IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	No. WD 63159
WILBUR SCHOTTEL,	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

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JURISDICTIONAL STATEMENT

Wilbur Schottel appeals the judgment and order of the Honorable Larry D. Harmon denying a jury trial on Mr. Schottel's petition for release from secure confinement in the Department of Mental Health as a sexually violent predator. To the extent that this appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals, Western District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.070, RSMO 2000; to the extent this appeal involves a real and substantial claim challenging the constitutionality of a Missouri statute, jurisdiction lies in the Missouri Supreme Court and Mr. Schottel requests transfer of this case to that Court.

STATEMENT OF FACTS

Wilbur Schottel pleaded guilty in 1995 to sodomy (61683L.F. 6-7).[1] On February 29, 2000, the State filed a petition seeking Mr. Schottel's confinement in a secure Department of Mental Health facility as a sexually violent predator pursuant to Section 632.480, RSMo 2000, *et seq.* (61683L.F. 6-8). Mr. Schottel stipulated on June 14, 2000, that he was a sexually violent predator as that term was defined by statute, and he was committed to secure confinement in the Department of Mental Health (61683L.F. 32, 33).

An Annual Examination of Mental Condition required by Section 632.498 was prepared on June 8, 2001 (61683L.F. 34-36). The report set out a number of treatment goals for Mr. Schottel (61683L.F. 34). It suggested that Mr. Schottel needed to learn his offense cycle; express his thoughts and feelings about his past deviant behaviors; learn basic sexual anatomy, sexual development, and "safe-

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[1] The record on appeal consists of a legal file (L.F.), a supplemental legal file containing depositions offered in lieu of live testimony (Sup.L.F.), and a transcript of the July 17, 2003, probable cause hearing (Tr.). Mr. Schottel has requested this Court to take judicial notice of the legal file submitted to this Court in Case No. WD 61683, the appeal from the denial of Mr. Schottel's first petition for release. Mr. Schottel will refer to this legal file as (61683L.F.).

sex"; improve his assertiveness skills; learn to discuss family issues without becoming defensive; discuss and understand his feelings about personal issues; learn productive leisure skills; and develop a relapse prevention plan (61683L.F. 34). The report informed the court that Mr. Schottel quickly began group therapy and appeared "very highly motivated for treatment and continues to work diligently on identifying his deviant sexual impulses and identifying his offense cycle." (61683L.F. 35). Mr. Schottel had achieved a level 4 rating, the highest attainable at the treatment facility, in mid-December of 2000 (61683L.F. 35). He was able to recognize some of his grooming behavior (61683L.F. 35). Mr. Schottel was beginning to recognize that his deviant sexual behavior was related to stressors over the course of his life, not the self-reported impotence resulting from his diabetes (61683L.F. 35). The report stated that this last issue was very difficult for Mr. Schottel, and that he was only beginning to attempt to recognize it (61683L.F. 35). The treatment team indicated their concerns about Mr. Schottel's difficulty acknowledging his family turmoil, and for his desire to blame the deviancy on his diabetes (61683L.F. 36). Mr. Schottel had been in the program for less than a year and therefore had not started relapse prevention planning (61683L.F. 36).

Mr. Schottel filed a petition for release from confinement pursuant to Section 632.489, RSMo 2000, on February 27, 2002 (61683L.F. 45-46, 47-48). The probate court denied Mr. Schottel's petition without a probable cause hearing pursuant to Section 632.504, RSMo 2000 (61683L.F. 83-84). Mr. Schottel's appeal of this ruling was denied by this Court because while that appeal was pending, Mr. Schottel filed a second petition for release, which was denied after a probable cause hearing, rendering the appeal moot. ***In the Matter of the Care and Treatment of Schottel***, 121 S.W.3d 337 (Mo. App., W.D. 2003).

Another annual review was filed on June 25, 2002 (L.F. 5). Mr. Schottel filed another petition for release on October 31, 2002 (L.F.9-10). He asserted that sufficient evidence existed to demonstrate probable cause that his mental abnormality had so changed that he was safe to be at large (L.F. 9). He supported this assertion with the conclusions reached by Dr. Delaney Dean in January and October of 2002 that Mr. Schottel's mental abnormality had so changed that, if released, he is unlikely to engage in sexual violence (L.F. 10). Mr. Schottel requested a probable cause hearing to present this evidence (L.F. 10).

The State sought the dismissal of Mr. Schottel's petition without a probable cause hearing on two grounds. The State requested the probate court to consider

Mr. Schottel's petition "frivolous" under Section 632.504, and to summarily dismiss it (L.F. 13). It relied on the June 2002 annual review to support its request (L.F. 14-22). The State also requested that the probate court summarily dismiss Mr. Schottel's petition under the provisions of the same statute because it was his second request for release which shall be denied if it fails to contain facts upon which a court could find Mr. Pate's condition had so changed that a hearing is warranted (L.F. 23-24).

The probate court denied both of the State's requests to summarily deny Mr. Schottel's petition for release without a probable cause hearing (Tr. 5-11). At the beginning of the probable cause hearing, held on July 17, 2003, Mr. Schottel made an oral motion to declare Section 632.498, RSMo 2000, unconstitutional because the literal language of the statute requires him to demonstrate that he "will not engage in predatory acts of sexual violence if discharged" in order to proceed to a jury trial where his release or continued commitment would be determined (Tr. 12). Mr. Schottel pointed out that this is a higher burden of proof than that upon which the State can secure his continued confinement at a jury trial (Tr. 12). Under the statute, the State need only prove at trial that Mr. Schottel is "likely to engage in predatory acts of sexual violence if released." (Tr. 14). Mr. Schottel also argued that not only is the burden on him higher than is

imposed on the State, but that it is essentially an impossible standard to meet (Tr. 12-13). He argued that no psychiatrist or psychologist would say that someone would *never* commit a certain act in the future (Tr. 13). The probate court denied Mr. Schottel's motion to declare Section 632.489 unconstitutional (Tr. 40).

The parties argued for and against a jury trial to determine whether Mr. Schottel should be released from secure confinement. Mr. Shottel offered the evaluation prepared by Dr. Delaney Dean in January of 2002 and the deposition of Dr. Luis Rosell (Tr. 11, 15-16). The State offered depositions of Dr. Jay Englehart and Dr. Martha Bellew-Smith, and the annual review just filed with the court in June of 2003 (Tr. 11, 27, 28).

The probate court suggested that if it followed the procedure generally applied in a criminal preliminary hearing, which might be required by the way the SVP statutes are written, it would only look at Mr. Schottel's evidence to decide probable cause, whether certain necessary facts exist (Tr. 33). The State suggested that the court could look at all of the evidence, including its depositions and the 2003 annual report (Tr. 34). Mr. Schottel's counsel agreed that the court could consider the depositions of Dr. Englehart and Dr. Bellew-Smith because otherwise those witnesses would have testified in person (Tr. 36). Counsel did object to consideration of the 2003 annual report, but the court

admitted it "for purposes of considering whether or not it has anything to do with" the petition for release (Tr. 37).

