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Seconds Anyone: Using the Missouri SVP Law to Punish after Time Served

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Seconds Anyone? Using the Missouri SVP Law to Punish After Time Served

In re Care and Treatment of Van Orden[1]

I. INTRODUCTION

For nearly a century, the United States Supreme Court has recognized states' right to involuntarily commit persons who have shown a pattern of sexual violence, are unable to control their behavior, and thus are likely to reoffend if permitted to go free.[2] However, the Supreme Court has demanded that, when committing sexually violent predators, states take pains to safeguard individual due process rights and prevent erroneous commitments.[3] While requiring a few specific procedural safeguards, the Supreme Court has essentially left to the states' discretion the appropriate burden of proof to apply in civil commitment contexts.[4]

In 1999, the Missouri legislature implemented a statutory scheme to commit dangerous sexual predators.[5] In order to commit an individual under this original Missouri Sexually Violent Predator (SVP) Law, the state was required to prove beyond a reasonable doubt that the individual had previously committed sexually violent acts and possessed a mental abnormality that made him or her likely to reoffend if released.[6] Upon such a showing, an individual would be placed in confinement until his or her mental state had changed such that he or she no longer posed a threat, at which point he or she would be fully discharged.[7]

In 2006, amendments to the Missouri SVP Law took effect, lowering the state's burden of proof and changing the status under which rehabilitated individuals were permitted to rejoin society.[8] These seemingly minor changes had enormous consequences, causing the constitutionality of the entire Missouri SVP scheme to be called into question.[9] In the recent case, *In re Care and Treatment of Van Orden*, the Missouri Supreme Court addressed these concerns and found the amended scheme constitutional.[10] However, in doing so, Missouri's highest court has effectively transformed what was once a remedial measure into a punitive sanction, under the veil of the Department

1. 271 S.W.3d 579 (Mo. 2008) (en banc).
2. *See infra* notes 62-66 and accompanying text.
3. *See infra* notes 67-68 and accompanying text.
4. *See infra* Part III.B.
5. *See infra* note 126 and accompanying text.
6. *See infra* note 128 and accompanying text.
7. *See infra* note 146 and accompanying text.
8. *See infra* notes 147-50 and accompanying text.
9. *See infra* note 176 and accompanying text.
10. *See infra* Part IV.

of Mental Health, legitimizing indefinite restraint of personal liberty without due process of law.[11]

II. FACTS AND HOLDING

Richard Wheeler and John Van Orden each had lengthy histories of sexually violent behavior.[12] After multiple convictions for committing such offenses, both men were found to be "sexually violent predators" under Missouri's Sexually Violent Predator Law[13] and ordered into involuntary civil commitment.[14] Each man appealed his respective judgment, claiming, inter alia, that the Sexually Violent Predator Law is unconstitutional.[15]

Richard Wheeler's extensive history of sexually violent behavior began early in his life.[16] At the age of twenty, Wheeler was charged with the molestation of his nine-year-old cousin and admitted to Fulton State Hospital.[17] In 1971, a mere four years later, he was convicted of molesting a four-year-old neighbor girl and was sentenced to a year in jail.[18] In 1981, Wheeler was again convicted of sexual abuse, this time of an adult woman, and sentenced to two years in prison and five years probation.[19] Wheeler's wife subsequently filed for divorce, claiming that Wheeler had sexually abused their son.[20] Wheeler received two years probation in 1996 after pleading guilty to first-degree sexual misconduct involving an eleven-year-old boy.[21] A year later, Wheeler was again convicted of first-degree statutory sodomy and sentenced to ten years in prison for the molestation of a four-year-old boy.[22]

While serving this sentence, Wheeler refused sex offender treatment and "continued to engage in sexually offending behaviors."[23] Subsequently, a psychologist for the Missouri Department of Corrections conducted a review at the end of Wheeler's sentence to consider whether he met the definition of a "sexually violent predator."[24] During this process, the psychologist con-

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11. *See infra* Part V.

12. *In re* Care and Treatment of Van Orden, 271 S.W.3d 579, 582-83 (Mo. 2008) (en banc).

13. MO. REV. STAT. §§ 632.480-.513 (2000).

14. *In re Van Orden*, 271 S.W.3d at 583-84.

15. *Id.* at 581-82.

16. *Id.* at 582.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 582-83.

23. *Id.* 583.

24. *Id.* According to Missouri Revised Statute section 632.480(5) (Supp. 2006), a "sexually violent predator" is

> any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if

ducting Wheeler's review contacted the Missouri Attorney General requesting information that she subsequently received.[25] Satisfied that Wheeler might meet the criteria for "sexually violent predator" status, the psychologist sent notice to the attorney general, who subsequently filed a petition for commitment.[26]

The case then proceeded to the probable cause hearing, where Wheeler filed a motion to dismiss, claiming that the state had failed to strictly comply with the statutory procedures set out in Missouri Revised Statute section 632.483.1 "because the psychologist contacted the attorney general prior to completing the end of confinement review."[27] The court denied Wheeler's motion and ordered that he submit to a psychiatric evaluation.[28] Wheeler filed an additional motion prior to trial challenging the constitutionality of the 2006 amendment to section 632.495 because it reduced the standard of proof for involuntary commitment of a sexually violent predator from beyond a reasonable doubt to clear and convincing evidence.[29] The court overruled Wheeler's motion, and the case proceeded to a bench trial.[30] "The court [ultimately] found that Wheeler met the definition of 'sexually violent predator' and ordered commitment."[31]

John Van Orden was first convicted of sexually violent behavior in 1987, when he pled guilty to sexual misconduct with his sixteen-year-old

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not confined in a secure facility and who: (a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, RSMo, of a sexually violent offense; or (b) Has been committed as a criminal sexual psychopath pursuant to section 632.475 and statutes in effect before August 13, 1980.

This statute is still good law. *See* § 632.480(5) (Supp. 2008).

25. *In re Van Orden*, 271 S.W.3d at 583.

26. *Id.*

27. *Id.* Missouri Revised Statute section 632.483.1(1) (Supp. 2006) provides,

When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection 4 of this section. Written notice shall be given: (1) Within three hundred sixty days prior to the anticipated release from a correctional center of the department of corrections of a person who has been convicted of a sexually violent offense, except that in the case of persons who are returned to prison for no more than one hundred eighty days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison . . . .

This statute is still good law. *See* § 632.483.1(1) (Supp. 2008).

28. *In re Van Orden*, 271 S.W.3d at 583.

29. *Id.* (referring to MO. REV. STAT. § 632.495.1 (Supp. 2006) (amending § 632.495 (Supp. 2005)). As amended, section 632.495 states in relevant part, "The court or jury shall determine whether, by clear and convincing evidence, the person is a sexually violent predator." MO. REV. STAT. § 632.495.1 (Supp. 2006).

30. *In re Van Orden*, 271 S.W.3d at 583.

31. *Id.*

niece and was sentenced to two years probation.[32] Five years later, Van Orden was convicted of first-degree sexual abuse after abusing his five-year-old daughter and was sentenced to four years in prison.[33] Consequently, "his parental rights were terminated [due to] this abuse and the abuse of his four-year-old son."[34] While incarcerated, Van Orden began attending a treatment program designed for sex offenders.[35] However, he completed only the first phase of the program.[36]

In 1998, Van Orden was sentenced to seven years in prison for abusing a four-year-old girl.[37] During this period of incarceration, Van Orden was successful in completing the first two phases of his treatment program.[38] However, upon being released on parole in 2004, he stopped attending treatment.[39] After violating the conditions of his parole, Van Orden returned to prison.[40] He was released on parole a second time, only to be arrested during the fall of 2005 for again violating the conditions of his parole, "including consuming alcohol and receiving unsuccessful termination from sex offender treatment."[41]

The department of corrections subsequently notified the attorney general that Van Orden might "meet the definition of 'sexually violent predator.'"[42] In response, the state filed a petition to commit Van Orden, requiring that the board of probation and parole revoke his parole.[43]

