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 REPLY BRIEF

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Jurisdictional Statement and Statement of Facts

Appellant restates and incorporates his Jurisdictional Statement and Statement of Facts filed with his brief in chief.

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 re Leon G., 2001 WL 125844 (Ariz. App., Div. 1 Feb. 15, 2001);

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

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

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In re Gordon, 102 Wash.App. 912 10 P.3d 500 (Wash. App. 2000);

In re Linehan, 557 N.W.2d 171, 182 (Minn. 1996);

Section 632.480(2) RSMo (2000);

Section 1.140 RSMo;

U.S. Const., Amend. 14;

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

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

Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 PSYCHOL. PUB. POL'Y & L. 505.

Argument[1]

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,

[1] Appellant has chosen to reply solely to Point I. He in no way waives his arguments as to Points II-IV.

it had to determine that he is unable to refrain from committing sexually violent acts.

Respondent concedes that the "prevailing interpretation" of Missouri Supreme Court Rule 41.01(b) exempts proceedings in the probate divisions from the requirement that a motion for new trial be filed in order for matters to be preserved for appeal (Resp. Br. 21). However, Respondent urges this Court to effectively amend Rule 41.01(b) by decision, requiring that a motion for new trial be filed, regardless of whether the trial judge holds that the Missouri Rules of Civil Procedure should apply to the proceedings (Resp.Br. 22).[2] Appellant respectfully submits that this Court should not do as Respondent wishes. Litigants are entitled to rely upon the unequivocal language of the Missouri Rules of Civil Procedure. Once the probate court decides – pursuant to the authority unequivocally granted it by Mo. Sup. Ct. Rule 41.01(b) – that the rules of civil procedure do not apply, the parties are justified in proceeding accordingly.

In the alternative, Respondent suggests that this Court amend Rule 41.01(b) prospectively, requiring a motion for new trial be filed to preserve issues for appeal (Resp. Br. 21-22). Appellant notes that, when it issued Rule 41.01(b), this Court specifically provided that a number of rules do apply to probate

[2] Below, the State urged that the probate judge not to apply Rule 51 governing the change of venue and judge to the proceedings (Tr. 60).

proceedings. It can be assumed that this Court did not mistakenly exclude Rule 78.07, requiring the filing of a motion for new trial.

Respondent suggests that such a change would "ensure that such procedures are followed and the ability of appellate courts to function effectively is preserved" (Resp. Br. 22). However, the State does not suggest that, in the years since the adoption of Rule 41.01, appellate courts have not been "functioning effectively" in reviewing probate proceedings. It does not point to any appeals from probate courts in which the reviewing court has had difficulty defining the issues on appeal or otherwise suffered for the lack of a post-trial motion.

There is nothing about Sexually Violent Predator procedure that justifies departing from well-established procedures regarding motions for new trial. If a given court wishes to do so, it has the power to issue an order to that effect under Rule 41.01. As the State offers no reason for departing from the established rule, this Court should preserve the flexibility embodied in Rule 41.01.

Hendricks prohibits commitment of those who can control their behavior.

Respondent argues that the United States Supreme Court decision in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997) does not bar the civil commitment of those who are able to refrain from sexually violent conduct (Resp. Br. 25-26). In making this argument, the State materially misconstrues Hendricks.

The State seems to characterize those portions of the Hendricks decision, upholding the Kansas SVP statute because it limited its sweep to those who could

not refrain from sexually violent acts, as "dicta" (Resp. Br. 26-27). The basis for the Court's judgment is not "dicta." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S.Ct. 1114, 1128 (1996). The Hendricks court was called upon to decide under what circumstances a person judged to be an SVP could be involuntarily committed. Hendricks, 521 U.S. at 349, 117 S.Ct. at 2076. Specifically, the issue before the Court was whether the definition of an SVP in the Kansas statute – which provided for the commitment of persons having a "mental abnormality," rather than "mental illness" – was consistent with the Due Process Clause of the United States Constitution. Id. at 355-56, 117 S.Ct. at 2079.

The Hendricks Court upheld the Kansas SVP scheme because it found that Due Process did not require a finding of "mental illness" for some one to be involuntarily committed for treatment. Id. It rejected Hendricks' claim that his confinement could not be predicated on a "mental abnormality" – a term which he characterized as devoid of medical or psychological meaning. Id. at 358-59, 117 S.Ct. 2080-81. The Court noted that the Due Process Clause did not require any particular nomenclature and 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.'" Id. 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 (**emphasis** added). 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 2080 (emphasis added). Thus, the Hendricks Court did not state – as Respondent would have this Court believe – that **any** "mental abnormality" or "personality disorder" that causes a person to be dangerous would permit involuntary commitment, just those ailments that rendered that person unable to control their dangerous behavior.

