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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF DAQUAN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001959

INITIAL BRIEF OF APPELLANT

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2.

Whether due process requires that ineffective assistance of counsel claims may be raised on direct appeal from a commitment under South Carolina's Sexually Violent Predator Act?

3.

The State's expert revealed on direct-examination that he had a financial interest in the company that manufactures the penile plethysmograph test he administered to appellant. Did trial counsel's failure to impeach for bias deprive appellant of his statutory and due process rights to the effective assistance of counsel, requiring a new trial or a remand to the trial court to supplement the record on this issue?

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[1] Issues 1, 2, and 7, which concern whether this Court may hear these claims on direct review, are identical to the claims raised in In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181, currently pending before this Court, in which a motion to certify the case was filed in the Supreme Court. As of the writing of this initial brief, the Supreme Court has not yet ruled on the certification motion in Chapman. The State took no position on the certification motion.

4.

Whether trial counsel's failure to move to exclude any evidence related to a penile plethysmograph because, like a polygraph test, it is unreliable and unscientific, deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial or a remand to the trial court to supplement the record on this issue?

5.

Whether trial counsel's failure to move to dismiss the case because the multidisciplinary team lacked the requisite five members required by section 44-48-50 of the SVP Act deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires appellant's release?

6.

Whether trial counsel's initial agreement with the State not to mention the lack of treatment in the SVP program, and then failing to inquire about the lack of treatment after the State expert opened the door, deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial?

7.

Alternatively, if the Court denies relief on the preceding issues and fails to provide a means for appellant to raise his claims of ineffective assistance of counsel, whether the SVP Act is unconstitutional because it deprives appellant of due process?

STATEMENT OF THE CASE

On July 1, 2013, the State filed a petition to commit appellant pursuant to the South Carolina Sexually Violent Predator Act. R. ___. (State's Petition). The underlying convictions were three counts of lewd act on a child. R. ___. (State's Petition). On September 15, 2014, appellant was tried before the Honorable Alison Lee and a jury. Tr. 1. Nicole Wetherton represented the State. Tr. 1. Dave Belding represented appellant. Tr. 1. The jury voted to commit appellant. Tr. 286, ll. 4 – 14. This appeal follows.

ARGUMENT

1.

A person confined under South Carolina's Sexually Violent Predator Act has a due process right to the effective assistance of counsel under the federal and state constitutions as well as under the statutory right to counsel in the Act.

Relevant Facts

Johnson's underlying convictions were three Alford pleas to lewd act upon a child. R.___(Pet. Pursuant to the Sexually Violent Predator Act). Tr. 172, ll. 16 – 173, l. 24. He denied committing any sexual offenses to both the Department of Mental Health ("DMH") expert and to the State's expert. Tr. 203, ll. 13 – 19. Tr. 76, ll. 14 – 19. He was sentenced to fifteen years' imprisonment suspended to time served and five years' probation. Tr. 179, ll. 16 – 20. This meant he was released as soon he was as he was "set up with probation." Tr. 179, l. 21 – 180, l. 2.

Johnson was originally charged with criminal sexual conduct with a minor in the first degree, for which he faced life imprisonment. Tr. 177, ll. 6 – 11. The State called the solicitor who prosecuted Johnson who testified that her job was to "seek justice." Tr. 178, l. 1. Appellant asked the solicitor whether "justice was done by a plea to lewd act to time served." Tr. 178, ll. 16 – 17. The solicitor responded, "Based upon the evidence and the factors, yes." Tr. 178, l. 18.

The State's expert, Dr. William Henry Burke ("Burke") characterized the crimes for which the trial judge sentenced Johnson to time served as "exceptionally heinous and cruel." Tr. 122, ll. 1 – 15. Tr. 123, l. 11 – 124, l. 2. Dr. Burke was hired by the Attorney General after DMH's expert did not recommend that Johnson be committed under the

SVP Act. Tr. 123, ll. 8 – 10. Tr. 189, ll. 1 – 13. Tr. 206, ll. 2 – 7. Dr. Burke was not licensed in psychiatry or psychology, but counseling. Tr. 115, l. 17 – 116, l. 10. At one point on cross-examination, Dr. Burke also claimed to be an actuary. Tr. 130, ll. 2 – 12. He retracted this claim after defense counsel asked if he was licensed, explaining that he misunderstood the original question ("Are you an actuary?"). Tr. 130, ll. 2 – 12.

Johnson only found himself facing commitment under the SVP Act because of the sad circumstances surrounding the revocation of his probation. When Johnson was being released from the county detention center, he asked to be taken to his family's residence, but the probation office told him he was not permitted to live there. Tr. 140, l. 21 – 141, l. 7. Instead, the jail took Johnson to a homeless shelter. Tr. 141, ll. 8 – 10. Presumably because Johnson was on the sex offender registry, the homeless shelter would not take him. Tr. 141, ll. 8 – 14. Johnson then went to the emergency room. Transcript 141, ll. 11 – 21. He went to the emergency room for two nights because he had no place to stay. Tr. 141, l. 18 – 142, l. 1. He then went to his mother's house "trying to find a place to stay" when "the GPS picked it up and they went and got him." Tr. 142, ll. 2 – 11. Johnson essentially was free for three days on probation before he was revoked for being homeless. Tr. 144, ll. 6 – 10. The State's expert believed this situation increased Johnson's risk for reoffending because it showed "an inability to follow directions."[2] Tr. 144, ll. 6 – 145, l. 25.

Dr. Kimberly S. Harrison ("Harrison") first evaluated Johnson for the Department of Mental Health ("DMH"). Tr. 188, ll. 12 – 17. Tr. 189, ll. 12 – 13. She testified for

[2] Johnson's mother passed away while he was in prison. Tr. 192, ll. 6 – 25. Dr. Burke told the jury grief over a mother's death "can increase your level of risk." Tr. 107, l. 9 – 108, l. 14.

the defense. Tr. 186, ll. 4 – 5. Dr. Harrison diagnosed Johnson with pedophilia, but did not recommend commitment. Tr. 204, l. 14 – 205, l. 1. Tr. 206, ll. 2 – 7.

At trial, Dr. Harrison stated that she could not currently offer an opinion whether Johnson met the criteria under the SVP act because the Attorney General originally gave her incorrect information about Johnson's charges when she made her first evaluation. Tr. 206, l. 2 – 13. The Attorney General informed Dr. Harrison that a charge had been dismissed which actually had resulted in a conviction. Tr. 219, ll. 5 – 19. Dr. Harrison had specifically asked the Attorney General about the dismissal of the charge and was told the charge had been dismissed. Tr. 219, ll. 14 – 19. Tr. 196, ll. 6 – 22. Even including the conviction, which would have changed his score on a risk assessment instrument called the Static-99R, it could have changed his score from what was initially calculated as a "four" to as high as a "six." Tr. 198, l. 1 – 199, l. 17. Even with a score of a "six," Johnson's recidivism rate under the Static-99R would have been in the category of 24.7% over a five-year period. Transcript 199, l. 12 – 200, l. 2. Dr. Harrison candidly stated that she would need to be able to do more research to come up with an accurate Static-99R score an offer an opinion as of the time of trial. Tr. 208, ll. 7 – 17.

