IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD63159

IN THE MATTER OF THE CARE AND TREATMENT OF WILBUR SCHOTTEL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Wilbur Schottel appeals the order from the Clay County Circuit Court, entered after a hearing, that found no probable cause to believe that his mental abnormality had so changed that he is safe to be at large and will not engage in predatory acts of sexual violence if discharged. In his first point, Schottel challenges the sexually violent predator law's release provision, set out in Section 632.498, as violating his right to due process under the United States and Missouri Constitutions (App. Br., 25-38). While jurisdiction would normally rest in the Missouri Supreme Court under Article V, §3 of the Missouri Constitution, this Court has jurisdiction because Schottel's claim is not real and substantial. *Wright v . Dept. of Social Services,* 25 S.W.3d 525, 528 (Mo. App. W.D. 2000). To properly preserve a constitutional challenge for appeal, the general rule is that the issue must be raised at the earliest opportunity. *Call v. Heard,* 925 S.W.2d 840, 847 (Mo. banc 1996). Schottel did not raise in his previous petition for release the claim he raises here, nor did he raise it in his subsequent appeal to this Court. *See Schottel v. State,* 121 S.W.3d 337 (Mo. App. WD 2003). Furthermore, the mere assertion that a statute is unconstitutional does not deprive this Court of jurisdiction. *Wright,* 25 S.W.3d at 528. A claim is merely colorable if it is so obviously unsubstantial and insufficient in either fact or law as to be clearly without merit. *Kansas City Star Co. v. Shields,* 771 S.W.2d 101, 103 (Mo. App. W.D. 1989). As is reflected by Schottel's failure to raise his constitutional challenge earlier, and by his decision to appeal to *this* Court, his claim in point one is neither real nor substantial, and this Court can exercise jurisdiction over his appeal.

STATEMENT OF FACTS

In 1995, at the age of 63, appellant Wilbur Schottel was arrested for molesting five girls between the ages of 8 and 13 years old (Supp. L.F., 4). The victims reported Schottel repeatedly touched them on the breast and genitals, encouraged them to touch his genitals, showed them pornographic films, forced them to smoke cigarettes, offered them alcohol, and threatened them not to tell their parents or authorities (Supp. L.F, 3-4). Schottel did not know why he touched them, other than he couldn't control himself when the opportunity presented itself (Supp. L.F, 4). He admitted he always had a weakness for playing with young girls, and that he sought out young girls who came from bad homes (Supp. L.F, 4). His sexual attraction to young girls is a longstanding one, and included sexual encounters in 1957, 1983, and 1985, in addition to those for which he was arrested in 1995 (Supp. L.F, 4).

As part of a plea bargain, Schottel pleaded guilty on September 14, 1995, to one count of sodomy, and six remaining counts of sodomy were dismissed (Supp. L.F, 4). He was sentenced to 15 years imprisonment (Supp. L.F, 4). Upon his release from prison in 2000, the State filed a petition with the probate division of the of the circuit court alleging he was a sexually violent predator ("SVP") (L.F., 1).

On June 14, 2000, Schottel waived trial on the petition and stipulated that he "is beyond a reasonable doubt a sexually violent predator" as that term is defined in Section 632.480(5) RSMo. 2000. (L.F., 3; *Schottel v. State,* 121 S.W.3d 337, 338 (Mo. App. WD 2003). That same day, the circuit court entered judgment committing Schottel to the Department of Mental

Health for control, care, and treatment until such time as his mental abnormality had so changed that he could be safely released. *Id.*

As required by Section 632.498, the Department filed with the circuit court on June 18, 2001, an annual review of Schottel's status, opposing his release from commitment (L.F. 3). On February 27, 2002, Schottel filed a motion to withdraw his prior stipulation that he is a SVP. On that same day, he also filed a petition seeking his release; he later amended that petition, attaching a report from Dr. Delaney Dean that concluded Schottel's "mental abnormality has changed such that he is unlikely to engage in acts of sexual violence." (*Schottel*, 121 S.W.3d at 339).

On June 10, 2002, the circuit court denied the petition without a probable cause hearing, as well as Schottel's motion to withdraw his stipulation (L.F., 5). On August 8, 2002, Schottel appealed that denial to this Court (L.F., 6). A year having passed since the first annual review, the Department filed with the circuit court another annual review on June 25, 2002, opposing Schottel's release (L.F., 5, 15-22).

With his appeal pending in this Court, Schottel filed another petition for release on October 31, 2002 (L.F., 6, 9-10), alleging that "Dr. Dean reviewed the most recent [2002] annual review and still and again believes that Mr. Schottel would not be likely to engage in acts of sexual violence should he be released" (L.F. 10). The State averred that Schottel failed to "state any facts to support the allegation that [his] mental abnormality has so changed that he is safe to be at large" (L.F., 13).

Pursuant to Section 632.504, the State asked the circuit court to dismiss Schottel's second petition as frivolous, and to summarily deny the petition pursuant to the statute because it was his second request for release without the Department's approval (L.F., 11-14). The circuit court denied those requests (Tr. 5-11, L.F. 6-7).

On June 3, 2003, the Department submitted to the circuit court another annual review opposing Schottel's release (Supp. L.F, 2-11).

A probable cause hearing was held on July 17, 2003 (Tr. 1-42). In lieu of live testimony, the parties stipulated to the admission of depositions from experts who would have been called: Dr. Jay Englehart and Dr. Marty Bellow-Smith on behalf of the State, and Dr. Luis Rosell on behalf of Schottel[1] (Tr. 11, 36; Supp. L.F. 13-57, 58-142, 143-

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[1]In his Statement of Facts, Schottel refers to a written report offered by Dr. Delaney Dean in January, 2002, as part of Schottel's first petition for release (App. Br., 9). However, at the probable cause hearing on his second petition for release, held a year and a half later, Schottel did not offer into evidence that report or a supplemental report addressing the Department's 2002 Annual Review. At the probable cause hearing, the court made reference to depositions of four experts (Tr., 36), but Schottel has not included that report or a deposition of Dr. Dean in the record on appeal in this case. Rule 81.12(a) states the record on appeal "shall contain all of the record, proceedings and evidence necessary to the determination of all questions presented. . . ." As the appellant, it was Schottel's duty to prepare a legal file such that the record holds all the evidence needed for the determination

199). The State entered into evidence the June 3, 2003 Annual Review by the Department (Tr. 36-37, Supp. L.F., 2-12).

