IN THE
SUPREME COURT OF MISSOURI

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

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

Appellant adopts the Jurisdictional Statement and Statement of Facts from his substitute brief.

PRESERVATION AND STANDARD OF REVIEW

A. Preservation issues in points relied on.

The State has alleged that J.B.'s points relied on are all multifarious because he alleged a single claim of legal error violated multiple rights in each point. (State Sub. Br. 15). The State misunderstands "multifarious." A point is multifarious only "when it groups together multiple, independent claims rather than a single claim of error[.]"*Kirk v. State*, 520 S.W.3d 443, 450 n. 3 (Mo. banc 2017). For example, in *Kirk*, cited by Respondent, this Court said the appellant's point relied on was multifarious, "containing more than one basis for reversal," where he grouped the denial of four separate motions to dismiss into a single allegation of error in one point relied on. *Id.* at 449-50 n. 3. Rule 84.04 contemplates "*legal reasons*," plural, why the single "challenged ruling or action" constitutes reversible error.

J.B.'s points relied on are not multifarious. For example, in Point I, he asserts one claim —that the trial court erred in committing him— and states the legal reasons why that was error —because he was denied effective assistance of counsel, due process, and a fair trial— and then explains why —in that trial counsel failed to object to and introduced pieces of evidence.

G. Standard of review.

Below, the Southern District determined that all points but J.B.'s IAC claim were not preserved for appellate review because trial counsel did not timely file the motion for new trial. *Matter of J.B.*, SD34550, --- S.W.3d ---, 2017 WL 5784678, *2-3 (Nov. 19, 2017). Should this Court agree, J.B. requests that this Court review for plain error under Rule 84.13(c).

ARGUMENT

I. J.B. 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 Point I, 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. 20, 22, 24, 27). 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 24, 27-29). 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. 16). 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. 28). 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. 17). *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.

D. J.B. received IAC.

The Western District Court of Appeals has said that it has no issue with *Stenzel* or *Foster*. *Matter of Brown v. State*, 519 S.W.3d 848, 585 (Mo. App. W.D. 2017).

The *Foster* court found the State attorney's opening statement alone sufficient to require reversal, though there were numerous references to prior review determinations including testimony, references from hospital reports, and closing argument. *In re Care and Treatment of Foster*, 127 P.3d 277, 286 (Kan. 2006). "Stated simply, we see no reason whatsoever, even in a noncriminal proceeding, why the State's attorney—or the State's evidence—need mention the levels of review of the case that occurred before it was brought

to this jury." *Id*. Allowing the State to tell the jury that a multidisciplinary team of professionals, a team of prosecutors, and the judge have all previously determined that the SVP proceedings proceed is "extremely prejudicial" and "[a]t minimum, it is inconsistent with substantial justice and affects [the accused's] substantial rights, …and denies him his right to a fair trial" even in the face of strong evidence against him. *Id*. at 288. The Court also ruled that "such statements by counsel *and associated evidence* [were] prohibited" on retrial. *Id*.

In this case, the jury heard evidence that the SVP screening process is as follows: (1) an initial screening evaluation occurs before release from prison (Opening, Tr. 231; Kircher, Tr. 455); (2) 3-5% of men screened are determined to meet criteria and referred on to the MDT and the AG, and approximately 97% are not (Weitl, Tr. 438; Kircher, Tr. 458); (3) the MDT then does a review (Scott, Tr. 661; Kircher, Tr. 492-93); (4) the MDT can find that someone is not an SVP, but the case still moves forward in the process (Weitl, Tr. 435); (5) the PRC reviews the case after the MDT (Scott, Tr. 661); (6) the AG reviews the case, and decides whether to file a petition and ask for a probable cause hearing for adjudication of whether an individual is an SVP (Scott, Tr. 661, 665; Kircher, Tr. 492-93); (7) the EOC evaluator testifies at the probable cause hearing in support of commitment (Scott, Tr. 663; Weitl, Tr. 434); (8) then there is a determination whether the person should be held and a reason to have a full evaluation (Scott, Tr. 658, 661, 665, 667); (9) depending on the outcome of the probable cause hearing, the court holds an individual and orders a full evaluation (Scott, Tr. 658, 663, 665); and (10) the court ordered Scott to evaluate J.B. (Tr. 658, 667). Relevant transcript excerpts are included in Appellant's Brief Appendix, A-3 to A-14.