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 2081 (emphasis added). The Hendricks Court's decision that Hendricks could be committed on the basis of a "mental abnormality" was, therefore, predicated upon its finding that the Kansas commitment statute limited confinement to those who could not control their behavior.

The limited sweep of the Kansas SVP statute, as interpreted by the Hendricks Court, was the reason that it comported with Due Process. Nonetheless, the State would have this Court disregard the very basis for the Hendricks decision as "dicta." Contrary to the State's position here, in mentioning Hendricks' lack of control, the Hendricks court was not merely "discussing the facts of the case," as Respondent would have this Court believe, it was establishing its rationale for upholding the Kansas statute (Resp. Br. 26).

Appellate courts in Kansas, Minnesota and Arizona all differ with Respondent's analysis and found that Hendricks required that a person subject to commitment be found to have a volitional impairment that renders him unable to control his actions. In the Matter of Crane, 7 P.3d 285 (Kan. 2000); In re Linehan, 594 N.W.2d 867 (Minn. 1999);[3] In re Leon G., 2001 WL 125844 (Ariz. App., Div. 1 Feb. 15, 2001). Appellant discussed the holdings in Crane and Linehan at length in his brief in chief, but In re Leon G. was issued subsequently

[3] The Linehan court held that the Minnesota SVP act could only be applied to those who lacked "adequate" control over his sexual impulses, rather than "any" control. Linehan, supra, at 876.

and merits further discussion as it provides further explanation for the Kansas court's holding in Crane.

The Arizona Court of Appeals was faced with a statutory scheme similar to Missouri's in In re Leon G. The appellant in that case pled guilty to five counts of child molestation and one count of sexual abuse and was sentenced to incarceration. Id. [2]. Prior to his release, Leon G. was screened for civil commitment as a "sexually violent person" pursuant to the Arizona SVP statute. Id. Ultimately, a jury found that he was a sexually violent person and he was committed to confinement in the state hospital. Id. [3]. On appeal, he challenged the constitutionality of Arizona's SVP statute and cited to Crane for support of his assertion that he could not be civilly committed as an SVP without a finding that he suffered from a volitional impairment. Leon G., supra [15].

Arizona's appellate courts had already upheld that state's SVP statute in Martin v. Reinstein, 195 Ariz. 293, 987 P.2d 779 (App. 1999), but the Leon G. court was the first to consider the volitional impairment issue. Leon G., supra, [15]. The court examined both Crane and Hendricks and determined that the reason that the Hendricks Court upheld the Kansas statute was because it was limited to those who could not control their behavior:

> The fact that Hendricks could not control his behavior is mentioned throughout the opinion . . . His "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." [Hendricks, supra, at 360].

This lack of control appears the deciding factor for the Supreme Court to uphold the constitutionality of the Kansas statute, particularly in view of that court's language, quoted in paragraph 15 above, that a finding of dangerousness, standing alone, is insufficient for civil commitment.

Leon G., supra [16] (emphasis added).

The Arizona statute did not limit confinement to those who suffered from a volitional impairment, and permitted the commitment of a person who had a "personality disorder" or "conduct disorder." Leon G., supra [21]. Therefore, under Hendricks, the statute violated Due Process. Id. [21, 24].

Respondent criticizes Crane, purportedly for "not articulating a rationale" for requiring a volitional impairment (Resp. Br. 27). Respondent does not see any meaningful distinction between a person who cannot refrain from sexually violent conduct and a person who can stop himself, but for whatever reason, will not do so (Resp. Br. 27). According to the State, "Nothing in Hendricks suggests that the Crane line [of cases] would make sense to the U.S. Supreme Court" (Resp. Br. 27). Not true. As the Arizona court in Leon G. noted, "Crane makes explicit what was implied in Hendricks." Leon G., supra [18]. By repeatedly emphasizing that it was upholding the Kansas Act because it was limited to those with volitional impairments, the Hendricks Court would see those cases as logical applications of the reasoning it employed.

The rationale for the distinction between persons who can and who cannot control their behavior is fairly straightforward. The Hendricks Court noted that those suffering under a volitional impairment "are unlikely to be deterred by the threat of confinement." Hendricks, supra, at 362-363, 117 S.Ct. at 2081. On the other hand, people who can control their behavior, can be deterred from acting out by the possibility of discovery and punishment. As the Hendricks Court stated, these persons are distinguished from Hendricks –who lacked volitional control over his actions – and, unlike Hendricks, are "more properly dealt with exclusively through criminal proceedings." Id. at 760, 117 S.Ct. at 2081. Therefore, the only way to deal with the dangerous impulses of those who **cannot** control their behavior is to confine them for treatment. However, those who can control their behavior can be deterred through the threat of ordinary criminal sanctions.

The court in Leon G. elaborated on the distinction between persons who do and do not have a volitional impairment, and built upon the foundation laid by Hendricks and Crane, noting that the difference is supported by psychological research:

> Like Hendricks, many people with pedophilia may experience themselves as unable to control their sexual desires for children. Many people with a variety of bad habits and addictions may similarly feel this way about their inability to exercise self-control. People addicted to TV, chocolate, tobacco, coffee, or even jogging, and people who abuse alcohol and illicit drugs, often experience themselves as being out of control and unable to

> resist the object of their strong desires. But this perception of being out of control, although it may explain why they do not exercise self-control, may not be accurate. People who have strong desires, particularly those rooted in unconscious psychological needs or "drives," may find their desires difficult to resist . . . There is, however, a considerable difference between a desire not resisted and an irresistible desire.

Leon G., [20], quoting Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 PSYCHOL. PUB. POL'Y & L. 505, 520-21 (hereinafter, "Therapeutic Jurisprudence").

Under Hendricks, the State is permitted to deal with those who have "irresistible desires" to commit sexually violent acts by confining them for treatment until they are cured. Therefore, in those cases, commitment satisfies substantive Due Process. This is the common thread that began in Hendricks and runs through Linehan, Crane, and Leon G.. The converse is laid out in both Hendricks and Leon G.: a person who has desires that he does not resist – but could if he wanted to – must be dealt with through the normal criminal process.

The Hendricks court stated as much when it held that those lacking a volitional impairment are "more properly dealt with exclusively through criminal proceedings." Id. at 760, 117 S.Ct. at 2081. The Leon G. court stated that, "[a]fter a 'controllable' sexual offender has served a prison sentence for the sexual offense, further incarceration under a sexual predator act becomes punitive rather than therapeutic." Leon G., supra [17].

Respondent, although apparently critical of the Leon G. court for citing to a psychological journal (Resp. Br. 28 [FN3]), does not offer any convincing analysis to support its own view. Respondent would put Appellant and Hendricks on a "spectrum" rather than draw any significant distinction between those with and those without a volitional impairment (Resp. Br. 28 [FN3]). As discussed above, this was not the analysis conducted by the Hendricks Court and lacks any support beyond the Respondent's own bare assertions.

The weakness of Respondent's arguments are readily apparent from the fact that it does not cite to Hendricks **at all** in arguing that Due Process permits confining in a mental institution those who can control their behavior (Resp. Br. 23-25). Other than critiquing Appellant's reliance on Hendricks – which it asserts is misguided – the State ignores it, preferring to base its argument upon one pre-Hendricks Supreme Court case, Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780 (1992), this Court's opinion in State v. Revels, 13 S.W.3d 293 (Mo. banc 2000), and In re Gordon, 102 Wash.App. 912, 10 P.3d 500 (Wash. App. 2000). Respondent cannot rely on these cases to support its argument.

At the risk of belaboring the obvious, Appellant submits that the Supreme Court's opinion in Hendricks is unquestionably the leading authority on the constitutionality of SVP commitment. Respondent cites In re Linehan, 557 N.W.2d 171, 182 (Minn. 1996) for the proposition that Foucha was "the leading United States Supreme Court case on the subject" (Resp. Br. 30, internal quotes omitted). This case has been superceded by In re Linehan, 594 N.W.2d 867 (Minn

1999), which was decided after the U.S. Supreme court remanded the earlier case for reconsideration in light of Hendricks. Linehan, 594 N.W.2d at 871. The later Linehan case does not apply Foucha, but rather relies on Hendricks for its analysis. Id. at 871-76.

Further, neither Foucha nor Revels deal with the topic: both cases involved the continuing confinement of persons who had been acquitted of criminal charges on the grounds of insanity and who remained confined after trial. Foucha, supra, at 73-75, 112 S.Ct. at 1782-83; Revels, supra, at 294-95. It is clear that Hendricks, not Foucha or Revels, is determinative on this question. This is particularly apparent from the fact that In re Gordon, the only SVP case that Respondent does cite, purports to apply Hendricks but not Foucha in making its decision that Washington's SVP statute is constitutional. In re Gordon, supra, at 917, 10 P.3d 500, 502.

