



**In the
Missouri Court of Appeals
Western District**

**IN THE MATTER OF THE CARE)
AND TREATMENT OF NICHOLAS)
GRADO A/K/A NICHOLAS R.) WD79756
GRADO, A/K/A NICHOLAS RYAN)
GRADO,) OPINION FILED: October 17, 2017
)
Appellant,)
)
v.)
)
STATE OF MISSOURI,)
)
Respondent.)**

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Kathleen A. Forsyth, Judge**

Before Division Two: Anthony Rex Gabbert, Presiding Judge, Thomas H. Newton,
Judge and Gary D. Witt, Judge

Following a jury trial, Nicholas Grado ("Grado") was committed to the custody of the Department of Mental Health ("Department") under the Sexual Violent Predator Act, sections 632.480 through 632.525¹ (the "SVP Act"). Grado appeals his commitment alleging eight points of error. We affirm.

¹ All statutory citations are to RSMo 2000 as updated through the December 31, 2016 cumulative supplement, unless otherwise indicated.

Factual Background

The State filed a petition in the Circuit Court of Jackson County on October 16, 2014 ("Petition"), seeking a hearing to determine whether Grado qualified as a sexually violent predator ("SVP") under the statute. At the time of the Petition, Grado was serving a five-year sentence in the Missouri Department of Corrections ("DOC") for child molestation in the first degree. When Grado was eighteen years old, he had sexual contact with three children, ages five to seven, over the course of three weeks. This contact included having his nephew and niece perform oral sex on him. He was charged with four felony counts regarding the sexual contact with the three children. He plead guilty to three counts of the Class B Felony of Child Molestation in the first degree. In 2012, the criminal court sentenced him to five years in the DOC on each count to be served concurrently, but suspended the execution of that sentence and placed Grado on probation on condition that he complete a 120 day treatment program in the DOC for sex offenders. Less than one year after being placed on probation he was alleged to have violated the terms of his probation by watching pornography, using the internet to view inappropriate videos, frequenting the library without permission, and other violations. His probation was revoked in 2013 for violating its terms and he was sentenced to serve his previously suspended prison term.

A jury trial was held on the State's Petition ("Trial") to declare Grado a SVP. At the Trial, Dr. Lisa Witcher ("Dr. Witcher") testified for the State. Dr. Witcher, a licensed psychologist for the Department was appointed by the probate court to conduct a sexually violent predator examination of Grado. Dr. Witcher testified that, in addition to the

molestation for which he was convicted, Grado had multiple prior instances of sexual abuse of children. When Grado was fourteen, he had his one-year-old nephew place his hand on Grado's penis while Grado was masturbating. At fifteen, Grado showed pornography to a boy of eight or nine; the two touched one another's genitals and Grado had the boy perform oral sex on him. Grado's interactions with this boy took place multiple times over a six to seven month period.

Dr. Witcher testified that she reviewed Grado's records² and relied on her interview with him to see if he met the criteria for any mental disorder listed in the DSM-V.³ Dr. Witcher diagnosed Grado with pedophilic disorder non-exclusive type, sexually attracted to both males and females. In her testimony, Dr. Witcher stated that Grado had "recurrent intense sexually arousing fantasies, sexual urges, or behavior involving sexual activity with a prepubescent child or children, generally 13 years or younger" for a period of over six months.

Additionally, evidence was presented that Grado watched Hentai, Japanese animated pornography featuring half-human, half-animal adult characters with exaggerated sexual features. Grado also played a video game in which an adult babysitter cared for a child to earn "trust points" which could then be traded for sexual interactions between the babysitter and child. Both the babysitter and child were human but had the

² These records are known as a "referral packet" from the Missouri Attorney General's office. Dr. Witcher testified that this packet includes the charging file, a completion report, and an end of confinement report regarding the subject's completion of treatment in the Missouri Sex Offender Program. The packet also includes a "plethora" of other records amounting to "thousands and thousands of pages" including information from elementary school records through records to date of the Department of Corrections.

³ Diagnostic and Statistical Manual of Mental Disorders, 5th edition

heads of Sonic the Hedgehog cartoon characters. The game amounted to a game from which the player learned grooming behavior to manipulate child victims; behaviors which were strikingly similar to Grado's actions with his victims. Finally, Grado also had sexual contact with animals which lead to Dr. Witcher diagnosing him with zoophilia⁴. Dr. Witcher testified that a person with two or more paraphilias--in this case pedophilia and zoophilia--is at greater risk to reoffend.