The day after the probable cause hearing the probate court denied Mr. Schottel's petition for release by an order reading:

> The court finds no probable cause that the respondent's mental abnormality has so changed that he is safe to be at large and will not engage in acts of sexual violence if discharged, and therefore, does not set a hearing on respondent's amended motion for release, and hereby denies the same.

(L.F. 28).

Dr. Dean, an attorney and psychologist, evaluated Mr. Schottel on January 23, 2002 (61683L.F. 49). She interviewed Mr. Schottel and reviewed all available records (61683L.F. 49). Dr. Dean noted the offending pattern that led to Mr. Schottel's conviction (61683L.F. 50). The results of psychological testing she conducted ruled out the type of psychopathological or personality factors often found in persons who engage in violent, aggressive, or predatory sexual behavior (61683L.F. 52).

Dr. Dean reviewed Mr. Schottel's progress in treatment, and noted that he has diligently engaged in treatment, successfully completed the tasks assigned to

him, openly admitted his sexual offending, was fully cognizant of the harm he had caused his victims, expressed genuine regret about his behavior, and has prepared a relapse prevention plan (61683L.F. 52). The doctor discussed treatment needs identified in the June 2001 annual evaluation and concluded, "It is my opinion that Mr. Schottel is fully cognizant of his offense cycle; he is capable of expressing his thoughts and feelings about his past deviant sexual behaviors; he understands sexual anatomy and other areas of sex education. I find his relapse prevention plan to be well thought-out and quite reasonable." (61683L.F. 52).

Dr. Dean diagnosed Mr. Schottel with pedophilia, but "it is also [her] opinion that his risk level for re-offending is quite low…." (61683L.F. 53). Using the Sexual Violence Risk - 20 assessment instrument, Mr. Schottel qualified for only one of the twenty factors associated with offending (61683L.F. 53). That factor was "sexual deviance" encompassed by his pedophilia (61683L.F. 53). "Based on a risk factor analysis alone, then, one could assert a strong argument that Mr. Schottel presents a very small risk for re-offending." (61683L.F. 53). Dr. Dean indicated that the focus of sex offender treatment is teaching the skills that enhance self-control (61683L.F. 54). There are no psychological testing methods to assess self-control, but the clinical construct of "impulsivity" is closely related

to self-control (61683L.F. 54). It is Dr. Dean's opinion that Mr. Schottel does not display overall impulsivity, that he possesses good self-control overall and in the area of sex offending, and that "he will not have serious difficulty in controlling himself, when he is released." (61683L.F. 54). Dr. Dean's ultimate conclusion is "that Mr. Schottel's mental abnormality has changed such that, if released, he is unlikely to engage in acts of sexual violence." (61683L.F. 55). Mr. Schottel advised the probate court that Dr. Dean had reviewed his case in October of 2002, and her opinions remained the same (L.F. 10).

Dr. Rosell is a Missouri and Iowa licensed clinical psychologist with a practice in Iowa (Sup.L.F. 146). He is a certified sex offender treatment provider in Iowa, and the former director of the sex offender treatment program for the Iowa prison system (Sup.L.F. 147). Dr. Rosell has conducted sex offender evaluations prior to commitment and for release (Sup.L.F. 149).

Dr. Rosell was asked to evaluate Mr. Schottel to determine whether his mental abnormality had so changed that he was safe to be at large and will not engage is acts of sexual violence if discharged (Sup.L.F. 153). According to static factors, Mr. Schottel's risk of re-offense was six percent over five years (Sup.L.F. 154-156). Dr. Rosell also considered dynamic factors revealed by the research (Sup.L.F. 156). That Mr. Schottel stipulated to civil commitment meant that he

did not intend to fight treatment (Sup.L.F. 158-159). He had not been provided sex offender treatment in prison so he agreed to treatment in a civil commitment (Sup.L.F. 159). Another factor reducing Mr. Schottel's risk to re-offend was his completion of every class but one offered to him at the Missouri Sex Offender Treatment Center (Sup.L.F. 159). Dr. Rosell said that showed that Mr. Schottel wants to engage in treatment (Sup.L.F. 159).

Dr. Rosell testified that research shows a low rate of recidivism for older persons, those over sixty (Sup.L.F. 160). Mr. Schottel was seventy-two years old (Sup.L.F. 156). Other research shows that once a person is punished for a crime they are less likely to re-offend (Sup.L.F. 160). Mr. Schottel's incarceration and civil commitment was the first time he had been punished and treated for a sex offense (Sup.L.F. 160-161). Other factors in Mr. Schottel's favor were that he was married, had no male victims, no substance abuse, and good institutional adjustment in prison (Sup.L.F. 161-162). Dr. Rosell diagnosed Mr. Schottel with pedophilia, increasing his risk because he has a sexual interest in children (Sup.L.F. 162).

Dr. Rosell testified that finishing treatment reduces recidivism, but it was only one factor he looks at in assessing risk (Sup.L.F. 159-160, 163). It is also important to look at why someone has not completed treatment and what the

person has not done in treatment (Sup.L.F. 164). Mr. Schottel had taken every class offered and wants to take relapse prevention class but it has not yet been offered to him (Sup.L.F. 163). Mr. Schottel explained to Dr. Rosell the areas he needed to focus on and what he needed to be aware of to avoid re-offending (Sup.L.F. 164). A lot of the classes Mr. Schottel has taken address parts of the relapse plan process (Sup.L.F. 164). Dr. Rosell noted comments by MSOTC treatment staff that make it sound like Mr. Schottel has not done anything (Sup.L.F. 164). Mr. Schottel had passed every class but one, and he was taking that class again (Sup.L.F. 164). It did not make sense to Dr. Rosell that Mr. Schottel could pass all of his courses if he did not understand the treatment being taught (Sup.L.F. 165). Dr. Rosell said that it is important to look at empirical factors rather than just forming an opinion on personal belief (Sup.L.F. 165). Looking at the factors shown by the research improves the judgment with regard to the person (Sup.L.F. 165).

Dr. Rosell noted from MSOTC records that a group of persons at the center say that Mr. Schottel is doing okay, but that Dr. Bellew-Smith says that Mr. Schottel is the worst of the worst and she does not have a positive thing to say about him (Sup.L.F. 167). Dr. Rosell is concerned that Mr. Schottel has completed as many classes as he has but Dr. Bellew-Smith considers him the worst among

the patients (Sup.L.F. 167). Dr. Rosell admitted that he has not met every patient at MSOTC but could not believe that Mr. Schottel was the highest risk person there given the static and dynamic factors in his favor and his years of treatment (Sup.L.F. 168). The records noted that Mr. Schottel challenges many things and files a lot of grievances (Sup.L.F. 168). It is possible that that filters into the assessments of Mr. Schottel (Sup.L.F. 169). He noted that in two reports written two days apart one person saw Mr. Schottel as improving, another saw Mr. Schottel getting worse (Sup.L.F. 169). Dr. Bellew-Smith's assessments were not just a little different but varied widely from that of the people who deal with Mr. Schottel everyday (Sup.L.F. 169).

