IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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| IN THE MATTER OF<br>THE CARE AND TREATMENT<br>OF DESI EDWARDS,<br>Respondent/Appellant. | ) | No. 78858 |

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APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT
THE HONORABLE DENNIS SCHAUMANN

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# APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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## JURISDICTIONAL STATEMENT

The trial court found appellant Desi Edwards to be a sexually violent predator pursuant to Section 632.480 RSMo, et seq. (all references to RSMo will be to RSMo 2000 unless otherwise indicated), after a jury trial in St. Louis City, Missouri. The trial court entered its judgment on October 5, 2000. Edwards filed a Motion for new trial on November 2, 2000. The court denied the motion on November 16, 2001, and this Court deemed the Notice of Appeal timely filed on January 23, 2001.

To the extent that any issue raised in this brief raises a colorable issue of validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court. To the extent that this appeal does not involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Rules 83.01-83.04; Mo.Const. Article V, Section 3; Section 477.050 RSMo.

## STATEMENT OF FACTS

Appellant Desi Edwards pleaded guilty to rape in 1989 (Tr. 209[1]). On November 24, 1999, the state filed a Petition seeking to commit Edwards as a Sexually Violent Predator (SVP) pursuant to Section 632.480 (Cum.Supp. 1998) (L.F. 8-18). The first jury trial ended in a hung jury (L.F. 6). After a second jury trial, Edwards was found to be a SVP (L.F. 189). At that trial, the following evidence was adduced.

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[1] The Record on Appeal shall be cited as follows: Legal File (L.F.); Trial Transcript (Tr.); Supplemental Legal File (SuppLF ).

On June 10, 1989, Officer Paul Saulter received a call in reference to a child molestation complaint (Tr. 158-159). When he arrived, he met a very upset, angry woman holding a one-year-old girl (Tr. 159, 161). The woman told him that she had been asleep and awoke to the sound of her child crying (Tr. 160). She got up to see about the child and saw Edwards with his pants around his ankles, rubbing his penis on the child's vagina (Tr. 160). Officer Saulter arrested Edwards (Tr. 161). There is no evidence of a charge arising from this incident (Tr. 1. et seq.).

On November 9, 1989, Edwards did some painting for Sylvia Ware (Tr. 188). Ms. Ware heard her granddaughters arguing and called for them (Tr. 188). She saw Edwards at the foot of the stairs, and he ran past her (Tr. 189). One of the granddaughters, 8-year-old Sylvia Foster, was bleeding, so Ms. Ware took her to the hospital (Tr. 190). Sylvia Foster said that Edwards had sex with her against her wishes (Tr. 194).

Edwards pleaded guilty to raping Sylvia Foster and received a ten-year sentence (Tr. 209). Edwards' statements concerning the crime have varied, but he has admitted it occurred (Tr. 166, 200). When he spoke to Dr. Logan (a psychiatrist who examined him), he said he did not recall the incident (Tr. 254). He also testified at trial and told the jury he did not recall it (Tr. 171). Edwards has consistently stated that the did not recall the incident with the one year old (Tr. 167, 170, 199). Edwards is "barely" able to read and write, and reads below a third grade level (Tr. 201-202).

Edwards had been released on parole in 1997 (Tr. 212). Edwards did well while at the halfway house – he had no rule violations, and he participated in drug counseling and sex offender counseling (Tr. 229). He completed a drug and alcohol program (Tr. 213).

Based upon his progress he was released into the community; he later returned to the halfway house (Tr. 217). Edwards had problems completing sex offender counseling because of his low IQ (Tr. 219). In January of 1998 Edwards returned to prison after violating his parole by using alcohol and failing to pay fees (Tr. 233).

Dr. William Logan, a psychiatrist, examined Edwards at the state's request to determine if he is a SVP (Tr. 243). Dr. Logan concluded that he met the definition (Tr. 244). He testified that Edwards has a "mental abnormality", without specifying what the mental abnormality is, and "appears to have a psychosexual attraction to children" (Tr. 264-265).

Dr. Logan found that Edwards failed to complete the Missouri Sex Offender Program (MoSOP) administered in the Department of Corrections (DOC) the first time due in part to his intelligence limitations (Tr. 252). Edwards refused to participate in MoSOP a second time because he would be released prior to completion of the program (Tr. 253). Dr. Logan stated that those who do not complete MoSOP are more likely to reoffend (Tr. 253). Dr. Logan believed that Edwards would benefit from treatment, but needed to be in a secure environment to prevent drug use relapse (Tr. 255).

Dr. Logan testified that Edwards stated that he did not remember the two incidents, which Dr. Logan stated was inconsistent with records where he said he did remember (Tr. 254). Dr. Logan acknowledged that Edwards has had many relationships with adult women, and is very candid about his substance abuse problem (Tr. 275).

Dr. Logan stated that Edwards appears to act on his attraction to children only when three things are present: 1) Edwards is intoxicated; 2) Edwards is near children; and 3)

Edwards has the desire for children (Tr. 266). He concluded that six factors make Edwards more likely than not to reoffend: 1) the previous acts were not accidental; 2) they indicate an attraction to prepubescent children; 3) while intoxication lessens control, the attraction to children is still there; 4) he has little ability to control his substance abuse; 5) he hasn't completed sex offender treatment; and 6) he denies the behavior (Tr. 268-273). Dr. Logan admitted that studies show that clinical judgment overestimates reoffense rates by 90% -- put differently, only 10% of those believed to reoffend actually do (Tr. 284). Another study shows a 33-40% accuracy rate of predictions of reoffense (Tr. 285).

Dr. Logan concluded that Edwards is a SVP because the previous incidents were of a sexually violent nature, he shows a mental abnormality, he has an "inclination" towards children, he has a substance abuse problem, and he was unrelated to both victims (Tr. 274).

Dr. Richard Scott evaluated Edwards to see if he met the qualifications to be a SVP (Tr. 310). He found Edwards to have a full scale IQ of 82, with a verbal IQ of 77, placing him in the bottom 4-5% of the population (Tr. 312). He also found that Edwards had a mental abnormality, and that mental abnormality is Antisocial Personality Disorder (ASPD) (Tr. 315). Dr. Scott concluded that Edwards is *not* more likely than not to reoffend (Tr. 315).

Edwards does not meet the diagnostic criteria for pedophilia because his two incidents were only five months apart, and the criteria states that the behavior must exist for six months) (Tr. 325). He meets the other two criteria (acted on his thoughts and he

was over sixteen years of age (Tr. 326). Further, people who are intoxicated or mentally impaired can engage in unusual sexual behavior, but it is distinguishable from paraphelias by evidence of a person's preferred pattern and evidence that the incidents are isolated to the existence of the condition (Tr. 328-329). Edwards has a consistent pattern of adult female relationships (Tr. 329).

ASPD does not make a person more likely than not to sexually violently reoffend (Tr. 331). It does not make a person unable to control their behavior (Tr. 357).

Dr. Scott used two tests: the RRASOR and the MnSOST-R (Tr. 333). Edwards' score on the RRASOR is 1, meaning he has a 4.4% chance of reoffending within 5 years, and a 6.5% chance of reoffending within 10 years (Tr. 342). Edwards scored in the high-risk range on the MnSOST-R, giving him a 70-78% chance of reoffending over 4-6 years (Tr. 346). The reason for the discrepancy is that the MnSOST-R looks for general antisocial traits, while the RRASOR looks for sexual deviance (Tr. 347). Edwards scores very low in sexual deviance (Tr. 347). Furthermore, studies show that denying the offense is not significant in the chance of reoffense (Tr. 349).

Edwards was an adolescent at the time of the incidents, and their rates of reoffense are lower (Tr. 350). Drug and alcohol use has no correlation to reoffense rates (Tr. 353). Dr. Scott believed it is important to note that while out on parole, he did not sexually reoffend (Tr. 356).

The jury found Edwards to be a SVP and the trial court committed him involuntarily pursuant to Section 632.480 RSMo (Tr. 466-467). This appeal follows.

