IN THE
SUPREME COURT OF MISSOURI

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

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

N.G. adopts the jurisdictional statement and statement of facts from his initial brief.

ARGUMENT

I. N.G. cannot be committed based on teenage behavior.

The State's arguments about N.G.'s age at the time of his SVP trial should be rejected, and *Brown* nor *Kirk* addressed the constitutional challenge at issue. *Graham* is applicable here, as its holding rested largely on the inconsistency of imposing a final, irrevocable confinement on a juvenile, who had capacity to change and grow. The State does not dispute that SVP commitment is mandatory following the jury's verdict, and is a lifetime custody from which there is no discharge.

A. Age at the time of the crime controls.

N.G.'s age at the time of the SVP trial is irrelevant. What matters is his age, and consequently his maturity and development, *at the time he committed the crime*. *See Roper v. Simmons*, 543 U.S. 551, 556 (2005) (whether constitutional to execute individual who was between 15 and 18 "*when he committed a capital crime.*"). Nor is it dispositive that N.G. "was at least 18 years old when he committed the index offense" and pled guilty. (State Sub. Br. 21). "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id*. at 574. Science has demonstrated, and other courts have acknowledged, that youthful offenders at that age are fundamentally and categorically different from adults. (Ap. Br. 28-30); *Roper*, 543 U.S. at 570-71; *Graham v. Florida*, 560 U.S. 48, 68 (2010).

Therefore, this Court should also reject the State's argument that "Appellant failed … to demonstrate that his mental development made commitment as an SVP inappropriate." (State Sub. Br. 22). Moreover, at trial, Wollert affirmed it is important to take the science concerning development into consideration, look at developmental issues, and weigh them when doing an SVP evaluation. (Tr. 604-6). Gould has a theological counseling degree; he is not a trained psychologist or neuropsychologist qualified to make any judgments about this issue. (Tr. 429).

Furthermore, the evidence at trial was that N.G. engaged in sexual behaviors as an adolescent because he was curious and impulsive. (Tr. 503-504; 643). He repeated

behaviors he observed in his peers. (Tr. 626). He also did not appreciate the harmfulness of his conduct. (Tr. 626). N.G. never grasped the consequences of his actions, and being locked up in jail was a shock to him. (Tr. 627). This is precisely the type of immature, risky, and impulsive behavior that characterizes adolescence. There is no allegation N.G. engaged in sexually inappropriate behaviors past the age of 18 or once he entered into adulthood.

B. *Brown* and *Kirk* do not control the issue presented.

Matter of Brown v. State, 519 S.W.3d 848, 854 n. 1 (Mo. App. W.D. 2017) and *Kirk v. State*, 520 S.W.3d 443, 451 (Mo. banc 2017) presented facial challenges to the SVPA's constitutionality; neither appellant challenged the constitutionality of their respective commitments based on their individual, unique characteristics. In contrast, N.G. challenges *his* commitment under the SVPA predicated on his youthful criminal behaviors. His challenge is similar to the as applied challenge raised in *In re Brasch*, 332 S.W.3d 115 (Mo. banc 2011) under the Sixth and Fourteenth Amendments to the U.S. Constitution and art. I, § 10 of the Missouri Constitution.

Brown's assertion that commitment cannot constitute cruel and unusual punishment *under the Eighth Amendment* does not dispose of N.G.'s cruel and unusual punishment claims under the Fourteenth Amendment's Due Process Clause. The Supreme Court of the United States has examined cruel and unusual punishment claims involving involuntary civil commitment under the Fourteenth Amendment. *Youngberg v. Romeo,* 457 U.S. 307, 315-16 (1982) (challenge to conditions of confinement). "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id*. at 315-316. "[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id*. at 316 (citation and quotation omitted). This interest survives involuntary commitment. *Id*.

More recently, the Supreme Court has said that whether a consequence is cruel and unusual requires examination of the nature of the offense and characteristics of the offender. *Graham*, 560 U.S. at 60. The Supreme Court of the United States said that Graham's sentence

> guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might to do demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed when he was a child in the eyes of the law.

Id. at 79.

N.G.'s challenge to lifetime custody without the possibility of discharge or unconditional release because of his age at the time of the underlying non-homicide crime is clearly identifiable under *Graham*. Under *Youngberg*, cruel and unusual claims in civil commitment cases are at least cognizable under the Fourteenth Amendment.