Dr. Rosell testified to his belief from his discussions with Mr. Schottel, his review of the progress notes, and all the courses Mr. Schottel had completed that he "has made a change in this time he's been in treatment." (Sup.L.F. 169). The doctor testified that a person who has attended treatment for three years and appeared motivated will incorporate that and gain some insight (Sup.L.F. 169-170). Dr. Rosell considered the factors constantly brought up by the treatment staff unrelated to sex offender recidivism or Mr. Schottel's grooming behavior in the past (Sup.L.F. 170). An incident arose over photographs in a newspaper that staff interpreted as an attempt to learn information about future victims (Sup.L.F.

170-171). Inmates in lots of facilities want newspapers and Dr. Rosell did not consider that to be a risk factor for recidivism (Sup.L.F. 172).

Dr. Rosell noted that progress through the MSOTC program seemed to take a really long time (Sup.L.F. 174). He was concerned about the affect that had on the patients (Sup.L.F. 175). If a person cannot see the light at the end of the tunnel you cannot expect them to be motivated (Sup.L.F. 175). You cannot expect them to feel that they are getting help or to develop trust (Sup.L.F. 175).

Neither Dr. Englehart nor Dr. Bellew-Smith believe that Mr. Schottel is ready for release (Sup.L.F. 40, 105).

Most of Dr. Englehart's contact with Mr. Schottel was ten to twenty minutes a month administering Mr. Schottel's medications (Sup.L.F. 19, 41). Within the last couple of months prior to his deposition, however, Dr. Englehart had been instructing a class two hours a week on psychiatric disorders in which Mr. Schottel participated (Sup.L.F. 19, 41). The purpose of this class is to teach the patients to think of a psychiatric diagnosis the same as a medical diagnosis (Sup.L.F. 19). He teaches about different kinds of diagnoses so that patients can recognize those traits in themselves, and so that they can have empathy for persons with other diagnoses (Sup.L.F. 20). Dr. Englehart said that it is important that the persons know what their diagnosis is so he can later teach

them the risk factors of the disorder, the treatment methodologies that have been shown to work, and the commonalties in treatment for various diagnoses (Sup.L.F. 20-21). Dr. Englehart believes that if a person does not acknowledge their condition they cannot seek treatment (Sup.L.F. 21). He said that Mr. Schottel believes that the doctor's diagnosis of pedophilia is incorrect (Sup.L.F. 22). Dr. Englehart suggested that this could allow Mr. Schottel to tell himself that he does not need to watch his urges toward under aged females if he is released (Sup.L.F. 23). The doctor admitted that Mr. Schottel has acknowledged having pedophilia, but vacillates back and forth depending on his mood (Sup.L.F. 23).

Dr. Englehart said that Mr. Schottel continues to focus on his release, not on self-improvement (Sup.L.F. 26). Mr. Schottel has become confrontational, and has built up a conspiracy of lies against him (Sup.L.F. 27-31). He has threatened Dr. Englehart and Dr. Bellew-Smith with lawsuits for putting lies in his records (Sup.L.F. 29-30). Dr. Englehart said this conspiracy theory is affecting Mr. Schottel's progress through treatment because he focuses on the conspiracy rather than on the treatment he needs (Sup.L.F. 32).

Dr. Englehart noted the goals of the treatment currently being provided to Mr. Schottel at MSOTC, and suggested that he is not meeting them (Sup.L.F. 37-38). He said Mr. Schottel does not recognize authority, the first goal, because he

keeps violating the rules (Sup.L.F. 37). He said Mr. Schottel has failed to meet the second goal, taking responsibility for his actions, because when he gets caught breaking rules he will not admit he is wrong and accept consequences (Sup.L.F. 37). Dr. Englehart said that Mr. Schottel has failed to meet the third goal of the current treatment provided to him, recognition of the value of sex offender treatment, because the doctor's impression is that Mr. Schottel thinks the treatment is a joke (Sup.L.F. 38). Mr. Schottel thinks he is cured, but Dr. Englehart believes that no pedophile is ever "cured" (Sup.L.F. 38).

Dr. Englehart indicated that as the staff views its treatment program, the minimum amount of time to complete all of the treatment is four and half to five years (Sup.L.F. 49). However, they assign an "optimal" number of years for completion of the treatment at eight years, which is assumed to be the amount of time it will take an average person to complete the program (Sup.L.F. 49). While Dr. Englehart suggested that individual performance may require less than eight years, everyone at MSOTC is given the eight year prognosis (Sup.L.F. 50-53). This average and universal assignment of it to all the patients was the result of a recent "recalculation" of the program at the facility (Sup.L.F. 49).

Dr. Englehart acknowledged that in "some ways" there had been a "positive change" in Mr. Schottel (Sup.L.F. 40). But he added that some of Mr.

Schottel's negative feelings about the treatment have become greater as he has added more things to his conspiracy theory (Sup.L.F. 40).

Dr. Bellew-Smith is the director of MSOTC and she developed the program (Sup.L.F. 62). The program has four phases (Sup.L.F. 71). Only one person has ever made it to phase two, and Dr. Bellew-Smith describes him as "marginal" (Sup.L.F. 125). No one has "progessed" to the third or fourth phase, and Dr. Bellew-Smith will write the specific treatment plan for those phases when someone is ready to move up to them (Sup.L.F. 71).

Like everyone else in MSOTC, Mr. Schottel is still in phase one (Sup.L.F. 74). Dr. Bellew-Smith described the goals of phase one are to address attitudes and denial (Sup.L.F. 75). In this phase they try to get the person where he will recognize authority and follow rules (Sup.L.F. 75). They try to get the person to accept responsibility for current actions (Sup.L.F. 75). And finally, they try to get the person to recognize the personal value of sex offender treatment (Sup.L.F. 75). Dr. Bellew-Smith summarized the goals of phase one: "It's very much like readiness for treatment." (Sup.L.F. 75). To move to phase two, the person must meet these goals for one year (Sup.L.F. 75).[2]

[2] Dr. Englehart said the phase one goals could be achieved in six months (Sup.L.F. 48).