This evidence is strikingly similar to that presented in *Stenzel*: there was evidence that a very small percentage of individuals are referred to the MDT and AG (i.e., 3-5 %); multiple independent evaluations occur (i.e., EOC, DMH); an initial review is presented to a review committee (MDT and PRC), which decides whether the case should proceed; and since the proceedings only continue based on a recommendation of the EOC author or finding by the trial court, the reasonable inference is that J.B. was found to meet SVP

criteria at every step of the way. *In re Detention of Stenzel*, 827 N.W.2d 690, 704-05 (Iowa 2013). But there was more.

Like in *Foster*, there was evidence that J.B.'s parole was violated, and that in all SVP cases, psychologists render opinions, the MDT committee looks at the case, it is passed it on to the PRC, and the AG's office make a determination about whether to petition for SVP commitment. *In re Care and Treatment of Foster,* 127 P.3d 277, 252 (Kan. 2006). There was also evidence that there is always a probable cause hearing, the judge decides if further confinement for evaluation is required, and if so, then DMH is ordered to do an evaluation. *Id*. In this case Scott was ordered to do an evaluation; therefore the natural and logical inference is that these steps all occurred here.

It is also disingenuous to claim that the evidence at issue was relevant to any issue to be decided by the jury. (State Sub. Br. 29). At trial, the State's attorney objected to the relevance of the evidence at issue: "He's talking about pretrial procedures, we're at the trial itself. I think the question of what the procedures are pretrial are irrelevant." (Tr. 633). The State's attorney recognized the evidence was a comment on credibility. (Tr.663); *Foster*, 127 P.3d at 286-287. The State's attorney also objected to questions about the State's involvement in the process. (Tr.437). The State cannot argue an alternate theory now. "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).

E. Additional examples of IAC in this case.

Below, the Southern District determined that all points but J.B.'s IAC claim were not preserved for appellate review because trial counsel did not timely file the motion for new trial. *Matter of J.B.*, SD34550, --- S.W.3d ---, 2017 WL 5784678, *2-3 (Nov. 19, 2017). Rule 78.04 requires the motion be filed within 30-days; Rule 44.01(b) does not permit additional time. *Id.* at *2. The trial court granted trial counsel's request for "an additional ten days for filing the motion for new trial." *Id.* Trial counsel filed the motion within the ten-day extension, but 36 days after the verdict, outside of the Rule 78.04 30-

day window. *Id*. Therefore, J.B.'s motion for new trial was untimely and treated as though it had never been filed. *Id*.

Under similar circumstances, reasonably competent counsel would not have filed the motion outside of the time limit established by the Rules. Given the plain language of Rule 78.04—"Any motion for new trial… shall be filed not later than [30] days after the entry of judgment"— and Rule 44.01(b)—the court "may not extend the time for taking any action under Rule[ ] … 78.04..."—, trial counsel's request and untimely filing was not the product of a decision informed by a reading of the applicable rules and within the range of competent assistance. There can be no strategy in drafting a motion for new trial to preserve issues, but filing it outside of the mandatory window. An untimely motion is considered as though it was never filed, and therefore, the trial court could not have granted a meritorious, but late, motion for new trial. And on appeal, a preserved claim could have been meritorious under a more favorable standard of review. Thus, J.B. was prejudiced.

F. Conclusion.

This court should find that trial counsel's introduction of inherently prejudicial and damning evidence about the screening process constituted IAC resulting in prejudice and undermining the fairness of the trial. J.B. must have a new trial, with constitutionally adequate counsel.

If record does not support J.B.'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 he 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 J.B.'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.

II. Murder case was not relevant to SVP criteria.

A. Point relied on.

The State has asked this Court to refuse to consider any new claims under Rule 83.03(b). Just as the State did not ask the Court to overturn *Norton* as it relates to J.B.'s claim of IAC in its brief in the Southern District, J.B. did not mention §490.065 in this point in his initial brief below. However, he did address §490.065 in his reply brief below, in response to the arguments raised by the State,[6] and this is not a claim that was not raised in the court of appeals. (Ap. Br. 17-18).

Appellant's counsel submits that she should have included §490.065 and should have asserted that the evidence was not relied upon in the original brief and point relied on because it is well settled that the admission of any expert testimony is governed by that statute. *Murrell v. State*, 215 S.W.3d 96, 110 (Mo. banc 2007) (counsel even cited to *Murrell* in Appellant's initial brief below, and thus, clearly should have been aware of this rule). Appellant's counsel also submits that she had no reasonable strategy for failing to do so, and that failure to do so was not the product of any informed decision. Thus, this case exemplifies not only another instance in which J.B. received ineffective assistance in this case, but also the problems of raising IAC claims on direct appeal. *See* Point I.