## POINTS RELIED ON

### I

**The trial court erred and abused its discretion when it (a) denied Edwards' motion for a directed verdict, and/or b) submitted Instruction No. 6 while refusing Edwards' proffered Instruction Nos. B, C, and/or D. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Edwards lacks volitional capacity to control his behavior. Edwards was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.**

**Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation 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 without also requiring a showing of inability to control conduct. The trial court's rulings deprived Edwards of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Edwards's volitional capacity, nor was it instructed that before finding Edwards 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);

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

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

**II**

**The trial court erred when it denied Edwards' 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 Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Edwards was prejudiced by the trial court's error because there was no evidence of or consideration given to placing him in the least restrictive**

**environment. Thus, Edwards was deprived of his liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.**

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

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

Section 632.300 RSMo et seq;

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 2.

**III**

**The trial court erred when it denied Edwards' Motion For Immediate Release because the SVP statute requires release if a jury is not "satisfied" that the detainee is a SVP. After the first jury trial, the jury was not satisfied that Edwards is a SVP. Instead of releasing Edwards, the trial court declared a mistrial and continued to detain him. Edwards was prejudiced because instead of being released, he was subjected to a second trial, after which he was committed as a SVP. The trial court's ruling deprived Edwards of his rights to due process as guaranteed by Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.**

Section 632.480, et seq. RSMo;

Section 632.495 RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 10.

**IV**

**The trial court erred when it denied Edwards' Motion to Dismiss for Lack of Standing, failed to dismiss the petition because it failed to plead all necessary facts, and when it proceeded to try and enter a judgment against Edwards. The state's petition fails to state a claim or plead sufficient facts as required by Section 632.480 RSMo, et seq. The petition failed to plead that the Multidisciplinary Team (MDT) found that Edwards met the definition of a SVP, and for that reason the petition is defective and the trial court never acquired jurisdiction. Because the MDT did not find that Edwards met the definition of a SVP, the state lost standing to proceed. Because the trial court never acquired jurisdiction and the attorney general never acquired standing to proceed, the trial court erred in entering a judgment finding Edwards to be a SVP and committing him pursuant to Section 632.480 et seq. The trial court's rulings deprived Edwards of his rights to due process as guaranteed by Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.**

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 10.

**V**

**The trial court erred when it denied Edwards' Motion For Directed Verdict, because the evidence adduced at trial did not support the claims alleged in the Petition. The state failed to prove that Edwards' mental abnormality made it more**

**likely than not that he would sexually violently reoffend if not confined. Edwards was prejudiced because he has been committed when the evidence does not support his need for commitment. The trial court's rulings deprived Edwards of his rights to due process and a fair trial as guaranteed by Article I, Sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.**

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

In re Johnson, No. 23335, slip op. (Mo.App.S.D. May 18, 2001);

U.S. Const. Amends. 5, 6, 14;

Mo. Const Art. I, Sec. 10, 18(a).

**VI**

**The trial court erred and abused its discretion when it overruled Edwards' motion in limine, overruled his objections, and allowed testimony from Officer Paul Saulter regarding what a woman told him about the incident with the one year old. The testimony was hearsay and not subject to any exception to the hearsay rule. Edwards was prejudiced because the jury used the testimony as proof of the truth of the matter and concluded he had sexually offended in addition to the rape conviction for which he served a prison sentence. The trial court's error violated Edwards' rights to due process, to be tried only for the allegations charged, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution.**

Bynote v. National Super Markets, Inc, 891 S.W.2d 117 (Mo.banc 1995);

U.S. Const. Amends. 5, 6, 14;

Mo. Const Art. I, Sec. 10, 17, 18(a).

**VII**

**The trial court erred and abused its discretion when it denied Edwards' Motion to Find Section 632.483.5 Unconstitutional and to Permit Testimony of Members of the Multidisciplinary Team, granted the state's motion to quash subpoenas served upon the Multidisciplinary Team (MDT), refused to allow Edwards to present testimony from members of the MDT concerning their review and conclusion that he was not a SVP, refused to allow any testimony as to the MDT's findings, and refused to allow Edwards to make an offer of proof concerning the members of the MDT. The rulings denied Edwards his due process right to present his defense and he was prejudiced by the trial court's error(s) because he was prevented from presenting favorable testimony that he is not a SVP. Had Edwards presented that testimony, the outcome would have been different.**

**The trial court ruled that Section 632.483.5 RSMo prevents the members of the MDT from testifying for any reason. Any interpretation of Section 632.483.5 that excludes relevant testimony without exception is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Edwards has a due process right to present favorable evidence. The trial court's rulings therefore**

**deprived Edwards of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process.**

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

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

Diehl v. Dir. Of Revenue, 869 S.W.2d 293 (Mo.App.E.D. 1994);

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

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

## VIII

**The trial court plainly erred, causing manifest injustice, when it allowed the state to call Edwards to the stand and testify as a witness against himself. The right to remain silent in an involuntary commitment proceeding includes the constitutional protection against self-incrimination. Edwards was prejudiced because the jury considered his statements as evidence against him. The trial court's error violated Edwards' rights to due process of law and right to remain silent, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution.**

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

In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967);

State ex rel. Simanek v. Berry, 597 S.W.2d 718 (Mo.App.W.D. 1980);

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 10, 19.

**IX**

**The trial court plainly erred, causing manifest injustice, when it failed to dismiss the case because the Circuit Attorney for the City of St. Louis, Dee Joyce Hayes, did not participate in the prosecutor's review committee that voted to permit the State to commence SVP proceedings against Edwards. Section 632.483.5 RSMo 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, the state is required to show that Dee Joyce Hayes was 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 Edwards, the committee had to be properly constituted according to the Legislature's plainly expressed mandate. The trial court's error violated Edwards' rights to due process of law, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.**

Section 632.483.5 RSMo;

Sections 56.010, 56.430 RSMo;

Sections 56.151, 56.540 RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 10.

**ARGUMENT**

**I**

**The trial court erred and abused its discretion when it (a) denied Edwards' motion for a directed verdict, and/or b) submitted Instruction No. 6 while refusing Edwards' proffered Instruction Nos. B, C, and/or D. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Edwards lacks volitional capacity to control his behavior. Edwards was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.**

**Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation 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 without also requiring a showing of inability to control conduct. The trial court's rulings deprived Edwards of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Edwards's volitional capacity, nor was it instructed that before finding Edwards to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.**

During the instruction conference, the state offered Instruction No. 6:

INSTRUCTION NO. 6

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

First, that respondent pleaded guilty to rape in the Circuit Court of St. Louis City, Missouri, on July 13, 1990;

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 offense of rape.

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.

(See Stipulation) (emphasis added). Counsel[2] offered Instruction No. B:

INSTRUCTION NO. B

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

First, that respondent pleaded guilty to rape in the Circuit Court of St. Louis City, State of Missouri on July 13, 1990, and

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, and

*Fifth, that this mental abnormality impairs respondent's volitional capacity to such a degree that he is unable to control his sexually violent behavior,*

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 offense of rape.

As used in this instruction, "mental abnormality" means a congenital or acquired condition affecting the emotional ***or*** **volitional** capacity which predisposes the person

[2] For clarity, Edwards' counsel shall be referred to as "counsel".

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.

(L.F. 172-173) (emphasis added). Counsel offered Instruction No. C:

INSTRUCTION NO. C

A diagnosed mental abnormality which makes the person more likely than not to sexually violently reoffend requires that the diagnosed mental abnormality be of a type and severity which impairs the volitional capacity of the Respondent to such a degree that respondent is unable to control his sexually violent behavior.

(L.F. 174). Counsel offered Instruction No. D:

INSTRUCTION NO. D

In reaching your verdict, you may not find Desi A. Edwards to be a sexually violent predator based upon prior offenses alone, absent evidence of a currently diagnosed mental abnormality that makes him more likely than not to commit predatory acts of sexual violence.

(L.F. 174). The trial court refused the instructions (L.F. 172-175, Tr. 298-302). Counsel included these rulings as assignments of error in the motion for new trial (L.F. 185-186).

In reviewing challenges to jury instructions, the appellate court decides whether the error materially affected the merits of the case. EPIC, Inc. v. City of Kansas City, 37 S.W.3d 360, 366 (Mo.App.W.D. 2000). The party alleging error must show that the

instruction misdirected, misled, or confused the jury. Id. Errors in refusing tendered instructions are reviewed for abuse of discretion. Quinn v. Leonard, 996 S.W.2d 564 (Mo.App.E.D. 1999).

