IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF D.N., Appellant.	)	No. SC SC98077

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE EASTERN DISTRICT COURT OF APPEALS, FROM THE
CIRCUIT COURT OF CLARK COUNTY, MISSOURI
FIRST JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE RICK R. ROBERTS, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

D.N. appeals the judgment and order of the Honorable Rick Roberts following a jury trial in Clark County, Missouri, committing D.N. to secure confinement in the custody of the Department of Mental Health ("DMH") as a SVP ("SVP"). This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and jurisdiction lay in the Missouri Court of Appeals, Eastern District, Article V, Section 3, Missouri Constitution RSMO §477.050. Following a written option dated July 9, 2019, the state sought transfer by motion, and this court granted said motion pursuant to article V § 10 of the Missouri constitution.

STATEMENT OF FACTS

D.N. N. committed a sexually violent offense, the crime of sexual abuse, in 2004. (Tr. 269). D.N. never acted out sexually while in DOC. (Tr. 373). He had no sexual misconduct violations while in DOC, or violent offenses. (Tr. 361). In the past 10 years he had not received any conduct violations at all. (Tr. 361). He successfully completed the year-long Missouri Sex Offender Treatment Program ("MoSOP") while incarcerated. (Tr. 365-66). D.N.'s MoSOP therapist recommended that he should be transitioned to community supervision as soon as possible and thereafter be required to complete a community-based treatment program approved by his parole officer. (Tr. 365).

Instead, the State petitioned to civilly commit him as a sexually violent predator ("SVP"). (Lf. d2). The Department of Mental Health, following this petition, found that D.N. did not meet criteria as a SVP. (Tr 423, Lf d14). The State's petition was tried by a jury in June of 2017. (Tr. 3).

Jury Selection

The morning of trial, the State argued that D.N. should not be permitted to conduct voir dire about "explicit detail[s]" of his underlying offenses. (Tr. 16-17). The State argued that anything about the age of D.N.'s victims, how many victims, or the sex acts themselves would be inflammatory. (Tr. 16-17). D.N. countered that it was relevant to inquire about the age of the victims "and if anybody has strong feelings about that that would cause them to be biased and impartial." (Tr. 17). He also argued he should be allowed to inquire whether the fact that one of his victims was intellectually disabled

would cause the jurors to be biased against him. (Tr. 17). The trial court denied the motion. (Tr. 17).

During voir dire, defense counsel told the jury panel that, "you're likely to hear evidence that D.N. has a victim that is 10 years old and an alleged victim that is 10 years old at the time of the offense." (Tr. 169). The State's objection, made based on its pretrial motion, was sustained. (Tr. 169).

The State's Case

The State hired Dr. Harry Goldberg, a clinical psychologist who is not licensed in Missouri. (Tr. 258-59). Dr. Goldberg testified that he is hired to comment on whether he thinks an individual has a mental abnormality, and whether the individual is "more likely than not to engage in sexually violent acts as a result of that mental abnormality." (Tr. 268).

Dr. Goldberg looked at D.N.'s sexual offending history. (Tr. 273). In 1989, D.N. pled guilty to indecent conduct with a child after his eight-year-old son reported that D.N. placed his penis against the boy's buttocks. (Tr. 273-74). D.N. completed the resulting two-year probation term in 1992. (Tr. 278).

Dr. Goldberg said that D.N. committed a sexual offense against an adult woman named Emily in 1992. (Tr. 278-79). The woman was sleeping when she felt someone touching her and engaging in sexual activity. (Tr. 279). When she realized that it was D.N. and not her boyfriend, D.N. fled her apartment. (Tr. 279). He pled guilty to sodomy and was sentenced to five years in DOC. (Tr. 279-80). D.N. told Dr. Goldberg that he had

been partying that night with a girlfriend, and mistakenly thought he had gone into the girlfriend's apartment and was touching her.[1] (Tr. 280). D.N. was convicted and released from prison in 1995. (Tr. 281).

According to Dr. Goldberg, in 1997 there were additional allegations of misconduct. (Tr. 282). He said that there was suspicion of some unidentified conduct of a "sexual nature" involving D.N.'s disabled sister-in-law. (Tr. 282-83). There was never a police report about what Dr. Goldberg said "were just suspicions" less reliable than a conviction. (Tr. 334-36). Dr. Goldberg also said that a woman called police after she saw D.N. looking at two girls in bathing suits who were outside on the lawn. (Tr. 283-84). He said there was no indicated D.N. did anything sexual or how old the girls were. (Tr. 337).

Later, Mr. N.'s 10- or 11-year-old stepson accused D.N. of sexually abusing him on three instances. (Tr. 285-86). At the time of the report, the stepson said that when he was four, D.N. touched and sucked his penis. (Tr. 286). He said that D.N. did the same thing when he was seven. (Tr. 286). The stepson also said that there was another incident when he was in preschool or kindergarten, where D.N. allegedly put his penis on the boy's buttocks. (Tr. 286). No charges were pursued, however Dr. Goldberg said that "there was a preponderance of the evidence [finding] that something happened" by a state agency. (Tr. 286-87). D.N. consistently said that it never happened. (Tr. 287). The stepson was deposed in this case, and said that the conduct actually occurred when he was around eight years old, not four, and changed his version of when the alleged abuse happened and how often it happened. (Tr. 337-38).

[1] The woman was also referred to as Mr. N.'s "girlfriend" or "friend-with-benefits," a term that refers to having a sexual relationship. (Tr. 333).

Dr. Goldberg testified that D.N. was arrested in 2004. (Tr. 287). His wife, Candie, reported that she saw D.N. and her disabled 39-year-old sister with their pants down in the bedroom. (Tr. 287). D.N. reportedly said something to the effect of, "Well, I can't get it here. I got to get it somewhere." (Tr. 287). Thereafter, he placed a gun to himself and said he was going to kill himself. (Tr. 288). He was ultimately convicted of sexual abuse and sentenced to 15 years in prison. (Tr. 288). D.N. admitted that he had sex with the sister-in-law. (Tr. 289).

Dr. Goldberg also looked at D.N.'s general criminal history, which included offenses for driving while under the influence, selling marijuana to an undercover officer, and failure to pay child support. (Tr. 291-92). While on probation for those offense, he had violations for possessing marijuana, not maintaining employment, and failing to report a change in residence to his PO. (Tr. 291).

Next, Dr. Goldberg diagnosed D.N. with three disorders from the Diagnostic and Statistical Manual ("DSM-5"): pedophilic disorder, sexually attracted to males; other specified paraphilic disorder, nonconsensual sex; and other specified personality disorder, antisocial personality. (Tr. 293-94). Dr. Goldberg diagnosed pedophilic disorder based on the two incidents with D.N.'s son and stepson. (Tr. 295). He said that D.N. had four incidents in which he had been accused of sexual misconduct with individuals incapable of giving consent—his two children, the sister-in-law, and the sleeping woman—as the basis for the other specified paraphilic disorder diagnosis. (Tr. 296-97). Finally, Dr. Goldberg diagnosed other specified personality disorder, antisocial personality because D.N. has "criminal personality traits." (Tr. 297-98).

Dr. Goldberg said that these conditions are not mental abnormalities on their own, but they work together to form one. (Tr. 301). The conditions interact together to cause emotional and volitional capacity problems because D.N. had been through treatment and sanctioned, but reoffended. (Tr. 301-302). He also said the conditions together predispose D.N. to commit sexually violent offenses. (Tr. 302).

Turning to the risk element, Dr. Goldberg said that D.N.'s past offenses were predatory, and that any future offenses would be, too. (Tr. 304). He used four actuarial instruments: the Static-99R, Static-2002R, SORAG, and VRAG-R. (Tr. 305). Dr. Goldberg assigned a score of four on the Static-99R, which he said put D.N. within the "above average risk range" and a similar score on the Static-2002R (Tr. 309). A score of four corresponds to an 11% likelihood of re-offense after five years. (Tr. 309).

The VRAG and SORAG combine sexual violence and nonsexual violence[2] together. (Tr. 310). Dr. Goldberg assigned a score of four on the VRAG-R, which corresponds to a 34% estimated chance of committing a sexual or non-sexually violent offense in five years, and 60% chance within 12 years. (Tr. 310). A score of eleven on the SORAG corresponded to a 31% chance of committing a sexually violent or non-sexually violent offense within 5 years, or 58% over 12 years. (Tr. 310).

Dr. Goldberg also considered other dynamic risk factors, using the SRA-FV. (Tr. 312-13). D.N. received points for sexual interest in children, sexual preoccupation,

[2] Including assaults and murders, behavior that is not present in Mr. N.'s history and outside the scope of whether Mr. N. is at risk of sexually reoffending. (Tr. 354, 356).

callousness,[3] grievance thinking, dysfunctional coping, resistance to rules and supervision, impulsivity, and substance abuse. (Tr. 313-15). While D.N. has had strokes and uses a walker to move, Dr. Goldberg did not think he had physical or medical problems affecting his risk of committing another offense. (Tr. 316). He concluded that D.N. is more likely than not to engage in a predatory act of sexual violence if not confined in a secure facility and meets SVP criteria. (Tr. 323).

Candie Davis, D.N.'s ex-wife, testified. (Tr. 380-81). During their marriage, D.N. worked at a sawmill until his fingers were cut off, and the family was fraught with ongoing financial instability. (Tr. 383, 390, 399). Ms. Davis was aware of the accusations her son made against D.N. (Tr. 384-85). She also said that D.N.'s son told her that D.N. touched him in the shower. (Tr. 388). Ms. Davis testified about seeing D.N. and her sister in the bedroom with their pants down in 2004, after which D.N. grabbed their daughter and also said he would kill himself. (Tr. 385-87). She did not know anything about suspicions of earlier sexual conduct with the sister. (Tr. 391).

D.N.'s stepson, then 23 years old, also testified for the State. (Tr. 403). He said that he lived with D.N. and Ms. Davis until he was 11 years old, when D.N. "raped my aunt and me." (Tr. 403).

