SC96851

In the Supreme Court of Missouri

In the Matter of the Care and Treatment of

James Braddy,

Appellant

Appeal from the Circuit Court of Iron County
The Honorable Randall Head, Judge

Respondent's Substitute Brief

JOSHUA HAWLEY
Attorney General

KATHARINE DOLIN
Assistant Attorney General
Missouri Bar No. 64817

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-0475
Fax: (573) 751-3825
Katharine.Dolin@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

On June 9, 2016, Appellant was committed to the custody of the Director of the Department of Mental Health for care, control, and treatment as a sexually violent predator (SVP) following a jury trial in the Circuit Court of Iron County, Probate Division, the Honorable Randall Head presiding. L.F. 69. The jury committed Appellant upon the following facts:

Appellant's Offending History

Appellant had several convictions for stealing and burglary. Tr. 261. He was also arrested for murder while on probation for burglary. Tr. 261. The murder case was resolved with Appellant's guilty plea to hindering prosecution in exchange for his testimony against a co-defendant. Tr. 262.

In 1998, naked photos that Appellant had taken of the ten-year-old niece of his ex-wife were discovered in a paper plate in a recipe box in a cabinet. Tr. 263. The girl in the photos disclosed several years of abuse at the hands of Appellant beginning in 1995, when Appellant made her watch pornography while he fondled her genitals and buttocks and made sexual comments. Tr. 264. The child disclosed many instances of abuse following the first incident and indicated that every time Appellant took her to the "Sale Barn" he unbuttoned her pants and groped her. Tr. 264. Evidence showed that Appellant groomed her by telling her he was taking the photos of her so he could use "witchcraft" to make a boy she liked like her back. Tr. 266. To dissuade her

from testifying, Appellant wrote letters encouraging her to say she lied and telling her she would embarrass herself by testifying. Tr. 271. He was convicted of abuse of a child for his offenses against this victim. Tr. 273.

This was not the only child Appellant groomed using "witchcraft." Appellant convinced a fourteen-year-old girl to let him to engage in sodomy and statutory rape in exchange for a "spell" to get a boy to like her. Tr. 267–68. For that offense, he was convicted of endangering the welfare of a child and statutory rape. Tr. 271, 273. The jury also heard evidence that Appellant threatened this victim both directly and indirectly to dissuade her from testifying. Tr. 272.

Yet another child gave a statement that Appellant had reached up under her nightgown, fondled her vagina, and told her he would make her live with him and she would never see her parents again. Tr. 269. She was only six or seven years old. Tr. 269.

A friend of one of Appellant's female relatives told police that he had solicited her and his relative to smoke marijuana, take naked photos of themselves, and give the photos to him. Tr. 270. A similar solicitation was made to a friend of the 1998 victim. Tr. 270.

Less than two years after he was released on parole from his sex offense sentences, Appellant created another victim, the six-year-old daughter of his friends. Tr. 283. He groomed her by promising her clothes and a pony. Tr. 284.

He admitted to his parole officer that he was getting close to the child and was warned to stay away from her. Tr. 285. Nevertheless, Appellant fondled, kissed, and raped the victim repeatedly. Tr. 287. The victim also witnessed Appellant doing to another child what he had done to her. Tr. 287. The jury heard evidence that Appellant offered another inmate two hundred thousand dollars to burn this victim's house down with her in it. Tr. 288. For this offense, he was convicted of statutory rape in the first degree. Tr. 289.

Appellant's Treatment History

Appellant completed the Missouri Sex Offender Program (MOSOP) in 2008. Tr. 279. He was thereafter released on parole and continued sex offender treatment in the community. Tr. 282. He also registered as a sex offender. Tr. 282. He then offended against another child while on parole and returned to prison. Tr. 282–83, 287. He again completed MOSOP. Tr. 294. During his treatment, he did not take any responsibility for offending against his victims other than that which was required to plead guilty. Tr. 294. Appellant did not discuss his sexual offenses in an open and honest way either time he did treatment. Tr. 275. At the time of trial, he still did not provide details of his offending, denied parts of the offenses, justified his offenses, and blamed others for his behavior. Tr. 275. Notably, even after treatment, Appellant still did not admit to a deviant attraction to children. Tr. 291.

Dr. Kimberly Weitl

Dr. Kimberly Weitl, a licensed psychologist, evaluated Appellant to determine if he was a SVP. Dr. Weitl had worked with sex offenders for nearly 20 years. Tr. 237–38. She testified that she reviewed over 5,000 cases of male sex offenders in Missouri. Tr. 241.

She reviewed Appellant's records from the Department of Corrections, records from the Board of Probation and Parole, medical records, records from Appellant's time in MOSOP, prosecutors' files, and conducted an in-person interview with Appellant. Tr. 253–54.

Dr. Weitl testified that she found that Appellant had a mental abnormality. Tr. 298. She testified that Appellant suffered from pedophilia, antisocial personality disorder, and narcissistic personality disorder. Tr. 643. She also explained that Appellant's mental abnormality predisposed him to commit sexually violent offenses to a degree that causes him serious difficulty in controlling his behavior. Tr. 311–12.

Dr. Weitl also testified that she performed a risk assessment on Appellant. Tr. 651. She scored Appellant on the Static-99R and Static-2002R actuarial tools and he received a moderate-high score on both instruments. Tr. 318, 320. His score on the Static-2002R put him in the 93.3 percentile among sex offenders and offenders with his score were four times more likely to recidivate than the average sex offender. Tr. 322.

Dr. Weitl also testified that she considered additional risk factors from the literature. Tr. 333. She found that Appellant's risk was increased by his deviant sexual interest, unsuccessful supervised release, antisocial lifestyle, substance abuse, sexual preoccupation, global intimacy deficits, poor problem-solving, poor self-regulation, negative social influences, and grievance/hostility. Tr. 333–39. She did not find any mitigating factors. Tr. 344. Dr. Weitl explained that Appellant was not entitled to a risk reduction for successfully completing treatment because he did not appear to have genuine insight into his sexual behavior. Tr. 341.

After considering the actuarials and the additional risk factors, Dr. Weitl opined that Appellant was more likely than not to commit a future predatory act of sexual violence unless confined in a secure facility. Tr. 246. She opined that Appellant did meet the criteria of a SVP under Missouri law. Tr. 346.

