No. SC96380

In the Missouri Supreme Court

IN THE MATTER OF THE CARE AND TREATMENT OF NICHOLAS GRADO,

Appellant.

Appeal from Jackson County Circuit Court
Sixteenth Judicial Circuit, Probate Division
The Honorable Kathleen A. Forsyth, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JOSHUA D. HAWLEY
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitution

Court Rules

Other Authority

STATEMENT OF FACTS

The State of Missouri filed a petition in the Circuit Court of Jackson County on October 16, 2014, seeking a hearing to determine whether Appellant was a sexually violent predator. (L.F. 1, 9-12). Appellant was then serving a sentence in the Missouri Department of Corrections for child molestation in the first degree, section 566.067, RSMo.[1] (L.F. 9-10). Appellant was tried by a jury on February 29-March 2, 2016, before Judge Kathleen A. Forsyth. (L.F. 90-93). Appellant contests the sufficiency of the evidence to support the judgment. Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

Dr. Lisa Witcher, a licensed psychologist for the Missouri Department of Mental Health, was appointed by the probate court to conduct a sexually violent predator examination of Appellant. (Tr. 316, 323). In conducting such an examination, Dr. Witcher said that she tries to determine if the individual meets the criteria for a mental abnormality, if they have committed a sexually violent offense in the past, and if the individual is more likely than not to commit a future act of sexual predatory violence unless confined to a secure facility. (Tr. 324-25). Dr. Witcher testified that the records she

[1] All statutory citations are to RSMo 2000 as amended by the relevant Cumulative Supplements.

reviewed in Appellant's case were the type of records reasonably relied upon in her field and that she found the specific records in Appellant's case to be reliable. (Tr. 323). Dr. Witcher testified that it was her opinion, to a reasonable degree of psychological certainty, that Appellant met the criteria to be a sexually violent predator. (Tr. 379).

A certified record of Appellant's guilty plea in May of 2012, to a charge of child molestation in the first degree, was admitted into evidence. (Tr. 325-26). Dr. Witcher testified that the crime of child molestation in the first degree was a sexually violent offense under Missouri law. (Tr. 326). A copy of the statutory definition of a mental abnormality was admitted into evidence, and Dr. Witcher testified that that was the definition she used in determining whether Appellant has a mental abnormality. (Tr. 327). She then read the definition to the jury:

> A mental abnormality is a congenital or acquired condition that affects the emotional or volitional capacity that predisposes a person to commit sexually violent offense in a degree that causes the individual serious difficulty controlling his behavior.

(Tr. 327). Dr. Witcher then explained what that definition means:

> Okay. So it means that the individual suffers from a condition that he was either born with or developed over time that affects his or her ability to control themselves in such a way

that can lead to them committing a sexually violent offense. Okay? So these conditions cause them serious difficulty controlling their behavior because of that emotional or volitional impairment, if that makes better sense.

(Tr. 328).

Dr. Witcher said that she reviewed Appellant's records and relied on her interview with him to see if he met the criteria for any condition listed in the DSM-V. (Tr. 328-29). Dr. Witcher diagnosed Appellant with pedophilic disorder non-exclusive type, sexually attracted to both males and females. (Tr. 330, 342). Dr. Witcher testified that pedophilia is a lifetime and chronic disease. (Tr. 359).

She testified that Appellant met Criteria A of that disorder, which is "over a period of six months, recurrent intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children, generally 13 years or younger." (Tr. 331). Dr. Witcher said that when Appellant was fourteen, he masturbated while making a one-year-old boy place his hand on Appellant's penis. (Tr. 333). When Appellant was fifteen years old, he showed pornography to an eight or nine year old boy and had oral sex with the child. (Tr. 334). That activity took place over a six to seven month period. (Tr. 334). Appellant had turned sixteen by the time he stopped offending against that child. (Tr. 648). Appellant later engaged in

sexual behavior with children who were twelve to fourteen years younger than himself, which was the behavior that led to the child molestation charge. (Tr. 332).

Dr. Witcher testified that Appellant also met Criteria B of the diagnosis, which is that "the individual has acted on the sexual urges[,] or the sexual urges or fantasies cause marked distress or interpersonal difficulty." (Tr. 335). Dr. Witcher said that Appellant's records showed that he was bothered by his behavior and that those feelings caused him distress. (Tr. 335). She said that Appellant was sanctioned for his behavior and placed in the Department of Corrections, which itself causes some interpersonal difficulty and difficulty in functioning. (Tr. 335). Dr. Witcher said that Appellant's feelings of guilt did not stop his behavior. (Tr. 335-36). Appellant reported that he would push those guilt feelings away and continue to engage in the behavior. (Tr. 336). Dr. Witcher testified that Appellant's sexual urges toward children were defined by the fact that he victimized at least five children. (Tr. 336-37). Appellant also reported receiving sexual gratification from those encounters, reaching ejaculation on several occasions. (Tr. 337).

Dr. Witcher testified that Appellant also met Criterion C, which is that the individual is at least 16 years of age and at least five years older than the child or children being victimized. (Tr. 337). Appellant was approximately eighteen-and-a-half or nineteen years old at the time of his index offense and

his victims were a five-year-old, a six-year-old, and a seven-year-old. (Tr. 337, 340). The sexual acts involving those children took place over a period of approximately three weeks. (Tr. 338). Appellant started off by engaging the children in a game of Truth or Dare and telling them that they were in a dream. (Tr. 338-39). Appellant initially showed his penis to the children and then escalated into daring them to put their hand on his penis and soliciting oral sex from them. (Tr. 339-40). Dr. Witcher said that she believed that Appellant's acts as a fifteen-year-old against the eight or nine year old boy may have continued past Appellant's sixteenth birthday. (Tr. 338).

Dr. Witcher testified that Appellant's pedophilia rose to the level of a mental abnormality because it resulted in a sexually violent offense and has been shown to affect Appellant's ability to control his behavior. (Tr. 343, 378). Dr. Witcher said that Appellant's reports that he engaged in the behavior despite feeling guilty showed that his pedophilia caused him serious difficulty in controlling his behavior. (Tr. 343).

