IN THE
SUPREME COURT OF MISSOURI

IN THE MATTER OF THE CARE AND TREATMENT OF N.G., Respondent/Appellant.	))))	No. SC96830

APPEAL TO THE
SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT
THE HONORABLE KATHLEEN A. FORSYTH, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Chelseá R. Mitchell, MOBar #63104
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
E-mail: chelsea.mitchell@mspd.mo.gov

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JURISDICTIONAL STATEMENT

N.G. was committed by the Honorable Kathleen A. Forsyth as a Sexually Violent Predator ("SVP"), following a jury trial in Jackson County, Missouri. The Missouri Court of Appeals, Western District, affirmed N.G. ' commitment. This Court took transfer of this cause on application of the appellant, and therefore has jurisdiction pursuant to Rule 83.04.Mo. Const. art V, §10. (as amended 1976).[1]

[1] The Record on Appeal consists of a Transcript (Tr.) and a Legal File (L.F.). Unless otherwise noted, all statutory references are to RSMo. 2006, cumulative through the 2013 supplement.

STATEMENT OF FACTS

N.G. was just 23 years old when committed as an SVP. (L.F. 94). His only conviction occurred when he was 18. (Tr. 326, 338-40).

Department of Mental Health ("DMH") psychologist Lisa Witcher testified for the State at trial. (Tr. 316). The State also called Missouri Sex Offender Program ("MoSOP") operations manager Rob Gould. (Tr. 428). The evidence adduced at trial was as follows.

Over a three-week period, 18-year-old N.G. had sexual activity with three children, ages 5-7 years old.[2] (Tr. 338-39). N.G. dared a nephew place his hand and mouth on N.G.'s penis. (Tr. 339). Another day, N.G. tried to get a niece to perform oral sex on him and later that day asked the other two children to put their mouths on his penis. (Tr. 339-40). N.G. was convicted of child molestation in the first degree for his conduct. (Tr. 326). He received a five-year sentence and was released on probation after 120 days. (Tr. 635, 627). His probation was later revoked for technical reasons. (Tr. 631). The State petitioned to commit N.G. before his release. (L.F. 9).

Witcher said 14-year-old N.G. had a one-year-old place his hand on N.G.'s penis because N.G. wanted to know what it was like to have another person touch him. (Tr. 333). Gould testified N.G. was babysitting the nephew, who he didn't want to leave alone, but also wanted to masturbate. (Tr. 503). N.G. was curious about what it would feel like to have his penis touched, and the nephew was accessible. (Tr. 503-4). N.G. testified, "I feel like I did that based on impulsivity. It was just a moment." (Tr. 643). Witcher said at 15, N.G. showed B., 8 or 9 years old, pornography; the two touched one another and had oral sex. (Tr. 334).

The American Psychiatric Association's ("APA") Diagnostic and Statistical Manual ("DSM") is based on consensus among professionals and used to make diagnoses. (Tr. 328-29). It has specific criteria for pedophilic disorder. (Tr. 331). Witcher said N.G. engaged in sexual behavior with a child beginning at 14 or 15, his behaviors "last over a

[2] The conduct over the three-week period is the single "index offense." (Tr. 388). An "index offense" is the committing offense for which the individual was caught and prosecuted. (Tr. 340).

period of three months," he was bothered by his own behavior, and was sanctioned and imprisoned. (Tr. 332, 335). She said N.G. had sexual urges towards children "in that he, he victimized" them. (Tr. 336).

Witcher testified that a pedophilic disorder diagnosis by itself is not enough to qualify as a mental abnormality. (Tr. 324). However, in N.G.'s case, his pedophilic disorder rose to the level of a mental abnormality because it resulted in a sexually violent offense and "it's been shown to affect his ability to control his behavior." (Tr. 343, 378). She believed it caused N.G. "serious difficulty" because he reported feeling guilty or thinking he should not be doing it, but engaged in that behavior anyway. (Tr. 343).

Witcher assessed N.G.'s future risk by scoring actuarials. (Tr. 344). She gave N.G. a score of 4 on the Static-99R, meaning "his chance of reconviction is a (sic) 17.3[%] within the first five years." (Tr. 346). Witcher gave N.G. a score of 6 on the Static-2002R, which "places him in the moderate risk category and gave him a 22.7[%] chance of reconviction over five years." (Tr. 348). She also looked at dynamic risk factors that can change. (Tr. 349). Witcher ultimately testified that N.G. is more likely than not to commit future acts of sexual predatory violence unless confined. (Tr. 377).

Psychologist Richard Wollert testified for N.G. (Tr. 541). He said juveniles[3] are very different from adults in terms of impulsivity, psychosocial judgment, maturity, and likelihood to act inappropriately. (Tr. 549-50). He explained the brain develops from back to front, with the frontal temporal lobes developing last, during one's twenties. (Tr. 587-88). Those lobes control foresight, judgment, and decision making. (Tr. 588). Wollert testified an SVP evaluation must be approached within the context of brain development research. (Tr. 590-91). The evaluator must discern whether sexual behaviors were the product of developmental factors or stable factors that will persist into adulthood. (Tr. 575).

N.G. , his mother, and his brother also testified. (Tr. 517, 525, 611). N.G. testified that at the time he offended, he didn't think of his conduct as harmful; he saw it as the same scenario he experienced with a peer when he was 8. (Tr. 626). He testified that he had never

[3] Used "more generally" and not as defined by law. (Tr. 549).

grasped the consequences of his actions before getting caught, and being locked up in jail "was a shock to me." (Tr. 627).

Other Matters

In opening, trial counsel said N.G. watched Hentai, Japanese animated pornography featuring half-human, half-animal adult characters with sexually exaggerated features. (Tr. 304-5). Gould said N.G. watched Hentai and testified about a video game N.G. played involving anthropomorphized Sonic the Hedgehog cartoon characters involving earning trust credits to spend on treats and performing sexual acts. (Tr. 500-1, 454-56).

In opening, both the State's attorney and trial counsel told the jury that N.G. had sexual contact with animals. (Tr. 297-99, 306). Witcher testified that she gave him a zoophilia diagnosis and said he had "some sexual impulsivity and promiscuity of engaging with animals." (Tr. 351, 361). She testified research says having two or more paraphilias "increases their risk to reoffend," but also said that sexually violent offenses only include contact offenses against humans. (Tr. 354, 391). Witcher said attraction to animals was not even illegal. (Tr. 388). Gould testified that during MoSOP, it was more difficult for N.G. to discuss interactions with children than with animals and that N.G. agreed he was at greater risk to offend against animals. (Tr. 438-39,443). Both attorneys asked N.G. questions about animals. (Tr. 617-18, 651-52, 659)

N.G.'s motions for directed verdicts were denied. (L.F. 71-76; Tr. 515, 675). The jury found him to be an SVP and he was committed to DMH. (L.F. 89, 94). His motion for a judgment notwithstanding the verdict or a new trial was also denied. (L.F. 95-109, Tr. 728). This appeal follows.

Additional facts necessary to the disposition of the issues raised are set forth in the argument.

POINTS RELIED ON

I.

The trial court plainly erred in committing N.G. because this violated his rights to due process, equal protection and freedom from cruel and unusual punishment, guaranteed by U.S. Const. amends. V, VIII, XIV; Mo. Const. art. I, §§2, 10, 21, in that N.G. was 18 at the time of his underlying crime; that conduct is the only basis for finding a sexually violent offense, mental abnormality, and mental abnormality-caused risk; and commitment is a mandatory lifetime sentence in DMH custody.

Graham v. Florida, 560 U.S. 48 (2010);

Miller v. Alabama, 132 S.Ct. 2455 (2012);

Roper v. Simmons, 543 U.S. 551 (2005);

U.S. Const. amends. V, VIII, XIV;

Mo. Const. art. I, §§2, 10, 21;

§§211.041, 211.425, 589.400;

Rule 110.04(a)(12), 84.13(c);

Roger Przybylski & Christopher Lobanov-Rostovsky, *Chapter 1: Unique Considerations Regarding Juveniles Who Commit Sexual Offenses in* Sex Offender Management Assessment and Planning Initiative, Report NCJ 247059 (National Criminal Justice Ass'n & U.S. Dept. of Justice, 2014);

P.H. Tolan, T. Walker, & N.D. Reppucci, *Applying developmental criminology to law: Reconsidering juvenile sex offenses*, 14(1) JUSTICE RESEARCH AND POLICY 117 (2012).

II.

The trial court erred in committing N.G., and denying his motion for a directed verdict and for a judgment notwithstanding the verdict, because the evidence was insufficient to prove he suffered from a mental abnormality making him more likely than not to commit predatory acts of sexual violence if not confined, in violation of his rights to due process, equal protection, a fair trial, and amounting to cruel and usual punishment under U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21; §§632.480, 632.495, in that the State's evidence was insufficient to prove he met DSM-5 criteria for pedophilic disorder, there was no evidence of predisposition, and Witcher's opinions were speculative, and not supported by the record, probative, or sufficient to make a submissible case.

Murrell v. State, 215 S.W.3d 96 (Mo. banc 2007);

In re Marriage of Harris, 446 S.W.3d 320 (Mo. App. S.D. 2014);

McGuire v. Seltsam, 138 S.W.3d 718 (Mo. banc 2004);

Brown for Estate of Kruse v. Seven Trails Investors, LLC, 456 S.W.3d 864 (Mo. App. E.D. 2014);

U.S. Const. amends. VIII, XIV;

Mo. Const. art. I, §§10, 21;

§§632.480, 632.495;

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 685 (5th ed. 2013);

Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnosis in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY LAW 443, 446 (2008).