Dr. Witcher used her findings to score Grado on the Static 99-R and Static 2002-R actuarial instruments to determine Grado's risk to reoffend. Grado received a score of four on the Static 99-R, which placed him in the moderate to high risk category of being reconvicted of another offense within the next five to ten years. Grado was scored as a six on the Static 2002-R placing him at moderate risk to reoffend. Based on the totality of Grado's behaviors, Dr. Witcher opined that Grado was more likely than not to commit a future act of sexually predatory violence unless confined to a secure facility.

Grado testified that his first sexual experience was with another boy when they were both in the second grade. He watched progressively more disturbing pornography on the internet when home alone. At approximately fourteen, Grado had his nephew touch Grado's erect penis. When Grado was approximately fifteen, he began having sexual contact with various cats and dogs by rubbing his penis on their fur and using them to masturbate or encouraging them to lick his penis. He also sexually penetrated a Great Dane with his penis. When Grado was sixteen he had a thirteen-year-old boy touch his penis.

⁴ Zoophilia is a paraphilia involving a sexual fixation on sexual activity between humans and animals which is also known as bestiality.

Finally, when he was eighteen, Grado had sexual contact with his nephew, niece, and another young girl--the crimes for which he was arrested. Grado testified that he could not say if he was still attracted to children and was equivocal on whether he would reoffend if left alone with a child. Grado believed he could still "easily" manipulate children but testified that he no longer had the desire. Further, Grado stated that seeing animals still acts as a sexual trigger.

Grado's mother and brother testified regarding Grado's childhood and their continued support. Dr. Richard Wollert ("Dr. Wollert"), a clinical and forensic psychiatrist, also testified for the defense. Dr. Wollert did not conduct an evaluation of Grado but generally discussed research on the developmental psychology of persons from the age of twelve through their early twenties. Dr. Wollert was unable to state whether any of the general psychological research he testified to would be applicable to Grado.

The jury found Grado to be a sexually violent predator ("SVP"). The court ordered Grado to be committed to the Department for control, care and treatment. This appeal followed.

Standard of Review

Appellate review in a[] SVP case is limited to a determination of whether there was sufficient evidence admitted from which a reasonable jury could have found each necessary element by clear and convincing evidence. The appellate court does not reweigh the evidence but determines only whether the judgment was supported by sufficient evidence. Matters of credibility and weight of testimony are for the jury to determine. For that reason, the evidence is viewed in the light most favorable to the judgment, accepting as true all evidence and reasonable inferences favorable to the judgment and disregarding all contrary evidence and inferences. A judgment will be reversed on insufficiency of the evidence only if there is a complete absence

of probative facts supporting the judgment. Questions of law are reviewed *de novo*.

In re George, 515 S.W.3d 791, 795-96 (Mo. App. W.D. 2017) (internal quotations and citations omitted).

Discussion

As applicable to this case, a "sexually violent predator" is "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility" and who "[h]as pled guilty or been found guilty in this state or any other jurisdiction, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, of a sexually violent offense[.]" Section 632.480(5). A "mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others[.]" Section 632.480(2).

I.

Grado's first point on appeal alleges that the trial court erred in finding him to be a SVP because the criminal conviction ("Index Offense") leading to his incarceration took place when he was a juvenile and commitment to the Department constitutes a life sentence without the possibility of parole, and as a juvenile, this is tantamount to cruel and unusual punishment. This argument, however, is contrary both to the facts of this case and existing caselaw.

First, we note that Grado concedes this claim was not raised in the probate court and thus has not been preserved for appeal. *State v. Worthington*, 8 S.W.3d 83, 87 (Mo. banc 1999). Instead, Grado asks that we review this claim for plain error which requires this Court to find that manifest injustice or a miscarriage of justice resulted from the alleged error. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009).

Review for plain error involves a two-step process. The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. All prejudicial error, however, is not plain error, and [p]lain errors are those which are evident, obvious, and clear. If plain error is found, the court must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice.

Id. at 607-08 (internal citations and quotations omitted).