If it is cruel and unusual to impose a life without the possibility of release sentence on a juvenile offender for a nonhomicide crime, then it must be unconstitutional to confine the civilly committed —who may not be punished at all—for life without the possibility of discharge or unconditional release predicated on committing the same offense at the same age. *Youngberg*, 457 U.S. at 315-316; *Graham*, 560 U.S. at 82. The SVPA does not provide *any opportunity* to be unconditionally released or a procedure for seeking discharge from an SVP commitment order. §§632.498, 632.505. Like Graham, N.G. will die in government custody without any meaningful opportunity to obtain discharge, no matter what he might do, because the State's SVPA denies him any chance to be unconditionally released from the trial court's commitment order based solely on a nonhomicide crime he committed as a child. The Constitution must prohibit this.

II. The State's Evidence was Insufficient

A. An expert's testimony must be supported by the record.

The State ignores that courts have traditionally considered an expert's testmony concerning the bases for his or her opinions in evaluating the sufficiency of the evidence. *See*, e.g., *Nelson v. State*, 521 S.W.3d 229, 234 (Mo. banc 2017) ("Both experts testified extensively regarding the bases for their opinions"); *Underwood v. State*, 519 S.W.3d 861, 876 (Mo. App. W.D. 2017) (experts' additional testimony and evidence supported the experts' conclusions). Missouri Courts have also said that an expert's opinion must be supported by evidence in the record. *Morgan v. State*, 176 S.W.3d 200, 210 (Mo. App. W.D. 2005). In *Morgan*, the Western District found that there was no evidence from which the jury could reasonably infer the facts necessary to support a verdict because the expert's testimony was not supported, as required, by competent evidence in the record. 176 S.W.3d at 209, 211. In contrast, in *In re A.B.*, because the expert's opinion was supported by the record, it was sufficient, in conjunction with evidence of past sex offenses, to create a submissible case. 334 S.W.3d 746 (Mo. App. E.D. 2011) (detailing bases for opinions in reviewing sufficiency challenge).

B. The evidence did not establish N.G. was presently suffering from mental abnormality.

As anticipated, the State argued on appeal that a pedophilia diagnosis satisfies this statutory definition of a mental abnormality standing alone, misconstruing *Murrell*, the evidence at trial, and the consensus in the relevant scientific field. (State Sub. Br. at 31). Closer inspection of *Murrell* reveals that the State is not relieved of its duty to prove each of the four elements of a mental abnormality when an expert claims the accused has a pedophilic disorder diagnosis. *See Murrell v. State*, 215 S.W.3d 96, 108 (Mo. banc 2007) (noting holding in accord with decision of Court of Appeals affirming mental diagnosis qualified as mental abnormalities where all of statutory elements met).

The evidence presented by the State at trial was consistent with this. Both the State's attorney and Witcher agreed that a diagnosis from the DSM, including pedophilic disorder,

"is not enough to qualify, just by itself, as a mental abnormality" (Tr. 343). "Parties on appeal generally must 'stand or fall' by the theories upon which they tried and submitted their case in the circuit court below." *Ross-Paige v. Saint Louis Metro. Police Dept.*, 492 S.W.3d 164, 175 (Mo. banc 2016) (including the respondent).

And, the psychological community agrees. The DSM represents the consensus for mental health professionals for diagnostic criteria for any type of mental disorder. (Tr. 329). It states that when diagnoses are used in forensic contexts,

> dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, ***the clinical diagnosis of a DSM-5 mental disorder such as*** intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, *or* ***pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard*** (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that ***assignment of a particular diagnosis does not imply a specific level of impairment or disability***.
>
> ***
>
> Nonclinical decision makers should also be cautioned that ***a diagnosis does not carry any necessary implications regarding*** the etiology or causes of the individual's mental disorder or ***the individual's degree of control over behaviors*** that may be associated with the disorder***. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time***.

Diagnostic and Statistical Manual of Mental Disorders 25 (5th ed. 2013) (DSM-5) (emphasis supplied).