III.

The trial court erred in committing N.G., and in denying his motion for a directed verdict and for a judgment notwithstanding the verdict, because the evidence was insufficient to prove that he suffered from a mental abnormality making him more likely than not to commit predatory acts of sexual violence if not confined as required by §632.495, in violation of his rights to due process, equal protection, a fair trial and amounting to cruel and usual punishment under U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21; §632.480, in that the State's evidence did not establish that pedophilic disorder caused N.G. to be more likely than not to commit predatory acts of sexual violence if not confined.

Care and Treatment of Cokes, 107 S.W.3d 317 (Mo. App. W.D. 2007);

Underwood v. State, 519 S.W.3d 861 (Mo. App. W.D. 2017);

U.S. Const. amends. VIII, XIV;

Mo. Const. art. I, §§10, 21;

§§632.480, 632.495.

IV.

The trial court erred in committing N.G. as an SVP because he was denied the effective assistance of counsel, due process, a fair trial, and equal protection guaranteed by U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21; and §632.492, that his trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would render under the circumstances since the record reflects that trial counsel failed to object to, and even introduced evidence that N.G. viewed Hentai, played sexually-oriented video games, and had sexual contacts with animals, and without such evidence there is a reasonable probability the outcome of trial would have been different.

Strickland v. Washington, 466 U.S. 668 (1984);
In re Norton, 123 S.W.3d 170, (Mo. banc 2003);
Christian v. State, 502 S.W.3d 702 (Mo. App. S.D. 2016);
Buck v. Davis, 137 S.Ct.759 (2017);
U.S. Const. VIII, XIV;
Mo. Const. art. I, §§10, 21;
§632.492.

ARGUMENT

I.

The trial court plainly erred in committing N.G. because this violated his rights to due process, equal protection and freedom from cruel and unusual punishment, guaranteed by U.S. Const. amends. V, VIII, XIV; Mo. Const. art. I, §§2, 10, 21, in that N.G. was 18 at the time of his underlying crime; that conduct is the only basis for finding a sexually violent offense, mental abnormality, and mental abnormality-caused risk; and commitment is a mandatory lifetime sentence in DMH custody.

The United States Supreme Court ruled that juveniles cannot be sentenced to life in prison without parole for nonhomicide crimes. *Graham v. Florida*, 560 U.S. 48, 79-80 (2010); U.S. Const. amend. VIII, XIV; Mo. Const. art. I, §21. N.G. was eighteen years old when he committed the underlying sexually violent offense, child molestation in the first degree under §558.011. (L.F. 10; Tr. 338-39). On the basis of that underlying criminal conduct, the State successfully sought to have N.G. committed. (L.F. 9-12, 89, 94).

Standard of Review

N.G. unsuccessfully moved to dismiss the proceedings because there is no discharge from lifetime commitment. (L.F. 41-46, 107-8; Tr. 7-8). He did not ask the court to dismiss the proceedings against him as a fundamental violation of his rights to due process, equal protection and freedom from cruel and unusual punishment, given his youthfulness at the time of his underlying criminal conduct.[4] Therefore, this Court reviews for plain error and will reverse if the error resulted in manifest injustice. Rule 84.13(c); *In re Gormon*, 371 S.W.3d 100, 107 (Mo. App. E.D. 2012).

Analysis

A. Juvenile Offenders & Commitment

[4] U.S. Const. amends. V, VIII, XIV; Mo. Const. art. I, §§2, 10, 21.

The Sexually Violent Predator Act ("SVPA") requires findings prior to commitment, including: "the individual (1) has a history of past sexually violent behavior; (2) a mental abnormality; and (3) the abnormaltiy creates a danger to others if the person is not incapacitated." *Murrell v. State*, 215 S.W.3d 96, 105 (Mo. banc 2007), *citing Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). While mental abnormality and future risk findings are required, "The original conviction for a sexually violent offense acts as an anchor around which other pieces of evidence may be cemented." *Holtcamp v. State*, 259 S.W.3d 542 (Mo. banc 2008).

The SVPA does not distinguish between juveniles and adults for the purposes of commitment. *See* §632.480, et seq. Missouri Courts have never been called upon to examine whether or not that "anchor" will hold water based solely on offenses committed as a juvenile, or if a mental abnormality and future risk can be "cemented" to juvenile conduct alone. The answers must be "no."

Neuroscience and brain-based research demonstrate that "juveniles are developmentally different from adults." Roger Przybylski & Christopher Lobanov-Rostovsky, *Chapter 1: Unique Considerations Regarding Juveniles Who Commit Sexual Offenses in* Sex Offender Management Assessment and Planning Initiative, Report NCJ 247059 (National Criminal Justice Ass'n & U.S. Dept. of Justice, 2014) (included in *Appendix*).

> Based on the scientific evidence, it is clear that juveniles and adults differ in their cognitive capabilities, capacity for self-management and regulation, susceptibility to social and peer pressure, and other factors related to judgment, criminal intent, and the capacity to regulate behavior. Juveniles also differ from adults in their propensity to engage in persistent criminal behavior, in that they are less likely to continue to engage in such behavior.

Id. citing P.H. Tolan, T. Walker, & N.D. Reppucci, *Applying developmental criminology to law: Reconsidering juvenile sex offenses*, 14(1) JUSTICE RESEARCH AND POLICY 117, 117-146 (2012).

The brain's frontal lobe controls advanced functions including imagination, abstract thought, judgment of consequences, planning and controlling impulses, and continues to develop into an individual's early twenties. Michele Deitch, et al., *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, 13-14 (Univ. of Tex. at Austin, 2009); (Tr. 395-96). While a steady decline in impulsivity begins in adolescence, it remains elevated in the mid-twenties. Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L.& Soc. Change 285, 295 (2012) (discussing neuro-imaging research). Studies confirm the prefrontal cortex is not fully mature until an individual reaches his twenties. *See,* Jay Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain,* 1021 Annals N.Y. Acad. Sci.77, 83 (2004). In fact, "the brain does not reach full maturation until the age of 25." Deitch at 13-14; Levick at 299; (Tr. 397).

This is apparent in the "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking" traits characterizing adolescence. *Miller v. Alabama*, 132 S.Ct. 2455 (2012), *citing Roper v. Simmons*, 543 U.S. 551, 569 (2005). The Supreme Court recognized "that the character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 570. It is unreasonable to conclude "that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* Their actions are "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 560 U.S. at 68, *citing Roper*, 543 U.S. at 570. Youthful qualities and character traits subside with aging and maturity. *Roper*, 543 U.S. at 570. "Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Id.* "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570-71. As a result of these

studies, it has been argued that drawing a line at 25 is more appropriate than 18. Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. Crim. L. & Criminology 667, 699-700 (2014).

B. This Court Should Hold Children Under 21 Are Juveniles

In *Roper*, the Supreme Court held it was cruel and unusual punishment to execute juveniles, persons under the age of 18. 543 U.S. at 574. Although *Roper*, in dicta, drew the line at 18, the defendant was 17; thus the issue of whether it would be constitutional to execute an 18 year old was not truly before the court. Before *Roper*, the Court drew the line at under the age of 16. *See Stanford v. Kentucky*, 492 U.S. 361 (1989) (constitutional to execute offenders who were 16 and 17 at time of crime); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (unconstitutional to execute an offender under 16 at time of crime).

Even *Roper* acknowledged that the line-drawing at age 18 was not scientifically founded since "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Later, *Graham* noted "parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68 (also recognizing 18 line). The Court recognized the obvious fact that features of adolescence do not disappear upon one's eighteenth birthday, observing that "'youth is more than a chronological fact.'" *Miller*, 123 S.Ct. at 2467.

State courts may draw the line above 18 before a mandate by the Supreme Court. In *People v. House*, 72 N.E. 3d 357 (Ill. App. 2015), the court found the 18-year cut off "arbitrary." The Illinois court noted international practices: in Germany, youthful offenders ages 18-21 are tried in juvenile court; in Sweden, young adults are tried in juvenile court until age 25; and in the Netherlands, there are alternatives for juveniles 18-21. *Id*. at 387 (internal citaions omitted). The defendant in house was 19 years and 2 months, "barely a legal adult and still a teenager." *Id*. at 388. Imposing a mandatory sentence for the rest of his natural life "shocks the moral sense of the community." *Id*.

A Kentucky court declared the death penalty unconstitutionally cruel and unusual for those under 21 *at the time of the offense* in *Kentucky v. Bredhold*, Fayette Circuit Court,

7th Division, Case No. 14-CR-161 (Aug. 1, 2017), relying on the same scientific evidence as *Roper*. (Op. p. 6-11, included in Appendix). Bredhold was 18 years and 5 months old at the time of the crime. (Order, p. 2). This Court, in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (2004), held that the execution of children under 18 at the time of their crime was prohibited by the Eighth Amendment.