Grado was convicted of three counts of first-degree child molestation for events that occurred when he was at least eighteen years old. At the time of Trial on this action, Grado was 23 years of age. Chapter 211 governs juvenile proceedings in Missouri. Section 211.021 defines "adult" as "a person seventeen years of age or older." Grado attempts to argue that this Court should recognize the definition of juvenile to be those of 21 years of age and under by citing to section 211.041 which maintains that the juvenile court *may* retain jurisdiction over a juvenile until they are 21 years of age. We give Grado points for creativity for this argument but the statute he cites neither changes the age of majority in Missouri nor applies to this case. At the time he committed the Index Offense for which he was convicted he was eighteen years of age. Even if we were to accept Grado's argument, at the time of the Trial and his commitment to the Department as a SVP, Grado was 23 years old. The focus of the Trial was not to determine his prior convictions but to

determine if he, at the time of the Trial, fell within the statutory definition of a SVP and if he was likely to reoffend if not placed in a secure facility. The relevant age in this matter was his age at Trial and Grado fails to present any argument that a person at the age of 23 should be considered a juvenile.

Certainly there were actions of Grado that occurred before he was eighteen that were presented and considered by the jury. However, there is nothing that prohibits such acts from being considered. Grado relies on *Graham v. Florida*, 560 U.S. 48, 79-80 (2010) for the general proposition that a juvenile cannot be sentenced to life in prison without the possibility for parole for a non-homicide crime. While this is true, *Graham* is inapplicable to this case. First, Missouri's SVP commitment program is not life imprisonment without the possibility of probation or parole, it is a treatment program from which a person can be released if determined to no longer be a danger to reoffend. *Murrell v. State*, 215 S.W.3d 96, 103-05 (Mo. banc 2007). Second, the SVP commitment program is not a punishment under the criminal code. *In re Brown*, 519 S.W.3d 848, 853-54 (Mo. App. W.D. 2017). It is a civil commitment governed by certain safe guards. *Id.* Similar programs have been found constitutional by the United States Supreme Court. *Id.*; *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *U.S. v. Comstock*, 560 U.S. 126 (2010). Grado's entire argument is directly contrary to existing and binding Missouri precedent.

The jury heard testimony from the manager of operations for the Missouri Sex Offender Program and Grado's therapist in the program, Robert Gould ("Gould"), that "[w]ith respect to sex offending, I would say that a 20-year-old, 19-year-old should have the same level of insight and understanding that a 30-year-old would." Thus, even absent

the legal recognition that Grado was an adult, there was expert testimony that mentally he *should* have been treated as an adult even at the time of the Index Offense.

The only argument espoused by Grado that has any connection to his juvenile behavior is that his initial offenses for which he was never criminally charged occurred while he was fourteen or fifteen, thus a juvenile. The fact that Grado started to offend when he was a juvenile is relevant to the fact that he continued to sexually offend as an adult. All proceedings relating to his Index Offense and his confinement as a SVP occurred while Grado was an adult. Even if this Court were to expand the definition of juvenile far beyond its current recognized bounds to the age of 21, Grado was not a juvenile at the time of his commitment to the Department. Further, Grado's commitment in no way runs afoul of the restrictions on *criminal* punishments in *Graham*. We find no error, plain or otherwise. Point One is denied.

II.

Grado's second point on appeal alleges that there was insufficient evidence to prove that he met the criteria for pedophilic disorder and thus there was insufficient evidence upon which the jury could find him to be a SVP. This Court reviews "the evidence in a light most favorable to the jury verdict, disregarding all contrary evidence and inferences, and determine[] whether the evidence was sufficient for the jury to determine [the defendant] suffered from a qualifying mental abnormality." *In re Nelson*, 521 S.W.3d 229, 233 (Mo. banc 2017) (internal quotations omitted).

The State notes, the Missouri Supreme Court has stated that pedophilia is a mental abnormality that necessarily involves a propensity to commit sexual offenses. *In re*

Murrell, 215 S.W.3d 96, 107 (Mo. 2007). Accordingly, a diagnosis of pedophilia satisfies the statutory definition of mental abnormality standing alone. *Id.* This is also true for paraphilia with which Grado was also diagnosed. *In re Bradshaw*, 375 S.W.3d 237, 243 (Mo. App. S.D. 2012).

