IN THE
SUPREME COURT OF MISSOURI

IN THE MATTER OF THE CARE AND TREATMENT OF J.B.,	)	No. SC96851
Appellant.	)	

APPEAL TO THE
SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF IRON COUNTY,
MISSOURI FORTY SECOND JUDICIAL CIRCUIT, PROBATE
DIVISION THE HONORABLE RANDALL HEAD, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

J.B. appeals his commitment to the Department of Mental Health ("DMH") as a Sexually Violent Predator ("SVP"), following a jury trial in Iron County, Missouri. Ultimately, the Missouri Court of Appeals, Southern District, affirmed Appellant's commitment. This Court took transfer of this cause on application of the appellant, and therefore has jurisdiction pursuant to Rule 83.04.[1] Mo. Const. art. V, §10 (as amended 1976).

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

STATEMENT OF FACTS

J.B. has not served his entire sentence criminal sentence. (Tr. 358-59). The Missouri Department of Probation and Parole recommended that he be released and granted him parole. (Tr. 358). However, the State successfully petitioned to have him civilly committed, rather than be supervised on parole. (L.F. 15-18, 68).

In 2010, J.B. was convicted of statutory rape for sexual acts involving K.S., who was six or seven years old. (Tr. 283, 289). He had previously been convicted by a jury for endangering the welfare of a child after having sex with 14-year-old D.C. in 1998. (Tr. 267-68, 271). There was also testimony that he plead guilty to one count of statutory rape in the second degree. (Tr. 272-73). He had also pled guilty to abuse of a child for taking photographs of an unclothed 13 or 14-year-old, A.W., around the same time. (Tr. 272-73). It had been alleged that J.B. had sexual contact with A.W. beginning in 1995, however he was not criminally charged with such. (Tr. 262, 264). During the investigation involving D.C. and A.W., it was also alleged that J.B. sexually touched 7-year-old M.B. (Tr. 269). It was further alleged he solicited photographs from M.H. and M.K., though no photographs were discovered or charges levied. (Tr. 270, 429).

While in prison, J.B. completed MoSOP.[2] MoSOP is focused on behavior management; it does not "cure" disorders. (Tr. 279). J.B. completed assignments, analyzed his offending behavior, prepared a relapse prevention plan, and demonstrated empathy for his victims. (Tr. 279-80).

Witnesses at Trial

Psychologist Kimberly Weitl was hired by the State. (Tr. 237, 239-40). Dr. Weitl diagnosed J.B. with pedophilic disorder, antisocial personality disorder ("ASPD"), and narcissistic personality disorder. (Tr. 303). She testified J.B. had a mental abnormality.[3] (Tr. 312). To assess "if he's more likely than not to commit another act of sexual violence if not

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[2] Missouri Sex Offender Program.

[3] Narcissistic personality disorder was not a mental abnormality; however, according to Dr. Weitl, it increased J.B.'s risk. (Tr. 378).

confined," Dr. Weitl used actuarial instruments and other factors. (Tr. 313, 317, 319-20, 322, 334-39). Her ultimate opinion was that J.B.'s risk was "more likely than not." (Tr. 346).

Dr. Nina Kircher, a psychologist and the end-of-confinement evaluator ("EOC"), testified for the State. She diagnosed J.B. with ASPD, and believed that motivated J.B.'s offending.[4] (Tr. 467-68). She testified ASPD was a mental abnormality; based on history, it appeared to her that ASPD affected J.B.'s emotional and volitional capacity and predisposed him to commit acts of sexual violence and she believed he had serious difficulty controlling his behavior. (Tr. 470-71). Dr. Kircher used the Static-99R, Stable-2007, and dynamic factors analysis to asses J.B.'s risk. (Tr. 472, 47-77, 483). Dr. Kircher said J.B. "meets the more likely than not threshold" and was an SVP. (Tr. 491).

DMH Certified Forensic Examiner Rick Scott performed the court-ordered SVP evaluation. (Tr. 654). He diagnosed J.B. with ASPD and pedophilia. (Tr. 673). Dr. Scott also evaluated J.B.'s risk using actuarials and other factors. (Tr. 691-708). Dr. Scott said there is no research showing J.B.'s actuarially predicted risk could become greater than 50%, that is "more likely than not." (Tr. 709). Dr. Scott testified J.B. was not "more likely than not" to reoffend if not confined. (Tr. 709).

J.B. also testified in his own defense. (Tr. 526).

Screening Process

In opening, J.B.'s trial counsel told the jury that Dr. Kircher's evaluation was to determine if J.B. should be "screened out" and her role was to "screen him and pass him along" in the SVP process. (Tr. 232). During direct examination, Dr. Weitl told the jury about her experience "screening men… to see if they met this SVP or sexually violent predator commitment." (Tr. 238). When J.B. was paroled in 2008, he did not "have a conviction that would have gotten him screened as a [SVP]." (Tr. 275).

[4] She also "ruled-out" pedophilic disorder, meaning she did not have the evidence required to give the diagnosis. (Tr. 468). Dr. Kircher did not know if J.B. was attracted to children. (Tr. 488).

Trial counsel cross-examined Dr. Weitl about her screening role. (Tr. 433-36, included in *Appendix*). Counsel elicited testimony that: the EOC evaluation is "a screening process," the author testifies at a probable cause determination before the jury trial, the EOC is passed to the MDT who made a determination, and the Attorney General can overrule the MDT. (Tr. 433-35). Dr. Weitl also told the jury that when she was doing EOCs for DOC, 97% of the time she said men did *not* meet SVP criteria. (Tr. 437-38).

Trial counsel also cross-examined Dr. Kircher about the EOC and screening process. Her "evaluation was performed for screening purposes pursuant to referral to the [MDT] and the Attorney General's Office for their consideration of whether to proceed with a probable cause hearing for adjudication of the offender as an [SVP]." (Tr. 492-93, included in *Appendix*). Dr. Kircher agreed she does a screening evaluation to inform the MDT but did not know who does a full evaluation after her referral. (Tr. 492-93). She refers 3-5% of the cases she reviews. (Tr. 458).

After establishing Dr. Scott's credentials, defense counsel elicited testimony that he does SVP screening evaluations for DMH equivalent to the EOC. (Tr. 657, 660). Then there is a court order to do a full evaluation. (Tr. 657). He told the jury the screener determines "whether the case should then be reviewed before a final decision is made as to whether they're held and then have a full evaluation by [DMH]," "your decision, yes or no, leads to a referral to a [MDT] that does a review of the case and the [PRC] that does of a review of the case prior to it being filed by the Attorney General." (Tr. 661). Dr. Scott also said the standard of proof for the EOC is different, because "at that level… the standard of proof is a preponderance of the evidence" at the probable cause hearing. (Tr. 663). After the process, including the MDT and Attorney General's decision, Dr. Scott was ordered by the court to do an evaluation. (Tr. 667).

Murder Allegation

J.B. filed a motion in limine to exclude irrelevant and prejudicial evidence that he was charged with murder in the first degree in 1979. (L.F. 35). At trial, J.B. objected to Exhibit 4, an exhibit prepared by the State purporting to identify J.B.'s past crimes which contained

the statement: "1980-1996: Murder/hindering, stealing, burglary, receive stolen" based on his motion in limine. (Tr. 260; Ex. 4). The objection was overruled; Exhibit 4 was displayed and the witnesses permitted to discuss the murder allegation. (Tr. 261). Dr. Weitl told the jury J.B. was arrested for murder, but allowed to "plea to a lesser charge" of hindering prosecution because he testified against a co-defendant. (Tr. 261-62).

Jury Selection

During jury selection, defense counsel asked if anyone believed that a prison sentence was not "enough as resolution to the sort of crimes that you heard about today?" (Tr. 142). Juror 19, Ms. Hughes, responded in the affirmative. (Tr. 143). Ms. Hughes stated: "I don't know that there is – I mean, I don't know that there's something you could say to me that say turn him loose, let him walk around;" "I mean, someone would have to be mentally ill to do things to children like that;" that a mental abnormality was already there; and "I mean, I don't care whether he's committed or he's in jail. He needs to be in one or the other. He don't need to be out with my child or these other people's children." (Tr. 144, 145-46). Juror 4, Mr. Swaringim, indicated he agreed with Juror 19. (Tr. 146).

Ms. Hughes was struck for cause. (Tr. 184). Defense counsel's request to strike Mr. Swaringim was denied. (Tr. 188,191).

Other Motions, Closing Argument, Verdict

J.B.'s motions for a directed verdict were denied. (Tr. 523, 794). The jury returned a verdict finding J.B. to be an SVP. (Tr. 828; L.F.68). The trial court committed J.B. to the custody of DMH. (L.F. 69). This appeal follows.

Additional facts necessary to the disposition of the issues raised on appeal are set forth in the argument portion of the brief.

POINTS RELIED ON

I.

The trial court erred in committing J.B. to DMH as an SVP because he was denied the effective assistance of counsel, in violation of his rights to due process, a fair trial guaranteed by U.S. Const. XIV, Mo. Const. art. I, §10, and §632.492, in 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 introduced evidence of: the screening process; the MDT, PRC and Attorney General's Office pre-filing reviews and determinations; and a probable cause determination by the trial judge to support further proceedings and cause to order an SVP evaluation, and trial counsel failed to object to evidence that only 3-5% of men are referred into the SVP process. J.B. was prejudiced because there is a reasonable probability the outcome of trial would have been different without this evidence.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Wheat, 775 S.W.2d 155 (Mo. banc 1989);

Buck v. Davis, 137 S.Ct. 759 (2017);

In re Care and Treatment of Foster, 127 P.3d 277 (Kan. 2006);

U.S. Const. XIV;

Mo. Const. art. I, §10;

§632.492, 632.498.

II.

The trial court erred in admitting evidence and testimony that J.B. had been arrested as a co-defendant in a murder case, over his objection, because this violated his rights to due process, a fair trial guaranteed by the U.S. Const. amend. XIV and Mo. Const. art. I, §10, and §490.065, in that J.B. plead guilty to hindering prosecution and the "murder case" evidence was irrelevant to whether or not he met SVP criteria under §632.480(5), not relied upon by any expert, and prejudicial.

Gates v. Sells Rest Home, Inc., 57 S.W.3d 391 (Mo. App. S.D. 2001);

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006);

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

U.S. Const. amend. XIV;

Mo. Const. art. I, §10;

§490.065.

III.

The trial court committed reversible error and abused its discretion in failing to strike Juror 4, Mr. Swaringim, for cause and permitting him to serve on the jury over J.B.'s objections, in violation of J.B.'s rights to due process, equal protection and to an impartial jury, guaranteed by U.S. Const. amend. XIV, Mo. Const. art. I, §§10, and 22, and §494.470, because Mr. Swaringim was not qualified to serve as a juror in that he formed and expressed opinions concerning the matter and material facts in controversy that may have influenced his judgment, his beliefs precluded him from following the court's instructions, and he was not rehabilitated.

Joy v. Morrison, 254 S.W.3d 885 (Mo. banc 2008);

Thomas by and through Thomas v. Mercy Hospitals East Communities, 525 S.W.3d 114 (Mo. banc 2017);

Heitner v. Gill, 973 S.W.2d 98 (Mo. App. S.D. 1998);

U.S. Const. XIV;

Mo. Const. art. I, §§10, 22;

§494.470.

ARGUMENT

I.

The trial court erred in committing J.B. to DMH as an SVP because he was denied the effective assistance of counsel, in violation of his rights to due process, a fair trial guaranteed by U.S. Const. XIV, Mo. Const. art. I, §10, and §632.492, in 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 introduced evidence of: the screening process; the MDT, PRC and Attorney General's Office pre-filing reviews and determinations; and a probable cause determination by the trial judge to support further proceedings and cause to order an SVP evaluation, and trial counsel failed to object to evidence that only 3-5% of men are referred into the SVP process. J.B. was prejudiced because there is a reasonable probability the outcome of trial would have been different without this evidence.

This appeal presents one of the first IAC claims following an SVP trial in Missouri.[5] On appeal, J.B. 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 harmful to J.B.

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 States Supreme Court

[5] *See also Grado v. State*, SC96830.

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.")[6] Effective assistance is "fundamental and essential to a fair trial" and protected by the Due

[6] 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.

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)).[7] 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[.]"[8] 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.[9] The Illinois SVP statutes endow the right to

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[7] 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.

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

[9] 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); *Commonwealth v. Ferreira*, 852 N.E.2d 1086, 1091 (Mass. App. Ct. 2006); *State v. Campany*, 77 A.D.3d 92

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.

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.

(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).

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.

J.B. 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).

J.B. 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.

J.B. Received Ineffective Assistance of Counsel

A. Relevant Facts

In opening statements, J.B.'s trial counsel told the jury that Dr. Kircher's evaluation was to determine if J.B. should be "screened out" and her role was to "screen him and pass him along." (Tr. 232). During direct examination, Dr. Weitl told the jury about her experience "screening men… to see if they met this SVP or sexually violent predator commitment." (Tr. 238).

Trial counsel cross-examined Dr. Weitl in detail about her screening role. (Tr. 433-36; relevant excerpts included in the *Appendix*). Counsel elicited testimony that: the EOC evaluation is "a screening process," the author testifies at a probable cause determination before the jury trial, the EOC is passed to the MDT who made a determination, and the Attorney General can overrule the MDT. (Tr. 433-35). Dr. Weitl also told the jury that when she was doing EOCs for DOC, 97% of the time she said men did *not* meet SVP criteria. (Tr. 437-38).

Trial counsel also cross-examined Dr. Kircher about the EOC and screening process. Her "evaluation was performed for screening purposes pursuant to referral to the [MDT] and the Attorney General's Office for their consideration of whether to proceed with a probable cause hearing for adjudication of the offender as an [SVP]." (Tr. 492-93, relevant excerpts included in the *Appendix*). Dr. Kircher agreed she does a screening evaluation to inform the MDT but did not know who does a full evaluation after her referral. (Tr. 492-93). She refers 3-5% of the cases she reviews. (Tr. 458).

After establishing Dr. Scott's credentials, defense counsel elicited testimony that he does SVP screening evaluations for DMH equivalent to the EOC. (Tr. 657, 660; relevant excerpts included in the *Appendix*). Then there is a court order to do a full evaluation. (Tr. 657). He told the jury the screener determines "whether the case should then be reviewed before a final decision is made as to whether they're held and then have a full evaluation by [DMH]," "your decision, yes or no, leads to a referral to a [MDT] that does a review of the case and the [PRC] that does a review of the case prior to it being filed by the Attorney General." (Tr. 661). Dr. Scott also said the standard of proof for the EOC is different, because "at that level… the standard of proof is a preponderance of the evidence" at the probable cause hearing. (Tr. 663). After the process, including the MDT and Attorney General's decision, Dr. Scott was ordered by the court to do an evaluation. (Tr. 667).

B. Standard of Review

To prevail on a claim of ineffective assistance of counsel, J.B. 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

1. Evidence of Screening Process Was Harmful

Admission of evidence of the SVP screening process has been deemed unfairly prejudicial and reversible in error other states. The jury should not be informed that there was a screening evaluation and a preliminary determination by the court. *In re Care and Treatment of Foster*, 127 P.3d 277, 283, 286-87 (Kan. 2006) (State's attorney committed reversible misconduct by mentioning MDT determination, PRC review, AG review, probable cause hearing, and determination to go forward). "Introducing evidence that a lengthy selection process, including representatives inside and outside the department of corrections, picked out [someone] to be one of the few candidates for SVP status presents a 'real danger the jury will be unfairly influenced' by a purportedly unbiased 'imprimatur.'" *In re Detention of Stenzel*, 827 N.W.2d 690, 707 (Iowa 2013) (quoting *Foster*, 127 P.3d at 286) (and finding abuse of discretion to admit unduly prejudicial expert testimony about screening process, including referral to MDT and AG's office, independent evaluators, and determinations about filing petition). The resulting prejudice is "significant," "because a jury has a natural tendency to look for guidance from those clothed in authority… even when guidance is not needed." *Id*.

The *Stenzel* court ruled that evidence about the SVP selection process, specifically expert testimony about the process used by the government to decide which inmates would become the subject of SVP proceedings, was erroneously admitted. *Id*. at 704-705. The expert told the jury that "some" sex offenders due to be released are referred by a committee to the

MDT, and of those, some are referred to the attorney general's office; based on a preliminary evaluation, a determination is made whether to file a petition. *Id*. at 704.

The Iowa court said that the expert admissibility statute, which is similar to Missouri's, is not designed to "enable parties to shoehorn otherwise inadmissible evidence into its case" or "intended to be a mechanism for experts to self-bolster their own opinions." *Id*. at 705-706. Finally, "and perhaps most important," the screening process lacked probative value and unfairly prejudiced the respondent. *Id*. at 706. The Court noted that the State never explained why such testimony was needed, only claiming the evidence was "minimal" and there was sufficient foundation for the testimony. *Id*. at 708. The State did not prove that the admission of the evidence was not prejudicial; because of the improper admission of testimony about the selection process, the court reversed and remanded for a new trial. *Id*.

But that is precisely the type of evidence introduced in J.B.'s trial. As in *Foster*, the jury heard about an initial screening, MDT determination, PRC review, Attorney General review, probable cause hearing, determination by the court and order for further evaluation. (Tr. 433-35, 492-93, 657, 661-63, 667). A jury has a natural tendency to look for guidance from the authority of the MDT, team of prosecutors, and the trial judge. *Foster*, 127 P.3d at 286; *Stenzel*, 827 N.W.2d at 707. Evidence of the trial court's probable cause determination is especially prejudicial because it expresses judicial approval of the State's case. *Foster*, 127 P.3d at 287. There is "no reason whatsoever" why the levels of review prior to the jury trial should be mentioned; this evidence "stacks the deck" against the putative SVP. *Id.*at 286. Such evidence is "extremely prejudicial," "inconsistent with substantial justice and affects [] substantial rights." *Id*. at 288. The jury also heard about a winnowing process, where only 3-5% of cases are referred into the process. (Tr. 437- 38, 458). *See Stenzel*, 827 N.W.2d at 704.

2. Counsel was ineffective

In *Christian*, defense counsel failed to object when the State's attorney presented part of defendant's civil deposition testimony, including references to defendant's invocation of the right to silence, at trial. *Id.* at 706-7. Defendant appealed the denial of his PCR motion and alleged counsel's failure to object was not reasonable trial strategy; the Court of Appeals

agreed and found prejudice. *Id.* at 709-10. The deposition invocation testimony was presented as affirmative evidence, without any curative instruction to the jury at any time about the exercise of the right to silence. *Id*. at 714. The case was remanded for a new trial. *Id.*

In *Buck v. Davis*, defense counsel presented 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 United States Supreme Court said, "No competent defense attorney would introduce such evidence about his own client." *Id.* The Court also found a reasonable probability that the result of the proceedings would have been different without this incompetent representation. *Id.* at 776. The future 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.*

As in *Buck*, trial counsel elicited testimony from court-appointed experienced evaluator and psychologist, Dr. Scott. (Tr. 657, 660). On direct, Dr. Scott told the jury about the screening process from first review by the EOC; to referral to the MDT, PRC and Attorney General for determinations; then a probable cause hearing before a judge; and court-ordered evaluation after deciding to hold a suspected SVP for further proceedings. (Tr. 657, 661, 663, 667). No competent defense attorney would introduce such evidence about his own client, showing multiple layers of evaluation, review and court determinations. Defense counsel also unreasonably failed to object to testimony that only 3-5% of men initially reviewed are referred into the SVP process. (Tr. 437-38, 458). This was not reasonable trial strategy.

There is a reasonable probability that the outcome of trial would have been different without this evidence. Just like in *Buck*, the jury was required to make a predictive judgment involving speculation about J.B.'s future. Testimony from multiple psychologists with

experience performing evaluations that he had been carefully screened, was in the 3-5% of those who are referred, reviewed by two committees, the Attorney General determined a petition should be filed, the court determined there was probable cause to hold J.B. on the State's allegations and further court-ordered evaluation was required, was hard evidence from an expert to guide the jury's inquiry. And that "evidence" had no bearing on whether J.B. had a mental abnormality or mental abnormality-caused risk under the statutory criteria. It merely gave the jury assurances that they could rely on guidance from the MDT, PRC, Attorney General and the court's own approval for the proceedings and determination they had to make.

Failure to object, and further ineffectiveness in eliciting additional harmful testimony, so undermined the proper functioning of the adversarial process that J.B.'s trial cannot be relied upon as having produced a just result. *Christian*, at 713. Testimony about the screening process is inherently prejudicial, objectionable, and results in reversible error when introduced by the State. *Stenzel*, 827 N.W.2d 690; *Foster*, 127 P.3d 277. "When 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. No competent attorney would have introduced this evidence about her own client. *Id.* at 775.

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. J.B. did not receive a fair trial as required by the Due Process Clauses. U.S. Const. amend. XIV, Mo. Const. art. I, §10. 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 J.B. 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.

II.

The trial court erred in admitting evidence and testimony that J.B. had been arrested as a co-defendant in a murder case, over his objection, because this violated his rights to due process, a fair trial guaranteed by the U.S. Const. amend. XIV and Mo. Const. art. I, §10, and §490.065, in that J.B. plead guilty to hindering prosecution and the "murder case" evidence was irrelevant to whether or not he met SVP criteria under §632.480(5), not relied upon by any expert, and prejudicial.

J.B. filed a motion in limine to exclude irrelevant and prejudicial evidence that he was charged with murder in the first degree in 1979. (L.F. 35). On direct, the State asked Dr. Weitl about J.B.'s "conviction history" and the significance of any "non sexual acts that may have gotten him in the legal system." (Tr. 259). The State's attorney proceeded to ask Dr. Weitl to identify Exhibit 4, which the attorney's office prepared. (Tr. 259). J.B. objected to Exhibit 4, because it contained the statement: "1980-1996: Murder/hindering, stealing, burglary, receive stolen," based on his motion in limine. (Tr. 260; Ex.4). The objection was overruled; Exhibit 4 was displayed and the witnesses permitted to discuss the murder allegation. (Tr. 261).

After displaying Exhibit 4 to the jury, Dr. Weitl agreed that it covered J.B.'s offense histories in the 1980's and 90's. (Tr. 261). Dr. Weitl testified that J.B. "was arrested for murder" (Tr. 261). The State asked her "How was the murder case resolved." (Tr. 262). Dr. Weitl said that J.B. was "allowed to plea to a lesser charge"—hindering prosecution—because he testified against the co-defendant. (Tr. 262).

It was not until the third day of trial that the jury heard J.B. was *not* arrested for murder, but was prosecuted for "obstruction" because he didn't report that a crime happened and that J.B. did not murder anyone. (Tr. 743, 756). In his post-trial motion, J.B. alleged that the trial court erred in allowing the State to present the murder evidence, violating his rights to due process and a fair trial.[10] (L.F. 71).

[10] U.S. Const. amend. XIV; Mo. Const. art. I, §10.

Standard of Review

The admission of expert testimony is governed by §490.065. *Murrell v. State*, 215 S.W.3d 96, 110 (Mo. banc 2007). Whether the testimony constitutes expert testimony and should be admitted under §490.065 is reviewed *de novo*. *Adkins v Hontz*, 337 S.W.3d 711, 719 n.6 (Mo. App. 2011) (abrogated on other grounds). Considerations applicable to all testimony, like relevance, are reviewed for abuse of discretion. *Id*.

The trial court has discretion whether to admit evidence at trial. A trial court abuses its discretion when the ruling was against the circumstances before the court, is so arbitrary and unreasonable as to shock the sense of justice, or indicates a lack of careful consideration. *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo. App. S.D. 2001). An appellate court will reverse the trial court's ruling if the error resulted in prejudice that deprived the defendant of a fair trial. *Id.*

The standards for admission of expert testimony are fundamental rules of evidence. *State Bd. of Registration of Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-155 (Mo. banc 2003). SVP commitment is only constitutionally permissible "provided the commitment takes place pursuant to proper procedures and evidentiary standards. *Murrell*, 214 S.W.3d at 103. (*citing Kansas v. Hendricks*, 521 U.S. 346, 357 (1997)); U.S. Const. amend. XIV; Mo. Const. art. I, §10.

Analysis

The murder evidence was not relevant to the sexual violence issues at the SVP trial. It had nothing to do with the mental abnormality offered by the State or mental abnormality-caused risk.

To be admissible, evidence must be legally and logically relevant. *State v. Davis*, 211 S.W.3d 86, 88 (Mo. banc 2006). Evidence is logically relevant if it proves or disproves facts at issue or corroborates other relevant evidence. *Gates*, 57 S.W.3d at 396*;* §§632.495, 632.480(5). 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. *Davis*, 211 S.W.3d at 88. Prejudice may result if there is a possibility that

the "bad-guy evidence," even if probative, will be overused. *Id*. Courts "should require that the admission of evidence of other crimes be subjected to rigid scrutiny" because such evidence "could raise a legally spurious presumption of guilt in the minds of the jurors." *Id.*

The effect of the "murder case" evidence was to tell the jury that J.B. was involved murdering someone; criminally charged as a co-defendant in a "murder case;" and that a "lesser charge" was only available because J.B. worked out a deal against his co-defendant. Even if true, an arrest, charge, or conviction for murder had no tendency to prove J.B. suffered from an acquired or congenital condition predisposing him to commit acts of sexual violence in such a degree causing him serious difficulty controlling that behavior, or that such a mental abnormality caused made him more likely than not commit future predatory acts of sexual violence if not confined. §632.480.

The State's spurious murderer case evidence was not the basis for any diagnosis serving as the predicate condition of a mental abnormality, and was not probative of any material fact in controversy or issue to be decided by the jury. Dr. Weitl testified that she diagnosed J.B. with the mental disorders of pedophilic disorder and ASPD, which were mental abnormalities. (Tr. 303, 378). When giving the basis for her diagnoses, Dr. Weitl did not mention an arrest for murder or involvement in a "murder case." (Tr. 303-307). She did rely on a conviction for "hindering prosecution" relative to ASPD. (Tr. 306). So did Dr. Scott, but he did not rely on a "murder case," either. (Tr. 679). Therefore, an arrest or involvement in a "murder case" was not a fact or data relied upon by any expert at trial as the basis of any opinion. As such, testimony about murder was not admissible under §490.065.

Telling the jury J.B. was involved in a murder was for the purpose of attacking his character and painting him as a bad or evil man, to support the inference that he is the type of person who should be locked up in DMH custody. It also could have raised a presumption that J.B. was guilty of a violent crime, yet escaped punishment. It is reasonable to believe a man who commits a murder in the first degree is dangerous, and it is natural to desire someone to be appropriately punished and confined where he is unable to do so again in the future. But, J.B. was not criminally charged, prosecuted, or convicted of murder. (Tr. 743, 756).

The trial court erred in admitting the evidence because it was not admissible under §490.065 or relevant. It was, however, prejudicial. And, this Court is required to assume that the jury considered this evidence as it reached its verdict. *Gates*, 57 S.W.3d at 396. Admission of this evidence violated J.B.'s rights to due process and a fair trial.[11] Therefore, this Court must reverse and remand for a new trial without this irrelevant, inadmissible, and prejudicial evidence.

[11] U.S. Const. amend. XIV and Mo. Const. art. I, §10.

III.

The trial court committed reversible error and abused its discretion in failing to strike Juror 4, Mr. Swaringim, for cause and permitting him to serve on the jury over J.B.'s objections, in violation of J.B.'s rights to due process, equal protection and to an impartial jury, guaranteed by U.S. Const. amend. XIV, Mo. Const. art. I, §§10, and 22, and §494.470, because Mr. Swaringim was not qualified to serve as a juror in that he formed and expressed opinions concerning the matter and material facts in controversy that may have influenced his judgment, his beliefs precluded him from following the court's instructions, and he was not rehabilitated.

Relevant Facts

During jury selection, defense counsel asked if anyone believed that a prison sentence was not "enough as resolution to the sort of crimes that you heard about today?" (Tr. 142). Juror 19, Ms. Hughes, responded in the affirmative. (Tr. 143). The following exchange happened:

ATTORNEY: You just answered the question. You don't – for crimes that [J.B.] has already been convicted of, he should never get out of prison?

MS. HUGHES: If he did something to my daughter, he wouldn't be sitting there, so ---

ATTORNEY: Fair enough.

MS. HUGHES: That's my personal feeling.

ATTORNEY: Fair enough.

MS. HUGHES: It's not that he did it once. You say there are multiple things, so I'm saying that he's sick and he needs to be in mental health? I think he needs to be in general population.

ATTORNEY: Okay. Not an option here.

MS. HUGHES: Okay.

ATTORNEY: Can you consider the two options that you're given if you're a member of this jury?

MS. HUGHES: I mean, I don't know.

ATTORNEY: Your body language is telling me no.

MS. HUGHES: I don't know that there is – I mean, I don't know that there's something you could say to me that say turn him loose, let him walk around.

ATTORNEY: Just so I can make my record and I understand, there's nothing I'm going to be able to tell you, nothing [J.B.] will tell you, nothing the psychologists who are testifying on behalf of [J.B.] can tell you that's going to let you follow the Court's instruction to let him go?

MS. HUGHES: I mean, someone would have to be mentally ill to do things to children like that.

ATTORNEY: That's fair. That's a fair belief. I have heard that belief many, many times. Okay.

MS. HUGHES: I mean, not someone in a sane mind would do that to a child.

ATTORNEY: So it sounds like you might have already made some decisions about his mental status?

MS. HUGHES: I mean, it's there. I mean –

ATTORNEY: … It sounds like we're already – we're pushing things up a little bit with you, and you might have already decided that there's a mental ---

MS. HUGHES: I mean, I don't care whether he's committed or he's in jail. He needs to be in one or the other. He don't need to be out with my child or these other people's children. I mean, I can't just – I mean, that would be like – it's just crazy. I mean, why would you put a killer, an attack dog, in a pen with your child?

ATTORNEY: Fair enough. Okay.

Who here, and just give me a hand, who here agrees with Number 19? Okay, I've got one, ***four***, sixteen, seventeen, twenty, twenty-one, twenty-two. [additional prospective jurors raised their hands.]

(Tr. 145-46).

Juror 4, who responded to defense counsel's question, agreeing with Ms. Hughes, was

Mr. Swaringim.[12] (Tr. 146). Ms. Hughes was struck for cause. (Tr. 184). Defense counsel's request to strike Mr. Swaringim was denied. (Tr. 188, 191). The State's attorney was not willing to agree to a strike for cause based on a juror's raised hand. (Tr. 188, 191). Defense counsel objected to the Court's ruling and refusal to strike Mr. Swaringim.[13] (Tr. 188-91). Mr. Swaringim sat on the jury which decided J.B.'s case. (Tr. 196, 202, 204; L.F.8 (signature line 6)). J.B. included this error in his post-trial motion. (L.F. 71).

Standard of Review

A juror's qualification to serve on a jury is determined by the entire voir dire examination and the trial court is in the best position to evaluate his qualifications. *Joy v. Morrison,* 254 S.W.3d 885, 888 (Mo. banc 2008). Appellate courts will reverse a trial court's ruling on a motion to strike a juror for cause if it is clearly against the evidence and is an abuse of discretion. *Id.* "A failure by a trial judge to question independently a potential juror to explore possible prejudice may undercut any basis for a trial judge's exercise of discretion and constitute reversible error." *Id.* at 891. No showing of a real probability of injury is required. *Id.* at 888-89.

"The critical question in these situations is always whether the challenged venireperson indicated unequivocally his or her ability to fairly and impartially evaluate the evidence." *Id*. at 891.

Analysis

J.B. has a constitutional right to a fair and impartial jury of twelve qualified jurors. *Thomas by and through Thomas v. Mercy Hospitals East Communities*, 525 S.W.3d 114, 118 (Mo. banc 2017); U.S. Const. amend XIV; Mo. Const. art. I, §§10, 22(a). Juror qualification

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[12] Mr. Swaringim made other responses during voir dire, unrelated to the basis for the request to strike him. At the outset, he indicated he had previously been represented by the trial judge, but indicated he would have no problems following instructions because of their prior relationship. (Tr. 51). He also had a vacation starting on Friday the week of trial. (Tr. 103).

[13] U.S. Const. XIV; Mo. Const. art. I, §§10, 22.

is governed by §494.470, which provides in relevant part:

1. ... [N]o person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person ... shall be sworn as a juror in the same cause.
2. Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case.

Thomas, 525 S.W.3d at 118.

Section 494.047 identifies two types of bias: (1) forming an opinion on the case or material facts of the case; (2) opinions about "larger issues" that preclude following the instructions given by the court. *Thomas*, 525 S.W.3d at 118 (internal citations and quotations omitted).

In *Joy*, a prospective juror was "substantially" troubled by the "issue of lawsuits against doctors;" he said he "probably would be biased for the doctors." *Thomas*, 525 S.W.3d at 118 (*citing Joy*, remaining citations and quotations omitted). When directly asked if he could be "fair and unbiased" if selected, he said that he "could be fair." *Id*. He also said that he would be "fair and reasonable" in evaluating the evidence. *Id*. "Finally, all prospective jurors were asked whether they believed "they could not follow the trial court's instructions" or if they could "keep an open mind until [they had] heard all of the evidence," and the prospective juror did not respond." *Id*. at 118-119. *Joy* held that the juror had not formed an opinion about the material facts of the case, which would require his disqualification under subsection 1, because he did not have any knowledge concerning the matter or material facts in controversy. *Id*. His opinions also would not preclude him from following the court's instructions, so he was not disqualified under subsection 2. *Joy*, 254 S.W.3d at 890.

Similarly, the prospective juror challenged in *Thomas*, had no knowledge concerning the matter or material facts in controversy. *Thomas*, 525 S.W.3d at 119. She made statements indicating a "generalized slight bias:" she said that her sister worked as a nurse in a hospital affiliated with the defendants, and that while she might start out "slightly" in favor of hospitals and nurses. *Id*. This Court said at that point in voir dire, the juror's answers were equivocal. *Id*. This Court continued:

> If counsel had not asked further and established an unequivocal response that prospective juror 24 could set aside any bias and judge the case fairly and impartially, the trial court would have been obligated to do so before seating the juror, for where a venireperson's answers are equivocal as to his or her qualifications to be a juror, it is incumbent upon the trial judge to question the juror further to either confirm the lack of qualifications to serve, or to rehabilitate the venireperson.

Id. (internal citation and quotation omitted).

However, attorneys on both sides asked the prospective juror additional questions. *Id*. She then said she would not give one party more credibility than another and explained that her slight biases came from opinions expressed by her sister about a different hospital. *Id*. When asked, "Can you put that aside and assure the Court that you will do your level best currently to decide this case based on what you hear in this courtroom… and the judge's instructions," she said yes. *Id*. This was a "yes, without qualification, [that] she could follow the trial court's instructions." *Id*.

In this case, the prospective jurors were informed about the issue in the case, material facts, and the only two outcomes possible in the trial. They possessed much more information than the jurors in *Joy* and *Thomas*. The State began voir dire by telling the jury that the purpose of "this case" was to "try[] to get [J.B.]… into a mental health facility rather than on the streets." (Tr. 28). It told the jury pool that "the person doesn't go to the streets, the person goes to a mental health facility for controlled care and treatment" and said, "It's either commitment to a mental health facility or not." (Tr. 39, 55).

The State told the prospective jurors psycho-sexual mental health was "our mental issue" and asked if anyone believed there is no such thing as a pedophile or other psycho-sexual disorder that makes someone too dangerous to be around others. (Tr. 39). The jury pool learned the case was about pedophilia and sexual abuse of small children, specifically the fact that sexual acts were committed against 7 to 14-year-old children, and that J.B. had been convicted. (Tr. 39, 57, 68, 132).

And defense counsel echoed that "the two options in this case are that you commit J.B. to [DMH] or you release him." (Tr. 128). Then defense counsel asked if the prison

sentence was not enough resolution to the crimes J.B. had committed. (Tr. 142).

Ms. Hughes, Juror 19, had formed a generalized opinion about sex offenders—"someone would have to be mentally ill to do things to children like that"— had already made a decision about J.B.'s mental status— "I mean, it's there;" and about the outcome of the case— "I don't care whether he's committed or he's in jail. He needs to be in one or the other" but not released; "I mean, I can't just – I mean, that would be like -- it's just crazy" to vote to release J.B.. (Tr. 144-46). When defense counsel asked, "who here, and just give me a hand, who here agrees with Number 19?," Mr. Swaringim, Juror 4, raised his hand and defense counsel called out his number. (Tr. 146).

The trial court granted the State's request to strike Ms. Hughes. (Tr. 184). The State opposed J.B.'s motion to strike Mr. Sweringim, and was unwilling to consent "based just on a hand raise... just a hand raise is not a commitment." (Tr. 188). The trial court overruled the motion to strike Mr. Swearingim. (Tr. 188, 190). Raising one's hand is sufficient to make a disclosure during voir dire. *See Heitner v. Gill*, 973 S.W.2d 98, 104-105 (Mo. App. S.D. 1998) (with regard to juror nondisclosure claim, if prospective juror raised his hand, he made a disclosure; if he did not raise his hand, he failed to make a disclosure). And in J.B.'s trial, it was routine.[14]

Disclosing that he agreed with Ms. Hughes meant that Mr. Swaringim, too, had formed a decision about J.B.'s mental status and how he would use his vote when deciding the case. This went beyond an expression of "generalized slight bias" at issue in *Thomas*. Endorsing "someone would have to be mentally ill to do things to children like that," and "I mean, it's there" shows Mr. Swaringim had formed or expressed opinions about J.B. and mental abnormality matter to be decided in the case. This is an opinion about the matter and

[14] For example, the trial judge asked for a response from the venire panel, by requesting that jurors "please raise your hand" and noted "I see no hands" when there were no responses to his preliminary questions. (Tr. 16-18). The State's attorney opened voir dire asking for jurors to raise their hands in response to his question. (Tr.27). The State also acknowledged hand-raising as disclosure of agreement with Ms. Hughes, specifically following up with Juror 55, Mr. Branstetter, about the extent of his agreement with Juror 19, in efforts to rehabilitate him. (Tr. 171, 173-174).

material facts in the case that would constitute disqualifying bias under §494.470.1.

And a generalized opinion that anyone who committed an offense against a child would also be mentally ill is disqualifying bias under §494.470.2. The remaining responses indicated his opinions or beliefs precluded him from following the law and instructions given by the trial court, because he would require evidence from the defense to "turn him loose," and could not consider the prospect of J.B. being released. Of course, the jury was instructed that J.B. did not have a burden to produce any evidence at trial, and if the State failed to prove its case, the jury was required to find he was not an SVP and J.B. would be released. (L.F. 65, 66); §632.495.

The trial court's decision to strike Ms. Hughes for cause, but refusing to strike the juror who agreed with her on all relevant bases, is illogical. Mr. Sweringim did not unequivocally indicate his ability to fairly and impartially evaluate the evidence and follow the court's instructions. *Joy*, 254 S.W.3d at 891. He expressed generalized opinions and specific beliefs about the facts and issues in this case that translated into bias against J.B. Because he did not reassure the court that he could be impartial and follow the court's instruction, the court did not have discretion to refuse to strike him and to seat him as a juror. *See Thomas*, 525 S.W.3d at 120.

The trial court committed reversible error in refusing to strike Mr. Sweringim. J.B. is entitled to a new trial before 12 fair and impartial jurors.

CONCLUSION

For the reasons stated herein, J.B. is entitled to a new trial. Alternatively, if this Court believes the record is not sufficient to address the IAC claim raised in Point I, this Court should appoint a special master or remand to the trial court so that he has an opportunity to present additional evidence demonstrating defense counsel's deficient performance and prejudice.

Respectfully submitted,

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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, table of contents, certificate of compliance, and the appendix, the brief contains 10,501 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