Missouri statutes and rules recognize a child does not become an adult until 21. For example: Rule 110.04(a)(12), regarding juvenile proceedings, states:"[a]s used in Rules 110 to 129, unless the context requires a different meaning: … (12) 'juvenile' means a person under 21 years of age who is subject to the jurisdiction of the court;" §211.041 provides:"the jurisdiction of the child may be retained for the purpose of this chapter until he or she has attained the age of twenty-one years;" §211.425.6 says the requirement to register as a "juvenile sex offender" shall terminate upon the juvenile offender reaching age twenty-one, unless such "juvenile offender" is required to register as an adult. Thus, it is appropriate for this Court to hold that a child under 21 cannot be subject to life imprisonment without probation or parole since such a child can still be within juvenile court jurisdiction.

C. N.G. Has No Meaningful Release Opportunity

Graham's holding rested largely on the inconsistency of imposing a final, irrevocable penalty on a juvenile, who had capacity to change and grow. 560 U.S. at 68-69. *Miller* recognized "the great difficulty…of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. 132 S.Ct. at 2469.

There must be "some meaningful opportunity to obtain release based on maturity and rehabilitation." *Id.* That means a "chance for fulfillment outside prison walls" and a "chance for reconciliation with society." *Graham,* 560 U.S. at 79. The State "need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 80.

SVP commitment is lifetime custody in DMH. *State ex rel. Schottel v. Harman*, 208 S.W3d 889, 891 (Mo. banc 2006) (someone "released" under the statute "remains committed to custody."); §§632.498, 632.505.5 ("A person who is conditionally released…remains under the control, care, and treatment of the department of mental health."). Government "custody" is not limited to physical incarceration; one supervised by the government and subject to conditions is "hardly a free man." *Nicholson v. State*, 524 S.W. 2d 106,109 (Mo. banc 1975). Conditional release, if obtained, "does not result in complete restoration of that person's liberty" and due process requires the person be fully released. *Van Orden*, 271 S.W.3d at 589-90 (Cook, S.J., concurring). Under the SVPA, there is ***no*** opportunity to obtain release from government custody once committed. As a result, N.G. *is* incarcerated and will be confined for life without the possibility of government control terminating.

This is the functional equivalent of a life without parole sentence for his juvenile offense. *Graham*'s "flat ban" on life without parole applies to all nonhomicide crimes committed by juveniles. *Miller*, 132 S.Ct. at 2465; *Graham*, 560 U.S. at 75. Other states have extended this prohibition to fixed-term sentences functionally equivalent to life without parole, like consecutive sentences or sentences for so many years as to ensure death in prison. *See, e.g., State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) (unconstitutional LWOP sentence not fixed by substituting a sentence with parole that is the practical equivalent); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (sentence was de facto equivalent to prohibited life without sentence); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *State v. Riley,* 110 A.3d 1205 (2015), *cert. denied*, 136 S.Ct. 1361 (2016); *Henry v. State*, 175 So.3d 675 (Fla. 2015), *cert. denied*, 136 S.Ct. 1455 (2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013).

D. N.G.

It is N.G.'s age, and consequently his maturity and development, *at the time of the underlying* conduct which matters. For example, Christopher Simmons was 17 when he committed murder in 1993, and was 18 when convicted and sentenced. *Roper,* 543 U.S. at

556. Terrance Graham was born on January 6, 1987, making him almost two and a half years younger than N.G. *Graham*, 560 U.S. at 53. Graham was 16 when he committed his first crime and 54 days shy of his 18th birthday when he allegedly committed the second. *Id*. at 54-55. He was 19 when sentenced to life imprisonment without the possibility of release for the underlying nonhomicide crime. *Id*. at 57-58.

N.G.'s only crime, and sexually violent offense, occurred when he was 18, in April of 2011. (Tr. 326 338-40). Witcher diagnosed pedophilic disorder because N.G. had sexual contact with children beginning at 14 or 15, and again at 18. (Tr. 343, 378, 332, 340). To conclude pedophilic disorder was a mental abnormality, she relied on the fact that he committed the underlying behaviors. (Tr. 348).

The evidence demonstrated this conduct was the type of immature, risky, and impulsive behavior that characterizes adolescence. Witnesses testified N.G. engaged in such behavior because he wanted to know what it felt like for someone to touch his penis. (Tr. 333, 503-4). N.G. testified, "I feel like I did that based on impulsivity. It was just a moment." (Tr. 643). This behavior was not likely to continue into adulthood, as N.G. matured and his brain developed, or to be evidence of deprived character, or persisting interests or behaviors as adult behaviors.

Witcher never cited adult behaviors as the basis for her opinions. She criticized responses N.G. gave during a February of 2015 interview. (Tr. 374). N.G. was 22 then. Witcher said N.G. was uncertain of his primary sexual partner preference. (Tr. 351). N.G. was not able to identify "I am only attracted to adult women; or, no, I'm only attracted to adult men," or that he was attracted to both. (Tr. 360). He did not know if he could be around children because he had offended against them in the past. (Tr. 360).[5] "He was talking about how in order to figure out what type of relationship he wanted, where he needed -- where he wanted himself to be, where he pictured himself to be, he needed more experience." (Tr. 374).

[5] This appears to be solely in reference to sexual attraction. Witcher testified N.G. knew he could not be around children and children could be a trigger due to his past offense. (Tr. 361).

But where Witcher faulted N.G. is exactly why science says he is different. N.G. himself doubted his juvenile behavior represented an ingrained preference and pattern that would repeat itself during adulthood. There was no testimony that N.G.'s juvenile behaviors were driven by enduring characteristics and traits that followed him into adulthood, or that his behaviors were entrenched and would continue. The juvenile behaviors relied upon to commit N.G. to a lifetime of confinement in DMH evidenced nothing more than youthful qualities that subsided with age, maturity, and brain development. SVP commitment must be cemented on more.

Conclusion

N.G.'s commitment violates due process, equal protection and is cruel and unusual punishment. U.S. Const. amends. V, VIII, XIV; Mo. Const. art. I, §§10, 21. N.G.'s commitment must be reversed and he must be released from lifetime confinement based on juvenile offenses and behaviors.

II.

The trial court erred in committing N.G., and denying his motion for a directed verdict and for a judgment notwithstanding the verdict, because the evidence was insufficient to prove he suffered from a mental abnormality making him more likely than not to commit predatory acts of sexual violence if not confined, in violation of his rights to due process, equal protection, a fair trial, and amounting to cruel and usual punishment under U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21; §§632.480, 632.495, in that the State's evidence was insufficient to prove he met DSM-5 criteria for pedophilic disorder, there was no evidence of predisposition, and Witcher's opinions were speculative, and not supported by the record, probative, or sufficient to make a submissible case.

N.G.'s commitment hinges on the pedophilic disorder diagnosis advanced by the State; without it, no mental abnormality exists. (Tr. 343, 378). §632.480(2).

N.G.'s motions for a directed verdict and judgment notwithstanding the verdict were denied. (Tr. 675, 728; L.F. 7, 74-76, 95-109). He argued the State did not adduce sufficient proof to support a verdict and commitment and the trial court erred in failing to grant his motions, violating his rights to due process and a fair trial, and resulting in cruel and unusual punishment.[6] (LF. 74-75).

Standard of Review

The denial of a motion for a judgment notwithstanding the verdict and of a motion for a directed verdict are reviewed for whether the State made a submissible case. *Ellison v. Fry*, 436 S.W.3d 762, 768 (Mo. banc 2014). A case may not be submitted to the jury unless each and every element is established by legal and substantial evidence. *Id*. Whether the State made a submissible case is a question of law reviewed *de novo*. *Id*. If one element of the State's case is not supported by the evidence, then the directed verdict or judgment

[6] U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21.

notwithstanding the verdict was appropriate and this Court must reverse. *Id*. If one element is missing, civil commitment is unconstitutional. *Murrell*, 215 S.W.3d at 104; U.S. Const. amend. XIV; Mo. Const. art. I, §10.

On appeal, this Court reviews the evidence in the light most favorable to the verdict, disregarding contrary evidence and inferences, and determines whether the evidence was sufficient for the jury to find that N.G. is an SVP by clear and convincing evidence. *Murrell*, 215 S.W.3d at 106; §632.495. This Court will not disregard inferences that are a natural and logical extension of the evidence such that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993).

Analysis

Under the SVPA, the State must prove that N.G. is an SVP because he "suffers from a mental abnormality which makes [him] more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." §632.480(5). Whether an individual meets these mental illness and dangerousness requirements, "turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. 418, 429 (1979). Expertise is required to diagnose a psychological condition, determine predisposition, and to assess the degree of control over one's behaviors—all matters beyond the understanding of lay persons. §490.065. However, it is not enough for an expert to merely make an ultimate conclusion using the "mental abnormality" and "more likely than not" magic words from the SVPA.

"To have probative value expert opinion must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation." *State ex rel. Mo. Highway and Transp. Com'n v. Modern Tractor Supply Co.*, 839 S.W.2d 642, 648 (Mo. App. S.D. 1992); *and see Brown for Estate of Kruse v. Seven Trails Investors, LLC*, 456 S.W.3d 864 (Mo. App. E.D. 2014). Expert testimony must be supported by the record; when it is not, it is insufficient to create a submissible case. *Morgan v. State*, 176 S.W.3d 200, 210 (Mo. App. W.D. 2005) (*citing McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004)). *And see Underwood v. State*, 519 S.W.3d 861, 876

(Mo. App. W.D. 2017) (experts' additional testimony and evidence supported the experts' conclusions). "Evidence may be admitted and admissible, but still not constitute substantial evidence." *In re Marriage of Harris*, 446 S.W.3d 320, 331 (Mo. App. S.D. 2014) (Rahmeyer, joined by Sheffield).