Counsel made a motion for a directed verdict at the close of all the evidence (Tr. 304; L.F. 179). The trial court denied the motion (Tr. 304; L.F. 179). Counsel included this ruling as an assignment of error in the motion for new trial (L.F. 181). A motion for a directed verdict essentially presents an issue of submissibility. Love v. Hardee's Food Systems, Inc., 16 S.W.3d 739, 741-2 (Mo.App.E.D. 2000). To make a submissible case, the plaintiff must present substantial evidence for every fact essential to the case. Id. In determining whether there is submissible evidence, the appellate court views the evidence and all reasonable inferences in the light most favorable to the plaintiff. Id.

Edwards asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Edwards would assert that manifest injustice would result if left uncorrected, and would request plain error review. Rule 84.13(c).

The issues presented above involve answering this question: is the state required to prove that the prisoner lacks volitional capacity to control his sexually violent behavior before the jury may find a prisoner to be a SVP pursuant to the SVP statute and thus involuntarily commit him? The answer is "yes".

***Volitional capacity is a required element , and the SVP statute is unconstitutional because it fails to require the state to prove lack of volitional capacity***

The Missouri SVP statute violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it does not – on its face – clearly limit its application to those who, because of a mental abnormality, are **unable to control their behavior**[3]**.** Put another way, one who has the **volitional** capacity to refrain from predatory acts can be committed as a 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. The Missouri statute defines a "mental abnormality" as 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).

In Kansas v. Hendricks 521 U.S. 346, 117 S.Ct. 2072 (1997), the United States Supreme Court addressed the due process requirements on involuntary commitment in the context of a person accused of being a SVP. Kansas has a SVP statute similar to Missouri's. 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

[3] This issue is currently before the Missouri Supreme Court. See In re Thomas, SC 83186, argued March 28, 2001.

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 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 [Kansas] 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). 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 . . . 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.

In In the Matter of Crane, 7 P.3d 285 (Kan. 2000)[4], the Kansas Supreme Court had the opportunity to apply the Hendricks opinion to the Kansas SVP statute. The majority examined the U.S. Supreme Court's opinion in Hendricks and determined that due process requires the state to prove that Crane cannot control his behavior before involuntarily committing him. Id. at 288-91. The Crane Court found that "Kansas' statutory scheme for commitment of sexually violent predators does not expressly

[4] This case is currently before the U.S. Supreme Court. In re Crane, Docket No. 00-957, 2000 WL 966703 (KS 2000).

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 law as discussed above, therefore, clearly requires the state to prove that Edwards lacked volitional capacity to control his conduct before he could be committed as a SVP.

The state's failure to prove lack of volitional capacity means that the state failed to meet its burden of proof; therefore the trial court erred in overruling Edwards's motion for directed verdict. In re Linehan, 594 N.W.2d 867 (Minn. 1999), is instructive. There, the Minnesota Supreme Court examined the constitutionality of that state's SVP regime. To be committed under the Minnesota SVP 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). That is what this Court should do, for the same reasons. This Court should reverse the judgment of the trial court and order Edwards discharged from confinement.

Edwards further argues that a "fair reading" of the Hendricks opinion should lead this Court "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." Crane, supra at 290-91. The Crane Court 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.

As noted previously, the Missouri SVP statute violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it does not – on its face – clearly limit its application to those who, because of a mental abnormality, are **unable to control their behavior**. One who has the **volitional** capacity to refrain from predatory acts can be involuntarily committed as a 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) (emphasis added).

The Missouri SVP statute, like the Minnesota and Kansas statutes, can be read to permit 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. By allowing involuntary 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.

In determining if a statute is constitutional, the reviewing 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). 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).

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 Edwards 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). 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, because the entire SVP statute is so tightly intertwined with, connected to, and dependent upon the definition of a sexually violent predator.

The unconstitutional definition of "mental abnormality" winds its way through the entire SVP statute to an extent that it becomes inextricable because "mental abnormality" is included in discussing who is and who is not a SVP, and what the various players'

roles are pursuant to Section 632.480, et seq. It is the controlling factual issue at each and every stage of the proceedings. From the notice that the DOC and DMH 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, et seq. (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 incline them to commit sexually violent acts, but whose behavior is not beyond their control. 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.

This Court cannot say that the Legislature would have placed all these burdens on the DMH, 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. For all these reasons, the SVP statute should be struck down because it violates the Due Process clauses of the United States and Missouri Constitutions. This Court should reverse the judgment and order Edwards discharged.

***The trial court erred in failing to grant Edwards' motion for directed verdict because due process requires the state to prove lack of volitional capacity before it may involuntarily commit Edwards***

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). 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) (emphasis added).

Further, volitional capacity must be a required element before someone can be found to be a SVP because without the element the statute would not be narrowly tailored to suit the purpose of confining only those with a present mental abnormality that makes

him or her presently dangerous. In Foucha v. Louisiana, 504 U.S. at 71, 112 S.Ct. at 1780, the U.S. Supreme Court found that a Louisiana statute allowing the state to civilly commit insanity acquitees unless the acquitee proved he was *not* dangerous violated due process. Id. The Court went on to say that one of the problems with the Louisiana law was that it was not narrowly tailored to suit the purpose.

> …the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law.

Id. at 82-83, 112 S.Ct. at 1787.

Here, the State presented evidence that Edwards appears to be unable to avoid drug use if not in a secure environment, but did not prove that Edwards was unable to stop committing sexually violent acts of his own free will (Tr. 255). Thus, the jury certainly found against Edwards without determining that he lacked the ability to restrain himself from such conduct. The jury likely found that Edwards had an **emotional** but not a

**volitional** defect. This is particularly true because 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. The jury focused on Edwards' emotional capacity and gave no heed to whether his volitional capacity was such that he could control his actions.

As noted above, volitional capacity must be a required element before someone can be found to be a SVP because without the element the statute would not be narrowly tailored to suit the purpose of confining only those with a present mental abnormality that makes them presently dangerous. In Foucha v. Louisiana, 504 U.S. at 71, 112 S.Ct. at 1780, the U.S. Supreme Court found that a Louisiana statute allowing the state to civilly commit insanity acquitees unless the acquitee proved he was *not* dangerous violated due process. Id.

In Edwards' case, the state presented evidence that Edwards has ASPD, a personality disorder that may lead to criminal conduct, in order to meet its burden of proof that he has a mental abnormality. Without a requirement that the state demonstrate a lack of volitional capacity, Edwards would be in the same position as the detainee in Foucha – someone who once committed a criminal act and has a personality disorder which *may* lead to criminal behavior and for which there is no effective treatment, being confined forever because he would never be able to demonstrate that he no longer had ASPD. If ASPD is all that is required, then it would run afoul of Foucha. The trial court, therefore, erred in failing to grant Edwards' motion for a directed verdict, because the state failed to prove that he lacked volitional capacity

***The trial court further erred in failing to instruct the jury on the element of volitional capacity***

Edwards notes that Minnesota resolved the issue differently. 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 … 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 should 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. If this Court rules that the SVP statute need not be struck down *in toto*, then Edwards argues this Court should adopt the same clarification that the court in Linehan adopted.

Edwards submits that the omission from Instruction No. 6 of the element required by Hendricks – that Edwards 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 verdict director in Crane was virtually identical to the one submitted to the jury in Edwards' 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). Instruction No. 6 did not encompass personality disorders, as does the instruction in Crane, but it is not a material difference.

As noted above, the focus of the analysis in Crane was on whether the instruction permitted the accused to be found a 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, 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 Edwards was unable to control his actions before finding him to be a SVP and violated

the strictures of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as enunciated in Hendricks.

This conclusion is reinforced by Crane, where the court noted that only an impairment of the volitional capacity raises the implication that the person's behavior is beyond his control. In this case, the jury was not required to find that Edwards could not control his behavior before finding that he was a SVP and permitting him to be involuntarily confined. The trial court's refusal to submit Instruction No. B and submitting Instruction No. 6 without also submitting Instruction Nos. C and D, in order to make sure that the jury was instructed on the requirement of volitional capacity, therefore prejudiced Edwards.

