudiced appellant and this Court should reverse his commitment and remand this cause for a new trial.

For the forgoing reasons, the trial court erred when it (a) denied appellant's motion to dismiss or, in the alternative, (b) overruled appellant's objection to Instruction 6. The SVP statute violates the guarantees of Due Process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it permits the State to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses. Due Process requires that no person be involuntarily committed except upon proof that he is unable to control his behavior. This Court must, therefore, declare that the Missouri SVP statute is unconstitutional, reverse the judgment of the lower court and either order that appellant be discharged from custody or be given a new trial.

II.

The trial court erred when it denied appellant's motion to dismiss the State's petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The guarantee of Equal Protection of the laws requires that similarly situated persons be treated similarly. A court which involuntarily commits a person to confinement within a "secure facility" under the control of the Department of Mental Health for reasons other than a finding that he is a sexually violent predator must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be an SVP is automatically committed to the custody of the Missouri Department of Mental Health. There is no rational basis for the disparate treatment of the two classes of persons. Appellant was prejudiced by the trial court's error because there was an abundance of evidence that, if he received outpatient mental health treatment while he was on parole, he would not likely reoffend. Thus, appellant was deprived of his liberty pursuant to a statute which, on its face, violates the guarantees of Equal Protection of the law

Appellant filed a motion to dismiss pleadings on July 19, 1999 (LF, 67-79). He asserted, *inter alia*, that the SVP statute violated his right to equal protection of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 [sic] of the Missouri Constitution (LF, 77-78). Among his grounds for

arguing that the SVP statute was a penal statute and was unconstitutional was that the statute

> Makes no provision for "treatment" other than incarceration, and ignores the principles of detention under the least restrictive environment which are guaranteed by mental health statutes to others supervised by the department of mental health. See, Section 630.115.1(10) RSMo.

(LF, 75). The court denied appellant's motion (LF, 2).

While appellant raised this issue in his motion to dismiss, appellant did not raise this issue specifically as a point of error in his motion for new trial (LF, 179-181). To preserve error for appeal in a jury-tried case, Mo. Sup. Ct. Rule 78.07(a)(1) requires that the matter be included in the motion for new trial. However, this cause was tried in the probate division (Tr. 1, 65). Rule 78.07 does not apply to proceedings in the Probate Division of the circuit court unless the judge rules that it shall. Mo. Sup. Ct. Rule 41.01(b). In this case, the probate judge specifically declined to make the rules of civil procedure applicable (Tr. 63-64). Thus, a motion for new trial was not necessary to preserve the matter for appeal.

Should this Court find it not to be preserved, appellant in the alternative requests review for "plain error" resulting in "manifest injustice." Mo. Sup. Ct. Rule 84.13(c). This Court will presume the statute to be valid "unless it clearly contravenes a constitutional provision," and will "adopt any reasonable reading of the statute that will allow its validity" and will "resolve any doubts in favor of constitutionality." State v. Burns, 978 S.W.2d 759, 760 (Mo. banc 1998).

The Equal Protection Clause of the United States Constitution "does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Baxtrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 763 (1966), quoted in In re Young, 857 P.2d 989, 1011 (Wash. 1993). Further:

> The Supreme Court has said that the dangerousness of the detainee "may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all"

Young, supra. "A person cannot be deprived of procedural protections afforded other individuals merely because the State makes the decision to seek commitment under one statute rather than another statute." Id., citing Humphrey v. Cady, 405 U.S. 504, 512, 92 S.Ct. 1048, 1053-54 (1972).

The SVP statute is, of course, not the only provision of Missouri law that permits the involuntary commitment of individuals to the Department of Mental Health. Section 632.300 RSMo et seq., provides that persons who present "a likelihood of serious harm to himself and others" may be involuntarily detained. Section 632.355.1 RSMo. Such a person is entitled to a jury trial on the issue, and if the jury finds that the person is "mentally ill" and dangerous, the court is presented with options:

> At the conclusion of the hearing, if the court or jury finds that the respondent, as a result of mental illness, presents a likelihood of serious harm to himself or others, and the court finds that a program appropriate to handle the respondent's condition

> has agreed to accept him, the court shall order that the respondent be detained for involuntary treatment in the least restrictive environment for a period not to exceed one year or for outpatient detention and treatment under the supervision of a mental health program in the least restrictive environment not to exceed one hundred eighty days

Section 632.355.3 RSMo. Someone who is involuntary committed pursuant to this Section is done so for treatment according to an "individualized treatment plan" developed by the program which treats him. Section 632.355.3 RSMo.

Thus, a person who is not adjudged to be an SVP – but is still considered dangerous – may receive either inpatient treatment while detained for a year or may be given outpatient treatment for 180 days. If such a person is detained, he must be held in the least restrictive environment:

> Notwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department, the order of detention shall be to the custody of the director of the department, who shall determine where **detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting.**

Section 632.365 RSMo (emphasis added). Once he is committed, the facility where he resides "shall release a patient, whether voluntary or involuntary, from the facility to the least restrictive environment, including referral to and subsequent placement in the

placement program of the department." Section 632.385.1 He may also be furloughed and allowed to leave the facility short periods. Section 632.385.4 RSMo.