Dr. Bellew-Smith expressed her opinion why Mr. Schottel was not ready for release. She said one of the rules of the world we live by is that you cannot have sex with children, and Mr. Schottel has violated that rule over his lifetime (Sup.L.F. 77-78). "So he really did not recognize the authority and follow rules in the big world because that is a big world rule." (Sup.L.F. 78). Mr. Schottel has not broken many rules at MSOTC but according to Dr. Bellew-Smith he repeatedly breaks a big one, a rule associated with his sexual offending: he will not recognize authority over him (Sup.L.F. 78). According to Dr. Bellew-Smith, "Working on that here in the tiny microcosm of this place, when he can do it here, then we're getting him ready to do it in the much bigger world. But he has to be able to do it little before he can do it big." (Sup.L.F. 78). Her example was Mr. Schottel's apparent unauthorized transfer of a cup of coffee to another patient at the facility (Sup.L.F. 79). The rule against unauthorized transfer is put in place to prevent one patient from doing a favor for another, a favor which the patient will expect to be returned (Sup.L.F. 79). She equated this with Mr. Schottel's grooming of his victims (Sup.L.F. 79-80). Dr. Bellew-Smith admitted that she did not know if Mr. Schottel's failure to recognize authority is connected in any way to his past grooming behavior other than "its just a fly in your face, I'll do as I please." (Sup.L.F. 81).

Dr. Bellew-Smith said that Mr. Schottel will not accept responsibility for his current conduct, such as the unauthorized exchange of coffee (Sup.L.F. 83-84). She again described this as a little thing he had to accept, "and then we'll work on getting him to do bigger things later." (Sup.L.F. 84).

Dr. Bellew-Smith noted an assignment given to Mr. Schottel by Dr. Englehart to write a paper on pedophilia when Mr. Schottel objected to that diagnosis (Sup.L.F. 102). Dr. Bellew-Smith interpreted Mr. Schottel's refusal to do the assignment as an unwillingness "to look at and grapple with the issues … of pedophilia." (Sup.L.F. 103). From this she concluded that if Mr. Schottel has pedophilia but will not accept it, then he "is one of the highest risk people that we have." (Sup.L.F. 103).

Dr. Bellew-Smith talked at length about Mr. Schottel undercutting the authority of treatment providers and his accusations that others are lying about him (Sup.L.F. 91-96). She said this showed his poor progress "because he's never getting treatment, which is why he is still in phase one." (Sup.L.F. 96).

The June 2003 annual examination submitted to the probate court essentially repeated the testimony of Dr. Englehart and Dr. Bellew-Smith in their depositions (Sup.L.F. 2-12). The report indicated that Mr. Schottel has completed the following classes: Behavior Techniques, Emotional Wellbeing, Conflict

Resolution, Sex Education, Communication, Self-Esteem, Stress Management, Responsibility Taking, and Independent Study (Sup.L.F. 7). Although it was prepared by Dr. Linda Meade, all annual reports are reviewed, edited, and signed by Dr. Bellew-Smith and Dr. Englehart (Sup.L.F. 10, 65). They are also reviewed by the Department of Mental Health's legal counsel (Sup.L.F. 65).

POINTS RELIED ON

I.

Section 632.498 is unconstitutional under the Due Process Clauses of Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the procedure for release provided in the statute imposes a higher, and potentially impossible, quantum of evidence upon a person committed as a sexually violent predator to seek release from involuntary commitment - probable cause to believe that the committed person "will not engage in acts of sexual violence if discharged" - than is imposed upon the State to confine the person involuntarily, or to continue his confinement –that the person is more likely than not to engage in acts of sexual violence if not confined, or is likely to engage in acts of sexual violence if discharged. Because Section 632.498 is not severable from the remainder of the SVP law, Sections 632.480 to 632.510 are also unconstitutionally invalid because they subject the release of an involuntarily committed person solely to the will of the State.

In re the Matter of the Care and Treatment of Norton, No. SC 85538 ((Mo. banc January 27, 2004);

Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 489 (1996);

State v. Wanta, 592 N.W.2d 645 (Wis. App., 1999);

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Sections 632.480, .486, .489, .492, .495, .498, .501, RSMo 2000.

II.

The probate court erred in denying Mr. Schottel's petition for release pursuant to Section 632.498 without a trial on the merits, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Mr. Schottel made a *prima facie* showing in his petition that probable cause exists to believe that his mental abnormality has so changed that he is safe to be at large, sufficient to warrant a trial on the merits of his petition for release from involuntary confinement.

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997);

In the Matter of the Care and Treatment of Amonette, 98 S.W.3d 593 (Mo. App., E.D. 2003);

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976);

Detention of Petersen, 42 P.3d 952 (Wash. Sup.Ct. 2002);

United States Constitution, Fourth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.498, RSMo 2000

ARGUMENT

I.

Section 632.498 is unconstitutional under the Due Process Clauses of Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the procedure for release provided in the statute imposes a higher, and potentially impossible, quantum of evidence upon a person committed as a sexually violent predator to seek release from involuntary commitment - probable cause to believe that the committed person "will not engage in acts of sexual violence if discharged" - than is imposed upon the State to confine the person involuntarily, or to continue his confinement –that the person is more likely than not to engage in acts of sexual violence if not confined, or is likely to engage in acts of sexual violence if discharged. Because Section 632.498 is not severable from the remainder of the SVP law, Sections 632.480 to 632.510 are also unconstitutionally invalid because they subject the release of an involuntarily committed person solely to the will of the State.

A sexually violent predator is "any person who suffers 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 2000.[3] When it appears that a person may be a sexually violent predator, the attorney general may file a petition in the probate court alleging that the person is a sexually violent predator. Section 632.486. The probate court must determine whether probable cause exists to believe that the person is a sexually violent predator. Section 632.489. If the court finds that such probable cause exists, the case proceeds to a trial to determine on the merits whether the person is a sexually violent predator. Section 632.492. If the jury finds that the person is a sexually violent predator, he is committed to the Department of Mental Health for indefinite, involuntary commitment. Section 632.495. At each step in this process, the determination is whether the person is a sexually violent predator; that is, a person whose mental abnormality makes them more likely than not to engage in predatory acts of sexual violence if not securely confined.

Missouri's SVP law establishes procedures for the person's release from secure confinement. The person's mental status is examined annually. Section 632.498. The report is provided to the court, which reviews the status of the person's commitment. ***Id***. If the director of DMH does not consent to the person's release, the person may nonetheless petition for his release and the

[3] Statutory references will be to RSMo 2000, unless otherwise indicated.

probate court will hold a hearing on the annual review and the petition for release. ***Id***. If the court determines that "probable cause exists to believe that the person's mental abnormality has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, the matter proceeds to a trial on the merits whether the person should be released from involuntary commitment. ***Id***. If a trial on the merits is granted, the burden of proof is on the State to prove beyond a reasonable doubt that the person's mental abnormality "remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence." ***Id***.