Grado challenges Dr. Witcher's diagnosis of Grado with pedophilia, and thus her conclusion that Grado met the SVP requirements, on two bases. First, there was insufficient evidence to show that Grado's behavior lasted longer than six months and second there was insufficient evidence on which Dr. Witcher could conclude that such behavior caused Grado distress or interpersonal difficulty.

Grado argues that because the actual molestation of the children involved in the Index Offenses only lasted for three weeks, the State was unable to demonstrate that Grado met the definition of having a pedophilic disorder because such disorder requires actions over a period of at least six months. This confuses the medical standard. The standard is not that acts taken against one victim in isolation must last for at least six months. Instead it is the period of time over which the totality of sexually aberrant behaviors occurred. The DSM requires:

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

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION, 697 (2013) (emphasis added). Dr. Witcher presented sufficient testimony to show that Grado had sexual urges or fantasies, many of which he acted upon, from the age of fourteen through his Index Offense at age eighteen and up through the time of the Trial at 23. Dr. Witcher reviewed Grado's records and conducted an interview with him. She made clear that this was the type of evidence that was standard for experts in her field to rely. Even if we ignore the behavior that took place while Grado was under the age of sixteen, Grado showed aberrant sexual behaviors existing significantly longer than six months. Grado committed his Index Offense at age eighteen and his SVP Trial was held when he was 23 years old. The jury heard testimony that throughout his prison confinement Grado continued to have pedophilic urges and fantasies, urges and fantasies which, are sufficient under the DSM to diagnose a pedophilic disorder and urges and fantasies which, in the expert opinion of Dr. Witcher were sufficient to diagnose Grado with pedophilic disorder.⁵

Grado also argues that he merely suffered from pedophilia as a sexual orientation and not from pedophilic disorder, the disorder being required for a finding that a person is a SVP. A person may be classified as having pedophilia but not the corollary disorder if they have a sexual interest in children but suffer no shame, guilt or anxiety about the

⁵ In his Reply Brief, Grado attempts to parse words and argue that Dr. Witcher only testified that Grado suffered from "pedophilia"--a sexual orientation--not a "pedophilic disorder." We do not read Dr. Witcher's testimony to be so limiting. Although true that often the parties and witnesses at the Trial use the term "pedophilia" rather than the perhaps more accurate term of "pedophilic disorder" we find that it was clear from the totality of the testimony that all parties were aware that they were discussing whether Grado suffered from "pedophilic disorder" rather than a more generalized "pedophilia" as it was clear that Grado was a pedophiliac and the purpose and focus of the Trial was to determine whether Grado had a "pedophilic disorder." "Pedophilia" was merely the more common shortened term.

impulse and have **never** acted upon that impulse. *Id.* at 698. This cannot be the case for Grado because he has acted on his impulses multiple times. Still, Grado challenges Dr. Witcher's finding that Grado suffered from pedophilic disorder by arguing that Dr. Witcher simply "assumed" that Grado was distressed by his behavior. This is not the case. Dr. Witcher specifically testified that during his self-evaluation Grado was able to "at least retrospectively" identify "feelings of guilt" as they related to his child victims.

Once an expert's opinion has been admitted, as with any other evidence, it may be relied on for purposes of determining the admissibility of the case. *In re Turner*, 341 S.W.3d 750, 754 (Mo. App. S.D. 2011). The State presented expert testimony that Grado met the definition of pedophilic disorder based on his past behaviors and her interview with him regarding such behaviors and the risk even Grado testified he believed he posed if released. This, in and of itself, was sufficient evidence upon which the jury could find him to be a SVP.

We find that the State presented sufficient evidence from which a jury could find that Grado was a SVP. Point II is denied.

III.

In his third point on appeal Grado argues that the State failed to produce sufficient evidence that Grado's pedophilic disorder would cause him to "more likely than not" commit predatory acts of sexual violence if not confined.

"Missouri's SVP statute requires a finding that, to be committed, the individual 1) has a history of past sexually violent behavior; 2) a mental abnormality; and 3) the abnormality creates a danger to others if the person is not incapacitated." *In re Murrell*,

215 S.W.3d 96, 105 (Mo. banc 2007). Under § 632.480(5)(a), an offender has a history of sexual violent behavior if he "[h]as pled guilty or been found guilty . . . of a sexually violent offense." Once a history of sexual violence has been established, before an offender may be committed as a SVP, "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 to a secure facility." *In re A.B.*, 334 S.W.3d 746, 752 (Mo. App. E.D. 2011).