Dr. Burke gave Johnson a score of "eight" on the Static-99R. Tr. 82, ll. 1 – 24. Dr. Burke arrived at his higher score because he included a write-up at the county jail for masturbating as his "index offense." Tr. 83, l. 1 – 84, l. 24. Because the "index offense" changes what other offenses are counted, making the detention officer's write-up the index offense greatly increased Johnson's score. Tr. 83, l. 1 – 84, l. 24. Dr. Harrison believed that including the write-up from the jail was incorrect because, unlike the Department of Corrections, the jail had no "oversight or quasi judicial system to

determine if something actually happened or not." Tr. 201, l. 5 – 202, l. 4. According to Dr. Harrison, the scoring manual for the Static-99R required the practitioner to give the person the benefit of the doubt if it was unclear whether to use something like the jail write-up. Tr. 202, ll. 1 – 4.

As will be explained more thoroughly in Issues 3 and 4, Dr. Burke told the jury that the main difference between his opinion and Dr. Harrison's was the result of a penile plethysmograph test given to Johnson. Tr. 113, ll. 22 – 24. Dr. Harrison testified, "There are a lot of problems with phallometric testing," and that DMH no longer used them for pre-commitment evaluations. Tr. 221, ll. 3 – 25. Trial counsel failed to object to the admission of any evidence regarding the phallometric testing of Johnson. He also failed to impeach Dr. Burke with evidence (offered by Dr. Burke himself during his direct-examination) that he had a financial connection to the manufacturer of the penile plethysmograph test that he claimed was "vitally important" to his opinion Tr. 113, ll. 22 – 24.

Discussion

The Right to Counsel Includes the Right to Effective Assistance

Johnson has a due process right to the effective assistance of counsel. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). This right flows from the due process clauses of both the United States and South Carolina Constitutions.[3] U.S. Const. amend. V, XIV. S.C. Const. Art. I, § 3. This right is distinct from the Sixth Amendment right to counsel in criminal cases. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (finding no Sixth Amendment right to counsel because SVP cases are not criminal proceedings).

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 (1979). "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." Vitek v. Jones, 445 U.S. 480, 492 (1980). "It is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual and that whether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." Id. (internal quotations omitted). The

[3] Appellate counsel is compelled to direct the Court's attention to In the Matter of McCoy, 360 S.C. 425, 602 S.E.2d 58 (2004). In McCoy, the Court held that it would apply the Anders v. California, 386 U.S. 738 (1967) procedure to SVP cases. McCoy at 427, 602 S.E.2d at 58. In dicta, the Court stated that persons committed under the SVP Act have no Sixth or Fourteenth Amendment rights to counsel, but do have a statutory right to counsel. Id. It does not appear that the Fourteenth Amendment issue was before the Court and the Court gave no citation for this proposition nor engaged in any analysis of this issue. Id. To the extent this Court believes McCoy establishes a precedent that no due process right to counsel exists in SVP cases, McCoy should be overruled.

discussion of "stigma" in Vitek referred to a person confined because he was mentally ill. Id. at 484. It is hard to imagine anything more stigmatizing than labeling a person a sexually violent predator.

Every justice who considered the merits in Vitek concluded that involuntary commitment implicates a liberty interest protected by the due process clause. Id. at 482, 497-98. The Vitek decision is somewhat complicated because four justices believed the case was moot and did not discuss the merits of the due process question in their dissenting opinions. Id. at 500-02 (dissents of Stewart, J. and Blackmun, J.). Four of the five justices who considered the merits concluded that due process required appointed counsel. Id. at 494-97 ("In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.").

South Carolina's SVP Act stresses the right to counsel and the need to conform to constitutional requirements. Defendants have the right to counsel at the probable cause hearing. S.C. Code Ann. § 44-48-80(C)(1). If the defendant is going to be tried under the SVP Act, he is entitled, "[a]t all stages of the proceedings under this chapter . . . to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 44-48-90(B). If a defendant is incompetent, they are entitled to "all constitutional rights available to defendants at criminal trials." S.C. Code Ann. § 44-48-100(B). Finally, the SVP Act contains an overarching provision to ensure constitutional protections for accused persons, which states, "The involuntary detention and commitment of a person pursuant to this chapter must conform to constitutional requirements for care and treatment." S.C. Code Ann. § 44-48-170.

"Once a State has granted prisoners a liberty interest . . . due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." Vitek, 445 U.S. at 488-89 (internal quotations omitted). South Carolina grants persons accused under the SVP Act a liberty interest in the right to counsel. This liberty interest would be meaningless if the right to counsel did not mean the right to effective assistance of counsel. The Legislature did not emphasize the right to counsel in the SVP Act only to mean that counsel would be allowed to perform in violation of constitutionally acceptable standards. Otherwise, an SVP defendant's attorney could, for example, sleep through the trial and this would meet the technical requirement of the appointment of counsel. Surely the Legislature did not intend to grant defendants an empty right to counsel that has no substantive meaning.

Appellant anticipates that the State will rely on Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) to support any opposition it may have to recognizing a right to effective assistance of counsel in an SVP case. In Aice, the Court ruled that ineffective assistance of PCR counsel will not excuse the failure to bring all of a prisoner's PCR claims in his initial PCR. Aice at 449-51, 409 S.E.2d at 393-94. To support this decision, the Court distinguished Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) by stating that Austin "never received a full 'bite' at the apple." Aice at 452, 409 S.E.2d at 395. Unlike Aice, Johnson is seeking his first full bite at the apple based on the ineffectiveness of **trial counsel** at the SVP proceeding where his liberty was in jeopardy.

Other states with SVP laws recognize that the right to the effective assistance of counsel is uncontroversial. See People v. Landau, 154 Cal. Rptr.3d 1, 17-18 (Cal. Ct. App. 2013) (addressing ineffective assistance of counsel claim in SVP commitment

case); Manning v. State, 913 So.2d 37, 37-38 (Fla. Dist. Ct. App. 2005) (recognizing right to effective assistance of counsel in SVP cases and stating Florida Supreme Court "has previously recognized that an individual who faces involuntary commitment to a mental health facility has a liberty interest at stake, and therefore has the right to the effective assistance of counsel at all significant stages of the commitment process."); Smith v. State, 203 P.3d 1221, 1232 (Idaho 2009) ("[T]he legislature has granted a statutory right to counsel, which gives Smith the statutory right to effective assistance of counsel."); People v. Rainey, 758 N.E.2d 492, 502 (Ill. App. Ct. 2001) ("We therefore conclude that the right to counsel under the Act includes the right to the effective assistance of counsel."); In re Detention of Crane, 704 N.W.2d 437, 438 (Iowa 2013) ("As a threshold matter, we note that in this appeal the State concedes that respondents in chapter 229A proceedings have the right to effective assistance of counsel."); In re Ontiberos, 287 P.3d 855, 865 (Kan. 2012) ("And since we have held that there is a constitutional right to assistance of counsel in KSVPA proceedings, our caselaw instructs that this right carries with it a correlative right to competent, effective counsel."); Commonwealth v. Ferreira, 852 N.E.2d 1086, 1090-91 (Mass. App. Ct. 2006) ("As in the context of appointment of counsel in civil proceedings under G.L. c. 119 § 29, we conclude that the right to counsel in G.L. c. 123A proceedings would be of little value if there were no expectation that counsel's assistance will be effective."); In re Civil Commitment of D.L., 797 A.2d 166, 171 (N.J. App. Div. 2002) (stating that the "right to effective, unhindered, assistance of counsel is among those 'immutable principles of justice which inhere in the very idea of free government'" in deciding that SVP defendants have a right to counsel on appeal (quoting Powell v. Alabama, 287 U.S. 45,

68 (1932))); State v. Timothy BB., 975 N.Y.S.2d 237, 240 (N.Y. App. Div. 2013) ("Initially, we hold that while Mental Hygiene Law article 10 proceedings are civil rather than criminal, and that ineffective assistance of counsel may only be considered in civil litigation if extraordinary circumstances are present, the indefinite and involuntary nature of confinement that may result in this type of proceeding constitutes such an extraordinary circumstance."); Jenkins v. Director of the Virginia Ctr. Behav. Rehab., 624 S.E.2d 453, 460 (Va. 2006) ("We also hold that Jenkins has a constitutional right to effective assistance of counsel during the proceeding in which he was adjudicated a sexually violent predator, and on appeal from that adjudication."); In re Detention of Stout, 150 P.3d 86, 97 (Wash. 2007) (addressing ineffective assistance of counsel claim in SVP case); State ex rel. Seibert v. Macht, 627 N.W.2d 881, 886 (Wis. 2001) (finding that right to counsel in an SVP appeal "encompasses the right to effective assistance of counsel.").

The Kansas Supreme Court's decision in Ontiberos is particularly instructive because South Carolina's SVP Act is modeled on the Kansas statute. In re Matthews, 345 S.C. 638, 649, 550 S.E.2d 311, 316 (2001) ("South Carolina's Act is modeled on Kansas' Sexually Violent Predator Act."); In re McCracken, 346 S.C. 87, 97, 551 S.E.2d 235, 238 (2001) ("We hold today in In the Matter of Matthews . . . that a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences."). The Kansas court began by analyzing the relevant statute which provided that "at all stages" of the SVP proceedings a person "*shall be entitled to the assistance of counsel. . . .*" Ontiberos, 287 P.3d at 862-63 (emphasis in original) compare S.C. Code Ann. § 44-48-90(B). The court then stated that "when there is a right to counsel there is

necessarily a correlative right to effective counsel—regardless of whether the right derives from a statute or the constitution." Ontiberos, 287 P.3d at 863.

The court then considered whether an SVP defendant had a constitutional right to counsel. Id. The court examined the relevant United States Supreme Court precedent on the Due Process Clause, including Vitek. Id. at 864-65. Ontiberos stressed that the right to counsel flowed from the defendant's liberty interest "in personal freedom, not just the Sixth and Fourteenth Amendment right to counsel in criminal cases." Id. at 864. The court also stressed that since the state is represented by counsel, "the person the State seeks to commit should also have access to an attorney." Id. at 865. The court ultimately concluded that defendants in SVP cases had a constitutional due process right to the effective assistance of counsel. Id. at 865.

This Court should adopt the reasoning of Ontiberos because the South Carolina and Kansas acts are indistinguishable. Defendants in SVP cases in South Carolina face the possibility of being involuntarily committed for the rest of their lives. Except in a capital case, no greater liberty interest exists. Johnson had a statutory right and a constitutional due process right to the effective assistance of counsel at his trial. A citizen facing a few days in jail from criminal proceedings in Magistrate's Court is entitled to effective assistance of counsel. A person facing a lifetime of being warehoused at South Carolina's former Death Row deserves no less.

A Higher Standard for Effective Assistance Applies in Civil Involuntary Commitment Proceedings

SVP proceedings concern narrow, complicated issues unfamiliar to most civil and criminal practitioners. Complex medical testimony concerning mental illness is

statutorily required to be proven in every case. S.C. Code Ann. § 44-48-30(1). The State is required to prove that a person "suffers from a mental abnormality or personality disorder." S.C. Code Ann. § 44-48-30(1). The State also must prove future dangerousness. S.C. Code Ann. § 44-48-30(1). See also Kansas v. Crane, 534 U.S. 407, 410-15 (2002) (discussing constitutional requirement of proving a person's lack of control over their behavior). The SVP statute requires the involvement of not just a "trained, qualified mental health clinician," but a mental health professional who has "expertise in treating sexually violent offenders." S.C. Code Ann. § 44-48-50 (3).

As the Supreme Court recognized in Crane, "[T]he science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." Crane, 534 U.S. at 413. The first mental health professional in an SVP case is technically the court's expert who frequently will testify on behalf of the State. S.C. Code Ann. § 44-48-90(C). If the State does not like the findings of the court's expert, it can shop for its own expert and seek commitment. S.C. Code Ann. § 44-48-90(C). Defendants in SVP cases have a statutory right to their own mental health expert, so trial counsel must be competent to select, assist, and work with the defense's own mental health expert. S.C. Code Ann. § 44-48-90(C). Therefore, in almost every case, trial counsel must prepare for a minimum of two expert witnesses in the mental health field, and sometimes more.

As recognized by the SVP Act and the cases interpreting the Act, within the field of mental health the expert issues in an SVP case do not involve the more familiar mental illnesses such as depression or legal concepts such as competency. See Hall v. Florida, 134 S.Ct. 1986 (2014) (discussing the intricacies of the standard error of measurement in

IQ tests); See also Heather Ellis Cucolo, Michael L. Perlin, "Far from the Turbulent Space:" Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators, 18 U. Pa. J. L. & Soc. Change 125 (2015) (detailing the complexity of the varied psychiatric and psychological tools used in SVP cases). The Legislature drew a specific distinction between SVPs and other persons who must be committed because of mental illness. S.C. Code Ann. § 44-48-20. In its findings, the Legislature stated, "The civil commitment of sexually violent predators is not intended to stigmatize the mentally ill community." S.C. Code Ann. § 44-48-20. SVPs cannot be housed with other mentally ill persons. S.C. Code Ann. § 44-48-20. This Court has recognized that the SVP Act applies to a "**small subclass** of dangerous offenders who should be involuntarily committed." In re Thomas S., 402 S.C. 373, 377, 741 S.E.2d 27, 29 (2013) (emphasis added).

In a thorough discussion of the difficulties practitioners face in representing defendants in involuntary commitment cases, the Montana Supreme Court created a higher legal standard for counsel to meet than in criminal cases.[4] In the Matter of the Mental Health of K.G.F., 29 P.3d 485 (2001). The court rejected the familiar Sixth Amendment analysis of Strickland v. Washington, 466 U.S. 668 (1984). K.G.F., 29 P.3d at 291-92. The court stated that Strickland "simply does not go far enough" to protect the liberty interest at stake in a civil commitment. Id. at 491. Strickland's presumption of

[4] Montana does not have a law authorizing the commitment of sexually violent predators. Therefore, the Montana Supreme Court has not yet had the opportunity to apply this higher standard to SVP cases. Montana does require classification of a criminal defendant as a sex offender prior to sentencing and offers them sex offender treatment during their incarceration instead of waiting until they are about to be released, as is done in South Carolina. Mont. Code Ann. § 46-23-509.

reasonable professional assistance" did not apply in a proceeding that routinely accepts "an unreasonably low standard of legal assistance." Id. at 491.

The court set forth several specific guidelines which apply with equal force to SVP cases. Counsel must be competent and have "specialized course training." Id. at 498. The court emphasized the necessity of fully investigating the client's circumstances and acting as a zealous advocate. Id. at 498-500. K.G.F. also directed the trial judges that they were "charged with the duty of safeguarding the due process rights of individuals involved at *every* stage of the proceedings." Id. at 501 (emphasis in original). Ultimately the court stated, "We hold that upon a substantial showing of evidence, presented to the issuing district court, or this Court . . . that counsel did not effectively represent the patient-respondent's interests pursuant to the foregoing standards, an order of involuntary commitment should be vacated." Id.