D.N.'s stepson said that he saw D.N. on top of his aunt, told his mom, and later saw D.N. with a gun threatening to shoot himself. (Tr. 405). He said that was not the first time he had seen D.N. with his aunt; he did not know how many times he had seen it before and had tried to say something, but no one believed him. (Tr. 405-6).

[3] Research looking at what factors are valid and reliable in the field indicates that that callousness is not substantiated as a risk factor related to recidivism. (Tr. 357-58).

Concerning the allegations that D.N. had sexually abused him, he said that D.N. "put his mouth on my private areas, penetrate me inappropriately." (Tr. 406). It started when he was about four, happened "a lot," and stopped when he was about eight or nine years old. (Tr. 406). The stepson said he told Ms. Davis that he was "raped" and D.N. said he was lying. (Tr. 404). The stepson also said that D.N. hit him when he snuck out. (Tr. 404).

The stepson acknowledged that he has schizophrenia and that there have been times when he saw something that was not there. (Tr. 408). The stepson remembered telling defense counsel in a deposition that the offenses started when he was eight years old. (Tr. 409). He testified at trial that he knew it happened, but could not say when it happened or when it started or ended, and also that the alleged abuse ended six months to a year before D.N. went to prison. (Tr. 409). He never told anyone what had happened prior to being "locked up" in a boys home "for psychiatry" where the boys talked about things they had been through and he learned that that kind of touching was inappropriate. (Tr. 411).

The Defense

DMH forensic examiner and psychologist Dr. Jeffery Kline testified on behalf of the defense. (Tr. 414). He was appointed by the court to perform an evaluation in this case. (Tr. 419).

Dr. Kline determined that D.N. does not suffer from a mental abnormality as defined by statute. (Tr. 423-24, 433). He also relied on the DSM-5. (Tr. 424). Dr. Kline did not diagnose D.N. with pedophilic disorder because there was no evidence to suggest

that he had a sexual preference or intense interest in sex with children. (Tr. 425). He explained that pedophilic disorder is more than just committing a sexual offense; it has to involve preferential sexual attraction and people can commit sexual offenses against children even if they are not necessarily attracted to children. (Tr. 425, 450-53). He further explained that although D.N. had sexual behaviors, the diagnostic criteria require an intense, persistent arousal to children and there was no evidence of that. (Tr. 425, 450-51).

Similarly, Dr. Kline did not diagnose D.N. with other specified paraphilic disorder, non-consent, because there was not evidence that D.N. was attracted to another's lack of consent. (Tr. 427-31, 454-55). He said there was "absolutely no evidence" that D.N. was attracted to non-consent because of age, unconsciousness, or legal ability to give consent. (Tr. 455). He told the State's attorney that he would not make a decision based on "no evidence." (Tr. 455).

Dr. Kline agreed that D.N. did not meet criteria for an antisocial personality disorder diagnosis. (Tr. 442). He also did not see information suggesting that D.N. has any other personality disorder. (Tr. 442). Dr. Kline concluded that D.N. does not meet SVP criteria. (Tr. 446, 465).

Dr. Kline testified that he "combed through every single page" for additional information concerning the sister-in-law, but nothing suggested something sexual had actually happened in 1997. (Tr. 432).

Dr. Kline was concerned with Dr. Goldberg's use of the VRAG-R and SORAG tests because the SORAG is a "very old" test which has a different updated version, and

the VRAG-R was created by combining the old SORAG with another old test. (Tr. 436). Dr. Kline explained that using both was like "double dipping" and that the method lacked any research. (Tr. 436). He also explained that the VRAG-R measured risk of committing any future violent act, examines very different people than who are eligible for SVP commitment, and that there is not any research demonstrating it actually predicts risk at issue. (Tr. 440).

The trial court would not permit Dr. Kline to testify about his assessment of D.N.'s risk because he found that D.N. did not have a mental abnormality. (Tr. 423). In an offer of proof, Dr. Kline said that he assigned D.N. a score of 4 on the Static-99R. (Tr. 468). He also used the Stable-2007, which looks at dynamic factors, and can inform a decision about whether a person is appropriate for release. (Tr. 468). Dr. Kline determined that D.N. is not more likely than not to commit a predatory sexually violent offense if not confined to a secure facility. (Tr. 469).

D.N. testified at trial. (Tr. 479). He explained that in 1989, he and his son showered together. (Tr. 481). He said he plead guilty to indecent contact with a minor because his son's mother had just been arrested and she could have been sent to prison. (Tr. 482). On cross, he also said that his son later confessed that the mother put him up to it because she wanted to get child support. (Tr. 504). D.N. testified that he did not do anything to his stepson. (Tr. 505).

D.N. explained that he was at rock bottom in 1992, drinking and using drugs a lot after his friend Sammy died. (Tr. 483-84). He said that he was at a party at his girlfriend's apartment, which was next to Emily's apartment, one evening. (Tr. 484). After returning

from getting cigarettes, while drunk and high on cocaine, he came to the first apartment, it was open, and he thought it was his girlfriend's apartment. (Tr. 485). D.N. thought it was his girlfriend in bed when he "started showing this girl love" with sexual touching. (Tr. 485). The girl in bed said, "Stop it, Mike," turned on the light, and fell against the table and the lamp, at which time they both "realized it." (Tr. 485). D.N. pled guilty because he said he was guilty of the crime. (Tr. 485). He said that he put himself in Emily's shoes and thought about how he scared her. (Tr. 486).

D.N. testified that he was seeking revenge against his wife, Ms. Davis, and wanted to be mean to her when he committed the next offense against his sister-in-law. (Tr. 488). Initially he thought it was his wife, not his sister-in-law. (Tr. 507-8). He explained that he did not look at things through his wife's perspective and it was never about sex. (Tr. 488, 490). He also said that he didn't see it through the sister-in-law's eyes until MoSOP. (Tr. 500). D.N. said that he made a choice, and that he can go a different direction and not be the same person anymore. (Tr. 501). He said he was wrong when it came to his convictions. (Tr. 502).

D.N.'s MoSOP therapist, Mr. Walker, helped him evaluate his behaviors and see that revenge-seeking and a sense of entitlement are thinking errors. (Tr. 490-91). D.N. became aware of the impact his behaviors had on others and regretted his actions. (Tr. 500-1). He learned to look at himself when he experienced problems, not at others, to use "Walker's Law"—to stop and think before acting—, and to come up with good solutions rather than making the problem bigger. (Tr. 491, 493). To prevent harming someone else, D.N. will use this "stop and think" and question his motives and ask himself why he is

behaving or feeling a certain way. (Tr. 501). He will also seek counsel from his minister and therapist. (Tr. 501-2).

Verdict and Commitment

D.N.'s motion for a directed verdict at the close of all evidence was denied. (Lf d 30-1). The case was submitted to the jury and the jury returned a verdict finding D.N. is an SVP. (Tr 549). The trial court entered and order and judgment committing D.N. to DMH. (Tr. 549,554).

Motion for a New Trial

At the hearing on D.N.'s motion for a new trial, defense counsel confessed that he had been ineffective in failing to investigate and failing to request a change of venue. (Tr. 552). At the time of D.N.'s trial, his brother Jimmy had pending criminal charges for child molestation in the first degree. *See State v. J. N.*, 16CK-CR00382-01. (Felony information filed 2/3/17 charging 2 counts of child molestation, first degree, in violation of §566.067). He informed the court he had learned that prospective Juror 68 approached Jimmy's criminal defense attorney concerning the bias expressed by venire persons during D.N.'s trial. (Tr. 552-53).

Defense counsel disclosed that he was not aware of Jimmy's pending sex case and the "significant feelings and opinions" that were related to it, or of the "bad blood" and general feelings about the N.s from the community until jury selection. (Tr. 552). He admitted that he should have investigated that prior to trial. (Tr. 552).

The trial court denied the motion for new trial. (Tr. 553). This appeal follows.

Additional facts necessary to the disposition of the issues raised herein will be set out in the Argument portion of the brief as necessary.

POINTS RELIED ON

I.

The trial court abused its discretion when it prohibited D.N. from questioning the venire panel during *voir dire* about the age of victims and whether anyone had strong feelings about the age of the victims that would cause them to be biased, in that the victims' ages were critical facts of the case that had substantial potential for revealing any disqualifying basis because of sympathies for a child and were facts emphasized by the State throughout the trial. The trial court's denial of *voir dire* on the victims' age prevented the defense from uncovering bias, and therefore denied D.N.'s due process rights to a fair trial and an impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and Art. I, §§10 and 22 of the Missouri Constitution.

State v. Clark, 981 S.W.2d 143 (Mo 1998)

State v. Ousley, 419 S.W.3d 65 (Mo. 2013)

Care and Treatment of Wolfe v. State, 291 S.W.3d 829 (Mo. App. W.D. 2009)

U.S. Const. Amend. XIV;

Mo. Const. Art. I, §§10, 22(a).

II.

The trial court abused its discretion when it excluded the expert testimony of Dr. Kline concerning his risk assessment and opinion that D.N. is not more likely than not to commit predatory acts of sexual violence if not confined based on the State's argument that this evidence was irrelevant since Dr. Kline did not believe D.N. suffers from a mental abnormality, because this ruling denied D.N. his due process rights to a fair trial, present a defense, and the assistance of a mental health expert independent of the prosecution guaranteed by U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that, as a forensic psychologist with experience and training in SVP evaluations and risk assessments and court-ordered to perform an SVP evaluation in this case, Dr. Kline was qualified to render an expert opinion on D.N.'s future dangerousness for the jury to consider; Dr. Kline's ultimate future dangerousness conclusion was based, in part, on his consideration of relevant and admissible actuarial instruments; Dr. Kline's opinion was key to D.N.'s defense to this essential element of the State's case; and his testimony was necessary to rebut the State's evidence and explain why D.N.'s actuarial scores and dynamic risk factors did not lead to a conclusion that he was more likely than not to commit predatory acts of sexual violence if not confined.