In the 2003 Annual Review, the Department's treatment team of Dr. Linda Meade, Dr. Marty Bellew-Smith, and Dr. Jay Englehart, advised the court that Schottel is superficially involved in treatment and there remained critically important issues that make it unsafe for him to be in the community (Supp. L.F, 9). The team identified five things he must do: (1) increase awareness of his tendency to reject rules and norms with which he does not agree that are grooming behaviors he used for sexual offending, (2) explore deeply his life-long attraction to and preference for female children as a form of sexual expression, (3) exhaustively explore thinking errors and strategies to prevent sexual offending, (4) explore his anger, revenge-seeking and overwhelming feelings of entitlement; the same feelings he had for his victims, and (5) develop an individualized and highly specific relapse prevention plan that provides

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of the questions presented to the appellate court. *Boyer v. City of Potosi*, 77 S.W.3d 62, 67 (Mo. App. E.D. 2002). Without citing any authority for the proposition, Schottel asks this Court to take judicial notice of the legal file in another court file (App. Br., 6). If Schottel felt that report was necessary to the determination of the questions presented in this appeal, he had a duty to include it in the legal file he filed in this case. That is true even if the this Court and the parties can find the report by searching their files in another appeal. *See e.g. State v. Weber*, 814 S.W.2d 298 (Mo. App. E.D. 1991).

concrete strategies to avoid re-offending, because his only stated strategy is to tell people he is a sex offender (Supp. L.F. 9-10).

Schottel completed some classes while in treatment, as well as failing one; completion of classes suggests an intellectual ability and academic understanding of the principles presented in each class, but does not mean he has demonstrated application or mastery of class principles outside the class (Supp. L.F. 7).

Schottel is "absolutely not" ready for release, in the opinion of Dr. Marty Bellew-Smith, the clinical director at the Department's Missouri Sex Offender Treatment Center (MSOTC) (Supp. L.F, 62, 69). She explained Schottel's master treatment plan, their short and long term treatment goals for him, and the difficulty Schottel had in treatment (Supp. L.F, 72-76, 79-87). The intent of the early phase of treatment is for Schottel to learn to change behavior by taking responsibility for current actions in every area of life; restrictions, therefore, are great, and the level system is designed to slowly grant privileges to residents (Supp. L.F, 83-88).

The programming for phase one of Schottel's treatment is targeted at his (1) failure to recognize authority and follow rules, (2) failure to take responsibility for acts, demonstrated by lying or other forms of denial, and (3) failure to recognize values or goals of sex offender treatment, as demonstrated by lack of commitment to the treatment program, and his negative behavior or comments to staff and/or peers (2003 Annual Review, Supp. L.F, 7). Completion of this phase essential before further progress can be made in addressing the specific factors involved in his sexual crimes, including personal responsibility for those crimes and the

personal characteristics that led him to commit those crimes (2003 Annual Review, Supp. L.F, 7).

However, Dr. Bellew-Smith explained that Schottel's behavior has been the very opposite of the goals he's supposed to be working on; nothing ever happens to him that is his fault or responsibility (Supp. L.F, 91-92). Both in the 2003 Annual Review and her testimony, specific examples where provided about rules violations that demonstrated this attitude; they included giving property to other residents, disobeying staff orders, possession of photographs of young girls, and possession of a wire 6-feet long (Supp. L.F., 7-8). Dr. Bellew-Smith noted that Schottel forces the treatment team to focus on what other people are "doing to him" so he never has to do the necessary work to get through treatment (Supp. L.F, 90, 96).

To get through phase one of treatment the resident has to demonstrate they can meet their short-term goals for one year; that phase is easy to complete in one year (Supp. L.F., 90). In Dr. Bellew-Smith's opinion, Schottel is intentionally stuck in phase one, seeking revenge for perceived wrongs; the same pattern of behavior that lead to his sexual offending (2003 Annual Review, Supp. L.F, 8, 90)

Dr. Bellew-Smith described Schottel's primary motivation to be the desire to get out, not to do the work (Supp. L.F, 87). She said that she didn't see any positive progress in the last year; she explained you can change a person's ability to manage and control their behavior, to be able to manage to make deviant thoughts go away or avoid acting on them, but in order to do that the individual has to do the work and accept help from other people (Supp. L.F., 104-105).

Dr. Jay Englehart is a psychiatrist and the full-time medical director at the Department's Missouri Sex Offender Treatment Center; and is part of the treatment team for Schottel (Supp. L.F., 17-19). In his opinion, it's an important part of treatment for Schottel to understand and acknowledge he suffers from Pedophilia; although Schottel has acknowledged Dr. Englehart's diagnosis, Schottel believes it is incorrect and that he does not suffer from Pedophilia (Supp. L.F., 22-23). Schottel continues to focus on release rather than self-improvement; he told Dr. Englehart that it didn't matter what he did because he was going to be released (Supp. L.F., 26). Dr. Englehart explained that every time we try to get him to focus on himself and his own problems or discuss our perceptions of him, he changes the conversation back to how he's been wronged by various people over time (Supp. L.F., 32-33).

Schottel doesn't recognize authority, has a difficult time following the rules, and an even more difficult time taking responsibility for his actions, according to Dr. Englehart (Supp. L.F., 36-37). Schottel's negative feelings about the treatment team have grown larger, and he has shown little or no progress in his ability to actually discuss his sexual offense history (Supp. L.F., 40).

Schottel told Dr. Englehart a number of times that he's cured, and the doctor believes that Schottel feels treatment is a joke (Supp. L.F., 38). Dr. Englehart believes that Schottel has made little or no progress and does not believe he has changed (Supp. L.F., 40)

Dr. Luis Rosell testified that the risk level is the aspect of the mental abnormality that your are looking at (Supp. L.F., 154). Based on one actuarial instrument, the Static-99, Dr. Rosell believed that Schottel's risk of re-offense over a five-year period was six percent;

according to Dr. Rosell, that was also Schottel's risk on the day he stipulated that he was a SVP (Supp. L.F., 154, 181). When asked if he believed there has been a substantial change in Schottel's future risk for sexually offending, Dr. Rosell said it appears that he was always a low risk, and after prison, and aging, he is going to be less of a risk since the time when he last offended (Supp. L.F., 176, 184). Schottel told Dr. Rosell that he viewed his risk of re-offending to be zero (Supp. L.F., 188). Such a view causes Dr. Rosell some concern (Supp. L.F., 188).

In Dr. Rosell's opinion, Schottel's willingness to stipulate he was a SVP, his completion of classes at the MSOTC, and his desire to take a relapse prevention class, showed he wants to engage in treatment (Supp. L.F. 159). Dr. Rosell later explained that motivation for treatment is not a major factor in lessening a person's future risk (Supp. L.F., 182). Dr. Rosell stated he did not believe the Department was holding Schottel back because of their personal feelings toward him; he said, "I am not sure exactly why he was being held back" (Supp. L.F., 178). Dr. Rosell never talked to Dr. Englehart or Dr. Bellew-Smith (Supp.L.F., 195).

Dr. Rosell said that he was not exactly sure how long other SVP programs are; "I think they usually probably take at least five years maybe, but I am not sure exactly other programs . . . "(Supp. L.F., 174) He explained that "I just don't believe - - I don't feel that the program needs to be this long; that's just my opinion;" he said he believed the amount of information can be taught in less than a year (Supp. L.F., 190).

At the probable cause hearing, Schottel asked the court to declare the release provision contained Section 632.498 unconstitutional "because it requires me to prove a higher burden

for simple probable cause than [the State] has to prove at trial" (Tr. 12). Schottel contended that the statute requires him to prove "that he will not engage in acts of sexual violence, but only requires the State at the [subsequent jury trial for release] to prove that he is likely to commit acts of sexual violence if he's released" (Tr. 12). That standard, he argued, not only imposes a greater burden on him than the State, it also imposes an "impossible burden for [him] to satisfy at any point in time;" Schottel argued he would not be able to find "anybody to say that somebody will not ever commit a certain act in the future . . . we just can't do that with the absolutism that the statute appears to require" (Tr. 13). The court denied Schottel's oral motion (Tr. 40, L.F. 6-7).

The parties then argued whether probable cause had been established to justify a jury trial to determine whether Schottel should be released (Tr. 12-23, 23-39). The following day, July 18, 2003, the court entered an order finding "no probable cause that [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., 7, 25)

On August 1, 2003, Schottel filed a notice of appeal (L.F. 7).

On December 16, 2003, this Court affirmed the circuit court's denial of Schottel's first petition for release and his motion to withdraw his stipulation. *Schottel v. State,* 121 S.W.3d 337 (Mo. App. W.D. 2003). The court held that whether the circuit court erred in denying the petition for release without a probable cause hearing was moot because he was subsequently granted a full evidentiary probable cause hearing pursuant to his second petition for release. *Id.*

ARGUMENT

I. Schottel cannot overcome the presumption that Section 632.498 is constitutional because in describing the risk of re-offense necessary for commitment using slightly different language the legislature did not establish different levels of risk because the plain meaning of the statute is clear that to be or remain committed as a sexually violent predator there must be a finding that the person is more likely than not to commit future acts of sexual violence.

Schottel argues Section 632.498, the release provision of the SVP Act, is unconstitutional because it permits the state to commit a person, and maintain that commitment, on three varied levels of risk at three different stages in the commitment process: (1) "more likely than not" to re-offend, at the initial commitment trial, (2) "will not" re-offend, at the probable cause hearing for release, and (3) "likely" to re-offend at the final hearing on release (App. Br., 27-28). The statute, however, is not unconstitutional because the level of risk required for commitment by Section 632.480(5) and Section 632.498 is more likely than not.

Schottel did not preserve his claim for appeal

Respondent first, however, urges this Court to find that Schottel has not preserved this claim for review. To properly preserve a constitutional challenge for appeal, the general rule is that the issue must be raised at the earliest opportunity. *Call v. Heard,* 925 S.W.2d 840, 847 (Mo. banc 1996).

A petition seeking Schottel's commitment was filed on February 28, 2000 (L.F., 1). On May 31, 2000, Schottel raised a series of constitutional challenges to the sexually violent predator law, which were denied by the circuit court on June 8, 2000 (L.F., 2). He did not include with those claims the one he now raises before this Court (L.F. 2).

Schottel also did not raise this claim in his first petition for release, nor did he raise it in his subsequent appeal to this Court. *Schottel v. State*, 121 S.W.3d 337, 338 (Mo. App. WD 2003), nor did he raise it when he filed his second petition for release (L.F., 9-10). The purpose of the rule requiring a constitutional claim to be raised at the earliest opportunity is to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue. *Heard*, 925 S.W.2d at 847. In *Heard*, the court held that even though the claim was not raised until a motion for new trial, the purpose of the statute was met, and the court deemed the issue was adequately raised. *Id.*

Schottel did raise the issue before the trial court. However, Schottel waited until the last possible moment, an oral motion at the probable cause hearing to make his challenge. Respondent acknowledges the *Call* holding was that the purpose of the rule was met when the claim was included in a motion for new trial. *Id.* at 847. But here Respondent's dilatory tactic in raising his claim does not meet with the expressed purpose of the general rule requiring a constitutional rule to be raised at the earliest possible opportunity. *Id.* 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, is not served in cases like a civil commitment, where a court exercises continuing jurisdiction of the proceeding indefinitely. How many years can Schottel wait before he

decides to assert a challenge to the Statute? In this case, he waited nearly three and a half years.

Requiring Schottel to raise his claim earlier does not unfairly burden his right to raise constitutional challenges. Committees in other states have raised challenges to the release provisions of statutes in the direct appeal of their commitment. *See In re Detention of Bailey,* 740 N.E.2d 1146 (Ill. App. 200). In fact, even in criminal cases, defendants must assert certain constitutional claims prior to trial or they are deemed to have waived their right to assert them. *See Horsey v. State,* 747 S.W.2d 748, 756 (Mo. App., S.D. 1988) (J. Hogan, concurring) *citing U.S. v. Bascaro,* 742 F.2d 1335, 1365 (11th Cir. 1984), *cert. denied,* 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985)(defendant must assert double jeopardy claim in motion prior to trial or it is waived) . Having failed to raise his claim in a direct appeal from his commitment, or in his first petition for release, or in his subsequent appeal of the dismissal of that petition, Schottel should be deemed to have waived his right to raise it in subsequent petitions. Short of finding a waiver, Schottel's failure to earlier raise this claim should persuade this Court that the claim is obviously without merit.

Section 632.498 is presumed to be Constitutional

Because this point involves statutory interpretation, which is a question of law, this Court's review is *de novo. Ochoa v. Ochoa,* 71 S.W.3d 593, 595 (Mo. banc. 2002). Several well-established standards guide any challenge to the constitutionality of a statute. Statutes are presumed to be constitutional, and this Court is to construe any doubts regarding a statute in favor of it's constitutionality. *McEuen v. Mo. State Bd. of Education,* 120 S.W.3d 207, 209

(2003). The party raising the challenge bears the burden of demonstrating that the statute is unconstitutional, *C.C. Dillon Co. v City of Eureka,* 12 S.W.3d 322, 327 (Mo. banc. 2000), and that party "bears an extremely heavy burden." *Etling v. Westport Heating & Cooling Services, Ind.,* 92 S.W.3d 771 (Mo. banc. 2003) *citing Linton v. Mo. Veterinary Med. Bd.,* 988 S.W.2d 513, 515 (Mo. banc 1999). A statute will not be invalidated "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *In re: Marriage of Kohring,* 999 S.W.2d 228, 231 (Mo. banc 1999).

The Legislature established one level of risk for commitment: More likely than not

The purpose of the sexually violent predator act is to protect the public and provide treatment for those determined to suffer from a mental abnormality that makes them sexually dangerous. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 841-842 (Mo. App. W.D. 2000); *Ingrassia v. State,* 103 S.W.3d 117, 119 (Mo. App. E.D. 2002). In Section 632.480(5), RSMo, the definition of a sexually violent predator, the legislature defined that dangerousness as a risk that, based on a person's mental abnormality, makes it more likely than not they will commit future acts of sexual violence if not confined in a secure facility for care, control and treatment. §§ 632.480(5) & 632.492, RSMo. Thus, to protect the public, the legislature established a system to commit for treatment convicted sex offenders who are likely to commit future acts of sexual violence.

Schottel argues that the legislature intended to create three different, widely varied levels of risk that must be demonstrated at three different phases of a commit proceeding. He

contends that once a person was committed, the legislature intended to require the person to demonstrate for release a level of risk that he calls impossible: that the person "will not offend again." But to interpret 632.498 as requiring the person to prove they will not offend attaches a meaning to those words that the legislature clearly did not intend. Schottel's interpretation of the statute is hyper-technical, and is neither reasonable or logical. Such an argument is an obvious attempt to frustrate the purpose of the statute - - to protect the public and provide treatment to mentally disordered sex offenders - - by creating a constitutional concern where there is none.

The issue is what the legislature intended when they said that a person found beyond a reasonable doubt to be a sexually violent predator must prove probable cause to believe that their "mental abnormality has so changed they are safe to be at large and will not engage in acts of sexual violence if discharged." §632.480, RSMo. If the purpose intended by the statute is kept in view, the plain unmistakable meaning is that person must show that they are no longer a sexually violent predator. That is, they no longer have a mental abnormality that makes them more likely than not to commit acts of sexual violence. They must show their mental abnormality has changed such that their risk is different than it was when they were committed. They must produce probable cause to believe they are no longer more likely than not to engage in acts of sexual violence.

In the release provision in 632.498, the legislature chose to describe that risk briefly without referring back to the longer and more awkward description contained in 632.480(5). The legislature used slightly different language in 632.498 to express that level of risk - -

probable cause the person will not offend - - but clearly did not intend to establish a different level of risk.

"Probable" is defined as "having more evidence for than against," and "probability" is defined as "a condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it. *Black's Law Dictionary*, p. 1201 (6th ed. 1990). Said another way, probable cause that a person "will not" re-offend is the equivalent of having more evidence for the proposition that he will not offend than against it - - in other words, that it is not "more likely than not" he will re-offend.

To further support his argument that there are different levels of risk required by the commitment statute, Schottel points to the final jury trial held if probable cause of a change in the mental abnormality is found, and argues that because the state must prove there that the person is "likely" to engage in acts of sexual violence, the statute is unconstitutional (App. Br., 28). However, the legislature's description of the risk by using "likely" clearly is intended to refer to the "more likely than not" risk as established in the definition of a sexually violent predator in 632.480(5). In fact, Schottel offers no authority for his claim that the term "likely" as used in the statute means something different - - constitutes a different quantum of evidence, as he describes it - - than the term "more likely than not" in the definition of a sexually violent predator.

The term "likely is not a legal term with a fixed meaning. "Courts have attached various meanings to the term, depending to a large extent upon the context within which it is used." *In the Matter of Leon G.*, 59. P.3d 779 (Ariz. 2002). "Likely" has been found to mean more

likely than not, more probable than not. *See U.S. v. Powell*, 761 F.2d 1227, 1233 (8th Cir. 1985). Likely has been found to mean "probable or reasonably to be expected." *In Re: Foster*, 426 N.W.2d 374, 377 (Iowa 1988). In *Holden v. Missouri R. Co.*, 84 S.W. 133, 136 (1904), likely was found to mean "probable or reasonably to be expected."