Dr. Witcher also reached an opinion that Appellant is more likely than not to commit a future act of sexually predatory violence unless confined to a secure facility. (Tr. 376-77, 427). Her assessment of Appellant's risk of engaging in future predatory acts of sexual violence involved scoring Appellant on the Static 99-R and Static 2002-R actuarial instruments, and performing a meta-analysis of dynamic risk factors. (Tr. 344, 349).

Appellant received a score of four on the Static 99-R, which placed him in the moderate to high risk category of being reconvicted of another offense within the next five to ten years. (Tr. 346). Appellant's score of six on the Static 2002-R placed him in the moderate risk category. (Tr. 348). Dr. Witcher testified that reconviction rates do not account for persons who commit another offense and are not caught, or for persons who are caught but not convicted for some reason. (Tr. 347).

Dr. Witcher's meta-analysis identified several dynamic risk factors. (Tr. 350). Those were: (1) Appellant's diagnosis of pedophilia; (2) his past emotional congruence with children; and (3) his sexual impulsivity and sexual promiscuity. (Tr. 350-51). As examples of that, Dr. Witcher noted that Appellant had engaged in sexual activities with animals throughout his sexual development, which led to a diagnosis of "other specified paraphilia," also known as "zoophilia." (Tr. 351).

Dr. Witcher explained that zoophilia requires that a person engage in or fantasize about sexual activity with animals, and that those actions or fantasies cause them distress. (Tr. 358). She said that her diagnosis of zoophilia in Appellant was made to a reasonable degree of psychological certainty. (Tr. 354). Dr. Witcher testified that Appellant attributed a lot of human qualities to the animals that he had been engaged with in the past, and that those beliefs sometimes had a sexual aspect to them. (Tr. 355). She

testified that multiple paraphilias increase the risk to reoffend because those people have more deviant sexual interests. (Tr. 354).

Another risk factor was Appellant's uncertainty regarding his sexual preference. (Tr. 351). Appellant had told Dr. Witcher that he was not sure if his main sexual preference was children, if it was animals, or if it was women. (Tr. 351). Dr. Witcher said that put Appellant at a higher risk to reoffend because of the pedophilia and his past behaviors. (Tr. 360).

Dr. Witcher also testified that Appellant's manipulation and grooming behaviors showed planning and forethought, which increased his risk. (Tr. 351-52). Appellant's risk was also increased by his emotional congruence with children. (Tr. 353). Appellant connected more easily with children than with people in his peer age group, which would cause him to gravitate more towards children. (Tr. 353). Appellant told Dr. Witcher that he knew he could take advantage of children, that he had purposely done that in the past, and that he had a desire to teach the children about sex. (Tr. 355-57).

Dr. Witcher said that Appellant had developed some insight during treatment about his previous behaviors and was able to retrospectively identify his feelings of guilt. (Tr. 360). Appellant also had some insight into his diagnosis of zoophilia and into some of his triggers and protective factors. (Tr. 360-61). For instance, Appellant was able to identify that being alone with children was a trigger for him. (Tr. 361). But Dr. Witcher said that

insight was somewhat negated by his contradictory statements that he was not attracted to children:

> Because while he can identify as a risk to be alone around children – he can say, because I might sexually offend against them. On the other hand, he argues 50 percent of the time he's not attracted to them and it's not a problem and then 50 percent of the time he will admit, well, yeah, I have fantasized about children and I have engaged in this behavior.
>
> So, to me, had he developed a more full understanding of his diagnosis of his, his urges, his fantasies, his ideas about children, he would be able to more fully explain, well, this is why I might reoffend. This is why I say this. This is why I might do this. And he was not quite able to do that, based on my notes and treatment.

(Tr. 361-63). Dr. Witcher said that Appellant's difficulty in explaining why he is attracted to children could cause him difficulty in using that information to control his behavior. (Tr. 363).

Dr. Witcher explained that the deviant sex cycle generally starts with a trigger that then leads to behavior. (Tr. 367). Persons going through sex offender treatment, like Appellant, are supposed to work on and identify their deviant sex cycle. (Tr. 367). Dr. Witcher said that Appellant's treatment

records showed that he had a really hard time discussing his attraction to children and had a hard time discussing the victims in his case and the sexual gratification he received from them. (Tr. 367-68). Dr. Witcher testified that when she interviewed Appellant about a year prior to trial he had denied having any fantasies about children in the preceding year, but that Appellant gave a deposition on the Friday before trial where he acknowledged a present sexual attraction to children. (Tr. 368-69).

Robert Gould, the manager of operations for the Missouri Sex Offender Program, testified that Appellant was in the program between November 4, 2013 and September 16, 2014. (Tr. 428, 432). Gould served as the primary therapist for Appellant's group. (Tr. 437). A requirement of the program was that Appellant discuss the details of his case, his life history, and his offending dynamics. (Tr. 438). Gould said that Appellant was more willing to discuss his interactions with animals than his interactions with children. (Tr. 439).

Gould said that the primary purpose of MOSOP was to focus on the child victims. (Tr. 440). He described Appellant as being robotic and removed when discussing the children. (Tr. 441). Appellant said that he presented no risk of offending against children and was more at risk of acting on his urges towards animals. (Tr. 443). Gould testified that Appellant felt worse about what he did towards the animals than he felt towards the child victims. (Tr.

444). Gould felt that Appellant was telling him what he wanted to hear when discussing the children. (Tr. 444). By the end of treatment, Appellant maintained the position that he no longer had the problem that would cause any risk to children. (Tr. 452, 458). His focus at that point was how to avoid future sexual acts with animals. (Tr. 458). Gould said that he did not see anything in treatment to indicate that Appellant had lost his sexual attraction for children. (Tr. 460-61).