Grado raises several challenges under this point. First, he argues that the State never presented any evidence that his *mental abnormality* is what makes it more likely than not that he would engage in a future predatory act of sexual violence. Missouri's SVP statute does not require proof of a mental abnormality that, in and of itself, predisposes a person to commit sexually violent offenses. *In re George*, 515 S.W.3d at 796. But, even so, we find that when reading Dr. Witcher's testimony in its entirety, it is clear that she did, in fact, connect Grado's mental abnormality to the likelihood that he would commit future acts of sexual violence. Dr. Witcher testified:

[State]: Dr. Witcher, what questions are you looking to answer in your sexually violent predator evaluation?

[Dr. Witcher]: I am asked to determine if the individual has -- meets criteria for, [] a mental abnormality; if they have committed a sexually violent offense in the past; and then if they are more likely than not that their behavior is going to be impaired by their mental abnormality.

At this point, trial counsel objected, arguing that Dr. Witcher was not clearly stating the standard for finding a SVP so the State agreed to ask a specific question to "shore it up."

The State went on to ask:

[State]: Dr. Witcher, is the third thing that you in particular are looking at, whether Mr. Grado is more likely than not to commit a future act of sexual predatory violence unless confined to a secure facility?

[Dr. Witcher]: Yes. Much better said.

It is clear from both Dr. Witcher's original statement and the State's follow-up that the future act of sexual predatory violence was connected to the mental abnormality. Further, when testifying as to the definition of a "mental abnormality," Dr. Witcher stated that "it means that the individual suffers from a condition that he was either born with or developed over time that affects his or her ability to control themselves in such a way that can lead to them committing a sexually violent offense." Dr. Witcher then went on to testify that Grado was more likely than not to commit a future act of predatory violence against a child, had the mental abnormality of pedophilic disorder, and that he met the criteria to be a SVP to a reasonable degree of psychological certainty. This testimony was sufficient evidence upon which a reasonable jury could find that Grado was more likely than not to reoffend *because* of his mental abnormality. *See In re Nelson*, 521 S.W.3d 229, 234 (Mo. banc 2017) (even though expert did not use the phrase "predatory acts of sexual violence" in opining defendant was more likely than not to reoffend, her opinion "in context" was sufficient evidence for the jury to find the criteria was met).

Grado himself admitted that while on probation he viewed "furry pornography"⁶ which he justified as acceptable because it was focusing on animals and not children. While on probation, Grado had to move into a half-way house because of his sexual interactions with animals in the home. This inability to control his behaviors with animals to which he was attracted could reasonably suggest to a trier of fact that Grado would be unable to control his sexual interactions with children if not in a secure facility and under the care and treatment of the Department.

We find the trial court did not err in denying Grado's request for a directed verdict based on insufficient evidence. Point III is denied.

IV.

Grado's fourth point on appeal alleges that the trial court erred in committing him to the care of the Department because he received ineffective assistance from his trial counsel. Specifically, that trial counsel was ineffective in failing to object to and otherwise introducing evidence of Grado's history of viewing Japanese pornography, playing pedophilia focused video games, and using animals for sexual gratification.

Grado admits that no Missouri court has recognized that an ineffective assistance of counsel claim is cognizable in an appeal from a SVP commitment order. Although the Missouri Supreme Court has had the opportunity to address such a question, it has declined to do so.⁷ The right to effective assistance of counsel generally flows from the Sixth

⁶ Furry pornography is a subculture of pornography focusing on fictional anthropomorphic animal characters with human personalities and characteristics.

⁷ In *In re James Braddy*, the question of whether a claim of ineffective assistance of counsel was legally cognizable was raised. No. SC96296, ordered retr transferred (July 13, 2017). The Court, however, chose not to address the question, instead transferring the case back to the Southern District Court of Appeals in light of *Kirk v.*

Amendment. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Thus, such claims generally apply only to criminal actions. *Bittick v. State*, 105 S.W.3d 498, 502 (Mo. App. W.D. 2003).

