No. SC91186

In the
Missouri Supreme Court

In the Matter of the Care and Treatment of
JAMES BRASCH,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Jon Cunningham, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

JURISDICTIONAL STATEMENT

This appeal is from the St. Charles County probate court's order committing Appellant to the custody of the Department of Mental Health as a sexually violent predator. Section 632.495, RSMo Cum. Supp. 2006. This appeal involves the constitutionality of a state statute, § 632.495, RSMo Cum. Supp. 2006, as applied to Appellant. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3. Notice of appeal was originally filed in the Missouri Court of Appeals, Eastern District, but that court transferred this case to this Court prior to opinion. *See* Rule 83.01.

STATEMENT OF FACTS

Appellant, James Brasch, was committed to secure confinement in the custody of the Department of Mental Health as a sexually violent predator following a jury trial beginning on July 20, 2009, in St. Charles County probate court, with the honorable Jon Cunningham, presiding. (Tr. 1).[1] Appellant's commitment was based upon the following facts, viewed in the light most favorable to the verdict.

When Appellant was fourteen years old, he was residing at Edgewood Children's Center. (Tr. 195). After being discovered hiding with a girl behind a building, Appellant was accused of sexually abusing her. (Tr. 195). Appellant denied the allegations, indicating that he had just broken up with her, and no criminal charges resulted. (Tr. 195). At age sixteen, Appellant experimented by allowing a cat to lick his penis, but he did not like it. (Tr. 195).

Appellant was in a lot of trouble as a juvenile, with many arrests for theft-related and other problematic behaviors eventually leading to his placement in the Division of Youth Services. (Tr. 196). Appellant's antisocial behavior continued into his adulthood. (Tr. 196).

In November of 1984, G.W. reported that Appellant had been in her home earlier in the evening. (Tr. 196-197). But after he left, he later returned, climbed into

[1] The record on appeal consists of a probable cause hearing transcript (PC Tr.), trial transcript (Tr.), and a legal file (L.F).

G.W.'s bed, and began stroking her breasts. (Tr. 197). Once G.W. realized who was in her bed, she yelled at him and told him to leave; she then notified police. (Tr. 197). Appellant said he had been given a key, and that he and G.W. were in the home together, where they fell asleep on the couch. (Tr. 197). He said that he shook her leg, but denied touching her breasts. (Tr. 197). Appellant was arrested, but the prosecutor did not pursue charges. (Tr. 197).

Appellant continued to get arrested for stealing, forgery, and burglary offenses, and at one point was sent to prison. (Tr. 197). Every time Appellant was under supervision (e.g. parole release), he violated his release conditions or was arrested for a new offense. (Tr. 197-198).

In May of 1993, Appellant entered, through an unlocked door, the home of a woman he knew. (Tr. 198). He then entered the bedroom of the woman's ten-year-old daughter, removed her underpants, and began caressing her buttocks. (Tr. 198). The girl asked who it was, and Appellant responded, "James." (Tr. 198). The girl ran from the bedroom and into the bathroom, where she locked the door. (Tr. 198). Appellant left her bedroom and went into the woman's bedroom, where he removed his clothing and got into bed with her. (Tr. 198). The woman screamed at Appellant to leave, and he refused to do so until she contacted the police. (Tr. 198). Appellant was eventually arrested for first-degree sexual abuse, third-degree assault, and first-degree burglary. (Tr. 198-199). Appellant was prosecuted, but pled guilty to third-

degree assault only in exchange for the dismissal of the sexual abuse and burglary charges. (Tr. 199). He was sentenced to fifteen days in jail. (Tr. 199).

On July 10, 1993, Appellant entered the home of an elderly woman, where she found him in her kitchen smoking a cigarette. (Tr. 199-200). She notified police, and Appellant left. (Tr. 200). Later that evening, before his arrest, Appellant entered the home of a family and found a ten-year-old girl that he awoke by lying on top of her, kissing her, and fondling her buttocks. (Tr. 200). The girl recognized Appellant as a person from the neighborhood she knew as Jamie, and when she told him to leave, Appellant said he was in the wrong room before he left the residence. (Tr. 200). The family notified the police, and the police discovered that Appellant had entered the home through the victim's bedroom window by climbing a trashcan he had placed next to the house. (Tr. 200). Appellant later pled guilty to first-degree burglary, and the prosecutor dismissed the sexual abuse charge. (Tr. 200). Appellant was sentenced to five years in DOC. (Tr. 200).