***Conclusion***

For all the reasons discussed, the SVP statute violates the guarantees of Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it permits the state to deprive a person of his liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses, without also requiring the state to prove that he is unable to control his behavior. 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. This Court must, therefore, declare the Missouri SVP statute unconstitutional, reverse the judgment of the lower court, and order Edwards discharged from custody.

In the alternative, should this Court – like the courts in Crane and Linehan – find that Hendricks only requires an additional element be added to the jury instructions, this Court should reverse Edwards' commitment and remand with directions for a new trial with a corrected verdict director, such as Instruction No. B. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

**II**

**The trial court erred when it denied Edwards' 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 Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Edwards was prejudiced by the trial court's error because there was no evidence of or consideration given to placing him in the least restrictive environment. Thus, Edwards was deprived of his liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.**

Edwards filed a Motion To Dismiss Based on Due Process, Equal Protection, Double Jeopardy, and Ex Post Facto Grounds (L.F. 37-49). He asserted, *inter alia*, that the SVP statute violated his right to equal protection of law because there is no consideration for placing someone detained pursuant to the SVP statute in the least restrictive environment, while there is such consideration for someone committed pursuant to Section 632.300 (L.F. 45-47). The trial court denied Edwards' motion (L.F. 37).

Edwards included the issue in the motion for new trial (L.F. 184). Edwards asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Edwards asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c).

The trial court erred when it denied Edwards' Motion to Dismiss because 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):

> 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 not the only provision of Missouri law that permits the involuntary commitment of individuals to the DMH. 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. 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 180 days.

Section 632.355.3. Someone who is involuntarily 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.

Thus, a person who is not adjudged to be a 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. Id. 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 (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.

In contrast, a person adjudged to be a SVP must be committed to the custody of the DMH 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 DOC. Id. Once there he must be segregated from the incarcerated criminal offenders. Id.

The judge who presides over the proceedings against a non-SVP shall remand him for "treatment in the least-restrictive environment." Id. He is given an "individualized treatment plan" and remanded to a program that can carry it out, on either an inpatient or outpatient basis. Id. Someone found to be a SVP, however, is simply dispatched to be confined within a secure facility operated by the DMH, without consideration of any outpatient treatment. Section 632.495.

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.

Washington had a SVP statute very similar to the Missouri scheme. It defined a SVP in virtually the same way as the Missouri statute, 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 respondent 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 a SVP: incarceration.

In Baxtrom v. Herald, 383 U.S. at 107, 86 S.Ct. at 760, the state differentiated between civil commitments for those nearing the end of a prison term from all other civil commitments by denying jury review of civil commitment only to those nearing the end of a prison term. The United States Supreme Court held that to be a violation of Equal Protection of the law. Id. In the same way, differentiating between civil commitments as a SVP and all other civil commitments by requiring only a SVP committee to be held in a secure environment, no exceptions, is a violation of Equal Protection.

As Edwards discussed in Point I, there is no way under Section 1.140 RSMo to sever out those 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 a 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 a 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, the SVP statute must be struck down **in toto**.

The lack of consideration given to less restrictive alternatives prejudiced Edwards because there was no indication that he required complete confinement in order to receive treatment for his condition. For the forgoing reasons, the trial court erred when it denied Edwards' Motion to Dismiss. The SVP statute violates the guarantees of the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution because, unlike other persons involuntarily committed, a person found to be a 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 Edwards 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 trial where the jury will be instructed that they can consider less restrictive alternatives to total confinement in a secure facility. Young, supra, at 1012.

To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

## III

**The trial court erred when it denied Edwards' Motion For Immediate Release because the SVP statute requires release if a jury is not "satisfied" that the detainee is a SVP. After the first jury trial, the jury was not satisfied that Edwards is a SVP. Instead of releasing Edwards, the trial court declared a mistrial and continued to detain him. Edwards was prejudiced because instead of being released, he was subjected to a second trial, after which he was committed as a SVP. The trial court's ruling deprived Edwards of his rights to due process as guaranteed by Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.**

The state twice subjected Edwards to a jury trial for a determination of his status as a SVP (L.F. 6). After the first trial, the trial court declared a mistrial "as jury [sic] was unable to reach a unanimous verdict" (L.F. 6, 122). The trial court ordered that Edwards be transported to the SVP unit until retrial (L.F. 6, 122). Prior to trial, counsel filed a Motion For Immediate Release of Respondent Because the First Jury Was Not Satisfied Beyond a Reasonable Doubt That He Is A Sexually Violent Predator (SuppLF 1-3). He asserted, *inter alia*, that he was entitled to immediate release pursuant to Section 632.495 RSMo because the statute required release if a jury could not find unanimously that Edwards was a SVP (SuppLF 2). The trial court denied Edwards' motion (SuppLF 3).

Retrial occurred on or about October 4, 2000, after which Edwards was found to be a SVP (L.F. 7).

Edwards included the issue in the motion for new trial (L.F. 181). Edwards asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Edwards asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c).

Statutory construction is a question of law, not of discretion. Eckenrode v. Dir. of Revenue, 994 S.W.2d 583 (Mo.App.S.D. 1999). The primary rule of statutory construction is to ascertain the intent of the legislature and give effect to that intent if possible. State ex rel. Div. of Child Support Enf. v. Gosney, 928 S.W.2d 892 (Mo.App.E.D. 1996). If a word is not defined in the statute, that word is given its plain, ordinary, dictionary meaning. Delta Airlines, Inc. v. Dir. of Revenue, 908 S.W.2d 353 (Mo.banc 1995). The courts favor a construction that avoids an unjust or unreasonable result. Rankin Tech. Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991). Provisions are to be construed together and harmonized, if possible. Gott v. Dir. of Revenue, 5 S.W.3d 155 (Mo.banc 1999).

Section 632.495 states in pertinent part:

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. … *If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release*.

Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. (Emphasis added).

Using the rules of statutory construction and reading the words for their plain, ordinary meanings, it is clear that the jury's determination begins and ends with whether they are unanimously satisfied that the state has proven to them, beyond a reasonable doubt, that the detainee is a SVP. Section 632.495. If the jury is not, then the statute clearly states that the detainee must be released. Id. In Edwards' case, the first trial ended when the jury was "unable to reach a unanimous verdict" (L.F. 6, 122). That clearly indicates that a unanimous jury was not satisfied that he met the criteria of a SVP. Therefore, by the plain, ordinary meaning of Section 632.495, Edwards was entitled to be released.

The statute does make mention of what may occur in a mistrial. That phrase in the statute must be harmonized with the remaining portion of the statute. Again, the first two sentences clearly indicate that if a unanimous jury cannot conclude that a detainee meets the criteria of a SVP, he must be released. Those sentences must be read with the last sentence, and effect given to the entire statute as a whole. Gott, 5 S.W.3d at 155.

Giving effect to the phrases in the statute as a whole, the term "mistrial" must refer to situations other than a hung jury. To include a hung jury in the statute's term "mistrial" would be the equivalent of invalidating the second sentence and rendering it meaningless. This Court presumes that the legislature did not enact meaningless provisions. Allen v. Public Water Supply Dist. 5, 7 S.W.3d 537 (Mo.App.E.D. 1999).

Specific provisions control over general provisions if the two cannot be harmonized. City of Bridgeton v. Ford Motor Credit Co., 788 S.W.2d 285, 289 (Mo.banc 1990). The express mention of one thing controls to the exclusion of another. Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137 (Mo.banc 1980). The statute is specific and expressly discusses what the trial court must do if a jury cannot unanimously decide that the detainee is a SVP. The statute is general as to what happens in a mistrial situation, and excludes any mention of a hung jury. Thus, Edwards submits that the first two sentences of Section 632.495 control over the last sentence.