The court concluded that probable cause existed to find Van Orden a sexually violent predator and thus ordered a formal hearing.[44] Van Orden filed a motion to dismiss the petition, claiming that the state had not strictly complied with section 623.483.1 because his parole had not yet been revoked at the time the petition was filed.[45] The trial court overruled Van Orden's motion and ordered that he be subject to psychiatric evaluation.[46] Van Orden subsequently filed a motion arguing that the 2006 amendment to section 632.495 was unconstitutional because it decreased the burden of proof for involuntary commitment of a sexually violent predator from beyond a reason-

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32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* (referring to MO. REV. STAT. § 632.483.1 (Supp. 2006)). See *supra* note 27 for the text of section 623.483.1(1).
46. *In re Van Orden*, 271 S.W.3d at 583.

able doubt to clear and convincing evidence.[47] This motion also was overruled.[48]

In May 2007, a jury trial was held on the issue of Van Orden's civil commitment.[49] The state presented testimony from psychologist Dr. Mandracchia, "who diagnosed Van Orden with pedophilia and anti-social personality disorder and found that he was more likely than not to reoffend if not committed."[50] This assessment was based "on the results of the Static-99 actuarial test, which measures a person's likelihood of reoffending, as well as his own assessment of Van Orden's risk factors, including anti-social personality disorder, alcoholism, an offense pattern of sexually deviant behavior, and the fact that he offended while under supervision."[51]

At the instruction conference, Van Orden argued that the burden of proof – clear and convincing evidence – should be defined in the jury instructions and provided an instruction to be included.[52] The trial court overruled the objection, however, and submitted the instructions to the jury without defining the phrase "clear and convincing evidence."[53] The jury concluded that Van Orden was a sexually violent predator, and he was ordered civilly committed.[54]

Richard Wheeler and John Van Orden appealed their individual judgments.[55] Both argued independently that section 632.495, which provides for the standard of proof in civil commitment hearings for alleged sexually violent predators,[56] is unconstitutional because due process requires the state to prove that a person meets the definition of "sexually violent predator" beyond a reasonable doubt.[57] As both men challenged the validity of a Missouri statutory section, the Missouri Supreme Court had exclusive jurisdiction over the

47. *Id.* See *supra* note 29 for the relevant part of section 632.495.

48. *In re Van Orden*, 271 S.W.3d at 583.

49. *Id.*

50. *Id.* at 583-84.

51. *Id.* at 584.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 581.

56. See *supra* note 29 for the relevant part of section 632.495.

57. *In re Van Orden*, 271 S.W.3d at 582. Amended section 632.495, however, required only that "[t]he court or jury . . . determine[,] . . . by clear and convincing evidence, the person is a sexually violent predator." MO. REV. STAT. § 632.495.1 (Supp. 2006) (current version at § 632.495.1 (Supp. 2008)). Both Wheeler and Van Orden also argued "that the state failed to strictly comply with the terms" of the statute providing the procedures to be used in civil commitment proceedings of sexually violent predators. *In re Van Orden*, 271 S.W.3d at 581 (referencing § 632.495 (Supp. 2006) (current version at § 632.495 (Supp. 2008))). Additionally, "Van Orden argue[d] separately that the trial court erred in [both] failing to define 'clear and convincing evidence' in the jury instructions as well as in [erroneously] admitting testimony about the results of the Static-99 actuarial instrument." *Id.*

matter, pursuant to article V, section 3 of the Missouri Constitution.[58] And because both Wheeler and Van Orden's challenges raised the same issue, the Missouri Supreme Court consolidated their cases on appeal.[59]

On December 16, 2008, the Missouri Supreme Court held that the provision in Missouri Revised Statute Section 632.495 requiring the clear and convincing evidence burden of proof for the involuntary civil commitment of sexually violent predators was constitutional and in doing so affirmed the involuntary commitments of both Richard Wheeler and John Van Orden as sexually violent predators.[60]

III. LEGAL BACKGROUND

A. Introduction to Civil Commitment

The United States Supreme Court first upheld a statute that provided for the civil commitment of sexual offenders in 1940 in *Minnesota ex rel. Pearson v. Probate Court*.[61] The statute in question provided for the commitment of persons who had shown a pattern of sexual misconduct, were unable to control their behavior, and were likely to reoffend.[62] The Court held that, "because certain classes of people posed a greater threat to society than others," it would not violate equal protection if these classes of persons were managed differently.[63] Further, because the law required proof of the criteria laid out in the statute, the Court found the law to be neither unconstitutionally

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58. *In re Van Orden*, 271 S.W.3d at 581. "The supreme court shall have exclusive jurisdiction in all cases involving the validity of . . . a statute . . . of this state . . . ." MO. CONST. art. V, § 3.

59. *See In re Van Orden*, 271 S.W.3d at 579.

60. *Id.* at 579, 582. The Missouri Supreme Court also held that (1) the phrase "clear and convincing evidence" need not "be defined in the jury instructions," (2) no showing was made that the state failed to comply with the procedural requirements for civil commitment set forth in section 632.483.1, and (3) Wheeler and Van Orden failed to show "that the trial court abused its discretion in admitting the testimony on the Static-99" actuarial test. *Id.* at 582.

61. 309 U.S. 270, 271-72, 277 (1940) (holding that a Minnesota statute authorizing the civil commitment of individuals with "'psychopathic personalit[ies]'" was constitutional). *See* Robert Bilbrey, *Civil Commitment of Sexually Violent Predators: A Misguided Attempt to Solve a Serious Problem*, 55 J. MO. B. 321, 322 (1999), *available at* http://www.mobar.org/journal/1999/novdec/bilbrey.htm. (citing *Minnesota ex rel. Pearson*, 309 U.S. 270).

62. *See Minnesota ex rel. Pearson*, 309 U.S. at 274.

63. *Id.* at 275 ("The class [the Court] did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control."). *See* Bilbrey, *supra* note 61, at 322 (citing *Minnesota ex rel. Pearson*, 309 U.S. at 275).

vague nor indefinite.[64] Finally, the Court determined that the procedural safeguards found within the statute, such as the right to counsel and the right to a hearing, were adequate to protect the fundamental due process rights of those being committed.[65]

After *Pearson*, the Supreme Court continued to clarify what was constitutionally required for civil commitment. In *Baxtrom v. Herold*, the United States Supreme Court struck down a civil commitment statute that did not provide judicial review to persons civilly committed at the end of their incarceration, holding that the statute violated equal protection.[66] A decade later, in *O'Connor v. Donaldson*, the United States Supreme Court held unconstitutional a statute that allowed for the civil commitment of mentally ill persons who did not pose a danger and who were capable of living safely in society by themselves or with the assistance of dependable and amenable acquaintances.[67] In *O'Connor*, the Court noted that, even if the "original confinement was founded upon a constitutionally adequate basis, . . . it could not constitutionally continue after that basis no longer existed."[68] Only a few years later, in 1979, the Court would go on to provide further constitutional guidelines for civil commitment.

B. Use of the "Clear and Convincing Evidence" Standard in Civil Commitment Proceedings: Addington v. Texas[69]

In *Addington v. Texas*, the United States Supreme Court considered what burden of proof should govern in civil commitment proceedings.[70] In *Addington*, during a civil commitment proceeding, a Texas trial court refused to use the beyond a reasonable doubt burden of proof in the jury instructions, and Frank O'Neal Addington was subsequently committed indefinitely to a state mental hospital.[71] Addington appealed, claiming that the use of any standard of proof lower than that required in criminal proceedings – beyond a reasonable doubt – violated his due process rights.[72] The Texas Court of Civil Appeals agreed, reversing the judgment of the lower court.[73] The Texas Supreme Court subsequently reversed the court of civil appeals' decision, and the United States Supreme Court granted a writ of certiorari.[74]

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64. *Minnesota ex rel. Pearson*, 309 U.S. at 274.
65. *Id.* at 275.
66. 383 U.S. 107, 110 (1966).
67. 422 U.S. 563, 576 (1975).
68. *Id.* at 574-75.
69. 441 U.S. 418 (1979).
70. *Id.* at 419-20.
71. *Id.* at 421.
72. *Id.* at 421-22.
73. *Id.* at 422.
74. *Id.* at 422-23.