As evidenced by the State's brief, it does not understand the distinction between "pedophilia" and "pedophilic disorder." *Pedophilia* is a sexual orientation. *Id.* at 698. (Tr. 329). *Pedophilic disorder* "necessarily includes other elements that may change over time with or without treatment: subjective distress (e.g., guilt, shame, intense sexual frustration, or feelings of isolation) or psychosocial impairment, or the propensity to act out sexually

with children, or both." DSM-5, at 699. The DSM did not make this distinction until the fifth edition, published after *Murrell.*

Given the record made at trial, it is unreasonable for anyone to conclude that the State's evidence satisfied the diagnostic criteria for pedophilic disorder, a factual finding necessary to establish the first mental abnormality element. (Tr. 330). N.G. agrees that Criterion A does not require evidence of abuse against one person for more than six months. But it does require evidence of sustained and persistent behavior or thoughts involving prepubescent children. DSM-5, at 697. The State agrees that Criterion C states that: "The individual is at least age 16 years and at least 5 years older than the child or children in Criterion A." *Id*. (State Sub. Br. 29). When the diagnostic criteria are read together, they require evidence that the individual was at least 16 at the time of the thoughts or behaviors which persisted for more than 6 months. *Id.* at 699. (State Sub. Br. 29).

This Court must reject the State's attempt to look beyond what Witcher testified she relied upon to satisfy the criteria. (State Sub. Br. 30). Witcher explicitly identified the evidence she relied upon for determining Criterion A, requiring behaviors sustained for more than six months, at trial:

> [STATE'S ATTORNEY] Q. Did you see any indication in your interview with Mr. Grado or in his records that satisfied Criterion A?
>
> [WITCHER] A. Yes.
>
> Q. What did you see?
>
> A. I saw that, beginning at approximately age 14 -- I would say age 15, the defendant, the defendant -- the Respondent was engaging in sexual behavior with a child that was under the age of 13, approximately five years younger than himself. That was number one.
>
> Additionally, he showed during his index offenses -- it lasted over a period of three months, but combined with the sexual activity that began at the age of 15, he engaged in sexual behavior with children who were approximately 14 to 13 to 12 years younger than himself.

(Tr. 332).

There can be no dispute that Witcher relied on the behaviors from when N.G. was 15 in order to establish a period of at least six months, contrary to the established medical

standard in the DSM. (Tr. 331-332). The State acknowledges that an expert's opinion must be based on the established standard of care and not some personal standard. (State Sub. Br. 33, citing *Underwood*). Witcher did not "go through a range of documents to find" whether N.G. had any behaviors after turning 16 other than the index offense when he was 18, which spanned only three weeks. (Tr. 338). Therefore, her conclusion N.G. met diagnostic criteria for pedophilic disorder was not supported by the record.

Even if a pedophilic disorder diagnosis was properly made and supported by competent evidence in the record, the State's evidence still failed to establish that N.G. suffered from a mental abnormality. Witcher's testimony that pedophilia, or "pedophilic interest" was not a conclusion that N.G. currently or presently suffered from *pedophilic disorder* at the time of trial, or that a pedophilic disorder diagnosis predisposed him to commit sexually violent offenses, and no evidence in the record supported such conclusions.

C. The evidence did not establish that a mental abnormality makes N.G. "more likely than not."

Witcher never claimed N.G. was "more likely than not" *because of a mental abnormality*. (Tr. 325, 376-377, 378, 398, 419). Her testimony does not demonstrate that a mental abnormality was linked to, or the cause of, N.G.'s predicted future risk, even when taken as a whole, as the State suggests. (State Sub. Br. 33-34).

> Initially Dr. Witcher explained the questions she answers in an SVP evaluation as:
>
> I am asked to determine if the individual has -- meets criteria for, A, a mental abnormality; if they have committed a sexually violent offense in the past; and then if they are more likely than not that their behavior is going to be impaired by their mental abnormality.

(Tr. 323-24). The State's attorney attempted to clarify by asking, "is 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). Though she agreed that it was, this does not show, in any way, that Witcher's risk analysis was tied to a mental abnormality.

"[D]etermin[ing], again, if this behavior is long, long, long one you said. So if they should be confined to an institution[,]" which Witcher said is the risk assessment, likewise fails to tie her risk analysis to a mental abnormality. (Tr. 343). The State never asked questions about risk caused by a mental abnormality in *any* of the questions it asked her. (Tr. 325, 343, 377, 378). Identification of pedophilia as *a risk factor* undermines any attempt to suggest risk was caused by the mental abnormality in this case; Witcher described the ultimate "more likely than not" question as "a conglomeration of all the risk factors[.]" (Tr. 350, 398; State Sub. Br. 34-35).

The testimony cited by the State demonstrates that Witcher did not understand the statutory definitions and criteria in the SVPA. (State Sub. Br. 35). Her explanation of her interpretation of the statutory mental abnormality elements or the meaning of "more likely than not" did not make a submissible case as to a cause and effect relationship between that purported mental abnormality and N.G.'s risk. (Tr. 328, 398; State Br. 30-31). Witcher's bare conclusion that N.G. "meets the criteria to be a sexually violent predator" was not supported by the record and was insufficient to make a submissible case.

III. N.G. Received Ineffective Assistance of Counsel ("IAC")

In *In re Norton*, 123 S.W.3d 170, 173 (Mo. banc 2003), this Court said that SVP commitment impinges on the fundamental right to liberty[1] and that the Appellant-SVP's "***due process right to the assistance of counsel*** vested at the time the Attorney General filed a petition with the probate division pursuant to section 632.486." Though the State cites to *Norton* throughout its response to this point, it argues that there is no constitutional right to counsel and that commitment does not impinge on a fundamental right of liberty. (State Sub. Br. 42, 46, 49). This Court should continue to reject the arguments advanced by the State.

A. Counsel is constitutionally required because an accused SVP faces actual confinement if he loses at trial.

J.B. has always claimed the right to counsel under the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and art. I, §10 of the Missouri Constitution. (See Ap. Br. at 52-53). The Supreme Court of the United States has recognized since the 1930's that the right to counsel is essential to a fair trial under the Fourteenth Amendment's Due Process Clause. *Powell v. Alabama*, 287 U.S. 45 (1932) (failure to appoint counsel denied due process under the Fourteenth Amendment). Certain personal rights are safeguarded against state action "not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they

[1] This Court said the same thing in *In re Bernat*, 194 S.W.3d 863, 868 (Mo. banc 2006), and again in *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007). The State wants this Court to overrule *Norton*, *Bernat*, and *Coffman* because the fact that J.B. has a fundamental liberty interest at stake in this litigation subjects the government's conduct to strict scrutiny, a burden it cannot overcome in this case. *Norton*, 123 S.W.3d at 173, *Bernat*, 194 S.W.3d at 868, *Coffman*, 225 S.W.3d at 445. The State made the same request in *Kirk v. State*, 520 S.W.3d 443 (Mo. banc 2017) and *Nelson v. State*, 521 S.W.3d 229 (Mo. banc 2017). The State's request failed then, as it must fail now. *See Kirk*, 520 S.W.3d at 450 (rejecting challenge to lack of LRE under strict scrutiny review under *Norton* and *Coffman*).

are included in the conception of due process of law." *Id*. at 67. It is "clear that the right to the aid of counsel is of this fundamental character." *Id*.

While the right to counsel under the Sixth Amendment may only apply to criminal cases,[2] "it is equally true that the provision was inserted into the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner." *Id*. at 69 (1932) (citation omitted). "If in any case, ***civil or criminal***, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.* (citing to non-criminal immigration cases concerning Fourteenth Amendment right to counsel). The right to counsel is "so fundamental and essential to a fair trial, and to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."

The Supreme Court has also said that the constitutional right to counsel under the Fourteenth Amendment is triggered by the risk of actual, physical confinement following a trial.

> [T]hat it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments rights to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault*, 387 U.S. 1 [(1967)] that "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*," the juvenile has a right to appointed counsel even though proceedings may be styled "civil" and not "criminal." *Id.*, at 41[ ] (emphasis added). Similarly, four of the five Justices who reached the merits in *Vitek v. Jones*, 445 U.S. 480 [(1980)], concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital. The fifth Justice differed from the other four only in declining to exclude the "possibility that the required assistance may be rendered by competent laymen in some cases." *Id.*, at 500 [ ] (separate opinion of POWELL, J.).

Lassiter v. Dept. of Social Services of Durham County, N.C., 452 U.S. 18, 25-26 (1981) (examining Fourteenth Amendment claim to right to assistance of appointed counsel in

[2] *But see In re Brasch*, 332 S.W.3d 115 (Mo. banc 2011), evaluating and SVP's as applied challenge brought under the Sixth and Fourteenth Amendments.

civil child custody case). These cases demonstrate that when a defendant in a case will be subject to a deprivation of liberty if he loses, fundamental fairness requires appointment of counsel whether the proceedings are "civil" or "criminal." *Id*. at 26-27; *accord Carothers v. Carothers*, 337 S.W.3d 21, 26 (Mo. banc 2011) (right to counsel in civil contempt proceedings); *State ex rel. Family Support Div.-Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App. W.D. 2010) (adopting "actual imprisonment" standard for application of right to counsel under Fourteenth Amendment).