In contrast, a person adjudged to be an SVP must be committed to the custody of the Department of Mental Health and confined to a "secure facility." Section 632.495. He cannot be housed with non-SVP detainees and may be placed in one of the prisons run by the Missouri Department of Corrections. Section 632.495 RSMo. There he must be segregated from the incarcerated criminal offenders. Section 632.495 RSMo.

The judge who presides over the proceedings against a non-SVP shall remand him for "treatment in the least-restrictive environment." He is given an "individualized treatment plan" and remanded to a program that can carry it out, on either an inpatient or outpatient basis. AN SVP, however, is simply dispatched to be confined within a secure facility operated by the Department of Mental Health, without consideration whatsoever of any outpatient treatment.

There is no rationale that would suffice to justify the blanket incarceration of persons adjudged to be SVPs while others – who are also found to be dangerous – are given individualized treatment in the least restrictive environment appropriate to their condition. This is what the Washington Supreme Court found under similar circumstances in Young, supra.

The State of Washington had an SVP statute very similar to the Missouri scheme. It defined an SVP in virtually same way as the Missouri statute did, as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in

predatory acts of sexual violence." Young, supra, at 993. The proceedings against the accused Washington SVP are very similar to those provided by the Missouri SVP statute. Id. The appellant in Young argued that the Washington SVP statute violated his right to equal protection of the law because "it does not require consideration of less restrictive alternatives to confinement." Id. at 1012. Young contrasted the SVP statute with the general provisions for civil commitment, which required "considerations of such alternatives as a precursor to confinement." Id.

The Washington Supreme Court agreed with Young's argument, holding that the court, prior to committing a person found to be an SVP to confinement, must consider less restrictive alternatives:

> The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so. Here, the State offers no justification for not considering less restrictive alternatives under [the civil commitment statute] and denying the same under [the SVP statute]. ***Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under [the civil commitment statute], it is necessary to account for these differences by considering alternatives to total confinement.*** We therefore hold that equal protection requires the State to comply with provisions of [the civil commitment statute] as related to the consideration of less restrictive alternatives.

Id. at 1012 (emphasis added). Like the Washington SVP scheme, the Missouri SVP statute violates equal protection by not providing for the consideration of less restrictive

alternatives to total physical confinement. The judge and jury in SVP cases – unlike in other commitment proceedings – have only one option if the person is found to be an SVP: incarceration.

As appellant discussed in **Point I**, there is no way under Section 1.140 RSMo to sever out the portions of Section 632.495 which mandate confinement while preserving the Legislature's intent. It was the clear intention of the Legislature that the targets of these proceedings be confined. That much is clear from Section 632.495, which made no provision for any outcome except for incarceration, if the accused is found to be an SVP. The SVP statute is an elaborate, multileveled scheme for identifying, evaluating and confining sexually violent predators. Again, the Legislature has directed that numerous state and local agencies dedicate extensive resources to this task. This Court cannot say that the Legislature would have done so if it knew that the Equal Protection Clause mandated that an SVP be subjected to anything less than automatic total confinement at the close of the proceedings. Because there is no way to read a less restrictive alternative requirement into Section 632.495 RSMo, the SVP statute must be struck down **in toto**.

The lack of consideration given to less restrictive alternatives prejudiced appellant. There was an abundance of evidence that appellant could have been placed in an outpatient treatment program and would not reoffend. Appellant was to be placed on parole for four years (Tr. 299). Persons under the supervision of probation or parole officers have a "substantially lower" rate of recidivism than people who are unsupervised (Tr. 299). However, the recidivism rate goes up once the offender is released from supervision (Tr. 299). The MOSOP therapist who worked with appellant recommended

that appellant be required to attend long term group therapy geared towards avoiding sexually offending behavior (Tr. 328). He should also be required to avoid liquor and being around children (Tr. 328). The State has outpatient sex offender programs available for ex-convicts (Tr. 339).

The highest risk of recidivism for sex offenders is within the first three to five years after release on parole (Tr. 390). Dr. Cuneo stated that scientific studies do not support the proposition that most offenders relapse after they are discharged from probation (Tr. 390). Further, appellant's sex drive has declined with his age, as did his ASPD (Tr. 395-98). Dr. Cuneo did not think there was a high risk of appellant reoffending, particularly if he continued with treatment for his drug and alcohol problems (Tr. 405, 408-09, 418-19).

Appellant's probation could be structured so that his continued release was conditioned upon his active participation in out-patient treatment programs for his anger management and alcohol abuse (Tr. 421). He could also be evaluated using a pleythysmograph, which would help determine if he was still a pedophile (Tr. 422). Appellant could also be prohibited from being alone with children as a condition of his parole (Tr. 422). Cuneo had reviewed MOSOP's parole plan for appellant and considered it appropriate for appellant's situation (Tr. 439). If appellant remained in treatment, Cuneo thought he was not likely to commit sexually predatory acts (Tr. 440). Thus, had less restrictive alternatives been considered, there was an abundance of evidence that would have supported a placement in a program such as would be available to a non-SVP patient.