Appellant was placed on parole in 1996, but was arrested again following an offending spree and returned to prison. (Tr. 200-201). Appellant had entered at least four homes, looking for someone to have sexual contact with. (Tr. 201). The first burglary that night involved Appellant attempting to enter a window by climbing on top of a barbecue grill he had placed next to the wall. (Tr. 202). The resident saw

Appellant, screamed, and called 911, causing Appellant to flee. (Tr. 202). Essentially the same thing happened at a second residence. (Tr. 202).

While police were investigating the first two calls, a man approached them and indicated that his wife had just been sexually assaulted. (Tr. 202). The woman had been asleep on the couch and felt a man digitally penetrating her vagina. (Tr. 202-203). The woman assumed it was her husband, but when the contact became rough, she awoke and realized that it was not her husband. (Tr. 203). She tried to get up, but Appellant knocked her down, and she screamed. (Tr. 203). Her husband, who was asleep in the bedroom, came out and struggled with Appellant until Appellant managed to free himself and flee. (Tr. 203).

A fourth woman later reported that that same night, she had left her rear patio door open and that a man had come inside and was standing over her in her bedroom, drooling. (Tr. 203). She said the man smelled of alcohol. (Tr. 203). She asked who was there, and the man said, "Jim." (Tr. 203). The woman told him to leave, and he did. (Tr. 203).

Appellant was eventually arrested in the same neighborhood, a couple of streets over from where the initial crimes occurred, and many of the victims identified him immediately. (Tr. 203-204).

Around the same time, Appellant began displaying signs of schizophrenia, a chronic psychotic disorder involving auditory hallucinations. (Tr. 205). Appellant

also had paranoid delusions, which are false beliefs that people hold onto as though they are absolute fact. (Tr. 205). Appellant believed that the CIA had been tracking him through a chip implanted in him during surgery to repair a broken jaw. (Tr. 205). Appellant also believed that the CIA used lenses in his eyes to track the activities of people around him. (Tr. 205). Appellant believed that officials in St. Charles County and the CIA gave him directives or physically controlled his body, causing him to engage in a variety of behaviors. (Tr. 205).

Upon examination, Appellant was found to be incompetent to stand trial and was placed in treatment to restore his competence. (Tr. 204, 206). Appellant was eventually released for trial in 1999 when he pled guilty to sodomy and three counts of burglary for the four home invasions in 1996. (Tr. 204, 206). He was sentenced to twelve years in prison beginning in 1999, and he remained incarcerated either on pending charges or in relation to parole violations until 2007. (Tr. 200, 204).

While in prison, Appellant was not given an opportunity to participate in the Missouri Sexual Offenders Program because his schizophrenia interfered with his ability to be a reasonable participant in the treatment. (Tr. 208). At various times while he was in prison, Appellant required an increase in the level of psychiatric care he was receiving, and at one point, he had to be placed at Fulton State Hospital because he could not be managed in a regular prison setting. (Tr. 209).

Prior to Appellant's scheduled release date, Dr. Kimberly Weitl filed an end-of-confinement report, opining that Appellant met the definition of a sexually violent predator. (L.F. 13). The prosecutor's review committee agreed, and the Attorney General's Office filed a petition seeking to civilly commit Appellant as a sexually violent predator. (L.F. 6-14).

The probate court found probable cause to believe that Appellant was a sexually violent predator and ordered the Department of Mental Health to conduct an evaluation of Appellant and determine whether Appellant met the definition of a sexually violent predator. (PC Tr. 46-47). Dr. Richard Scott conducted the evaluation. (Tr. 189).

During the interview, Dr. Scott asked Appellant about his repeated behavior of breaking into homes to have sex with women, and Appellant explained, "usually if they see who I am they have sex with me. I go there to have sex." (Tr. 210). Dr. Scott indicated that this was a faulty core belief that demonstrated Appellant's lack of recognition of the boundary of the home. (Tr. 210). The fact that two of Appellant's victims had been children did not have much bearing, as Dr. Scott believed that Appellant simply "takes who's available"; he saw no signs that Appellant was a pedophile. (Tr. 211). And despite the fact that these scenarios had never played out the way Appellant hoped, he continued repeating the behavior, which indicated that he

did not learn from his mistakes, or that his thinking was impaired enough that he could not make sound judgments. (Tr. 212).

Appellant explained his sexual offending as a function of either the CIA or St. Charles County officials controlling his body. (Tr. 212). Appellant said that somebody in St. Charles County made him "do sexual offenses." (Tr. 214). He said that the CIA saved him. (Tr. 214). He also blamed the behavior on an alcoholic black-out. (Tr. 212).