In sum, Section 632.495 is clear that if a jury cannot unanimously decide if a person is a SVP, that person must be released. That specific discussion of what happens contols over a general, nonspecific provision discussing mistrials. The trial court therefore had to release Edwards after the first trial because the jury did not unanimously determine he was a SVP. The trial court's failure to do so prejudiced Edwards because he should have been released. For the forgoing reasons, the trial court erred when it denied Edwards' Motion For Immediate Release, in violation of Edwards' rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. This Court must reverse the judgment of the lower court and order that Edwards be discharged from custody. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

## IV

**The trial court erred when it denied Edwards' Motion to Dismiss for Lack of Standing, failed to dismiss the petition because it failed to plead all necessary facts, and when it proceeded to try and enter a judgment against Edwards. The state's petition fails to state a claim or plead sufficient facts as required by Section 632.480 RSMo, et seq. The petition failed to plead that the Multidisciplinary Team (MDT) found that Edwards met the definition of a SVP, and for that reason the petition is defective and the trial court never acquired jurisdiction. Because the MDT did not find that Edwards met the definition of a SVP, the state lost standing to proceed. Because the trial court never acquired jurisdiction and the attorney general never acquired standing to proceed, the trial court erred in entering a judgment finding Edwards to be a SVP and committing him pursuant to Section 632.480 et seq. The trial court's rulings deprived Edwards of his rights to due process as guaranteed by Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.**

The state filed its Petition pursuant to Section 632.480 RSMo (Cum.Supp. 1998) (L.F. 8-18). In that Petition, the state alleged that Edwards "may meet the criteria of a sexually violent predator" because he had been convicted of a sexually violent offense, that he suffers from a mental abnormality, and that the mental abnormality makes him more likely than not to engage in predatory acts of sexual violence (L.F. 8-9). The state attached to the petition the End of Confinement Report prepared by Laura Glore and the record of the prosecutor's review committee (L.F. 12-16, 17-18). The state failed to

plead in the Petition that the Multidisciplinary Team (MDT) found that Edwards met the definition of a SVP.

Prior to trial, Edwards filed a Motion to Dismiss for Lack of Standing by the Attorney General's Office (L.F. 79-83). In that motion, he asserted that the MDT unanimously found that he did ***not*** meet the definition of a SVP, and the attorney general lost standing to proceed at that point. (L.F. 79-83, 104-105) The trial court denied the motion (L.F. 80).

Edwards further asserts that he was entitled to relief because the MDT as defined by Section 632.480 voted unanimously that Edwards did not meet the definition of a SVP, and therefore the state failed to plead a necessary fact in its petition. The record reflects that the MDT, consisting of Jonathon Rosenboom, Psy.D., MoDOC, Wanda De La Cruz, MoDOC, Richard Gowdy, Ph.D., MoDMH, Joseph Parks, M.D., MoDMH, and Mark Altomari, Ph.D., MoDOH [sic], voted unanimously that Edwards did not appear to meet the definition of a SVP (L.F. 82, 104-105).

The trial court proceeded to try Edwards and enter a judgment finding him to be a SVP and committing him involuntarily pursuant to Section 632.480 (L.F. 189).

Edwards included in his motion for new trial an assignment of error in failing to grant the Motion to Dismiss for lack of standing (L.F. 182). Edwards asserts that the error is preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Edwards asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c). Edwards requests plain error review of his allegation that

the trial court erred in failing to dismiss the petition because the state failed to plead an essential element.

One of Edwards' interrelated claims in this point is that the petition failed to state a cause of action. A motion to dismiss for failure to state a cause of action is reviewed for adequacy of the pleadings. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo.banc 1993). The appellate court assumes that all averments in the petition are true and determines if the facts alleged meet the elements of a recognized cause of action. Id.

All of Edwards' claims in this Point depend upon a construction of Section 632.480. Statutory construction is a question of law, not of discretion. Eckenrode v. Dir. of Revenue, 994 S.W.2d 583 (Mo.App.S.D. 1999).

Edwards asserts that the state's Petition is inadequate because it fails to allege that the MDT found that Edwards met the criteria for a SVP. The SVP statute clearly requires that the MDT assess a detainee to determine if that person meets the definition of a SVP, and must perform that assessment within thirty days of receiving written notice from an agency with jurisdiction. Section 632.483.4. Edwards asserts that the MDT must find that a detainee meets the definition of a SVP before the state may proceed, and that fact was not pleaded in the Petition. Because that fact is not pleaded in the Petition, the Petition fails to state sufficient facts, and the trial court did not have jurisdiction to proceed.

The primary rule of statutory construction is to ascertain the intent of the legislature and give effect to that intent if possible. State ex rel. Div. of Child Support Enf. v. Gosney, 928 S.W.2d 892 (Mo.App.E.D. 1996). If a word is not defined in the statute,

that word is given its plain, ordinary, dictionary meaning. Delta Airlines, Inc. v. Dir. of Revenue, 908 S.W.2d 353 (Mo.banc 1995). The courts favor a construction that avoids an unjust or unreasonable result. Rankin Tech. Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991). Provisions are to be construed together and harmonized, if possible. Gott v. Dir. of Revenue, 5 S.W.3d 155 (Mo.banc 1999).

Section 632.483 states in pertinent part:

1. When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection 4 of this section.

* * *

4. The director of the department of mental health and the director of the department of corrections shall establish a multidisciplinary team consisting of no more than seven members, at least one from the department of corrections and the department of health…[.] The team, within thirty days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator. The team shall notify the attorney general of its assessment.

Section 632.486 states in pertinent part:

When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee… 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 allegation*.

(Emphasis added).

Using an understanding of ordinary English and the rules of statutory construction, it is clear that the Legislature contemplated that the MDT would assess the detainee and determine if there was sufficient cause to believe that the person is a SVP. This is clearly intended as a check on the agency with jurisdiction. The statute sets up a three step process before the attorney general may file a petition: 1) the agency with jurisdiction gathers information and determines in the first instance if the person may be a SVP; 2) the MDT then assesses to see if that person may be a SVP; and then 3) the prosecutor's review committee decides by a majority vote if the person may be a SVP. Reading the statutes as a whole, all three must occur before the attorney general may file a petition.

Here, it appears the attorney general chose to ignore the MDT's conclusion that Edwards did not meet the definition of a SVP. To conclude that the attorney general may ignore one or all of the findings prior to filing a petition would be to conclude that the Legislature created provisions with no meaning. This Court presumes that the Legislature did not enact meaningless provisions. Allen v. Public Water Supply Dist. 5, 7 S.W.3d 537 (Mo.App.E.D. 1999). If the MDT's assessment could be ignored, then there would be no reason for the assessment at all and the provision would have no meaning. This is obviously not the Legislature's intent.

The rules of statutory construction compel a conclusion that the MDT must first find that the person meets the definition of a SVP before proceedings pursuant to Section 632.480 may continue. Thus, in order to state a cause of action, the Petition had to allege that the MDT found Edwards to meet the definition of a SVP, and the MDT had to make

that finding before the prosecutor's review committee could vote or the attorney general could even file a petition in the first place. Because the state failed to demonstrate that necessary predicate to filing the petition and failed to allege the necessary predicate of the MDT's finding, the trial court did not have jurisdiction to proceed.

The trial court's failure to dismiss the case prejudiced Edwards because the trial court, without jurisdiction to do so, entered a judgment finding him to be a SVP and involuntarily committing him to confinement. For the forgoing reasons, the trial court erred when it denied Edwards' Motion to Dismiss for Lack of Standing by the Attorney General's Office, failed to dismiss the proceedings because the pleadings were facially insufficient, and further in proceeding to trial and entering a judgment against Edwards, in violation of Edwards' rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. This Court must reverse the judgment of the lower court and order that Edwards be discharged from custody. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction is in the Missouri Supreme Court, and appellant requests transfer to that Court.

## V

**The trial court erred when it denied Edwards' Motion For Directed Verdict, because the evidence adduced at trial did not support the claims alleged in the Petition. The state failed to prove that Edwards' mental abnormality made it more likely than not that he would sexually violently reoffend if not confined. Edwards was prejudiced because he has been committed when the evidence does not support**

**his need for commitment. The trial court's rulings deprived Edwards of his rights to due process and a fair trial as guaranteed by Article I, Sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.**

The state filed its Petition pursuant to Section 632.480 RSMo (Cum.Supp. 1998) (L.F. 8-18). In that Petition, the state alleged that Edwards "may meet the criteria of a sexually violent predator" because he had been convicted of a sexually violent offense, that he suffers from a mental abnormality, and that the *mental abnormality* makes him more likely than not to engage in predatory acts of sexual violence (L.F. 8-9).