Both the Missouri and United States Supreme Courts have recognized that where there is no constitutional right to counsel, there is no constitutional claim to ineffective assistance of counsel. *State v. Hunter*, 840 S.W.2d 850, 871 (Mo. 1992); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Some Missouri courts have, however, found that an ineffective assistance of counsel claim may be recognized where the right to counsel is conferred by statute. *See In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. App. W.D. 1989) (termination of parental rights pursuant to section 211.462); *In re I.R.S.*, 361 S.W.3d 444, 448 (Mo. App. S.D. 2012) (children subject to juvenile court jurisdiction under section 211.031). As the State notes, *In re J.C., Jr.*, predates *Hunter* and relied on out of state cases to establish such a right. This, however, is not the case with *In re I.R.S.* No statute or Supreme Court rule establishes a claim for ineffective assistance of counsel in a SVP case. Despite two cases acknowledging a claim for ineffective assistance of counsel where a right to an attorney is conferred by statute--as it is here--it still would require this court to extend and recognize the right within an area of law which it has never before applied. Where the Missouri Supreme Court has had the opportunity to recognize such a claim but has declined to decide the issue or amend its own rules, we decline to take such a leap at this time.

State, 520 S.W.3d 443 (Mo. banc 2017) and *Nelson v. State*, 521 S.W.3d 229 (Mo. banc 2017) neither of which decided whether such a claim was cognizable.

Grado is correct that a number of other jurisdictions have recognized a cognizable claim for ineffective assistance of counsel following a SVP proceeding. *See Matter of Chapman*, 796 S.E.2d 843, 846 (S.C. 2017) (because the right to assistance of counsel during all stages of SVP proceedings was conferred by statute defendants "necessarily [have] a right to effective assistance of counsel during the proceedings."); *In re Ontiberos*, 287 P.3d 855, 865-66 (Kan. 2012) ("[A] person detained under the KSVPA may raise an ineffective assistance of trial counsel claim on direct appeal"); *Jenkins v. Dir. of VA Ctr. For Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006); *In re Detention of Blaise*, 830 N.W.2d 310, 317 (Iowa 2013); *In re Detention of Moore*, 216 P.3d 1015 (Wash. 2009); *In re Commitment of Dodge*, 989 N.E.2d 1159 (Ill. App. 2013); *Smith v. State*, 203 P.3d 1221, 1233 (Idaho 2009). The application of the holding in these cases to Missouri, however, should more properly be determined by the Missouri Supreme Court and the legislature. *See Bohner v. State*, 157 So.3d 526, 527 (Fla. App. 2015) (noting that the Florida Supreme Court specifically adopted a rule to address the right to claims of ineffective assistance of counsel following a SVP proceeding).

Even if this Court were inclined to authorize a claim for ineffective assistance of counsel in a SVP proceeding despite not yet being accepted by the Missouri Supreme Court, we find that Grado's counsel was not ineffective in his representation. Grado claims that his counsel failed to object to, and otherwise introduced evidence of Grado's past viewing of Japanese pornography, playing pedophilia focused video games, as well as Grado's sexual attraction to animals. Applying the accepted standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which governs ineffective assistance of counsel claims

in post-conviction relief, this Court applies a two prong test to such claims. *Id.* at 687. A movant must show by a preponderance of the evidence that: (1) his or her counsel failed to exercise the level of skill and diligence expected of a reasonably competent counsel under similar circumstances, and (2) that he or she was prejudiced by such failure. *Id.*; *Johnson v. State*, 406 S.W.3d 892, 898-99 (Mo. banc 2013).

We begin with the first prong. To show that counsel did not exercise the level of skill and diligence expected of a reasonably competent attorney, the movant must overcome a strong presumption that counsel's conduct was reasonable and effective. *Johnson*, 406 S.W.3d at 899. In this case, the State's expert Dr. Witcher testified as to Grado's viewing of Japanese pornography, use of a pedophilic video game, and zoophilia in its case in chief. Dr. Witcher relied on these behaviors to diagnose Grado and she testified as to why evidence of these behaviors was relevant to her diagnosis. Although Grado argues that his attorney failed to object to this testimony, he does not present a valid basis for such an objection. Grado's therapist in the Missouri Sex Offender Program, Gould, also showed a relevant connection between Grado's behaviors and his risk of reoffending. Experts can rely on evidence that is not otherwise admissible if it is of a type reasonably relied on by experts in their field. *In re Wadleigh*, 145 S.W.3d 434, 438 (Mo. App. W.D. 2004). Grado fails to establish that this evidence was not properly relevant and probative on the issues presented to the jury. Trial counsel cannot be "deemed ineffective for failing to make nonmeritorious objections." *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998); *Woods v. State*, 458 S.W.3d 352, 362 (Mo. App. W.D. 2014).