To suggest that the legislature intended to create such a variety of risk levels when it used the terms probable cause to believe the person "will not" and "likely" strains credulity - - and is an obvious attempt to interpret the statute in a way that makes it unconstitutional.[2] However, this Court must construe any doubts regarding the statute in favor of it's constitutionality. *McEuen v. Mo. State Bd. of Education*, 120 S.W.3d at 209. A statute will not be invalidated "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *In re: Marriage of Kohring*, 999 S.W.2d at 231.

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[2]Interestingly, until the probable cause hearing on July 17, 2003, where he raised this claim for the first time, even Schottel apparently did not believe the standard of risk for probable cause - - "will not" - - meant anything other than the "more likely than not" risk under which he was committed because in his amended petition for release he alleged that he was entitled to release under that provision because he would present evidence from Dr. Dean that he "*would not be likely* to engage in acts of sexual violence should he be released" (L.F., 9-10)(emphasis added).

Although one might wish that the legislature had drafted its statues with the absolute uniformity, clarity, and precision of an English grammar teacher, it obviously did not do so. *Lewis v. Gibbons,* 80 S.W.2d 461, 465 (Mo. banc 2002) *citing Wolff Shoe Co. v. Director of Revenue,* 762 S.W.2d 29, 31 (Mo. banc. 1988). In *Lewis,* the court explained that "[a]lthough the legislature has chosen to write these various residency statutes in slightly different ways and with slightly different language, their plain meaning, as in the statute before us, is clear." *Id.*

It is not the place of an appellate court to require that the legislature draft its statutes with that degree of precision. *Id.* Instead, the primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. *Id.* "The construction of statutes is not to be hyper-technical, but instead is to be 'reasonable and logical and [to] give meaning to the statutes.'" *State ex. rel Rhodes v. Crouch,* 621 S.W.2d 47, 49 (Mo. banc 1981).

Although the legislature has chosen to describe the future risk necessary for a person's commitment as a sexually violent predator in slightly different ways and with slightly different language, their plain meaning in the statute is clear. Indeed, Schottel does not cite to any authority in Missouri or elsewhere, that has construed that this method of describing the risk by using slightly different language establishes different levels - - or quantums - - of risk. He has failed to point to any such case even though the very language the Missouri legislature used to describe the risk, "will not," at the probable cause hearing in the release proceeding, has

been used in a number of other states. *See e.g. Westerheide v. State,* 767 So.2d 637, 660 (Fla.App. 2000); *In re: Pederson,* 980 P.2d 1204, 1210 (Wash. 1999); *Matter of Care and Treatment of Hendricks,* 912 P.2d 129, 133 (Kan. 1996); *Gaal v. Iowa Dist. Ct. for Linn Co.*, 2002 WL 31113863 (Iowa. App. 2002)[3].

In fact, similar language has been construed to mean the same level of risk. In *Kansas v. Hendricks,* the United States Supreme Court upheld the statutory scheme for civil commitment of sexually violent predators. *See Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The release provision in the Kansas statute in effect at that time was similar to 632.498, in that it required "a hearing to determine that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and *will not* engage in acts of sexual violence if discharged." Kan. Stat. Ann. § 59-29a08 (1994)(later amended)(emphasis added). In upholding the Kansas law, the United States Supreme Court pointed to the release provision and said, "[i]f 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 commitment." *Hendricks,* 117 S.Ct. At 2083. Thus, the *Hendricks*' majority

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[3]*Gaal* is unpublished in the Southwestern Reporter, however the Westlaw citation is available, and Iowa Supreme Court Rules provide that unpublished opinions of the Iowa appellate courts may be cited in a brief, although they do not constitute controlling legal authority. Iowa Ct. R. 6.14(5).

looked at the statute and viewed the "will not" re-offend language of the release provision in the Kansas statute as requiring proof of the same risk that was required for the initial commitment. "For all relevant purposes, the Kansas and Missouri sexual predator statutes are the same." *Thomas v. State,* 74 S.W.3d 789, 790 (Mo. banc 2002).

Quite simply, the purpose of the words "will not," and "likely," in the release provision of 632.498, within the context of the statute, whether stated expressly or not, refer to the same "more likely than not" risk established in the definition of a sexually violent predator in 632.480(5). The legislature was not required to use the precision of an English grammar teacher; it's not a reviewing court's place to require the legislature draft its statutes with that degree of precision. *Lewis,* 80 S.W.3d at 465. The legislature was free to choose to describe the risk in slightly different ways and with slightly different language.

Section 632.498 is presumed to be constitutional and Schottel has not overcome his extremely heavy burden to demonstrate that the statute is unconstitutional. *Etling v. Westport Heating & Cooling Services, Ind.*, 92 S.W.3d 771 at 773. The statute does not impinge on his fundamental right of liberty protected by the due process clause from arbitrary governmental action because the statute requires one level of risk to be or remain committed as a sexually violent predator. Schottel's first point should be denied.

II The circuit court did not err in denying Schottel's petition for release without a trial on the merits because the evidence presented did not establish that probable cause existed to believe that his mental abnormality so changed that he is safe to be at large.

The issue here is whether any deference is to be given to the circuit court's probable cause determination in a sexually violent predator release hearing, and whether a person found to be a sexually violent predator is entitled to a trial on the merits of release by presenting only terse and conclusory, but no specific, evidence about a change in his mental abnormality that makes him safe to be at large.

The trial court's probable cause finding is entitled to deference

A probate court's probable cause finding on a petition for release in a SVP proceeding is entitled to deference on appeal because of the unique position the court holds in supervising the review of a person who has already been adjudicated to be beyond a reasonable doubt a person with a mental abnormality that makes them more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility.

While it is true that a review of a trial court's probable cause determination is usually subject to de novo review, this Court has held that the nature of the case can affect the deference given to trial court's decision regarding probable cause. *See State v. Trenter*, 85 S.W.662, 668-69 (Mo. App. W.D. 2002). In that case, this Court explained that the de novo standard does not apply to a magistrate's determination of probable cause because of the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. *Id.* at 669 *citing Ornelas v. U.S.*, 116 S.Ct. 1657 (1996). The deference given to the trial court encourages police to use the warrant process. *Id. citing Ornelas v. U.S.*, 116 S.Ct. 1657 (1996). Accordingly, the court held that it must give great deference to the issuing judge's final determination of probable cause. *See also State v. Laws*, 801 S.W.2d 68, 70 (Mo. banc.