The trial court proceeded to try Edwards and enter a judgment finding him to be a SVP and committing him involuntarily pursuant to Section 632.480 (L.F. 189).

Counsel made a motion for a directed verdict at the close of all the evidence (Tr. 304; L.F. 179). The trial court denied the motion (Tr. 304; L.F. 179). Counsel included this ruling as an assignment of error in the motion for new trial (L.F. 181). Edwards asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Edwards asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c).

A motion for a directed verdict essentially presents an issue of submissibility. Love v. Hardee's Food Systems, Inc., 16 S.W.3d 739, 741-2 (Mo.App.E.D. 2000). To make a submissible case, the plaintiff must present substantial evidence for every fact essential to the case. Id. In determining whether there is submissible evidence, the appellate court

views the evidence and all reasonable inferences in the light most favorable to the plaintiff. Id.

Section 632.495 requires the state to prove beyond a reasonable doubt that Edwards is a SVP. By virtue of the fact that the state has chosen to make reasonable doubt the standard, Edwards has a due process right to require the state to meet that standard. Civil commitment for any purpose is a significant deprivation of liberty that requires due process protection. Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809 (1979). State statutes that have the force and effect of law can create an interest to be protected by the due process clause. Vitek v. Jones, 454 U.S. 480, 488, 100 S.Ct. 1254 (1980). Once a state has afforded an opportunity for that interest, due process requires the interest not be arbitrarily denied or abrogated. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100 (1979); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974). Once a rule of procedure is in place, therefore, that rule must comport with due process. United States v. MacCollum, 426 U.S. 317, 323, 96 S.Ct. 2086 (1976).

"Reasonable doubt" is defined in Instruction No. 5 as "a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case" (See Stipulation filed with this Court). Here, the state's evidence leads to a doubt based upon reason and common sense, because the state failed to demonstrate that it is Edwards' mental abnormality that makes him more likely than not to reoffend.

Section 632.480(5) defines a SVP 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…". Put differently, it is the mental abnormality that has to make the person more likely than not to sexually violently reoffend before he meets the definition of a SVP and is eligible for involuntary civil commitment.

Here, the state failed to prove that it is the *mental abnormality* that makes Edwards more likely than not to sexually violently reoffend. Dr. Logan, the state's witness, testified that Edwards has a "mental abnormality", without specifying what he believed the mental abnormality is, and "appears to have a psychosexual attraction to children" (Tr. 264-265). Dr. Logan's report indicates that Edwards has a "behavioral abnormality", but does not indicate a "mental abnormality" (L.F. 151-163). Dr. Logan believed that Edwards would benefit from sex offender treatment, but the reason Edwards needed to be in a secure environment was to prevent drug use relapse, *not* because of the mental abnormality (Tr. 255).

Dr. Logan stated that Edwards appears to act on his attraction to children *only* when three things are present: 1) Edwards is intoxicated; 2) Edwards is near children; and 3) Edwards has the desire for children (Tr. 266). Dr. Logan reiterated the significance of the drug abuse problem in his conclusion that Edwards is a SVP (Tr. 274).

Dr. Logan, therefore, did not believe and did not testify that the mental or behavioral abnormality, whatever he believed it to be, was the reason Edwards would reoffend. Dr. Logan believed Edwards' drug problem and inability to control that drug problem was the factor that would lead to reoffense. The state did not present any evidence that drug addiction is a mental abnormality. Because the law requires the state prove that reoffense

will occur *because of the mental abnormality*, the state failed to meet its burden of proof. The trial court should have granted Edwards' motion for directed verdict because the state failed to prove its case.

The trial court's failure to grant Edwards' motion for directed verdict prejudiced Edwards because he does not meet the definition of a SVP, and should not be committed. For the forgoing reasons, the trial court's error violated Edwards' rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse the judgment of the lower court and order that Edwards be discharged from custody. See In re Johnson, No. 23335, slip op. (Mo.App.S.D. May 18, 2001), *app. for transfer granted August 21, 2000, SC No. 83738*.

**VI**

**The trial court erred and abused its discretion when it overruled Edwards' motion in limine, overruled his objections, and allowed testimony from Officer Paul Saulter regarding what a woman told him about the incident with the one year old. The testimony was hearsay and not subject to any exception to the hearsay rule. Edwards was prejudiced because the jury used the testimony as proof of the truth of the matter and concluded he had sexually offended in addition to the rape conviction for which he served a prison sentence. The trial court's error violated Edwards's rights to due process, to be tried only for the allegations charged, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the**

**United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution.**

Edwards filed a pretrial motion to exclude testimony from Office Paul Saulter on grounds of relevance and hearsay (L.F. 176-177). After hearing an offer of proof, the trial court overruled the motion and allowed Saulter to testify (Tr. 149-157). Counsel renewed the objection on grounds of relevance, hearsay, and that the statements of the mother are not excited utterances, and the trial court again overruled the objection (Tr. 154-160). Saulter testified that on June 10, 1989, he received a call in reference to a child molestation complaint (Tr. 158-159). When he arrived, he met a very upset, angry woman holding a one-year-old girl (Tr. 159, 161). The woman told him that she had been asleep and awoke to the sound of her child crying (Tr. 160). She told Saulter that she got up to see about the child and saw Edwards with his pants around his ankles, rubbing his penis on the child's vagina (Tr. 160). Saulter arrested Edwards (Tr. 161).

Edwards included the trial court's errors as issues in the motion for new trial (L.F. 181-182). Edwards asserts that the errors are preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree, Edwards would assert that manifest injustice would result if left uncorrected, and would request plain error review. Rule 84.13(c).

Questions of admissibility of evidence are left to the trial court's discretion, and those decisions will be overturned only upon showing and abuse of that discretion. Willman v. Wall, 13 S.W.3d 694 (Mo.App.W.D. 2000). Abuse of discretion occurs when the ruling is clearly against the logic of the circumstances and is so unreasonable as to shock the conscience. Robertson v. Robertson, 15 S.W.3d 407 (Mo.App.S.D. 2000).

When a witness offers out-of-court statements of another as proof of the matters asserted in those statements, the testimony is hearsay. Bynote v. National Super Markets, Inc, 891 S.W.2d 117, 120 (Mo.banc 1995). An excited utterance is an exception to the hearsay rule, which depends upon a "startling or unusual occurrence sufficient to overcome normal reflection [such that] the ensuing declaration [is] a spontaneous reaction to the startling event". Id. at 122 (Citations and internal quotes omitted). The level of stress required is extreme:

> [U]nder certain external circumstances of physical shock, a stress of nervous excitement which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock.

State v. Post, 901 S.W.2d 221, 224 (Mo.App.E.D. 1995). The statement must be made "under the immediate and uncontrolled dominion of the senses." Id.

The statements made under such conditions are considered trustworthy and admissible because they are "unadorned" by the chance to think about the event. Id. In determining if a statement is an excited utterance, factors to consider include: 1) the time between the event and statement; 2) if the statement is in response to a question; 3) whether the statement is self-serving; and 4) the speaker's physical and mental state. Id.

Applying these principles, it is abundantly clear that Saulter's testimony about what the woman told him is offered as proof that the events occurred. The assistant attorney general stated that the testimony was offered to demonstrate "past behavior" (Tr. 8). The

assistant attorney general acknowledged that there are "hearsay complications", but added that Saulter would only testify to his observations (Tr. 8).

While Saulter did testify about observations, he also testified as to what the woman told him (Tr. 160-162). It is thus hearsay. The statements do not qualify as an excited utterance because 1) about thirty minutes elapsed between the alleged event and Saulter's conversation with the woman (Tr. 151, 158); 2) there is no evidence that the woman's statement was in response to a question (Tr. 151, 160); and 3) Saulter indicated that the woman was angry, but there was no indication that she was so incredibly upset that she was overcome with emotion and could not rationally function (Tr. 151-162). The woman's statements, as testified to by Saulter, were hearsay and inadmissible.