The SVPA allows for indefinite commitment of individuals who lose at trial and are designated SVPs. §632.495. This is a restriction on the fundamental right of liberty by actual physical confinement. *Norton*, 123 S.W.3d at 103, *Coffman*, 225 S.W.3d 439; *Bernat*, 194 S.W.3d at 686. Counsel is constitutionally required.[3]

Under these standards, the State's efforts to equate the effectiveness of *trial* counsel in an SVP case to the effectiveness of *post-conviction* counsel are meritless. A similar comparison by the government was rejected in Illinois in *People v. Rainey*, 758 N.E.2d 492 (Ill. Ct. App. 2001), because proceedings under the applicable SPV Act "more closely resemble criminal prosecutions than postconviction proceedings." *Id*. at 502 (determining what standard to apply to IAC claims). For example, in both SVP and criminal proceedings, the proceedings are initiated by the State and counsel protects the defendant from the prosecutorial forces of the State. *Id*.[4] The same is true in Missouri.

It is also true that this Court has said that there is no constitutional right to counsel during PCR proceedings, and consequently no IAC claims relative to PCR counsel. *State v. Hunter*, 840 S.W.2d 850, 871 (Mo. banc 1992) (relying on *Coleman v. Thompson*, 501

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[3] *Lassiter* demonstrates that a procedural due process inquiry is only necessary where physical liberty is *not* at stake. (engaging in *Matthews* balancing test to determine whether procedural due process required appointed counsel in termination of parental rights case in light of presumption that litigant *only* has a constitutional right to appointed counsel where physical liberty at stake).

[4] The Court also noted that the SVP statute provided all constitutional rights available in criminal proceedings, in contrast with applicable PCR statutory provisions. *Rainey*, 758 N.E. at 503

U.S. 722, 752 (1991)). However, this Court has said that SVPs do have a due process right to assistance of counsel in SVP proceedings. *See Norton*, 123 S.W.3 at 173; and §632.492 ("At all stages of the proceedings pursuant to [§§]632.480 to 632.513, any person … shall be entitled to the assistance of counsel[;]" §632.495.1 (right to appeal). *And see Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005) (citing *Smith v. Robbins*, 528 U.S. 259 (2000); criminal defendants have right to counsel at trial and on appeal)).

B. Effective assistance of counsel is required to ensure a fair trial and should be evaluated under *Strickland*.

The State argues that "effectiveness of counsel is not essential to the determination of whether a person is an SVP[.]"[5] (State Sub. Br. 39). The purpose of constitutionally required counsel is to ensure a fair trial. Counsel is essential because he or she is the means through which all other rights of the person on trial are asserted and secured. *Powell*, 287 U.S. at 68-69.

"The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (finding no denial of the Fourteenth Amendment's guarantee of assistance of counsel because counsel performed his "full duty intelligently and well."). It has long been recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, n. 14 (1970), which relied *Powell* and *Avery*, *supra*, among others). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper

[5] Based on this assertion, the State claims that any opinion about IAC would be an advisory opinion. (State Sub. Br. 39). This is incorrect. "An opinion is advisory if there is no justiciable controversy, such as if the questions affects the rights of persons who are not parties in the case, the issue is not essential to the determination of the case, or the decision is based on hypothetical facts." *State ex rel. Heart of America Council v. McKenzie*, 484 S.W.3d 320, 324 n. 3 (Mo. banc 2016). Effective assistance of counsel *is* essential to any SVP determination and affects J.B.'s rights. Establishing a procedure to litigate these claims would ensure that the facts are developed and presented, not hypothetical.

functioning of the adversarial process that the trial cannot be relied on has having produced a just result." *Id*.