There is a separate procedure in the event that the director of DMH concludes that the person is ready for release and consents to the person's petition for release. "If the director of the department of mental health determines that the person's mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released, the director shall authorize the person to petition the court for release." Section 632.501. In this event the court shall hold a trial on the merits without first determining probable cause. ***Id***. Even so, the State can contest the petition for release, and bears the burden of proving beyond a reasonable doubt that the person's "mental

abnormality remains such that the person is not safe to be at large and that if discharged is likely to commit acts of sexual violence." ***Id.***

Note the variations in the language used in this process. To gain the person's involuntary commitment the State must prove that the person's mental abnormality makes him *more likely than not* to engage in predatory acts of sexual violence. To defeat the person's release from involuntary confinement it is enough for the State to prove that the person's mental abnormality only makes him *likely* to engage in acts of sexual violence. But before the person is even provided a trial on the merits of his petition for release without consent of DMH, the probate court must find probable cause to believe that the person *will not* engage in acts of sexual violence. The State commits the person to involuntary confinement upon the middle quantum of evidence among the statutes: more likely than not to re-offend. It continues the person's involuntary confinement on the lowest quantum of evidence: likely to re-offend. But a trial on the merits of the person's release under Section 632.498 is provided only on the highest quantum of evidence: will not reoffend. As directed by the statute, this was the standard applied by the probate court to deny Mr. Schottel a hearing on the merits of his petition for release: "The court finds no probable cause that the respondent's mental abnormality has so changed that he is safe to be at large and

will not engage in acts of sexual violence if discharged…." (L.F. 28) (emphasis added).

Mr. Schottel made an oral motion at the beginning of the probable cause hearing to declare Section 632.498 unconstitutional because the literal language of the statute requires him to demonstrate that he "will not engage in predatory acts of sexual violence if discharged" in order to proceed to a jury trial where his release or continued commitment would be determined (Tr. 12). Mr. Schottel pointed out that this is a higher quantum of evidence than that upon which the State can secure his continued confinement at a jury trial (Tr. 12). Under the statute, the State need only prove at trial that Mr. Schottel is "likely to engage in predatory acts of sexual violence if released." (Tr. 14). Mr. Schottel also argued that not only is this quantum of evidence higher than that imposed on the State, but that it is essentially an impossible standard to meet (Tr. 12-13). He argued that no psychiatrist or psychologist would say that someone would *never* commit a certain act in the future (Tr. 13). The probate court denied Mr. Schottel's motion to declare Section 632.489 unconstitutional (Tr. 40).

Analysis of Mr. Schottel's constitutional challenge must begin by recognizing that civil proceedings for involuntary commitment impinge on the fundamental right of liberty protected by the due process clause from arbitrary

governmental action. ***In re Salcedo***, 34 S.W.3d 862, 867 (Mo. App., S.D. 2001); ***In the Matter of the Care and Treatment of Norton***, No. SC 85538 (Mo. banc January 27, 2004) Slip Op. 4. "In our society liberty is the norm…." ***U.S. v. Salerno***, 481 U.S. 744, 746, 107 S.Ct. 2095, 2105, 95 L.Ed.2d 697 (1987). The requirements of procedural due process apply to the deprivation of the interests encompassed by the constitutional protection of liberty. ***Laubinger v. Laubinger***, 5 S.W.3d 166, 174 (Mo. App., W.D. 1999). In determining what process is due, three competing interests must be balanced: the private interest that will be affected by the official action; the risk of an erroneous deprivation of this interest through the process used; and the government's interest involved. ***Id***. at 175. A two-step analysis is required to determine whether the appellant is denied his constitutional right to procedural due process. ***Id***. at 174. The first step is to determine whether the appellant was deprived of a constitutionally protected interest. ***Id***. The provisions of Section 632.498 take effect when the committed person has lost his liberty, and impacts the person's ability to reclaim that constitutional right. Mr. Schottel's loss of liberty can be continued under the provisions of the statute. The second step in the analysis is to determine whether the procedures are sufficient to satisfy constitutional due process requirements. ***Id***. As set out below, the provisions of Section 632.498 are insufficient to satisfy due process.

Section 632.498 violates due process by demanding a greater quantum of evidence to gain access to a trial for release than is required at a trial to initially confine or continue to confine the person involuntarily. Mr. Schottel supported this argument in the probate court with the decision of the United States Supreme Court in ***Cooper v. Oklahoma***, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996). ***Cooper*** involved the question of a defendant's competency to stand trial. 116 S.Ct. at 1374-1375. The Oklahoma law presumes a person is competent to stand trial unless he proves his incompetency by clear and convincing evidence. ***Id***. The Court interpreted prior cases to require a determination whether the defendant was "more likely than not" incompetent. ***Id***. at 1378. The "clear and convincing" standard was described as a "heightened standard." ***Id***. at 1379. The United States Supreme Court held that the near uniform application of the lower standard more protective of the defendant's rights than the heightened standard required by Oklahoma offended a "deeply rooted" principle of justice. ***Id***. at 1380. In ***Cooper*** that deeply rooted principle was a defendant's right to be competent at trial.

Mr. Schottel is attempting to access a deeply rooted principle of justice, his constitutional right to liberty. The conclusions reached in ***Cooper*** are applicable to the heightened quantum of evidence required for Mr. Schottel to gain access to

a trial for his release from involuntary confinement. The Supreme Court in ***Cooper*** noted that the "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." ***Id***. at 1381. (citation omitted). The Court held that requiring the defendant to prove his incompetency by the heightened standard did not "jealously guard" an incompetent person's right not to stand trial, but rather imposed "a significant risk of an erroneous determination that the defendant is competent." ***Id***. By the same token, requiring Mr. Schottel to demonstrate that he *will not* re-offend does not jealously guard his constitutional right to liberty, but rather imposes a significant risk of an erroneous determination that he is remains a sexually violent predator, a person only *more likely than not* to re-offend. The Wisconsin Court of Appeals explained ***Cooper*** in ***State v. Wanta***, 592 N.W.2d 645 (Wisc. App., 1999):

> In *Cooper*, the Supreme Court held that a State may not require a defendant who claims to be incompetent to prove his incompetency by clear and convincing evidence because to do so would permit a State to "proceed with a criminal trial after the defendant has demonstrated that he is more likely than not incompetent."

Id. at 695. The Sixth Circuit Court of Appeals noted in ***United States v. Gatewood***, 230 F.3d 186, 191, (6th Cir. 2000), that the United States Supreme Court in ***Cooper*** required a procedure guaranteeing protection of a constitutional right. It is clear from these cases that the State of Missouri may not demand evidence that Mr. Schottel *will not* re-offend before permitting him a trial to regain his liberty when it requires of itself only that Mr. Schottel is *more likely than not* to re-offend to confine him, and only that he is *likely* to re-offend to keep him confined.

Mr. Schottel correctly suggested to the probate court below that not only does Section 632.498 require a higher quantum of evidence for him to gain access to a trial for his liberty, but it imposes a standard that is virtually impossible to meet. According to the statute and the probate judge's ruling, Mr. Schottel and anyone else committed as a sexually violent predator is given a trial on the merits only if probable cause exists to believe "that the person's mental abnormality has so changed that he is safe to be at large *and will not engage in acts of sexual violence if discharged*…." The potential for involuntary civil commitment under SVP laws to be a "life sentence" has been a concern for the courts called upon to review the laws. Four of the five justices of the United States Supreme Court who upheld the statute in ***Kansas v. Hendricks***, 521 U.S. 346, 117 S.Ct.