For the forgoing reasons, the trial court erred when it denied appellant's motion to dismiss. The SVP statute violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution[4] because, unlike other persons involuntarily committed, a person found to be an SVP does not have the benefit of the court considering less-restrictive alternatives to total confinement. This Court must, therefore, declare that the Missouri SVP statute is unconstitutional, reverse the judgment of the lower court and order that appellant be discharged from custody. Should this Court not strike down the entirety of the SVP statute, it should do as the Young court did, remand for a new hearing at which the jury could be instructed that they can consider less restrictive alternatives to total confinement in a secure facility. Young, supra, at 1012.

[4] Caselaw suggests that Article I, Section 2 provides equal protection guarantees substantially similar to those provided by the Fourteenth Amendment to the U.S. Constitution. See, e.g.: Brawner v. Brawner, 327 S.W.2d 808 (Mo. 1959).

III.

The trial court erred when it denied appellant's motion to dismiss on grounds that, as applied to appellant, the SVP statute violates the guarantee against ex post facto punishment provided by Article I, Section 10 of the United States Constitution and Article I, Section 13 of the Missouri Constitution. The Missouri SVP statute is punitive, rather than remedial, in that (a) persons found to be sexually violent predators are subject to far more restrictive terms of confinement and may be confined in prison, rather than in a separate facility provided by the Missouri Department of Mental Health, and (b) the prosecutor's committee, rather than the multidisciplinary committee exercises control over the commencement of SVP proceedings. Since commitment as an SVP constitutes an additional penalty for the offenses to which appellant already pled guilty, it cannot be applied retroactively to appellant without violating the guarantee against increasing the punishment for an offense after it was committed.

Appellant filed a motion to dismiss pleadings on July 19, 1999 (LF, 67-79). He asserted, *inter alia*, that the SVP statute constituted ex post facto legislation, in violation of the United States and Missouri Constitutions (LF, 74). The court denied appellant's motion (LF, 2).[5]

[5] Caselaw suggests that the ex post facto guarantees provided by Article I, Section 13 of the are similar to those provided by Article I, Section 10 of the U.S. Constitution. See, e.g. State v. Wings, 867 S.W.2d 607 (Mo.App. E.D. 1993).

Appellant also raised the denial of his motion to dismiss as a point of error in his motion for new trial (LF, 179-181). To preserve error for appeal in a jury-tried case, Mo. Sup. Ct. Rule 78.07(a)(1) requires that the matter be included in the motion for new trial. However, this cause was tried in the probate division (Tr. 1, 65). Rule 78.07 does not apply to proceedings in the Probate Division of the circuit court unless the judge rules that it shall. Mo. Sup. Ct. Rule 41.01(b). In this case, the probate judge specifically declined to make the rules of civil procedure applicable (Tr. 63-64). Thus, a motion for new trial was not necessary to preserve the matter for appeal. This Court will presume the statute to be valid "unless it clearly contravenes a constitutional provision," and will "adopt any reasonable reading of the statute that will allow its validity" and will "resolve any doubts in favor of constitutionality. State v. Burns, 978 S.W.2d 759, 760 (Mo. banc 1998).

The Ex Post Facto Clause "forbids the application of any new punitive measure to a crime already consummated." Kansas v. Hendricks, 521 U.S. 346, 370, 117 S.Ct. 2072, 2086 (1997), quoting California Dept. of Corrections v. Morales, 514 U.S. 499, 505, 115 S.Ct. 1597, 1601 (1995) (internal quotes omitted); State v. Sanders, 842 S.W.2d 170 (Mo.App. E.D. 1992). In this case, commitment under the SVP statute is punitive and was not in operation at the time the offenses for which appellant was convicted occurred, so that application of the SVP statute to appellant violates the prohibition against ex post facto punishment. In making the determination, a reviewing court will examine the language of the statute itself, not how it is applied to any individual prisoner. Seling v.

Young, -- U.S. --, --- S.Ct. ----, 2001 WL 37676 (January 17, 2000) (disapproving of "as applied" ex post facto analysis and upholding the Washington SVP statute).

The Missouri SVP Statute is punitive

The Hendricks court found that the Kansas SVP statute was not punitive, and its application to Hendricks therefore did not violate the prohibition against either double jeopardy or ex post facto punishment. Hendricks, supra, at 361, 117 S.Ct. at 2081. In making this determination, the majority in Hendricks stated that "the categorization of a particular proceeding as civil or criminal is first of all a question of statutory construction." Id. (citations, internal quotes omitted). As a threshold matter, the Hendricks Court found that it was the Kansas Legislature's intent to establish a "civil" proceeding, and to prove that a statute was punitive and created a criminal penalty despite its "civil" label, Hendricks would have to show by "the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'" Id. (citations, internal quotes and brackets omitted). Hendricks was not able to show that the Kansas Legislature intended their SVP proceedings to be punitive. However, appellant can meet that burden in this case.