To make a submissible case here, the State had to produce substantial evidence that established N.G. suffered from pedophilic disorder, the only basis offered as a mental abnormality, and that his pedophilic disorder made it more likely than not that he would commit predatory acts of sexual violence if not confined. To establish a mental abnormality, the State had to prove four elements: (1) N.G. has a congenital or acquired condition; (2) that affects his emotional or volitional capacity; (3) which predisposes him to commit sexually violent offenses; (4) to a degree that causes him serious difficulty in controlling that behavior. *Murrell*, 215 S.W.3d at 106 (*citing Kansas v. Crane*, 534 U.S. 407 (2002); *Thomas v State*, 74 S.W.3d 789, 791-2 (Mo. banc 2002)); §632.480(2).

A. The State's evidence was insufficient to prove mental abnormality element 1- Diagnosed Condition.

1. Diagnostic criteria

At the outset, N.G. must make an important distinction between a paraphilia and a paraphilic disorder. A *paraphilia* is any intense and persistent sexual interest other than normophilic sexual activities. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 685 (5th ed. 2013). Pedophilia is a *paraphilia* involving an "intense or preferential sexual interest in children." *Id*. at 685. The DSM calls it a "sexual orientation." *Id*. at 698. A paraphilia is necessary, but not sufficient alone, for having a paraphilic disorder diagnosis. *Id*. at 686. In the DSM, a paraphilia is represented by Criterion A. *Id*. A *paraphilic disorder* diagnosis requires additional evidence beyond the preferential sexual interest, found in Criterion B. *Id*. The DSM did not make this distinction until the most recent, fifth edition. The DSM represents the consensus for mental health professionals for diagnostic criteria for any type of mental disorder. (Tr. 329).

Thus, there is a difference between pedophilia and pedophilic disorder. *Id*. at 686, 698. The DSM has specific criteria for pedophilic disorder:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).

B. The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

C. The individual is at least age 16 years and at least 5 years older than the child or children in Criterion A.

Note: Do not include an individual in late adolescence involved in an ongoing sexual relationship with a 12- or 13-year-old.

(Tr. 331, 335, 337); DSM-5 at 697.

"The Criterion A clause, indicating that the signs or symptoms of pedophilia have persisted for 6 months or longer, is intended to ensure that the sexual attraction to children is not merely transient." DSM-5 at 698. Criterion C "requires for a diagnosis a minimum age of at least 16 years and at least 5 years older than the child or children in Criterion A." DSM-5 at 697. The minimum age serves to modify Criterion A, excluding consideration of any fantasies, urges, and occurring before 16, or involving someone less than five years younger. DSM-5 at 697. While true *pedophilia*, the sexual preference and orientation, may be lifelong, *pedophilic disorder* "necessarily includes other elements that may change over time with or without treatment …. Therefore, the course of pedophilic disorder may fluctuate, increase, or decrease with age." *Id*. at 699.

2. Witcher's diagnosis and evidence

Dr. Witcher's testimony cannot satisfy Criterion A. Witcher testified Criterion A was satisfied based on the following: (1) at the age of 15, N.G. began engaging in sexual behaviors with a child, and (2) his index offense "it lasted over a period of three months." (Tr. 332). Concluding that Witcher's testimony provided a sufficient basis for establishing Criterion A, requires disregarding the natural and logical consequence of the diagnostic

excluding of evidence of any behaviors before N.G. turned 16. Any conduct occurring when N.G. was 15 is not diagnostic evidence.

Witcher relied on the behaviors which occurred when N.G. was 15 in order to establish a period of at least six months. Witcher was not reasonably certain that N.G. offended against B. after turning 16. She said, "I believe so. I would have to go through a range of documents to find that." (Tr. 338, 380). Nor was she reasonably certain about B.'s age. She testified he was "between ages eight and ten. We're never really sure what the age range was…" (Tr. 334). Criterion C requires certainty about both individual's ages before any conduct could be evidence of Criterion A. Expert testimony that is not given to a reasonable degree of certainty does not constitute substantive, probative evidence on which a jury could find ultimate facts. *See Brown*, 456 S.W.3d at 874.

Witcher said Criterion C was satisfied by N.G.'s index offense, the conduct and conviction when he was 18. (Tr. 340, 380-81). Those acts spanned only three weeks. (Tr. 338, 381). Witcher's conclusion as to Criterion A was unsupported and insufficient to make a submissible case as to that predicate finding required to prove N.G. suffered from pedophilic disorder.

Criterion B required evidence beyond the fact that the acts occurred. It required evidence that N.G. "acted on these *sexual urges*, or the *sexual urges or fantasies* cause marked distress or interpersonal difficulty." (Tr. 335); DSM-5 at 697. Thus, Criterion B required evidence of (1) a direct causal link showing the acts were caused by pedophilic urges, or (2) that pedophilic sexual urges or fantasies caused marked distress or interpersonal difficulty. Under either prong, the urges must be specific to pedophilia, not to sexual contact in general.

Witcher testified that N.G. "was bothered by his *behavior*…which causes distress," and was sanctioned with a prison sentence, which causes some interpersonal difficulty. (Tr. 335). She also opined that N.G. had sexual urges towards children "in that he, he victimized" them. (Tr. 336). Therefore, Witcher's conclusion required two stacked *assumptions*: (1) because N.G. engaged in sexual acts with a child, he had pedophilic urges; (2) those pedophilic urges caused him distress or difficulty. This circular logic cannot form

the basis for a reliable opinion. A speculative opinion lacks probative value to support a verdict. *Brown*, 456 S.W.3d at 873.

3. Acts must be distinguished from pedophilic sexual orientation.

Acts of child molestation do not in and of themselves mean the offending behavior was caused by pedophilic sexual orientation or pedophilic disorder. (Tr. 381); Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnosis in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY LAW 443, 446 (2008) (included in *Appendix*). Distinguishing offenses that resulted from true pedophilic interest requires additional evidence; one cannot assume a sex offense was a consequence of the paraphilia. *Id.* Making a diagnosis based on history "is never justified" and a valid diagnosis cannot be made based on criminal sexual behaviors alone. *Id.* at 447; DSM-5 at 697 (Criterion B: "the individual has acted on *these sexual urges*, or *the sexual urges or fantasies* cause marked distress or interpersonal difficult."). Assuming N.G. had sexual urges towards children because he committed criminal acts was not supported by the basis articulated by Witcher, or standards in the field. Witcher impermissibly made an assumption based on her diagnosis and made her diagnosis based on her assumption. *McGuire*, 138 S.W.3d at 722. Her assumptions and circular logic do not form a reliable basis for an expert opinion. *Id*. Expert opinion without a rational basis is without probative value. *Modern Tractor Supply Co.*, 839 S.W.2d at 648.

4. Adolescence must be considered.

Determining a sexual offense was caused by pedophilic interests also requires ruling out other possible explanations. First & Halon at 448; DSM-5 at 699-700. For example, the DSM-5 specifically warns that it is difficult to differentiate pedophilia from age-appropriate sexual interest or from sexual curiosity during adolescent development. DSM-5 at 699. The record reveals N.G. ' acts were the latter. According to Witcher, N.G. wanted to know what it was like to have another person touch him. (Tr. 333). Gould testified N.G.

was curious what it would feel like to have his penis touched by someone else. (Tr. 503-4).

For an individual whose behaviors occurred during adolescence, like N.G., the problem of establishing pedophilic causation is compounded by neuro-physical brain development continuing well into one's twenties. *See* Point I. The United States Supreme Court has recognized that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. The "parts of the brain involved in behavior control continue to mature through late adolescence." *Graham,* 560 U.S. at 68.

Research confirms "'adolescence is a time of heightened risk-taking and recklessness' and that puberty is associated with both higher levels of sensation-seeking behavior and heightened intensity of feeling in risk-taking situations." Przybylski & Lobanov-Rostovsky, *supra*, *citing* L. Steinberg, et al., *Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model.* 44(6), DEVELOPMENTAL PSYCHOLOGY 1764, 1776 (2008); Levick, at 294. "In sum, research on the neurophysiology of the brain and the neurofunctional developmental changes in the brain suggest a qualitatively different basis for much of the behavior that falls under sexual offense if the behavior is that of an adolescent rather than an adult." *Id.*, *citing* Toler at 129.

Witcher's testimony was not probative. One must supply missing evidence or give the State unreasonable, speculative, or forced inferences to find that the State established N.G. suffers from pedophilic disorder, a predicate finding to making a submissible case as to mental abnormality.

B. Remaining mental abnormality criteria

N.G. anticipates the State will argue *Murrell* stands for the proposition that a diagnosis of pedophilic disorder satisfies all for elements of the statutory mental

abnormality definition standing alone.[7] *See Murrell*, 215 S.W.3d at 107. In *Murrell,* this Court said:

> Murrell is correct insofar as he argues that a diagnosis of ASPD, based upon a history devoid of any sexual crimes, cannot, standing alone, satisfy the statutory definition of an SVP; that evidence would only satisfy the "mental condition" aspect. Murrell is also correct to the extent he argues sexually deviant disorders such as sadism and pedophilia, which are mental abnormalities necessarily involving a propensity to commit sexual offenses, satisfy the statutory definition standing alone.

Murrell, 215 S.W.3d at 107.

This Court's discussion of paraphilias, including sadism and pedophilia, in *Murrell* was dictum and must be read in context. Murrell argued that antisocial personality disorder, a diagnosis which does not inherently involve sexual attractions, did not satisfy the third mental abnormality element, predisposition to commit sexually violent offenses. *Id*. He did not challenge the remaining elements. *Id*. at 106, n. 11. However, this Court noted that the remaining elements had been established. *Id*. The State must establish *each and every element* to make a submissible case. *Ellison*, 436 S.W.3d at 768.

According to the State and Dr. Witcher, a diagnosed condition in and of itself is not enough to conclude one has a mental abnormality. (Tr. 343). The DSM confirms this is true:

> In most situations, the clinical diagnosis of a DSM-5 mental disorder such as… pedophilic disorder does not imply that an individual with such a condition meets the legal criteria for the presence of a mental disorder or specified legal standard …

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[7] Missouri Courts are also citing *Murrell* for the same proposition. *See Matter of J.D.B.*, --- S.W.3d ---, ED10442-01 *9 (Mo. App. E.D. 2017) ("The Supreme Court of Missouri classifies 'pedophilia' as a sexually deviant disorder that satisfies the statutory definition of 'mental abnormality.'" The Eastern District found the evidence was sufficient to establish the appellant had that diagnosis and, relying on *Murrell*, did not examine the remaining three mental abnormality elements.) *And see Underwood v. State*, 519 S.W.3d 861, 876 (Mo. App. W.D. 2017) ("A pedophilia diagnosis alone satisfies the "mental abnormality" standard.).

> For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question.
>
> … Nonclincial decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding… the individual's degree of control over behaviors that may be associated with the disorder.

DSM-5 at 25.

Witcher said the diagnosis she gave N.G. rose to the level of a mental abnormality "[b]ecause it, A, resulted in a sexually violent offense; and then, B, it's been shown to affect his ability to control his behavior." (Tr. 343). This testimony was insufficient to find a mental abnormality under both the statutory definition and Witcher's definition. Both specifically require that the condition predispose commission of sexually violent offenses. Witcher did not claim Pedophilic disorder predisposed N.G. to commit sexually violent offenses. There was no factual basis in the record to support Witcher's conclusion, and therefore no facts from which the jury could reasonably conclude that pedophilic disorder satisfied the four elements of a mental abnormality. To make that finding, the jury had to engage in guesswork, conjecture, and speculation, which it could not do. Missing evidence cannot be supplied now on appeal.

C. Witcher's opinion had no probative value.

In *Fox*, Plaintiff had been assaulted outside of her apartment and sued the complex on the basis that the lack of security was the proximate cause of her injuries. *Vittengl v. Fox*, 967 S.W.3d 269, 272 (Mo. App. W.D. 1998). Defendant appealed, arguing that Plaintiff's evidence was insufficient. *Id.* at 278. Plaintiff relied on a psychologist's expert testimony, over objection, to establish causation. *Id.* at 279. Psychologist testified that an attacker staked out the unsafe location for a victim, and that had there been more lighting and a different sized sign, the assault would not have happened there. *Id.* at 273. He also reasoned from the fact that the attack was brutal and the attacker did not have a car to

conclude the attacker selected that particular spot for his planned crime. *Id.* at 280. The Court said there was "no *scientific* reason to make such an inference—it is merely a factual hypothesis one could suggest." *Id.*

> [T]here is a danger in generally allowing attenuated reasoning where an initial inference is drawn from fact and other inference as built cumulatively upon the first so that the conclusion reached is too remote and has no sound logical foundation in fact. Such reasoning lacks probative force. The question of whether an expert opinion is based on and unsupported by sufficient facts or evidence is a question of law for the court.

Id. The Court noted, "once one asserts a plausible major premise…, then everything else flows toward liability, even if the reasoning is circular" *Id.* While the reasoning seems logically appealing, it involves the *Petitio Principii* (Begging the Question) logical fallacy. *Id.* at 281, n. 13. "[I]nstead of causation being difficult to prove, it becomes very easy to prove because of the underlying assumptions." *Id.* at 828.

Of course N.G.'s sexually violent offense involving a child was abhorrent and is not condoned. Witcher's basic assumptions influenced her perception of the circumstances, and the reasoning process she employed. *Id.* at 281 n. 13. Once confronted with an offense against a child, everything flowed toward liability, even though Witcher's reasoning was circular. We must resist the ease and appeal of accepting non-scientific opinion, doing nothing more than drawing base, gut assumptions that a sexual offense against a child was motivated by sexual attraction to a child.

Conclusion

Witcher's diagnosis was built upon circular logic and stacked assumptions. She reasoned from her diagnosis, and the same assumptions required to make it, that N.G. had a mental abnormality. Her diagnostic opinion and ultimate mental abnormality conclusion were speculative and without a rational basis, and therefore had no probative value for the jury's determination. Witcher's testimony was not substantial evidence and the State did not make a submissible case. There is a complete absence of probative facts necessary to

sustain a verdict. The trial court erred in denying N.G.'s motions for directed verdict and a judgment notwithstanding the verdict.

N.G. was prejudiced by submission of his case to the jury and by his subsequent commitment predicated on insufficient evidence. Such a commitment violates due process and inherently constitutes cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21. N.G.'s commitment must be reversed and he should be discharged because the State cannot make a submissible case if remanded. Alternatively, if this Court believes the State could make a submissible case, based on the record presented, then this Court should remand for a new trial.

III.

The trial court erred in committing N.G., and in denying his motion for a directed verdict and for a judgment notwithstanding the verdict, because the evidence was insufficient to prove that he suffered from a mental abnormality making him more likely than not to commit predatory acts of sexual violence if not confined as required by §632.495, in violation of his rights to due process, equal protection, a fair trial and amounting to cruel and usual punishment under U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21; §632.480, in that the State's evidence did not establish that pedophilic disorder caused N.G. to be more likely than not to commit predatory acts of sexual violence if not confined.

N.G.'s motions for a directed verdict and for a judgment notwithstanding the verdict were denied. (Tr. 675, 728; L.F. 7, 74-76, 95-109). N.G. argued the State did not adduce sufficient proof necessary to support a verdict, including that a mental abnormality, here pedophilic disorder, caused him to be more likely than not to commit future predatory acts of sexual violence, and that the trial court erred in failing to grant his motion.[8] (L.F. 74-75). He incorporates the Standard of Review and argument from Point II as if fully set forth herein.

Analysis

A. The State's evidence failed to establish risk caused by pedophilic disorder.

The State offered pedophilic disorder as the basis for a mental abnormality. N.G. maintains that the State failed to prove he suffered from pedophilic disorder and a mental abnormality. "The State must further prove that the mental abnormality makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." *Underwood*, 519 S.W.3d at 875; §632.480. Thus, the legislature has required proof of a causal connection between the mental abnormality and future risk. *See*

[8] U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21.

In re Leon G., 59 P.3d 779 (Ariz. 2002) (confinement requires state to demonstrate cause and effect relationship between mental disorder and probability of future acts); *In re G.R. H.*, 711 N.W.2d 587 (N.D. 2006) (statutory language requires causal relationship or nexus between disorder and dangerousness which establishes a likelihood of reoffending); *In re Commitment of Laxton*, 647 N.W.2nd 784 (Wisc. 2002) (SVP definition requires that the individual is dangerous *because* of mental disorder); *In re Miller*, 186 P.3d 201, 206 (Kan. App. 2008) (interpreting statute to cover "a diagnosis that renders an individual more likely to commit crimes of sexual violence.").

The State failed to prove that the *mental abnormality of pedophilic disorder makes* N.G. "more likely than not" to reoffend with predatory acts of sexual violence. The State's sole evidence on this issue consisted of Witcher's testimony.

When the State asked Witcher what she looks for in an SVP evaluation, risk caused by a mental abnormality was never identified:

> Q. Dr. Witcher, what questions are you looking to answer in your sexually violent predator evaluation?
>
> A. I am asked to determine if the individual has -- meets criteria for, A, a mental abnormality; if they have committed a sexually violent offense in the past; and then if they are more likely than not that their behavior is going to be impaired by their mental abnormality.

(Tr. 323-24). N.G. objected because this was misleading and a misstatement of the law. (Tr. 324). The State attempted to "shore it up," but never made a causal connection between risk and the mental abnormality. (Tr. 324-25).

Witcher assessed risk by scoring actuarial instruments. (Tr. 344). She relied on two instruments, the Static-99R and Static-2002R. (Tr. 344). She assigned N.G. a score of 4 on the Static-99R, "moderate to high risk," and corresponding to a 17.3% chance of reconviction within five years. (Tr. 346). A score of 6 on the Static-2002R corresponds to a 22.7% chance of reconviction. (Tr. 348). She said that this is both an overestimate and an underestimate of the risk relevant to an SVP case. The actuarials are based on reconviction rates, measuring only who gets caught for committing reported offenses. (Tr.

415-416). However, the Actuarials overestimate conviction for a sexually violent offense. (Tr. 404).

Then Witcher looked at additional dynamic factors that can increase or decrease risk. (Tr. 349-50). One factor was "his diagnosis of pedophilia, which was not included in the Static." (Tr. 350). She said dynamic factors of emotional congruence with children and zoophilia increased risk, but did not claim this about pedophilic disorder. (Tr. 353-54). Witcher testified that there is no way to make an adjustment to the actuarially predicted risk of recidivating based on these risk factors. (Tr. 403). She did not add these factors to actuarial risk to arrive at a particular level of risk. (Tr. 406). Witcher affirmed that actuarials are the most accurate way of predicting risk for reconviction of any sexual offense (Tr. 403, 411). The natural, logical, and inescapable inference from this testimony is that there is that the best indications of risk suggest someone with N.G. ' actuarial score has a 17.3-22.7% chance of recidivism for any type of sexual offense, and that risk is unrelated to pedophilic disorder. The record is void of any evidence or testimony concerning risk caused by pedophilic disorder.

B. The State's evidence failed to prove N.G. was "more likely than not" to commit any future offense.

The actuarial instruments do not predict *predatory acts of sexual violence* as those are defined by the SVPA in §632.480. Witcher's testimony that the actuarial instruments suggest someone with the same score as N.G. has a 17.3-21.7 chance of general sexual recidivism did not constitute substantial evidence sufficient to make a submissible case.

"It goes without saying that a jury of laypersons would lack sufficient knowledge and understanding to draw any reasonable conclusions solely from the raw scores of testing instruments employed by forensic experts."[9] *Care and Treatment of Cokes*, 107 S.W.3d 317, 323 (Mo. App. W.D. 2007). Witcher's testimony "lacked any detail that would have

[9] Research confirms high risk according to an actuarial instrument "does not also imply that there is a mental abnormality causing this high risk." First & Halon at 450.

imparted to the jury the necessary knowledge to allow it to reasonably infer from the [Statics] raw scores that the appellant would not only sexually reoffend, but would do so in a violent and predatory manner." *Id*. at 323-24.

Witcher's testimony also failed to establish that N.G. was "more likely than not" to commit such offenses. Witcher did an opinion:

> Q. And before we get to that, the sort of the ultimate one, let me ask you this, Dr. Witcher, did you reach an opinion as to whether or not N.G. is more likely than not -- N.G. is more likely than not to commit a future act of sexual predatory violence unless confined to a secure facility?
>
> A. I did.
>
> Q. And what was your opinion?
>
> A. My opinion is that he is.

(Tr. 376-77). However, her opinion is not based on any legal or logical understanding of the phrase "more likely than not."

Witcher testified that there is no definition of "more likely than not" under Missouri law. (Tr. 398). She also testified that she has a "vague definition" of that particular phrase:

> Q. So, but in your mind, do you have a particular definition that you follow?
>
> A. I do. It's vague. It's a vague definition. But it's the idea of what "more likely than not" is the combination, a conglomeration of all the risk factors that will cause that person to tip over into committing or engaging in, engaging in behaviors that they cannot control. Risky behavior, seriously dangerous behavior, whatever tips them over into that behavior which they can no longer control.
>
> Q. So when you say "it tips it over" that kind of sounds like you're engaging in a weighing process?
>
> A. It's -- I hate to say "weighing." I don't have a better phrase than "tips it over." So it's -- if all of these factors are together and combined, is this person more likely than not, is he going to face -- he or she – going to face a situation, given all of the risk factors, that they will have difficulty controlling their behavior? I guess it would

be -- I don't know that it would be a weighing, as much as it would be all of these things combined would lead to a dangerous situation.

(Tr. 398-99).

To be probative and sufficient to make a submissible case, Witcher's testimony had to be "based on the established standard of care and not upon a personal standard." *Underwood*, 519 S.W.3d at 875 (*citing Lee v. Hartwig*, 848 S.W.2d 498, 498 (Mo. App. W.D. 1992)). Operative legal terms, like "more likely than not" in an SVP case, "must be adequately defined by the expert or in the question presented to the expert to ensure that the expert is basing the opinion on well recognized standards[.]" *Id*. Witcher's explanation did not provide a coherent, much less well-recognized, definition of "more likely than not." As it relates to the submissibility of the State's case, Witcher's testimony did not show that the proper legal standard was used or that her opinion was based on the law and not something else. *Id* (citations and quotations omitted).

This Court was asked to define "more likely than not" in *Nelson v. State*, 521 S.W.3d 229 (Mo. banc 2017). Nelson argued the State's evidence was insufficient because the State's experts failed to define that they understood the phrase "more likely than not" to mean a likelihood greater than 50%. *Id*. at 234. The Court said Nelson failed to demonstrate "why the jury [could] be trusted to give the phrase 'more likely than not' it's plain and ordinary meaning but an expert … [could not] be so trusted." *Id*. The record in this case demonstrates why "more likely than not" must be defined.

At no point in time did Witcher or the State connect an alleged mental abnormality ***as the cause*** of future risk under the statute. There were no facts supporting a reasonable inference that pedophilic disorder made N.G. "more likely than not" based on the readily understood and common understanding of that term. To draw such conclusion, Witcher and the jury had to engage in impermissible speculation and guesswork.

Because the State failed to prove that *pedophilic disorder* was the mental abnormality that *makes* N.G. more likely than not to commit predatory acts of sexual violence if not confined, the State failed to make a submissible case. N.G. was entitled to a directed verdict. N.G. was prejudiced by submission of his case to the jury and by his

subsequent commitment predicated on insufficient evidence. Such a commitment violates due process and inherently constitutes cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21. N.G.'s commitment must be reversed and he should be discharged because the State cannot make a submissible case if remanded. Alternatively, if this Court believes the State could make a submissible case, based on the record presented, then this Court should remand for a new trial.

IV.

The trial court erred in committing N.G. as an SVP because he was denied the effective assistance of counsel, due process, a fair trial, and equal protection guaranteed by U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21; and §632.492, that his trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would render under the circumstances since the record reflects that trial counsel failed to object to, and even introduced evidence that N.G. viewed Hentai, played sexually-oriented video games, and had sexual contacts with animals, and without such evidence there is a reasonable probability the outcome of trial would have been different.

This appeal presents the first IAC claim following an SVP trial in Missouri.[10] On appeal, N.G. challenged the effectiveness of defense counsel, appointed pursuant to §632.492 and the Due Process Clauses, because defense counsel failed to object to, and further introduced evidence of, N.G.'s youthful sexual exploration with animals, and use of Japanese animated pornography and sexually-oriented video games with cartoon characters.

Effective Assistance of Counsel in SVP Cases

A. Constitutional Right to Effective Assistance of Counsel

There are two bases for the right to effective assistance of counsel in SVP proceedings. First, it is a constitutional right. The United States Supreme Court has "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *accord Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) (plurality opinion); U.S. Const. amend. XIV. "There is a substantial liberty interest in avoiding confinement in a mental hospital." *Zinermon v. Burch*, 494 U.S. 113, 131 (1990). Moreover, the United

[10] *See also Braddy v. State*, SC96851.

States Supreme Court has found that to satisfy due process, persons suffering from mental disorders requiring involuntary confinement must be provided with independent legal assistance during the commitment proceeding. *Vitek*, 445 U.S. at 496-97.

In Missouri, "The right to counsel exists in state, in addition to federal, proceedings, by virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State ex rel. Family Support Div.-Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App. W.D. 2010). The right to counsel is also guaranteed by the Missouri Constitution, art. I, §10. *Magerstadt v. La Forge*, 303 S.W.2d 130, 133 (Mo. 1957). For the purposes of triggering a defendant's right to counsel under the due process clause, the distinction between a 'criminal' and a 'civil' proceeding is irrelevant if the outcome of the civil proceeding is imprisonment." *Lane*, 313 S.W.3d at 182. This Court has said that no person may be imprisoned unless represented by counsel at trial. *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 975 (Mo. banc 2009).

Directly on point, this Court has also said that an accused SVP's "***due process right to the assistance of counsel*** vested at the time the Attorney General filed a petition with the probate division pursuant to section 632.486." *In re Norton*, 123 S.W.3d 170, 173 (Mo. banc 2003). SVP commitment impinges on the fundamental right of liberty, requiring strict scrutiny review. *Id*.

The United States Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Missouri courts have, too. *See Harper v. State*, 404 S.W.3d 378, 383 (Mo. App. S.D. 2013) ("The right to counsel necessarily encompasses the right to effective assistance of counsel."); *and State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 597, 606 (Mo. banc 2012) (right to counsel in criminal cases "is a right to effective and competent counsel, not just a pro forma appointment whereby the defendant has counsel in name only.")[11] Effective assistance is "fundamental and essential to a fair trial"

[11] Missouri courts have gone so far as to sua sponte ensure the due process right to counsel before confinement on appeal, because it is necessary to prevent a denial of that fundamental right. *See Lane*, 313 S.W.3d at 186.

and protected by the Due Process Clause. *Strickland*, 466 U.S. at 689; *and see Gideon v. Wainwright,* 372 U.S. 335, 341 (1963).

B. Statutory Right to Effective Assistance of Counsel

The legislature conferred a number of rights on accused SVPs because even in civil proceedings, "the person whose commitment is sought has a 'liberty interest protected by the due process clause from arbitrary governmental action.'" *Id*. at n. 10 (quoting *In re Salcedo*, 34 S.W.3d 862, 867 (Mo. App. S.D. 2001) *and citing Kansas v. Hendricks*, 521 U.S. 346 (1997)).[12] Three specific SVPA provisions address the issue raised herein.

First, §632.489 provides the individual is entitled to various rights, "in addition to the rights previously specified" by law, including "(1) To be represented by counsel[.]"[13] Next, §632.492 provides, "[a]t all stages of the proceedings [under the SVPA], any person subject to [the SVPA] shall be entitled to the ***assistance of counsel***, and if the person is indigent, the court shall appoint ***counsel to assist*** such person." Finally, §632.498 states that "[t]he committed person shall be entitled to be present and entitled to the benefit of all ***constitutional protections*** that were afforded the person at the initial commitment proceeding" in conditional release proceedings. By including these three provisions in the SVPA, the legislature clearly expressed its intention that defendants be represented by counsel and afforded constitutional protections.

Other states have construed civil commitment statutes providing the right to counsel as requiring effective assistance of counsel.[14] The Illinois SVP statutes endow the right to

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[12] One of the necessary safeguards afforded under the Kansas SVP Act was, "In the case of an indigent person, [that] the State was required to provide, at public expense, the assistance of counsel" *Hendricks*, 521 U.S. at 353. Traditionally criminal safeguards demonstrated great care to confine only narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. *Id*. at 364.

[13] Chapter 632 previously specified that in civil detention proceedings, an individual has the right to be represented by an attorney. §632.335.2(1).

[14] For SVP cases, s*ee Bohner v. State,* 157 So.3d 526, 527 (Fla. App. 2015); *In re Commitment of Dodge*, 989 N.E.2d 1159 (Ill. App. 2013); *In re Detention of Blaise*, 830 N.W.2d 310, 317 (Iowa 2013); *In re Detention of Moore*, 216 P.3d 1015 (Wash. 2009);

counsel, and to appointed counsel if indigent. *People v. Rainey*, 758 N.E.2d 492, 501 (Ill. Ct. App. 2001). The statutory right to counsel provides persons subject to commitment with the right to effective assistance of counsel measured under the *Strickland* standard. *Id*. The Illinois courts reasoned:

> that just as the Supreme Court had determined that it would be 'incongruous' for the sixth amendment to require the assistance of counsel but permit that counsel to be 'prejudicially ineffective,' the legislature could not have intended to provide individuals subject to involuntary commitment with the right to counsel and permit that counsel to be prejudicially ineffective.

Id. at 501-501 (citation omitted). The legislature's express goal of providing counsel and constitutional protections "would be hollow if defendants under the [SVP] Act were entitled to counsel but not to the effective assistance of that counsel." *Id.* at 502.

Because the South Carolina SVP statute confers the right to assistance of counsel during all stages of SVP proceedings, defendants under that law "necessarily have a right to effective assistance of counsel during the proceedings." *Matter of Chapman*, 796 S.E.2d 843, 846 (S.C. 2017). The South Carolina court said that this statutory right to counsel is distinct from the sixth amendment right to counsel in criminal proceedings. *Chapman*, 796 S.E.2d at 846. "However, given the significant due process implications inherent in civil commitments, we find [the SVPA's] right to counsel is not merely a statutory right, but also a constitutional one arising under the Fourteenth Amendment and the South Carolina Constitution." *Id*. "Lest the right ring hollow, we further hold this right to counsel is necessarily a right to effective counsel." *Id*. at 847. IAC claims are reviewed under the *Strickland* standard. *Id*. at 849-850.

Commonwealth v. Ferreira, 852 N.E.2d 1086, 1091 (Mass. App. Ct. 2006); *State v. Campany*, 77 A.D.3d 92 (N.Y. App. Div. 2010); *Jenkins v. Dir. of the Va. Ctr. for Behavioral Rehab.,* 624 S.E.2d 453, 460 (Va. 2006). *And see*, e.g., *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 384 (Alaska 2007), *Pope v. Alston,* 537 So.2d 953, 956–57 (Ala.Civ.App.1988); *Smith v. State*, 203 P.3d 1221 (Idaho 2009); *Matter of J.S.*, 401 P.3d 197 (Mont. 2017); *In re Commitment of Hutchinson*, 421 A.2d 261, 264 (Pa. Super. Ct. 1980).

The Kansas Court of Appeals held that "because there is a statutory right to counsel in sexually violent predator proceedings, there is a correlative right to effective counsel and a remedy for counsel's failure in that regard." *In re Ontiberos*, 247 P.3d 686, 690 (Kan. App. 2011) (finding ineffective counsel violates due process). "To rule otherwise would make the appointment of counsel in these cases a useless gesture." *Id*.

The Missouri legislature could not have intended to provide individuals subject to involuntary commitment under the SVPA with the right to counsel and permit that counsel to be prejudicially ineffective or merely a pro forma appointment of counsel in name only. Even if the right to counsel was only conferred by statute, these provisions "impl[y] a right to *effective* assistance of counsel; otherwise the statutory right to counsel would become an 'empty formality.'" *In Interest of J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. App. W.D. 1989) (termination of parental rights cases under §211.426). *See C.V.E. v. Greene County Juvenile Office*, 330 S.W.3d 560, 574 (Mo. App. S.D. 2010); *In Interest of J.M.B.*, 939 S.W.2d 53, 55-56 (Mo. App. E.D. 1997); *and In Interest of J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017).

C. Raising Claims of Ineffective Assistance of Counsel

Because there is a substantive constitutional right to counsel, there must be a way to challenge representation that falls below a constitutional standard. *See In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 820, n. 22 (Mo. banc 2011) (IAC due process claim presented on direct appeal moot because reversed on other grounds). The right to counsel is meaningless if there is no remedy when counsel is ineffective.

N.G. has appellate rights, including the right to appellate counsel. §§632.492, 632.495.1. Generally when IAC claims are brought on direct appeal, the claim is evaluated on the face of the record. *Id*. at 448; *see also C.M.B.R.*, 332 S.W.3d at 814, 820 n. 22; *State v. Wheat*, 775 S.W.2d 155, 157 (Mo. banc 1989) (overruled on other grounds); *Ontiberos*, 287 P.3d at 11; *Stout*, 150 P.3d at 97; *Blaise*, 830 N.W.2d 310. Before the enactment of PCR rules, courts could review IAC claims on direct appeal, where the record was sufficient to permit review. *Wheat*, 775 S.W.2d at 157.

As not all IAC claims will be apparent from the face of the record, there is a need to adopt a mechanism for resolving factual disputes regarding the effectiveness of SVP counsel. *See C.M.B.R.*, 332 S.W.3d at 814, 820 n. 22. In such situations, the appellate court could either remand for a hearing and presentation of additional evidence in the trial court or could appoint a special master. *Id*.; *and see Wheat*, 775 S.W.2d at 157. However, there are inherent difficulties in raising IAC claims on direct appeal. Just as trial counsel is unlikely to raise her own ineffectiveness in a motion for a new trial, appellate counsel is unlikely to raise her ineffectiveness on direct appeal.

An SVP's IAC claims could be brought through habeas petitions. *See Chapman*, 796 S.E.2d 843; *Jenkins*, 624 S.E.2d at 461-62. IAC claims were raised in habeas proceedings prior to the enactment of our post-conviction rules. *See State ex rel. Nixon v. Jaynes,* 63 S.W.3d 210, 214 (Mo. banc 2001) (overruled on other grounds). But this avenue presents significant problems. Without the right to counsel in habeas proceedings, it would be nearly impossible to challenge the effectiveness of trial counsel. Habeas petitions may be filed at any time, and successive habeas petitions are permitted in Missouri, thus delaying finality of the case. *Id*. at 217.

This Court could adopt a new set of Rules of Civil Procedure specifically applicable to SVP actions. *See In re Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators*, 13 So.3d 1025 (Fla. 2009).

N.G. urges the Court to expand application of the existing post-conviction rules to SVP proceedings. The rules provide clear timeframes and procedures for filing, litigating, and adjudicating motions for relief. They also ensure adjudication of all claims for relief in one proceeding, avoid successive motions, bring finality to the process, and ensure that public resources are not "expended to investigate vague and often illusory claims[.]" *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012); Rule 24.035, Rule 29.15.

N.G. Received Ineffective Assistance of Counsel

A. Relevant Facts

The only two issues before the jury were (1) whether N.G. had a mental abnormality, and (2) if so, whether that mental abnormality made him more likely than not to commit predatory acts of sexual violence. §632.480. Whether someone has a mental abnormality predisposing commission of sexually violent offenses, or that mental abnormality causes them to be more likely than not to commit future predatory sexually violent offenses, only involves contact offenses against people. (Tr. 378, 391); §632.480.

In opening statements, the State and trial counsel both said that N.G. had sexual contact with animals. (Tr. 297-99, 306). Trial counsel said N.G. watched Hentai. (Tr. 304-5).

While discussing future risk, Witcher said that N.G. engaged in sexual activities with animals and she diagnosed him with zoophilia, which she classified under "some sexual impulsivity and promiscuity of engaging with animals." (Tr. 351). She also testified that research says having two or more paraphilias increases the risk of reoffense. (Tr. 354). Trial counsel did not object to this evidence. Witcher said being attracted to animals was not even illegal. (Tr. 388).

During MoSOP, it was more difficult for N.G. to discuss interactions with children than with animals, and he agreed he was at a greater risk to offend against animals. (Tr. 438-39, 443). Gould said N.G. saw a dog on a poster and it was inviting to him. (Tr. 464-65). Trial counsel unsuccessfully objected to questions about animals at this point. (Tr. 473-74). Both attorneys asked N.G. questions about sexual contact with animals. (Tr. 617-18, 651-52, 659).

Gould testified about a video game N.G. played involving cartoon characters earning trust credits to spend on treats and sexual acts. (Tr. 454-56). Trial counsel did not object. N.G. was asked about the video game, "Baby Gets Creamed;" he testified on cross that the characters were 13 or 14 years old. (Tr. 662). Trial counsel did not object.

During cross-examination, trial counsel asked Gould about the types of pornography N.G. watched, including furry and Hentai. (Tr. 500-1). She also asked N.G. about Hentai and the video games. (Tr. 619, 622-25, 629-30).

B. Standard of Review

To prevail on a claim of ineffective assistance of counsel, N.G. must meet the two-part *Strickland* test, showing that: (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that (2) he was prejudiced by counsel's deficient performance. *Christian v. State*, 502 S.W.3d 702, 705 (Mo. App. S.D. 2016); *Strickland*, 466 U.S. at 687. "The 'benchmark' for judging whether counsel is ineffective, however, is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 713. Prejudice exists where there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 705.

C. Analysis

In *Christian*, defense counsel failed to object at trial when the State's attorney presented part of defendant's civil deposition testimony, including invocation of the right to silence. *Id.* at 706-7. The Southern District found that the failure to object was not reasonable trial strategy. *Id.* at 709-10. The defendant was prejudiced by the failure to object because deposition invocation testimony was presented as affirmative evidence, without any curative instruction any time about the exercise of the right to silence. *Id*. at 714. The case was remanded for a new trial. *Id.*

In *State v. McCarter*, 883 S.W.2d 75 (Mo. App. S.D. 1994), defense counsel was ineffective for introducing evidence that his client had been accused of sexual crimes by his three grandchildren years earlier. The Court of Appeals explained that though trial counsel has wide latitude in trial strategy, it "does not amount to unconstrained discretion;" his or her actions must be "*reasonable* under prevailing professional norms." Id. at 78. "Tactical trial decisions are susceptible of being so unsound that they amount to ineffective assistance by trial counsel[.]" *Id*. The court affirmed that the attorney's conduct did not fall within the acceptable range of professionally competent assistance of counsel and

constituted a failure to exercise the degree of skill and diligence that a reasonably competent attorney would have performed under similar circumstances. *Id*. at 79.

In *Buck v. Davis*, defense counsel presented harmful expert testimony that Buck's race predisposed him to violent conduct and increased the probability of future dangerousness. 137 S.Ct. 759, 775 (2017). The Supreme Court said, "No competent defense attorney would introduce such evidence about his own client." *Id.* The Court found a reasonable probability that the result of the proceedings would have been different without this incompetent representation. *Id.* at 776. The dangerousness issue required the jury to "render a predictive judgement inevitably entailing a degree of speculation;" evidence of Buck's skin color was "hard statistical evidence—from an expert—to guide an otherwise speculative inquiry." *Id.* The prejudicial effect of the testimony was "heightened by the source of the testimony"—an expert with a doctorate in psychology, experience in evaluations, and appointed by the court. *Id.* at 777. "Reasonable jurors might well have valued his opinion concerning the central question before them." *Id.* The evidence was prejudicial, even though only mentioned twice during the trial. *Id.*

Here the central questions before the jury were: (1) whether N.G. had a mental abnormality of pedophilic disorder, and (2) if so, whether that pedophilic disorder mental abnormality made him more likely than not to commit predatory acts of sexual violence. §632.480. "Sexually violent offenses" and sexually violent acts all involve contact sexual offenses against people. §632.480. Reasonably competent counsel would have objected to admission of any testimony or evidence beyond the scope of those two issues and would not have elicited testimony beyond them.

Trial counsel both failed to object and introduced evidence harmful to her own client starting in opening statements. Trial counsel failed to object when the State's attorney mentioned sexual contact with animals, even though trial counsel was aware that the State was advancing pedophilic disorder as the only mental abnormality. Trial counsel also told the jury about sexual contact with animals and said that N.G. watched Hentai in opening statements.

During the presentation of evidence, Witcher said that pedophilic disorder was the mental abnormality. (Tr. 343, 378). She relied on facts of N.G.'s underlying sexually violent offense and alleged conduct with children to make her diagnosis and mental abnormality conclusion. (Tr. 331-335, 338, 340, 380-81). Because she did not rely on any sexual contact with animals or zoophilia diagnosis as the basis for that opinion, any evidence about sexual activity or diagnosis involving animals was not relevant or probative of the mental abnormality issue. Reasonably competent counsel would object to irrelevant evidence, particularly where it confuses the issues and has a tendency to mislead the jury. And reasonably competent counsel would not have introduced additional evidence about N.G. acts with animals.

Witcher did not mention Hentai or the video game, or rely on them in forming any opinions. Therefore, they were not facts or data underlying an expert opinion, and were inadmissible under §490.065. It makes sense that Witcher did not rely on those two depictions because they had no relationship to commission of sexually violent offenses or behaviors. Video games and cartoons are excluded from the list of sexually violent offenses. §632.480. Evidence that does not bear on sexually violent offenses cannot be relevant to a mental abnormality or mental abnormality-caused risk determination. Reasonably competent trial counsel would object to any irrelevant and inadmissible evidence of Hentai and video games, and certainly would not introduce the topic to the jury. But trial counsel told the jury that N.G. watched Hentai in opening statements. (Tr. 304-5). And she failed to object when the State elicited testimony that N.G. played a video game involving anthropomorphized characters and sexual acts. (Tr. 454-56, 662).

Reasonably competent counsel also would have objected because that viewing Hentai and playing video games is protected free speech. Non-obscene virtual pornography is protected under the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002). That includes virtual pornography that appears to depict children, but was created without using real children, which creates no victim or crime. *Id.* at 250-56. That Court also upheld a First Amendment challenge to criminalizing depictions and portrayals of animal cruelty. *U.S. v. Stevens*, 559 U.S. 460, 465-66 (2010) (striking down statute

aimed at "crush videos," appealing to individuals with sexual fetishes, and applying to dog fight videos). Video games qualify for First Amendment protections. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790-91 (2011) (striking down regulation of violent games).

D. Prejudice

N.G. was prejudiced because evidence about sexual contact with animals, zoophilia, video games, and Hentai was not relevant; it was, however, misleading and confusing. "To be admissible, evidence must be relevant." *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo. App. S.D. 2001). The probative value of evidence must outweigh its prejudicial effect and the danger of confusing the issues, misleading the jury, wasting time, or cumulative effect to be legally relevant. *State v. Davis*, 211 S.W.3d 86, 88 (Mo. banc 2006).

None of this evidence could prove or disprove if N.G. suffered from pedophilic disorder, if pedophilic disorder was a mental abnormality as defined by the SVPA, or if pedophilic disorder caused him to be more likely than not to commit predatory acts of sexual violence against other humans. *See Gates*, 57 S.W.3d at 396; §632.480. The evidence offered by the State should have been excluded following a timely objection.

"In a jury trial, when evidence is admitted that should have been excluded, the appellate court is required to assume that the jury considered that evidence as it reached its verdict." *Id*. In this case, the State asked the jury to do so. In closing, the State told the jury:

> Now, Dr. Witcher also explained that multiple paraphilias increase risk. They make someone more risky because the level of deviance in that person is so high. That's where the animals really come into play, ladies and gentlemen. *That demonstrates, again, that N.G.'s deviance, his mental abnormality, causes him serious difficulty controlling his behavior*, even after treatment which he says was successful. He is still triggered into having deviant sexual interest in animals when he sees them.

(Tr. 686-69).

This was misleading and confusing. The alleged mental abnormality was pedophilic disorder, not anything related to animals. And the State had to prove N.G. had serious difficulty controlling his predatory, sexually violent behaviors involving people. Presentation of the misleading, irrelevant and prejudicial evidence as *affirmative* evidence suggested this was "hard statistical evidence… to guide an otherwise speculative inquiry" by the jury. *Buck*, 137 S.Ct. at 776. That the testimony came from Witcher, the court-appointed experienced evaluator and psychologist, heightened its prejudicial effect. And, "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Buck,* 137 S.Ct. at 777.

Trial counsel was objectively unreasonable in failing to object and in eliciting this evidence, and in so doing, undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland*, 466 U.S. at 686. N.G. did not receive a fair trial as required by the Due Process Clauses. U.S. Const. amend. XIV, Mo. Const. art. I, §10. His subsequent commitment violates due process and inherently constitutes cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Mo. Const. art. I, §§10, 21. This Court must reverse and remand for a new trial with new counsel.

Alternatively, if this Court believes the record is not sufficient to address this claim, this Court should appoint a special master or remand to the trial court so that N.G. has an opportunity to present additional evidence demonstrating defense counsel's deficient performance and prejudice. *C.M.B.R.*, 332 S.W.3d at 814, 820 n. 22; *Wheat*, 775 S.W.2d at 157.

CONCLUSION

For the reasons stated herein, N.G.'s commitment must be reversed. Under Points I-III, he is entitled to release from custody. Under Point IV, he is entitled to a new trial. Alternatively, if this Court believes the record is not sufficient to address the IAC claim raised in Point IV, this Court should appoint a special master or remand to the trial court

so that N.G. has an opportunity to present additional evidence demonstrating defense counsel's deficient performance and prejudice.

Respectfully submitted,

/s/ Chelseá R. Mitchell

Chelseá R. Mitchell, MOBar #63104
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
E-mail: chelsea.mitchell@mspd.mo.gov

Certificate of Compliance

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, signature block, certificate of compliance, and the appendix, the brief contains 15,195 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell