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 REPLY BRIEF

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TABLE OF AUTHORITIES

***STATUTES*:**

JURISDICTIONAL STATEMENT

Mr. Schottel incorporates the jurisdictional statement set out on page 5 of his initial brief.

STATEMENT OF FACTS

Mr. Schottel incorporates the Statement of Facts set out in pages 6 through 21 of his initial brief.

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 632.501 are also unconstitutionally invalid because they subject the release of an involuntarily committed person solely to the will of the State.

Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996);

In re Detention of Bailey, 740 N.E.2d 1146 (Ill.App., 2000);

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, .492, .498, 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.

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

People v. Hardcare, 90 Cal.App.4th 1392 (2002);

Care and Treatment of Tucker, 578 S.E.2d 719 (South Carolina Sup.Ct., 2003);

Gaal v. Iowa District Court for Linn County, 2002 WL 31113863 (Iowa App., 2002);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 632.498, .501, 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 632.501 are also unconstitutionally invalid because they subject the release of an involuntarily committed person solely to the will of the State.

Mr. Schottel must first correct a misstatement of fact by the State in its brief. The State claims that Mr. Schottel failed in his obligation to provide the

necessary record on appeal to this Court by not including Dr. Delany Dean's January 2002 report (Resp. Br. 11, 34, 35, 38). This is not true. Mr. Schottel filed a motion in this Court on February 27, 2004, requesting the transfer of the legal file in the prior appeal of the denial of his release from confinement, Case No. WD 61683, to this pending appeal. Mr. Schottel noted in that motion that in this second review hearing the parties referred to the report prepared by Dr. Delany Dean regarding Mr. Schottel's mental status that was initially prepared and provided to the probate court in the first release hearing, that the report is part of the record on appeal submitted to this Court in WD No. 61683, and that Dr. Dean's report is necessary for complete consideration of the evidence before the probate court at the hearing currently on appeal. This Court granted Mr. Schottel's motion to transfer that record to this appeal on March 8, 2004. Dr. Dean's report *is* a part of the record in this appeal and Mr. Schottel has complied with his obligation to provide the complete record in support of his argument.

The State next suggests that Mr. Schottel waived the claim on appeal by not raising it at the earliest opportunity (Resp. Br. 19-21). But the case it acknowledges in its brief demonstrates the error of its suggestion. Raising a constitutional challenge in the motion for new trial was sufficient in ***Call v. Heard***, 925 S.W.2d 840, 847, (Mo. banc 1996), cited by the State, to preserve it for

appellate review. Here, Mr. Schottel raised his constitutional challenge in an oral motion prior to the probable cause hearing (Tr. 12). The State attempts to avoid ***Call v. Heard*** by suggesting that Mr. Schottel's "dilatory tactic" of waiting "until the last possible moment" to raise the claim violates the purpose of the rule to prevent "surprise to the opposing party and to allow the trial court to identify and rule on the issue…." (Resp. Br. 20). Contrary to the State's position, however, is the fact that the issue was presented to the trial court, and the State won the issue without even arguing against it (Tr. 23-37). The State offers no argument here that it was so surprised by the challenge that it could not *adequately* defend against it, nor that the probate court was unable to identify and rule on the issue.

It is true that unlike ***In re Detention of Bailey***, 740 N.E.2d 1146 (Ill.App., 2000), Mr. Schottel did not challenge the release provisions in the appeal from his initial commitment. But unlike Mr. Schottel's case, ***Bailey*** was a challenge to the constitutionality of the entire Illinois sexually violent predator law. While the State complains that Mr. Schottel did not raise this challenge in an appeal from his initial commitment, it later relies in argument in Point II on Mr. Schottel's stipulation to his initial commitment (Resp. Br. 32). Mr. Schottel did not appeal

his initial commitment.[1] The constitutionality of the release procedures was not ripe for review in Mr. Schottel's case until the issue of his release arose.

It is true that Mr. Schottel did not raise this issue in his first petition for release, nor on appeal from the denial of that petition. All he can suggest is that at that time the release procedures were new to counsel and the ramifications of the statutory elements were not fully appreciated. It may well be that even in that proceeding the issue was still not ripe for consideration because the probate court denied even a probable cause hearing (L.F. 84). It is in the probable cause hearing that the necessary element whether he "will not" engage in acts of sexual violence arises. Section 632.498, RSMo 2000. That point was not reached in the first petition for release.

The challenge was made and is fully preserved in the proceeding underlying this pending appeal. Mr. Schottel raised the challenge before the hearing, and following the probable cause hearing the probate court denied a

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[1] Mr. Schottel unsuccessfully sought to withdraw that stipulation along with his first release petition. (61683 L.F. 37-44). The State argued, and this Court agreed, that Mr. Schottel had no legal basis upon which to withdraw his stipulation. ***In the Matter of the Care and Treatment of Schottel***, 121 S.W.3d 337 (Mo. App., W.D. 2003).

trial on the merits because it found "no probable cause to believe 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). The issue has been squarely joined and is ripe for this Court's review.

Turning to the merits of the claim, the State accuses Mr. Schottel of trying to frustrate its good intentions by "creating a constitutional concern where there is none." (Resp. Br. 23). It can only suggest that there is no constitutional concern raised by the differing standards set out in the various statutes by interpreting the different language in the three separate statutes to mean the same thing (Resp. Br. 23-28). A sexually violent predator is defined as someone who suffers from a mental abnormality which makes the person *more likely than not to engage* in predatory acts of sexual violence. Section 632.480(5). This is the standard which must be met to confine the person. Section 632.492. To secure a trial on the merits for release from confinement, the person must show probable cause to believe that his mental abnormality has so changed that he is safe to be at large and *will not engage* in acts of sexual violence if discharged. Section 632.498. If the person can meet this standard, the State can still prevent his release by establishing at a trial that the person's mental abnormality remains such that he is not safe to be at large and if released is *likely to engage* in acts of sexual violence.

Section 632.498. In order to preserve this statutory scheme the State argues, as it must, that the statutory language "more likely than not to engage," "likely to engage," and "will not engage," all mean the same thing. To do so, the State must interpret the language to mean something other than the plain language used by the legislature. The State makes a worthy effort to do so in its brief, but Mr. Schottel believes that its effort is unavailing, and indeed is not supported by the argument it makes. The State points to cases where various meanings of the term "likely" have been provided by the courts (Resp. Br. 25). The State appears to be asking this Court to apply an interpretation of the different statutory language so that all three of them mean the same thing.

"When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." ***State v. Rowe***, 63 S.W.3d 647, 650 (Mo. banc 2002). "Legislative intent can only be derived from the words of the statute itself." ***Id***. "Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." ***Id***. "Court[s], under the guise of discerning legislative intent, cannot rewrite the statute." ***Id***. The three statutes use different language with different meanings. No matter how much rationalization the State can offer for this Court to interpret a single legislative intention, more likely than not to engage in behavior is not the same

as likely to engage in behavior, and neither is the same as will not engage in behavior.

The State interprets the United States Supreme Court decision in ***Kansas v. Hendricks*** 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) as holding that the language of the Missouri statute "will not engage in acts of sexual violence if discharged" means the "same standards as required for the initial commitment." (Resp. Br. 27-28). This interpretation of ***Hendricks*** is unwarranted. The United States Supreme Court considered the release provisions during its evaluation of whether the sexually violent predator act was penal, or criminal, in violation of the *ex post facto* and double jeopardy provisions of the constitution. Not before the Court was whether a more onerous, and perhaps impossible, quantum of evidence was being required of the committed person in seeking release from involuntary civil confinement than was required of the state to confine the person in the first place. The question raised in Mr. Schottel's appeal was not raised, and therefore not decided in ***Hendricks***.

Another significant problem for the State here is that while Mr. Schottel brought the differing standards to the attention of the probate court, the court made its ruling by finding "no probable cause that [Mr. Schottel'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). The probate court neither found that Mr. Schottel failed to establish probable cause to believe that he was not more likely than not to engage in acts of sexual violence if released, nor did it indicate that its judgment could be read in that manner. So the State's position in this appeal requires this Court to not only "interpret" the meaning of the statutes, but also to "interpret" the meaning of the Judge Harman's order in the State's favor as well.

By the plain language used in three separate statutes, the legislature created separate standards for the different proceedings under the SVP law. The most onerous burden is placed upon the individual seeking his release from custody without the agreement of a state agency. This violates due process of law.

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.

The State challenges the standard of review urged by Mr. Schottel's reliance on ***Detention of Peterson***, 42 P.3d 952 (Wash.Sup.Ct., 2002). The Washington Supreme Court held that a person committed as a sexually violent predator establishes the necessary probable cause to warrant a release trial 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***. at 958. The State asserts that ***Peterson*** is a minority position not followed by other states (Resp. Br. 36). In support of this assertion it cites this Court to ***People v. Hardcare***, 90 Cal.App.4th 1392 (2002) (Resp. Br. 36). ***Hardcare*** does not reject the ***Peterson*** standard. The ***Hardcare*** Court noted that "[p]robable cause has a lower threshold of proof than beyond a reasonable doubt or by a preponderance of the evidence, and has been defined as 'a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion' of the facts to be proven." 90 Cal.App.4th at 1400. The Court expressed the question on appeal: "whether the evidentiary record of the show cause hearing disclosed a

rational basis for believing that Hardcare was no longer a danger to others…." ***Id***. at 1402. Hardcare failed to meet this burden because there was no disputed issue of fact and it was uncontested that he remained a danger to others. ***Id***. The only evidence before the trial court was the opinion of a single psychologist who had performed the annual review and opined that Hardcare remained a danger because he refused to participate in treatment. ***Id***. at 1397. The probate court in Mr. Schottel's case was not presented with uncontested evidence of Mr. Schottel's continued danger, and ***Hardcare*** is of no benefit to the State.