This Court should adopt K.G.F.'s higher standard of competence and its lower burden of proof for SVP ineffective assistance of counsel cases. McCracken recognized

that the Sixth Amendment right to counsel does not apply in civil proceedings, therefore the low Strickland standard should not be used. Appellant concedes that many states use the Strickland standard. See, e.g., Ontiberos, 287 P.3d at 866-68. However, Strickland is the floor for such claims and this Court should interpret the Due Process Clauses of the federal and South Carolina constitutions to provide greater protections for its citizens.

2.

Due process requires that ineffective assistance of counsel claims may be raised on direct appeal from a commitment under South Carolina's Sexually Violent Predator Act.

Because appellant has no other avenue to raise his claims of ineffective assistance of counsel, due process requires that this Court allow him to raise these claims on direct appeal. Appellant urges this Court to adopt a procedure similar to that used by Kansas. Ontiberos, 287 P.3d at 865-66. Where a claim of ineffective assistance is plain from the record as is manifestly the case here, this Court should reverse an SVP commitment and remand for a new trial. Where a claim of ineffective assistance requires development of a record, this Court should remand to the Circuit Court to conduct an evidentiary hearing. This procedure would not conflict with longstanding South Carolina precedent regarding ineffective assistance claims on direct appeal because that precedent applies to criminal cases, not civil actions under the SVP Act. See, e.g., State v. Carpenter, 277 S.C. 309, 309, 286 S.E.2d 384, 384 (1982) ("Appellant's sole ground for appeal is ineffective assistance of counsel at trial. This Court usually will not consider that issue on appeal **from a conviction.**") (emphasis added).

Johnson cannot raise his unpreserved claims and seek plain error review. Our Supreme Court "has routinely held the plain error rule does not apply in South Carolina state courts." State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). "Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review." Id. South Carolina does not even use the plain error standard in death penalty cases. State v. Torrence, 305 S.C. 45, 60-61, 406 S.E.2d 315, 324 (1991) (abolishing *in favorem vitae* review in capital cases).

A person convicted in a criminal trial can avail himself South Carolina's post-conviction relief ("PCR") procedures, but Johnson cannot use the PCR statute because it only applies to criminal convictions. S.C. Code Ann. § 17-27-20. See also State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388, (1995) ("In South Carolina, post-conviction relief is an available remedy which provides defendants with great latitude in alleging errors below. Appellant will have ample opportunity to raise any unpreserved errors through post-conviction relief.") Only a "person who has been convicted of, or sentenced for, a crime" may bring a PCR action. S.C. Code Ann. § 17-27-20(A). Johnson's commitment under the SVP Act is civil. He has not been convicted of or sentenced for a crime. Therefore he does not meet the definition of a person who may institute a PCR proceeding.

Johnson cannot use the South Carolina habeas corpus statute for the same reason: it only applies to persons "committed or detained for any crime." S.C. Code Ann. § 17-17-10. After the passage of the PCR statute, the writ of habeas corpus has been primarily limited to actions in the original jurisdiction of the South Carolina Supreme Court. Pennington v. State, 312 S.C. 436, 439, 441 S.E.2d 315, 316 (1994); Simpson v. State,

329 S.C. 43, 45-47, 495 S.E.2d 429, 430-31 (1998); Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Compare, e.g., Miller v. State, 377 S.C. 99, 659 S.E.2d 492 (2008) (directing circuit court clerk to accept a petition for habeas corpus filed by an inmate). This remedy is not an adequate safeguard for Johnson's constitutional claims because the legal standard for such claims is too high.

"Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. For these reasons, a defendant bears a much higher burden in a habeas proceeding." Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) (comparing a habeas case filed in the South Carolina Supreme Court's original jurisdiction with cases arising in circuit court under the PCR Act). The standard for bringing such a claim is whether the constitutional violation "constitutes a denial of fundamental fairness shocking to the universal sense of justice." Pennington, at 439, 441 S.E.2d at 316. This nearly insurmountable legal standard is much higher than even the onerous Strickland standard imposed in Sixth Amendment cases. Compare Jenkins, 624 S.E.2d at 455-56; 460 (considering SVP inmate's habeas petition in the Virginia Supreme Court's original jurisdiction and applying Strickland standard). Due process cannot be satisfied by making someone who has only been **civilly** committed satisfy the highest appellate review standard under our **criminal** law.

It also appears that, even if an SVP inmate can file a petition for habeas corpus in circuit court, such a petition is limited to challenging the conditions of their confinement. McCracken at 91, 551 S.E.2d at 238. The Court stated that raising the issue of whether McCracken's conditions as an SVP inmate demonstrated that he was "being improperly punished as a criminal" was properly raised in a habeas petition filed against his

custodian. Id. Johnson is not challenging the conditions of his confinement. He is challenging the constitutionality of his adjudication.

Once again, the Kansas experience is instructive. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002) ("As we noted in Matthews, South Carolina's Act is modeled on Kansas' Sexually Violent Predator Act. . . ."). In Ontiberos, the court determined that, like here, the Kansas PCR statute did not apply to SVP cases. Ontiberos, 287 P.3d at 866 (citing Kan. Stat. Ann. § 60-1507). The Kansas habeas statute is more broadly worded than South Carolina's. Compare S.C. Code Ann. § 17-17-10 with Kan. Stat. Ann. § 60-1501(a) (stating that "any person in this state who is detained, confined **or restrained of liberty on any pretense whatsoever**" may bring a habeas action so long as the claims would not be cognizable under the Kansas PCR statute) (emphasis added). The court stated that SVP ineffective assistance claims could be brought under the state habeas statute.[5] Ontiberos, 287 P.3d at 866.

[5] Ontiberos argued that he could not use the state habeas statute. Ontiberos also argued that he could not bring an ineffective assistance claim on direct appeal. This appears to be a tactical decision on appeal used in an attempt to have the entire Kansas SVP statute declared unconstitutional. Ontiberos, 287 P.3d at 865-67.

In going further, the Kansas Supreme Court recognized its general rule that claims of ineffective assistance of counsel are not considered for the first time on appeal. Id. at 865-66 citing State v. Van Cleave, 716 P.2d 580 (Kan. 1986). However, the court also noted an exception to this rule—that an appellate court has "discretion to remand to the trial court for an evidentiary hearing on the ineffective assistance of counsel claim to avoid the expense and delay of a separate [PCR] action later." Ontiberos, 287 P.3d at 866. See also Van Cleave, 716 P.2d at 582-83 (likening the discretion to remand an ineffective assistance claim to remanding a claim of newly discovered evidence). South Carolina's appellate courts also remand cases to the circuit court when a claim of newly discovered evidence is raised on appeal. See State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 564 (2009) ("Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing.").

The Ontiberos court ultimately concluded that ineffective assistance claims could either be raised in state habeas or on direct appeal with a remand if necessary. Ontiberos, 287 P.3d at 866. Because South Carolina's habeas statute is more restrictive than the Kansas statute, the rationale for allowing ineffective assistance claims on direct appeal in SVP cases is even stronger in Johnson's case than in the Ontiberos case. Ontiberos ultimately had his commitment reversed after a remand for consideration of his ineffective assistance claims. Ontiberos 287 P.3d at 875.