For all the reasons stated, the trial court erred and abused its discretion when it allowed Officer Saulter to testify as to what the woman said. Edwards was prejudiced because the statements were used as evidence that he offended sexually more than once, in order to support the conclusion that he is a SVP. The trial court's error violated Edwards's right to due process, to be tried only for the charges and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution. This Court must reverse and order Edwards discharged, or, in the alternative, this Court must reverse and remand for a new trial.

## VII

**The trial court erred and abused its discretion when it denied Edwards' Motion to Find Section 632.483.5 Unconstitutional and to Permit Testimony of Members of the Multidisciplinary Team, granted the state's motion to quash subpoenas served upon the Multidisciplinary Team (MDT), refused to allow Edwards to present testimony from members of the MDT concerning their review and conclusion that he was not a SVP, refused to allow any testimony as to the MDT's findings, and refused to allow Edwards to make an offer of proof concerning the members of the MDT. The rulings denied Edwards his due process right to present his defense and he was prejudiced by the trial court's error(s) because he was prevented from presenting favorable testimony that he is not a SVP. Had Edwards presented that testimony, the outcome would have been different.**

**The trial court ruled that Section 632.483.5 RSMo prevents the members of the MDT from testifying for any reason. Any interpretation of Section 632.483.5 that excludes relevant testimony without exception is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Edwards has a due process right to present favorable evidence. The trial court's rulings therefore deprived Edwards of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process.**

Edwards filed a Motion to Find Section 632.483.5 RSMo Unconstitutional and to Permit Testimony of Members of the Multidisciplinary Team (MDT) (L.F. 199-120). In that motion Edwards asserted that the MDT unanimously voted that he did not meet the

definition of a SVP, but that Section 632.483.5 precluded the testimony (L.F. 119). Edwards asserted that the statute denied him his right to call "qualified, relevant witnesses with probative opinions and evidence to aid in the defense" in violation of his rights to present a defense and due process (L.F. 119).

The record reflects that the MDT, consisting of Jonathon Rosenboom, Psy.D., MoDOC, Wanda De La Cruz, MoDOC, Richard Gowdy, Ph.D., MoDMH, Joseph Parks, M.D., MoDMH, and Mark Altomari, Ph.D., MoDOH [sic], and voted unanimously that Edwards did not appear to meet the definition of a SVP (L.F. 82, 104-105). The state moved to quash subpoenas directed to those individuals because the MDT did not have personal knowledge regarding Edwards, they were not required to have any particular expertise, and their opinion is inadmissible lay opinion (L.F. 116-118). The trial court granted the state's motion to quash (L.F. 116, 121). The trial court overruled Edwards' motion to declare the statute unconstitutional and permit testimony from the MDT (L.F. 121). The trial court appears to have considered allowing Edwards to make an offer of proof, but decided not to allow an offer. The words "Offer of Proof by Resp." appear on the face of Edwards' motion, but they are crossed out (L.F. 119).

Counsel attempted to ask Dr. Scott about the MDT's findings (Tr. 308). The state objected because it was not "discoverable", and the trial court sustained the objection (Tr. 309).

Counsel included these rulings as assignments of error in the motion for new trial, with the exception of the question posed to Dr. Scott (L.F. 184-186). Edwards asserts the error is preserved for appellate review. Rule 78.07(a)(1). Should this Court disagree,

Edwards would assert that manifest injustice would result if left uncorrected, and would request plain error review. Rule 84.13(c).

When evidence is excluded, the issue on appeal is not whether the evidence was admissible, but rather, the issue is whether the trial court abused its discretion in excluding the evidence. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848 (Mo.App.E.D. 2000). Abuse of discretion occurs when the ruling is clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration. Id.

The record is silent as to the trial court's reasons for its rulings. This brief will address each argument asserted by the state in its motion to quash, and also will address Section 632.483.5 RSMo.

The state asserted in its motion to quash two reasons to support its position: 1) the MDT did not have personal knowledge regarding Edwards; and 2) the MDT were not required to have any particular expertise, and their opinion is inadmissible lay opinion. The MDT appeared to have everything Dr. Logan and Dr. Scott had except for a personal interview (Tr.247, 310-12). The MDT had information on the underlying offense, criminal history, mental health documentation, and institutional records (L.F. 105). As for the expertise, the MDT appears to be comprised of mostly degreed professionals: Jonathon Rosenboom, Psy.D., MoDOC, Chief of Medical Services; Richard Gowdy, Ph.D., MoDMH, Director of Forensic Services; Joseph Parks, M.D., MoDMH, Deputy Director of Psychiatry; and Mark Altomari, Ph.D., MoDOH [sic], Clinical Psychologist (L.F. 104). These doctors are certainly qualified professionals. In any event, the state's

arguments address weight, not admissibility. See St. Louis Southwestern Ry. Co. v. Fed. Compress and Warehouse Co., 803 S.W.2d 40, 43 (Mo.App.E.D. 1990).

The trial court also ruled that Edwards could not elicit evidence of the MDT's findings because it was prohibited (Tr. 309). Edwards submits that he has a due process right to present evidence in support of his position, and the statute is subordinate to that right. 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 United States Supreme Court holds that denominating a proceeding as "civil" does not necessarily deprive a person of constitutional protections, and that civil commitment is a deprivation of liberty that requires constitutional protection. Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809 (1979). Assuming this Court concludes that the state made a submissible case, then Edwards had the right to present evidence in his behalf. See Diehl v. Dir. Of Revenue, 869 S.W.2d 293, 295 (Mo.App.E.D. 1994).

Instructive is State ex rel. Mo. Highway and Transp. Comm. v. Beseda, 892 S.W.2d 740 (Mo.App.E.D. 1994). There, the landowner appealed a damage award, alleging that the trial court improperly excluded evidence. Id. The landowner sought to present testimony concerning damage resulting from changing a parking lot entrance from paved to dirt. Id. at 742. The court concluded that the trial court abused its discretion in excluding the evidence because the evidence directly impacted upon the value of the land. Id.

In Washington by Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo.banc 1995), the defendant sought to rebut evidence that the plaintiffs would incur educational expenses by showing the availability of public special education. The trial court excluded the evidence. Id. at 620. The appellate court reversed on grounds that the collateral source rule did not apply, but did not dispute the notion that the defendant had the right to present evidence tending to mitigate damages. Id. at 620-621.

In the same way, Edwards attempted to demonstrate that he was not a SVP through the testimony of five professionals that the state entrusted to make that decision in the first instance. If an appellate court can conclude that a party had the right to present evidence in an ordinary civil case, then a civil case where a party's very liberty is at stake presents an even more compelling scenario for allowing presentation of favorable evidence. The evidence Edwards sought to present directly impacted an ultimate issue in the case, and the trial court abused its discretion in refusing to allow Edwards to present it. The law clearly gives Edwards a due process right to present evidence in his behalf. The question then is this: should Section 632.483.5 trump Edwards' due process right to present evidence in his own behalf? Edwards asserts that the answer is no.

Section 632.483.4 (Cum.Supp. 1999) establishes a method for creating the MDT. Section 632.483.5 states that "[t]he determination of … any member pursuant to this section … shall not be admissible evidence in any proceeding to prove whether or not the person is a sexually violent predator." Interestingly, Section 632.483.5 (Cum.Supp. 1998) does not have this proscription. The reason for this addition in Section 632.483.5

(Cum.Supp. 1999) is not clear from reading both versions of the statute. It appears to be an afterthought.

This Court must therefore ascertain the Legislature's intent. The primary rule of statutory construction is to ascertain the intent of the legislature and give effect to that intent if possible. State ex rel. Div. of Child Support Enf. v. Gosney, 928 S.W.2d 892 (Mo.App.E.D. 1996). The courts favor a construction that avoids an unjust or unreasonable result. Rankin Tech. Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991). Using these rules, compare the isolated sentence from Section 632.483.5 with the entirety of the SVP statute. The entirety of the statute reverberates with a detainee's rights. The detainee has the right to have a judge determine if there is probable cause to proceed, and at that hearing the detainee has the right to counsel, to present evidence, to cross examination of witnesses and to view and copy all petitions and reports in the file. Section 632.489.2. If probable cause exists, the detainee has the right to a trial, either by court or jury. Section 632.492. At that trial, the detainee has the right to counsel, and the appointment of counsel if found indigent. The detainee has the right to a unanimous verdict, proof beyond a reasonable doubt, and an appeal. Id.