B. Analysis.

On direct, the State asked Weitl about J.B.'s "conviction history" and the significance of any "non[-]sexual acts that may have gotten him in the legal system." (Tr. 259). The State's attorney proceeded to ask Weitl to identify Exhibit 4, which the attorney's office prepared. (Tr. 259). After displaying Exhibit 4 to the jury, the Weitl agreed that it covered J.B.'s offense histories in the 1980's and 90's. (Tr. 261). Weitl testified that J.B. "was arrested for murder." (Tr. 261). The State asked her, "How was the murder case

[6] The State made the same arguments again in its substitute response before this Court: "As long as an expert relies upon the material … and the source of the records are the type that are reasonably relied upon by experts, admissibility is satisfied." (State Sub. Br. 37-38; State Br. 32).

resolved." (Tr. 262). Weitl said that J.B. was "allowed to plea to a lesser charge"— hindering prosecution— because he testified against the co-defendant. (Tr. 262).

The effect of this evidence was to tell the jury that J.B. was involved murdering someone; criminally charged as a co-defendant in a "murder case;" and that hindering prosecution was a "lesser charge" than murder, available only because J.B. worked out a deal against his co-defendant.

The State's claim that this evidence was relevant to the SVP issues is disingenuous based on the evidence it presented at trial. (State Sub. Br. 37). Weitl testified that she diagnosed J.B. with the mental disorders of pedophilic disorder and ASPD, which were both mental abnormalities. (Tr. 303, 378). When giving the basis for her diagnoses, Weitl did not mention an arrest for murder or involvement in a "murder case." (Tr. 303-307). She did rely on a conviction for "hindering prosecution" relative to ASPD. (Tr. 306). As did Scott. (Tr. 679).

The State's cross-examination of Scott in an attempt to manipulate the nature of the arrest evidence to suggest that J.B. was involved in murdering someone highlights the misleading and prejudicial nature of the evidence:

> [Attorney]: He was arrested for murder in 1980, correct?
>
> [Scott]: That's incorrect. He was prosecuted for obstruction. He did not murder anyone.
>
> [Attorney]: He was arrested for it, correct?
>
> [Scott]: He was arrested with a co-defendant who committed the murder, and he was never prosecuted for it. *To suggest that he's a murderer again risks misleading a jury, which I cannot do. It's part of my ethical principles to not let you misuse my work in a situation like that.*
>
> [Attorney]: Doctor, before you assume I'm trying to mislead, would you let me ask my questions. He was arrested for murder; yes?
>
> [Scott]: Yes.
>
> [Attorney]: And that police report consisted of him and a buddy looking for the son of the victim.
>
> [Scott]: Sure.

[Attorney]: And then they arrived at the location, and his buddy murdered the -- murdered the father of the person they were looking for.

[Scott]: Yes. That is what the prosecution of the case led, that's the conclusion, yes.

[Attorney]: And he was arrested as a co-defendant for murder and then took a deal?

[Scott]: And *the data showed that he didn't do it. So, you can call it taking a deal or maybe it went down the path of what really happened, and that is he didn't report a crime and therefore obstructed justice*.

[Attorney]: And he got a conviction for hindering prosecution, correct?

[Scott]: Yes.

(Tr. 755-756) (emphasis supplied).

No expert testified that the "murder case" was evidence that a mental abnormality make J.B. more likely than not to commit predatory acts of sexual violence, which are all contact sexual offenses, if not confined. There was no allegation that failing to report a crime committed by another person meant J.B. had any predisposition to commit sexually violent offenses, an inability to control his predatory and sexually violent behavior, or was likely to commit a predatory and sexually violent offense in the future. The State did not attempt to connect the murder by another person, or J.B.'s hindering prosecution conviction, with any alleged underlying sexual conduct. Thus, suggesting that J.B. was involved in murdering someone did not make it more or less probable that he was predisposed to commit sexual offenses, had serious difficulty controlling sexual behavior, or would commit sexual offenses of any kind in the future. It was not logically relevant.