Dr. Scott asked Appellant about any anger he had towards the victims, and Appellant replied,

> We'd joke about it, but not have sex. We'd say let's go grudge fuck them. Some girl would go by and flip us off, so she needs a grudge fuck. Sex relieves me. I don't get mad, snap on these guys, like the CO . . . and get real tense and tight. Masturbation relieved it. Not too many women, but I'd masturbate. I did it all the time. I'd have to do it to keep from getting angry.

(Tr. 213).

Dr. Scott identified Appellant's response as a means of "sexual coping," or "the use of sex when anxiety or anger or other negative feelings are around." (Tr. 214). He indicated that this was "important because it's a risk factor for re-offending." (Tr. 214).

Dr. Scott diagnosed Appellant with several mental disorders: paranoid schizophrenia, antisocial personality disorder (APD), major depressive disorder, and substance dependence for alcohol, marijuana, cocaine, and amphetamine. (Tr. 215-216). Tests also showed that Appellant was of borderline intellectual functioning, meaning that he was not mentally retarded, but he was below average intelligence. (Tr. 216). Of these diagnoses, Dr. Scott found Appellant's antisocial personality disorder to constitute a mental abnormality under the statutory definition. (Tr. 231). He indicated, "I believe that it's the antisocial personality disorder that is what's driving his sexual offending, and his sexual offending has included sexually violent offenses." (Tr. 232). Dr. Scott believed that Appellant's APD caused him serious difficulty controlling his behavior as evidenced by his two sprees of offending in 1993 and 1996; "He was in trouble, he went to prison, he was paroled and he continued to engage in the behavior." (Tr. 233).

Dr. Scott also did a risk assessment on Appellant, using a combination of static and dynamic risk factors, to determine whether Appellant was more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. (Tr. 234). Dr. Scott first evaluated Appellant on two actuarial instruments: the RRASOR and the STATIC-99. (Tr. 236, 241). Both instruments placed Appellant in the high risk category. (Tr. 240, 246). As for dynamic factors, Dr. Scott noted the absence of protective factors, such as parole supervision and successful sex offender treatment,

and the presence of many risk-increasing factors, such as victims under the age of twelve, sexual coping, repeated parole violations, a high measure of psychopathy, non-compliance with medication, heavy use of alcohol and drugs, poor judgment, and heightened impulsivity. (Tr. 250-252).

When discussing Appellant's schizophrenia, Dr. Scott noted that schizophrenia can lower risk for general criminality if a person is adequately treated, but he indicated that "it does not necessarily cause a significant reduction in risk for sexual offending or violent offending." (Tr. 251). And he pointed out that even if Appellant were on medications that fully controlled all of his schizophrenic symptoms, Dr. Scott's risk assessment would not change because of the presence of all of the other risk factors. (Tr. 252). Dr. Scott also indicated that

> Mr. Brasch is getting proper treatment. He is in a mental health facility and has been, and whether it's a sex offender treatment center or otherwise he has available to him the full range of medical and psychiatric treatment that any patient in the Department of Mental Health gets.

(Tr. 253). Dr. Scott pointed out that

> our patients get the newest medications. Unlike prison where they have a budget that keeps their medications down to using the old ones, the inexpensive ones – which is a reality that we have to deal with all the time – in the

Department of Mental Health we have an enormous budget so that our patients are getting the newest and best medications.

(Tr. 253). Dr. Scott emphasized that Appellant had been receiving psychiatric treatment, and that he was at "psychiatric baseline." (Tr. 253). Dr. Scott noted that Appellant "is at the best he can be and my risk assessment took that into consideration." (Tr. 253).

Although Appellant was stabilized on various medications, he maintained his delusion about a chip implanted in his jaw allowing others to control his behavior. (Tr. 254). Dr. Scott noted that this particular delusion was fixed and not responding to medication. (Tr. 254). He also indicated that this delusion increased Appellant's risk because "If he does not believe he has control over his behavior then he is going to be less likely to do what he can to prevent a new sex offense." (Tr. 254). Dr. Scott ultimately opined that Appellant met the definition of a sexually violent predator under Missouri law. (Tr. 255).

Appellant hired Dr. William Logan to conduct a second evaluation. (Tr. 310-311). Dr. Logan also found that Appellant suffered from a mental abnormality, but he opined that the mental abnormality was schizophrenia, rather than antisocial personality disorder. (Tr. 335-337). Dr. Logan felt that Appellant's schizophrenia had not been "adequately controlled." (Tr. 337). As for risk, Dr. Logan indicated that he could not use the STATIC-99 on Appellant due to his schizophrenia. (Tr. 341). In

fact, Dr. Logan did not believe there was any way to assess Appellant's risk of future offense because of his current state of mental health. (Tr. 345, 347, 360). Dr. Logan persisted in this belief even when confronted with a statement from the STATIC-99 coding rules indicating that "[i]t is appropriate to use the Static-99 to assess individuals with mental health issues such as schizophrenia and mood disorders." (Tr. 367). Because he felt he could not assess Appellant's risk, Dr. Logan indicated that it was impossible to say, with a reasonable degree of psychiatric certainty, that Appellant qualified for commitment as a sexually violent predator. (Tr. 378).

At Appellant's trial, outside the presence of the jury, Appellant made an offer of proof regarding Appellant's motion to dismiss on the ground that the SVPA was unconstitutional as applied to Appellant. (Tr. 293). He called Dr. Logan to testify that Appellant was not amenable to treatment in his current mental state and medication regimen. (Tr. 295, 297). Dr. Logan further opined that Appellant could be more aggressively treated with medication. (Tr. 298). Dr. Logan had no quarrel with the type of treatment Appellant was receiving, only with the aggressiveness of that treatment. (Tr. 299).

During his cross-examination of Dr. Scott, Appellant questioned the doctor about the drug, Clozaril or Clozapine. (Tr. 259). Dr. Scott testified that it was "touted as a miracle drug" and he had seen it work on people who did not respond to other medications. (Tr. 259). He said the major problem with the drug was that "in a small

number of individuals Clozapine causes agranulocytosis, which is a blood disorder that kills the person." (Tr. 259). Dr. Scott indicated that it was "used as a last line and very rarely because we can deal with a tremor. We can't give medication for death." (Tr. 259). He also noted that Appellant was at "psychiatric baseline. He has done very well on the medications that are available." (Tr. 259). When asked if Appellant had been given the opportunity to try Clozapine, Dr. Scott indicated that he was unaware if Appellant had been on a trial of it or if Appellant had requested a trial of it. (Tr. 260). Dr. Scott testified that Appellant's use of medication was based upon informed consent, and that Appellant had control over the medication he was given unless he was dangerous. (Tr. 260).

Dr. Logan testified that, while in treatment, Appellant had been given trials of Zyprexa and Abilify, but both drugs were discontinued; Zyprexa because of the excessive weight gain it caused, and Abilify because of Appellant's negative response (his symptoms actually worsened). (Tr. 324, 327). Dr. Logan also acknowledged the possible side-effect of death caused by Clozaril, and he testified, "I'm not sure, frankly, I would go to Clozaril quite yet." (Tr. 329). Instead, Dr. Logan advocated placing Appellant back on Zyprexa with an additional medication called Metformin for weight control. (Tr. 329). Dr. Logan also acknowledged that Appellant exercised control over the medication he received. (Tr. 346).

The jury found Appellant to be a sexually violent predator, and the probate court ordered him committed to the custody of the Department of Mental Health for control, care and treatment. (Tr. 436, 441; L.F. 145, 164). This appeal followed.

ARGUMENT

Point I

The probate court did not err in overruling Appellant's motion to dismiss the petition based upon a claim that the SVPA was unconstitutional as applied to him because Appellant's claim is without merit in that Appellant's motion was speculative and contrary to established law, and dismissal was not the proper remedy for a perceived problem with his current treatment regimen. Appellant's potential lack of amenability to sex offender treatment at this time does not render the Act or his commitment unconstitutional.

Appellant argues that the SVPA is unconstitutional as applied to him because he is not currently amenable to sex offender specific treatment. But Appellant's claim is speculative and contrary to established law. Appellant's true quarrel is not with the existence of treatment, but rather with the adequacy of treatment. And a constitutional challenge on appeal from the determination of his sexually violent predator status is not the proper vehicle for challenging the nature of his treatment. In short, because Appellant is being treated for his schizophrenia and has been confined for control and care, any potential lack of amenability to sex offender treatment does not render either the statute or his commitment unconstitutional.

A. Standard of review.

"The constitutionality of a statute is a question of law, the review of which is *de novo*." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). "A statute's validity is presumed, and a statute will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Id*. "This Court is bound to adopt any reasonable reading of the statute that will allow its validity and to resolve any doubts in favor of constitutionality." *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998).

B. Appellant's commitment under § 632.495 is constitutional.

When Appellant was incarcerated in the Department of Corrections, he was not given the opportunity to participate in MOSOP because the severity of his schizophrenic symptoms interfered with his ability to be a reasonable participant. (Tr. 208). Appellant's mental state "was variable enough that he was not appropriate for their program[.]" (Tr. 209). In fact, while Appellant was in prison, he had to be transported to Fulton State Hospital because "he had gotten too ill to be managed in a regular prison setting." (Tr. 209).

Before his commitment proceedings pursuant to the Sexually Violent Predator Act, Appellant filed a motion to dismiss the petition, arguing that the Act (§ 632.480 *et seq*.) was unconstitutional as applied to him because he was "not amenable to sex offender treatment." (L.F. 101). Appellant argued that the Missouri Sex Offender

Treatment Center had "the means available to improve [his] cognitive function, using antipsychotic drugs such as Clozaril, but MSOTC has not, to date, given [Appellant] the appropriate medications." (L.F. 102). Because the Act requires that a person determined to be a sexually violent predator be committed for control, care and treatment, Appellant reasoned that his lack of amenability to treatment under his current medication regimen rendered his commitment unconstitutional. (L.F. 103). He argued that committing him at that time "would amount to warehousing of a chronically mentally ill man." (L.F. 103) (quoting Dr. Logan).

The State argued that Appellant's motion, based on the idea that Appellant was not amenable to treatment under his current medication, was based upon pure speculation. (Tr. 11). The State indicated that Appellant would "have the option for treatment. He may or may not respond to it but the jury is not deciding whether or not he's going to respond to treatment." (Tr. 11). The court denied Appellant's motion, stating, "I don't believe there's any precedent for me to issue such a ruling [as Appellant requested]." (Tr. 13).

The court committed no error in overruling Appellant's motion. The motion was meritless for many reasons: first, it was based upon speculation; second, it was contrary to established law; and third, it requested an improper remedy for a perceived problem with Appellant's medication regimen.

1. The probate court properly denied Appellant's speculative motion.

As the State noted at trial, Dr. Logan's belief that Appellant would not receive treatment was purely speculative. The foundation for Dr. Logan's belief was "from experience." (Tr. 295). He indicated that he had "read over [MSOTC's] protocols in the past, [but] not in conjunction with this current case." (Tr. 295-296). He also based his belief on what had occurred while Appellant was in prison and was denied participation in MOSOP. (Tr. 296).

While Appellant had not received treatment in prison, the Missouri Sex Offender Treatment Center, run by the Department of Mental Health, is an entirely different entity. Dr. Scott testified that Appellant was "getting proper treatment. He is in a mental health facility and has been, and whether it's a sex offender treatment center or otherwise he has available to him the full range of medical and psychiatric treatment that any patient in the Department of Mental Health gets." (Tr. 253). Dr. Scott also noted that "[u]nlike prison where they have a budget that keeps their medications down to using the old ones, the inexpensive ones – which is a reality that we have to deal with all the time – in the Department of Mental Health we have an enormous budget so that our patients are getting the newest and best medications." (Tr. 253).

Additionally, by all accounts, Appellant's behavior at MSOTC was much better than it was in prison, as he had not refused his medications since the move; whereas,

while he was in prison, he had to be involuntarily medicated several times, and at one point was sent to Fulton State Hospital for treatment that the prison could not provide. (Tr. 209, 260; L.F. 25-26). It is also worth noting that before his guilty plea to the index offense, Appellant was declared incompetent to stand trial. (L.F. 25; Tr. 204, 206). At that point, he was sent to the Department of Mental Health for treatment, and DMH was able to successfully treat Appellant so as to restore his competence. (L.F. 25; Tr. 204, 206). Thus, Dr. Logan's belief (and accordingly, the basis for Appellant's motion) that Appellant would not receive treatment if he were committed was based on nothing more than speculation. And the court committed no error in denying a speculative motion to dismiss.

A similar situation arose in *In the Matter of the Care and Treatment of Whitfield v. State*, 250 S.W.3d 722 (Mo. App. W.D. 2008). In *Whitfield*, the respondent in a sexually violent predator commitment proceeding filed a motion to dismiss the petition, arguing "that his commitment would violate his statutory right to treatment and his constitutional right to due process by failing to allow for individualized treatment that he could successfully complete." *Id.* at 723. The motion was based on expert testimony that the respondent "did not possess the cognitive skills to complete sex offender treatment if committed" because of his low IQ and "significant difficulty retaining information in his long-term memory." *Id.* The court denied the motion, and the respondent was found to be a sexually violent predator. *Id.*

On appeal, he argued that the SVPA and constitutional due process considerations required that he "be provided appropriate, potentially successful treatment if he is to be confined as an SVP." *Id*. The Western District first determined that the premise of the respondent's legal argument was faulty insofar as "[t]he record [did] not establish that there [was] no possibility of Whitfield's receiving any kind of adequate treatment while confined." *Id*. The court noted that "[t]he trial court was not required to believe [the expert's] testimony." *Id*. The court stated, "Dr. Isaacson, who lacked a thorough knowledge of the programs the State was capable of providing, reviewed a handout entitled 'The Big Picture' issued by the Missouri Sex Offender Treatment Center." *Id*. Based upon what she read, "[s]he did not believe Whitfield possessed the cognitive skills to respond to this kind of treatment." *Id*. at 724. The court determined that "[a]part from her opinion, there was no evidence that an SVP with significant cognitive limitations could not be provided some kind of individualized treatment if necessary." *Id*. The court held, "Dr. Isaacson's opinion did not bind the trial court." *Id*.

The same is true in Appellant's case. Dr. Logan's belief did not bind the probate court in any way to a finding that Appellant could not receive any sex offender treatment in his current state of mental health. On the contrary, Dr. Scott testified that Appellant was in fact, "getting proper treatment." (Tr. 253). Appellant's argument is based upon nothing more than a credibility determination that the probate

court apparently resolved adversely to Appellant's position. Because "[a]n appellate court defers to the probate court in its role as the finder of fact, giving due regard to the opportunity of the trial court to have judged the credibility of witnesses," *Estate of Posey v. Bergin*, 299 S.W.3d 6, 18 (Mo. App. E.D. 2009), there is no basis for this Court to overturn the probate court's determination.

2. The probate court's decision was consistent with U.S. Supreme Court and Missouri precedent.

The probate court was also correct that there was no basis in the law for granting Appellant's motion. Even assuming, as Dr. Logan did, that Appellant was not amenable to treatment in his current state of mental health, the lack of amenability to treatment does not render a subsequent commitment under the SVPA unconstitutional. This was determined first by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and again by the Missouri Court of Appeals, Western District, in *Whitfield*.

In *Hendricks*, the respondent argued that Kansas's Sexually Violent Predator Act was punitive in nature (and therefore, unconstitutional) because it failed to offer any legitimate treatment. *Hendricks*, 521 U.S. at 365. This argument was based upon Mr. Hendricks's declarations that "treatment is bull----," and that "the only sure way he could keep from sexually abusing children in the future was 'to die.'" *Id*. at 355. The Court rejected Mr. Hendricks's argument, noting, "we have never held that the

Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." *Id*. at 366. The Court analogized that "[a] State could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease." *Id*. The Court went on to note that

> it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.

Id.

The Western District addressed a similar issue in *Whitfield*. After finding an evidentiary void to support the respondent's claim that he could not be treated, the court nevertheless went on to reject the respondent's argument that "treatment [was] the only essential and legitimate purpose of the SVP statutes." *Whitfield*, 250 S.W.3d at 724. While the court agreed "that the statute requires the State to offer reasonable forms of treatment to persons adjudicated to be SVPs," the court determined that "it is a logical[] fallacy to conclude that because the statute directs something, that one thing is the only purpose of the statute." *Id*. Reviewing the plain language of the statute, the court determined that "confinement of predatory individuals dangerous to

society is probably *the* major legislative purpose of the SVP statute." *Id*. (emphasis in original). And, citing *Hendricks*, the court held that "[s]uch a purpose is constitutionally permissible." *Id*.

After discussing the Court's holding in *Hendricks*, the Western District held that "Section 632.495.2 does not obligate the State to provide treatment that will produce a particular outcome." *Id*. And while noting that "[t]he hope, of course, is that the committed individual will respond to treatment so as to cease to be a threat to society," the court recognized that "[t]he reality, however, is that an individual who is unable to benefit from the treatment remains just as much a threat to members of society as a committed person who *refuses* to participate in treatment." *Id*. at 724-725 (emphasis in original). The court concluded that "[w]hile the statute prescribes the provision of treatment, there is no statutory or constitutional bar to confinement of an SVP who cannot or will not respond to treatment." *Id*. at 725.

Here, even if Appellant's mental state is such that he is not currently amenable to sex offender specific treatment, that does not entitle him to release, nor would it have justified a dismissal of the commitment petition. As Dr. Scott noted, even setting aside the effects of Appellant's schizophrenia on his risk of reoffending, there were still sufficient remaining factors that Dr. Scott's opinion on risk would not have changed. In short, Appellant is a dangerously mentally ill person that needs to be confined for public safety. And any potential lack of amenability to treatment does

not render either his commitment or the SVPA unconstitutional. As was made clear by Justice Kennedy's concurrence in *Hendricks*, the potential constitutional problem lies not in the adequacy of treatment, but rather in the availability of the treatment: "If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish." *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring). "[T]he State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment." *Allen v. Illinois*, 478 U.S. 364, 373 (1986). And Appellant has never alleged that treatment is not available or offered to those committed as sexually violent predators. Thus, his constitutional challenge is without merit.

3. A constitutional challenge on appeal is not the proper vehicle for Appellant's challenge to the adequacy of his treatment.

Appellant's true quarrel does not seem to be with the statutory scheme of the SVPA, but rather with the specific treatment regimen that DMH has provided for him. Appellant's own expert testified that he had no quarrel with the type of treatment Appellant was receiving, only with the aggressiveness of that treatment. (Tr. 299). Appellant's brief suggests that the drug, Clozaril or Clozapine, could have been given to Appellant in an effort to overcome his fixed delusion about the CIA-implanted chip,

and thus render him amenable to sex offender treatment. (App. Br. 29). But both Dr. Scott and Dr. Logan noted that a potential side effect of this drug is death, and that it is only to be used as a last resort. (Tr. 259, 329). Additionally, there is nothing in the record indicating that Appellant, himself, is interested in trying this potentially fatal drug. Both doctors testified that Appellant exercised control over the medication he received, and Dr. Scott indicated that Appellant expressed satisfaction with his current medications because "they help[] him feel calmer." (Tr. 260, 346; L.F. 26). Consequently, the record does not even support the notion that Appellant, himself, is dissatisfied with his current treatment.

Yet, even if Appellant did wish more aggressive treatment of his schizophrenic symptoms, a constitutional challenge to his civil commitment is not the proper avenue for relief. "[T]he Constitution only requires that the courts make certain that professional judgment [in determining treatment] in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (addressing a constitutional challenge to the treatment regimen of an involuntarily committed mentally challenged individual).

Here, Dr. Scott indicated that Appellant was currently at "psychiatric baseline" and that he "is at the best he can be." (Tr. 253). Dr. Logan disagreed and believed that Appellant could be treated more aggressively. (Tr. 299). But both doctors were

professionals in the fields of psychology and psychiatry, respectively. And there is no question but that professional judgment was – and continues to be – exercised regarding Appellant's treatment regimen. It is not for the courts to determine which treatment regimen is superior.

Contrary to Appellant's argument that "[t]he State has been providing [Appellant] the same medications since 1996," the State has tried Appellant on a variety of medications (Haldol, Cogentin, Vistaril, Zyprexa, Paxil, Navane, Risperdal, and Abilify), but has found his current regimen to be the most effective with the least drawbacks. (Tr. 324, 327; L.F. 25-26). Nevertheless, if Appellant takes issue with his current treatment, that is a conflict he must resolve with the Department of Mental Health, not the Attorney General's Office. "[T]he Department of Mental Health should be a party to any proceeding after SVP adjudication purporting to relate to treatment or management of the custody of the SVP and involving special conditions." *In the Matter of the Care and Treatment of Fogle v. State*, 295 S.W.3d 504, 512 (Mo. App. W.D. 2009). If Appellant is truly unhappy with his current medication regimen, he should seek available remedies with the Department of Mental Health, not challenge the constitutionality of the SVPA or his commitment.

In short, the probate court committed no error denying Appellant's motion to dismiss because it was speculative and contrary to established law. If Appellant takes issue with his current medication regimen, he should seek remedies with the

Department of Mental Health; a constitutional challenge on appeal from the determination of his sexually violent predator status is not the proper avenue for such an attack.

Point II

The probate court did not abuse its discretion in overruling Appellant's motion for mistrial during the State's closing argument because the State's argument that the jurors should commit Appellant and prevent the addition of another victim was wholly proper and based upon the evidence in that one of the elements the State was required to prove was that Appellant was more likely than not to commit a sexually violent offense if not confined in a secure facility, and the State presented such evidence through the testimony of Dr. Scott.

Appellant argues that the State's closing argument was improper and was simply a plea to the jurors' emotions, passions and prejudices. But because the argument was based on evidence and related to one of the elements the State was required to prove, there was nothing improper in the State's argument, and Appellant's claim to the contrary should be rejected.

A. Standard of review.

"A trial court maintains broad discretion in the control of closing arguments." *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006). "Counsel are afforded wide latitude in closing argument in arguing facts and drawing inferences from the evidence." *In the Matter of the Care and Treatment of Burgess v. State*, 147 S.W.3d 822, 833 (Mo. App. S.D. 2004). "This Court reviews preserved objections to errors in closing argument under an abuse of discretion standard." *In the Matter of the Care*

and Treatment of Bernat v. State, 194 S.W.3d 863, 866 (Mo. banc 2006). "An argument does not require reversal unless it amounts to prejudicial error." *Forrest*, 183 S.W.3d at 226.

Likewise, "The decision to grant a mistrial lies in the sound discretion of the trial court." *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 778 (Mo. banc 1989). "The trial court is in a far superior position to assess the impact of an argument on a jury." *Burgess*, 147 S.W.3d at 833. "Assessing whether any prejudicial effect occurred is in the discretion of the trial court, and only if the trial court's decision was clearly against reason and resulted in prejudice will we find that the trial court abused its discretion." *Id*. "Absent a manifest abuse of discretion, an appellate court will not interfere with the trial court's decision." *Pierce*, 769 S.W.2d at 778.

B. The State's argument that Appellant should be committed to prevent the addition of another victim was proper and based upon the evidence.

During closing argument, Appellant objected when the State urged the jurors to commit Appellant to avoid the creation of additional victims:

> [AAG]: Ladies and gentlemen, you've got an important job today and I'm asking you not to add any more names to this list because we are telling you in this trial –
>
> [Counsel for Appellant]: Objection, Your Honor. We need to approach. I'm sorry.

(The following proceedings took place at the bench:)

[Counsel for Appellant]: Judge, that line of argument is totally inappropriate. The case law has long held that prosecutors cannot look at the jury in closing and say what happens in response, what happens after this. This is clearly outside the bounds of what is appropriate in closing argument.

I would ask for a curative instruction, and at this point I would ask for a mistrial. There have been murder cases mis-tried on less egregious objections than that.

(Tr. 428). The State responded,

Judge, everything in this case specifically says that more likely than not he is going to commit another predatory act. That means there is going to be another victim, which is our whole point. Our evidence is that there is going to be another victim. I'm telling the jury that that's simply element four of this case.

(Tr. 428-429). The court overruled the objection. (Tr. 429). The State went on to argue,

You have heard a list of victims in this case. Element four of what you're to decide, we are telling you, we are telling you more likely than not he is going to go out and make another victim and I'm asking you not to let that happen.

(Tr. 429).

"Counsel is traditionally given wide latitude to suggest inferences from the evidence on closing argument." *Nelson v. Waxman*, 9 S.W.3d 601, 606 (Mo. banc 2000).

Here, Dr. Scott testified that Appellant was more likely than not to commit a predatory act of sexual violence if not confined to a secure facility for control, care and treatment. (Tr. 255). Thus, the State's argument was based upon the evidence presented at trial.

While Appellant is correct that, in the guilt phase of a criminal case, "it is not proper for the State to speculate as to future possible acts or conduct of the defendant," *State v. Collins*, 150 S.W.3d 340, 353 (Mo. App. S.D. 2004), Appellant's commitment trial was not the equivalent of the guilt phase of a criminal prosecution. In the context of a criminal prosecution, "a defendant has the right to be tried only for what crime he has or has not done, and not for what crime he might do in the future." *Id.* Future danger is not an element to be proven in the guilt phase of a criminal case. But the same is not true of a sexually violent predator civil commitment proceeding. There, a person's future dangerousness is not only relevant, but one of the elements the State must prove for civil commitment. Sections 632.480(5) and 632.495.1, RSMo Cum. Supp. 2006. Appellant cites no authority supporting his assertion of error.

Consequently, it is a wholly proper subject for closing argument, and Appellant's claim to the contrary should be denied.[2]

[2] It is conceivable that an argument that commitment should be based solely on the possibility of potential reoffense, rather than the more-likely-than-not standard, would be erroneous, as that would urge the jury to commit on a basis contrary to the statute and instructions. The same would be true if the State argued future victims, but failed to offer evidence during the trial that the respondent was more likely than not to reoffend. But neither of those scenarios is present in Appellant's case.

CONCLUSION

The probate court did not commit reversible error in this case. The jury's determination that Appellant is a sexually violent predator and the court's order committing him to the custody of the Department of Mental Health should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,420 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of November, 2010, to:

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APPENDIX