It is clear that the Legislature intended the detainee have the panoply of constitutional rights afforded criminal defendants, and for the same reason – a threatened deprivation of liberty simply requires it. Whatever the reason for the proscription against having the MDT offer testimony, the Legislature clearly did not intend for it to usurp the constitutional protections repeated over and over again throughout the statute.

In determining if a statute is constitutional, the reviewing 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). 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).

Should this Court conclude that the proscription against presenting testimony from the members of the MDT is absolute and a detainee's right to present favorable testimony is subordinate to Section 632.483.5, then Missouri law requires that the SVP statute be struck down **in toto** and the case against Edwards dismissed, or that the proscription against presenting testimony from members of the MDT be severed out of the statute.

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). Edwards submits that the sentence in issue in Section 632.483.5 violates his due process right to present favorable evidence on his own behalf, and that is severable because the 1998 version of the paragraph omits the sentence. If this Court cannot presume that the Legislature would have established the MDT procedure if it believed that members of the MDT could testify at SVP hearings and trials, then this Court must invalidate the entire SVP statute.

Edwards was prejudiced by the trial court's rulings because the jury was not allowed to hear that several professionals whose job entailed an assessment and determination that Edwards is or is not a SVP concluded he was not. The trial court's refusal to allow Edwards to present this evidence, either through the members of the MDT or through Dr. Scott, led to the jury's conclusion that he was a SVP, and he was therefore prejudiced.

Section 632.483.5 of the SVP statute violates the guarantees of Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution for all the reasons discussed. This Court must either declare that the sentence in Section 632.483.5 violates due process and sever it from the remainder of the statute or invalidate the entire SVP statute, reverse the trial court's judgment, and discharge Edwards from commitment. In the alternative, this

Court must reverse his commitment and remand this cause for a new trial with evidence that the MDT found he did not meet the definition of a SVP.

## VIII

**The trial court plainly erred, causing manifest injustice, when it allowed the state to call Edwards to the stand and testify as a witness against himself. The right to remain silent in an involuntary commitment proceeding includes the constitutional protection against self incrimination. Edwards was prejudiced because the jury considered his statements as evidence against him. The trial court's error violated Edwards' rights to due process of law and right to remain silent, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution.**

At trial, the state called Edwards to testify (Tr. 170-187). He testified he did not recall the incident with the one year old, and did not remember the incident with Sylvia Foster (Tr. 170-172). He testified at length about his substance abuse problems (Tr. 173-184). He denied sexual attraction to children (Tr. 185).

While Edwards claimed in his motion for new trial that it was error to call him to testify, counsel did not object at trial (Tr. 170; L.F. 182-183). Edwards asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c). Under plain error review, this court may grant relief if the trial court's action resulted in manifest injustice or a miscarriage of justice. In re D.L., 999 S.W.2d 291 (Mo.App.E.D. 1999). Edwards asserts manifest injustice occurred when the trial court allowed the state to call him as a witness against himself.

The United States Supreme Court holds that denominating a proceeding as "civil" does not necessarily deprive a person of constitutional protections, and that civil commitment is a deprivation of liberty that requires constitutional protection. Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809 (1979).

> [C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil". And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty…[.]

In re Gault, 387 U.S. 1, 50, 87 S.Ct. 1428, 1455 (1967).

Directly on point is State ex rel. Simanek v. Berry, 597 S.W.2d 718 (Mo.App.W.D. 1980). In that case the relator, an attorney, sought by writ to prevent the trial court from forcing him to file an answer on his client's behalf in an involuntary commitment proceeding pursuant to Section 202[5], RSMo 1978. Id. at 719. The relator alleged that requiring an answer violated the detainee's right to remain silent. Id.

In holding that the relator did not have to answer the petition, the Western District stated:

> [I]t is clear that before anyone may be deprived of his liberty, whether the proceeding be denominated criminal or civil, the person is entitled to due process of law and is further entitled to the constitutional protection that he shall not be compelled to be a

[5] Section 202, RSMo 1978 allowed for detention and treatment is the person demonstrated a mental illness and a danger to himself or others.

witness against himself, or as sometimes stated, the right not to be required to incriminate himself.

Id. at 720. The court further noted that "[I]t is clear this right would be violated by requiring the respondent to take the stand and to testify." Id.

It could not be clearer, then, that Edwards has and had a constitutional right to not be required to incriminate himself. Nonetheless, the trial court permitted the state to call him to the stand and do exactly that. Edwards was prejudiced because his trial testimony was, in spots, inconsistent with his prior statements concerning the underlying offense and the uncharged incident with the one year old, and the state used that information against him to argue that he required confinement because he did not benefit from treatment and had a "selective memory" (Tr. 435-436).

For the forgoing reasons, the trial court plainly erred when it permitted the state to call Edwards to testify as a witness against himself. The trial court's error violated Edwards' rights to due process of law and freedom from self incrimination, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution. This Court must remand this cause with directions that the case against Edwards be dismissed and Edwards discharged from confinement, or in the alternative reverse and remand for a new trial.

## IX

**The trial court plainly erred, causing manifest injustice, when it failed to dismiss the case because 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 Edwards. Section 632.483.5 RSMo 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, the State is required to show that Dee Joyce Hayes was 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 Edwards, the committee had to be properly constituted according to the Legislature's plainly expressed mandate. The trial court's error violated Edwards' rights to due process of law, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.**

In Exhibit B to the Attorney General's Petition, the record shows that the Prosecutor's Review Committee convened by conference call on November 23, 1999 (L.F. 18). The members of the committee were Morley Swingle (Cape Girardeau County Prosecuting Attorney), Dwight Scroggins (Buchannan County Prosecuting Attorney), Michael Wright (Warren County Prosecuting Attorney), Joseph Warzycki (City of St. Louis Circuit Attorney designee) and Jack Banas (St. Charles County Prosecuting Attorney) (L.F. 18). Dee Joyce Hayes, Circuit Attorney for the City of St. Louis at that time, did not participate in the meeting and did not vote (L.F. 18).

Edwards asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c). Under plain error review, this court may grant relief if the trial court's action resulted in manifest injustice or a miscarriage of justice. In re D.L., 999 S.W.2d 291 (Mo.App.E.D. 1999). Edwards asserts manifest injustice occurred

by allowing the case to proceed when the state failed to meet the requirements of Section 632.483.5.

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

Section 632.483.5 (emphasis added).

As stated, Dee Joyce Hayes did not participate in the conference call and did not vote (L.F. 18). The prosecutor's review committee in Edwards' case was thus not constituted in compliance with the provisions of the SVP statute and the trial court should have dismissed the action. 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, Edwards will use the term "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. 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 Edwards as a 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 plainly erred when failed to dismiss the action because the state failed to comply with the clear requirements of Section 632.480. As the prosecutor's review committee was not properly constituted, the Attorney General did not have the authority to file a petition to commit Edwards pursuant to the SVP statute. The trial court's error violated Edwards' rights to due process of law, guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. This Court must remand this cause with directions that the case against Edwards be dismissed and Edwards discharged from confinement.

## CONCLUSION

WHEREFORE, for the reasons set forth in Points I-IX of this brief, appellant Desi Edwards respectfully requests this Court reverse the judgment committing him as a SVP and order him discharged, or in the alternative remand for a new trial. Should this Court determine that any of the claims represent a colorable challenge to a state statute, Edwards requests this Court transfer this case to the Missouri Supreme Court.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this ___ day of _____ 2001, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Pursuant to Missouri Supreme Court Rule 84.06(c), Special Rule 361, and this Court's orders, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 24, 800 words, 1760 lines, or 100 pages. The word-processing software identified that this brief contains 21, 057 words, excluding the cover page, signature block, and certificates of service and compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfree Anti-Virus software and found virus-free.

_____

Nancy L. Vincent