Gould further said that Appellant could not take responsibility for making mistakes such as violating program rules. (Tr. 449-50). Gould said that Appellant was not able to master being aware of his surroundings, which could put him in the position of being triggered into committing sex acts and then committing those acts. (Tr. 450-51).

Gould described a video game that Appellant said he had spent hours playing called "Babies Getting Creamed." (Tr. 454). Appellant's character in the game had a human body and a head resembling that of the video game character Sonic the Hedgehog. (Tr. 454). The task of the character was to babysit a neighbor's child called "Cream," which was a child's body in a skirt and a Sonic the Hedgehog head. (Tr. 455). The babysitter would do things with Cream to build trust. (Tr. 455). As the game progressed, the trust points could be spent so that the adult babysitter could perform sexual acts with Cream. (Tr. 456). Gould compared the game to the process of grooming a

potential victim. (Tr. 456). He said there were "striking parallels" between the grooming behavior in the game and the grooming associated with Appellant's index offense. (Tr. 457).

Appellant testified on his own behalf. (Tr. 611). He said that his first sexual encounter was with a friend when they were in second grade. (Tr. 613-14). The boys performed oral sex on each other, touched their penises, and attempted to perform anal sex. (Tr. 614). Appellant said about that, "I felt a little weird. But I enjoyed it." (Tr. 614). Appellant said that his activities with animals began when he was about fifteen, when he rubbed his penis on his cat's fur while masturbating in his bedroom. (Tr. 617-18). Appellant also allowed dogs to lick his penis, and penetrated a Great Dane on one occasion. (Tr. 618). Appellant said that he was engaging in sexual activity with animals on a daily basis by the time he was seventeen. (Tr. 618).

Appellant also started watching pornography when he was fifteen. (Tr. 618-19). Appellant started with adult heterosexual pornography. (Tr. 619). He also watched Hentai, which is animated pornography featuring characters that were part animal and part human. (Tr. 619, 623). Appellant said he liked Hentai and it was part of the reason he engaged in sex with animals. (Tr. 619). Appellant said that a lot of his friends liked Hentai, which caused him to think it was okay. (Tr. 629-30). By the time Appellant was in high school, he spent sixty-percent of his time playing video games and most of the

rest of his time watching pornography. (Tr. 621-22). Appellant admitted that he was playing "Babies Getting Creamed" at about the time he committed the index offense. (Tr. 624). Appellant was unable to say whether he was still attracted to children, but he acknowledged that "because I have done some stuff like that, there is probably a chance for it." (Tr. 640).

Appellant's mother and brother testified about his childhood. (Tr. 516-24, 525-27). Appellant also presented testimony from Dr. Richard Wollert, a clinical and forensic psychiatrist from Portland, Oregon. (Tr. 541-609). Dr. Wollert did not conduct an actual evaluation of Appellant, but instead discussed research on the developmental psychology of persons from the age of twelve through their early 20's. (Tr. 553, 605). Dr. Wollert admitted on cross-examination that he did not know if those concepts applied to Appellant, or to what extent they might apply. (Tr. 605).

The jury returned a verdict finding that Appellant is a sexually violent predator. (Tr. 715-16; L.F. 89). The court entered a judgment and order of commitment to the Department of Mental Health for control, care, and treatment. (L.F. 94). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

ARGUMENT

I.

Appellant is eligible to be committed as an SVP.

Appellant claims that commitment as an SVP is a mandatory lifetime sentence in DMH custody that he should be ineligible for because he was eighteen years old at the time of his index offense, making him functionally a juvenile. But this Court has recently rejected the theories underlying Appellant's claim by reaffirming that the SVP Act is not punitive, and that persons eighteen years of age and older are not considered juveniles.

A. Standard of Review.

Appellant concedes that his claim has not been preserved because it was not raised in the probate court, and he asks this Court to review for plain error.[2] Plain error review requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error.

---

[2] "Although the case before [this Court] pertains to a civil commitment proceeding, the rules governing plain error in civil and criminal cases are 'substantially similar such that cases construing one may be equally applicable to plain error review under the other.'" *Lewis v. State*, 152 S.W.3d 325, 328 n.3 (Mo. App. W.D. 2004) (quoting *Davolt v. Highland*, 119 S.W.3d 118, 135 n.14 (Mo. App. W.D. 2003)).

State v. Baumruk, 280 S.W.3d 600, 607 (Mo. 2009). Review for plain error involves a two-step process. *Id.* The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or a miscarriage of justice has resulted. *Id.* All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious, and clear. *Id.* If plain error is found, the Court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* at 607-08.

B. Analysis.

Appellant argues that his commitment as an SVP is unconstitutional because he was 18 years old when he committed the child molestation that served as his Index Offense. Appellant argues that he should be considered a juvenile and that SVP commitment is a life sentence that constitutes cruel and unusual punishment.

Appellant's claim is premised on the theory that commitment under the Act is punitive, lifetime detention. This Court has recently rejected the argument that the SVP Act is punitive and has reaffirmed that the Act is civil in nature. *In re Kirk*, 520 S.W.3d 443, 450 (Mo. 2017), *see also In re Murrell*, 215 S.W.3d 96, 105 (Mo. 2007) (stating that commitment under the SVP Act is not necessarily indefinite or a life sentence).

Appellant's argument is based on a criminal case where the United States Supreme Court held that the Eighth Amendment prohibits juveniles from being sentenced to life in prison without parole for a non-homicide offense. *Graham v. Florida*, 560 U.S. 48, 82 (2010). Appellant's reliance on *Graham* is misplaced. Because the SVP Act is civil and non-punitive, commitment under the Act cannot be deemed cruel or unusual punishment. *In re Brown*, 519 S.W.3d 848, 853-54 (Mo. App. W.D. 2017) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361, 369 (1997)).

Appellant argues that "Missouri Courts have never been called upon to examine whether or not [the anchor offense in an SVP case] will hold water solely on offenses committed as a juvenile, or if a mental abnormality and future risk can be 'cemented' to juvenile conduct alone." (Appellant's Brf., p. 17). But this Court need not decide whether SVP commitment can be based upon a juvenile offense because Appellant was at least 18 years old when he committed the index offense, and he pled guilty as an adult to the crime of first-degree child molestation. (Tr. 325-26, 340). *See* § 211.021, RSMo ("'[a]dult' means a person seventeen years of age or older[.]"). Even *Graham* defines juveniles as those under the age of eighteen. *Graham*, 560 U.S. at 74-75 (citing *Roper v. Simmons*, 543 U.S. 551, 574 (2005)).

Appellant nevertheless argues that this Court should hold that "a child under 21 cannot be subject to life imprisonment without probation or parole

since such a child can still be within juvenile court jurisdiction." (Appellant's Brf., p. 32). In addition to the fact that commitment is not life imprisonment without probation or parole, this Court need not address whether a person under 21 can or should be committed under the Act because Appellant was over the age of 21 when he was found to be an SVP. (Tr. 325; L.F. 7). The focus of his SVP trial was not to determine his prior convictions but to determine if he fell within the statutory definition of an SVP *at the time of his trial*, and if he was likely to reoffend in the future if not placed in a secure facility. The relevant age in this matter was Appellant's age at trial, and Appellant presents no authority for declaring someone over the age of 21 to be a juvenile.

Appellant also argues that studies on the development of the brain have suggested that it is more appropriate to draw the line for juvenile offenders at age 25. (Appellant's brf., pp. 18-19). This Court has recently rejected a claim that a criminal defendant should have been deemed ineligible to receive the death penalty based on his psychological age, rather than his chronological age. *Tisius v. State*, 519 S.W.3d 413, 431 (Mo. 2017).

Appellant failed in any event to demonstrate that his mental development made commitment as an SVP inappropriate. Appellant's own expert, Dr. Wollert, was unwilling to make that connection when cross-examined by the State's attorney:

Q. You said that it was important to take into consideration the stuff that you testified about, the science that you testified about; right?

A. Yes.

Q. But you didn't do that in this case because you weren't asked?

A. Correct.

Q. Okay. Now, Dr. Wollert, you said that, generally, if somebody meets the criteria for pedophilia that almost always you say that they meet the criteria for SVP?

A. Yes.

Q. Okay. And when you were asked to explain that, you further clarified that you feel that way because, generally, they would be risky enough, based on the cases, that you would say they are a sexually violent predator; right?

A. Right. But I would have done an evaluation. I would have looked at the whole history. Looked at the file. Consider whether – what the developmental issues are. That context would be part of the whole thing, correct.

Q. If you did an evaluation?

A. If I did an evaluation.

Q. Which you did not do in this case; correct?

A. Correct.

Q. So you can't tell us really very much at all about Mr. Grado, in particular; can you?

A. No. I mean, I read the reports.

Q. Sure.

A. And can tell you those sorts of things. But, I mean, I didn't do an evaluation of Mr. Grado.

Q. So you can't tell us if the developmental, maturity science that you testified about – you can't tell us if that really applies to Mr. Grado?

A. It should be weighed. I can't tell you if it applies and to what extent it applies to him. That's my position.

Q. Right. So you can't tell us if it affects him one way or the other; right?

A. No. That wasn't my job.

(Tr. 604-06).

The jury also heard expert testimony from Robert Gould, the manager of operations for the Missouri Sex Offender Program, that "[w]ith respect to sex offending, I would say that a 20-year-old, 19-year-old should have the same level of insight and understanding that a 30-year-old would." (Tr. 504).

Thus, even absent the legal recognition that Appellant was an adult, there was expert testimony that mentally he should have been treated as an adult at the time of the Index Offense. The weight to be given opinion evidence is for the trier of fact. *Hoffmann v. Hoffmann*, 676 S.W.2d 817, 826 (Mo. 1984). The jury was thus free to accept the testimony of Gould and reject that of Dr. Wollert. *Id.*

Here, as found repeatedly by Missouri courts, the SVP Act is constitutional, and because it is a civil statute that does not constitute punishment it cannot violate the constitutional right to be free from cruel and unusual punishment. Therefore, the probate court did not plainly err in committing Appellant as an SVP. Appellant's point should be denied.

II.

Sufficient evidence was presented for the jury to find that Appellant suffered from pedophilic disorder.

Appellant claims that there was insufficient evidence to prove that he met the criteria for pedophilic disorder. But the State's expert testified that she reached that diagnosis to a reasonable degree of psychological certainty by relying on facts and data of a type reasonably relied on by experts in her field. Appellant's argument thus goes to the weight of the evidence, which was for the jury to determine once the expert's opinions were admitted without objection.

A. Standard of Review.

Appellate review of sufficiency of the evidence in an SVP case is limited to a determination of whether there was sufficient evidence admitted from which a reasonable jury could have found each necessary element by clear and convincing evidence. *In re George*, 515 S.W.3d 791, 795 (Mo. App. W.D. 2017). The appellate court does not reweigh the evidence but determines only whether the judgment was supported by sufficient evidence. *Id.* Matters of credibility and weight of testimony are for the jury to determine. *Id.* For that reason, the evidence is viewed in the light most favorable to the judgment, accepting as true all evidence and reasonable inferences favorable to the judgment and disregarding all contrary evidence and inferences. *Id.* A

judgment will be reversed on insufficiency of the evidence only if there is a complete absence of probative facts supporting the judgment. *Id.*

B. Analysis.

1. *Appellant's criticisms go to weight, not sufficiency.*

Any question as to whether proffered expert testimony is supported by a sufficient factual or scientific foundation is one of admissibility, which must be raised by a timely objection or a motion to strike. *In re Turner*, 341 S.W.3d 750, 754 (Mo. App. S.D. 2011). Once an expert opinion has been admitted, as any other evidence, it may be relied on for purposes of determining the submissibility of the case. *Id.*; *In re Jones*, 420 S.W.3d 605, 612 (Mo. App. S.D. 2013) (rejecting claim that evidence was insufficient to support diagnosis of pedophilia). An appellant cannot "backdoor" an issue relating to the admissibility of expert testimony under the guise of a sufficiency of the evidence argument. *In re Turner*, 341 S.W.3d at 754. In fact, the *McGuire* case cited by Appellant concerned the admissibility of expert testimony. *McGuire v. Seltsam*, 138 S.W.3d 718, 720 (Mo. 2004).

Expert testimony that relies on facts and data of a type reasonably relied on by experts in their field is sufficient to make a submissible case. *In re A.B.*, 334 S.W.3d 746, 754 (Mo. App. E.D. 2011). Dr. Witcher testified that she based her opinions on information that was reasonably relied on by members of her profession. (Tr. 323). She also testified that she had reached

her diagnosis of pedophilic disorder to a reasonable degree of psychological certainty. (Tr. 342-43).

Dr. Witcher explained the bases that she relied on to support her diagnosis. "This alone precludes [this Court] from finding a complete absence of probative fact to support the verdict[.]" *In re O'Hara*, 331 S.W.3d 319, 320 (Mo. App. S.D. 2011). Appellant's argument that Dr. Witcher's testimony was insufficient to establish the criteria used to make her diagnosis misses the distinction between admissibility and submissibility. *Id.* Once Dr. Witcher's opinions were admitted without objection, it was for the jury to determine their weight. *Id.* Appellant had the opportunity to, and did, challenge the credibility of Dr. Witcher's opinions through cross-examination. *In re Turner*, 341 S.W.3d at 754. Any weakness in the factual underpinnings of her opinion goes to the weight to be given to that testimony and not its admissibility. *In re Elliott*, 215 S.W.3d 88, 95 (Mo. 2007). Appellant's arguments about the purported fallacies of Dr. Witcher's reasoning are nothing more than an attempt to have this Court reweigh the evidence in his favor, which is something this Court will not do. *In re Barlow*, 250 S.W.3d 725, 734 (Mo. App. W.D. 2008).

2. *Sufficient evidence of pedophilic disorder.*

The following criteria for a diagnosis of pedophilic disorder are set out in the DSM-V:[3]

> A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, urges, *or* behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
>
> B. The individual has acted on these sexual urges, *or* the sexual urges or fantasies cause marked distress or interpersonal difficulty.
>
> C. The individual is at least age 16 years and at least 5 years older than the child or children in Criterion A.

American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 697 (5th ed. 2013) (emphasis added). Appellant argues that Dr. Witcher's diagnosis of pedophilic disorder fails because the evidence does not establish that he met the first two of those criteria.

---

[3] While Dr. Witcher used the DSM criteria in reaching her diagnosis, the definition of mental abnormality in the SVP statute does not require that the mental abnormality be in the DSM. § 632.480(2), RSMo.

Appellant contends that he does not meet criterion A because the actual molestation of the children involved in his index offense lasted only three weeks. This confuses the medical standard. The standard is not that acts taken against one victim in isolation must last for at least six months. Instead, the six month requirement describes the period of time over which the totality of the sexually aberrant behaviors occurred. Dr. Witcher presented sufficient testimony to show that Appellant had sexual urges or fantasies, many of which he acted upon, from the age of fourteen up through the time of trial at age twenty-three.

Appellant argues that any behavior occurring before Appellant turned sixteen is not to be considered. But even if that evidence is excluded, Appellant still showed aberrant behaviors existing significantly longer than six months. Appellant committed his Index Offense at eighteen and his SVP trial was held when he was twenty-three years old. (Tr. 337, 340, 518). The jury heard testimony that throughout his prison confinement Appellant continued to have pedophilic urges and fantasies. Those urges and fantasies are sufficient under the DSM to diagnose a pedophilic disorder and were, in Dr. Witcher's expert opinion, sufficient to diagnose Appellant with pedophilic disorder.

Appellant also argues that Criterion B of the DSM standards was not met because Dr. Witcher merely assumed that he suffered marked distress

from his pedophilic urges. This is not the case. Dr. Witcher specifically testified that during his self-evaluation, Appellant was at least able to retrospectively identify feelings of guilt as they related to his child victims. (Tr. 335).

3. *Sufficient evidence Appellant suffered from a mental abnormality*.

Appellant also criticizes Dr. Witcher's conclusion that Appellant had a mental abnormality. He argues that Appellant's pedophilia had to predispose him to commit sexually violent offenses. But that argument has been rejected on the basis that it "simply misunderstands that the SVP statute does not require proof of 'a mental abnormality that, in and of itself, predisposes a person to commit sexually violent offenses.'" *In re George*, 515 S.W.3d at 796 (quoting *In re Murrell*, 215 S.W.3d at 106). Furthermore, this Court has stated that pedophilia is a mental abnormality that necessarily involves a propensity to commit sexual offenses. *In re Murrell*, 215 S.W.3d at 107. Accordingly, a diagnosis of pedophilia satisfies the statutory definition of mental abnormality standing alone. *Id.* Even Appellant's expert, Dr. Wollert, agreed that a person meeting the criteria for pedophilia almost always meets the criteria for being declared an SVP. (Tr. 604).

Appellant's challenge to Dr. Witcher's diagnosis is not legally cognizable. *In re Jones*, 420 S.W.3d at 611. His point should be denied.

III.

Sufficient evidence was presented to link Appellant's mental abnormality to his future risk of re-offending.

Appellant claims that the State's evidence did not establish that his pedophilic disorder caused him to be "more likely than not" to commit predatory acts of sexual violence if not confined. But the State's evidence was sufficient to link Appellant's future risk to his mental abnormality.

A. Standard of Review.

Appellate review of sufficiency of the evidence in an SVP case is limited to a determination of whether there was sufficient evidence admitted from which a reasonable jury could have found each necessary element by clear and convincing evidence. *In re George*, 515 S.W.3d at 795. The appellate court does not reweigh the evidence but determines only whether the judgment was supported by sufficient evidence. *Id.* Matters of credibility and weight of testimony are for the jury to determine. *Id.* For that reason, the evidence is viewed in the light most favorable to the judgment, accepting as true all evidence and reasonable inferences favorable to the judgment and disregarding all contrary evidence and inferences. *Id.* A judgment will be reversed on insufficiency of the evidence only if there is a complete absence of probative facts supporting the judgment. *Id.*

B. Analysis.

As noted above, the SVP statute does not require proof of a mental abnormality that, in and of itself, predisposes a person to commit sexually violent offenses. *Id.* at 796. Furthermore, the record does not support Appellant's argument that Dr. Witcher did not link his risk of future acts of predatory violence to his mental abnormality. An expert is allowed to testify as to an ultimate issue so long as the opinion is based upon the established standard of care and not upon a personal standard. *In re Underwood*, 519 S.W.3d 861, 875 (Mo. App. W.D. 2017). Although operative legal terms must be adequately defined by the expert or in the question presented to the expert to ensure that the expert is basing her opinion on well recognized standards, the judge has discretion to determine whether an adequate definition of an operative legal term has been provided. *Id.* Terms from a statute need not be recited in a ritualistic fashion. *Id.; In re George*, 515 S.W.3d at 798. Rather, the expert's testimony in context should prove that the proper legal standard was used. *In re George*, 515 S.W.3d at 798. Dr. Witcher's testimony, taken as a whole and in context, satisfied that requirement.

Dr. Witcher initially described the third step of the sexually violent predator evaluation as determining if it is more likely than not that the person's behavior is going to be impaired by their mental abnormality. (Tr. 324). Appellant objected, and the State's attorney offered to re-ask the

question before the court could rule on the objection. (Tr. 324). Dr. Witcher was then asked, "[I]s the third thing that you in particular are looking at, is whether Mr. Grado is more likely than not to commit a future act of sexual predatory violence unless confined to a secure facility." (Tr. 324-25). Dr. Witcher agreed that was a better way to say what she had been trying to express. (Tr. 325). The testimony as a whole showed that Dr. Witcher was tying her analysis of Appellant's future risk to his mental abnormality.

Dr. Witcher testified that after diagnosing Appellant with pedophilia, she next determined whether that pedophilia rises to the level of a mental abnormality. (Tr. 343). After determining that Appellant did have a mental abnormality, she then determined whether he met the risk criteria that had been discussed earlier. (Tr. 343-44). Dr. Witcher later testified that after performing the risk assessment, she made a determination as to whether Appellant met the criteria for a sexually violent predator. (Tr. 376). She also testified to a reasonable degree of psychological certainty that Appellant met the criteria to be a sexually violent predator. (Tr. 379).

Furthermore, Dr. Witcher's testimony about risk factors included an extensive discussion of the manifestations of Appellant's pedophilia, which she had already described as a mental abnormality. (Tr. 350-53, 355-57, 359-64). *See In re Underwood*, 519 S.W.3d at 875 (finding that while doctors did not recite an element in their recitation of a legal definition, they did discuss

that component in their testimony). That gave the jury a basis to find that Appellant's future risk was tied to his mental abnormality.

The jury could also find a connection between Appellant's mental abnormality and his future risk from the combination of Dr. Witcher's descriptions of mental abnormality and the "more likely than not" standard applicable to the future risk requirement of the statute. Dr. Witcher testified that she used the statutory definition of mental abnormality, which is a condition "that affects a person's ability to control themselves in such a way that can lead them to committing a sexually violent offense." (Tr. 328). Dr. Witcher had found that Appellant has a mental abnormality because his pedophilia causes him serious difficulty in controlling his behavior. (Tr. 343). She later described the "more likely than not" standard of risk as a conglomeration of the risk factors that cause a person to engage in behavior that they cannot control. (Tr. 398). Dr. Witcher thus tied the future risk standard to inability to control behavior, which is part of the mental abnormality finding.

Appellant's argument also fails for the reasons set out in the previous point. Any question as to whether proffered expert testimony is supported by a sufficient factual or scientific foundation is one of admissibility, which must be raised by a timely objection or a motion to strike. *In re Turner*, 341 S.W.3d at 754. Once an expert opinion has been admitted, as any other evidence, it

may be relied on for purposes of determining the submissibility of the case. *Id.* An appellant cannot "backdoor" an issue relating to the admissibility of expert testimony under the guise of a sufficiency of the evidence argument. *Id.*

Expert testimony that relies on facts and data of a type reasonably relied on by experts in their field is sufficient to make a submissible case. *In re A.B.*, 334 S.W.3d at 754. Dr. Witcher testified that she based her opinions on information that was reasonably relied on by members of her profession. (Tr. 323).

Dr. Witcher explained the bases that she relied on to support her diagnosis. "This alone precludes [this Court] from finding a complete absence of probative fact to support the verdict[.]" *In re O'Hara*, 331 S.W.3d at 320. Appellant's argument misses the distinction between admissibility and submissibility. *Id.* Once Dr. Witcher's opinions were admitted without objection, it was for the jury to determine their weight. *Id.* Appellant had the opportunity to, and did, challenge the credibility of Dr. Witcher's opinions through cross-examination. *In re Turner*, 341 S.W.3d at 750. Any weakness in the factual underpinnings of her opinion goes to the weight to be given to that testimony and not its admissibility. *In re Elliott*, 215 S.W.3d at 95. Appellant's arguments are nothing more than an attempt to have this Court

reweigh the evidence in his favor, which is something this Court will not do. *In re Barlow*, 250 S.W.3d at 734.

Appellant's challenge to Dr. Witcher's diagnosis is not legally cognizable. *In re Jones*, 420 S.W.3d at 611. His point should be denied.

IV.