Dr. Nena Kircher

Dr. Nena Kircher, a licensed psychologist with the Missouri Department of Mental Health, evaluated Appellant as well. Tr. 458. She testified that she performed 800–900 evaluations and found only 3–5 percent of offenders she evaluated met SVP criteria. Tr. 458.

She testified that she reviewed Appellant's MOSOP files, interviewed treatment providers, reviewed Appellant's Probation and Parole records, medical records, mental health records, and interviewed Appellant himself. Tr.

458–59. Dr. Kircher testified that she gave Appellant a antisocial personality disorder diagnosis and a "rule-out" pedophilic disorder diagnosis. Tr. 468.[1] She testified that both conditions form a mental abnormality which causes him serious difficulty in controlling his behavior. Tr. 471.

Dr. Kircher also performed a risk assessment on Appellant. Tr. 472. Dr. Kircher scored Appellant on the Static-99R and testified that he received a score of moderate-high on that instrument. Tr. 471. She also scored him on the Stable-2007 and he received a score corresponding to a high need for treatment. Tr. 483. Dr. Kircher also considered Appellant's additional risk factors from the literature. Tr. 486. She found that offense-supportive

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[1] Dr. Kircher explained that a rule-out diagnosis is given when a condition "looks like it's here, but I don't have [sic] 100 percent because it wasn't fully addressed in treatment." Tr. 468. Contrary to Appellant's assertion, which Respondent addressed in the briefing below, Dr. Kircher never testified that she "did not know if [Appellant] was attracted to children." App. Sub. Br. 8. She testified that he has an emotional congruence with children, meaning he sees them as very easy to manipulate. Tr. 487–88. She also testified that he is just as risky whether he victimizes children as a result of an attraction or victimizes them because they are convenient targets. Tr. 488.

attitudes, lack of emotionally-intimate relationships, general self-regulation problems, emotional congruence with children, childhood behavior problems, poor problem-solving, and grievance/hostility served to exacerbate his risk. Tr. 487.

Dr. Kircher testified that treatment did not reduce Appellant's risk because he offended after his first treatment and had difficulty with his second. Tr. 461. She noted that he minimized his offending and blame-shifted in her interview with him. Tr. 463–64.

Dr. Kircher testified that Appellant was more likely than not to engage in predatory acts of sexual violence and that he met SVP criteria. Tr. 491.

Appellant

Appellant testified that the victims for whom he was convicted exaggerated the degree of their abuse and all of the other victims for whom he was not convicted lied. Tr. 602. He testified that he offended against his ten-year-old victim for revenge and denied any attraction to her. Tr. 551, 555. He also denied all sexual contact with her outside of the photos he took. Tr. 553. He completely denied offending against his six or seven-year-old victim. Tr. 547. Of the victim he created on parole, Appellant indicated that he was not trying to groom her by becoming close to her and her family but rather was engaged in a root-digging business enterprise with them. Tr. 546. He explained that his plot to kill her after she disclosed the abuse was really a plot to "set

up" the inmate he solicited to do the killing "hoping somebody would beat the snot out of him." Tr. 573–74. He admitted that he coerced his fourteen-year-old victim into having sex with him because he wanted to prove she was cheating on his son. Tr. 558. He denied being attracted to her. Tr. 565.

Appellant testified that he "faked and phonied" his way through his first stint in MOSOP by having other people do his assignments. Tr. 559. He also agreed that he drafted a written description of how to use "witchcraft" to coerce girls into having sex with him, including asking "if they can keep their mouths shut," asking if they would "use him as a teacher," asking if they have "the balls to do the spells," asking if they would "do anything he says without question," and indicating that having sex with a relative makes the "spells" more powerful. Tr. 624–25.

Dr. Richard Scott

Dr. Richard Scott, a licensed psychologist for the Department of Mental Health, evaluated Appellant. Tr. 653. Dr. Scott also diagnosed Appellant with pedophilia and antisocial personality disorder. Tr. 673. He testified that he asked Appellant what he thought about the pedophilia diagnosis and Appellant indicated that he "would like to say [he is not a pedophile]" but MOSOP has given him "something to be aware of in [his] surroundings, to think about personally." Tr. 675. Dr. Scott indicated that Appellant received a moderate score on the psychopathy checklist. Tr. 680.

While Dr. Scott found that Appellant suffered from a mental abnormality, Tr. 735, he concluded that because none of the five-year reconviction rates on the Static instruments ever exceeded 50 percent, Appellant was not more likely than not to reoffend over his lifetime. Tr. 708–09.

ARGUMENT I

Appellant cannot raise a claim of ineffective assistance of counsel here, but even if he could, he is not entitled to relief because his counsel was effective.

In his first point, Appellant argues that he received ineffective assistance of counsel ("IAC").[2] Appellant's argument fails for three reasons: 1) such a claim is not cognizable on direct appeal, 2) even if it were, there is neither a constitutional nor statutory right to effective assistance of counsel in proceedings under the Sexually Violent Predator Act (SVPA); and 3) even if there were, Appellant's counsel was not ineffective.

A. Claims of ineffective assistance of counsel are not cognizable on direct appeal.

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[2] In Point I, Appellant argues that several different actions of trial counsel violated several of his constitutional and statutory rights. In Points II and III, Appellant asserts that the trial court violated several of his constitutional rights by admitting evidence and overruling his motion to strike a juror. Raising multifarious points on appeal is a practice this Court has recently reiterated violates Rule 84.04(d) and makes these claims subject to dismissal. *See Kirk v. State*, 520 S.W.3d 443, 450 n.3. (Mo. 2017).

Lawsuits under the SVPA are special statutory proceedings with a special right to appeal. *See* Section 632.495.1, RSMo. Appeals are limited to the "determination as to whether a person is a sexually violent predator." *Id.* Claims of IAC do not concern that determination and are thus outside the scope of the statutory right to appeal. Appellant therefore cannot bring such a claim here. *See Farinella v. Croft*, 922 S.W.2d 755, 756 (Mo. 1996) ("The right to appeal is purely statutory and, where a statute does not give a right to appeal, no right exists."). Since effectiveness of counsel is not essential to the determination of whether a person is an SVP, any opinion on the issue would constitute an advisory opinion. *State ex rel. Heart of America Council v. McKenzie*, 484 S.W.3d 320, 324 n.3 (Mo. 2016).[3]

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[3] Nor does the SVPA provide for any kind of collateral attack. Appellant therefore asks this Court to make law where the legislature has declined to do so. "'Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. The legislature may wish to change the statute. . . .But this Court, under the guise of discerning legislative intent, cannot rewrite the statute.'" *McKenzie*, 484 S.W.3d at 327 (quoting *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002)). "'When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.'" *Id.*

Allowing IAC claims on direct appeal is not feasible. To evaluate IAC claims, courts generally require testimony from trial counsel regarding trial strategy. But it is not routine procedure in Missouri to adduce new evidence in direct appeals.[4] Further, in order to be preserved for appeal, claims must be raised in a motion for new trial. Missouri Supreme Court Rule 78.07. However, as it is trial counsel that generally drafts that motion, it is unlikely that trial counsel would claim to have been ineffective. This case illustrates that conflict. Appellant's trial counsel did not raise a claim of her own ineffectiveness in her motion for new trial, so it is not preserved for appellate review. In fact, trial counsel argued in her motion for new trial that the trial court should have allowed *more* evidence of pretrial procedures, L.F. 73, but it is trial counsel's discussion of pretrial procedures that appellate counsel now argues was ineffective.

The cases to which Appellant cites for the proposition that IAC claims are cognizable on direct appeal in SVP proceedings are from states that have

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[4] One reason why IAC claims are to be raised under criminal post-conviction relief Rules 29.15 and 24.035 is that those rules allow for a hearing. *See State v. Wheat*, 775 S.W.2d 155, 157–58 (Mo. 1989) (claims of ineffective assistance of counsel are not cognizable on direct appeal; they must be raised under the post-conviction rules).

a dissimilar direct and collateral review structure to Missouri. Kansas reviews IAC claims on direct appeal because Kansas, unlike Missouri, has a procedure to remand IAC claims raised on direct appeal back to the trial court in lieu of filing a habeas corpus action. *In re Ontiberos*, 287 P.3d 855, 860 (Kan. 2012) (citing *State v. Van Cleave*, 716 P.2d 580 (1986)(recognizing remand as an expeditious remedy to pursue IAC allegations)). Iowa and Washington review IAC claims on direct appeal because those states, unlike Missouri, generally allow IAC claims on direct appeal. *See State v. McFarland*, 899 P.2d 1251, 1257 (Wash. 1995); *State v. Johnson*, 784 N.W.2d 192, 196 (Iowa 2010).

Direct appeal is an inappropriate forum in Missouri to bring claims of IAC. Accordingly, this Court should find Point I not cognizable.

B. There is no constitutional right to effective assistance of counsel in SVP proceedings.

Even if direct appeal were the proper place to raise this type of claim, there is no constitutional right to effective assistance of counsel in SVP cases. The right to effective assistance of counsel generally flows from the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). By its wording, the Sixth Amendment applies to criminal actions only. *Bittick v. State*, 105 S.W.3d 498, 502 (Mo. App. W.D. 2003). The Sixth Amendment right to counsel thus has no application to the SVP Act, which is civil in nature. *Id.*;

In re Kirk, 520 S.W.3d at 450 (finding that the SVP Act does not violate constitutional provisions that apply exclusively to criminal laws).

It is difficult to find precedent that uses this term to in regards to counsel in civil cases. Indeed, all the cases Appellant cites to on page 15 of his substitute brief for the proposition that the right to counsel means the right to "effective" counsel are either criminal cases (*Strickland v. Washington*, 466 U.S. 668, 686 (1984), *Harper v. State*, 404 S.W.3d 378, 383 (Mo. App. S.D. 2013), *State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 597, 606 (Mo. 2012), *Gideon v. Wainwright,* 372 U.S. 335, 341 (1963)) or civil contempt cases with a possibility of imprisonment (*State ex rel. Family Support Div.-Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App. W.D. 2010)).

While Appellant cited to the Sixth Amendment in his brief in the Court of Appeals, he now claims that his right to effective assistance of counsel stems from the due process protections of the Fourteenth Amendment to the federal constitution and article I, section 10 of the Missouri constitution. App. Sub. Br. 15. Appellant argues that due process requires that this Court read an effectiveness requirement into the parts of the SVPA that mention the appointment and representation of counsel. However, it is unclear whether Appellant's argument is based on substantive due process or procedural due process.

Respondent will first address substantive due process. Appellant relies on this Court's decision in *In re Care and Treatment of Norton,* 123 S.W.3d 170, 173 (Mo. 2003) that the SVPA impinges on a fundamental right of liberty and that strict scrutiny applies. But the United States Supreme Court has never held that the involuntary commitment of those who are mentally ill and dangerous impinges on a fundamental right. Respondent respectfully requests that this Court reconsider its prior ruling that the SVPA impinges on a fundamental right.

Just last year, the United States Court of Appeals for the Eighth Circuit explained that the United States Supreme Court has *never* held that involuntary civil commitment burdens a fundamental right to liberty. *Karsjens v. Piper,* 845 F.3d 394, 407 (8th Cir. 2017). The court held that state sexually violent predator acts do not implicate a fundamental right to liberty and so are subject to rational basis review rather than strict scrutiny. *Id.* In its analysis, the Eighth Circuit followed United States Supreme Court precedent, which defined "fundamental rights" as those rights that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The Eighth Circuit observed that the United States Supreme Court was confronted with this question in *Kansas v. Hendricks*. *Id*.

In *Hendricks*, the United States Supreme Court held that SVP acts do not implicate a fundamental right to liberty that is "deeply rooted in this Nation's history and tradition" because involuntary civil commitment was permitted at the time of the founding. *Kansas v. Hendricks*, 521 U.S. 346, 375 (1997). As the United States Supreme Court pointed out, the involuntary commitment of "people who are unable to control their behavior and who thereby pose a danger to the public health and safety" is a long-standing practice. *Id.* (citing 1788 N.Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); *see also* A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes)).[5] After reviewing this longstanding history, the United States Supreme Court concluded "it thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Hendricks*, 521 U.S. at 357.

The Eighth Circuit also observed that, in the context of a due process challenge, involuntary civil commitment requires only "some *reasonable relation* to the purpose for which the individual is committed." *Karsjens*, 845

[5] This citation originally appeared in *Hendricks*, 521 U.S. at 357.

F.3d at 407 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) (court's emphasis). After considering these United States Supreme Court cases, and others, the Eighth Circuit held that the Minnesota Sexually Violent Predator Act *does not* implicate a fundamental right, so the appropriate level of scrutiny is whether the statute bears a rational relationship to a legitimate government purpose. *Karsjens*, 845 F.3d at 407–08.

This Court should adopt the Eighth Circuit's reasoning. In *Norton*, this Court found that the SVPA does implicate a fundamental right to liberty. *In re Care and Treatment of Norton*, 123 S.W.3d 170, 173 n. 10 (Mo. 2003) (citing *Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Vitek v. Jones*, 445 U.S. 480 (1980); *Foucha v. Louisiana*, 504 U.S. 71, 68 (1992), and *Hendricks*, 521 U.S. at 346). In *Bernat v. State*, 194 S.W.3d 863, 868 (Mo. 2006), this Court reaffirmed its holding in *Norton*. But *Heller*, *Vitek*, *Foucha*, and *Hendricks* do not require the conclusion that the SVPA implicates a fundamental right.

In *Heller*, the Court evaluated a due process and equal protection challenge to involuntary mental health commitments. Because the parties had litigated the case under the rational basis review standard below, the Court refused to apply heightened scrutiny. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Nor did it find that a fundamental right was at issue. Moreover, the commitment scheme survived rational basis review even though respondents lost some measure of liberty when they were committed. *Id*. at 325–26.

In *Vitek*, the Supreme Court simply held that a state could not transfer an individual from a prison to a mental hospital without due process. *Vitek v. Jones*, 445 U.S. 480, 492–93 (1980). The Court did not find that a fundamental right was at issue nor did it apply strict scrutiny. A plurality of four justices found that the inmate must be provided with qualified and independent assistance. *Id.* at 497. However, only three justices concluded that the required assistance had to be provided by counsel. *Id.* In fact, Justice Powell's concurrence suggested that the due process right of independent assistance could be satisfied through the services of a licensed psychologist or other mental health professional. *Id.* at 500 (Powell, J., concurring). The Court more recently stated that, "In *Vitek*, the controlling opinion found *no* right to counsel." *Turner v. Rogers*, 564 U.S. 431, 443 (2011) (emphasis in original).

And finally, *Foucha* does not require the application of strict scrutiny because, as Justice Thomas[6] pointed out in his dissent, the majority "never explains whether we are dealing here with a fundamental right..." *Foucha v. Louisiana*, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting). The Eighth Circuit found Justice Thomas's point persuasive. *Karsjens*, 845 F.3d at 407 (citing *Foucha*, 504 U.S. at 116) (Thomas, J., dissenting)).

[6] Joined by Justice Scalia and Chief Justice Rehnquist.

This Court's decision in *Norton*—that the SVP Act burdens a fundamental right to liberty—is ripe for reconsideration. *Norton* relied on *Hendricks*, which has been clarified by the United States Court of Appeals for the Eighth Circuit in *Karsjens*. *Norton* also relies on *Heller*, *Vitek*, and *Foucha*, but as demonstrated *supra*, those decisions do not compel a finding that Missouri's SVPA operates in such a way that "neither liberty nor justice [] exist." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Accordingly, this Court should find that the SVPA is properly reviewed under the rational basis standard. Under rational basis review, this Court will uphold the statute if it is "justified by any set of facts." *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. 2014). Under strict scrutiny review, the challenged provision must be narrowly tailored to achieve a compelling state interest. *Norton*, 123 S.W.3d at 174. In *Norton,* this Court held that the SVPA "is narrowly tailored to serve [the] compelling state interest ... [of] protecting the public from crime." As the SVPA survives strict scrutiny it certainly satisfies rational basis review.

Turning to procedural due process, it is important to note at the outset that the United States Supreme Court has stressed repeatedly that "due process is flexible" and "calls for such procedural protections as the particular situation demands."*Jennings v. Rodriguez,* 138 S. Ct. 830, 852 (2018). The factors to be considered are as follows: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such

interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews v. Eldridge,* 424 U.S. 319, 347 (1976).

As to the first factor, the United States Supreme Court has found that civil commitment causes a deprivation of liberty that requires due process protection. *Addington v. Texas*, 441 U.S. 418, 425 (1979).[7] This Court has also found that there is a liberty interest at stake in SVP proceedings. *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. 2008). However, it is important to remember that "at least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the *accurate determination of the matters* before the court, *not in a result more favorable* to him." *Heller,* 509 U.S. at 332 (emphasis added).

As to the second factor, the SVP act contains numerous and sufficient procedures to prevent an erroneous deprivation of liberty. As the law is written, counsel is required to be appointed at the probable cause hearing and represent respondents throughout the proceedings. §§632.489–92, RSMo.

[7] Notably, the Court went on to find that the due process requirements for civil commitment cases need not be the same as the due process rights afforded to criminal defendants. *Id.* at 428.

Further, the SVPA provides numerous procedural safeguards outside of the appointment of counsel: expedited timelines throughout the proceedings, a requirement of certain criminal offenses in respondents' backgrounds, Section 632.480, RSMo; a screening performed by a qualified doctor, Section 632.483, RSMo; a screening performed by a multidisciplinary team (MDT), Section 632.483, RSMo; a screening performed by a prosecutors' review committee (PRC), Section 632.483, RSMo; a probable cause hearing in front of probate judge at which respondents have a right to notice, a right to view all petitions and reports in the court file, and a right to present evidence and cross-examine witnesses, Section 632.489, RSMo; a determination of probable cause by the court, Section 632.489, RSMo; an evaluation by the Department of Mental Health, Section 632.489, RSMo; an evaluation by a doctor of the respondent's choosing, Section 632.489, RSMo; access to all materials provided to the MDT, interviews with family, associates, victims, and witnesses, and police reports, Section 632.489, RSMo; a trial, Section 632.492, RSMo; and a unanimous verdict if tried by jury, Section 632.495, RSMo.

These procedures go over and above those suggested by *Mathews*: (1) timely and adequate notice detailing the reasons for a proposed termination; (2) an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally; (3) retained counsel, if desired; (4) an impartial decisionmaker; (5) a decision resting solely on the

legal rules and evidence adduced at the hearing; and (6) a statement of reasons for the decision and the evidence relied on. 424 U.S. 319 n.4 (citing *Goldberg v. Kelly*, 397 U.S. 256, 266–71 (1970)).

As to the third factor, the government's interest is in protecting the public. *Norton*, 123 S.W.3d at 174. Creating a new avenue for collateral attack in a special statutory proceeding where the legislature did not do so would impose fiscal and administrative burdens on the government.

The SVPA comports with substantive and procedural due process standards as it is written. The Constitution does not compel the conclusion that Appellant is entitled to effective assistance of counsel.

C. There is no statutory right to effective assistance of counsel in SVP cases.

While there is no constitutional right to effective assistance of counsel in SVP proceedings, there is a statutory right to assistance and representation of counsel. Sections 632.489–92, RSMo. However, just because a statute provides for the appointment of counsel does not necessarily mean counsel must be effective.[8] For example, the statute governing post-conviction cases provides

[8] To support the proposition that the right to counsel means effective assistance of counsel, Appellant cites a string of only criminal cases. App. Sub. Br. 15–16.

for the appointment and representation of counsel. Section 547.360, RSMo, However, this Court has held that claims that post-conviction relief counsel was ineffective are "categorically unreviewable." *Gehrke v. State*, 280 S.W.3d 54, 58 (Mo. 2009).

Respondent acknowledges that, at least in the context of Missouri termination of parental rights cases under § 211.462, RSMo (1986), this Court has determined that a statutory right to counsel implies a right to effective assistance of counsel. *In Interest of J.P.B.*, 509 S.W.3d 84, 97 (Mo. 2017). However, even in those kinds of cases, the standard for "effectiveness" is not based the criminal standard in *Strickland* but rather only "whether the attorney was effective in providing his client with a meaningful hearing based on the record." *In Interest of J.C., Jr.,* 781 S.W.2d 226, 228 (Mo. App. W.D. 1989).

D. Appellant did not receive ineffective assistance of counsel.

Even if this Court were to find that there is a right to effective assistance of counsel, and that it could be raised on direct appeal, Appellant would still not be entitled to relief. Appellant claims his counsel was ineffective for: 1) introducing evidence of the end-of-confinement (EOC) screening process, 2) introducing evidence of the MDT, PRC, and Attorney General's Office prefiling

reviews and determinations,[9] 3) introducing evidence of a probable cause determination by the trial judge, and 4) failing to object to evidence regarding the percentage of offenders referred for SVP proceedings.

Appellant cites to no Missouri law that indicates that discussing the EOC or MDT screening process is error. Quite the opposite is true in Missouri. In fact, both the EOC examiner as well as members of the MDT are *not prohibited* from testifying at trial regarding their findings. *See Bradley v. State,* 440 S.W.3d 546, 556 (Mo. App. W.D. 2014) (the MDT members' testimony is not barred by statute); *Kirk*, 520 S.W.3d at 459 (the EOC examiner's testimony is not barred by statute). It stands to reason that if these individuals are allowed to testify themselves, testimony explaining their relevance to the jury would also be admissible.

Appellant cites to two out-of-state cases for the proposition that the pretrial process is inadmissible, both of which are distinguishable here. It is important to note that, contrary to Appellant's assertion, neither case holds that it is reversible error for the jury to simply hear about an initial screening,

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[9] Appellant asserts that "counsel elicited testimony that…the Attorney General can overrule the MDT." App. Sup. Br. 20. But counsel withdrew the question before the witness could answer. Tr. 435. Nor did the jury hear about the probable cause determination by the court. App. Sub. Br. 22.

MDT determination, PRC review, attorney general's office review, probable cause hearing, and second evaluation. App. Sub. Br. 24.

In *In re Care and Treatment of Foster,* 127 P.3d 277, 283 (Kan. 2006), the State's attorney told the jury in opening statement:

> After the parole is violated and he was back in prison again, then the case—his case is reviewed by a committee called a multidisciplinary team which looks at all of his records, his charges, accusations, past sexual behavior, and that committee makes a determination as to whether or not he is a risk to reoffend. Then it's passed on to another committee which, which is called the prosecutors' committee. That is where I come in and several other attorneys and we make a determination again based on the records, psychologists reviewed opinions in whether or not this man is at risk to reoffend, and then there is a hearing, a probable cause hearing where a Judge determines whether or not the State has enough evidence to go forward under the Sexually Violent Predator Act. In this case, the Judge determined that there was.

The Kansas Supreme Court concluded that these statements were inappropriate, as the jury had been told, before any evidence was presented, that several parties had already found Foster to be a SVP. *Id.* at 861. The court

found the reference to the trial judge's probable cause finding especially egregious. *Id*. at 287.

This is, of course, not the case here. Appellant's counsel's only comment in opening statement regarding the pretrial process was that Dr. Kircher screened Appellant. Tr. 232. Counsel did not even indicate what Dr. Kircher's finding was. Further, the jury *never* heard evidence that the trial court had already found probable cause.[10]

In *In re Detention of Stenzel*, 827 N.W.2d 690 (Iowa 2013), the State's expert was asked to explain the civil commitment process and answered that out of the universe of sex offenders due to be released, "some" are referred by the directors' review committee to the multidisciplinary team, and of those only "a very small percentage" are in turn referred to the attorney general's office. *Id.* at 704. He testified that "multiple independent evaluators" are used. *Id.* He testified that when the case reaches the attorney general's office, he might be

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[10] Contrary to Appellant's assertion, Dr. Weitl did not testify that the end-of-confinement author testifies at a probable cause determination before the jury trial. App. Sub. Br. 20. She merely said that she had testified at probable cause hearings. Tr. 434. She was not discussing what occurred in Appellant's procedural history, and she did not indicate that probable cause hearings are predicates for jury trials.

asked to serve as a preliminary independent evaluator. *Id.* If he is asked to do a preliminary evaluation, and if he finds the individual meets the SVP criteria, he would present his findings to a review committee which would then decide whether to file a SVP petition. *Id.* He testified that on occasions in the past, the attorney general has not filed a SVP petition even though the independent evaluator concluded the individual met the statutory criteria. *Id.* He indicated that he relied in part on the winnowing process to support his position that Stenzel was high risk. *Id.* Then the State's attorney told the jury in closing argument that there is "a screening process that goes into this and it's pretty sensitive and not many people meet the criteria as a sexually violent predator…In this case, at every step of the way, Mr. Stenzel has been considered to meet criteria for SVP, but what's really—what's important is what do you think?" *Id.* at 705. The Court found these facts to be reversible error. *Id.*

Here, testimony about the screening process was not nearly as detailed as in *Stenzel* and the experts did not testify that they relied on the screening process in reaching their conclusions. Neither counsel argued the screening process in closing. Information about the pretrial process was used by the State generally to explain the background of the witnesses and used by Appellant's counsel generally to minimize the importance of Dr. Kircher's testimony. It was clearly counsel's trial strategy to highlight to the jury that Dr. Kircher

reviewed only a portion of the available documents and that she did not conduct her EOC evaluation with the purpose of testifying at trial.

Appellant also takes issue with counsel's failure to object to testimony that the two current and former EOC screeners had only referred three to five percent of offenders they screened for SVP proceedings.[11] Again, the EOC examiner's testimony is not prohibited. If she is not barred from testifying, she is certainly not barred from explaining how she became involved in the case. As bias of a witness is always at issue, the party calling any witness should be able to address concerns of partiality. In a case where the EOC evaluator is called as an expert to testify that she found Appellant to meet SVP criteria, she is entitled to explain that she does not come to that conclusion frequently or lightly.

Conclusion

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[11] Contrary to Appellant's assertion, the jury was never told that "only 3–5% of men initially reviewed are referred into the SVP process." App. Sub. Br. 23. Dr. Weitl testified that when she was doing EOC evaluations, she did not refer ninety-seven percent of the offenders she reviewed. Tr. 437–38. Dr. Kircher testified that she only referred three to five percent of offenders. Tr. 458. Neither expert spoke to the referral rate of other examiners or the Department of Corrections in general.

Appellant does not have a constitutional or statutory right to effective assistance of counsel. Even if he did, he could not raise a claim of IAC on direct appeal. And even if he could, his counsel was not ineffective. Point I should be denied.

ARGUMENT II

The trial court did not err in admitting evidence that Appellant had been arrested for murder because it was relevant to whether or not he met SVP criteria

In his second point, Appellant argues that evidence of his arrest for murder was unfairly prejudicial and irrelevant bad character evidence.[12] Appellant is not entitled to relief because the evidence was accurate, relevant to the question before the jury, and presented in a way that was not misleading.

Standard of Review

The standard of review for the admission of evidence is abuse of discretion. *Murrell v. State*, 215 S.W.3d 96, 109–10 (Mo. 2007). The trial court has broad discretion to admit or exclude evidence, and appellate courts will not reverse the trial court's ruling absent an abuse of discretion. *Id*. at 109. An abuse of discretion occurs when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable

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[12] Appellant argues in his substitute brief that the admission of the evidence "violated his rights to due process, a fair trial…and §490.065." App. Sub. Br. 25. Appellant did not mention Section 490.065, RSMo in his brief below. A claim that the trial court violated that statute is a new claim that under Rule 83.08(b) should not be considered.

that it shocks the sense of justice and indicates a lack of careful consideration. *Id*. Because review is for prejudice, not mere error, the trial court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id*. at 109–10.

Analysis

Respondent must first correct Appellant's misstatement, still present in his substitute brief although addressed in the briefing below, that Appellant "was *not* arrested for murder." App. Sub. Br. 25 (emphasis in original). Both Dr. Weitl and Dr. Scott testified that Appellant was indeed arrested for murder. Tr. 261, 755.[13] Dr. Scott read the police reports and agreed that they indicated that Appellant and a friend went looking for the son of the murder victim, and when they arrived, Appellant's friend killed the victim. Tr. 755–56. Dr. Weitl testified that Appellant testified against his co-defendant and was allowed to plead to a lesser charge of hindering prosecution. Tr. 262. Evidence regarding this arrest was presented to the jury accurately and fully explained by experts testifying on both sides.

[13] While Dr. Scott initially testified that Appellant was not arrested for murder, when cross-examined further, he admitted that Appellant was, in fact, arrested for murder. Tr. 755.

Appellant correctly reprints the text from the slide presented to the jury, State's Exhibit 4, but leaves out that the slide was simply entitled "Timeline." It did not in any way indicate that Appellant was charged, prosecuted, or convicted of murder. Given that both experts testified that Appellant was arrested for murder but convicted of hindering prosecution, a slide entitled "Timeline" that contained the text "murder/hindering" was not misleading.

The evidence was also logically and legally relevant. The jury heard testimony that all three testifying experts diagnosed Appellant with antisocial personality disorder. This disorder is a "disregard for the violation of the rights of others." Tr. 305. Dr. Weitl testified that Appellant's hindering prosecution offense was one of the reasons she diagnosed him with antisocial personality disorder. Tr. 406. Dr. Scott testified that the same was true for his diagnosis. Tr. 679. Appellant's criminal history, including his murder arrest that led to a hindering prosecution conviction, was found to be relevant to Appellant's mental abnormality by experts on both sides.

It was also relevant to risk. Dr. Kircher found that antisocial personality disorder was the motivation for Appellant's sexual offending. Tr. 468. Dr. Scott testified that that pedophilia and antisocial personality disorder "integrate" to "drive [Appellant's] offending." Tr. 777.

As long as an expert relies upon the material in question in forming a diagnosis and the source of records are the type that are reasonably relied upon

by experts, admissibility is satisfied. "Questions regarding the sources and bases of an expert's opinion affect the weight rather than the admissibility of the opinion." *Whitnell v. State*, 129 S.W.3d 409, 416 (Mo. App. E.D. 2004). Dr. Weitl testified that the files she reviewed were of the type reasonably relied upon in her field and that she found them reasonably reliable in this case. Tr. 258. She indicated that she looks at an offender's whole history, especially his criminal history, during her evaluation. Tr. 258. She testified that she wants to know how an offender responds to the world, how he behaves, if there is anger present, and if he can get along with others. Tr. 258. Dr. Weitl testified specifically that, in this case, Appellant's murder arrest was important to her because he was on probation at the time he was arrested and was therefore not following conditions of probation. Tr. 261. The requirements of Section 490.065, RSMo were met.

The State established that the evidence was relevant to the experts' opinions and that the source of the evidence was reasonably reliable. The evidence was accurate, relevant to the question before the jury, and presented in a way that was not misleading. Appellant has not shown that the trial court's decision is against the logic of the circumstances, arbitrary, unreasonable, or indicates a lack of careful consideration. *Murrell*, 215 S.W.3d at 109. Point II should be denied.

ARGUMENT III

The trial court did not err when it denied Apellant's motion to strike Juror 4 because Juror 4 made no statements indicating he formed an opinion concerning the matter or material facts in controversy.

In his third point, Appellant argues that the trial court erred when it did not sustain his motion to strike Juror 4 for cause. Appellant is not entitled to relief because Juror 4 did not make any statements at all other than to indicate he knew the judge and had a vacation later in the week.

Standard of Review

A trial court's ruling on a motion to strike a venireperson for cause is reviewed for an abuse of discretion. *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. 2008). A trial court's decision not to strike a venireperson for cause should be upheld "unless it is clearly against the evidence and is a clear abuse of discretion." *Id.* (quoting *State v. Christeson*, 50 S.W.3d 251, 264 (Mo. 2001)). Under the abuse of discretion standard, the trial court's ruling is presumed correct, and the evidence before the trial court is viewed in a light favorable to the trial court's ruling. *Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298, 303 (Mo. 1992). The presumption is in place because the trial court is in "the best position to observe a venireperson's qualifications...." *Joy*, 254 S.W.3d at 888.

Analysis

Appellant's challenge to Juror 4 revolves around this question and statement from Appellant's attorney:

> Mr. Platz talked a little bit this morning about this being difficult subject matter, and it is, and I've tried enough of these cases to have seen some really interesting answers as far as what people think should happen. Is there anyone here who believes that a prison sentence, any prison sentence, isn't enough as a resolution to the sort of crimes that you heard about today?

Tr. 142. Juror 19 raised her hand and the following discussion was had:

> [JUROR 19]: Yes.
>
> MS. CLAY: You just answered the question. You don't -- for crimes that [Appellant] has already been convicted of, he should never get out of prison?
>
> [JUROR 19]: If he did something to my daughter, he wouldn't be sitting there, so --
>
> MS. CLAY: Fair enough.
>
> [JUROR 19]: That's my personal feeling.
>
> MS. CLAY: Fair enough.

[JUROR 19]: It's not that he did it once. You say there are multiple things, so am I saying that he's sick and he needs to be in mental health? I think he needs to be in the general population.

MS. CLAY: Okay. Not an option here.

[JUROR 19]: Okay.

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

[JUROR 19]: I mean, I don't know.

MS. CLAY: Your body language is telling me no.

[JUROR 19]: I mean, I don't know that there is-- I mean, I don't know that there's something you could say to me that says turn him loose, let him walk around.

MS. CLAY: Just so I can make my record and I understand, there's nothing I'm going to be able to tell you, nothing [Appellant] will tell you, nothing the psychologists who are testifying on behalf of [Appellant] can tell you that's going to let you follow the Court's 1 instruction to let him go?

[JUROR 19]: I mean, someone would have to be mentally ill to do things to children like that, so –

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

[JUROR 19]: I mean, not someone in a sane mind would do that to a child.

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

[JUROR 19]: I mean, it's there. I mean –

MS. CLAY: Well, and that's kind of what we've been getting at this morning is the idea that as the jury in this case, you're going to hear evidence about whether or not he has diagnoses, whether or not he should be committed. That will be for the jury to decide after they hear everything. 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 ---

[JUROR 19]: 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?

MS. CLAY: Fair enough. Okay.

Tr. 143–46.

Appellant's counsel then asked the panel "Who here, and just give me a hand, who here agrees with Number 19?" Tr. 146. Appellant's counsel then

listed off Juror 4 among several other numbers but did not ask him any questions. Tr. 146.

When Appellant's counsel asked the trial court to strike Juror 4 for cause, the State objected on the basis that a hand raise was neither a commitment nor an articulation of bias. Tr. 188. The court overruled Appellant's motion. Tr. 188.

Appellant has failed to demonstrate that the trial court abused its discretion when it overruled Appellant's motion to strike. Appellant argues that Juror 4 formed or expressed an opinion about the mental abnormality matter to be decided in the case because he "disclose[d] that he agreed with [Juror 19]," "had formed a decision about [Appellant's] mental status and how he would use his vote when deciding the case," and "endors[ed] 'someone would have to be mentally ill to do things to children like that.'" App. Sub. Br. 34. He also argues Juror 4 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 [Appellant] loose'" and "could not consider the prospect of [Appellant] being released." App. Sub. Br. 35.

But these statements are incorrect. There is no indication in the record of what, if any, of Juror 19's statements Juror 4 endorsed or agreed with, how Juror 4 would use his vote, or what Juror 4 would require or consider. This is because Juror 4 said *nothing* in response to the discussion counsel had with

Juror 19. And he said nothing because Appellant's counsel did not ask him anything. Instead of relying on the Juror 4's *statements*, Appellant relies only on the fact that his counsel *said* that Juror 4 raised his hand for the purpose of agreeing with another juror. Counsel's statements that a venireperson raised his hand is not a sufficient record to support a challenge for cause. It is quite easy to make mistakes when attempting to articulate who of eighty seated jurors has a raised hand when they are seated close together, several rows deep, and often in no intuitive order.

Even assuming *arguendo* Juror 4 did raise his hand, it is still not a sufficient record to support a challenge for cause. Juror 4 could have made a movement that was not intended to be a response, or could have raised his hand for another reason, such as to make a comment, ask a question, or even *disagree* with Juror 19.

Appellant cites *Heitner v. Gill* for the proposition that "raising one's hand is sufficient to make a disclosure during voir dire." App. Sub. Br. 24. In *Heitner*, the question before the court was whether a juror failed to disclose that a claim had been made against him for an auto accident. *Heitner v. Gill,* 973 S.W.2d 98, 104 (Mo. App. S.D. 1998). There was some debate as to whether he raised his hand in response to counsel's questions on the topic. The court found that if he raised his hand, he disclosed the claim, and if he did not, he failed to disclose the claim. *Id.* at 105.

While the Southern District took the stance that raising one's hand is sufficient to make a disclosure, its *own opinion* illustrates that such a stance is unworkable; this Court should not adopt it. In that case, counsel asked the jurors about past claims and followed up with several based on their responses. *Id.* at 104–05. All that could be said about the juror at issue in that case was that he was not questioned. *Id.* It is not clear from the opinion whether counsel made an exhaustive list of everyone that raised their hand and that it did not include the juror. It is also not clear whether, if there was a list, counsel followed up with everyone on it. Nor is it clear whether trial counsel or the court indicated orally that they did not see any hands, so as to invite someone whose hand was raised but who was not acknowledged to speak up. In a post-trial hearing, counsel confronted the juror with evidence that he had a claim filed against him. *Id.* at 105. The juror admitted to the claim and indicated that he did have his hand raised but no one followed up with him. *Id.* The court then remanded to the trial court to determine whether the juror raised his hand. *Id.* at 106. The trial court responded by indicating that it did not see the juror raise his hand but accepted as true his statement that he did raise his hand. *Id.*

This evidentiary mess is why a hand raise should be considered by this Court, as it was by the trial court, [14] as only an indication that a juror has something to say. It does not entitle the parties to speculate as to what that something would be, and therefore cannot form the basis of a strike for cause.

And while Appellant cites *Heitner*, it is actually adverse to his position if actually applied to the facts here. *Heitner's* premise is that the lack of a hand raise is a clear negative response to the question posed. *Id.* at 105. During voir dire, the State asked the jury panel, "Does anybody feel, who hasn't already said so, they could not give [Appellant] a fair shake and a chance to be heard?" Tr. 112–13. Juror 4 did not raise his hand. Tr. 113. The State also asked the panel, "For those who haven't already spoken to me, I guess, has anybody else kind of taken the position that they already kind of decided how the case should turn out even though they haven't heard anything, and it happens? Does anybody else feel that they've kind of arrived at that -- that hasn't already spoken to me. I know some of you guys have already said that." Tr. 117. Juror 4 did not raise his hand. Tr. 117. Counsel for Appellant asked the panel, "My job is to find the twelve of you who can sit together, hear all the evidence, hold

[14] Appellant, in his footnote 14, points out that the trial court and the State asked for a show of hands during voir dire. App. Sub. Br. 34. This is true. It is the most practicable way to identify which jurors require more inquiry.

off making a decision until you hear all of it, and then follow the Court's instructions in terms of whatever outcome you come to. Fair? Is there anybody who has any disagreement with what I just said?" Tr. 159. Juror 4 did not raise his hand. Tr. 160. Therefore, according to *Heitner*, as Juror 4 did not raise his hand in response to these questions, he unequivocally indicated that he could be fair.

Even assuming that Juror 4 did raise his hand, and did raise his hand to affirmatively respond to counsel's question, it is still not a sufficient record of any opinion he held. Appellant's counsel had an extended conversation with Juror 19. And while Appellant attempts to attribute *all* of Juror 19's opinions to Juror 4, App. Sub. Br. 35., his trial counsel failed to ascertain which*, if any*, of those opinions Juror 4 held. Juror 19 articulated several opinions, which, even if also held by Juror 4, would not have been sufficient to strike for cause. Appellant failed to show that Juror 4 formed or expressed any opinion at all, let alone one "concerning the matter or any material fact in controversy…that [may have influenced] [his] judgment." Similarly, Appellant cannot show that Juror 4's "opinions or beliefs [precluded him] from following the law as declared by the court in its instructions." Section 494.470, RSMo.

In attempting to distinguish *Joy* and *Thomas by and through Thomas v. Mercy Hosps. E. Cmtys.*, neither of which are useful to Appellant, Appellant for the first time argues that Juror 4 "possessed much more information than the

jurors" in those cases. App. Sub. Br. 33. Specifically, Appellant argues Juror 4 knew the issue in the case, material facts, and the only two outcomes possible in the trial. App. Sub. Br. 33. First, there is *no* information in the record in this case about what the jurors in *Joy* and *Thomas* were told. Second, from what can be gleaned from the *Joy* opinion, the juror at issue *was* aware of the "issue in the case" because he knew "the litigation involved a medical malpractice action." *Joy*, 254 S.W.3d. at 887, 889–90.[15] Third, while this Court in *Joy* and *Thomas* determined that the jurors at issue could not have formed an opinion about the material facts of the case because they did not have any knowledge concerning the matter or any material fact in controversy, it did not make some sort of an inverse finding that jurors who have this information automatically form an opinion that may influence their judgment.

Appellant states that Juror 4 "did not unequivocally indicate his ability to fairly and impartially evaluate the evidence and follow the court's instructions" and "did not reassure the court that he could be impartial and follow the court's instruction." App. Sub. Br. 35. Those statements imply that

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[15] The *Thomas* opinion does not discuss what or how much information the jurors had about the trial because the issue in the case was the juror's familiarity with the defendants. *Thomas by and through Thomas v. Mercy Hosps. E. Cmtys.*, 525 S.W.3d 114, 116 (Mo. 2017).

Juror 4 indicated something to begin with and that someone asked him for reassurances. Neither is true. This case is not like *Joy* or *Thomas*, where the jurors in question gave oral responses to questions and the debate was whether those responses were disqualifying. *Joy*, 254 S.W.3d at 887, 890; *Thomas*, 525 S.W.3d at 116–17. Here, Juror 4 did not give "equivocal responses" because Juror 4 said nothing relevant.[16]

The trial court's determination is entitled to deference because it was in the best position to observe the voir dire. *Joy*, 254 S.W.3d at 888. The trial court's decision to refuse Appellant's motion to strike was reasonable, is entitled to deference, and was not clearly against the evidence. *Joy*, 254 S.W.3d at 888. Point III should be denied.

[16] Juror 4's only oral statements were that he knew the judge and had a vacation later in the week. Tr. 51, 103.

CONCLUSION

The trial court did not err. The jury's determination that Appellant is a SVP and the trial court's order committing him to the custody of the Department of Mental Health should be affirmed.

Respectfully submitted,

JOSHUA D. HAWLEY

Attorney General

/s/ *Katharine A. Dolin*
Katharine A. Dolin

Assistant Attorney General
Missouri Bar No. 64817
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-0475
Fax: (573) 751-3825
Katharine.Dolin@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 11,154 words as calculated pursuant to the requirements of Rule 84.06, as determined by Microsoft Word 2016 software.

/s/ *Katharine A. Dolin*
Katharine A. Dolin
Assistant Attorney General