In its opinion, the Court began by explaining that "[t]he function of a standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[75] The Court pointed out that three different standards or burdens of proof have developed for use in different kinds of cases.[76] The Court reviewed the continuum of standards, beginning with the lowest – the preponderance of the evidence standard – which is typically used in "civil case[s] involving a monetary dispute."[77]

> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of erroneous judgment. . . . This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.[78]

The Court also noted that between these two extremes lies the standard of proof used in civil cases when "important individual interests" are involved – the clear and convincing evidence standard.[79]

In determining which standard should govern in a civil commitment proceeding, the Court articulated the importance of balancing both the individual's interest in not being indefinitely, involuntarily confined and the state's interest in committing the disturbed.[80] On the one hand, the Court recognized that "commitment for any purpose constitutes a significant deprivation of liberty" that may have significant social consequences calling for due process safeguards.[81] On the other hand, the Court acknowledged that states have a legitimate interest both in assisting citizens who cannot care for themselves and in protecting the community from mentally ill individuals who pose a threat.[82] The Court went on to assess the ability of each burden of proof to further both the state and individual interests involved, in an effort to determine which standard should apply in civil commitment proceedings.[83]

The Court first analyzed the lowest burden of proof – the preponderance of the evidence standard – expressing that it was unclear whether using a preponderance standard furthered any state interests.[84] The Court explained

75. *Id.* at 423 (quoting *In re* Winship, 397 U.S. 358, 370 (1970)).
76. *Id.*
77. *Id.*
78. *Id.* at 423-24 (footnote omitted).
79. *Id.* at 424.
80. *Id.* at 425.
81. *Id.* at 425-26.
82. *Id.* at 426.
83. *Id.* at 426-33.
84. *Id.* at 426.

that the Texas Mental Health Code made it clear that the state had no interest in confining persons who did not suffer from some mental illness or did not pose some kind of threat.[85] Because the preponderance standard increased the risk of incorrectly committing such individuals, this standard's ability to further the state's interests appeared to be limited.[86] The Court reasoned that this low standard of proof would increase the risk that an individual would be committed based solely on a few isolated instances of abnormal behavior; a showing of more than unusual conduct is required before denial of one's liberty can be justified.[87] Increasing the burden of proof, the Court reasoned, is a means by which to impress upon the fact-finder the magnitude of the decision and thereby possibly reduce the chances that improper commitments will be ordered.[88] Thus, the Court concluded "that due process requires the state to justify confinement [of an individual] by proof more substantial than mere preponderance of the evidence."[89]

The Court next addressed the highest of burdens, the standard used in criminal cases and which Addington argued should be applied for civil commitment – beyond a reasonable doubt.[90] The Court expressed that there are a number of reasons why a different standard of proof is appropriate in civil commitment proceedings than in criminal prosecutions.[91] First, the Court asserted that, in a civil commitment, the state's power is not being used in a punitive manner and thus cannot be likened to a criminal prosecution.[92] Second, the Court claimed that it should hesitate before moving away from the use for which this standard was traditionally reserved – criminal prosecution – both because the involuntary commitment procedures provide additional opportunities for erroneous commitment to be corrected[93] and because a truly mentally ill person will fare worse if released than a guilty person who is allowed to go free.[94] Finally, the Court explained that, "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question

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85. *Id.*
86. *Id.*
87. *Id.* at 426-27.
88. *Id.* at 427.
89. *Id.*
90. *Id.*
91. *Id.* at 428.
92. *Id.*
93. *Id.* at 428-29 ("[T]hough an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected.").
94. *Id.* at 429.

> One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Id. (citations omitted).

as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."[95] In order to exemplify this point, the Court pointed out that within the medical field the traditional standard is to a reasonable medical certainty, precisely because the "subtleties and nuances of [the field make] certainties virtually beyond reach."[96] Thus, the Court concluded that, although states are free to employ the criminal law standard, as many have, it is unnecessary to require states to apply the beyond a reasonable doubt standard in civil commitment proceedings.[97]

After concluding that the preponderance of the evidence standard does not satisfy due process requirements, and that the reasonable doubt standard is not constitutionally mandated, the Court turned to address the intermediate burden of proof – clear and convincing evidence.[98] The Court determined that this standard "strikes a fair balance between the rights of the individual and the legitimate concerns of the state" and informs the fact-finder that proof must be greater than preponderance of the evidence and thus is an acceptable burden of proof in civil commitment proceedings.[99]

Ultimately, the Court concluded that the trial court did not err in its instruction, as clear and convincing evidence is an appropriate burden of proof in civil commitment proceedings.[100] However, the Court did not insist upon a precise standard to be applied in civil commitment hearings but rather held that, as long as the burden is "equal to or greater than the 'clear and convincing' standard which . . . is required to meet due process guarantees," the "determination of the precise burden" to be applied "is a matter of state law."[101]

C. Involuntary Civil Commitment of Sexually Violent Predators: Kansas v. Hendricks[102]

The civil commitment statutes at issue in *Kansas v. Hendricks* arose largely as a result of a 1993 incident involving the rape and murder of a college student, committed by a man who had previously been convicted of rape.[103] In reaction to this crime, the Kansas legislature passed its Sexually Violent Predators Act,[104] which provided for the civil commitment of sexual-

95. *Id.*
96. *Id.* at 430.
97. *Id.* at 430-31.
98. *Id.* at 431-32.
99. *Id.* at 432-33.
100. *Id.* at 433.
101. *Id.*
102. 521 U.S. 346 (1997).
103. Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 94 (1994) (citing State v. Meyers, 923 P.2d 1024, 1031-32 (Kan. 1996)).
104. KAN. STAT. ANN. §§ 59-29a01 to -29a22 (West, Westlaw through 2008 Reg. Sess.).

ly violent felons who were likely to engage in predatory acts of sexual violence "due to a 'mental abnormality' or a 'personality disorder.'"[105] This law was first invoked to commit Leroy Hendricks, an inmate with a long history of sexually violent behavior who was scheduled for release.[106] Hendricks challenged his commitment, claiming that the commitment violated the Constitution's due process, double jeopardy, and ex post facto requirements.[107] The Kansas Supreme Court found the Act unconstitutional, holding that it did not satisfy substantive due process requirements for civil commitment.[108] The United States Supreme Court subsequently granted certiorari.[109]

First, the Supreme Court addressed Hendricks's claim that the statute violated his due process rights.[110] The Court provided that, "although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute."[111] The Supreme Court explained that it has consistently upheld statutes that provide "for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a threat to public safety," so long as the statutory commitment "takes place pursuant to proper procedures and evidentiary standards."[112]

The Court went on to express that "a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."[113] However, the Court noted that it has sustained civil commitment statutes in which both proof of dangerousness and proof of some additional factor, such as "mental illness," were required.[114] Because the Kansas statute required evidence of past sexually violent behavior *in addition to* a present "'mental abnormality' or 'personality disorder' that makes it difficult . . . for the person to control his dangerous behavior," the Court asserted that the Act "narrows the class of persons eligible for confinement to those who are unable to control their" violent propensities, and thus the Act is consistent with the involuntary commitment statutes previously upheld by the Court.[115]

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105. Bilbrey, *supra* note 61, at 323 (quoting KAN. STAT. ANN. § 59-29a02(a)-(b)). *See also Hendricks*, 521 U.S. at 350 (quoting KAN. STAT. ANN. § 59-29a02(a)-(b)).

106. *Hendricks*, 521 U.S. at 350.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 356.

111. *Id.* (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)) (citation omitted).

112. *Id.* at 357. For an example of a statute that has been upheld, see the discussion of *Addington v. Texas* in Part III.B.

113. *Hendricks*, 521 U.S. at 358.

114. *Id.*

115. *Id.* (quoting KAN. STAT. ANN. § 59-29a02(b)).

Next, the Court addressed Hendricks's claim that the statute violated the Constitution's ban on double jeopardy and ex post facto lawmaking.[116] Both claims relied on commitment under the statute being construed as criminal or punitive in nature.[117] The Court explained that, in order to determine whether this statute provides for civil detention or criminal punishment, one must begin by looking to the legislative intent.[118] According to the Court, the fact that this statute was placed within the Kansas probate code, rather than in the criminal code, and the fact that it was described "as creating a 'civil commitment procedure'" were strong indications that the Kansas legislature intended the statute to be civil in nature.[119] The Court asserted that it would reject the legislature's intent only where there was "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention.'"[120] Here, the Court noted that commitment under the Act is not designed for retribution or deterrence – the two primary goals of criminal punishment.[121] Subsequently, the Court concluded "that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive" in nature, thus eliminating an essential element for both double jeopardy and ex post facto claims.[122]

Finally, after reviewing all of Hendricks's claims, the Court held that the Kansas Sexually Violent Predator Act,[123] which provided for the involuntary civil commitment of persons deemed to be sexually violent predators, comported with the Constitution's due process, double jeopardy, and ex post facto requirements and thus was proper.[124] It is noteworthy that Kansas's act provided the model upon which Missouri based its sexually violent predator statute.[125]

116. *Id.* at 360-61.
117. *Id.*
118. *Id.*
119. *Id.* (quoting KAN. STAT. ANN. § 59-29a01).
120. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).
121. *Id.* at 361-62.
122. *Id.* at 369.
123. KAN. STAT. ANN. §§ 59-29a01 to -29a22.
124. *Hendricks*, 521 U.S. at 371.
125. Bilbrey, *supra* note 61, at 321, 326 nn.1 & 4 (citing KAN. STAT. ANN. §§ 59-29a01 to -29a19).

D. Evolution of Missouri Law on Sexually Violent Predators

On January 1, 1999, Missouri's Sexually Violent Predator Law went into effect.[126] Under this law,[127] a person could be deemed a "'[s]exually violent predator'" if the "person suffer[ed] from a mental abnormality which ma[de] the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility," and the individual "ha[d] pled guilty, . . . been found guilty, or been found not guilty by reason of mental disease or defect . . . of a sexually violent offense."[128] If it appeared that an individual might meet the statutory definition of a sexually violent predator, the process began with either the Department of Corrections or Department of Mental Health notifying the attorney general of this fact in writing.[129]

A seven-member multidisciplinary team, appointed by the directors of the Department of Corrections and Department of Mental Health, would then review the individual's records to determine whether the individual did, in fact, meet the statutory definition of a sexually violent predator and would then inform the attorney general of its findings.[130] The resulting report would be passed along to "a five-member prosecutors' review committee," appointed by the attorney general, which would determine whether it was appropriate to pursue civil commitment.[131] If the prosecutors' review committee determined that the individual met the definition of a sexually violent

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126. H.B. 1405, 89th Gen. Assem., 2d Reg. Sess. (Mo. 1998) (codified at Sexually Violent Predators, Civil Commitment, MO. REV. STAT. §§ 632.480-.513 (Supp. 1999)).

127. The majority of the Missouri Sexually Violent Predator Law, as enacted by H.B. 1405, is still in force today. For the purposes of the current discussion (*infra* notes 127-46 and accompanying text), all references will be to the Act as enacted and codified in 1999, with secondary references to the current versions of the statutes.

128. MO. REV. STAT. § 632.480(5)(a) (Supp. 1999) (current version at § 632.480(5)(a) (Supp. 2008)). Specifically, the statute defines a "[s]exually violent predator" as

> any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who: (a) [h]as pled guilty or been found guilty, or been found not guilty by reason of mental disease or defense pursuant to section 552.030, RSMo, of a sexually violent offense; or An individual may also be deemed a sexually violent predator if, in addition to suffering the above described mental abnormality, the person "[h]as been committed as a sexual psychopath pursuant to section 632.475 and statutes in effect before August 13, 1980."

Id. § 632.480(5)(b).

129. *Id.* § 632.483.1-.2; *see also* Bilbrey, *supra* note 61, at 324.

130. MO. REV. STAT. § 632.483.4 (Supp. 1999) (current version at § 632.483.4 (Supp. 2008)).

131. *Id.* § 632.483.5; *see also* Bilbrey, *supra* note 61, at 324.

predator, the attorney general could file a petition with the probate court in which the individual was originally convicted or committed, alleging that the individual was a sexually violent predator.[132]

The probate judge would then determine whether probable cause existed to believe that the person was a sexually violent predator.[133] If such probable cause existed, the judge would direct that the individual be taken into custody.[134] Within three business days, the individual would be provided a hearing to contest probable cause.[135] If the court determined that probable cause existed, the individual would be placed in a secure facility for psychiatric evaluation.[136]

Within sixty days of the examination, a trial would be held to establish whether the individual was a sexually violent predator.[137] The accused individual would have the right to trial by jury, the right to assistance of counsel, and, if the individual was indigent, the right to have counsel appointed.[138] Under this early scheme, if the court or jury determined, beyond a reasonable doubt, that the individual was a sexually violent predator, the individual would be committed to the custody of the Department of Mental Health to be held until such time as the individual no longer posed a danger to society.[139] During this period, the individual was to be segregated from all patients who had not also been deemed sexually violent predators.[140]

While in the custody of the Department of Mental Health, the individual would undergo an annual psychiatric examination, the results of which were to be provided to the court for "an annual review of the [individual's] status [as a] committed person."[141] If the director of the Department of Mental Health determined that the individual's mental abnormality had changed such that the person was not likely to re-offend if released, the director would au-

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132. MO. REV. STAT. § 632.486 (Supp. 1999) (current version at § 632.486 (Supp. 2008)). The attorney general has forty-five days from the date the original written notice was received from either of the state agencies to file a petition for commitment as a sexually violent predator. *Id.*

133. *Id.* § 632.489.1.

134. *Id.*

135. *Id.* § 632.489.2. At his probable cause hearing, the individual is entitled to be represented by an attorney, to present evidence, to cross-examine witnesses, and to view and copy all petitions and reports in the court file. *Id.* § 632.489.3.

136. *Id.* § 632.489.4.

137. *Id.* § 632.492 (Supp. 1999) (current version at § 632.492 (Supp. 2008)).

138. *Id.*

139. *Id.* § 632.495 ("[T]he person shall be committed . . . for control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large."). The burden of proof provision was amended in 2006. *See id.* § 632.495.1 (Supp. 2006) (current version at § 632.495.1 (Supp. 2008)); *infra* note 148 and accompanying text.

140. MO. REV. STAT. § 632.495 (Supp. 1999) (current version at § 632.495.3 (Supp. 2008)).

141. *Id.* § 632.498 (current version at § 632.498.1 (Supp. 2008)).

thorize the individual to petition the court for release.[142] The individual would also be provided "with an annual written notice of the . . . right to petition the court for release over the director's objection."[143] In either situation, the individual's petition for release would be served upon the court, and a hearing would be scheduled on the issue.[144] The committed individual retained, at this release hearing, "all [the] constitutional protections that were afforded . . . at the initial commitment proceeding."[145] At this hearing, if the state failed to prove beyond a reasonable doubt that the individual was likely to engage in acts of sexual violence if released, then the individual had to be discharged.[146]

Effective June 5, 2006, the Missouri legislature made a number of amendments to the Missouri SVP Law.[147] One of the most notable changes made was to the burden of proof that the state was required to meet during civil commitment proceedings. The standard changed from beyond a reasonable doubt to the more lenient clear and convincing evidence standard.[148] The other major change made by the amendments was the addition of a new section that changed the terms under which an individual would be released from civil commitment.[149] Prior to the amendments, if the court determined that an individual's mental abnormality had changed such that he or she no longer posed a threat, the court would discharge the individual.[150] However, the newly added Section 632.505 provides that, "[u]pon a determination . . . that the person's mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released, the court shall place the person on *conditional release*."[151] Under the 2006 amendments, individuals on conditional release do not receive annual review of their status[152] and are subject to a number of restrictions, any violation of which could result in the revocation of their release for a minimum of six months.[153] These particular amendments made to the SVP Law provided the basis for the conflict in *In re Care and Treatment of Van Orden*.[154]

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142. *Id.* § 632.501.

143. *Id.* § 632.498 (current version at § 632.498.2 (Supp. 2008)).

144. *Id.* §§ 632.498, .501 (current versions at §§ 632.498.3-.4, .501 (Supp. 2008)).

145. *Id.* § 632.498 (current version at § 498.5(1) (Supp. 2008)).

146. *See id.* §§ 632.498, .501 (current versions at §§ .498.5(3), .501 (Supp. 2008)).

147. *See* H.B. 1698, 93rd Gen. Assem., 2d Reg. Sess. (Mo. 2006) (amending MO. REV. STAT. §§ 632.484, .489, .495, .498, .501, .504, .507 and enacting § 632.505). The provisions became effective immediately upon the bill's enactment and are still in force. *Id.*

148. MO. REV. STAT. § 632.495.1 (Supp. 2008).

149. *Id.* § 632.505.

150. *See* MO. REV. STAT. § 632.501 (2000), *repealed by* H.B. 1698.

151. *Id.* § 632.505.1 (emphasis added).

152. *Id.* §§ 632.505.2, .3, .5.

153. *Id.* § 632.505.7.

154. 271 S.W.3d 579 (Mo. 2008) (en banc).

IV. THE INSTANT DECISION

Judge William Ray Price, Jr. delivered the opinion of the Missouri Supreme Court.[155] The court began by describing the process involved in sexually violent predator commitment proceedings, which has been explained above.[156] It then went on to contemplate the constitutionality of section 632.495 as recently amended only to require a showing of proof by clear and convincing evidence for the commitment of sexually violent predators.[157] In doing so, the court first reviewed the related claim made by both Wheeler and Van Orden that due process required the state to prove, beyond a reasonable doubt, that they were subject to commitment as sexually violent predators, because such proceedings for involuntary civil commitment affected a "fundamental liberty interest [in] subject[ing] them to indefinite commitment."[158]

In order to address this claim, the court began by examining how different burdens of proof are assigned to various categories of cases, providing that "[d]ue process requires the use of a burden of proof that 'reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.'"[159] The court explained that, typically, civil litigation utilizes the standard of preponderance of the evidence, while "civil cases that involve a fundamental right or liberty" require proof by clear and convincing evidence in order to "lessen[] the risk of an erroneous decision."[160] "[B]ecause of the implication on the defendant's liberty interest," the court explained that "[i]n criminal proceedings . . . the state has the burden of persuading the factfinder of guilt beyond a reasonable doubt, a burden that imposes almost the entire risk of error on the state."[161]

Next, the court looked to the United States Supreme Court decision in *Addington v. Texas*[162] for direction in the case at hand.[163] In *Addington v. Texas*, the Court "found that clear and convincing evidence was an appropriate burden of proof in civil commitment proceedings" for two reasons.[164] First, the continuing opportunities for review minimized the risk of error.[165] And second, because the state was not exercising its power in a punitive sense, the state was not constitutionally required to prove its case beyond a

155. *Id.* at 581.
156. *Id.* at 582 & nn.2 & 3.
157. *Id.*
158. *Id.* at 584-85.
159. *Id.* (quoting Jamison v. State, 218 S.W.3d 399, 411 (Mo. 2007) (en banc)).
160. *Id.* (citing Addington v. Texas, 441 U.S. 418, 423 (1979)).
161. *Id.*
162. 441 U.S. 418.
163. *In re Van Orden*, 271 S.W.3d at 585.
164. *Id.* (citing *Addington*, 441 U.S. at 427-31).
165. *Id.*

reasonable doubt.[166] The *Van Orden* court also noted that the *Addington* Court doubted the practicability of meeting the higher beyond a reasonable doubt burden due to the uncertainties implicit in psychiatric diagnosis.[167] However, citing *Addington*, the court provided that, ultimately, the precise burden of proof to be utilized in civil commitment proceedings, whether beyond a reasonable doubt or clear and convincing evidence, is a matter of state law.[168]

Finally, the court articulated reasons why the clear and convincing evidence standard is appropriate. Although civil commitment proceedings involve a liberty interest, the court reiterated that they are, nonetheless, civil proceedings, "the purpose [of which] is to determine whether a person suffers from a mental abnormality that makes the person more likely than not to engage in predatory acts if not confined."[169] The court averred that this process, including the resulting confinement of those who meet these criteria, furthers a number of important interests, including protecting society and providing these persons with necessary care and therapy.[170] Additionally, the instant court explained that "the statutory requirements and procedures in place effectively minimize the risk of erroneous commitment, by requiring the person to have a previous conviction of a sexually violent offense, and [requiring the individual] to undergo psychiatric evaluations."[171] The court also noted that persons subject to civil commitment proceedings are "afforded many of the same rights as a criminal defendant, including a formal probable cause hearing, the right to a jury trial, the right to an attorney, and the right to appeal."[172] Finally, the court explained that civil commitment of sexually violent predators is not indefinite.[173] Rather, "a person committed as a sexually violent predator receives an annual review to determine if the person's mental abnormality has . . . changed" to such an extent that "commitment is no longer necessary."[174] The trial court subsequently reviews this report, and, even if release is not recommended, the individual may file a release petition at any time for the court's review.[175] Ultimately, after reviewing the interests served by the amended version of section 632.495, as well as the statutory protections in place, the Missouri Supreme Court held that the state's use of the

166. *Id.*
167. *Id.*
168. *Id.* (citing *Addington*, 441 U.S. at 433).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 586.
174. *Id.*
175. *Id.*

clear and convincing evidence burden of proof in its law providing for the civil commitment of sexually violent predators was constitutional.[176]

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176. *Id.* at 584-86. The court also addressed the appellants' other claims. First, the court addressed Van Orden's contention that the burden of proof of "clear and convincing evidence" should be defined in jury instructions. *Id.* at 586. Judge Price asserted that it is up to the trial court whether or not to submit a definitional instruction. *Id.* While "legal or technical words occurring in the [jury] instructions should be defined, . . . the meaning of ordinary words used in their usual or conventional sense need not be defined." *Id.* Further, the court asserted that a simple, brief burden of proof instruction is best. *Id.* Finally, the court concluded that the phrase "clear and convincing evidence" did not require further definition, as "the words are commonly used, . . . readily understandable, and the phrase alone provides the jury with sufficient instruction on the applicable burden of proof." *Id.* As such, the instant court resolved that the additional definitional phrases provided by Van Orden would only have "increase[d] the possibility of confusion" and thus held that the trial court did not abuse its discretion in rejecting Van Orden's proposed definitional jury instruction. *Id.*

The Missouri Supreme Court then addressed Van Orden's contention that the trial court erred in overruling his motion to dismiss because the state failed to strictly comply with section 632.483.1 in allegedly filing its petition prematurely. *Id.* Although Van Orden claimed that section 632.483.1 only permitted the state to file the petition if parole was formally revoked, according to the court, section 632.483.1 does not address the timing for filing the petition for commitment. *Id.* Section 632.483.1(1) (Supp. 2006) stated in relevant part, "[I]n the case of persons who are returned to prison for no more than one hundred eighty days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison." (This statute is still good law. *See* § 632.483.1(1) (Supp. 2008)). The court emphasized that this section only addresses when the agency with jurisdiction "must send written notice to the attorney general [communicating] that a person in its custody may meet the definition of a sexually violent predator." *In re Van Orden*, 271 S.W.3d at 586. The court explained that this only "indirectly affects the filing of the petition because the attorney general's office cannot file [the petition] until it receives notice from the agency . . . ." *Id.*

> The plain language of the statute does not state that parole must be formally revoked before the agency in jurisdiction can begin the review process for civil commitment. Rather, it is the person's "readmission to prison" that triggers the agency's duty to begin the determination if the person may meet the requirements of the statute and send written notice to the attorney general.

Id. at 587. The court asserted that allowing the agency in the jurisdiction to begin its assessment at the earliest opportunity gave most effect to the purpose of this section, which "is to ensure timely notice is [provided both] to the attorney general and multidisciplinary team to determine if civil commitment proceedings should be initiated." *Id.* Finally, the court concluded that, as no prejudice resulted to Van Orden either from the date of the filing of his petition or from the written notice requirements, the trial court did not err in denying his motion to dismiss for the state's alleged failure to comply strictly with section 632.483.1. *Id.*

The court went on to address Wheeler's contention that the trial court erred in overruling his motion to dismiss because the state failed to strictly comply with sec-

Special Judge Jacqueline Cook filed a separate concurring opinion,[177] and Judge Richard Teitelman filed a separate dissenting opinion.[178] While coming to differing conclusions on how the case ultimately should be decided, both Judge Cook and Judge Teitelman were particularly concerned with the conditional release provision of section 632.505 and the impact it had on the entire statutory scheme.[179]

In her concurrence, Judge Cook explained that, while she wrote separately in order to stress her concerns regarding the constitutionality of the conditional release provision in section 632.505,[180] the constitutionality of section 632.505 and of the statutory scheme were not raised on appeal and thus could not be decided by the court in this case.[181] Judge Cook began by explaining that, in some circumstances, it might be permissible to deprive one of his or her liberty if the person posed a danger *in addition to* possessing

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tion 632.483.1 when "the psychologist for the department of corrections contacted the attorney general before completing the end of the confinement evaluation." *Id.* The court explained that "the plain language of the statute did not restrict contact between the attorney general and agency with jurisdiction prior to the completion of the assessment and recommendation," but rather only provided time limits within which the agency must send written notice to the attorney general to initiate civil commitment proceedings. *Id.* at 587. See *supra* note 27 for the relevant text of section 632.483.1. Because there appeared to have been no impropriety concerning the contact in question, and because the psychologist could have received the information from various other sources, the Missouri Supreme Court held that the trial court did not err in denying Wheeler's motion to dismiss for the state's alleged failure to comply strictly with section 632.483.1. *Id.*

Finally, the court addressed Van Orden's argument that the court had abused its discretion when it admitted testimony regarding "the results of the Static-99 actuarial instrument," specifically because the instrument predicts group, rather than individual, risk, which could confuse the jury. *Id.* The court noted that it previously addressed this issue in *In re Care and Treatment of Murrell*, 215 S.W.3d 96 (Mo. 2007) (en banc), where it was held that the results of the Static-99 were "admissible pursuant to section 490.065.3 in cases involving the civil commitment of a sexually violent predator so long as the instrument [wa]s used in conjunction with a full clinical evaluation." *Id.* (citing *In re Murrell*, 215 S.W.3d at 110-14). The court articulated that Van Orden's doctor had not relied solely on the Static-99 instrument, but rather also conducted an independent review of Van Orden's risk factors before determining that he was likely to reoffend. *Id.* at 588. Among the risk factors noted by the doctor were Van Orden's "anti-social personality disorder, alcoholism, offense pattern of sexually deviant behavior, and the fact that [Van Orden] had offended while under supervision." *Id.* Consequently, the court found that the trial court had not abused its discretion in admitting the results of the Static-99 at Van Orden's trial. *Id.*

177. *Id.* at 588-92 (Cook, J., concurring).

178. *Id.* at 592-94 (Teitelman, J., dissenting).

179. *See id.* at 591 (Cook, J., concurring), 593-94 (Teitelman, J., dissenting).

180. *Id.* at 588 (Cook, J., concurring).

181. *Id.* at 589.

either a mental illness or abnormality.[182] However, she then went on to assert that, while a loss of liberty may be permissible, it may also pose due process concerns if one is confined without the requisite finding of dangerousness or if procedural due process protections are not provided.[183] According to Judge Cook, the conditional release provision of section 632.505 posed due process concerns in both respects.[184]

Judge Cook was first concerned with the section's provision stating that "[o]nce a court or jury determines 'that the person is not likely to commit acts of sexual violence if released,'" that is, if it is determined that the person no longer poses a threat, the court will place the person on conditional release.[185] This is problematic, according to Judge Cook, when read together with section 632.505.5, which states that a person who is conditionally released "remains under the control, care and treatment of the department of mental health."[186] Judge Cook explained that the result raised serious due process concerns, because under this statutory scheme, the finding that a person was not dangerous did not "result in complete restoration of the person's liberty."[187] Rather, according to Judge Cook, the section provided merely for a tempered form of commitment.[188] Cook asserted that after finding that an individual no longer poses a threat, "such commitment, even if it is under a less restrictive setting [such as this], violates due process."[189]

The second problem posed by the 2006 amendments to the statutory scheme, according to Judge Cook, is that they remove a number of important statutory protections.[190] The previous version of the statutory scheme provided for annual review of individuals' statuses as sexually violent predators, permitted individuals to petition the court for release, and provided individuals annual notice of these rights.[191] The 2006 amendments to the statutory scheme eliminate both the annual review and written notice for individuals on conditional release.[192] Judge Cook asserted that this "failure to provide a person committed under the [sexually violent predator statute] a procedure by which to seek unconditional release or discharge may [also] violate the Due Process Clause."[193]

Due to these problems, Judge Cook concluded that,

182. *Id.* (emphasis added).
183. *Id.* at 589-90.
184. *Id.* at 590-91.
185. *Id.* at 590 (quoting MO. REV. STAT. § 632.505.1 (Supp. 2006)).
186. *Id.* (quoting MO. REV. STAT. § 632.505.5 (Supp. 2006)).
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 590-91.
191. *Id.* at 591.
192. *Id.*
193. *Id.*

> [I]f called to consider the impact the indefinite conditional release statute has had on the entire SVP statutory scheme, [the c]ourt may be compelled to find that such an indefinite restraint of liberty has made the SVP act so punitive in purpose or effect that it no longer can be considered civil in nature . . . .[194]

Judge Cook opined that such a change would require the use of a higher standard of proof.[195]

In his dissent, Judge Teitelman noted similar problems with the Sexually Violent Predator Law as amended, but to a different end.[196] Judge Teitelman agreed that the indefiniteness of commitment after the addition of the conditional release provision to Missouri's statutory scheme made the process, in substantial part, punitive in nature.[197] Teitelman explained that, if the purpose of the law was "purely remedial," then successful treatment of an individual such that he or she no longer posed a threat should result in the individual's unconditional release.[198] "Once the remedial purpose has been fulfilled, the continued deprivation of individual liberty," as results under the current statutory scheme, "amounts to nothing but a punitive sanction."[199] Judge Teitelman related this back to the question of the appropriate standard of proof and explained that this indefiniteness, and the resulting turn towards punitiveness, makes the use of a lower burden of proof unconstitutional.[200] Thus, Judge Teitelman concluded that, given the punitive nature of Missouri's current SVP Law, the statutory scheme should be held "unconstitutional insofar as it permits the state to commit individuals" indefinitely without requiring the state to "prove the prerequisites for commitment beyond a reasonable doubt."[201]

V. COMMENT

There are two statutory sections within Missouri's Sexually Violent Predator Law that placed the constitutionality of the statutory scheme in question. The first problematic portion of Missouri's SVP Law is the amended version of section 632.495.[202] Subsection 632.495.1 lowers the burden the state must meet in order to involuntarily commit an individual under the SVP

194. *Id.*
195. *Id.*
196. *Id.* at 592-94 (Teitelman, J., dissenting).
197. *Id.* at 592.
198. *Id.*
199. *Id.*
200. *Id.* at 593-94.
201. *Id.*
202. MO. REV. STAT. § 632.495 (Supp. 2006).

Law.[203] Under this subsection, the burden is lowered from the original beyond a reasonable doubt standard typically used in criminal prosecutions to the more lenient clear and convincing evidence standard.[204] It is this provision that appellants Van Orden and Wheeler specifically challenged in the case at hand.[205]

The second, and likely more problematic, section of the Missouri SVP Law is section 632.505, the conditional release provision.[206] This subsection was a new addition to the SVP scheme in 2006[207] and changed the manner in which persons previously committed as sexually violent predators were released from confinement and allowed to rejoin society.[208] Before the amendments, persons who were deemed to no longer pose a threat to society as sexually violent predators were simply discharged from commitment and allowed to rejoin the general population without limitation.[209] However, as a result of the addition of section 632.505 in 2006, rehabilitated persons are now conditionally released and must continue to comply with a plethora of regulations in order to maintain this status.[210] As amended, the statute provides no means by which persons may be fully discharged from this conditional release status.[211] Rather, these rehabilitated individuals are left in a perpetual state of limbo, no longer deemed to pose a threat, yet forever subject to special regulation and supervision of nearly every significant aspect of their lives.[212]

It is quite possible that either of these statutory sections, in and of themselves, would be constitutionally problematic. Independent of the statutory scheme in which it can be found, section 632.505's conditional release provision raises two significant due process concerns. The first problem, as noted by Judge Cook in her concurrence, is that "the statute provides for a form of commitment . . . without the requisite finding of dangerousness."[213] "Free-

203. *Compare* MO. REV. STAT. § 632.495.1 (Supp. 2008) ("The court or jury shall determine whether, by clear and convincing evidence, the person is a sexually violent predator."), *with* MO. REV. STAT. § 632.495.1 (Supp. 2005) ("The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.").

204. *Id.*

205. *In re* Care and Treatment of Van Orden, 271 S.W.3d 579, 582 (Mo. 2008) (en banc).

206. MO. REV. STAT. § 632.505 (Supp. 2006).

207. *See* H.B. 1698, 93rd Gen. Assem., 2d Reg. Sess. (Mo. 2006) (enacting MO. REV. STAT. § 632.505).

208. *Compare* MO. REV. STAT. §§ 632.498-.504 (2000 & Supp. 2005), *with* §§ 632.498-.505 (Supp. 2008).

209. *See id.* §§ 632.498-.504 (2000 & Supp. 2005).

210. *Id.* § 632.505 (Supp. 2006).

211. *See id.*

212. *See id.*

213. *In re* Care and Treatment of Van Orden, 271 S.W.3d 579, 590 (Cook, J., concurring).

dom from bodily restraint" has long been held to be a fundamental right "at the core of [those] liberties protected by the Due Process Clause."[214] As the Missouri Sexually Violent Predator Law impinges on this fundamental liberty, the Missouri Supreme Court has determined that strict scrutiny applies, and thus the law will be upheld only if it is narrowly tailored to further a compelling state interest.[215]

The fact that an individual suffers from mental illness alone does not provide the state with a compelling enough interest to allow curtailment of the individual's right to be free from bodily restraint. The Supreme Court has expressly declared that due process requires that a person be both mentally ill *and* dangerous in order to be civilly committed.[216] In line with this requirement, Missouri's highest court has held that the interest served by the Sexually Violent Predator statute is "protecting society from dangerous persons who are likely to commit future sexually violent crimes if not committed."[217] The United States Supreme Court has also recognized community safety as a legitimate and compelling state interest that can serve to justify the detention of dangerous persons.[218]

Therefore, commitment in this context must be predicated on a finding of dangerousness. If this is the case, once it is determined that an individual no longer poses a threat, "due process requires that the person be released – *fully* released – from commitment," as mental illness alone also cannot justify involuntary commitment.[219] However, under the amended version of section 632.505, a "finding that a person no longer poses a threat *does not* result in complete restoration of that person's liberty."[220] Rather, under the current version of section 632.505, once it is determined that an individual is not likely to reoffend if released, the person is merely *conditionally released.*[221]

While this release may appear to be a restoration of the rehabilitated individual's liberty, the statute explicitly declares otherwise. According to the terms of the statute, "[a] person who is conditionally released . . . remains under the control, care, and treatment of the department of mental health."[222]

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214. Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *see* Roe v. Wade, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

215. *In re* Care and Treatment of Coffman, 225 S.W.3d 439, 445 (Mo. 2007).

216. *Id.* at 446.

217. *Id.* at 445.

218. *See* United States v. Salerno, 107 U.S. 739, 748-49 (1987).

219. *In re* Care and Treatment of Van Orden, 271 S.W.3d 579, 590 (Mo. 2008) (en banc) (Cook, J., concurring). Even if the original involuntary confinement was "founded upon a constitutionally adequate basis" and was thus permissible, it cannot continue after that basis no longer exists. O'Connor v. Donaldson, 422 U.S. 563, 574-75 (1975).

220. *In re Van Orden*, 271 S.W.3d at 590 (Cook, J., concurring); *see* MO. REV. STAT. § 632.505.1 (Supp. 2008).

221. MO. REV. STAT. § 632.505.1.

222. *Id.* § 632.505.5.

The terms of this "conditional release" perpetually subject these persons to more than twenty regulations on how they may proceed to live their lives, any violation of which will subject the individual to arrest and return to a secure Department of Mental Health facility.[223] For example, without approval by the Department of Mental Health, conditionally released individuals "may not consume alcohol," be without gainful employment, "associate with any person who has [ever] been convicted of a felony[,] . . . leave the state," or "have any contact with any child," including their own.[224] Additionally, while in this state of perpetual conditional release, individuals are required to submit to outpatient treatment and monitoring, both of which they are required to finance.[225]

Contrary to what is constitutionally required, upon a finding that these individuals have been reformed and rehabilitated, rather than restoring their fundamental liberties, section 632.505 subjects these persons to a continued "form of moderated commitment."[226] Such perpetual restraints on liberty, "continued without opportunity of review or the possibility of unconditional release or discharge, would raise serious due process concerns."[227]

The second problem with the conditional release provision is that it "fails to provide sufficient procedural due process protection."[228] The Missouri Supreme Court has recognized that confinement "pursuant to an SVP statute is not necessarily indefinite," but rather should correlate with "the stated purposes of commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."[229] The court has further acknowledged that the "annual review mechanism" present in the pre-2006 SVP scheme "allowed the Missouri statute to comport with the due process protections of the U.S. Constitution."[230]

Prior to the 2006 amendments, Missouri's statutory scheme provided for an annual examination of a committed individual's mental health to determine whether the individual's mental abnormality had changed such that he or she was no longer likely to engage in acts of sexual violence if released.[231] This annual review mechanism guaranteed that an involuntary commitment that was initially permissible did not continue after the basis for it ceased to

223. *Id.* § 632.505.7(1).

224. *Id.* § 632.505.3(2), (6), (7), (8), (10).

225. *Id.* §§ 632.505.3(13)-(16), .3(19), .9 (Supp. 2008).

226. *In re* Care and Treatment of Van Orden, 271 S.W.3d 579, 590 (Mo. 2008) (Cook, J., concurring).

227. *Id.*

228. *Id.* at 589.

229. *In re* Care and Treatment of Murrell, 215 S.W.3d 96, 105 (Mo. 2007) (citing Kansas v. Hendrix, 521 U.S. 346, 363 (1997)).

230. *Id.*

231. MO. REV. STAT. § 632.498 (Supp. 2005), *repealed by* H.B. 1698, 93rd Gen. Assem., 2d Reg. Sess. (Mo. 2006).

exist.[232] However, the 2006 amendments to the statutory scheme did away with the annual review for conditionally released individuals.[233] The removal of this statutory protection leaves the Missouri SVP statute in a precarious position. There is now no safeguard in place to ensure that the limitations on conditionally released individuals' liberties remain linked to their stated purpose. Subsequently, restrictions on an individual's liberty, which were initially permissible, will be permitted to continue indefinitely, long after the basis for such limitations ceases to exist.

An additional statutory safeguard also was removed by the 2006 amendments when the conditional release status was created. Under the previous statutory scheme, committed persons were provided with annual written notice of their right to petition the court for discharge.[234] The 2006 amendments eliminated this notice requirement for conditionally released persons.[235]

It also is possible that section 632.495, the provision that reduces the state's burden of proof, would be constitutionally problematic in and of itself. The majority in the instant case focused largely on the United States Supreme Court's decision in *Addington v. Texas* in determining that a clear and convincing evidence standard is appropriate in the Missouri SVP Law.[236] *Addington* held that a clear and convincing evidence standard was constitutionally permissible in a civil commitment proceeding.[237] However, as Judge Teitelman explained in his dissenting opinion, a number of the propositions upon which the Supreme Court based its decision in *Addington* were inapplicable in the instant case.[238]

For example, one proposition distinguished by Judge Teitelman was that the "ongoing review of an individual's condition provide[d] continuous opportunities to correct an erroneous commitment decision."[239] While this may have been true in Missouri under the pre-2006 statutory scheme,[240] under the current scheme not all individuals are provided ongoing review.[241] In fact, the statute expressly states that conditionally released individuals will *not* be

232. *In re Murrell*, 215 S.W.3d at 105 (citing O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

233. MO. REV. STAT. § 632.498.1 (Supp. 2008). "The court shall conduct annual review of the status of the committed person. The court shall *not* conduct an annual review of a person's status if he or she has been conditionally released pursuant to section 632.505." *Id.* (emphasis added).

234. *Id.* § 632.498 (Supp. 2005), *repealed by* H.B. 1698.

235. *Compare* § 632.498.2 (Supp. 2008), *with* § 632.498 (Supp. 2005).

236. *See In re* Care and Treatment of Van Orden, 271 S.W.3d 579, 585 (Mo. 2008) (en banc) (discussing Addington v. Texas, 441 U.S. 418, 432-33 (1979)).

237. *Addington*, 441 U.S. at 432-33. *See also* discussion *supra* Part III.B.

238. *In re Van Orden*, 271 S.W.3d at 592 (Teitelman, J., dissenting).

239. *Id. See Addington*, 441 U.S. at 428-29.

240. *See* MO. REV. STAT. § 632.498 (Supp. 2005), *repealed by* H.B. 1698, 93rd Gen. Assem., 2d Reg. Sess. (Mo. 2006).

241. *See* MO. REV. STAT. § 632.498.1 (Supp. 2008).

provided annual review of their status.[242] As the protection that made a lower burden of proof permissible in *Addington* does not uniformly apply under Missouri law, the constitutionality of the lower burden in Missouri is quite a different question than was posed to the U.S. Supreme Court in *Addington*.

Secondly, the Court in *Addington* based its decision on the proposition that the beyond a reasonable doubt burden of proof is unworkable in the civil commitment context and is reserved for criminal cases.[243] While this may have been true to a certain extent at the time of the *Addington* decision, it is no longer true today. Not only do a number of states successfully utilize the criminal law standard in their SVP statutes,[244] but Missouri itself also successfully utilized the beyond a reasonable doubt standard for the commitment of sexually violent predators from 1999 until the amendments in 2006.[245] In practice, this standard did not prove to construct such a barrier that Missouri was unable to commit dangerous individuals.[246] Therefore, not only does it become apparent that the beyond a reasonable doubt standard is no longer being reserved for criminal cases, it also becomes clear that the heightened burden of proof can be very workable in a civil commitment context. Subsequently, neither of these propositions, which were important in the *Addington* decision, applied in the case at hand.

The United States Supreme Court held in *Addington* that the clear and convincing evidence standard was an appropriate burden of proof in civil commitment proceedings.[247] However, the Court did not insist upon this precise standard, but rather held only that a burden equal to or greater than the clear and convincing standard is required to satisfy due process.[248] The Missouri Supreme Court relied heavily on *Addington* in holding that the clear and convincing standard is sufficient in Missouri today.[249] However, much

242. *Id.*

243. *See Addington*, 441 U.S. at 428, 430-31.

244. *See, e.g.*, CAL. WELF. & INST. CODE § 6604 (West 2009); IOWA CODE § 229A.7(5) (West, Westlaw through 2009 Reg. Sess.); KAN. STAT. ANN. § 59-29a07(a) (West, Westlaw current through 2008 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 123A, § 14(d) (West, Westlaw through ch. 102 of 2009 1st Annual Sess.); S.C. CODE ANN. § 44-48-100(A) (West, Westlaw through 2008 Reg. Sess.); TEX. HEALTH & SAFETY CODE ANN. § 841.062(a) (West, Westlaw through 2009 Reg. & 1st Called Sess.); WIS. STAT. ANN. § 980.05(3)(a) (West, Westlaw through 2009 Acts 27, 29-39).

245. MO. REV. STAT. § 632.495 (Supp. 2005), *repealed by* H.B. 1698, 93rd Gen. Assem., 2d Reg. Sess. (Mo. 2006); *see also In re Van Orden*, 271 S.W.3d at 593 (Teitelman, J., dissenting).

246. *In re Van Orden*, 271 S.W.3d at 593 (Teitelman, J., dissenting) (citing *In re* Care and Treatment of Cokes, 183 S.W.3d 281 (Mo. App. W.D. 2005); *In re* Care and Treatment of Spencer, 171 S.W.3d 813 (Mo. App. S.D. 2005); *In re* Care and Treatment of Collins, 140 S.W.3d 121 (Mo. App. E.D. 2004)).

247. *Addington*, 441 U.S. at 432-33.

248. *Id.*

249. *See In re Van Orden*, 271 S.W.3d at 585 (discussing *Addington*, 441 U.S. 418).

has changed in the nearly thirty years since *Addington* was decided, and, as many of the propositions relied on by the *Addington* Court do not apply in the instant case, the constitutionality of the clear and convincing evidence standard under Missouri's current statutory scheme is not as clear as the majority would lead us to believe.

While either statutory section may pose constitutional questions alone, when combined sections 632.495 and 632.505 create a statutory scheme that is patently violative of due process. The majority noted in its opinion that the purpose of Missouri's SVP Law is (1) to protect society from persons likely to pose a danger and (2) to provide these persons with necessary treatment.[250] If these were in fact the only reasons for civil commitment under the SVP scheme, change in a committed individual's mental condition such that he or she no longer poses a threat should result in his or her unconditional release.[251] However, as discussed above, the result of section 632.505 is that the individual "remains under the control, care and treatment of the department of mental health."[252]

As Judge Teitelman eloquently stated in his dissent, "Once the remedial purpose has been fulfilled, the continued deprivation of individual liberty amounts to nothing but a punitive sanction."[253] The United States Supreme Court provides that, when it can be shown that a statutory scheme is so punitive in purpose or effect as to negate a state's intention that it be considered civil, the Court will consider the statute to have established criminal proceedings for constitutional purposes.[254] Regardless of the state's characterization of the SVP Law as a *civil* commitment proceeding, the conditional release provision in the statute, extending serious restraints on liberty long after the purpose for the original commitment has ceased to exist, creates a punitive effect. Therefore, this statute has established what should be considered criminal proceedings.

As the majority explained at the outset, due to the implications on a person's liberty, in criminal proceedings the state has the burden of persuading the fact-finder beyond a reasonable doubt.[255] Thus, the punitive effect of section 632.505 creates a requirement that the burden under the SVP scheme be beyond a reasonable doubt. As the amended version of section 632.495 does not provide for such a standard, but rather a lower inadequate standard, the result is that, together, sections 632.495 and 632.505 create a clear violation of due process.

250. *Id.* at 585.
251. *Id.* at 592 (Teitelman, J., dissenting).
252. MO. REV. STAT. § 632.505 (Supp. 2008). *See* discussion *supra* notes 238-43.
253. *In re Van Orden*, 271 S.W.3d at 592 (Teitelman, J., dissenting).
254. Kansas v. Hendrix, 521 U.S. 346, 361 (1997).
255. *In re Van Orden*, 271 S.W.3d at 585.

VI. CONCLUSION

The involuntary commitment of sexually violent predators has long been held to be a constitutional means by which to advance a state's interest in protecting members of its community from harm. As a result, the enactment of the Sexually Violent Predator Law in Missouri received little scrutiny. Indeed, who wants to stand up for the rights of persons convicted of committing multiple acts of sexual violence?

However, the recent attempt on the part of the Missouri legislature to ease involuntary commitment by eliminating procedural safeguards, in combination with the legislature's effort to permanently restrict the personal liberties of rehabilitated offenders, has transformed the once legitimate SVP scheme into an unconstitutional encroachment on fundamental due process rights. The Missouri Supreme Court had an opportunity in *In re Care and Treatment of Van Orden* to remedy these violations and stand up for the fundamental rights of an otherwise marginalized group. Instead, by holding the 2006 amendments to the Missouri Sexually Violent Predator scheme constitutional, Missouri's highest court has legitimized an outright assault on constitutionally protected fundamental liberties.

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