2072, 138 L.Ed.2d 501 (1997), concluded that the statute was only "*potentially* indefinite" because:

> The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. §59-29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. *Ibid.*

117 S.Ct. at 2083. Justice Kennedy, while joining the majority, questioned this conclusion; "Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life." 117 S.Ct. at 2087. Justice Kennedy cautioned that, "psychiatrists or other professionals engaged in treating pedophilia may be reluctant to find measurable success in treatment even after a long period and *may be unable to predict that no serious danger will come from release of the detainee*." ***Id***. (emphasis added).

Yet, to be granted a release hearing under the Missouri law, a psychiatrist or other professional must not only be willing to, but must in fact predict that no serious danger will come from the person's discharge and that "the person is safe to be at large and will not engage in acts of sexual violence if discharged." Section 632.498. Not only is such a prediction unlikely, if even possible, but it is

in complete contrast to the basis of the opinion of the other four Justices in the majority. The ***Hendricks*** majority held that, "If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee *satisfies the same standards as required for the initial confinement*." 117 S.Ct. at 2083 (emphasis added). Under Section 632.498 the probate court is not determining whether probable cause exists to believe that Mr. Schottel "satisfies the same standards as required for the initial confinement," that is, whether he is more likely than not to re-offend. Mr. Schottel is not even allowed a release hearing unless the evidence meets the higher standard of probable cause to believe that he *will not* re-offend. And even if Mr. Schottel can meet this higher burden to gain a release hearing, he is kept confined if he is only *likely* to re-offend, a lower standard than that required for his initial confinement.

Judge Wolff expressed his concerns regarding the commitment and release process established by Missouri's SVP law in his concurring opinion in ***In the Matter of the Care and Treatment of Norton.*** He noted, "The statutory scheme is built upon an unrealistic premise that there are 'mental abnormalities' that are reliably diagnosable and that human behavior can be predicted. However, most psychiatrists and psychologists say they can never reliably predict recidivism

among sex offenders…." Slip Op. at 5. Judge Wolff quoted from ***Hendricks*** that "[p]sychiatrists or other professionals engaged in treating pedophilia may be reluctant to find measurable success in treatment even after a long period and may be unable to predict that no serious danger will come from the release of the detainee." Slip Op. at 7.

The concern of Justice Kennedy and Judge Wolff is well founded. Dr. Bellew-Smith testified in her deposition that she has never recommended the release of an SVP (Sup.L.F. 124). She said that she once "refused to testify" regarding one person's readiness for release from confinement (Sup.L.F. 124). She claimed that she thought the person was ready for release, but since his commitment had been reversed on appeal he would be released without her testimony anyway if the State could find no other expert to testify that the person should be committed (Sup.L.F. 124, 133). But her testimony also reveals a much more complicated set of circumstances relevant to whether a psychologist can or will "predict that no serious danger will come from the release of the detainee." The State "hinted" that it wanted Dr. Bellew-Smith to testify in the case but she told the attorney general that he should not call her as a witness because she would have to testify that the person did not need to be committed (Sup.L.F. 132). But at the same time, she testified that she would also have told the

person's attorney if asked not to call her as a witness, to "leave me out of it." (Sup.L.F. 134-135). While her clinical judgment was that the person "maybe possibly" was safe to be at large, she did not want to testify because she was not sure one way or the other (Sup.L.F. 134-135, 137). Dr. Bellew-Smith said that recommending that someone does not need to be committed is "a really, really scary thing." (Sup.L.F. 134). She explained to counsel for the parties that whether a person is safe to be at large "may be very clear cut to you," it is "not always clear cut" to psychologists or psychiatrists (Sup.L.F. 135). So in at least one instance Dr. Bellew-Smith thought the person might not need to be committed, but only that he "might possibly" be safe to be at large, and she successfully avoided being called to testify by either party because she might say the person did not need to be committed but she also was not sure that she could testify that he was safe to be at large. Dr. Bellew-Smith is the director of the MSOTC program, and is probably the voice of the director of DMH for purposes of Section 632.498. It seems that Mr. Schottel and anyone else involuntarily confined by the State under the SVP law will find it very difficult indeed to get the director of DMH to consent that he is safe to be at large and will not re-offend. It is probably no easier for Mr. Schottel to find any other psychologist or psychiatrist to do so. And without such testimony, he will never be given a trial

at which he can attempt to persuade a jury to return his liberty. He may well be serving a life sentence.

Section 632.489 requires a nearly impossible quantum of evidence before Mr. Schottel is given the opportunity to have a court or jury to return his liberty, a standard significantly more burdensome than that borne by the State to initially confine him or to continue his confinement. This violates due process of law and renders the statute unconstitutional.

This then raises a dilemma, what is the appropriate relief? Simply invalidating Section 632.498 leaves Mr. Schottel and everyone else committed as an SVP at the mercy of MSOTC to ever seek release. Section 632.498 permits Mr. Schottel to petition for release without the consent of DMH. This is his means to challenge the opinions of those currently exercising control over him. It is the only way for him to challenge the opinions of state agents about the continuing need for his secure confinement. Without this section he has no way to protect his liberty interest against deprivation by the state. The only other release procedure allowed by the SVP law is the filing of a petition for release with the consent of the director of DMH under Section 632.501. This leaves the return of his liberty by the State entirely in the hands of agents of the State, the very government which deprived him of his liberty in the first place. For this reason,

invalidating Section 632.498 does not protect Mr. Schottel's constitutional rights; it would only exchange an unconstitutionally burdensome, and perhaps inaccessible, protection for no protection at all. Nor can this Court "interpret" Section 632.498 to require probable cause to believe that a committed person is not more likely than not to re-offend without re-writing the language of the statute. ***State v. Rowe,*** 63 S.W.3d 647, 650 (Mo. banc 2002). Because Section 632.498 is not severable from the remainder of the SVP law without further depriving Mr. Schottel and all persons committed under the law of their constitutional rights, the entire SVP law, Sections 632.480 to 632.510, must be held invalid as a deprivation of the fundamental right to liberty without due process of law. ***Akin v. Director of Revenue***, 934 S.W.2d 295, 298 (Mo. banc 1996). Mr. Schottel must be released from this unconstitutional confinement.

II.

The probate court erred in denying Mr. Schottel's petition for release pursuant to Section 632.498 without a trial on the merits, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Mr. Schottel made a *prima facie* showing in his petition that probable cause exists to believe that his mental abnormality has so changed that he is safe to be at large, sufficient to warrant a trial on the merits of his petition for release from involuntary confinement.