The State also cited this Court to ***Care and Treatment of Tucker***, 578 S.E.2d 719 (South Carolina Sup.Ct., 2003) and ***Gaal v. Iowa District Court for Linn County***, 2002 WL 31113863 (Iowa App., 2002) (Resp. Br. 36). The annual report in ***Tucker*** recommended continued confinement, another psychologist opined that Tucker would be safe for release in the future, and a third psychologist opined that Tucker could be released on supervision and medication. 578 S.E.2d at 469-470, 471). But because none of the opinions asserted that Tucker has so changed that he was safe to be at large and unlikely to commit sexually violent acts, the trial court's finding of no probable cause that Tucker met those standards was affirmed. ***Id***. at 471. Likewise in ***Gaal*** the only evidence contrary to continued confinement was that Gaal no longer benefited from treatment in the

commitment unit, but required psychiatric treatment and community supervision. 2002 WL 31113863 at *4. But the Iowa statute, like Missouri's, contemplates only complete discharge without any further treatment or supervision, and the Court held that Gaal thereby failed to meet his burden. ***Id***. But in Mr. Schottel's case, Dr. Dean opined "that Mr. Schottel's mental abnormality has changed such that, if released, he is unlikely to engage in acts of sexual violence," and Dr. Rosell opined that Mr. Schottel "has made a change in this time he's been in treatment," and does not have "serious difficulty controlling his behavior." (61683L.F., Sup.L.F. 169, 176). Thus, unlike the cases cited by the State, Mr. Schottel has presented evidence which meets the statutory standard. ***Tucker*** and ***Gaal*** are of no benefit to the State.

The State engages in exactly what it accuses Mr. Schottel of erroneously doing: "failing to apply the totality of the circumstances approach" instead resorting to a "divide-and-conquer" approach (Resp. Br. 37-38). In doing so, the State selects only evidence supporting its position in this cause, and offers an incomplete and misleading assessment of the evidence before the probate court. The State ignores substantial testimony from Dr. Dean and Dr. Rosell regarding Mr. Schottel's response to treatment, and claims that Dr. Rosell identified the only "change" in Mr. Schottel's situation was his age (Resp. Br. 34). Other

testimony comprising "the totality of the circumstances" ignored by the State includes Dr. Dean's review of Mr. Schottel's progress in treatment, noting 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). Dr. Dean 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. Rosell testified that 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). Mr. Schottel had passed every class but one, and he was taking that class again (Sup.L.F. 164). Dr. Rosell also noted that the notes by treatment staff that Mr. Schottel was doing okay in treatment was contradicted by Dr. Bellew-Smith, on

whose opinion Respondent substantially relies to suggest that Mr. Schottel has failed to meet his burden. Respondent is the party seeking to avoid the totality of the circumstances presented to the probate court. It has sought to avoid consideration of the merits of Mr. Schottel's petition by resorting to technicalities in the probate court and this Court to avoid a merits review (L.F. 13, 23-24, Resp. Br. 11, 34, 35, 38).

Respondent asserts that Mr. Schottel is asking this Court to adopt a standard the essence of which "is that regardless of any evidence the state presents, the person committed has met his probable cause burden if he *presents an expert who mouths the words that the person has changed and is safe to be at large*." (Resp. Br. 42) (emphasis added). That's the pot calling the kettle black. It was the State that called Dr. Amy Phenix, a California psychologist, as a witness to express an opinion so devoid of any scientific support that Angela Coffel was released from commitment in ***In the Matter of the Care and Treatment of Coffel***, 117 S.W.3d 116 (Mo. App., E.D. 2003). It is the State's proclivity to "expert-shop" that led Judge Wolff to note in ***In the Matter of the Care and Treatment of Norton***, 123 S.W.3d 170, 178 (Mo. banc 2003) "If the state psychiatrist cannot confidently state that an offender is a sexually violent predator, the state may shop around for an expert, even from another state." ***Coffel*** and ***Norton*** were

argued before the Missouri Supreme Court on the same day.[2] Even Dr. Bellew-Smith noted in her deposition in this case that she once "refused to testify" in a case that she thought the person was ready for release because the person 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).

[2] The Missouri Supreme Court re-transferred ***Coffel*** to the Eastern District which re-instated its reversal.

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 632.501, 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,

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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 3,936 words, which does not exceed the 7,750 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 April, 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 ___ day of May, 2004, to David Hansen, Assistant Attorney General, P.O. Box 65102-0899, Jefferson City, Missouri 65101.

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Emmett D. Queener