Idaho allows ineffective assistance claims on direct review of an SVP commitment because of the inadequacy of other state procedures. Smith, 203 P.3d at 1232-33. The SVP inmate in Smith sought to challenge the constitutionality of Idaho's

SVP act, but the state asserted that he "failed to preserve these issues for appeal." Id. at 1232. The Supreme Court of Idaho stated:

> Smith's argument that he can bring an ineffective assistance of counsel claim for the first time on appeal rests on procedural policy grounds. If he cannot bring a claim for ineffective assistance of counsel for the first time on appeal from the district court's affirmation of the Board's designation, **then there is no procedural vehicle for this claim.** Because there do not appear to be any other procedural grounds for the relief Smith seeks and because we believe that the record on appeal is sufficient to determine whether his claims have merit, **we will consider Smith's claims of ineffective assistance of counsel in this appeal.**

Id. at 1233 (emphasis added). See also In re Commitment of Dodge, 989 N.E.2d 1159, 1167 (Ill. Ct. App. 2013) (considering ineffective assistance claims in direct appeal of SVP commitment in Illinois); Timothy B.B., 975 N.Y.S.2d at 240-41 (considering ineffective assistance claims in direct appeal of SVP commitment in New York); Crane, 704 N.W.2d at 438-39 (considering ineffective assistance claims in direct appeal of SVP commitment in Iowa); Ferreira, 852 N.E.2d at 1091-92 (stating that appellate courts in Massachusetts will consider ineffective assistance claims in direct appeal "when the factual basis of the claim appears indisputable, as here, on the trial record, and the issues do not implicate any factual questions more appropriately resolved by the trial judge."); In re Detention of Coe, 250 P.3d 809, 838-40 (Wash. Ct. App. 2011) (considering ineffective assistance claim on direct appeal of an SVP case in Washington); In re Commitment of Lombard, 684 N.W.2d 103, 115-16 (Wis. 2004) (considering ineffective assistance claim on direct appeal of an SVP case in Wisconsin). Cf. In re Civil Commitment of A.H.B., 898 A.2d 1027, 1034 (N.J. App. Div. 2006) (stating that because issues raised on appeal in New Jersey were not presented to the trial court they would be reviewed under plain error standard "because of the personal liberty interests at stake").

Just as the Idaho Supreme Court found in Smith, in South Carolina Johnson lacks any procedural vehicle for raising his constitutional claims of ineffective assistance of counsel. It is for this reason that the Court should allow Johnson to raise his due process claims on direct review. The Kansas procedure outlined in Ontiberos provides a model for this Court. If the ineffective assistance claim can be decided on its merits based on the trial record, the appellate court should do so. If further facts are necessary to adjudicate an ineffective assistance claim, this Court should entertain a motion to remand to the circuit court from either the State or the appellant.

If the Court decides that it will not adopt the Ontiberos procedure, then appellant urges the Court to craft a procedural remedy that will allow Johnson to present his claims in a way that comports with due process. At a minimum, this would entail the right to an evidentiary hearing and the right to effective counsel. If the Court determines that it cannot do so, then, as will be argued in Issue 7, Johnson asserts that the SVP Act is constitutionally infirm and this Court should order his immediate release.

3.

The State's expert revealed on direct-examination that he had a financial interest in the company that manufactures the penile plethysmograph test he administered to appellant. Trial counsel's failure to impeach for bias deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial or a remand to the trial court to supplement the record on this issue.

Relevant Facts

When the Attorney General asked Dr. Burke about his training and experience, he began listing a veritable Fortune 500 of the sexual assessment industry. Tr. 52, l. 2 – 53, l. 13. He included a manufacturer he worked for:

> I've been trained over forty-five hours by **Limestone Technologies** who also has a plethysmograph for phallometric evaluation system. Phallometric or plethysmography measures blood flow to the penis. And so that is really critical in assessing someone's risk. And so when I say the Monarch and **Limestone, those are two companies that I've worked with. . . .** I've been—I am the—I train people for **Limestone Technologies** for phallometrics. What that means is **everyone who wishes to purchase the phallometric or plethysmograph system from Limestone** comes to my office outside of Charleston and trains for three days under my direct supervision in order to be certified to administer and interpret the results of that test.

Tr. 52, l. 15 – 53, l. 10 (emphasis added).

Dr. Burke was also the developer of a product called "Real Child Voices Stimulus." Tr. 56, ll. 11 – 22. Dr. Burke said "Real Child Voices" was related to the "plethysmography system that I was talking about."[6] Tr. 56, ll. 11 – 15. Dr. Burke and the other developers of this product were apparently unsatisfied because "historically, arousal levels were not that great," so the investors "got professional actors and went into a professional studio and so we used child's voices." Tr. 57, ll. 4 – 10. Dr. Burke said he and his partners "developed a stimulus package, which I'm very proud of." Tr. 57, ll. 17 – 18.

[6] While Dr. Burke did not specifically say that Limestone Technologies sells Real Child Voices Stimulus, it can be inferred he was referring to his earlier testimony about his partnership with Limestone.

Later, Dr. Burke continued to discuss his business relationship with Limestone Technologies. The State asked if he provided any type of training on the penile plethysmograph. Tr. 102, ll. 22 – 23. Dr. Burke bragged:

> I do. As I stated earlier, I've been hired by Limestone Technologies, which is—there are only two companies that make these machines in the world. And there are about three hundred clinicians on the planet that do it. I mean, it's not a whole lot of us that do it. **I've trained about a hundred and forty of them on the Limestone system.** I've been working with Limestone since 2000, the year 2000.

Tr. 102, l. 24 – 103, l. 6.

Dr. Burke gave the Limestone test to Johnson. Tr. 103, l. 22 – 105, l. 7. He told the jury that Johnson (who was under the age of twenty-five at the time of the test) "responded to a lot of categories very significantly." Tr. 103, l. 25 – 104, l. 1. Tr. 83, ll. 1 – 4. Johnson responded significantly to consenting adult females. Tr. 104, ll. 1 – 5. He also responded to "[a]nything to do with male or female children. . . ." Tr. 104, ll. 9 – 10.

Defining "significant" for the jury, Dr. Burke said "with the calculations that we're able to do, it looks like he responded to most of those categories with what is probably a full erection. Okay? He was fully aroused by virtually all of those categories that I just went over." Tr. 104, l. 24 – 105, l. 5. These test results made Johnson a much higher risk to reoffend because this meant there were more "potential victims." Tr. 105, ll. 11 – 25. Dr. Burke emphasized to the jury the effectiveness of his and Limestone Technologies' test, telling them that "positive responses to children in a phallometric laboratory is the single greatest predictor of re-offending in child molesters. The single—if there was only one test you could give, this would be it." Tr. 106, ll. 1 – 9.

Dr. Burke was asked to differentiate his opinion from Dr. Harrison, who concluded in her original report that Johnson did not need to be committed . Tr. 113, ll. 14 – 20. Dr. Burke emphasized the penile plethysmograph: "And I was afforded the data from the penile plethysmograph, or phallometric assessment, which is vitally important." Tr. 113, ll. 22 – 24. Dr. Harrison testified, "There are a lot of problems with phallometric testing," and that the Department of Mental Health no longer used them for pre-commitment evaluations. Tr. 221, ll. 3 – 25.

Discussion

A book used to teach law students describes a technique for cross-examining an expert witness for bias. Thomas A. Mauet, Fundamentals of Trial Techniques at 237-38 (2d ed. 1988). It provides an example of cross-examining an expert who testifies for an attorney on multiple occasions, eliciting his hourly rate, and then demonstrating his bias because he earned a significant amount of money for his opinions. Id. Trial counsel was ineffective in this case for failing to use this elementary cross-examination technique to demonstrate that Dr. Burke had a vested monetary interest in the penile plethysmograph test (hereinafter, "PPG") because of his business relationship with the manufacturer, Limestone Technologies.

Witnesses can always be cross-examined for bias. U.S. Const. amend. VI; Davis v. Alaska, 415 U.S. 308 (1991). "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. Dr. Burke offered on direct-examination that he worked for Limestone Technologies, that he did their training on the PPG, and had trained 140 people to use the PPG. Tr. 102, l. 24 – 103, l. 6. Trial counsel could have simply asked Dr. Burke

how much Limestone Technologies charges (or pays him) for the training and multiplied that by 140 to come up with a dollar figure. For example, if Limestone Technologies charges $2,000.00 for each training, that would equal $280,000.00 in gross revenue. Such a sizeable sum would have been enough to convince the jury that Dr. Burke had reasons other than an honest belief in its scientific reliability to represent the Limestone PPG as "vitally important." Tr. 113, ll. 22 – 24.

Even under the Strickland standard, failing to challenge a witness's bias constitutes deficient performance and prejudice. "Considerable latitude is allowed in the cross-examination of an adverse witness for bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). In Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001), the trial court erred in prohibiting cross-examination of a doctor for financial bias. The lawsuit stemmed from a car wreck and the only issue was the extent of the plaintiff's injuries. Id. at 363, 548 S.E.2d at 585. The defense intended to call a doctor who had a significant business and consulting relationship with the defendant's insurer, Nationwide. Id. The plaintiff wanted to cross-examine the doctor on the extent of his financial dealings with Nationwide. Id. at 364, 548 S.E.2d at 585. The Supreme Court reversed because the trial judge refused to permit cross-examination for the doctor's financial bias. Id. at 365-66, 548 S.E.2d at 585-86.

In criminal cases, frequently the currency for witnesses is time. Witnesses are regularly cross-examined on the possibility of favorable plea deals. In Brown, the trial court committed reversible error for refusing to allow a defendant to cross-examine a witness about her plea agreement with the State. Brown at 171, 399 S.E.2d at 594. The court found that the defendant "was unfairly prejudiced" by this limitation on cross-examination. Id.

The witness avoided substantial prison time, which was "critical evidence of potential bias that appellant should have been permitted to present to the jury." Id. See also State v. Mizzell, 349 S.C. 326, 332-33, 563 S.E.2d 315, 318 (2002).

Analogously, the failure to disclose pending charges or agreements with the State is held to be material under Brady v. Maryland, 373 U.S. 83 (1963). In a recent case from the Fourth Circuit, the government's failure to disclose a pending fraud investigation against one of its key witnesses was held to be material and required reversal of the conviction. United States v. Parker, ___ F.3d ___, 2015 WL 3895452 (4th Cir. June 25, 2015). The court stated that "exposure of a witness' motivation in testifying is a proper and important function of cross-examination." Id. at *6 (internal quotations omitted). Quoting the United States Supreme Court's opinion in United States v. Abel, 469 U.S. 45, 51 (1984), the Fourth Circuit stated that an effective showing of a witness's bias has "a tendency to make the facts to which he testified less probable in the eyes of the jury. . . ." Id. at *6 (internal quotations omitted).

The failure to cross-examine Dr. Burke on this point is clear from the record and requires no remand. Dr. Burke offered all of the information necessary to successfully impeach him during his direct-examination. All that was left to do on cross-examination was to fill in the dollar amounts. No reasonable trial strategy for failing to expose Dr. Burke's financial incentive to sell the jury on the Limestone PPG could exist.

This case amounted to a battle of the experts. Dr. Burke stated the key difference between his opinion and Dr. Harrison's opinion was the PPG. Demonstrating bias on this point was crucial as it would have undermined the seemingly scientific PPG and bolstered the credibility of Dr. Harrison who said there were problems with such tests.

If the case were remanded, perhaps further information about Dr. Burke's financial incentives could be found, such as how much money he makes from the Real Child Voices Stimulus Package or whether he has an ownership interest in Limestone Technologies. It is far more likely that a remand would allow demonstration of far more prejudice and extremely unlikely that any evidence that would undo the damage to Dr. Burke's credibility from the exposure of financial bias would be uncovered. Therefore, this Court need not remand and can reverse on the record as it currently exists. However, should the Court feel that it cannot reverse on this record, appellant asks the Court to remand the case for an evidentiary hearing to develop this issue for appeal.

4.

Trial counsel's failure to move to exclude any evidence related to a penile plethysmograph because, like a polygraph test, it is unreliable and unscientific, deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial or a remand to the trial court to supplement the record on this issue.

Trial counsel failed to challenge the admissibility of the PPG. Courts routinely hold that, like a polygraph, PPGs do not measure up to the evidentiary requirements of reliability and scientific validity. It is quackery masquerading as science. The admission of evidence regarding the PPG administered to Johnson caused substantial prejudice because the financially interested Dr. Burke claimed it was the most important factor supporting his opinion that Johnson needed to be committed.

Dr. Burke explained that the PPG originated in the Soviet Bloc during the 1950s. Tr. 98, l. 19 – 99, l. 6. Men attempted to evade military service by claiming they were

homosexual. Tr. 98, l. 19 – 99, l. 6. The Soviets and their satellites developed the PPG to determine whether these draft-dodgers were really homosexuals. Tr. 98, l. 19 – 99, l. 6.

Despite this dubious origin, Dr. Burke explained that use of the PPG spread to the United States in the 1960s.[7] Tr. 99, ll. 6 – 9. During a PPG, a person puts "a gauge around the penis" that contains mercury "or some other chemical compound." Tr. 99, ll. 16 – 21. Using the analogy of a "Ballpark Frank commercial" Dr. Burke described how the device measures changes in penile circumference while the subject is shown various audio and visual stimuli and can supposedly discover a man's deepest sexual desires.[8] Tr. 99, l. 16 – 102, l. 21. As described in Issue 3, Dr. Burke told the jury that the twenty-four year old Johnson responded "to most of those categories with what is probably a full erection." Tr. 104, l. 18 – 105, l. 7.

Much as evidence regarding lie-detectors is routinely excluded, evidence regarding the PPG is also inadmissible. State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). "Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." Id. at 252, 349 S.E.2d at 404. Trial counsel should have objected that the PPG does not satisfy South Carolina's requirements for the admission of scientific evidence and is inadmissible just like polygraph results. In re Robert R., 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000). See also Rule 702, SCRE; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

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[7] For a full history of the PPG and its many problems, see Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (Fall 2004) (hereinafter "Odeshoo"). The author notes that evidence from PPG tests have "generally not been found admissible at trial." Id. at 3.

[8] An analogous device exists for women. Odeshoo at n.9.

Under Rule 702, Council, and Jones, the trial court must determine whether the "underlying science is reliable." Council at 20, 515 S.E.2d at 518. In making this determination, the court should examine "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Id.

"Courts generally have held [the PPG] inadmissible to show the presence or absence of pedophilia." David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n.21. The Fourth Circuit held the PPG did not meet the scientific standards for admissibility in United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995). The court noted the "extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test." Id. at 1471.

The Virginia Supreme Court held that an expert's report that relied on PPG testing was inadmissible, even at a sentencing hearing. Billips v. Commonwealth, 652 S.E.2d 99, 101-02 (2007). The Billips court approached PPG testing with a critical eye:

> Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be "scientific," **and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism.** That tendency has given rise to frequent complaints of "junk science" in the courts. To guard against that risk, we continue to require a "threshold finding of fact with respect to reliability of the scientific method offered. . . ."

Id. at 101-02 (emphasis added). It is hard to imagine any field more "esoteric" than PPG testing. The court concluded that the PPG "evidence, lacking foundation, was

inadmissible in the sentencing proceeding." Id. at 102. See also United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (discussing the problems with the reliability of PPG testing where such testing was imposed as a condition of supervised release); Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) ("In fact, courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence because there are no accepted standards for this test in the scientific community."); United States v. White Horse, 177 F.Supp.2d 973, 975-76 (D.S.D. 2001) (citing the DSM-IV for the proposition that the PPG "is not accepted as a reliable or valid diagnostic tool"); State v. Spencer, 459 S.E.2d 812, 815 (N.C. Ct. App. 1995) ("We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy."); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) ("Given the rejection of penile plethysmograph evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.").

Given the overwhelming rejection of PPG testing by courts in other jurisdictions, trial counsel was deficient in failing to contest its admission in this case. It was no doubt prejudicial because Dr. Burke stated it was the most important factor he relied upon, and it was what differentiated his opinion from Dr. Harrison's. Dr. Harrison testified that DMH—the government agency in this state charged with the identification, housing, and treatment of SVPs—does not use PPGs in its evaluations. Tr. 221, ll. 3 – 25. This court should rule that, like polygraph examinations, PPGs are not admissible evidence in this state. In the event that the court cannot make this conclusion on this record or as a matter of

law, then it should remand the case to the trial court to develop a record under Rule 702 and Council as to whether PPG evidence is admissible.

6.

Trial counsel's failure to move to dismiss the case because the multidisciplinary team lacked the requisite five members required by section 44-48-50 of the SVP Act deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires appellant's release.

Trial counsel should have had Johnson's case dismissed and obtained his release. The State did not comply with the SVP Act in initiating these proceedings against him. Before SVP proceedings can begin, a "multidisciplinary team" receives written notice of a defendant's impending release. S.C. Code Ann. § 44-48-40(A). The multidisciplinary team reviews the defendant's records and determines whether the defendant "satisfies the definition of a sexually violent predator." S.C. Code Ann. § 44-48-50. If the team determines the defendant meets the definition, the defendant's case is forwarded for prosecution. S.C. Code Ann. § 44-48-50.

Johnson's multidisciplinary team did not comply with section 44-48-50 because it only had four members. Section 44-48-50 states that "Membership of the team **must** include" five members. S.C. Code Ann. § 44-48-50 (emphasis added). The statute lists the five members: (1) a representative from the Department of Corrections; (2) a representative from the Department of Probation, Parole and Pardon Services; (3) a representative from DMH; (4) a retired judge; and (5) a criminal defense attorney. S.C. Code Ann. § 44-48-50(1) – (5).

Johnson's multidisciplinary team lacked the most important member for protecting his rights: the retired judge. R. ___ (State's Petition, Exhibit A). The State's petition contains a "Sexual Predator Referral Form." R. ___ (State's Petition, Exhibit A). It shows the votes to refer Johnson were 4-0 with no abstentions. R. ___ (State's Petition, Exhibit A). Five signature lines are on the form, but Johnson's form only contains four signatures. R. ___ (State's Petition, Exhibit A). The signature line next to "JDG" is blank. R. ___ (State's Petition, Exhibit A). Despite the lack of compliance with the statute, the State offered this form as evidence to support its petition: "The Multidisciplinary Team met on May 31, 2013 and determined after assessment that Respondent satisfied the definition of a Sexually Violent Predator as set forth in S.C. Code Ann. Section 44-48-30 (Supp. 2008), and referred Respondent to the Prosecutor's Review Committee. . . ." R. ___ (State's Petition)

The use of the word "must" indicates the Legislature's intent that five persons—no less—make up the multidisciplinary team. S.C. Code Ann. § 44-48-50. Far from being a mere formality, the multidisciplinary team is tasked with reviewing all of Johnson's records and making the initial determination. S.C. Code Ann. § 44-48-50. Johnson's team not only lacked the required number of members, but lacked a key member who would have knowledge of the law and experience. Without a valid referral, a prosecution under the SVP Act cannot commence.

Trial counsel's failure to move to dismiss based on the State's failure to comply with the statute constituted ineffective assistance of counsel. Courts require strict compliance with statutes governing the involuntary commitment of an individual. See In re Jones, 743 N.E.2d 1090, 1093 (Ill. Ct. App. 2001). "Because involuntary commitment and the

involuntary administration of medications affect important liberty interests, strict compliance with the Code's procedural safeguards is required to insure that the mental health system does not become a tool to oppress rather than to serve society." Id. See also State v. Gowdy, 727 N.E.2d 579, 589 (Ohio 2000) (requiring strict compliance with notice provision in Ohio's SVP statute); Matter of Swanson, 804 P.2d 1, 4 (Wash. 1990) ("Thus, strict construction of the civil commitment statutes is required both by the language of those statutes and our case law interpreting them."). Had trial counsel moved to dismiss, Johnson would have been released because the State failed to strictly comply with the SVP Act. Therefore, this court should reverse and order Johnson's release.[9]

7.

Trial counsel's initial agreement with the State not to mention the lack of treatment in the SVP program, and then failing to inquire about the lack of treatment after the State opened the door, deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial.

Trial counsel rendered ineffective assistance when he acquiesced in the State's attempt to keep the lack of treatment in the SVP program from the jury. The Attorney General explained the resolution of its motion in limine to Judge Lee:

> MS. WETHERTON: And, Your Honor, I did also file a motion in limine to exclude any records—if Mr. Johnson was committed to the sexually violent predator treatment unit, we would agree not to speak about what type of treatment that he would actually receive while housed there at the unit. I've spoken to Mr. Belding prior to trial and he has agreed to that motion in limine.

Tr. 7, ll. 2 – 9. Trial counsel agreed when asked by Judge Lee. Tr. 7, ll. 16 – 17.

[9] Reversal would be required under both the K.G.F. and Strickland standards.

The State immediately opened the door on the treatment issue in its opening statement. The Attorney General told the jury that Johnson had "significant risk factors for re-offending. Such as that he has never had sex-offender treatment." Tr. 45, ll. 1 – 5. She then asked the rhetorical question of whether it would be safe to allow Johnson in the community "without ever taking any sex offender treatment." Tr. 46, ll. 5 – 8. Finally, she told the jury they would ultimately be convinced that Johnson "must be committed to the Department of Mental Health to get the treatment that he so desperately needs and to protect the children of Richland County and the state from him." Tr. 47, ll. 8 – 14. Dr. Burke told the jury that Johnson "needs to be confined and to undergo proper treatment." Tr. 112, ll. 1 – 7.

The jury asked two questions revealing its concern about this issue. Tr. 280, ll. 1 – 6. The jury wanted to know where Johnson would be committed. Tr. 280, ll. 1 – 6. The jury also asked "long-term treatment involves what amount of time?" Tr. 280, ll. 1 – 6. The trial judge responded that Johnson would be placed in DMH's care and that the length of time was not a matter for their concern. Tr. 283, l. 18 – 284, l. 21. Trial counsel acquiesced in these responses. Tr. 283, l. 18 – 284, l. 21.

Whether someone needs to be confined for treatment is part of the definition of a "sexually violent predator." S.C. Code Ann. § 44-48-30(1)(b). The Act defines a "sexually violent predator" as someone who is likely to engage in acts of sexual violence "if not confined in a secure facility for long-term control, care, **and** treatment." Id. (emphasis added). Treatment is essentially an element that the State must prove in order commit someone under the SVP Act. Otherwise, the statute would read "long-term control, care, **or** treatment" or omit the term. Therefore, the issue of treatment is relevant

in an SVP case, particularly when the State opens the door on this issue during its opening statement. Trial counsel was ineffective in not addressing this issue either with effective impeachment regarding the SVP program.

Since trial counsel did not proffer questions on cross-examination regarding the lack of treatment, a remand is necessary to fully assess the extent of ineffective assistance and the impact such evidence could have had on Johnson's trial. See Ontiberos, 87 P.3d at 866. Johnson should be allowed the opportunity to explore in an evidentiary hearing the extent to which trial counsel's failure to present evidence regarding the lack of treatment prejudiced his case. As the record now stands, appellant cannot prove prejudice under either the K.G.F. or Strickland standards. Therefore, this Court should remand this case to the circuit court for a full exploration of this issue so that Johnson can have meaningful appellate review and his due process rights are protected.

7.

Alternatively, if the Court denies relief on the preceding issues and fails to provide a means for appellant to raise his claims of ineffective assistance of counsel, the SVP Act is unconstitutional and deprives appellant of due process.

The great weight of authority in the country supports the consideration of claims of ineffective assistance in SVP cases on direct review. The solutions provided by these states—particularly Kansas—should be adopted to ensure the constitutionality of the SVP Act. Otherwise, the lack of any procedural remedy for Johnson to vindicate his ineffective assistance of counsel claims would render the SVP Act unconstitutional. Johnson cannot be constitutionally detained for the rest of his life after the egregious deprivations of his right to

counsel during his trial. Any decision by this Court which prevents Johnson from raising these claims will transform his continued detention into a constitutional violation.

Further compounding the problem of the SVP Act's constitutionality is South Carolina's consistent refusal to adopt a plain error standard. While plain error review is ultimately no substitute for the ability to raise claims of ineffective assistance because it does not encompass claims which would not appear in the trial record, if South Carolina used plain error review, it could ameliorate the constitutional infirmity of the SVP Act. However, "the plain error rule does not apply in South Carolina state courts." State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Even if plain error were applied to Johnson's case, he could not prevail on the claim raised in Issue 6, which requests relief because his attorney failed to present evidence of the lack of treatment after the State opened the door. It cannot be reasonably contended that this was an error by the trial judge. Plain error review would not cure the constitutional infirmity of the SVP Act in Johnson's case.

Continuing to detain Johnson illegally would not only amount to the denial of his claims of effective assistance of counsel; it would also be a complete denial of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). "A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel." Martinez v. Ryan, 132 S.Ct. 1309, 1317 (2012). "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." Id. State procedures which deny litigants the right to counsel or other fundamental constitutional rights violate due process. Douglas v. California, 372 U.S. 353, 357-58 (1963). See also Evitts v. Lucey, 469 U.S. 387 (1985) (invalidating state appellate rule that deprived defendant of his right to

counsel); Eskridge v. Washington Bd. Prison Terms & Paroles, 357 U.S. 214, 215 (1958) (invalidating a state rule that required appellants to convince a trial judge to give them a free transcript if "justice will thereby be promoted"); Santosky v. Kramer, 455 U.S. 745, 768-69 (1982) (finding state statute allowing a preponderance burden of proof in termination of parental rights cases violated the Due Process Clause); Addington v. Texas, 441 U.S. 418, 422-32 (1979) (finding that state's preponderance standard in involuntary commitment cases violated the Due Process Clause); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that state procedures in terminating welfare benefits violated due process).

This Court should consider Johnson's ineffective assistance claims on direct review. Otherwise, South Carolina's error preservation rules will cause a constitutional deprivation. **"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them."** Hormel v. Helvering, 312 U.S. 552, 557 (1941) (emphasis added). "A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." Id.

The sound policy announced by the United States Supreme Court in 1941 applies with equal force today. Johnson must be allowed to raise his due process claims in this appeal. If not, then South Carolina's rules of practice and procedure make the SVP Act unconstitutional and Johnson must be immediately released. It would then be up to the Legislature to amend the SVP Act to address how due process claims of ineffective assistance of counsel are to be raised. The Legislature could easily amend the PCR Act to

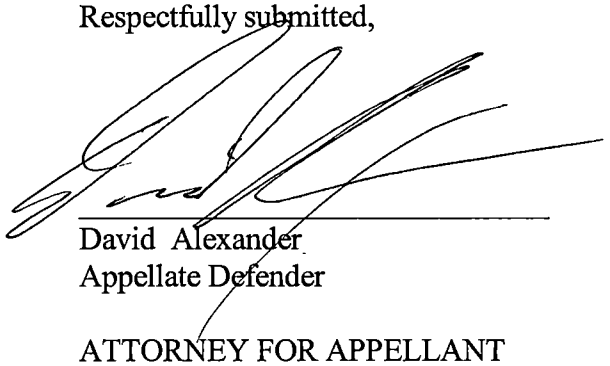
encompass SVP ineffective assistance of counsel claims. The Legislature could also amend the SVP Act requiring higher standards for appointed counsel and providing remedies when the right to counsel is deprived.

After extensive litigation, a federal district judge declared Minnesota's SVP Act unconstitutional. Karsjens v. Jesson, ___ F.Supp.3d ___, 2015 WL 3755870, *2 (D. Minn. June 17, 2015). The court did not order the immediate release of Minnesota's inmates, but instead stayed its hand and ordered the relevant decision makers to come together to fix the problem. Id. at *35-37. If this Court will not judicially recognize any mechanism for raising ineffective assistance of counsel claims, the Court could declare the SVP Act unconstitutional but stay Johnson's release for a short period of time to provide the Legislature with the opportunity to correct the Act's deficiencies. Otherwise, the deprivation of Johnson's fundamental right to counsel would require his immediate release from confinement.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

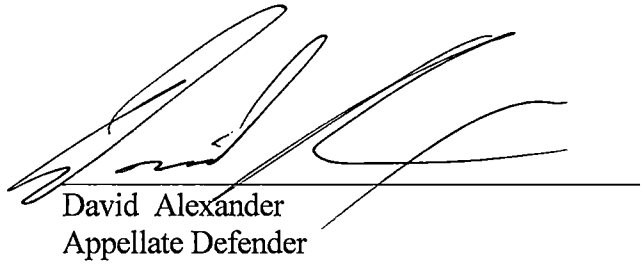
IN THE MATTER OF THE CARE AND
TREATMENT OF DAQUAN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001959

CERTIFICATE OF SERVICE

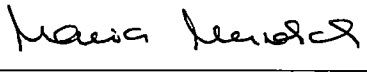
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of July, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of July, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: July 3, 2023.