Care and Treatment of Wolfe v. State, 291 S.W.3d 829 (Mo. App. W.D. 2009);

In re Doyle, 428 S.W.3d 755, 759 (Mo. App. E.D. 2014);

U.S. Const. Amend. XIV; Mo. Const. art. I, §§10, 22(a).

III.

The trial court plainly erred when it submitted instruction 6 which failed to require the jury to state which mental abnormality or abnormalities they found required D.N. to be remanded to the care and treatment of the Department of Mental Health. RSMO 632.495 requires a unanimous verdict on the part of the jury. Without knowing what mental abnormality the jury agreed D.N. suffered from, or if they unanimously agreed on any mental abnormality, it is impossible to know if their verdict was, in fact, unanimous. This was error because this ruling denied D.N. his due process rights to a fair trial, present a defense, and a unanimous verdict guaranteed by U.S. Const. amend. XIV and Mo. Const. art. I, §10 and RSMO 632.495, in that what, if any, mental abnormality D.N. suffered from was a central issue in this case, and but for the possibility of a non-unanimous finding, D. N. was reasonably likely to have not been found to be a SVP.

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. 2011);

U.S. Const. Amend. XIV;

Mo. Const. art. I, §§10, 22(a).

IV.

D.N. was provided ineffective assistance of counsel when his attorney failed to provide any basic, meaningful representation at the probable cause hearing in that he: failed to file an answer before the probable cause hearing; failed to lodge any objection to the testimony of Angela Webb, the unlicensed psychologist who authored the end of confinement report for the department of corrections; failed to bring to the attention of the court that there was no report authored by a qualified expert; failed to bring to the attention of the court that Dr. Webb not only was unlicensed, but had failed her examinations. This was error in that failure to file an answer and subsequently object to the qualifications of the end of confinement report writer has been ruled to allow a finding of probable cause solely on the pleadings, and waive future complaints about the qualifications of the end of confinement report writer. In this case, any reasonably competent attorney would have filed an answer, and objected to the testimony of Dr. Webb. A reasonably competent attorney would have provided some basic level of representation at and leading into the probable cause hearing, including filing an answer and raising the issue of Dr. Webb's lack of a license. But for this failure there would have been no finding of probable cause- especially given the sole Missouri licensed psychologist to examine D.N. found he did not suffer from a qualifying mental abnormality, and was not more likely than not to reoffend. This error deprived D.N. of his rights to a fair trial, due process of law, and effective assistance of counsel guaranteed by the

Sixth and Fourteenth Amendments to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution.

Martineau v. State, 242 S.W.3d 456 (Mo.App. S.D. 2007);

U.S. Const. Amend. XIV;

Mo. Const. art. I, §§10, 22(a).

V.

The Circuit Court clearly erred when it failed to grant the motion for new trial, or hold an evidentiary hearing on the issue of juror misconduct by intentional non-disclosure in violation of D.N.'s rights to due process of law and trial by an impartial jury under a fair trial and an impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution in that there was a reliable report, found credible in a related circuit court proceeding, of jurors discussing the case outside of the court room, including their belief that the N. family was composed of child molesters, and not disclosing such in *voir dire*.

State v. McFadden, 391 S.W.3d 408 (Mo. banc 2013**)**

U.S. Const. Amend XIV;

Mo. Const. art. I, §§10, 22(a).

VI.

The Circuit Court clearly erred in denying counsel's oral supplement to his motion for new trial in that evidence was presented sufficient to show by a preponderance of the evidence that trial counsel was ineffective for failing to investigate the jury pool, and as a result, to timely move for a change of venue. This was error in that but for this failure, D.N. could have had a trial by an untainted jury pool- as it was, because of the failure, he was tried by a jury pool which believed his entire male family line were child molesters. A reasonably competent attorney would have investigated the jury pool, then moved for a change of venue as a result of this local bias. This error deprived D.N. of his rights to a fair trial, due process of law, and effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution

In the matter of the Care and Treatment of Grado 559 S.W.3d 888 (MO 2018)

U.S. Const.Amend. XIV;

Mo. Const. art. I, §§10, 22(a).

VII.

There was structural error in this case in that , through no fault of D.N., the trial transcript contains material omissions sufficient to deny him full and meaningful appellate review on some of his claims. Failure to preserve a transcript is structural error when, even if such a deletion (as is the case here) is partial, it denies the appellant full and meaningful review on appeal. Because of this error, D.N. was deprived of his rights under guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution

State v. Borden, 605 S.W.2d 88, 92 (Mo. banc 1980).

U.S. Const. XIV;

Mo. Const. art. I, §§10, 22(a).

ARGUMENT

I.

The trial court abused its discretion when it prohibited D.N. from questioning the venire panel during *voir dire* about the age of victims and whether anyone had strong feelings about the age of the victims that would cause them to be biased, in that the victims' ages were critical facts of the case that had substantial potential for revealing any disqualifying basis because of sympathies for a child and were facts emphasized by the State throughout the trial. The trial court's denial of *voir dire* on the victims' age prevented the defense from uncovering bias, and therefore denied D.N.'s due process rights to a fair trial and an impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and Art. I, §§10 and 22 of the Missouri Constitution.

Standard of Review

The trial court has discretion to judge the appropriateness of specific questions posed to the venire panel during voir dire. *Care and Treatment of Wolfe v. State*, 291 S.W.3d 829, 832 (Mo. App. W.D. 2009). On appeal, this court will review the trial court's voir dire rulings for an abuse of discretion and a showing of prejudice from such abuse. *Id.*

Facts

The morning of trial, the State argued that D.N. should not be permitted to conduct *voir dire* about "explicit detail[s]" of his underlying offenses. (Tr. 16-17). The State

argued that anything about the age of D.N.'s victims, how many victims, or the sex acts themselves would be inflammatory. (Tr. 16-17). D.N. countered that it was relevant to inquire about the age of the victims "and if anybody has strong feelings about that that would cause them to be biased and [not] impartial." (Tr. 17). He also argued he should be allowed to inquire whether the fact that one of his victims was intellectually disabled would cause the jurors to be biased against him. (Tr. 17). The trial court denied the motion. (Tr. 17).

During voir dire, defense counsel told the jury panel that, "you're likely to hear evidence that D.N. has a victim that is 10 years old and an alleged victim that is 10 years old at the time of the offense." (Tr. 169). The State's objection, made based on its pretrial motion, was sustained. (Tr. 169).

The trial court erred and abused its discretion in denying D.N. the opportunity to voir dire about the critical facts of the case. He preserved this allegation of error in his post-trial motion. (D37, p6-7).

Analysis

D.N. is entitled to a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998); U.S. Const. amend XIV; Mo. Const. art. I, §10 and, § 22(a). *And see Hudson v. Behring*, 261 S.W.3d 621, 624 (Mo. App. E.D. 2008) ("It is axiomatic that civil litigants have a constitutional right to a fair and impartial jury of twelve qualified jurors."). One way this right is guaranteed is through an adequate voir dire, the purpose of which is to discover bias or prejudice in order to select a fair and impartial jury. *Clark*, 981 S.W.2d at 146.

Counsel may not try the case in *voir dire* and "presentation of the facts in explicit detail during *voir dire* is inappropriate." *Id*.; *Wolfe*, 291 S.W.3d at 832. But, "An insufficient description of the facts jeopardizes appellant's right to an impartial jury. Therefore, some inquiry into the critical facts of the case is essential to a defendant's right to search for bias and prejudice in the jury[.]" *Clark*, 981 S.W.2d at 147. The right to an impartial jury is meaningless without the opportunity to prove bias. *Id*. "Every fact need not be disclosed to prospective jurors. Only those critical facts—facts with substantial potential for disqualifying bias—must be divulged to the venire." *Id*.

According to the Supreme Court of Missouri,

> A case involving a child victim can implicate personal bias and disqualify prospective jurors. *State v. Wacaser,* 794 S.W.2d 190 (Mo. banc 1990); *cf. Littell* [*v. Bi-State Transit Dev. Agency*], 423 S.W.2d [34,] 37 [(Mo. App. 1967] ("[I]n civil cases it is proper to probe the minds of prospective jurors to discover prejudice because of sympathy for a child."). The trial court must strike for cause prospective jurors when they exhibit prejudicial bias because the victim is a child. *Wacaser,* 794 S.W.2d at 191–193.

Clark, 981 S.W.2d at 147. *And see State v. Ousley*, 419 S.W.3d 65, 73-74 (Mo. banc 2013) (Teenage defendant's age and victims' age were critical facts into which defense counsel should have been allowed to inquire during voir dire in case alleging rape of 14-year-old).

In *Clark*, the trial court erred when it completely precluded the defense attorney from questioning prospective jurors about a 3-year-old victim who died. *Id*. Before trial, the State successfully argued a motion in limine to prohibit the defense from "seeking a commitment" from the venire panel by identifying specific circumstances in the case,

specifically, that the victim was three years old at the time." *Id*. at 145. During voir dire, the trial court would not permit questioning about the age of the victim. *Id*. at 145-46.

On appeal, the Supreme Court of Missouri ruled that the trial court's complete denial of voir dire on the victim's age prevented the defense from uncovering bias, and therefore denied the defendant the right to an impartial jury. *Id*. at 147. Therefore, the ruling was an abuse of discretion. *Id*. The Supreme Court concluded the defendant was prejudiced. *Id*. at 148. The prosecutor emphasized the fact that the victim was a child, calling her a "baby" multiple times and repeating that she was three years old in opening statement, and emphasized the age again in closing argument. *Id*. at 147.

In contrast, there was no error in limiting defense counsel's voir dire on explicit details in *Wolfe*. 291 S.W.3d at 833. Defense counsel told the panel about relevant convictions, that Mr. Wolfe was diagnosed as a pedophile, "meaning he has attractions to pre-pubescent girls in this particular case, young girls," and about four hospitalizations in specific mental health facilities. *Id*. at 831-32. He was not permitted to further tell the panel the dates, locations, duration, factual basis, victim information (including ages, relationships, injuries sustained), and ultimate outcomes of seven different sexual offenses,[4] and then ask if the potential jurors could wait until the case is over to decide whether or not to commit Mr. Wolfe. *Id*. at 833-32. The trial court believed this type of voir dire was improper, akin to arguing the case and asking the jury for a decision before actually trying the case. *Id*. at 832.

[4] For example, defense counsel wanted to tell the jury explicit details like: in "1978, Mr. Wolfe sexually assaulted his five-year-old niece. Injuries included vaginal tears and scratching. No charges were filed by the family. *Id*. at 832.

On appeal, this the court of appeals found that the trial court permitted defense counsel to voir dire on the critical facts of the case that had "substantial potential for revealing any disqualifying basis among the prospective jurors." *Id*. The Court said the trial court's concerns were reasonable. *Id*. The trial court did not abuse its discretion and Mr. Wolfe was not prejudiced. *Id*.

Here, defense counsel wanted to voir dire the panel about D.N.'s victims' ages. (Tr. 169). Under *Clark*, the victims' age was a critical fact with substantial potential for disqualifying bias. It was proper for defense counsel to probe the minds of the prospective jurors to discover prejudice and bias because of sympathies for a child. Defense counsel's questioning was limited to the critical facts; he did not attempt to inform the jury about the details of the specific conduct during the offenses, the victims' injuries or relationships, or other circumstances of the abuse, or attempt to elicit a commitment to a verdict in his client's favor, like in *Wolfe*. "The question presented the jury with only the portion of the facts of the case likely to give rise to disqualifying bias, and with no more facts than were required to discover the targeted bias." *Ousley*, 419 S.W.3d at 74. As a result of the trial court's ruling, defense counsel was not able to inquire about bias or prejudice because of the ages of any of the victims.

There is a real probability that D.N. suffered an injury as a result of the trial court's denial of voir dire on the subject of the victims' ages. The State emphasized the victims' ages in opening statement, immediately telling the jury that D.N. had "indecent contact with his eight-year-old son" and sodomized his stepson from the time he was 4 years old. (Tr. 248-49). She would emphasize the ages of D.N.'s victims – 4, 8, 10, 18,

38, “little girls,” “young girls,” “very young victims”-- nine more times in opening statement alone, and five times in closing argument. (Tr. 249-50, 533, 535, 543).

D.N. was improperly prohibited from asking questions about the critical fact of the victims’ uncontested ages, infringing on his right to adequate voir dire and a fair and impartial jury. This Court should reverse and remand for a new trial..

II.

The trial court abused its discretion when it excluded the expert testimony of Dr. Kline concerning his risk assessment and opinion that D.N. is not more likely than not to commit predatory acts of sexual violence if not confined based on the State's argument that this evidence was irrelevant since Dr. Kline did not believe D.N. suffers from a mental abnormality, because this ruling denied D.N. his due process rights to a fair trial, present a defense, and the assistance of a mental health expert independent of the prosecution guaranteed by U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that, as a forensic psychologist with experience and training in SVP evaluations and risk assessments and court-ordered to perform an SVP evaluation in this case, Dr. Kline was qualified to render an expert opinion on D.N.'s future dangerousness for the jury to consider; Dr. Kline's ultimate future dangerousness conclusion was based, in part, on his consideration of relevant and admissible actuarial instruments; Dr. Kline's opinion was key to D.N.'s defense to this essential element of the State's case; and his testimony was necessary to rebut the State's evidence and explain why D.N.'s actuarial scores and dynamic risk factors did not lead to a conclusion that he was more likely than not to commit predatory acts of sexual violence if not confined.

Standard of Review

The trial court's rulings on the admissibility of evidence are generally reviewed for an abuse of discretion. *Murrell v. State*, 215 S.W.3d 96, 109 (Mo. banc 2007). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic

of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id*. Prejudice occurs where there is a reasonable probability that the error affected the outcome of trial. *Id*.

When an evidentiary rule or principal is violated, the erroneous exclusion of evidence creates a rebuttable presumption of prejudice. *State v. Walkup*, 220 S.W.3d 748, 756-57 (Mo. banc 2007). In criminal cases, the State may rebut the presumption by proving the error was harmless beyond a reasonable doubt. *Id*. The burden of proof in SVP cases is clear and convincing evidence. §632.495.

Facts

The trial court would not permit Dr. Kline to testify about his assessment of D.N.'s risk because he found that D.N. did not have a mental abnormality.

Dr. Kline submitted his court-ordered SVP evaluation report directly to the trial court on December 1, 2016. (L.F. 14:1). He assessed for the presence of a mental abnormality and the likelihood of future sexually violent predation. (L.F. 14:17-21). The report documents that, within a reasonable degree of psychological certainty, D.N. does not suffer from a mental abnormality and is not more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. (L.F. 14:21).

Prior to trial, the State made a motion *in limine* to prohibit Dr. Kline from testifying about the risk assessment half of his evaluation, arguing that it was irrelevant and inadmissible for a doctor who did not find a mental abnormality to testify to risk. (Tr. 12-13). Defense counsel countered that Dr. Kline's risk assessment would be relevant for

rebutting the State's evidence and Dr. Goldberg's risk assessment. (Tr. 13). He further argued that excluding Dr. Kline's risk assessment would prevent D.N. from defending against one of the two elements in the case. (Tr. 13). The trial court sustained the State's motion. (Tr. 14).

At trial, Dr. Kline testified that D.N. does not suffer from a mental abnormality. (Tr. 423-24). He was asked about Dr. Goldberg's various diagnoses and why he did not make the same diagnoses. (Tr. 424). Dr. Kline did not diagnose D.N. with pedophilic disorder because there was no evidence to suggest that he had a sexual preference or intense interest in sex with children. (Tr. 425). Similarly, Dr. Kline did not diagnose other specified paraphilic disorder, non-consent, because there was "absolutely no evidence" that D.N. was attracted to non-consent because of age, unconsciousness, or legal ability to give consent. (Tr. 427-31, 454-55). Dr. Kline agreed that D.N. did not meet criteria for an antisocial personality disorder nor did he see evidence of any other personality disorder. (Tr. 442). Dr. Kline's determined that, to a reasonable degree of psychological certainty, D.N. does not suffer from a mental abnormality. (Tr. 433).

At that point, defense counsel told the court at a side bar that he wanted to begin questioning Dr. Kline about his risk assessment. (Tr. 433). The court ruled that he could question Dr. Kline about the reliability and validity of risk assessment tools employed by Dr. Goldberg, but "if he doesn't meet the [mental abnormality] first prong, there's nothing to get us to the second prong [risk assessment]." (Tr. 434).

In an offer of proof, Dr. Kline said that he reached an opinion on the risk element. (Tr. 467). As part of his risk assessment, he assigned D.N. a score of 4 on the Static-99R.

(Tr. 468). He also used the Stable-2007, which looks at dynamic factors. (Tr. 468). Dr. Kline determined that, within a reasonable degree of psychological certainty, D.N. is not more likely than not to commit a predatory sexually violent offense if not confined to a secure facility. (Tr. 469).

Analysis

Every citizen has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). The right to present a defense at trial is a fundamental element of due process. *State v. Rauch*, 118 S.W.3d 263, 276 (Mo. App. W.D. 2003); U.S. Const. amend XIV; Mo. Const. art. I, §10. That right encompasses the right to a defense mental health expert who can assist a defendant in challenging the State's evidence of his future dangerousness. *Id.*; *Ake v. Oklahoma*, 470 U.S. 68, 80, 83-84 (1985); *McWilliams v. Dunn*, 137 S.Ct. 1790, 1800 (2017) ("*Ake* clearly established that a defendant must receive the assistance of a mental health expert who is … independent of the prosecution[.]"). The assistance of an expert, like the assistance of counsel, is one of the basic tools necessary for an effective defense. *Ake*, 470 U.S. at 77. It includes the expert's help evaluating reports, presenting arguments that might explain issues, and testifying on the relevant issues. *Dunn*, 137 S.Ct. at 1800-1; *Ake*, at 84.

When the State places psychiatric testimony on the question of future dangerous before the jury, "the relevance of responsive psychiatric testimony [is] evident" and a defendant must be afforded an opportunity to offer a well-informed expert's opposing view. *Ake*, 470 U.S. at 84 (relying on *Barefoot v. Estelle*, 463 U.S. 880 (1983), decided, in part, on assumption that the factfinder would be presented with views of prosecutor's

mental health expert and "the opposing views of the defendant's doctors" at trial). D.N.'s future dangerous is not only relevant in an SVP proceeding, but it also is a necessary element the State must prove to have him committed under §632.495.1. *In re Brasch*, 332 S.W.3d 115, 121 (Mo. banc 2011); *In re A.B.*, 334 S.W.3d 746, 752 (Mo. App. E.D. 2011) ("the State must satisfy a two-prong test: (1) the offender must suffer from a mental abnormality; (2) that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility."); U.S. Const. amend. XIV; Mo. Const. Art. I. §10.

The denial of an opportunity to present relevant and competent evidence negating an essential element of the State's case may, in some cases, constitute a denial of due process. *State v. Copeland*, 928 S.W.2d 828, 837 (Mo. banc 1996) (citing *Simmons v. South Carolina*, 512 U.S. 154 (1994)). Where the State relies on a prediction of future dangerous, elemental due process principles must operate to require admission of the defendant's relevant evidence in rebuttal. *Simmons*, 512 U.S. at 156.

The State placed D.N.'s future dangerousness--the likelihood of committing predatory acts of sexual violence at issue--by filing a petition for his commitment under the SVPA and presenting Dr. Goldberg's testimony that he was more likely than not to commit predatory acts of sexual violence if not confined to a secure facility. Under *Ake*, the relevancy of Dr. Kline's responsive testimony about D.N.'s future dangerousness is evident and D.N. was entitled to present Dr. Kline's opposing view. The excluded evidence went directly to the ultimate issue of D.N.'s future dangerousness. It was relevant to whether the jury should believe the State's evidence that he was more likely

than not to commit predatory acts of sexual violence if not confined, an element of the State's case.

Dr. Kline's testimony was not only relevant, it was admissible under §490.065. There was no dispute that Dr. Kline was qualified as an expert and that his testimony would have assisted the jury in understanding the evidence or determining a fact in issue. *See* §490.065.1. His testimony incorporating the results of actuarial instruments, used in conjunction with his full clinical evaluation, was relevant and admissible. *Murrell*, 215 S.W.3d at 111-13; §490.065.3. Experts may testify about the results of actuarials and their statistical predictions as "part of the assessment as to whether [the defendant] is more likely than not to reoffend because … actuarials … are relevant to that determination." *Id*. at 113.

In this case, Dr. Kline scored the Static-99R and Stable-2007 actuarial instruments. (Tr. 467-68). The instruments are reasonably reliable and relied upon by professionals in the field. (Tr. 469-70). Dr. Kline determined that D.N. had a score of four on the Static-99R. (Tr. 468). The Stable-2007 measured other applicable dynamic factors. (Tr. 468). Dr. Kline saw no evidence that D.N. has additional risk factors not captured by the instruments. (L.F. 14:21). Ultimately, Dr. Kline concluded that, to a reasonable degree of psychological certainty, D.N. is not more likely than not to commit a predatory act of sexually violent offense if not confined. (Tr. 469; L.F. 14:21).

Consistent with the due process requirements announced in *Ake* and the admissibility actuarials under *Murrell*, experts routinely conclude a defendant does not suffer from a mental abnormality and testify about their risk assessment and their

ultimate conclusions as to the defendant's likelihood of future predatory acts of sexual violence. *See Murrell*, 215 S.W.3d at 101 (DMH evaluator did not conclude defendant had serious difficulty controlling his behavior —a requirement for a mental abnormality finding); *In re A.B.*, 334 S.W.3d at 751 ("Despite not finding a mental abnormality, which precludes an SVP finding, Dr. Neufeld went on to engage in a re-offending risk assessment, using the Static-99." He determined the defendant "is *not* more likely than not to re-offend if not confined, and thus concluded that [defendant] is *not* an SVP.").[5]

The facts pertinent to this point and the risk assessment evidence excluded at trial are nearly identical to those admitted in *In re Doyle*, 428 S.W.3d 755, 759 (Mo. App. E.D. 2014). In *Doyle*, Dr. Kline concluded the defendant did not have a mental abnormality. *Id*. As in D.N.'s case, he considered a pedophilia diagnosis, but concluded there was not evidence to confirm that the defendant was actually attracted to children, or that his behavior was drive by sexual urges or fantasies with children. *Id*. He similarly concluded there was not information to prove another possible diagnosis. *Id*. Dr. Kline calculated a four on the Static-99R and identified the presence of some risk factors. *Id*.

[5] For additional cases, *see also Matter of Brown v. State*, 519 S.W.3d 848, 852 (Mo. App. W.D. 2017) (expert opinioned defendant did not have a mental abnormality, was not more likely than not to reoffend); *and Smith v. State*, 148 S.W.3d 330 (Mo. App. S.D. 2004) (expert concluded pedophilia did not rise to level of mental abnormality because there was no evidence of serious difficulty controlling behavior, scored Static-99, and opined that defendant did not have more than a 50% risk of reoffending.); *In re Coffel*, 117 S.W.3d 116 (Mo. App. E.D. 2003) (expert found no mental abnormality and addressed risk assessment); *In re Care and Treatment of Collins*, 140 S.W.3d 121 (Mo. App. E.D. 2004) (defense expert concluded diagnosis did not predispose commission of sexually violent offenses or cause serious difficulty controlling behavior).

He concluded the defendant was not more likely than not to reoffend if not confined to a secure facility.[6] *Id*.

The trial court erred and abused any discretion it had when it refused to permit D.N. to present Dr. Kline's risk analysis and future dangerousness opinion to the jury. The court's ruling denied D.N. the ability to rebut the State's evidence of his future dangerousness and to present his only defense on this issue. "That, in itself, is prejudicial in most circumstances." *Walkup*, 220 S.W.3d at 758. Under *Ake*, D.N. was entitled to the assistance of a psychologist on this issue and the denial of that assistance deprived him of due process and a fair trial. *Ake*, 470 U.S. at 87; U.S. Const. Amend. XIV; Mo. Const. art. I, §10.

Beyond that, the context of the evidence at trial supports the conclusion that D.N. was prejudiced by the evidentiary error. The primary differences in Drs. Kline and Goldberg's risk assessments were the actuarial measures used. The jury could have believed that the VRAG-R and SORAG were not reliable and were outdated, that Dr. Goldberg misused them, and therefore his testimony was not reliable. (Tr. 435-41). That would have left the jury with consideration of Dr. Goldberg's testimony the Static actuarial instruments and dynamic risk factors in determining D.N.'s risk. (Tr. 305, 312-13). Drs. Kline and Goldberg calculated the same Static-99R score, a 4.[7] (Tr. 309, 468).

[6] Dr. Rosell also testified that he determined the defendant did not have a mental abnormality, about his risk assessment, including the Static-99R, and concluded that the defendant was not more likely than not to reoffend. *Id*.

[7] Dr. Goldberg did not identify the score on the Static-2002R, only that it was "pretty much the same" as the Static-99R. (Tr. 309).

Dr. Goldberg said that a score of four estimates an 11% likelihood of re-offense within five years. (Tr. 309). He concluded, based on the actuarial tools and risk factors he considered, that D.N. is more likely than not to engage in sexual predatory acts if not confined. (Tr. 323). D.N. was unable to present Dr. Kline's testimony to explain why a Static-99R score of four and dynamic risk factors did not mean he was more likely than not to so reoffend. This essentially left the State's evidence and the credibility of Dr. Goldberg's static and dynamic risk factor testimony unchallenged. If the jury had heard Dr. Kline's excluded testimony, there is a reasonable probability that the outcome of trial would have been different. Had the jury accepted this evidence about D.N.'s risk, the jury would have rendered a verdict that he was not an SVP. Without the evidence from Dr. Kline, the jury was left with only D.N.'s bare, unsubstantiated assertion. The jury was without a factual basis to conclude that D.N. was not "more likely than not" to reoffend even if they found he had a mental abnormality.

D.N. is entitled to a new, fair trial where he is entitled to the assistance of an expert on the future dangerousness issue, including the presentation of the expert's testimony at trial.

III.

The trial court plainly erred when it submitted instruction 6 which failed to require the jury to state which mental abnormality or abnormalities they found required D.N. to be remanded to the care and treatment of the Department of Mental Health. RSMO 632.495 requires a unanimous verdict on the part of the jury. Without knowing what mental abnormality the jury agreed D.N. suffered from, or if they unanimously agreed on any mental abnormality, it is impossible to know if their verdict was, in fact, unanimous. This was error because this ruling denied D.N. his due process rights to a fair trial, present a defense, and a unanimous verdict guaranteed by U.S. Const. amend. XIV and Mo. Const. art. I, §10 and RSMO 632.495, in that what, if any, mental abnormality D.N. suffered from was a central issue in this case, and but for the possibility of a non-unanimous finding, D. N. was reasonably likely to have not been found to be a SVP.

Standard of Review.

Counsel timely tended his proposed instructions, and raised the issue of their denial in his motion for new trial. (L.F. D 34, D37) However, he did not complain these grounds- as such this error is not preserved.

This Court has summarized the standard of review in civil cases as one "…must establish the instruction at issue misdirected, misled, or confused the jury. *Sorrell v. Norfolk S. Ry. Co.*, 249 S.W.3d 207, 209 (Mo. 2008). Additionally, prejudice must have resulted from an instructional error. *Id*., citing *Dhyne v. State Farm Fire & Cas. Co*., 188

S.W.3d 454, 459 (Mo. 2006). Whether a jury was instructed properly is a question of law this Court reviews de novo. *SKMDV Holdings, Inc. v. Green Jacobson, P.C.*, 494 S.W.3d 537, 553 (Mo.App. E.D. 2016)

However, as this error is not preserved, appellant requests plain error review under rule 30.02. Error possibly causing a non-unanimous verdict has been found to be plain in the criminal context. *State v. Celis-Garcia*, 344 S.W.3d 150, 154 (Mo. 2011). In this context, for instructional error to constitute plain error, the defendant must demonstrate the trial court " 'so misdirected or failed to instruct the jury' that the error affected the jury's verdict." *Celis-Garcia*, 344 S.W.3d at 154

Relevant Facts:

The state submitted what became Instruction number 6 at the instruction conference. This instruction was submitted over objection by respondent, though the objection was not on the grounds complained of in this point relied on. (LF D3 6)

Analysis

Unlike most Missouri civil cases, in a civil commitment proceeding under the SVP act the jury must be unanimous. RSMO § 632.495. This is in line with several quasi-criminal protections afforded to the respondent, including a probable cause hearing, and the right to counsel. And as Missouri appellate courts have ruled in criminal proceedings, a respondent in a SVP commitment case should have the right to be certain that their jury finds all elements unanimously- something which would only have been guaranteed by proper instructions, lacking in this case.

RSMO § 632.495 demands that a jury verdict in a SVP case be unanimous. In this case all of the jurors agreed that they found D.N. was a SVP. But this alone does not indicate that their verdict was truly unanimous.

In the criminal context it has been ruled that a defendant has received a unanimous verdict only where the instructions are clear as to what specific act he is being found guilty of committing. This is true even in "multiple acts" cases. A multiple act case is a case where multiple acts could uphold a single charge or conviction. *Celis-Garcia*, 344 S.W.3d at 155-7. In a multiple acts case the state must make it clear in the charges and in the instructions what act underlies each conviction, or, that they must agree unanimously on one of several possible acts. *Celis-Garcia*, 344 S.W.3d at 155-7, *State v. LeSieur*, 361 S.W.3d 458, 462 (Mo.App. W.D. 2012). To do otherwise imperils the defendant's right to a fair trial and his right to a unanimous verdict under the Missouri Constitution. *Celis-Garcia*, 344 S.W.3d at 155-7.

> "In multiple acts cases, the verdict director must be drafted so as to protect the defendant's right to a unanimous jury verdict. There are two options when there are distinct criminal acts:
>
> 1. The state elects one particular criminal act on which it will rely to support the charge and that particular criminal act is submitted for consideration in the verdict director; or
>
> 2. The state elects to submit multiple criminal acts for the jury's consideration. If the state elects to submit multiple criminal acts, a separate verdict director must be submitted for each particular criminal act supported by the evidence, and an instruction based on MAI-CR 3d 304.16 shall be given immediately preceding the first verdict director of the series."

MAI-CR 304.02 Note on Use 7.

This is directly analogous to D.N.'s case. D.N. was accused of having a mental abnormality which would leave him more likely than not to reoffend. The instructions actually given did not specify a mental abnormality. D.N. was diagnosed by one expert as having pedophilic disorder, personality disorder NOS or a paraphilia for non-consent. (Tr 296-8). Another expert found that he had no mental abnormality. (Tr 425-55). A third's opinion was not used at trial (presumably due to her having subsequently failed her licensing examination three times). (Tr 19-22).

D.N. is entitled to a unanimous verdict. RSMO§ 632.495 He is entitled to know what the jury found was a condition that mandated he be remanded to the department of mental health for the rest of his natural life. This is especially true as there is great variation in how appellate courts have treated different underlying conditions: Pedophilic disorder is nearly universally accepted as a basis for a finding that one is a SVP, Not otherwise specified paraphilias are the subject of ongoing litigation, and disorders such as schizophrenia are sometimes excluded. *Compare*: *In re Det. of New*, *In re Det. of New*, 21 N.E. 3d 406(Illinois 2014) (Frye hearing required for Paraphilia NOS, Non-consent); *In Matter of Care & Treatment of George v. State*, 515 S.W.3d 791, 797 (Mo.App. W.D. 2017) (discussing schizophrenia)

D.N. has no ability to know if the jury relied on a disorder which is nearly universally accepted, or if they relied on one which could be the basis of an appeal- or post *Grado*- a motion for post commitment relief or writ, since there was no challenge under *Daubert* or *Fry* in this case.

In this case the instructions provided by the state were enough to have "misdirected, misled, or confused the jury".[8] *Sorrell v. Norfolk S. Ry. Co.*, 249 S.W.3d 207, 209 (Mo. banc 2008). There were demands to be unanimous- but not on every element, including what mental abnormality. This resulted in prejudice as there is a real risk that there was a non-unanimous verdict. The instruction merely read:

INSTRUCTION NO. 6

If you believe the evidence clearly and convincingly establishes:

First, that the respondent was found guilty of sexual abuse in the Circuit Court of Clark County, State of Missouri, and

Second, that the offense for which the respondent was convicted was a sexually violent offense, and

Third, that the respondent suffers from a mental abnormality, and

Fourth, that this mental abnormality makes the respondent more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility,

then you will find that the respondent is a sexually violent predator.

However, unless you find and believe the evidence has clearly and convincingly established each and all of these propositions, you must find the respondent is not a sexually violent predator.

As used in this instruction, "sexually violent offense" includes the offense of sexual abuse.

As used in this instruction, "mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior.

As used in this instruction, "predatory" means acts directed towards individuals, including family members, for the primary purpose of victimization.

L.f. doc 36 p 9.

Further this is plain error impacting D.N.'s substantial rights. There is a real risk he was denied his rights to a unanimous jury. This has been found plain error in the criminal context, and should be in civil commitment as well. *Celis-Garcia,* 344 S.W.3d at 155-7

The SVP Act mandates a unanimous verdict and the appellate courts must extend *Celis Garcia* to the context of SVP proceedings.

IV.

D.N. was provided ineffective assistance of counsel when his attorney failed to provide any basic, meaningful representation at the probable cause hearing in that he: failed to file an answer before the probable cause hearing; failed to lodge any objection to the testimony of Angela Webb, the unlicensed psychologist who authored the end of confinement report for the department of corrections; failed to bring to the attention of the court that there was no report authored by a qualified expert; failed to bring to the attention of the court that Dr. Webb not only was unlicensed, but had failed her examinations. This was error in that failure to file an answer and subsequently object to the qualifications of the end of confinement report writer has been ruled to allow a finding of probable cause solely on the pleadings, and waive future complaints about the qualifications of the end of confinement report writer. In this case, any reasonably competent attorney would have filed an answer, and objected to the testimony of Dr. Webb. A reasonably competent attorney would have provided some basic level of representation at and leading into the probable cause hearing, including filing an answer and raising the issue of Dr. Webb's lack of a license. But for this failure there would have been no finding of probable cause- especially given the sole Missouri licensed psychologist to examine D.N. found he did not suffer from a qualifying mental abnormality, and was not more likely than not to reoffend. This error deprived D.N. of his rights to a fair trial, due process of law, and effective assistance of counsel guaranteed by the

Sixth and Fourteenth Amendments to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution.

Standard of Review

Claims of ineffective assistance of counsel can be raised in SVP proceedings.. *Grado v. State,* 559 S.W.3d 888, (Mo 2018)), opinion modified on denial of reh'g (Dec. 4, 2018). Generally when ineffective assistance of counsel claims are brought on direct appeal, the claim is evaluated on the face of the record. *State v. Wheat*, 775 S.W.2d 155, 157 (Mo. 1989)

This Court has suggested that the correct test for ineffective assistance of counsel in SVP cases may be the *Strickland* test. *Grado v. State,* 559 S.W.3d 888, (Mo 2018). However, a majority of judges has not ruled on this matter, with most postponing the decision. *Id*. If the standard is *Strickland* a movant must prove that (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstance, and that (2) he was prejudiced by counsel's deficient performance. Christian v. State, 502 S.W.3d 702, 705 (Mo.App. 2016); *Strickland v Washington*, 466 U.S 668(1984)

Facts

D.N.'s case, like all SVP commitment cases, began with an end of confinement report, drafted by a psychologist who worked for the department of corrections. However, D.N.'s psychologist was not fully licensed to practice in Missouri. (Tr 19-22) She had only a provisional license. (Tr 19-22). She would go on to not only remain

unlicensed, but to fail her licensing examination on three separate occasions. (Tr 19-22). The state did not attempt to use her testimony at trial, presumably due to these deficiencies. (Tr. *passim*).

Despite this, D.N.'s pre-trial attorney did not file an answer to the petition in this case. (Lf d1). Nor did he challenge the end of confinement report, or the qualifications of the author. Probable cause was found. (Lf d 11). After this finding, the department of mental health had a qualified examiner evaluate D.N.. (Lf d14). He found D.N. did not have a mental abnormality or otherwise meet criteria as a SVP. (Lf d14, 423). The state then hired another expert, also not licensed in Missouri, though licensed in other states. D.N. was ultimately found to be a SVP, and remanded to the care and treatment of the Department of Mental health.

Argument

Counsel was ineffective in this case, due to a near total dereliction of his duties leading to the probable cause hearing.

Missouri case law is clear- failure to challenge the qualifications of an end of confinement report writer waives future objections. *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 77 (Mo. 2009) ("Here, Mr. Closser failed to raise the issue of Dr. Suire's license at the probable cause hearing or earlier, although a copy of the report was attached to the petition filed two months earlier.…. Such conduct militates in favor of finding a waiver"). Further, where no answer is filed, the fact that the end of confinement report writer is unqualified does not matter if there is any other evidence- including the petition itself. *Amonette v. State*, 98 S.W.3d 593, 599 (Mo.App. E.D. 2003)

(In a case with no denial of the allegations in the petition on the record on the record, which was submitted on the petition, certified documents, and live testimony regarding an interview with the respondent, that the burden to make probable cause was met, even though the psychologist who performed the interview was not licensed.); *Martineau v. State*, 242 S.W.3d 456, 460 (Mo.App. S.D. 2007) ("Even without expert testimony, the petition's allegations can establish probable cause, at least when—as here—the allegations were not denied and supporting documentary evidence was admitted at the hearing".)

In this case reasonably competent counsel would have provided some bare minimum of representation at the probable cause stage of the proceedings. They would have filed an answer, and they would have challenged the qualifications of the end of confinement report writer. Counsel in this case did none of that.

Had counsel provided some modicum of representation at this stage, D.N. would not have faced commitment. Without the end of confinement report and Dr. Webb's testimony, there would have been no evidence to find probable cause. The statute is clear- if there is not evidence of probable cause, the case cannot continue. RSMO § 632.489 (2). Here probable cause was established using Dr. Webb's report and testimony, despite her lack of qualifications This is not a case where Dr. Web merely did nothave a Missouri license, but was merely from another state- it is a case where the state used an expert who objectively could not make the Missouri standards of minimum performance, even after three attempts. (Tr 19-22).

Worse, in this case the sole Missouri licensed practitioner to evaluate D.N., found D.N. had no mental abnormality. (Tr. 433). There is a very real risk that because counsel abandoned his responsibilities at the probable cause stage, D.N. was subject to a commitment a competent attorney would have forestalled. This case should be remanded.

V.

The Circuit Court clearly erred when it failed to grant the motion for new trial, or hold an evidentiary hearing on the issue of juror misconduct by intentional non-disclosure in that in violation of D.N.'s rights to due process of law and trial by an impartial jury under a fair trial and an impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution in that there was a reliable report, found credible in a related circuit court proceeding, of jurors discussing the case outside of the Court room, including their belief that the N. family was composed of child molesters, and not disclosing such in voir dire.

Standard of Review

D.N. did not raise the issue in this point with the trial court until the hearing on his motion for new trial (Tr. 551-53). The trial court permitted D.N. to raise and argue this issue at the hearing for plain error. (Tr. 551-53). This Court may consider plain errors of juror nondisclosure appearing on the face of the record, where the error so affected D.N.'s rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected. *See State v. Mays*, 63 S.W.3d 615, 624 (Mo. 2001). D.N. requests plain error review under Rule 30.02.

Relevant Facts

In this case there was jury misconduct in the form of negligent or purposeful non disclosure.

The State's attorney told the panel that voir dire "really is the most important part of the trial, because this is our opportunity to find 12 people who can sit on this case and be fair to both sides." (Tr. 40-41). She explained that her questions were looking for whether the prospective jurors could be fair and impartial, would "put a thumb on the scale" for either side, follow the law, and listen to all the evidence. (Tr. 42).

The panel was asked specific questions about listening to the evidence and following the law in spite of "not liking what kind of person [D.N.] is" and about using their personal experiences for or against D.N. in the trial. (Tr. 60, 63).

> The State's attorney pointed out D.N. at counsel table:
> D.N. is seated between them at their table. Although he has been in prison for a while, anyone think that they might be familiar with his name or his face? His name is D.N. N..

(Tr. 65). Jurors 3, 10, 25, 35, 52, 56, and 66 expressed during open voir dire that they knew members of the N. family and were familiar with rumors and issues with the family. (Tr. 65-70).

Juror 25 knew D.N.'s brother, J.N, who had just been arrested. (Tr. 65-66). Prospective Juror 64 was also familiar with J.N. and had heard "a lot of details" through rumors. (Tr. 67-68). Juror 25 added that they had also heard the rumors. (Tr. 68). Prospective Juror 52 knew D.N., his ex-wife and her children, and said that he was "familiar with what took place." (Tr. 67). Juror 3 knew the N. family and that "there were some issues in that family." (Tr. 68). Juror 10 had been D.N.'s friend for 35 years. (Tr. 65).

Juror 56 thought that he or she would be biased because they had heard the rumors, too. (Tr. 69). He that because he had heard things, "and since this is a relative

now," he would be biased. (Tr. 69). He thought the trial may have been for D.N.'s brother because of the stories he had heard. (Tr. 70). Juror 35 knew D.N. and his brother. (Tr. 71). And finally, prospective Juror 66 wasn't sure if D.N. belonged to the same N. family that lived down the street from him growing up, but because of knowing someone that had been sexually molested, the case hit too close to home and he couldn't be fair. (Tr. 70-71).

A noon recess was held during D.N.'s trial. (Tr. 145-46). Before the venire panel was released for lunch, the trial court gave them the following instruction:

> Justice requires that you not make up your mind about the case until all the evidence has been seen and heard. You must not discuss this case among yourselves or with anyone else or comment on anything you hear or learn in this trial till the case is concluded and you retire to the jury room for your deliberations. Also, you must not remain the presence of anyone who is discussing the case when the court is not in session.

(Tr. 146).

Prospective Jurors 3, 10, 25, 35, 52, 56, and 66 were asked to stay and speak privately with the court and attorneys. (Tr. 146). During their individual, private discussions with the court, outside of the hearing of the other venire persons, the prospective jurors disclosed their personal knowledge of the N.s.

After the trial concluded prospective Juror 68[9] disclosed that prospective jurors expressed opinions about D.N., his family, and his guilt to Jimmy's defense attorney. She testified at a hearing on Jimmy's motion for a change of venue. *State v. Donald J. N.*, 16CK-CR00382-01, www.courts.mo.gov.casenet, order dated 8/4/17. During the hearing,

[9] *See* State's Motion in Opposition, filed 7/7/17 (identifying R S as a member of the panel). *State v. Donald J. N.*, 16CK-CR00382-01, www.courts.mo.gov.casenet. Ms. S was prospective Juror 68 at Mr. N.'s trial. (Tr. 552).

she indicated that some jurors thought that "it runs in the family" and that either D.N. or his brother was guilty. *Motion for Leave to File for Change of Venue Out of Time*, filed on 6/27/17 and State's *Opposition to a Change of Venue*, filed on 7/17/17 in *State v. Donald J. N.*, 16CK-CR00382-01, www.courts.mo.gov.casenet. The circuit court found that "During the noon recess of that trial, at a table of 6 or 8 people, an opinion was expressed about [the N.] family and the extent of trouble with the law family members had been in." *State v. Donald J. N.*, 16CK-CR00382-01, www.courts.mo.gov.casenet, order dated 8/4/17.

Analysis

"Venirepersons must have an 'open mind, free from bias and prejudice.'" *State v. Ess*, 453 S.W.3d 196, 203 (Mo. banc 2015) (citation omitted). "Prospective jurors have a duty to answer all questions fully, fairly, and truthfully during voir dire." *Id.* "Failure to respond fully, fairly, and truthfully can deprive the parties of information needed to exercise peremptory challenges or challenges for cause to ensure an impartial jury is empaneled." *Id*. "A prospective juror's qualifications are not determined from a single response but rather from the entire voir dire examination." *Id.* at 204.

When juror nondisclosure is alleged in a motion for new trial, the trial court must determine: (1) if nondisclosure occurred, and if so, (2) whether it was intentional or unintentional. *Id*. A trial court has discretion in determining whether these requirements are met. *Mays*, 63 S.W.3d at 624. A new trial is warranted if prejudice resulted from unintentional nondisclosure that may have influenced the jury's verdict. *Id*. Bias and prejudice are presumed if nondisclosure was intentional. *Id.*; *Ess*, 435 S.W.3d at 205.

"Accordingly, a finding of intentional nondisclosure of a material issue is tantamount to a *per se* rule mandating a new trial." *Ess*, 435 S.W.3d at 205.

The party alleging nondisclosure must bring it to the courts attention as soon as he learns of it and has an opportunity. *Id*. Generally he must present evidence through testimony or affidavits of any juror or other witness, or some other evidence to establish the facts of the prejudicial nondisclosure. *Mays*, 63 S.W.3d at 625-26; *Ess*, 435 S.W.3d at 202

In *Ess*, the trial court opened jury selection by telling the venire panel that each venireperson's answers must be truthful, full, and complete because failure to be truthful could force the parties to retry the case. 435 S.W.3d at 204. The trial court also instructed the venire panel that it must not discuss any subject connected with the trial, form or express an opinion about it, talk to others about the case, or permit others to discuss it within their hearing before a lunch recess. *Id*.; MAI-CR3d 300.04. According to Venireperson 26, while sitting outside of the courtroom during the recess, Juror 3 said "this is an open-and-shut case;" Juror 11 told Juror 3 they were not supposed to talk about the trial. *Id*.

Juror 3 did not respond to any questions once voir dire resumed. *Id*. at 205. The panel was repeatedly asked questions about whether anyone had already formed an opinion or conclusion, or had any bias against the defendant.[10] *Id*. On appeal, the

[10] Questions asked during voir dire included: willingness to listen to what everyone had to say before making up your mind; any reason why you would not be a good juror; whether anyone needed to clarify or add anything about his or her ability to be a juror in the case; whether anyone had preconceived notions about the defendant's guilt or innocence. *Ess*, 453 S.W.3d at 204-5.

Supreme Court of Missouri found that Juror 3 failed to respond to repeated, clear, unequivocal questions about his ability to be fair and impartial. *Id*. Moreover, it found that there was no reasonable inability of Juror 3 to comprehend the information solicited by the questions asked during voir dire as it was clear from the record that the parties were probing for prejudices anyone might hold. *Id*. Therefore, the Court concluded the nondisclosure was intentional. *Id*.

Moreover, Juror 3 disregarded the trial court's instructions to be truthful and that he was prohibited from forming or expressing opinions about the case. *Id*. at 205-206. It could not be presumed that he would follow the instructions already violated once seated as a juror. *Id*. at 206. Failing to make a disclosure prevented the parties from probing his qualifications as a juror, and withholding any bias or prejudice was improper and violated the court's instructions. *Id*. "Most importantly, prospective venire persons and jurors who serve at trial who form either a premature conclusion or hold a bias work to serve an injustice to our criminal justice system that guarantees both the state and the defendant an impartial, indifferent jury." *Id*.

The Supreme Court of Missouri presumed bias and prejudice occurred due to Juror 3's intentional nondisclosure, and concluded that the defendant's right to a fair trial was violated because Juror 3 served on the jury. *Id*. Therefore, it held that the trial court abused its discretion in denying the defendant's motion for a new trial and remanded for a new trial. *Id*.

Even if non-disclosure is unintentional, it can likewise lead to reversible error. In the case of unintentional nondisclosure, the party seeking the new trial has the burden of

proving prejudice. Allegations of nondisclosure are not self-proving and must be proven. *State v. Smith*, 944 S.W.2d 901, 922 (Mo. banc 1997). The record must support all allegations of nondisclosure and prejudice, and the trial court's findings are reviewed for abuse of discretion. *Id.* Unintentional non-disclosure warrants a new trial only if prejudice resulted that may have affected the jury's verdict. *State v. Hill*, 412 S.W.3d 281 (MoApp. E.D. 2013).

In this case, at the outset of voir dire, the trial court instructed the members of the venire panel that, "Your answers must not only be truthful, but they must be full and complete." (Tr. 38). The trial court also told the jurors to raise their hand if they remembered something or needed to modify any answer they had given. (Tr. 38). A lunchtime recess was taken during defense counsel's voir dire. (Tr. 146). The trial court instructed the panel members not to make up their minds before the evidence was presented, and not to discuss the case or remain in the presence of anyone who was discussing the case before the recess. (Tr. 146). No juror notified the court that they expressed an opinion to other jurors or was in the presence of others who were discussing the case during the break.

After the trial concluded prospective Juror 68[11] disclosed that during the break other prospective jurors expressed opinions about D.N., his family, and his guilt to Jimmy's defense attorney. She testified at a hearing on Jimmy's motion for a change of venue. *State v. J. N.*, 16CK-CR00382-01, www.courts.mo.gov/casenet, order dated 8/4/17. During the hearing, she indicated that some jurors thought that "it runs in the

[11] *See* State's Motion in Opposition, filed 7/7/17. Ms. S. was Juror 68 at Mr. N.'s trial. (; Tr. 552).

family" and that either D.N. or his brother was guilty. *Motion for Leave to File for Change of Venue Out of Time*, filed on 6/27/17, and State's *Opposition to a Change of Venue*, filed on 7/17/17, in *State v. J. N.*, 16CK-CR00382-01, www.courts.mo.gov/casenet. The circuit court found that "During the noon recess of that trial, at a table of 6 or 8 people, an opinion was expressed about [the N.] family and the extent of trouble with the law family members had been in." *State v. J. N.*, 16CK-CR00382-01, www.courts.mo.gov/casenet, order dated 8/4/17.[12]

The Clark County Circuit Court's finding that that prospective jurors expressed opinions about D.N.'s family and discussed the family members' legal troubles is evidence that juror misconduct occurred. It raises a presumption of prejudice, shifting the burden to the State to prove otherwise. *Smotherman v. Cass Regional Medical Center*, 499 S.W.3d 709, 712 (Mo. banc 2016). The State cannot rebut the presumption of prejudice.

Further, Counsel asked questions with specificity that the jurors who harbored these beliefs should have disclosed them. Non-disclosure can only occur after a sufficiently clear question. *State v. McFadden*, 391 S.W.3d 408 (Mo. 2013) In this case, multiple clear questions should have brought forth this information. Examples included:

> "D.N. is seated between them at their table…. anyone think that might be familiar with his name or his face? His name is D.N. N.. …
>
> In these cases, we're looking for 12 jurors, not 12 robots. You know, we understand that everyone has history, everyone has experiences. We don't ask you to pretend like that never happened. You know, they all kind of make us who we are. But what we're asking is, you know, will you use those experiences as evidence against D.N. instead of the evidence we're going to present to you,

[12] A transcript of these proceedings was requested by prior appellate counsel, but has not yet been provided

because that wouldn't be fair to D.N. to use those -- those stories, that he had nothing to do with, against him.- probably about someone else being molested?"

[Tr 65,71]

The record indicates that the non-disclosure had to have been intentional, given the contrast between the questions asked, and the conversation by the jurors involved over lunch. Even if it was not, it still resulted in prejudice as seen through the ruling in case 16CK-CR00382-01. Counsel raised the issue as soon as he was aware of it. This cause should be remanded for a new trial

VI.

The Circuit Court clearly erred in denying counsel's oral supplement to his motion for new trial in that evidence presented was sufficient to show by a preponderance of the evidence that trial counsel was ineffective for failing to investigate the jury pool, and as a result, to timely move for a change of venue. This was error in that but for this failure, D.N. could have had a trial by a an untainted jury pool- as it was, because of the failure, he was tried by a jury pool which believed his entire male family line were child molesters. A reasonably competent attorney would have investigated the jury pool, then moved for a change of venue as a result of this local bias. This error deprived D.N. of his rights to a fair trial, due process of law, and effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution.

Standard of Review

To avoid needless repetition, Appellant integrates the standard of review from Point IV.

Facts

To avoid needleless repetition, counsel integrates the facts from Point V,

Argument.

As discussed in point V, there was significant bias against D.N., and his entire family, in the small community where they lived. A reasonably competent attorney would have promptly moved for a change of venue after even cursory investigation.

In Clark County there was a perception that the N.s were, as a group, child molesters. The venire panel's comments on the matter were pointed, and often quite blunt. For instance, Juror 3 noted that he knew of issues with the N.'s including sex offences with kids (Tr 68, 150), Juror 10 knew of sex offences in the family though they had also been friends with D.N. for many years. (Tr 65,154). Juror 25 knew about J. N.'s case ,and knew of other stories about the family. (tr 159). Juror 52 knew D.N., and about at least one of his cases. (Tr 67, 165). Juror 56 knew of extensive rumors and about J.N.'s case. (Tr 69, 147). Juror 66 knew of extensive rumors about the family. (Tr 70, 161). Juror 71 knew about issues with the family, and though the whole male family line needed help. (Tr 166).

Prior to trial, or the running of the time file for a a change of venue as a matter of right under Rule 51. [13]Trial counsel should have investigated, and moved for a change of venue. As it was, D.N. was tried in a community where his family had a reputation as child molesters to the point that a juror noted the entire male line "needed help". (Tr 166). Reasonably competent counsel would have investigated, and reasonable investigation would have revealed the tainted jury pool, as is evidenced by the answers given in voir dire.

[13] Clark County is a County of under Seventy five thousand people (appendix, document 2)

Nothing in the record indicates that trial counsel did any such investigation. In fact, trial counsel admitted at the motion for new trial hearing, that he did no such investigation. (Tr 552).

> "I would like to -- in the way jury selection went, like to point to the Court that I feel that I was ineffective in representing my client by not filing a motion for change of venue, one, because I wasn't aware of the client's brother's pending sex case that had significant feelings and opinions that were related to the jury panel. Had I investigated that, I probably would have filed a motion related to that. And then also sort of the family of the N.s in this community and their sort of the bad blood and the feelings generally about the community and this family, I had no knowledge of until we started jury selection, and I feel that I should have investigated that prior to trial, and because of that, I was ineffective.
>
> (Tr 552).

In *Getten v. State*, 96, S.W.3d 143, 151 (Mo.App W.D. 2003) the Court succinctly summarized the state of the law: "[T]here are numerous cases in which postconviction relief has been granted because of counsel's failure to interview witnesses or to check out leads." *Perkey v. State*, 68 S.W.3d 547, 552 (Mo.App.2001) (quoting *Blankenship v. State*, 23 S.W.3d 848, 852 (Mo.App.2000)). This is because "[c]ounsel has a duty to make reasonable professional investigations or to make a reasonable decision that makes particular investigations unnecessary." *Moore*, 827 S.W.2d at 215 (quoting *State v. Griffin*, 810 S.W.2d 956, 958 (Mo.App.1991)). "An argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation." *Perkey*, 68 S.W.3d at 551 (quoting *Clay v. State*, 954 S.W.2d 344, 349 (Mo.App.1997)). "Strategic choices made after less than a thorough investigation are only reasonable to the extent that reasonable professional judgment

would support the choice not to investigate further." *Anderson v. State*, 66 S.W.3d 770, 776 (Mo.App.2002).".

Here, Counsel had no reason not to investigate and no reason not to move for a change of venue. Counsel admitted he should have done this in the hearing on his motion for new trial (Tr 552) Reasonably competent counsel would have done this. There was no advantage to avoiding looking into potential jury bias. There even less advantage to staying in Clark County, wherein he was known as a member of a family group prone to molest children.

But for counsel failing to investigate the jury pool and move for a change of venue, D.N. had a reasonable chance at a different verdict. This case should be remanded for a new trial.

VII.

There was structural error in this case in that , through no fault of D.N., the trial transcript contains material omissions sufficient to deny him full and meaningful appellate review on some of his claims. Failure to preserve a transcript is structural error when, even if such a deletion (as is the case here) is partial, it denies the appellant full and meaningful review on appeal. Because of this error, D.N. was deprived of his rights under guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution

Standard of review

Where there is a total lack of a transcript, prejudice is presumed. See *Dykes v. McNeill*, 735 S.W.2d 213, 213–14 (Mo.App. S.D.1987). *See also State v. Cooper*, 16 S.W.3d 680, 682–83 (Mo.App. E.D.2000). Where the missing portion is partial, counsel must show due diligence in attempting to rectify the error, and that there was error in that the missing portions prevented appellate review of some or all claims in the brief. *See*, *State v. Borden*, 605 S.W.2d 88, 92 (Mo. banc 1980).

Relevant facts

The Ttrial in this case was sound recorded, then transcribed by the office of state court administrator. (Tr 1). Within the transcript, the word “Indiscernible” appears, by undersigned counsel’s count, 66 times. (Tr *passim*). None of these are in actual testimony. Instead they are marks by the court reporter that portions of the transcript could not be completed due to issues with the audio. (Tr passim). Although several of

these instances are single missing words, several include entire side bar conferences. (Tr 40, 76, 86, 89, 515)

Counsel for appellant contacted trial counsel for the state, and for the respondent. They were not able to reach a stipulation as to what occurred during the side bars. The underlying audio was filed with the appellate court

Argument

"Indiscernible." Approximately 66 times in the transcript, this word appears, obliterating entire side bars, or single words in sentences. Although many of the sections can be guessed by context, several are more problematic.

In *voir dire*, entire side bar conferences are missing. This includes a side bar on page 76, 86, and 89. Outside of *voir dire* several other side bars also totally evaded the microphone, including one on page 40, and 515. Other sections include repeatedly broken quotes from the parties, which although arguably intelligible at some points, read more like Mad Libs than quotes from a trial at others. For instance on page 97, the State offered:

> You know, just (indiscernible) lock him up and that's the case (indiscernible). And even if (indiscernible) it's incompletely highlighting one -- already talked about my motion in limine -- one act (indiscernible) asking the jury to (indiscernible).

(Tr 97)

D.N. is not afforded full meaningful appellate review based on this transcript, He has raised multiple complaints involving *voir dire*- which is missing multiple side bars. He is, as of newly issued Supreme Court decisions, entitled to effective assistance of counsel- but he cannot have the performance of his counsel reviewed independently in

multiple places. *Grado v. State*, SC 96830, 2018 WL 4572722, at *1 (Mo. Sept. 25, 2018), opinion modified on denial of reh'g (Dec. 4, 2018).

D.N. is entitled to full fair appellate review. Although he has the distinction of creating a new public defender policy, which mandates a court reporter at future Commitment trials, this change in policy does not guarantee D.N. the review of his case that he is entitled to. This case should be remanded for a new trial.

CONCLUSION

WHEREFORE, based on the arguments as set forth in this brief, appellant respectfully requests this Court remand for a new trial or such other relief as this Court sees fit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 20thday of December 2018 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, garrick.aplin@ago.mo.gov, via the Missouri e-filing system, care of Mr. Daniel McPherson, Office of the Attorney General.

/s/ Amy E. Lowe_____
Amy E. Lowe

Certificate of Compliance

I, Amy Lowe, 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 2002, in times new roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the corrected brief contains 16065 words

_____/s/ Amy E Lowe_