Mr. Schottel understands that at first blush this Point contradicts the arguments made in Point I, above. The argument below is offered in the alternative to Point I, and rests on a slightly different basis. The difficulty of securing testimony that Mr. Schottel *will not* re-offend is borne out in the evidence produced through Dr. Delany Dean and Dr. Luis Rosell. Dr. Dean indicated in her report that "Mr. Schottel's mental abnormality has changed such that, if released, he is unlikely to engage in acts of sexual violence." (61683L.F. 55). Dr. Rosell testified that Mr. Schottel has changed since his initial commitment from all the courses he has completed and treatment he had been given, and that his risk to re-offend is lower than when he was initially

committed (Sup.L.F. 169, 176). Dr. Rosell believed that Mr. Schottel no longer has serious difficulty controlling his behavior (L.F. 176). Mr. Schottel believes that this testimony establishes the probable cause necessary for a trial on the merits of his release petition in accordance with the requirements of the United States Supreme Court, even if not under Section 632.498. The Supreme Court held in ***Kansas v. Hendricks***, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997): "If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee *satisfies the same standards as required for the initial confinement*." 117 S.Ct. at 2083 (emphasis added). Mr. Schottel suggests that his evidence establishes probable cause to believe that he is no longer subject to involuntary civil commitment because he no longer meets the standard for his initial confinement, that he is not more likely than not to re-offend. It is upon this standard that he makes the following argument.

Section 632.498, RSMo Cum. Supp. 2002, requires the treatment facility to examine a committed person's current mental status once a year. The results of that examination are provided to the probate court for annual review. ***Id***. The statute permits the person to petition the court for release without consent of the director of DMH. ***Id***. Section 632.498 provides the person a hearing to present

probable cause to believe that his mental abnormality has so changed that he is safe to be at large. If the court finds probable cause, it sets another hearing, before a jury if requested, to determine whether the person should ultimately be released. ***Id***. This takes the form of a trial, like that by which the person was initially committed. ***Id***.

An annual review of Mr. Schottel's mental condition was filed on June 25, 2002 (L.F. 5). Mr. Schottel filed a petition for release on October 31, 2002 (L.F.9-10). He asserted that sufficient evidence existed to demonstrate probable cause that his mental abnormality had so changed that he was safe to be at large (L.F. 9). He supported this assertion with the conclusions reached by Dr. Delaney Dean in January and October of 2002 that Mr. Schottel's mental abnormality had so changed that, if released, he is unlikely to engage in sexual violence (L.F. 10). Mr. Schottel requested a probable cause hearing to present this evidence (L.F. 10).

The probate court denied both of the State's requests to summarily deny Mr. Schottel's petition for release without a probable cause hearing (Tr. 5-11). The court held a probable cause hearing at which it took evidence by exhibits and depositions, and heard arguments by the parties (Tr. 11, 15-37). The day

after the probable cause hearing the probate court denied Mr. Schottel's petition for release by an order reading:

> The court finds no probable cause that the respondent's mental abnormality has so changed that he is safe to be at large and will not engage in acts of sexual violence if discharged, and therefore, does not set a hearing on respondent's amended motion for release, and hereby denies the same.

(L.F. 28).

At a probable cause hearing, the trial judge is the sole judge of the sufficiency of the evidence to determine whether probable cause exists. ***In the Matter of the Care and Treatment of Amonette***, 98 S.W.3d 593, 599 (Mo. App., E.D. 2003). The standard of review in a court-tried civil case requires the appellate court to reverse the judgment if there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976).

Amonette, ***supra***., involved a determination under Section 632.489 of whether probable cause existed to believe that the person is a sexually violent predator. 98 S.W.3d at 599-600. Probable cause is required by this statute before

a trial is held pursuant to Section 632.495 to determine whether the person has a mental abnormality causing serious difficulty controlling behavior such that the person is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Mr. Schottel has found no Missouri case involving a ruling on a petition for release under Section 632.498. But ***Amonette*** clearly demonstrates that sufficiency for probable cause is substantially lower than sufficiency for involuntary commitment. The Eastern District held that probable cause was demonstrated by an affidavit reflecting the unanimous vote of the prosecutor's review committee that Amonette met the definition of a sexually violent predator, proof of the conviction for sexual assault, and the testimony of a clinical social worker that did not include a diagnosis of a mental abnormality. 98 S.W.3d 600. This would clearly not suffice to justify involuntary confinement at a commitment trial requiring proof beyond a reasonable doubt. At trial the State called on a juvenile officer to testify regarding juvenile court adjudications against Amonette, a psychiatrist to testify about treatment Amonette had been given, a police officer who testified about recent overt acts committed by Amonette, and Dr. Richard Scott, a DMH psychologist who testified that Amonette had a mental abnormality and to a reasonable degree of psychological

certainty met the definition of a sexually violent predator under the statutes. ***Id***. at 596-597.

Mr. Schottel suggests that the appropriate standard for reviewing the sufficiency of a probable cause finding in a release proceeding is that applied by the Supreme Court of the State of Washington.[4] ***Detention of Petersen***, 42 P.3d 952 (Wash.Sup.Ct. 2002), involved a determination of the procedures to be followed in probable cause hearings as part of an annual review. ***Id***. at 954-955. The Washington statutes permit as part of the annual review a show cause hearing to determine if facts exist for a separate hearing to determine probable cause to believe that the person's mental abnormality has changed. ***Id***. at 957. The trial court concluded that Petersen had not shown probable cause to believe that he was not a risk if released, and denied the motion for release. ***Id***. 955-956. The Washington Supreme Court identified the question on appeal as whether facts exist to warrant a hearing on the merits; and identified the applicable standard of proof as probable cause. ***Id***. at 957.

Probable cause exists if the proposition to be proven has been *prima facie* shown. ***Id***. The Washington Court concluded that there are two possible statutory ways to determine if there is probable cause to proceed to an

[4] Mr. Schottel made the same suggestion to the probate court (Tr. 15, 35).

evidentiary hearing. ***Id***. Probable cause may be found from a deficiency in the State's ability to present a *prima facie* case to justify continued confinement. ***Id***. at 958. The second way to establish probable cause is through the petitioner's proof. ***Id***. The petitioner meets this burden by presenting evidence, which if believed, would show that his mental abnormality no longer exists, or if it does, that it would not likely cause the person to engage in predatory acts of sexual violence if released. ***Id***. If the petitioner makes either showing, an evidentiary hearing is mandated. ***Id***. The Washington Supreme Court concluded that the applicable standard of review on appeal was a *de novo* review of the trial court's legal conclusion of whether the evidence met the probable cause standard. ***Id***.

Mr. Schottel believes that this is the correct standard under which to review his claim. Section 632.498 permits the committed person to file a petition for release, and if he does the court must hold a hearing to determine whether there is probable cause to believe that the mental abnormality has so changed that the person is safe to be at large. If the court resolves that issue in the person's favor, another hearing is held, before a jury if requested, to determine the issue of the person's release. ***Id***. This presents a review similar to that in ***Petersen***, whether Mr. Schottel made a *prima facie* showing that his evidence would demonstrate probable cause to believe that his risk to reoffend has so

changed that he was safe to be at large. If he did so, an evidentiary hearing on that issue is mandated by the statute.