The Supreme Court of the United States has said that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims[.] *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (noting there are situations in which fundamental fairness may affect the analysis). The *Strickland* test is applied to SVP IAC claims in other states because the SVP's right to counsel arises from a constitutional due process right, similar to the rights attendant in a criminal trial. *See Matter of Chapman*, 796 S.E.2d 843, 849 (S.C. 2017) (holding "the more appropriate standard in these instances is the two-prong *Strickland* standard used to vindicate a criminal defendant's Sixth Amendment right to counsel"); *In re Ontiberos*, 287 P.3d 855 (Kan. 2012) (court held that it "makes sense" to apply *Strickland* based on Fourteenth Amendment right to counsel); *Jenkins v. Director of Va. Center for Behavioral Rehab.*, 224 S.E.2d 453 (Va. 2006) (recognizing constitutional right to effective assistance of counsel, evaluated under *Strickland*); *In re Detention of Crane*, 704 N.W.2d 437 (Iowa 2005) (applying *Strickland*). *See also In re Det. of Smith,* 72 P.3d 186 (Wash. Ct. App. 2003) (applying *Strickland*, though finding no constitutional right to counsel); *Rainey*, 758 N.E.2d 492 (applying *Strickland*, but not reaching constitutional question because of statutory right to counsel in all proceedings).

Courts in other states also apply the *Strickland* test to general involuntary civil commitments. For example, Washington applies *Strickland*, although the Sixth Amendment protections are not applicable, in part, because the standard is well known, supported by a well-developed body of case law, and the majority of jurisdictions that have considered IAC issues in civil commitment context have adopted that test. *In re Det. of T.A.H.-L*, 97 P.3d 767, 771 (Wash. Ct. App. 2004). *See also In re Protection of H.W.*, 85 S.W.3d 348, 356 (Tex. App. 2002) (looking to criminal standards to determine that IAC claims must be judged by *Strickland* test); *Pope v. Alston*, 537 So.2d 953, 956-57 (Ala. Civ. App. 1988) (involuntary civil committee must show counsel was ineffective under *Strickland*); *Matter of Alleged Mental Illness of Cordie*, 372 N.W.2d 24, 29 (Minn. Ct.

App. 1985) (*Strickland* test must be satisfied before involuntary commitment will be overturned because of IAC); *Jones v. State*, 477 N.E.2d 353 (Ind. Ct. App. 1985) (civil commitment proceeding is adversarial, and ultimate finding is less reliable if counsel is not effective; criminal *Strickland* standard justified because committee's liberty at stake).

As the State points out, IAC claims in termination of parental rights case are not judged under the *Strickland* standard. (State Sub. Br. 49). However there is no *constitutional* right to counsel in those cases, only a statutory right. *See In Interest of J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017) (parent has statutory right to counsel and therefore an implied right to effective assistance of counsel). Whether J.B. received his *constitutional right* to counsel must be measured under *Strickland*.

C. Procedure and forum for raising IAC claims in SVP cases.

Because there is a right to counsel, there must be a way to challenge representation that falls below a constitutional standard, even in a civil case. As the State highlights, there are inherent difficulties in raising IAC claims on direct appeal. J.B. agrees that "[a]llowing IAC claims on direct appeal is not feasible." (State Sub. Br. 39). *See Massaro v. U.S.,* 538 U.S. 500, 504-07 (2003) (identifying why IAC claims are difficult to adjudicate on direct appeal). Meritorious IAC claims will fail on direct appeal if the trial record is not adequate to support them. *Id*. at 506. "Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the [trial] court on collateral review." *Id*. at 506-07.

And in some instances, the accused SVP is represented at trial and on appeal by the same attorney. *See id.* at 502-03 (attorney who handles both trial and appeal is unlikely to raise IAC claim against herself); and *Kirk*, supra. Just as trial counsel is unlikely to raise her own ineffectiveness in a motion for a new trial, appellate counsel is unlikely to raise her ineffectiveness or that of her co-worker on direct appeal. *Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999) (recognizing appellate public defender from the same office as trial public defender has clear conflict of interest in examining defaulted claim on habeas).

There are also problems in relegating IAC claims to habeas petitions. Habeas petitions may be filed at any time, and successive habeas petitions are permitted in Missouri. *See State ex rel. Nixon v. Jaynes,* 63 S.W.3d 210, 217 (Mo. banc 2001) (overruled on other grounds) (holding that "successive habeas corpus petitions… are not barred"). As history in Missouri can attest, this proved unworkable and a framework for adjudicating IAC claims was necessary.

J.B. urges the Courts to expand application of this Court's post-conviction rules to SVP proceedings. Modern post-conviction rules ensure adjudication of all claims for relief in one proceeding, avoid successive motions, and preserve finality of judgment. The rules prevent "duplicative and unending challenges to the finality of a judgment[.]" *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. banc 2010). They bring finality to the process and to ensure that public resources are not "expended to investigate vague and often illusory claims[.]" *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012). Review of IAC claims through habeas corpus proceedings thwart these policy concerns and principals of jurisprudence.

Alternatively, should this Court determine that IAC claims must be raised on appeal, the Court should also announce how factual disputes and additional fact finding will be accomplished to ensure that those committed under the SVPA have a meaningful way to develop and present their IAC claims.

C. Trial counsel was ineffective.

A timely objection at trial would have been meritorious. While experts may rely on the type of information that is reasonably relied upon by experts in the field in forming their conclusions under §490.065, the relevancy of the underlying information remains a principal admissibility consideration. *See In re Wadleigh*, 135 S.W.3d 434, 438 (Mo. App. W.D. 2004) (Wadleigh did not object to the relevancy of the evidence he complained about at trial or on appeal, and conceded admissibility on appeal). This is true even if there are limited foundational requirements pursuant to an independent admissibility statute. *See*, e.g., *Nolte v. Ford Motor Company*, 458 S.W.3d 368, 382 (Mo. App. W.D. 2014) (§

490.220 did not compel admission of entire government report; trial court erred in failing to assess relevance); *State v. Allen*, 274 S.W.3d 514, 527-28 (Mo. App. W.D. 2008) (document admissible under § 490.150 public records exception must be relevant, among other things); *Eliste v. Ford Motor Co.*, 167 S.W.3d 742, 748 (Mo. App. E.D. 2005) ("Relevance is a requirement for admitting any evidence, and is in fact the principal criterion for the admission of evidence[;]" even that admissible under §490.022).

"Evidentiary relevance is directly related to the issue to be decided." *Nolte*, 458 S.W.3d at 382. Facts bearing remotely upon or collateral to the issues are not logically relevant and should not be admitted. *Id*. Evidence that N.G. watched various types of cartoon pornography and had some sexual contact with animals were collateral to the issues to be decided--(1) whether N.G. had a mental abnormality of pedophilic disorder, and (2) if so, whether pedophilic disorder made him more likely than not to commit predatory acts of sexual violence. And they were not relied upon by Witcher to make her diagnosis of pedophilic disorder, a fact that the State overlooks and which makes them inadmissible under §490.065. (Tr. 331-35, 338, 340, 380-81).

Even if there was some limited logical relevance, the evidence was not legally relevant. The offending evidence confused the issues and misled even the State's attorney, who argued that animals demonstrated N.G. "mental abnormality[ ] causes him serious difficulty controlling his behavior [because h]e is still triggered into having deviant sexual interest in animals…" (Tr. 668-69). This closing argument also demonstrates the prejudice to N.G.: the jury was led to decide the case on some basis other than the established propositions of the case. *Id*. at 383.

F. Conclusion.

An appropriately launched objection to evidence of cartoon pornography, video games, and animals should have been sustained by the trial court. Failure to make that objection, and introduction of the same type of evidence, constituted constitutionally ineffective assistance of counsel undermining the fairness of the trial. N.G. must have a new trial, with constitutionally adequate counsel.

If record does not support N.G.'s claim, as the State contends, then this court should appoint a special master or remand for a hearing followed by factual findings necessary to decide whether N.G. received constitutionally adequate representation and assistance of counsel, or announce that he may bring this type of challenge through post-commitment proceedings like those afforded under Rules 24.035 and 29.15.

Even if this Court determines that N.G.'s trial counsel was constitutionally adequate, this Court should affirm that accused SVPs have the constitutional right to effective assistance of counsel and announce how these types of claims should be raised and addressed in the SVP context.

CONCLUSION

For the reasons stated herein and in Appellant's initial brief, N.G.'s commitment must be reversed and he must be released from custody. Alternatively, his case must be remanded for a new trial.

Even if this Court determines that N.G.'s trial counsel was constitutionally adequate, this Court should affirm that accused SVPs have the constitutional right to effective assistance of counsel and announce how IAC claims should be litigated in SVP proceedings.

Respectfully submitted,

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Certificate of Compliance and Service

I, Chelseá R. Mitchell, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Local Rule XLI. The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance, the reply brief contains 6,591 words, which does not exceed the 7,500 words allowed for an appellant's reply brief.

/s/ Chelseá R. Mitchell

Chelseá R. Mitchell