1990), *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990). The nature and purpose of the role of the circuit court in the underlying procedure entitled the trial court's probable cause decision to deference in those Fourth Amendment cases.

And so it is with the review of the condition of a person who, like Schottel, has already been found to be mentally ill and dangerous in a sexually violent predator proceeding. That person does not stand on equal footing with a person who comes before a trial court challenging the probable cause for an arrest, a search, or a refusal to take a breathalyzer test. In those cases there has not been any sort of previous adjudication regarding the circumstances that brought the person before the court. Indeed, a committed person, like Schottel, does not stand on equal footing with a person facing a probable cause hearing pursuant to section 632.489 to determine whether he should stand trial for an initial commitment. At the initial probable cause hearing pursuant to 632.489, there has been no judicial finding regarding whether the person meets the criteria of a sexually violent predator -- only a petition from the state alleging the person is a SVP.

But at the time of a probable cause hearing for release there has been such a finding, beyond a reasonable doubt. After a person has been committed, the Director is to conduct a current examination once every year and provide that report to the court; the court is required to review the status of the committed person. §632.498, RSMo. Thus, at a probable cause release hearing, there will always be a report that the person's mental abnormality has not changed and that he is not safe to be at large. If the Department determines that the person's mental abnormality has so changed such that they person is not likely to commit acts of sexual

violence it shall authorize the person to petition the court for release and the case proceeds to trial without a probable cause hearing. §632.501, RSMo.

In Schottel's case, by the time of the probable cause hearing on July 17, 2003, the circuit court had held a probable cause hearing for his initial commitment, presided over his stipulation as a SVP, and received three annual reviews from the Department concluding that Schottel was not ready for release. The circuit court was very familiar with Schottel.

It is only logical that, after a jury or judge has determined a person to be a sexually violent predator beyond a reasonable doubt, and the supervising court has conducted annual reviews of the status of the committed person, the court's determination about whether there exists probable cause that the person's mental abnormality has so changed that they are safe to be a large, be given deference. Thus, the trial court's determination of probable cause in a release proceeding pursuant to 632.480 should be given deference and be reviewed for clear error.

Here, the circuit court accepted Schottel's stipulation that he was beyond a reasonable doubt a sexually violent predator, as defined in Section 632.480(5) on June 14, 2000 (L.F., 3; *Schottel*, 121 S.W.3d at 338). At the probable cause hearing, three years later, the circuit court received evidence from the Department that Schottel was "absolutely not" ready for release (Supp. L.F. 62, 69; 2003 Annual Review, Supp. L.F., 2-12). The Department's director of the Missouri Sex Offender Treatment Center, Dr. Bellew-Smith explained that Schottel's behavior in treatment had been the very opposite of the goals he was supposed to be working on (Supp. L.F., 91-92). She described Schottel's primary motivation to be the desire to get

out, not to do the work, and that she didn't see any positive progress (Supp. L.F., 87, 104-105). Her conclusions were similar to the annual review the Department had submitted to the court in 2002, which reached the same conclusion (L.F., 14-22).

Schottel's own actions before the circuit court buttressed Dr. Bellew-Smith's assessment that Schottel's primary motivation was to get out. He sought release from the circuit court at every opportunity. Despite stipulating that he was a SVP and needed treatment in a secure facility, upon receiving his first annual review in 2001, Schottel filed a petition to be released, along with a motion to withdraw his stipulation (L.F., 3; *Schottel,* 121 S.W.3d at 338). The circuit court denied his motion to withdraw the stipulation and his petition for release, without a hearing, and Schottel appealed to this Court. *Id.* While that appeal was pending, the Department submitted another annual review, in 2002, stating Schottel was not ready for release (L.F., 14-22). Schottel filed another amended petition seeking release; and the circuit court held a probable cause hearing, and denied the petition; and Schottel appealed to this Court (Tr. 1-42).

By the time of the probable cause hearing on July 17, 2003, the court had received three annual exams from the Department - - in 2001, 2002, and 2003 - - that reported Schottel had no success in treatment, that the Department did not see any positive progress, and that he was exhibiting the same pattern of behavior that led to his sexual offending (L.F., 14-22, Supp. L.F. 2-12).

The circuit court had reviewed reports related to Schottel beginning when the state initiated a commitment proceeding by filing a petition on February 29, 2000. The court

conducted a probable cause hearing pursuant to Section 632.489, to determine if Schottel should stand trial for a commitment (L.F. 1). It accepted his stipulation that he was a sexually violent predator, and reviewed annual reviews from the Department in 2001, 2002, and 2003, that concluded Schottel was not ready for release. Charged with continuing jurisdiction of Schottel's commitment, the circuit court was intimately familiar with the history of the case, and had a unique opportunity to evaluate the evidence concerning any change in Schottel's mental abnormality and future risk. It is not surprising the court was not persuaded that probable cause of a change existed, considering Schottel's immediate and unwavering efforts to gain his release.

Furthermore, the paucity of Schottel's evidence at the probable cause hearing supports the circuit court's decision.. At the hearing, Schottel made reference to a report done by Dr. Delaney Dean a year and a half earlier, and he told the court he "didn't have anything new from Dr. Dean."[4] (Tr., 8). In fact, Schottel did not submit to the court either a supplemental report or deposition from Dr. Dean. Schottel did present a deposition from Dr. Luis Rosell, in which Rosell stated he believed Schottel's risk was low at the time he stipulated, and was even lower now (Supp. L.F., 13). Dr. Rosell did not say there had been a change in Schottel's risk, instead saying that it appears he was always a low risk - - essentially disagreeing that Schottel ever met the definition of a sexually violent predator (Supp. L.F., 176). Schottel clearly disagreed with

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[4]Schottel did not include that report as a part of the record on appeal in this case.

See infra, p. 11, footnote 1.

Dr. Rosell that he was a always a low risk to re-offend, in that he stipulated that he is, in fact, beyond a reasonable doubt, a sexually violent predator. *Schottel*, 121 S.W.3d at 338. Very little, if any, evidence from Dr. Rosell, indicated Schottel's mental abnormality had so changed that he would be safe to be at large. (Supp. L.F., 143-199). Dr. Rosell did not articulate any specific change in Schottel, other than he had gotten older (Supp. L.F., 184).

Because of the nature of the circuit court's duty to annually review the case, and the fact that Schottel had already been adjudicated to be a sexually violent predator, the circuit court's finding of no probable cause should be given deference. In view of the evidence before the circuit court, it did not clearly error in finding no probable cause.

Even giving no deference to the circuit court, Schottel did not demonstrate probable cause for release

But even if this Court does not apply a clear error standard of review in this case, Schottel's point should be denied because under a de novo review, he still did not demonstrate that the circuit erred in finding no probable cause. Schottel did not present evidence demonstrating probable cause that his mental abnormality had so changed that he is safe to be at large and will not engage in acts of sexual violence if discharged. He presented no specific evidence of cognitive or attitudinal changes that would demonstrate a change.

Schottel contends he established probable cause warranting a full trial for release based on (1) Dr. Dean's testimony - - which is not in the record on appeal - - that Schottel's mental abnormality has changed such that, if released, he is unlikely to engage in acts of sexual violence, and (2) Dr. Rosell's testimony that Schottel completed courses in treatment and his

risk to re-offend is lower than when he was initially committed (App. Br., 39). Under any standard of review, those terse and conclusory statements do not establish probable cause that Schottel's mental abnormality has changed such that he is safe to be at large.

Schottel urges this Court to adopt the procedure established by a divided Washington Supreme Court in *Peterson v. Washington,* 42 P.3d 952 (Wash. 2002)(App. Br., 43-46). It that case, the court reversed a trial court's finding that the SVP had not established probable cause, and held the state bears the burden to establish probable cause, and that probable cause could be established by either a deficiency in the state's proof or the sufficiency of the offender's proof. *Id.* at 796-798.

But Washington is in the minority when it comes to states that have addressed the issue. *See People v. Hardcare,* 90 Cal.App.4th 1392, 1402 (2002)(SVP has the probable cause burden and deference given to trial court); *In the Matter of the Care and Treatment of Tucker,* 578 S.E.2d 719, 721-22 (S. C. 2003)(SVP has probable cause burden and appellate court will not disturb trial court unless no evidence that reasonably support finding) , *Gaal v. Iowa D. Ct. for Linn County,* 2002 WL 31113863 (Ia. App. 2002)(issue of first impression, burden on SVP to prove probable cause).

Citing the Washington standard, Schottel argues that presenting *any* evidence, regardless of how slight, constitutes probable cause. He argues that "the probate court could not have found no facts exist to support Mr. Schottel's petition for release" (App. Br., 46). And he further suggests that the circuit court must ignore contrary evidence. In this case, such evidence includes three annual mental examinations from the Department's treatment staff, as

well as testimony from the doctors directly responsible for providing treatment to Schottel.(App. Br., 46-47).

But in Missouri, at a probable cause determination, the court is to look at the "totality of the circumstances," not at individual, isolated, pieces of evidence. The Missouri Supreme Court explained that the reviewing court is "to determine probable cause based on the totality of the circumstances, and make a 'practical, common sense decision whether . . . there is a fair probability that contraband or evidence of a crime will be found.'" *State v. Berry,* 801 S.W.3d 64, 66 (Mo. banc 1990) *quoting Illinois v. Gates,* 462 U.S.213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed2d 527 (1983). In the context of a probable cause release hearing pursuant to 632.498, the court is to determine probable cause based on the totality of the circumstances, and make a practical, common sense decision whether there is a fair probability that Schottel's mental abnormality so changed that he is safe to be at large.

Looking at individual pieces of evidence, as Schottel suggests, fails to apply the totality of the circumstances approach. Such a "divide-and-conquer" approach to probable cause determinations was resoundingly denounced by the United States Supreme Court in *United States v. Arvizu,* 534 U.S.266, 122 S.Ct. 744, 751, 154 L.Ed.2d 740 (2002). In that case, the Supreme Court said the evaluation of "factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase." *Id.*

Schottel was required to show that, based on the totality of the circumstances a fair probability exists that he has changed. As the court said in *People v. Hardcare,* 90 Cal.App.4th 1392, 1402 (Cal. App. 2001), the question is whether the evidentiary record of the probable

cause hearing disclosed a rational basis for believing the sexually violent predator was no longer a danger to others, accepting the trial court's findings to the extent they were supported by substantial evidence. At the probable cause hearing, the burden is on the SVP to establish probable cause to believe that his mental condition has changed so that he is no longer a danger to others. *Id*.

Schottel's suggested notion of probable cause turns the very term on its head. As the phrase itself explains, the standard is *probable* cause, not *any* cause, nor a *little bit of* cause. In his brief, Schottel points to two factors that support Dr. Rosell's belief that Schottel is not more likely than not to re-offend: Rosell's opinion that Schottel's risk is lower because he is older, and the fact that Schottel completed some classes while in treatment (App. Br., 47). A search in Point II of Schottel's brief for facts stated with sufficient particularity that would give the court a sense that safe release is a possibility, reveals none.[5]

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[5]Schottel briefly states in his argument on Point II that "the fact exists that Dr. Dean will testify that Schottel can be released under the statutes" (App. Br., 46), but does not attempt to demonstrate what, if any, evidence in her report supported probable cause. As Respondent has noted, Schottel has not made Dr. Dean's report a part of the record in this appeal. But even if the evidence was in the record on appeal, as described by Schottel in his brief, it did not constitute evidence that based on the totality of the circumstances demonstrated a fair probability exists that he has changed.

Similarly, the South Carolina Supreme Court explained that when reviewing a trial court's dismissal of a petition for release for lack of probable cause, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's findings. *In the Matter of the Care and Treatment of Tucker*, 578 S.E.2d 719, 721 (S.C. 2003). "In the probable cause hearing, the committed person has the burden of showing the hearing court that probable cause exists to believe that his mental condition has so changed that he is safe to be released." *Id.* at 722.

In *Gaal v. Iowa D. Ct. for Linn County*, 2002 WL 31113863 (Ia. App. 2002), Andrew Gaal challenged the no probable cause finding at his annual review probable cause hearing. The assessment completed by the Civil Commitment Unit recommended his commitment continue because he had not shown any cognitive or attitudinal changes towards his sexually offensive behavior, and he had not participated sufficiently in the treatment program. *Id*. Gaal did offer contrary expert testimony that, he claimed, established Gaal's risk of offending had diminished. But that expert merely said that, in his opinion, Gaal no longer benefitted from, or needed treatment from within, the commitment unit. *Id.* According to the expert, Gaal simply "would not have the energy to misbehave." *Id.* The Iowa Court of Appeals upheld the trial court's finding of no probable cause, explaining that "very little of the evidence and testimony presented at the hearing indicated Gaal's condition had so changed that, if discharged he would be safe to be at large and would not re-offend." *Id.*

Schottel did not meet his burden of showing, based on reason and common sense, that there is a fair probability that his mental abnormality so changed that he is safe to be at large.

He relied on Dr. Rosell's testimony, but that testimony was strikingly similar to that described by the court in *Gaal*. Dr. Rosell testified that Schottel's willingness to stipulate that he was an SVP indicated he wanted treatment; "that's one positive thing," he said (Supp. L.F., 159). Of course, based on the totality of the circumstances, not a very persuasive example of change in Schottel, since Schottel has spent the time since his stipulation trying to both withdraw the stipulation and avoid treatment. In fact, according to the treatment team, his fixation with release was a major impediment to any treatment the staff tried to give to Schottel; Dr. Bellew-Smith described his primary motivation to be his desire to get out, and Dr. Englehart said Schottel felt treatment was a joke, he focused on release rather than self-improvement (Supp.L.F., 26, 38, 87). He told Dr. Englehart it didn't matter what he did because he was going to be released (Supp.L.F., 26).

Dr. Rosell mentioned that Schottel's age would lower his future risk because studies showed that individuals over 60 had a very low recidivism rate (Supp. L.F, 160). Schottel was 63 when he was arrested and charged with molesting five girls between the ages of 8 and 13 (Supp. L.F., 4). Dr. Rosell said Schottel should be given credit for finishing some classes at the treatment center (Supp. L.F., 159), despite the report from the treatment center that although completion of classes suggests intellectual functioning and academic understanding of the principle presented in each class, it does not mean the resident has demonstrated application of mastery of class principles outside the group (Supp. L.F., 7). Dr. Rosell explained that "I just don't believe - - I don't feel that the program needs to be this long; that's just my opinion," even though he admitted that most SVP programs are "I think usually

probably take at least five years maybe, but I am not sure exactly other programs" (Supp. L.F., 174, 190).

Dr. Rosell's testimony was similar to that described by the Iowa court in *Gaal*, where the expert said the person's risk had diminished and he didn't think he would have the energy to misbehave. *Gaal v. Iowa D. Ct. for Linn County*, 2002 WL 31113863 (Ia. App. 2002). That testimony wasn't enough to establish probable cause for a change such that the person is safe to be at large, and neither was Dr. Rosell's.

The fact that Schottel completed some cognitive classes, a fact relied on by Dr. Rosell, does not show probable cause to believe Schottel's mental abnormality had changed such that he is safe to be at large. First, the treatment team specifically explained that completing some classes suggests an intellectual ability and academic understanding of the principles, but does not mean the person has demonstrated a mastery of class principles outside the class (Supp. L.F., 7). Second, Schottel has not even completed the first phase of treatment (Supp. L.F., 8, 90). Third, the South Carolina Supreme Court found that even where the person met some treatment goals, but had not met several others, the evidence presented did not show probable cause to believe a change such that the person was safe to be at large. *Tucker*, 578 S.E.2d at 719. The court held that the evidence reasonably supported the trial court's finding of no probable cause and affirmed. *Id.*

The record is replete with evidence that Schottel did not meet any treatment goals, he failed to meet treatment goals on an annual basis, and he has failed to complete even the first phase of the treatment program (Supp. L.F., 2-12, 83-88, 90). In the 2003 Annual Review, the

Department's treatment team of Dr. Linda Meade, Marty Bellew-Smith, and Dr. Jay Englehart, advised the court that Schottel is superficially involved in treatment and there remained critically important issues that make it unsafe for him to be in the community (Supp. L.F, 9). Both Dr. Bellew-Smith and Dr. Englehart explained that Schottel doesn't recognize authority, violated significant rules - - including possessing pictures of girls the ages of his young victims - - and continually failed to take responsibility for his actions (Supp. L.F., 7-8, 32-37, 90, 97). Dr. Bellew-Smith described Schottel as engaged in the same pattern of behavior that led to his sexual offending (Supp. L.F., 11).

Finally, a word needs to be said about the standard Schottel asks this court to adopt. The essence of Schottel's argument 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. Besides inaccurately stating the probable cause standard as defined in Missouri, adopting such a standard would result in burdensome consequences for the person, the state, and the judiciary. Merely presenting a report with broad conclusions about a person's change, without specific details about such changes, would essentially establish an annual right to a jury trial - - something not contemplated by the statute, and something the probable cause standard is designed to prevent. As the court said in *In re Detention of Varner*, 734 N.E. 2d 226, 235 (Ill. App. 2000), "[t]he extra costs, to both committed persons and the State, of requiring an evidentiary hearing in every instance when a committed person files a petition for discharge are high in comparison to any additional protection this would provide."

With a record before it containing a dearth of evidence that Schottel had changed, and repeated, detailed, and substantial evidence from the state that he had not, the circuit court did not err in finding no probable cause and denying his second petition for release without a hearing. Accordingly, Schottel's second point should be denied.

CONCLUSION

In view of the foregoing, Respondent requests that the decision of the circuit court, probate division, be affirmed.

Respectfully submitted,

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Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 10, 461 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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David J. Hansen