Section 632.498 provides that "[i]f the court at the hearing determines that probable cause exists to believe that the person's mental abnormality has so changed that the person is safe to be at large and will not engage in predatory acts of sexual violence if discharged, then the court shall set a hearing on the issue." The Court in ***Peterson*** held that a petitioner establishes probable cause by presenting evidence, which if believed, would show that his mental abnormality no longer exists, or if it does, that it would not likely cause the person to engage in predatory acts of sexual violence if released. 42 P.3d at 958. This raises a question: by whom must the evidence be believed, the judge at the probable cause hearing or a jury at a trial for release from confinement if one is held? Mr. Schottel believes that ***Peterson*** also answers this question, and probable cause is established if he presents evidence, which if believed by the jurors at a release trial, would warrant his discharge. The Washington Supreme Court held that the applicable trial standards of proof – clear and convincing, beyond a reasonable doubt, or preponderance of the evidence –are inconsistent with the determination to be made at a probable cause hearing because they seek more than to simply determine whether "facts exist," they seek to weigh and measure

asserted facts against potentially competing ones. 42 P2d at 797. The fact exists that Dr. Dean and Dr. Rosell will testify that Mr. Schottel can be released under the statutes. Whether their testimony is more persuasive than that of Dr. Englehart and Dr. Bellew-Smith is weighing and measuring asserted facts against competing ones. A trial standard of proof has no application to a probable cause hearing, but only to a hearing on the merits where the evidence may be presented in full and weighed, and disputes in the evidence may be resolved by the fact finder. "Courts do not 'weigh evidence' to determine probable cause." ***Id***. at 798.

In light of Dr. Dean's and Dr. Rosell's testimony, the probate court could not have found that no facts exist to support Mr. Schottel's petition for release. At best, the probate court could have found their testimony less persuasive than that of Dr. Englehart and Dr. Bellew-Smith. This is not a determination of whether facts exist. This is a weighing or measurement of established facts against competing ones. This is a determination to be made at a trial on the merits, not at a probable cause hearing.

Under the standard for determining probable cause set out in ***Petersen*** the State made a *prima facie* showing that it could meet its burden at an evidentiary hearing that Mr. Schottel's mental abnormality had not changed by offering the

2003 annual review report and opinions of Dr. Englehart and Dr. Bellew-Smith. But Mr. Schottel went on to meet ***Petersen's*** second method of showing probable cause. He supported his petition with Dr. Dean's report indicating her opinion that Mr. Schottel's condition had changed so that he was safe to be at large. Mr. Schottel advised the probate court that Dr. Dean had reviewed his case in October of 2002, and her opinions remained the same (L.F. 10). Dr. Rosell testified to his belief from his discussions with Mr. Schottel, his review of the progress notes, and all the courses Mr. Schottel had completed that he "has made a change in this time he's been in treatment." (Sup.L.F. 170). Dr. Rosell believed that Mr. Schottel was not more likely than not to re-offend, and that his risk is now lower than when he stipulated to commitment because he is older, and has completed a substantial amount of treatment (Sup.L.F. 185-186). This situation looks like a typical trial. The State has presented two expert witnesses who testified that Mr. Schottel has not changed and is not safe for release and Mr. Schottel presented two experts who testified that he has changed and is safe for release. Whose opinion is ultimately correct is an issue to be resolved by a jury. The testimony of Dr. Dean and Dr. Rosell made a *prima facie* showing to establish probable cause to believe that Mr. Schottel's mental abnormality has so changed

that he is safe to be released sufficient to warrant a trial to determine whether or not to release him from involuntary commitment.

Because the trial court erred in finding no probable cause to believe that Mr. Schottel's mental condition has so changed that he is safe to be released, the judgment of the probate court must be reversed and the cause remanded for a trial on the merits to determine whether he should be released from involuntary commitment.

CONCLUSION

Because Section 632.498 is unconstitutional and not severable from the remainder of the SVP law without further depriving Mr. Schottel and all persons committed under the law of their constitutional rights, the entire SVP law, Sections 632.480 to 632.510, must be held invalid as a deprivation of the fundamental right to liberty without due process of law as set out in Point I, and Mr. Schottel must be released from this unconstitutional confinement. Because the trial court erred in finding no probable cause to believe that Mr. Schottel's mental condition has so changed that he is safe to be released, as set out in Point II, the judgment of the probate court must be reversed and the cause remanded for a trial on the merits to determine whether he should be released from involuntary commitment.

Respectfully submitted,

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10,658 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in January, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 26th day of February, 2004, to James R. Layton, State Solicitor, Office of Attorney General, 221 W. High Street, Suite 127, Jefferson City, Missouri 65101.

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Emmett D. Queener

APPENDIX

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Various provisions seek to ensure that any commitment ordered under section 6604 does not continue in the event the SVP's condition materially improves. To this end, annual mental examinations are required. The SVP may request appointment of an expert to perform the examination, and relevant records must be made available for this purpose. (§ 6605, subd. (a).) Unless the committed person "affirmatively waive[s]" the right to a hearing, the court must annually set a "show cause hearing" to determine whether there is "probable cause" to believe that the person's diagnosed mental disorder has "so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged." (§ 6605, subds. (b) & (c).) [FN12] If the court so finds, the SVP is entitled to a full hearing with the same basic rights afforded at the ***1148** initial commitment proceeding. (*Id.,* subd. (d).) "The burden of proof at the [full] hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged." (*Ibid.*) A favorable verdict entitles the SVP to unconditional release and discharge. (*Id.,* subd. (e).)

FN12. "The committed person shall have the right to be present and to have an attorney represent him or her at the show cause hearing." (§ 6605, subd. (b).)

In addition, at any time the Department of Mental Health has reason to believe that a person committed under the Act "is no longer a sexually violent predator," judicial review of the commitment must be sought. (§ 6605, subd. (f).) If the court accepts this recommendation, the person is entitled to unconditional release and discharge.
There also are two ways for an SVP to be conditionally released from confinement. First, the Director of Mental Health may file with the court "a report and recommendation for conditional release" where it appears that the SVP's diagnosed mental disorder has "so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community." (§ 6607, subd. (a).)
Second, the SVP may "petition[ ] the court for conditional release and subsequent unconditional discharge without the recommendation or concurrence of the Director of Mental Health." (§ 6608, subd. (a).) [FN13] Any hearing held under this section is similar in purpose to the conditional release hearing held at the request of the Director of Mental Health under section 6607. (§ 6608, subds. (a) & (d).) However, "[n]o hearing upon the petition shall be held until the person who is committed has been under commitment for confinement and care in a facility designated by the Director of Mental Health for not less than one year from the date of the order of commitment." (*Id.,* subd. (c).) [FN14]