Important in the Hendricks Court's finding that the Kansas SVP statute was not punitive was its determination that the Legislature did not intend the statute "to function as a deterrent." Id. The Court noted that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are unlikely to be deterred by the threat of confinement." Id. at 362-363, 117 S.Ct. at 2082.

As noted in **Point I**, supra, the Missouri SVP statute is **not** limited to those who suffer from a **volitional** impairment that makes them unable to control their actions, but also encompasses those who can stop their criminal behavior. Thus, since the Missouri SVP statute – on its face – was intended to be applied to those who can control their behavior, it can be inferred that the Legislature intended it to serve as a deterrent to those people from committing future acts. Thus, unlike the Kansas SVP statute at issue in Hendricks, there is evidence that the Legislature sought to deter future wrongdoing and thus the Missouri SVP statute would have a deterrent purpose akin to a criminal statute.

Next, the Hendricks Court found that the conditions of confinement under the Kansas scheme did not indicate that the State sought to punish its SVP inmates through confinement:

> And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institutions . . . Because none of the parties argues that people institutionalized under the Kansas general commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

Id. at 362-63, 117 S.Ct. at 2082. SVP prisoners in Kansas were confined in the psychiatric wing of a prison hospital "where those whom the Act confines and ordinary

prisoners are treated alike." Id. at 379, 117 S.Ct. at 2090. (Breyer, J., dissenting). That is not the case with the Missouri SVP statute. Everyone committed as an SVP are subject to far more restrictive conditions than non-SVP persons who are committed to the Department of Mental Health..

As noted in **Point II**, supra, Section 632.300 RSMo et seq, provides that persons who present "a likelihood of serious harm to himself and others" may be involuntarily detained. Section 632.355.1 RSMo. Someone who is involuntary committed pursuant to this Section is done so for treatment according to an "individualized treatment plan" developed by the program which treats him. Section 632.355.3 RSMo.

Thus, a person who is not adjudged to be an SVP but is still considered dangerous, may receive either inpatient treatment while detained for a year or may be given outpatient treatment for 180 days. If a person is detained, he must be held in the least restrictive environment:

> Notwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department, the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting.

Section 632.365 RSMo. Once he is committed, the facility where he resides "shall release a patient, whether voluntary or involuntary, from the facility to the least restrictive environment, including referral to and subsequent placement in the placement

program of the department." Section 632.385.1 He may also be furloughed, and allowed to leave the facility for short periods of time. Section 632.385.4 RSMo.

In contrast, an SVP must be committed to the custody of the Department of Mental Health and confined to a "secure facility." Section 632.495 RSMo. He cannot be housed with non-SVP detainees, and may be placed in one of the prisons run by the Missouri Department of Corrections. Section 632.495 RSMo. There, he must be segregated from the incarcerated criminal offenders. Section 632.495 RSMo.

It is clear that SVP prisoners are subject to far more restrictive conditions of confinement than those others who are committed because they are dangerous due to a mental abnormality. SVP prisoners are not eligible for outpatient treatment or furloughs. The statute explicitly provides that, "[a]t all times, persons committed for control, care and treatment by the department of mental health pursuant to Sections 632.480 to 632.513 **shall be kept in a secure facility designated by the director of the department of mental health . . ."** Section 632.495 (emphasis added). Further, unlike other persons who have been "civilly" committed, the Legislature explicitly provided that SVP prisoners can be housed in state prisons – not a prison hospital as in Kansas – but in a portion of the prison to be controlled by the Department of Mental Health. Section 632.495 RSMo.

Even within a Department of Mental Health facility, **all** SVP prisoners are segregated from non-SVP inmates, regardless of any individual determination of how dangerous the SVP is within an institutional setting. The Legislature clearly rejected less restrictive alternatives that are provided to other dangerous persons who are not SVPs.

The rejection of such alternatives is an indicator that the State had a punitive purpose in enacting the statute. Hendricks, supra, at 388, 117 S.Ct. 2095 (Breyer, J., dissenting) ("This Court has said that a failure to consider or to use, "alternative and less harsh methods" to serve a nonpunitive objective can help to show that legislature's 'purpose . . . was to punish.'), quoting Bell v. Wolfish, 441 U.S. 520, 539, n. 20, 99 S.Ct. 1861, 1874, n. 20 (1979). Thus, the harsh and restrictive terms of confinement imposed upon the SVP prisoner evinces the Legislature's intention to punish – not treat – persons committed under the SVP statute.

Finally, the fact that the Prosecutor's Review Committee – not the Multidisciplinary Committee – exercises control over the initiation of SVP proceedings, is further evidence of the Legislature's intention that the SVP statute function as a criminal punitive measure rather than as a legitimate treatment method. Section 632.483.4 RSMo directs the Directors of both the Department of Mental Health and Department of Corrections to establish a "multidisciplinary team," consisting of seven members to review the records of possible sexually violent predators. At least one member shall be from the Department of Mental Health. Section 632.483.4 RSMo. The multidisciplinary team reviews records pertaining to the subject and determines "whether or not he meets the definition of a sexually violent predator." Section 632.483.4 RSMo.

Section 632.483.5 RSMo directs that a five-member prosecutor's committee – made up of the prosecuting attorneys from both rural and urban jurisdictions – be established to review the subject's records and determine "whether or not he meets the definition of a sexually violent predator." If the prosecutor's review committee

determines – by majority vote – that the person meets the definition, the Office of the Attorney General can file a petition, in the probate division of the circuit court where the person was convicted or committed, requesting commitment as an SVP. Section 632.486 RSMo.

The **prosecutor's** committee, not the committee that is made up of mental health professionals, exercises the veto power over the commencement of SVP proceedings. The **prosecutors** can seek to have an inmate committed even if the experts do not find that he is an SVP requiring confinement. If the Legislature's purpose was treatment, rather than punishment, one would think that it would be exactly the converse – those with the expertise in identifying, evaluating and treating mental illness would have the final word on whether SVP proceedings could commence. The members of the multidisciplinary committee are the ones who would be suited to determine what a person's treatment needs are and under what conditions those needs could be met.

If the Legislature was genuinely interested in treating SVPs, it would have placed the decision in the hands of those who could determine if commitment was necessary and beneficial for the inmate. Instead, prosecutors who have none of that expertise and whose primary duty is to prosecute crimes and punish offenders are the ones who make that determination. While the report of the multidisciplinary committee is to be available for their review, Section 632.483.5 RSMo, there is no mandate that the prosecutors follow its recommendations or even consider them in making their decision. The dissent in Hendricks found this to be a strong indicator that the that the statute was punitive. Hendricks, supra, at 380, 117 S.Ct. at 2091 (Breyer, J., dissenting). ([T]he Act imposes . .

. confinement through the use of persons (county prosecutors) . . . traditionally associated with the criminal law.") Thus, this provision is further evidence that the Legislature intended that SVP commitment was a punishment, not treatment.

In contrast to the Kansas statute considered by the Court in Hendricks, the Missouri SVP statute has numerous elements that show the Legislature, under the guise of providing for civil commitment, intended SVP commitment to be additional punishment for those already convicted of sexually violent offenses. Both the punitive nature of the mandatory confinement – which, unlike in Kansas was far more restrictive than other civilly committed prisoners – and the grant of ultimate authority to the prosecutors committee rather than the body made up of mental health professionals, constitute clear evidence that the SVP statute was a punitive and pseudo-criminal measure.

Since the SVP statute is demonstrably punitive, it implicates the provisions of the Ex Post Facto Clause which prohibit retroactive punishment. The Hendricks Court stated that the Kansas statute was not "retroactive" to the period prior to the commission of Hendricks' offenses because it

> permits involuntary confinement based upon a determination that the person *currently* both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes.

Id. at 370, 117 S.Ct. at 2086. This statement is dicta, since the Hendricks majority had already determined that the Kansas statute was not punitive and, therefore, did not raise

ex post facto implications. Id; Cf. Charles W. v. Maul, 214 F.3d 350, 359 (2d Cir. 2000). Also, by the use of the term "evidentiary purposes," the Hendricks court meant that the prior convictions are only "used as evidence in the commitment proceedings, but were not a prerequisite to confinement." Seling, supra, 2001 WL 37676.

Prior convictions are not used in Missouri SVP proceedings merely for an "evidentiary purpose." One must have been convicted of a prior sexually violent offense to be the target of SVP proceedings, and in order to find a person to be an SVP, the jury must find that he was convicted of a sexually violent offense (LF, 165); Sections 632.480(5)(a), 632.495 RSMo. Thus, far from merely an evidentiary matter tending to prove the person's dangerousness, the prior criminal conviction is an essential element of the State's burden of proof and a predicate for proceeding against either a person who is confined or at large.

Confinement pursuant to the SVP statute is clearly punitive. The highly restrictive method of confinement – so much harsher than those others classified as "dangerous" because of a mental abnormality – displays this unmistakably. Also, the fact that the Legislature gave ultimate authority to the prosecutor's committee over that of mental health professionals is another strong indicator that an SVP was intended to be a second prosecution. Appellant was convicted for his offenses on June 25, 1982 – long before January 1, 1999, when the statute became effective. (LF, 165); Section 632.480. Thus, his confinement pursuant to the SVP statute "changed the legal consequences that attached to [appellant's] earlier crimes and in a way that 'significantly disadvantage[d] the offender.'" Hendricks, supra, at 395 (Breyer, J., dissenting), quoting Weaver v.

Graham, 450 U.S. 24, 101 S.Ct. 960, 964 (1981). Thus, the application of the SVP act retrospectively was prohibited by the Ex Post Facto clause.

For the forgoing reasons, the court erred when it denied appellant's motion to dismiss. Commitment of appellant pursuant to the SVP statute violated the Ex Post Facto clause of Article I, Section 10 of the United States Constitution and Article I, Section 13 of the Missouri Constitution because the measure was clearly punitive in nature and imposed additional punishment upon appellant after he was convicted and sentenced. Therefore, this Court must declare the SVP statute unconstitutional, reverse the judgment below, and order appellant discharged.

IV.

The trial court erred when it denied appellant's motion to dismiss on grounds that, as applied to appellant, the SVP statute violated appellant's right to be free from double jeopardy, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The Missouri SVP statute is punitive, rather than remedial, in that (a) persons found to be sexually violent predators are subject to far more restrictive terms of confinement and may be confined in prison, rather than in a separate facility provided by the Missouri Department of Mental Health, and (b) the prosecutor's committee, rather than the multidisciplinary committee exercises control over the commencement of SVP proceedings. Since commitment as an SVP constitutes an additional penalty for the offenses to which appellant already pled guilty, it cannot be applied to appellant without violating the guarantee against cumulative punishments for the same offense.

Appellant filed a motion to dismiss pleadings on July 19, 1999 (LF, 67-79). He asserted, *inter alia*, that the SVP statute violated his right to be free from double jeopardy, in violation of the United States and Missouri Constitutions (LF, 74). The court denied appellant's motion (LF, 2).

Appellant also raised the denial of his motion to dismiss as a point of error in his motion for new trial (LF, 179-181). To preserve error for appeal in a jury-tried case, Mo. Sup. Ct. Rule 78.07(a)(1) requires that the matter be included in a motion for new trial. However, this cause was tried in the probate division (Tr. 1, 65). Rule 78.07 does not apply to proceedings in the Probate Division of the circuit court unless the judge rules

that it shall. Mo. Sup. Ct. Rule 41.01(b). In this case, the probate judge specifically declined to make the rules of civil procedure applicable (Tr. 63-64). Thus, a motion for new trial was not necessary to preserve the matter for appeal. This Court will presume the statute to be valid "unless it clearly contravenes a constitutional provision," and will "adopt any reasonable reading of the statute that will allow its validity" and will "resolve any doubts in favor of constitutionality. State v. Burns, 978 S.W.2d 759, 760 (Mo. banc 1998).

The Fifth and Fourteenth Amendments to the United States Constitution prohibit a person from being twice placed in jeopardy for the same offense. Hendricks v. Kansas, 521 U.S. 346, 369, 117 S.Ct. 2072, 2085 (1997). The Double Jeopardy Clause prohibits not only successive criminal prosecutions, but also prohibits the State from "'punishing twice, or attempting a second time to punish criminally, for the same offense.'" Id., quoting Witte v. United States, 515 U.S. 389, 396, 115 S.Ct. 2199, 2204 (1995).

Examining the Kansas SVP statute, the Hendricks court found that it did not violate the Double Jeopardy Clause because commitment pursuant to the statute was not "punishment." Hendricks, supra, at 369-70, 117 S.Ct. at 2086. As noted in **Point III**, supra, the Missouri SVP statute **is** punitive, and therefore double jeopardy is implicated in an SVP commitment procedure which takes place after the target has already been convicted and sentenced for the sex offenses which trigger the commitment proceedings. For the sake of brevity, appellant restates and incorporates by reference his argument in **Point III**, supra, regarding the punitive nature of Missouri's SVP statute. The same analysis applies in both the double jeopardy and ex post facto contexts. Id., at 360, 370

("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and ex post facto claims.")

Since the Missouri SVP statute is punitive, the commitment proceedings against him constitute – in effect – a second prosecution and his commitment a second punishment for his prior convictions. The prohibition against double jeopardy prohibits the SVP statute being applied to appellant. As noted in **Point III**, supra, an essential element that the State was required to prove in the SVP proceeding against appellant was that he was convicted of forcible rape and forcible sodomy (LF, 165); Sections 632.480(5)(a), 632.495 RSMo. Thus, the forcible rape and sodomy served as both the basis of his criminal conviction and his commitment under the SVP statute.

The prohibition against double jeopardy precludes the State from both criminally convicting appellant for the rape and sodomy and committing him as an SVP on the basis of those convictions. In Department of Revenue v. Kurth Ranch, 511 U.S. 767, 770, 114 S.Ct. 1937, 1941 (1994), the state of Montana levied a tax on the possession and storage of illegal drugs. The Kurths were prosecuted for raising marijuana, pled guilty and were sentenced. Id. at 772, 114 S.Ct. at 1942. Subsequently, the State attempted to collect the back taxes owed on the marijuana, and the issue before the United States Supreme Court was whether the tax assessment was barred by double jeopardy. Id. at 773, 114 S.Ct. at 1942-43. The Supreme Court held that the tax was punitive and constituted "punishment" for the purposes of the prohibition against multiple punishments. Id. at 776-83, 114 S.Ct. 1943-48. As levied against the Kurths, the tax was prohibited - because they had already been prosecuted and punished for raising the marijuana, they

could not subsequently be assessed a punitive tax for the same behavior. Id. at 784, 14 S.Ct. at 1948.

Just as the tax in Kurth Ranch violated double jeopardy, the civil commitment does here. Appellant has already been convicted and punished for his crimes. He cannot now be subject to punitive incarceration under the guise of treatment for that same conduct. The same rape and sodomy acts that caused him to serve 23 years' imprisonment in the Missouri Department of Corrections now serve as the basis for his indefinite commitment as a sexually violent predator (Tr. 67). His confinement clearly violates the provisions of the Double Jeopardy Clause.

For the forgoing reasons, the trial court erred when it denied appellant's motion to dismiss. The State was barred by the prohibition against double jeopardy in the Fifth and Fourteenth Amendments from proceeding against him pursuant to the SVP statute. Therefore, this Court must hold the SVP statute unconstitutional, reverse the judgment of commitment, and order appellant discharged from confinement.

V.

The trial court erred when it denied appellant's motion to dismiss on grounds that the Circuit Attorney for the City of St. Louis, Dee Joyce Hayes, did not participate in the prosecutor's review committee which voted to permit the State to commence SVP proceedings against appellant. Section 632.483.5 (Cum. Supp. 1999) provides that one member of the prosecutor's review team "shall be *the* prosecuting attorney of the county in which the person was convicted." The section makes no provision for a designee. Thus, if the State was going to proceed with an SVP commitment against appellant, Dee Joyce Hayes had to be a member of the prosecutor's review committee. Since the assent of the prosecutor's review committee was mandatory prior to the State filing its petition to commit appellant, the committee had to be properly constituted according to the Legislature's plainly expressed mandate. The trial court's error violated appellant's rights to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Appellant filed a motion to dismiss pleadings on July 19, 1999 (LF, 32-35). He asserted, *inter alia*, that the case against him should be dismissed because the prosecutor's review committee that approved the filing of an SVP commitment petition against him did not include Dee Joyce Hayes, then Circuit Attorney for the City of St. Louis (LF, 34). The court denied appellant's motion (LF, 2).

Appellant also raised the denial of his motion to dismiss as a point of error in his motion for new trial (LF, 184). To preserve error for appeal in a jury-tried case, Mo. Sup.

Ct. Rule 78.07(a)(1) requires that the matter be included in the motion for new trial. However, this cause was tried in the probate division (Tr. 1, 65). Rule 78.07 does not apply to proceedings in the Probate Division of the circuit court unless the judge rules that it shall. Mo. Sup. Ct. Rule 41.01(b). In this case, the probate judge specifically declined to make the rules of civil procedure applicable (Tr. 63-64). Thus, a motion for new trial was not necessary to preserve the matter for appeal.

As noted in **Points I** and **III**, supra, the SVP statute mandates that no petition for SVP commitment be filed unless and until the "prosecutor's review committee," by majority vote, approves. Section 632.483.5 (Cum. Supp. 1998).[6] The section requires that one member of the review committee be the prosecuting attorney for the jurisdiction where the prisoner was convicted:

> The attorney general shall appoint a five-member prosecutor's review committee composed of a cross section of county prosecutors from urban and rural counties. No more than three shall be from urban counties, and one member **shall be *the* prosecuting attorney of the county in which the person was convicted** . . . The committee shall review the records of each person referred to the attorney general pursuant to subsection 1 of this section. The prosecutor's review committee shall make a determination of whether or not the person meets the definition of a sexually violent predator. The assessment of the multidisciplinary

[6] The Section was amended effective January 1, 2000, changing the method by which the committee is appointed. The revision is not relevant to appellant's argument.

committee shall be made available to the attorney general and the prosecutor's review committee.

Section 632.483.5 (emphasis added). On July 12, a prosecutor's review committee, which was also established by the SVP statute, met by conference call and voted to find that appellant met the definition of a sexually violent predator (LF, 23).

The members of the committee were Morley Swingle (Cape Girardeau County Prosecuting Attorney), Laura Donelson (Buchannan County Prosecuting Attorney designee), Michael Wright (Warren County Prosecuting Attorney), Joseph Warzycki (City of St. Louis Circuit Attorney designee) and Jack Banas (St. Charles County Prosecuting Attorney) (LF, 23). Dee Joyce Hayes, Circuit Attorney for the City of St. Louis, did not participate in the meeting and did not vote (LF, 34-35).

The prosecutor's review committee in appellant's case was thus not constituted in compliance with the provisions of the SVP statute and the trial court should have granted appellant's motion to dismiss. The Legislature, when it enacted this statute, stated that one member of the committee "shall be *the* prosecuting attorney of the county in which the person was convicted." This language is an unambiguous order that the elected prosecuting attorney of the county participate in the committee.

This Court's duty in interpreting and applying statutes is to "ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." Budding v. SSM Healthcare, 19 S.W.3d 678, 680 (Mo. banc 2000) (citation, internal quotes omitted). The plain and ordinary meaning of "**the** prosecutor **of** the county" is the elected prosecuting

attorney and not an assistant or "designee." This applies equally to the Circuit Attorney of the City of St. Louis and Assistant Circuit Attorneys, since they are statutory equivalents to the prosecuting attorney of a county and assistant prosecuting attorneys. For the sake of clarity, appellant will use "prosecuting attorney."

The prosecuting attorney **of** a county is an official elected for a four year term. Sections 56.010, 56.430 RSMo. She has the authority to appoint "assistant prosecuting attorneys." Sections 56.151, 56.540. Even the most cursory examination of Section 56 discloses that the Legislature knows the difference between **the** prosecuting attorney and **an** assistant prosecuting attorney. There is nothing to suggest that the two terms are interchangeable in the SVP statute, as in they are in the Missouri Rules of Criminal Procedure. Mo. Sup. Ct. Rule 19.05; State v. Tierney, 584 S.W.2d 618 (Mo.App. W.D. 1979). Thus, in "the plain and ordinary meaning" of the statute, Dee Joyce Hayes, as the then elected Circuit Attorney, was required to participate in the prosecutor's review committee which voted to commit appellant.

There are a number of good reasons for this duty to be non-delegable by the elected prosecutor. The Legislature may well have wanted an official who is directly accountable to the voters to participate in the determination of whether to commit a potential SVP who could be released into their community. Further, it is likely that the voice of the prosecuting attorney from where the offenses occurred would have an amplified voice in the deliberations of the review committee. The Legislature may well have wanted that influential person to be the elected prosecutor so that his or her influence and stature would not be diminished by the fact that he or she was an assistant.

Or, it could be that the Legislature, considering the gravity of committing a person to the Department of Mental Health – possibly for the rest of his life – wanted a person of significant legal experience and judgment to represent the community where the offense occurred. An attorney fresh out of law school can be an assistant prosecuting attorney, but it is not likely that such a person would be the elected prosecuting attorney of the county.

The Legislature spoke in utterly unambiguous language in Section 632.483.5. **The** prosecuting attorney **of** the county, not **an assistant** prosecuting attorney **from** the county where the person was convicted **must** participate in the prosecutor's review committee. Further, absent authorization by the majority vote of a properly constituted prosecutor's review committee, the Attorney General had no authority whatsoever to file a petition seeking to commit appellant as an SVP:

> When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection 5 of section 632.483 has determined by a majority vote, that the person meets the definition of a sexually violent predator, the attorney general may file a petition . . . alleging that the person is a sexually violent predator and stating sufficient facts to support such an allegation.

Section 632.486 RSMo. Thus, the majority vote by the prosecutor's review committee **as provided in subsection 5 of section 632.483** is an undeniably essential predicate to the filing of an SVP commitment petition.

The Section gives no authority to the Attorney General whatsoever to file a petition if the committee does not first approve or if the committee is improperly constituted. Since Dee Joyce Hayes, the Circuit Attorney of the City of St. Louis, did not participate in the proceedings of the prosecutor's review committee, the committee was not constituted as required by statute and the Attorney General did not have the power to file a petition. Thus, the trial court should have dismissed the petition.

For the forgoing reasons, the trial court erred when it denied appellant's motion to dismiss. As the prosecutor's review committee was not properly constituted, the Attorney General did not have the authority to file a petition to commit appellant pursuant to the SVP statute. The trial court's error violated appellant's rights to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.[7] This Court must remand this cause with directions that the case against appellant be dismissed and appellant discharged from confinement.

[7] Caselaw suggests that Article I, Section 10 provides largely similar due process protections as the U.S. Constitution. See, e.g. State v. Hester, 801 S.W.2d 695, 697 (1959).

Conclusion

Wherefore, for the forgoing reasons, appellant prays this Honorable Court to hold that Sections 632.480 – 632.513 RSMo are unconstitutional and remand this cause with orders that the judgment of the Probate Court be vacated and the petition against him dismissed or, in the alternative, for a new trial.

Respectfully Submitted,

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Certificate of Service

One written copy of the forgoing Appellant's Statement, Brief, and Argument and one copy on floppy disk was hand-delivered to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this 19th day of January, 2001.

_____

Attorney for Appellant

Certificate of Counsel Pursuant to Special Rule 1(b)

Pursuant to Special Rule No. 1, counsel certifies that this brief complies with the limitations contained in Special Rule No. 1(b). Based upon the information provided by undersigned counsel's word processing program, Microsoft Word 2000, this brief contains 1, 902 lines of text and 21, 863 words. Further, a copy of appellant's brief on floppy disk accompanies his written brief and that disk has been scanned for viruses and is virus-free as required by Special Rule 1(f).

Respectfully Submitted,

_____

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