Because the testimony regarding Grado's behaviors was admissible in the State's case-in-chief, we cannot say that it was not sound strategy for Grado's counsel to then present testimony regarding these behaviors during the defense's case in an attempt to minimize the impact of such evidence. Counsel attempted to present Grado's activities in a light such that the jury might not view them as activities that would increase Grado's likelihood of reoffending. "[C]ounsel is allowed wide latitude in conducting the defense and is entitled to use his or her best judgment in matters of trial strategy." *Placke v. State*, 341 S.W.3d 812, 817 (Mo. App. S.D. 2011). We cannot say that an attempt by the defense to minimize the impact of negative evidence was ineffective. *See Rios v. State*, 368 S.W.3d 301, 314 (Mo. App. W.D. 2012) (not ineffective to call witness even when his testimony might be interpreted negatively where trial counsel weighed the pros and cons of the testimony).

We will not recognize a new cause of action for ineffective assistance of counsel following a SVP trial where such a claim has yet to be recognized in this state. Further, we find that even if Grado could bring such a claim, his trial counsel was not ineffective in his representation on this basis. Claim IV is denied.

V.

Grado's final four points on appeal all raise constitutional challenges to the structure of the Missouri SVP program. In Point V, Grado claims that the 2006 amendments to the SVP Act violated due process by eliminating any possibility of discharge once committed. In Point VI, Grado claims that the Act is unconstitutional because it does not provide a least restrictive environment and there is no alternative to secure confinement. Point VII

alleges that the SVP Act violates numerous constitutional provisions because the commitment under the SVP Act is a punitive, lifetime confinement. Finally, Point VIII alleges that the SVP Act is unconstitutional because it permits a mental abnormality finding and commitment because of a condition affecting one's emotional capacity without a showing that the individual has difficulty controlling his predatory, sexual behavior.


Because Grado raises these claims challenging the constitutionality of the SVP Act, we must first address our jurisdiction over these issues on appeal. The Missouri Supreme Court has "exclusive appellate jurisdiction in all cases involving the validity of a statute." *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. banc 2015). But, the Supreme Court's "exclusive appellate jurisdiction is not invoked simply because a case involves a constitutional issue." *Id.* "When a party's claim is not real and substantial, but, instead, merely colorable, our review is proper." *Ahern v. P & H, LLC*, 254 S.W.3d 129, 134 (Mo. App. E.D. 2008). Where a constitutional challenge has been previously addressed by either the United States Supreme Court or the Missouri Supreme Court, the claim is merely colorable and this Court has jurisdiction over the appeal. *In re Matter of Brown v. State*, 519 S.W.3d 848, 853 (Mo. App. W.D. 2017). As was the case in *Brown*, the constitutional challenges raised herein have been fully addressed both by the United States Supreme Court and the Missouri Supreme Court. Thus, we have jurisdiction over this appeal. *See Id.*

As noted by the Missouri Supreme Court in *In re Kirk*, 520 S.W.3d 443, 449-50 (Mo. banc 2017), "[t]his entire collection of arguments has been rejected in the past." (footnote omitted). The Court went on to recite in detail the growing body of case law

rejecting the above arguments. We find it unnecessary to simply repeat the Court's holding verbatim here. Instead, we merely note that Grado raises no challenge to *In re Kirk*, nor distinguishes the facts or arguments from the case at bar. *See, also In re Brown*, 519 S.W.3d at 853-54 (same). As such, we are bound by and agree with *In re Kirk's* holdings and find that the court below did not err in finding Grado to be a SVP for the reasons challenged in Points V, VI, VII, and VIII.

CONCLUSION

The judgment of the trial court is affirmed.



Gary D. Witt, Judge

All concur