Even if the basis of an expert opinion, it did not mean "murder" evidence was admissible. Section 490.065 contemplates that experts will rely on information that is inadmissible and that does not come into evidence when forming opinions. *Whitnell v. State*, 129 S.W.3d 409, 416 (Mo. App. E.D. 2004). Weitl's testimony that hindering prosecution was evidence of ASPD reveals that she could have relied on the underlying conduct without ever mentioning that J.B.'s associate was involved in a murder. (Tr.306). If it was not necessary for her to discuss murder in explaining a diagnosis and mental abnormality opinion, then it was not necessary for the State to present it to the jury.

III. Failure to Strike Juror 4 Was Error

Initially the State argued on appeal that "there is no indication in the record that Juror 4 [Mr. Swaringim] responded to any relevant question." (State Br. 38). Now it claims that "[t]here is no indication in the record what, if anything Juror 4 endorsed or agreed with" when he raised his hand during voir dire. (State Sub. Br. 43). This shift tacitly recognizes that raising a hand is responding to the questions asked.

The State also claims that trial counsel "*said* that Juror 4 raised his hand for the purpose of agreeing with another juror," and implies that trial counsel made a false claim on the record or was mistaken about who raised their hand or why Juror 4 raised his hand. (State Sub. Br. 44). This Court must reject the State's incredulous suggestions.

Every attorney has a duty of candor to the court. An attorney shall not make a false statement of fact to the court, or fail to correct a false statement made to the court. Rule 4-3.3. An attorney must not falsify evidence. Rule 3-3.4. These duties existed during voir dire.

Ms. Dolin, appellate counsel for the State, was co-counsel at trial. (Tr. 3). She was present when her co-counsel questioned the panel and saw Mr. Swaringim raise his hand to answer questions, seated in the very front of the jury pool. (Tr. 51). She was present when defense counsel questioned the jury pool, and Mr. Swaringim raised his hand to indicate his agreement with Juror 19, Ms. Hughes. (Tr. 146). She was present when defense counsel called out the numbers of each venireperson who raised his or her hand, section by section, for the record. (Tr. 146). When defense counsel could not see all of the numbers, she said so. (Tr. 146). One venireperson, Ms. Bone, number 61, spoke up to let defense counsel know that she had raised her hand, but her number was not called. (Tr. 147). Ms. Dolin did not tell the trial court that Juror 4 did not actually raise his hand, or that she believed defense counsel was mistaken or dishonest.

At trial, Ms. Dolin personally acknowledged that Mr. Swaringim raised his hand.[7] (Tr. 188). She objected to the motion to strike him, saying, "I'm not willing to consent to anything that's based just on a hand raise. If there's something else, they verbalized or articulated some other reason in addition to that, I'm open to discussing it, but just a hand raise is not sufficient." (Tr. 188, 191). Defense counsel argued that "raising one's hand and agreeing to it and being identified on the record is a sufficient agreement and statement to be recognized and should be recognized." (Tr. 189). Again, Ms. Dolin did not suggest that defense counsel misrepresented who had raised their hand, or misidentified someone. Rather, she contended raising a hand was not enough.

The trial court below acknowledged that Mr. Swaringim, and others, responded to trial counsel's question by raising their hands. (Tr. 189). By raising his hand, Mr. Swaringim disclosed that he agreed with Ms. Hughes. Therefore, he disclosed that he, too, had formed opinions and beliefs that going to prison was not enough resolution given the underlying crimes and that J.B. needed to be confined, and expressed an inability to follow the Court's instructions and that he had already made a decision about J.B.'s mental status. (Tr. 142-146).

[7] Ms. Dolin's co-counsel also acknowledged hand-raising as disclosure of agreement with Ms. Hughes, specifically following up with Juror 55, Mr. Branstetter, about the extent of his agreement with Juror 19, in efforts to rehabilitate him. (Tr. 171, 173-174). The record further reveals that a show of hands was routine. The trial judge asked for a response from the venire panel, by requesting that jurors "please raise your hand." (Tr. 16). When a juror in the back raised a hand and his or her number could not be seen, the juror was asked to stand up to ensure their number was visible. (Tr. 16). The trial judge continued to ask preliminary questioning, noting "I see no hands" when there were no responses to his questions. (Tr. 17-18). The State's attorney opened voir dire asking for jurors to raise their hands in response to his question. (Tr. 27).

CONCLUSION

For the reasons stated herein, and in his substitute brief, J.B. is entitled to a new trial. Even if this Court determines that J.B.'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.

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). The brief was completed using Microsoft Word, Office 2013, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the reply brief contains 6,541 words and does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Chelseá R. Mitchell

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Chelseá R. Mitchell