Appellant's ineffective assistance of counsel claim is not cognizable and would lack merit if it were.

Appellant claims that his counsel was ineffective for failing to object to, and introducing evidence that, he viewed Hentai, played sexually-oriented video games, and had sexual contacts with animals. But Missouri does not recognize ineffective assistance of counsel claims in SVP cases. Even if this Court were to recognize such claims, they are not properly brought on direct appeal, and the record refutes Appellant's claim in any event.

1. *Even if claims of ineffective assistance of counsel are cognizable in SVP cases, those claims should not be decided on direct appeal.*

No Missouri court has ever recognized a right to effective assistance of counsel in SVP trials. Even if this Court were to rule that such claims are cognizable, this case does not represent the proper procedural vehicle to bring that claim. Lawsuits under the SVPA are special statutory proceedings with a special right to appeal. § 632.495.1, RSMo. Appeals are limited to the "determination as to whether a person is a sexually violent predator." *Id.* Claims of ineffective assistance of counsel do not concern that determination and are thus outside the scope of the statutory right to appeal. *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.").

Nor does the SVP Act provide for any kind of collateral attack. 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).

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.'" *Id.* 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.*

Furthermore, allowing ineffective assistance of counsel claims on direct appeal is not feasible. Claims of ineffective assistance of counsel often require testimony from trial counsel concerning their trial strategy. But it is not routine procedure in Missouri to adduce new evidence in direct appeals. Further, claims of error must be raised in a motion for new trial to be preserved for review. Supreme Court Rule 78.07. Those motions are normally

drafted by trial counsel and it is unlikely that counsel would ever claim to have been ineffective. This case illustrates that conflict as trial counsel did not include any claims of ineffective assistance of counsel in the motion that she drafted and filed with the trial court. (L.F. 95-109).

Direct appeal is an inappropriate forum to consider claims of ineffective assistance of counsel. Accordingly, this Court should find that Appellant's Point IV is not cognizable.

2. *Appellant has no constitutional right to counsel and thus no constitutional claim to ineffective assistance of counsel.*

Both this Court and the United States Supreme Court have recognized that where there is no constitutional right to counsel there is also no constitutional claim to ineffective assistance of counsel. *State v. Hunter*, 840 S.W.2d 850, 871 (Mo. 1992); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). Those decisions have followed that rationale to hold that claims of ineffective assistance of counsel in post-conviction proceedings are categorically unreviewable. *Hunter*, 840 S.W.2d at 871; *Coleman*, 501 U.S. at 752.

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).

Appellant cited to the Sixth Amendment in his brief in the Court of Appeals, but now claims that his right to the effective assistance of counsel stems from the due process protections of the Fourteenth Amendment.[4] It is unclear whether Appellant's argument is based on substantive due process or procedural due process.

The State will first address substantive due process. The 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 (1970). The Court went on to find though, 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.

The Supreme Court later addressed explicitly the question of the right to counsel in civil commitment proceedings. *Vitek v. Jones*, 445 U.S. 480, 482-

---

[4] The Missouri Constitution also contains a due process provision. Mo. Const. art. I, § 10. This Court has treated the state and federal Due Process Clauses as equivalent. *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 n.4 (Mo. 2010).

83 (1980). A plurality of four justices found that a prison inmate threatened with involuntary transfer to a mental hospital must be provided with qualified and independent assistance. *Id.* at 497. But only three justices concluded that the required assistance had to be provided by counsel. *Id.* 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).

Appellant, relying on this Court's decision in *In re Norton*, argues that the SVP Act impinges on a fundamental right of liberty. *In re Norton*, 123 S.W.3d 170, 173 (Mo. 2004). 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. The State respectfully requests that this Court reconsider its prior rulings that SVP commitment infringes upon a fundamental right.

The United States Court of Appeals for the Eighth Circuit, in an opinion issued just last year, 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 Supreme Court was confronted with this question in *Hendricks*. *Id.*

In *Hendricks*, the 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. *Hendricks*, 521 U.S. at 375. As the 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 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 F.3d at 407 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) (Eighth Circuit's emphasis). After considering these 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 SVP Act does implicate a fundamental right to liberty. *In re Norton*, 123 S.W.3d at 173 n.10 (citing *Heller v. Doe*, 509 U.S. 312 (1993); *Vitek*, 445 U.S. at 491-92; *Foucha v. Louisiana*, 504 U.S. 71, 68 (1992), and *Hendricks*, 521 U.S. at 346). This Court later reaffirmed the holding of *Norton*. *In re Bernat*, 194 S.W.3d 863, 868 (Mo. 2006). But *Heller*, *Vitek*,

---

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

Foucha, and *Hendricks* do not require the conclusion that the SVP Act 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*, 509 U.S. at 319. 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*, 445 U.S. at 492–93. The Court did not find that a fundamental right was at issue nor did it apply strict scrutiny. And as noted above, the Court's controlling opinion found *no* right to counsel. *Turner*, 564 U.S. at 443.

And finally, *Foucha* does not require the application of strict scrutiny because, as Justice Thomas pointed out in his dissent,[6] the majority "never explains whether we are dealing here with a fundamental right..." *Foucha*, 504 U.S. at 116 (Thomas, J., dissenting). The Eighth Circuit found Justice

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

Thomas's point persuasive. *Karsjens*, 845 F.3d at 407 (citing *Foucha*, 504 U.S. at 116) (Thomas, J., dissenting)).