Although Respondent faults Crane, supra, for supposedly lacking analysis, the In re Gordon decision truly fails in this regard. Gordon argued that the jurors in his case were misinstructed because they were not required to find that he was unable to control his actions. In re Gordon, supra, at 917, 10 P.3d at 502. The Washington Court of Appeals noted the language in Hendricks where the Court held that the Kansas SVP act was constitutional because it was limited to those who had a volitional defect. In re Gordon, supra, at 917-18, 10 P.3d 502. However, the Gordon court held that the Supreme Court's discussion on this topic merely reflected that it was "troubled by the prospect of commitment based on

only a general finding of dangerousness and a condition, such as a mental illness or abnormality, that deprives the individual of his ability to control that dangerousness." Id. at 918, 10 P.3d at 503.

The Gordon court then went on to say that Washington's statute passed muster under Hendricks by requiring a link between the prisoner's "mental abnormality or personality disorder" and "the likelihood that he or she will engage in predatory acts of sexual violence in the future." In re Gordon, supra, at 918, 10 P.3d at 503. What the court in Gordon overlooked – and the Hendricks, Crane, Linehan, and Leon G. courts did not – was the fact that some mental abnormalities do not deprive a person of his free will and do not render him unable to control his acts. The Leon G. court noted that

> it is not clear that pedophilia necessarily impacts volitional control. There is nothing in the diagnostic criteria to suggest that people diagnosed with pedophilia are unable to control themselves. 'Although some conditions may be said to deprive people of the ability to control their behavior . . . pedophilia and the other paraphilias do not seem to have this effect . . . They neither render individuals incompetent to engage in rational decision making nor make them unable to resist their strong desires to molest children or otherwise to act out sexually.'

Leon G., supra, [FN3], quoting Therapeutic Jurisprudence, 523-25.

Put another way, there are people whose disorders cause them to have desires to, for example, molest children. In all those people, their conduct is

linked to their disorder. However, not all of those people have been rendered unable to resist those desires. A person who can resist those desires can be deterred from reoffending by the threat of discovery, capture and imprisonment. A person who cannot resist those desires will not be deterred by anything, so may, under Hendricks, be confined for treatment.

Appellant was prejudiced by the erroneous verdict director because there was no evidence at trial that Appellant lacked volitional control over his actions.

Appellant argues in Point I(b) of his brief that the jury was misinstructed because the verdict director permitted the jury to find him to be an SVP without finding that he lacked volitional control over his actions (App. Br. 55-60). Having established that error, it is incumbent upon Appellant to show that he was prejudiced by it. Appellant analogized the omission of the volitional impairment from the verdict director to a jury instruction in a criminal case that omits a critical element or otherwise permits the jury to convict him without requiring the State to prove all the elements of the offense (App. Br. 59). Respondent does not challenge this analogy.

In order to show prejudice from a verdict director that diminishes the State's burden of proof, an Appellant can establish prejudice by showing that the jury could have rendered its verdict without finding all the necessary elements (App. Br. 59). Ergo, Appellant argued that the volitional impairment was not undisputed to establish that he is prejudiced. Again, neither of the testifying experts claimed that Appellant lacked volitional control over his actions: if

Appellant remained in treatment, Cuneo thought he was not likely to commit sexually predatory acts (Tr. 440). Cuneo gave Appellant more credit for pursuing treatment, whereas Scott was skeptical that Appellant was actively and sincerely seeking help, but did not testify that Appellant's actions were beyond his control (Tr. 290-95, 297, 310; 388-89).

Respondent does not – and cannot – contend that the evidence established beyond dispute that Appellant lacked the volitional capacity to refrain from acts of sexual violence. Respondent, citing Linehan, argues there was sufficient evidence to support a finding that Appellant lacked "adequate control of his harmful sexual impulses" (Resp. Br. 37) (internal quotes omitted). Hendricks requires more than a lack of "adequate" control in order for a person to be confined. As the Crane and Leon G., decisions noted, Hendricks mandates a lack of control, without the qualifier "adequate."

Instead of addressing Appellant's real argument, Respondent constructs and then demolishes a straw man. It asserts that Appellant is actually challenging the sufficiency of the evidence and then accusing Appellant of not citing the proper standard for a sufficiency claim (Resp. Br. 38-39). Respondent puts forth a riposte to an argument that Appellant did not make. The State's response – accusing Appellant of trying to sneak in a sufficiency argument – appears to follow the old aphorism: since Respondent cannot pound the facts nor the law, it has chosen to pound the table.

Hendricks requires that the State show that Appellant suffered from a volitional impairment that rendered him unable to control his sexual impulses. The jury in this case was not instructed that they had to make such a finding before it rendered its verdict. Respondent suggests that "if inadequate ability to control behavior were a constitutional requirement, the instruction would be sufficient because it . . . required the jury to find that Appellant was 'more likely than not to engage in predatory acts of violence if he is not confined to a secure facility' " (Resp. Br. 37).

Again, this is simply not the case. The jury was not in any way required to find that Appellant lacked **any** level of control over his behavior. The word "control" is found nowhere in the instruction. The jury was directed to conclude that Appellant was an SVP if they found that he had a "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" (App. Br. 55-56).

Put differently, the jury was instructed to order Appellant involuntarily committed if it found that his mental abnormality had **any** affect **whatsoever** upon either his emotional **or** volitional capacity, regardless of whether or not it substantially impaired his ability to control his actions. Even applying the watered-down standard proposed by Respondent, this instruction does not pass muster under Hendricks. Since this matter was very much in dispute, Appellant was prejudiced by the omission of that element from the verdict director.

In the alternative, this Court cannot, consistent with the intent of the Legislature, read a volitional impairment into the SVP statute.

In Point I(a) of Appellant's brief, he argues that this Court cannot add a volitional impairment to the SVP statute (App. Br. 47-55). The definition of an SVP encompasses anyone who had a mental abnormality affecting "the **emotional *or* volitional** capacity to commit sexually violent offenses." Section 632.480(2) (2000) RSMo (emphasis added). Thus, as discussed above and in Point I of Appellant's brief in chief, the Legislature cast a much broader net when it enacted the SVP statute than is permitted by Hendricks. Since the definition of an SVP is inextricably intertwined with the entire statute and this Court cannot assume that the Legislature would have enacted the statute if it knew its reach would be restricted, Appellant argued that the statute must be struck down *in toto* (App. Br. 47-55).

Again, the State mischaracterizes Appellant's argument. Respondent asserts that Appellant "argues that Missouri's law is so different from those interpreted in Crane and Linehan that the law must be stricken rather than interpreted in a constitutionally permissible fashion" (Resp. Br. 33). Appellant's argument is that, under the governing Missouri rules of statutory construction, this Court cannot bring the SVP statute into compliance with Hendricks without materially changing its meaning. Obviously, Kansas and Minnesota have their own cannons of statutory interpretation which permitted the Crane and Linehan courts to read a volitional impairment requirement into the statutes at issue in

those cases. For the reasons put forth in Point I(a) of Appellant's brief, this Court cannot assume that the Legislature would have enacted the SVP statute had it known that its reach would have been restricted by Hendricks.

Arizona has similar restrictions on how much a reviewing court can alter a statute. The court in Leon G. noted that its "judicial task requires that we construe our laws in harmony with the constitution wherever reasonably possible." Leon G., supra, [22] (citations omitted). Just as Section 1.140 RSMo limits this Court's ability to alter a statute to conform it to the requirements of Hendricks, Arizona law limited the Leon G. court's capacity to read a volitional requirement into the Arizona statute:

> [O]ur ability to interpret a statute's meaning or rectify statutory infirmities by construing the language to achieve a perceived legislative goal . . . is limited by the constitutionally decreed separation of powers that prohibits this Court form enacting legislation or redrafting defective statutes.

Id. (citations omitted). Thus, the Leon G. court could not alter the Arizona SVP statute to fit the confines of Hendricks, and struck the entire statute as unconstitutional:

> Using these accepted tools of statutory interpretation, we cannot find even seminal language in the Act implying volitional impairment, nor can we amend the Act by reading into it a volitional impairment concept not implied by its language. Because the Act does not require volitional

impairment as mandated by Hendricks, we conclude that it escapes a saving interpretation and accordingly is unconstitutional.

Leon G., supra, [23]. Just as the Arizona court could not alter its SVP statute to fit the requirements of Hendricks, this Court cannot do so either. The same prohibition against judicial legislation that drove the Leon G. decision requires that this Court strike Missouri SVP statute in its entirety.

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.

Conclusion

Wherefore, for the forgoing reasons and the reasons put forth in appellant's brief in chief, 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 and Certificate of Counsel Pursuant to Rule 1(b)

One written copy of the forgoing Appellant's Statement, Brief, and Argument and one copy on floppy disk were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this ___ day of _____, 2001. 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 5,616 lines of text and 549 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,

_____

Douglas R. Hoff, Mobar #45257