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. *Norton* also relied on *Heller*, *Vitek*, and *Foucha*, but as demonstrated above, those decisions do not compel a finding that Missouri's SVP Act operates in such a way that "neither liberty nor justice [] exist." *Glucksberg*, 512 U.S. at 720–21. Accordingly, the Court should find that the SVP Act 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. In re N*orton*, 123 S.W.3d at 174. In *Norton,* this Court held that the SVP Act "is narrowly tailored to serve [the] compelling state interest ... [of] protecting the public from crime." As the Act 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

following factors are considered: (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*, 441 U.S. at 425. 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. Further, the Act provides numerous procedural safeguards outside of the appointment of counsel: expedited timelines throughout the proceedings, and

a requirement of certain criminal offenses in a respondent's background, §632.480, RSMo; a screening performed by a qualified doctor, §632.483, RSMo; a screening performed by a multidisciplinary team (MDT), §632.483, RSMo; a screening performed by a prosecutors review committee (PRC), §632.483, RSMo; a probable cause hearing in front of a 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, §632.489, RSMo; a determination of probable cause by the court, §632.489, RSMo; an evaluation by the Department of Mental Health, §632.489, RSMo; an evaluation by a doctor of the respondents' choosing, §632.489, RSMo; access to all materials provided to the MDT, interviews with family, associates, victims, and witnesses, and police reports, §632.489, RSMo; a trial, §632.492, RSMo; a unanimous verdict if tried by jury, §632.495, RSMo.

These procedures go over and above those suggested by *Mathews*, which are: (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. *Matthews*, 424 U.S. at 319 n.4 (citing *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970)).

The third factor is the government's interest is in protecting the public. ***In re*** *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.

3. *Statutory right to counsel does not create claim for ineffective assistance of counsel.*

The SVP Act does provide that potential committees be afforded the assistance of counsel at trials conducted under the Act. § 632.492, RSMo. This Court and the Court of Appeals have found that the statutory right to counsel in termination of parental rights proceedings[7] implies a right to effective assistance of counsel. *See, e.g.*, *In re J.P.B.*, 509 S.W.3d 84, 97 (Mo. 2017); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. App. W.D. 1989). By contrast, this Court has, as noted above, found that there is no cognizable claim of ineffective assistance of post-conviction counsel, even though the statutes and rules governing post-conviction proceedings provide for the appointment of counsel for indigent defendants. § 547.360.5, RSMo; Supreme Court Rules 29.15(e) and 24.035(e). This Court should find that, similarly to civil post-

[7] § 211.462.2, RSMo

conviction cases, there is no right to effective assistance of counsel in civil SVP cases.

4. *The record refutes any cognizable claim that counsel was ineffective.*

Appellant would not be entitled to relief even if an ineffective assistance of counsel claim is cognizable and can be determined in this proceeding.

Because such a claim has not previously been recognized in Missouri, the question of what standard would apply in evaluating such claims has also not been established. The standard for determining ineffective assistance of trial counsel in criminal cases is the two-part test set forth in *Strickland*. *Johnson v. State*, 406 S.W.3d 892, 898 (Mo. 2013). First, the appellant must show that his counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would exercise in a similar situation. *Id.* at 898-99. To meet this prong, an appellant must overcome a strong presumption that counsel's conduct was reasonable and effective. *Id.* at 899. The second prong requires the appellant to show that he was prejudiced by trial counsel's failure. *Id.* To satisfy the prejudice prong, the appellant must demonstrate that, absent the claimed errors, there is a reasonable probability that the outcome would have been different. *Id.*

On the other hand, the *Strickland* standard has been found inapplicable in the parental termination cases where an implied right to effective counsel was found. *In re J.C., Jr.*, 781 S.W.2d at 228. The court instead found the relevant standard to be "whether the attorney was effective in providing his client with a meaningful hearing based on the record." *Id.* The record certainly suggests that counsel provided Appellant with a meaningful hearing by challenging the State's evidence and presenting evidence on his behalf. Appellant's claim would thus fail under the standard articulated in *In re J.C., Jr*. Appellant would also not be entitled to relief under the *Strickland* standard.

The first part of Appellant's claim is that trial counsel was ineffective for failing to object to evidence that he had watched various types of pornography and had engaged in sexual activity with animals. Those matters were part of the evidence that Dr. Witcher relied on in reaching her opinions. In discussing her diagnosis of pedophilia, she noted that Appellant had shown pornographic videos to a child that he had abused. (Tr. 334). In conducting her risk assessment, Dr. Witcher diagnosed Appellant with the paraphilia of zoophilia and testified that the presence of multiple paraphilias increases the risk to reoffend because those people have more deviant sexual interests. (Tr. 354). Dr. Witcher also testified that Appellant's grooming

behaviors demonstrated planning and forethought, which increased his risk of reoffending. (Tr. 351-52).

Those grooming behaviors and Appellant's viewing of pornography were linked by Robert Gould, the manager of operations for the Missouri Sex Offender Program, who also served as Appellant's therapist while Appellant was in the program. (Tr. 429, 437). Gould testified about Appellant's disclosure process while in the MOSOP program, which included his disclosures that he played video games involving animals. (Tr. 454). Gould compared the anthropomorphic video games that Appellant watched to the process of grooming a potential victim, testifying that there were "striking parallels" between the grooming behavior in the game and the grooming associated with Appellant's index offense. (Tr. 456-57).

Experts can rely on evidence that is of a type reasonably relied on by experts in the field. *In re Wadleigh*, 145 S.W.3d 434, 438 (Mo. App. W.D. 2004). Because the challenged evidence formed part of the basis for the expert opinions, that evidence was admissible and an objection would have lacked merit. Counsel is not required to make non-meritorious objections and is not ineffective for failing to make such objections. *Woods v. State*, 458 S.W.3d 352, 362 (Mo. App. W.D. 2014).

Appellant also claims that counsel was ineffective for having Appellant testify about his viewing of pornography and activities with animals. Once

that evidence was properly admitted in the State's case, it was a reasonable trial strategy to try to minimize the impact of that evidence by allowing Appellant to explain his activities in an attempt to persuade the jury that they did not increase his future risk of offending. *Rios v. State*, 368 S.W.3d 301, 314 (Mo. App. W.D. 2012).

Appellant's claim of ineffective assistance of counsel is not cognizable, and the record does not show that counsel was ineffective in any event. Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that the judgment of the circuit court should be affirmed.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 10,947 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI