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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JEFFREY ALLEN CHAPMAN,

APPELLANT

APPELLATE CASE NO. 2014-001181

AMENDED INITIAL BRIEF OF APPELLANT

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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 May 1, 2013, the State filed a petition to involuntarily commit appellant Jeffrey Allen Chapman pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* The immediate predicate conviction was a guilty plea for lewd act on a minor on April 6, 2005. R. ___ (State's Petition at page 2). Appellant was sentenced to fifteen years' imprisonment suspended to time served and five years' probation. R. ___ (State's Petition at page 2). Petitioner's probation was revoked for "technical violations, failing to comply with curfew and GPS monitoring requirements, and for failing to follow the advice and instructions of his parole agent." R. ___ (State's Petition at page 2).

On May 19, 2014, the SVP action was tried before the Honorable Robin B. Stilwell and a jury. Tr. 1. Tr. 4. Nicole Wetherton represented the State. Tr. 1. R. Mills Ariail, Jr. represented appellant. Tr. 1. The jury concluded that appellant was a sexually violent predator. Tr. 274, l. 22 – 275, l. 6. On May 20, 2014, Judge Stilwell signed an Order of Commitment placing appellant in the custody of the Department of Mental Health. R. ___ (Order of Commitment). This appeal follows.

ARGUMENT

Introduction

Trial counsel did not make a single objection during Jeffrey Allen Chapman's trial. He agreed before trial not to discuss any treatment Chapman would or would not receive in the SVP program. Tr. 18, ll. 5 – 16. He did not object when the State asked Chapman and Chapman's expert about another doctor who evaluated Chapman but who would not be testifying during the trial, giving the jury the clear implication that the missing doctor considered Chapman to be a predator. Tr. 211, l. 10 – 212, l. 3. Tr. 251, l. 14 – 252, l. 11. He did not object when the trial judge did not charge the jury after closing arguments. Tr. 260, l. 21 – 261, l. 4. He did not object when the State's expert speculated that Chapman might be a psychopath and compared him to the notorious serial killer Ted Bundy. Tr. 105, l. 4 – 106, l. 13.

Because of South Carolina's strict error preservation rules, none of these glaring errors could be raised in a direct appeal of a criminal conviction. But this case is a civil action. Other states with SVP programs routinely recognize the right to effective assistance of counsel; South Carolina has not yet done so. Even though Chapman has served all of his criminal sentence, he could be confined for the rest of his life in the SVP program. Due process entitles Chapman to the effective assistance of counsel and the right to be heard when this right is deprived.

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

Chapman was free for five years after receiving a fifteen year sentence suspended upon time served and probation. R. ___ (State's Petition at page 2). Chapman worked as an electrician and had no arrests or convictions for any sexual crimes when his probation was revoked for what the State admitted in its petition were "technical violations." R. ___ (State's Petition at 2).

Chapman's employer and minister, David Hyatt ("Hyatt") described the "technical violations" leading to the revocation of Chapman's probation. Tr. 154, ll. 17 – 24. Tr. 168, l. 13 – 171, l. 1. Hyatt employed Chapman as an electrician for four years. Tr. 155, ll. 3 – 4. Chapman had a GPS monitor and a beeper associated with his curfew. Tr. 168, l. 13 – 171, l. 1. One day after work, Chapman accidentally left his beeper in Hyatt's work van. Tr. 168, l. 13 – 171, l. 1. Hyatt dropped Chapman off at his house. Tr. 168, ll. 13 – 21. As Hyatt put it, "Jeff had to have that GPS beeper or he could get in deep trouble." Tr. 168, ll. 20 – 21. Chapman left his house to retrieve the beeper and was arrested for a GPS violation. Tr. 168, l. 13 – 171, l. 1. Chapman went back to prison for this violation in 2011, and, near the end of his sentence, the State decided he was a

sexually violent predator and instituted this proceeding against him.[1] R. ___(State's Petition at 1-2).

The State's expert was Dr. Maria Gehle ("Gehle") from the Department of Mental Health. Tr. 50, ll. 16 – 24. She opined that appellant was a sexually violent predator under the SVP Act and, without objection, testified that the people who could be at risk if Chapman were released were "just any woman he comes to pass in contact with. Could be a target. Any woman or child as well." Tr. 110, l. 14 – 111, l. 3. Tr. 112, ll. 1 – 5.

Dr. Gehle interviewed appellant for a total of five hours and reviewed his court records to come to this conclusion. Tr. 88, ll. 8 – 11. Tr. 61, l. 15 – 62, l. 5. She performed no investigation of Chapman's life during the five years he was free, employed, and had no criminal problems. Tr. 134, l. 15 – 137, l. 1. She did not speak to Chapman's girlfriend. Tr. 134, ll. 15 – 17. She did not speak to Chapman's boss, Hyatt. Tr. 134, ll. 18 – 137, l. 1. She did not speak to anyone at Chapman's church. Tr. 134, ll. 18 – 137, l. 1.

Chapman testified that he was "ashamed" of his admittedly bad past. Tr. 203, ll. 3 – 18. Chapman explained that he started drinking at the age of sixteen and became an alcoholic. Tr. 198, l. 21 – 200, l. 2. He was discharged from the Navy because of his alcoholism. Tr. 199, l. 22 – 200, l. 13. When he returned home, he ended up living in his car because of his drinking. Tr. 200, ll. 14 – 24. He could not keep jobs because of his

[1] The Court should note that the State did not seek to have Chapman committed upon his initial release on probation from his lewd act charge, but only after he had been free for five years until a technical violation of his probation that had nothing to with sex or violence landed him back in prison.

drinking. Tr. 202, ll. 6 – 8. He survived by working as a gigolo. Tr. 201, l. 19 – 202, l. 8.

Chapman quit drinking in 1999 and had not "had a drink in 15 years." Tr. 199, ll. 10 – 14. Hyatt confirmed the change in Chapman's life after he quit drinking and became involved in the church. Tr. 154, l. 17 – 161, l. 1. Hyatt was involved in a program called "Celebrate Recovery" and mentored Chapman. Tr. 155, l. 14 – 156, l. 14. Hyatt described Chapman as a "hard worker" and planned to rehire Chapman if he was released and to continue Chapman's counseling. Tr. 155, ll. 5 – 13. Tr. 159, l. 20 – 160, l. 9.

Dr. David Price ("Price") testified that Chapman did not meet the criteria for commitment under the SVP Act. Tr. 245, l. 21 – 248, l. 9. Dr. Price explained the problems with the major instrument used by Dr. Gehle, the Static-99R. Tr. 238, l. 16 – 248, l. 6. The Static-99R purports to be an actuarial tool that shows recidivism risk, but Dr. Price explained that the underlying data was from unpublished studies and it had no standard measurement of error. Tr. 239, ll. 6 – 20. He noted that even under Dr. Gehle's analysis of the Static-99R, people with similar scores as Chapman do not reoffend 60-75% of the time. Tr. 247, l. 21 – 248, l. 6. Chapman's age (fifty-two) made him less likely to reoffend and the chances of recidivism decrease by 2-4% per year after an individual turns fifty. Tr.247, l. 21 -248, l. 9. Dr. Price said Chapman did not have a personality disorder. Tr. 246, ll. 15 – 24. Dr. Price also placed great weight on Chapman's lack of trouble between 2005-2011. That was the "best indicator of whether he's going to reoffend." Tr. 246, ll. 10 – 14.

As will be discussed in greater detail, Chapman's lawyer did not object when the State asked Dr. Gehle about the definition of a psychopath and Dr. Gehle compared Chapman to Ted Bundy. Tr. 105, l. 4 – 106, l. 13. Trial counsel agreed not to mention the lack of treatment in the SVP program. Tr. 18, ll. 5 – 16. He did not ask any questions about the lack of treatment even after the State opened the door when it asked Dr. Gehle, "Do you know of anything other than this program that would guarantee that [Chapman] has any sex offender treatment?" Tr. 111, ll. 19 – 25. Trial counsel did not object when the State asked Chapman and Dr. Price about another doctor who had examined Chapman, but did not testify at the trial.[2] R. 211, l. 10 – 212, l. 3. R. 251, l. 14 – 252, l. 11. He did not object when the trial judge gave no jury charge at all after closing arguments. R. 260, l. 21 – 261, l. 4.

Discussion

The Right to Counsel Includes the Right to Effective Assistance

Chapman and others facing commitment under the SVP Act have 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

[2] This expert was Dr. Thomas Martin who provided the second opinion pursuant to the SVP Act. Tr. 19, ll. 7 – 22. Chapman's family, not trial counsel, retained Dr. Price. Tr. 20, l. 24 – 21, l. 10. Incredibly, the State moved to exclude Dr. Price's testimony on the ground that "under the SVP statute, they're entitled to one expert. He had one expert." Tr. 20, ll. 1 – 11. Judge Stilwell denied this motion. Tr. 23, ll. 2 – 7.

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 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

[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.

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, Chapman 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. Chapman 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).

The Attorney General agrees that specialized mental health testimony is required in SVP cases. Chapman's expert, Dr. Price, had a doctorate in clinical psychology from Auburn University, interned at the University of Pittsburgh, and had been qualified as an expert in "hundreds" of cases. Tr. 220, l. 19 – 224, l. 2. The Department of Justice retained Dr. Price to testify in federal prosecutions. Tr. 223, ll. 8 – 16. The Attorney General directed its voir dire at Dr. Price's experience with sexually violent predators. Tr. 224, l. 9 – 230, l. 16. The Attorney General then asked the trial judge to exclude Dr. Price's testimony stating, "He's not qualified to testify in these types of cases." Tr. 230, ll. 17 – 19. The trial judge overruled the objection and qualified Dr. Price as an expert. Tr. 230, ll. 20-22. The Attorney General continued to argue with the trial judge and compare the qualifications necessary, contending that only being qualified in clinical and forensic psychology was insufficient because Dr. Gehle had been "qualified as an expert in mental health evaluations pursuant to the Sexually Violent Predator Act." Tr. 231, ll. 1 – 17. Tr. 58, ll. 8 – 12.

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 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

[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.

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).

Chapman 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 Chapman 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). Chapman'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.

Chapman 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 Chapman'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. Chapman 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 Chapman'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 Chapman lacks any procedural vehicle for raising his constitutional claims of ineffective assistance of counsel. It is for this reason that the Court should allow Chapman 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 Chapman 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 8, Chapman asserts that the SVP Act is constitutionally infirm and this Court should order his immediate release.

3.

Trial counsel's failure to object to a psychologist's speculation that appellant might be a psychopath and comparing him to serial killer Ted Bundy deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial.

During the trial, the State ambushed Chapman with speculative and highly prejudicial testimony that he was a psychopath. Trial counsel failed to object. The trial court appointed Dr. Gehle to perform an evaluation of Chapman pursuant to the SVP Act. Tr. 51, l. 20 – 52, l. 4. S.C. Code Ann. § 44-48-80(D). Dr. Gehle concluded Chapman

met the criteria to be committed as an SVP and testified for the State at trial. Tr. 110, l. 20 – 111, l. 3.

The Act defines "sexually violent predator" as someone who "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(b).

During her direct testimony, Dr. Gehle told the jury that Chapman met the criteria for Biastophilia and Antisocial Personality Disorder. Tr. 98, ll. 4 – 9. She explained these diagnoses to the jury and concluded that the combination of these two disorders were "an especially dangerous combination." Tr. 98, l. 4 – 105, l. 3. The following questioning then occurred:

> **Q. Dr. Gehle, when a person – when someone is referred to as a psychopath, what does that mean?**
>
> A. Psychopath is somebody who appears rather charming, normal, yet they can often be self-centered, dishonest, undependable. They're largely devoid of guilt, remorse, empathy or love. They tend to exploit other people. They use people. If they get in any trouble or get caught they usually blame other people. They're really expert manipulators. They often do things for the sheer fun of it. Even when they destroy other peoples lives in the process. They often talk their way out of a lot of things.
>
> A con artist is a good example of a psychopath. You think in recent times like somebody like Bernie Madoff who can to your face lie to you and keep up a façade of being this well respected financier for so many years, is an example of a psychopath. **If you think of criminals, the prototype for a psychopath would be Ted Bundy. You know, a serial killer from back in the 80s. He's somebody who is a great example of a psychopath.** Very charming, didn't show his emotions, **can get away with murder. For a long time he did.**

> Q. Okay. And based on your expert opinion, **does Mr. Chapman meet the criteria or have traits consistent with someone in lay terms would be referred to as a psychopath?**
>
> A. Well, I didn't – I didn't attempt to diagnose him specifically with that disorder. **It's not something that's recognized in the DSM-5** so it's not something that I typically do as part of my evaluation. **But in looking at the characteristics of what a psychopath is, I mean, he has some of those characteristics** including the pathological lying, being manipulative, lack of remorse, being irresponsible, having some behavior control problems, being in denial, being sexually promiscuous.

Tr. 105, l. 4 – 106, l. 13 (emphasis added). Trial counsel did not object to any of this testimony about whether Chapman was a psychopath or the comparison to the serial killer Ted Bundy.

Failing to object to this highly inflammatory questioning and testimony constituted ineffective assistance of counsel. Trial counsel was required to act as a zealous advocate, recognize this speculative and prejudicial testimony, and object. See K.G.F., 29 P.3d at 498-501. It is apparent from the face of this record that trial counsel failed to effectively represent Chapman's interests. Id. at 501. No remand on this issue is necessary to determine that trial counsel's failure to object violated Chapman's due process rights. Ferreira, 852 N.E.2d at 1091-92.

Trial counsel should have immediately objected once the solicitor uttered the word "psychopath." An expert's opinion must be reliable. Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). See also Rule 702, SCRE. Expert testimony is "also subject to attack for relevancy and prejudice." State v. Council, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517-18 (1999). Trial judges must determine whether Rule 403 bars admission of the expert's testimony. Id. at 20, 515 S.E.2d at 518. Dr. Gehle's testimony about whether Chapman was a psychopath was speculation. Her

further testimony indicates that she was speculating because she had previously made no "attempt to diagnose him with that disorder." Tr. 106, ll. 5 – 13. She also testified that "psychopath" is "not something that's recognized in the DSM-5 so it's not something that I typically do as part of my evaluation." Tr. 106, ll. 5 – 8. Since "psychopath" is not a recognized diagnosis in the field, it fails the test for reliability under Council. See also State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) for the proposition that "the admissibility of scientific evidence requires a preliminary showing of general acceptance of the techniques and theories by the scientific community."). Dr. Gehle should never have been allowed to use the word "psychopath," much less speculate about Chapman.

Trial counsel also should have objected under Rule 403, SCRE. He should have objected immediately to the solicitor's question concerning psychopaths. By the time Dr. Gehle compared Chapman to Ted Bundy, the need to object was overwhelming, yet trial counsel sat mute. Comparing Chapman to one of America's most notorious serial killers was extremely prejudicial and had no probative value. Trial counsel utterly failed to zealously guard appellant's interests by failing to object.[6]

The harm to Chapman from this testimony was immense. Other courts have reversed because of comparisons to mass murderers and specifically for comparisons with Ted Bundy. "Comparing an accused or his acts to those of a notorious criminal is . . . an improper and erroneous interjection of facts not in the record." Brown v. State, 978 S.W.2d 708, 714 (Tex. App. 1998). In Brown, the prosecutor compared the defendant to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy in his closing argument.

[6] Trial counsel's failure to object would also constitute deficient performance under the higher Strickland standard.

Id. at 714. The prosecutor told the jury that, "Ted Bundy was very mentally ill, but he received the death penalty because he was still responsible for his acts." Id. The Texas court found that by comparing the defendant to Ted Bundy and the other two serial killers, the state "not only invoked the memory of the horrific crimes they committed but also effectively asked the jurors to punish appellant like they were punished, that is, by the assessment of imprisonment." Id. The court reversed over the state's objection that the error was harmless. Id. at 714-16. See also Vasquez v. State, 388 S.C. 447, 456-61, 698 S.E.2d 561, 565-68 (2010) (reversing because prosecutor called Muslim defendant a "domestic terrorist" during a trial held on the second anniversary of the September 11, 2001, attacks); Gonzalez v. State, 115 S.W.3d 278, 283-86 (Tex. App. 2003) (reversing because of prosecutor's comparison of defendant to Osama Bin Laden).

In State v. Hardy, 492 N.W.2d 230, 231-32 (Iowa Ct. App. 1992), the defendant was charged with the sexually motivated murder of a woman. The prosecution was allowed to introduce evidence that "on the night before the murder, a local cable television station had carried a movie about the life and crimes of the notorious serial killer of women, Ted Bundy." Id. at 233.

Conducting a Rule 403 analysis, the Iowa court found the evidence about the movie had "miniscule" probative value. Id. "On the other hand, the evidence was teeming with the tendency to suggest the defendant is an assaultive sexual deviant and rapist who has styled himself after the late mass murderer Ted Bundy. . . ." Id. The court further concluded that "the evidence concerning the content and timing of the movie about Ted Bundy served only to unfairly prejudice the defendant by drawing a not-so-subtle analogy between the defendant and a notorious serial killer." Id. at 234. The court

reversed, stating that if Rule 403 was "to be given any effect whatsoever, surely it should be to keep this type of information from jurors." Id.

Just as in Hardy, the State and Dr. Gehle completely lacked subtlety in their comparison of Chapman to Ted Bundy. This information had no probative value and extreme prejudicial effect. It preyed on the jury's fear of what would happen if Chapman were released. The solicitor capitalized on this comparison with her final question to Dr. Gehle on direct, eliciting the response that "just any woman he comes to pass in contact with" could be a target. Dr. Gehle's discussion of Ted Bundy's charming nature—which allowed him to "get away with murder" and that "[f]or a long time [Bundy] did"—also implanted in the jury's mind that perhaps Chapman was a murderer who had gotten away with crimes yet undiscovered by the State or that he would murder women in the future. Because the comparison came from an expert witness, the effect was even more prejudicial than in the above-cited cases. Juries tend to place more emphasis on testimony from an expert witness. State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("[I]t is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Trial counsel's failure to have this evidence excluded, obtain a mistrial, or preserve the issue for appeal constituted ineffective assistance that left the jury unfairly prejudiced against Chapman.[7] The ineffective assistance of trial counsel with respect to this issue is blatantly apparent from the record before this Court and no remand is necessary to decide this issue.

[7] The harm flowing from trial counsel's deficient performance would also satisfy the prejudice prong of Strickland.

4.

Trial counsel's lack of objection to the trial court's failure to give the jury any charge on the law at all after closing arguments and/or securing the court's charge on the record deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial.

No charge on the law appears on the record at the end of this case. Chapman's last witness completes his testimony. Tr. 259, ll. 10 – 16. The defense rests. Tr. 259, ll. 17 – 18. The State offers nothing in reply. Tr. 259, ll. 19 – 20. Judge Stillwell then addressed the jury: "All right. Ladies and gentlemen, we're going to go next to closing arguments but I'm going to take a quick break. I'm going to give you some instructions while we take that break." Tr. 259, ll. 21 – 24. At first reading, this sentence seems to refer to Judge Stilwell next telling the jury to select a foreperson and how to ask questions during deliberations. Tr. 259, l. 25 – 260, l. 18. The jury is then excused. Tr. 260, ll. 21 – 22.

Judge Stilwell then addressed the attorneys and told them, "I have already provided to the jury the charge on the law. Is there anything additional or any additional request for charge?" Tr. 260, l. 25 – 261, l. 2. Trial counsel had no requests or objections. Tr. 261, l. 4. The court took a short recess and the jury then returned. Tr. 262, ll. 8 – 19. Judge Stilwell noted the jury's selection of a foreperson and then the attorneys made their closing arguments. Tr. 262, l. 20 – 272, l. 22. At the conclusion of the arguments, the court did not charge the jury on the law, but sent them to the jury room for deliberations with no objection from trial counsel. Tr. 272, l. 23 – 273, l. 19. The jury then returns a verdict. Tr. 274, l. 113 – 275, l. 6. No jury charge appears on the record.

It is unclear exactly why no charge appears on the record. One possibility is that Judge Stilwell, when he said he was going to give the jury instructions during the break, meant that he charged them off-the-record. Another possibility is that Judge Stilwell, when he referred to having already given the jury a charge on the law, meant his preliminary instructions. Judge Stilwell gave jury instructions on reasonable doubt, direct and circumstantial evidence, expert testimony, and the SVP statute at the beginning of the case along with the standard preliminary instructions to a jury. Tr. 31, l. 19 – 37, l. 14. He told the jury, "Now, ladies and gentlemen, I'm going to give you the majority of the charge if not all the charge on the law now before we get started." Tr. 31, ll. 19 – 21.

Failing to obtain a jury charge at the end of the evidence and after argument constituted ineffective assistance of counsel. The rules of civil procedure require the trial court to charge the jury after argument. Rule 51, SCRCP. Rule 51 states that "the court **shall** instruct the jury **after arguments are completed.**" Rule 51, SCRCP (emphasis added). See also S.C. Const. Art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, **but shall declare the law.**") (emphasis added). Rule 51 also requires a party to object to "the failure to give an instruction . . . before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." Rule 51, SCRCP. Trial counsel should have objected that the trial court either did not charge the jury at all or that the court's charge was not on the record.

"The failure of a judge to charge upon any material point usually results from inadvertence, and the law casts upon the parties the duty of calling the judge's attention to the matter." State v. Adams, 68 S.C. 421, 47 S.E. 676, 678 (1904) (internal quotations omitted). "The failure to request instructions on any particular point is regarded waiver of

the right to such instruction and acquiescence in the omission." Id., 47 S.E. at 679. If failing to request a particular charge is error, then it follows that failing to request **any** jury charges **at all** constitutes ineffective assistance.

Trial counsel's error was grave and prejudiced Chapman. Juries are presumed to follow the trial court's instructions. State v. Northcutt, 372 S.C. 207, 228, 641 S.E.2d 873, 884 (2007). Confusing jury charges constitute reversible error. Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). If a confusing jury charge is reversible error, then the lack of any jury charge at all is reversible error. It left the jury free to speculate on how to reach a verdict.

Chapman also lost the benefit of specific jury charges that would have been favorable. The jury was not charged that the State had the burden of proof. It is error to give a charge that dilutes the State's burden of proof. Cage v. Louisiana, 498 U.S. 39, 41 (1990). Failing to charge the burden of proof at all is a more substantial error than dilution of the burden.

Chapman lost the benefit of a jury charge concerning reasonable doubt. A court's charge that errs in its explanation of reasonable doubt is error. State v. Manning, 305 S.C. 413, 416-17, 409 S.E.2d 372, 374-75 (1991). If there is a reasonable likelihood that a jury has applied a challenged instruction in a way that violates the Constitution, the case should be reversed. Estelle v. McGuire, 502 U.S. 62, 72 (1991). Without even telling the jury about the reasonable doubt standard at the close of the case, there is an extreme likelihood that the jury did not apply the reasonable doubt standard in a constitutional manner. A deficient reasonable doubt instruction is structural error that mandates reversal. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).

The trial court did not tell the jury at the end of the case that the lawyers' arguments were not instructions on the law. Without any charge from the court, the jury was free to use the arguments of counsel as the law they should follow. The trial court did not define "sexually violent predator" or give the elements the State was required to prove under the SVP Act. The trial court also failed to charge the jury on direct and circumstantial evidence at the end of the case. State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

Without a jury charge at the end of the case, the verdict cannot be reliable. The lack of a burden of proof or reasonable doubt instruction alone mandates reversal. Trial counsel committed a grievous error in failing to obtain a current, complete, and correct charge from the court at the close of the case. This error caused Chapman not to receive a fair trial by compromising his right to have the jury decide the case based on the applicable law. Trial counsel's error deprived Chapman of due process and this case must be reversed.[8]

5.

Trial counsel's failure to object to the State's questions regarding a doctor who examined appellant and did not testify at trial deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial.

During pre-trial motions, the State sought to have Chapman's expert, Dr. Price, excluded. Tr. 19, ll. 7 – 9. The State based its argument on the earlier evaluation of Chapman by Dr. Thomas Martin ("Martin"). Tr. 19, ll. 7 – 22. After Dr. Gehle opined that Chapman was an SVP, Chapman obtained another evaluation by Dr. Martin pursuant to the SVP Act and a consent order. Tr. 19, ll. 7 – 22. S.C. Code Ann. § 44-48-90(C). The attorney general told the court, "[Dr. Martin] fully evaluated Mr. Chapman and he

[8] The case should be reversed under either the K.G.F. or Strickland standard.

basically—he's been the independent expert on every case that I've had so far. And he came back and he's not going to testify at trial." Tr. 19, ll. 19 – 22.

Chapman's family—**not** trial counsel—retained Dr. Price. Tr. 21, ll. 4 – 10. Trial counsel informed the attorney general that he intended to call Dr. Price. Tr. 21, ll. 1 – 10. The attorney general then argued that Dr. Price should be excluded because of an interesting and draconian interpretation of the SVP Act:

> My response was—I have the emails and we talked about it, who's Dr. Price? It was the family retaining the expert. The problem I have is one under the statute **they're entitled to one expert. He had one expert.** And two, I was not made aware within any reasonable time. I could have served interrogatories but that requires 30 days. I did not have 30 days before this trial to serve those interrogatories. **And I didn't even think to go ahead and serve them on Mr. Ariail because he already had the one expert.**[9]

Tr. 20, ll. 1 – 11 (emphasis added). Judge Stilwell asked the attorney general for any authority that "stands for the proposition that the defendant can't retain his own expert?" Tr. 22, ll. 7 – 13. The State gave no authority but relied on "the plain language of the statute." Tr. 22, ll. 14 – 23. Judge Stilwell denied the State's motion to exclude Dr. Price. Tr. 23, ll. 2 – 7.

During the trial, the Attorney General cross-examined Chapman about Dr. Martin's absence. Trial counsel did not object:

> Q. Okay. Isn't it true that you had other evaluations as well by defense experts?
>
> A. Not that I recall, ma'am.

[9] From comments made by trial counsel, it appears that the Attorney General was also seeking to force Chapman to pay for Dr. Martin's evaluation because his family retained Dr. Price. Tr. 21, ll. 23 – 25.

Q. Isn't it true that Dr. Martin was retained by the defense for this trial to evaluate you as your expert?

A. Yeah, there should have been a red flag immediately with Dr. Martin. Because he knew you and says that he's been dealing with you two for quite some time, he knew y'all right away.

Q. Absolutely. He's an independent expert **that testifies for the defense in all of these cases**, doesn't he?

A. Right.

Q. **But he's not here to testify for you, is he?**

A. No, he's not here to testify for me.

Q. Okay.

A. Why is that, ma'am?

Q. You tell me.

A. I don't know.

Q. Okay. So why did you rape all these women?

Tr. 211, l. 10 – 212, l. 3 (emphasis added). Again, on cross-examination of Dr. Price, the attorney general asked about Dr. Martin. Again, trial counsel failed to object:

Q. Okay. Are you aware of any other opinions given by mental health professionals in regards to evaluating Mr. Chapman in this case?

A. I think maybe he had seen a Dr. Martin but I can't recall.

Q. Okay. Do you know Dr. Tom Martin?

A. I do not.

Q. Okay, so, prior to becoming involved, did you know Mr. Chapman had Dr. Martin retained **to conduct a full evaluation on him** for these proceedings?

A. Repeat the—prior to becoming involved?

Q. Prior to you becoming involved?

A. I think I was aware of that, I'm not sure at what point I was aware of that.

Q. Okay. So, in making your opinion you didn't consult with Dr. Martin?

A. I did not.

Q. So, do you know that Dr. Martin has an outpatient program specializing in sex offender treatment?

A. Not offhand, no.

Q. Okay. **Do you know that he worked at the Sexually Violent Predator Unit as a chief psychiatrist?**

A. No.

Tr. 251, l. 14 – 252, l. 11 (emphasis added). During her closing argument, the attorney general attacked Dr. Price, arguing that he did not "have any experience in this field evaluating sex offenders." Tr. 271, ll. 1 – 5.

Trial counsel's failure to object to the State's questions about Dr. Martin constituted ineffective assistance. Evidence regarding Dr. Martin was inadmissible under Rule 403. Way v. State, 410 S.C. 377, 764 S.E.2d 701 (2014); In the Matter of Gonzalez, 409 S.C. 621, 763 S.E.2d 210 (2014). Chapman's case is indistinguishable from Way, except that the error in Chapman's case is not harmless.

Way was an SVP case. Way at 379, 764 S.E.2d at 703. In Way, the State cross-examined the defendant concerning whether he had been evaluated by another doctor (coincidentally, also Dr. Martin). Id. at 381, 764 S.E.2d at 704. The defense objected. Id. The Court of Appeals held that the cross-examination was proper. Id. at 383, 764

S.E.2d at 705. The Supreme Court reversed, stating, "We disagree with the Court of Appeals to the extent it found it did not constitute error for the State to question Way about Dr. Martin." Id. "While the Court of Appeals was correct that the admission of this testimony is governed by the SCRE and our case law, for the reasons discussed in . . . Gonzalez . . . we find the probative value of questioning Way about his retention of a non-testifying psychiatric expert was substantially outweighed by the danger of unfair prejudice." Id. at 383-84, 764 S.E.2d at 705. "As a result, we conclude the State should not have been allowed to cross-examine Way about his retention of his non-testifying expert witness, Dr. Martin." Id. at 384, 764 S.E.2d at 705. The error in Way cannot be distinguished from Chapman's case. Even the doctor is the same. Trial counsel should have objected.

In Gonzalez, the Court discussed the danger in allowing this kind of evidence before the jury. Gonzalez at 634-36, 763 S.E.2d at 217. The State in Gonzalez asked the jury to draw an adverse inference from the absence of the defendant's expert witness (also Dr. Martin). Id. The Court explained that many reasons exist why a psychiatrist might not be called as an expert and determined that the "application of an adverse inference as to these types of experts allows a jury to simply *speculate* as to what the expert might have said." Id. (emphasis in original).

The Court found the error harmless in both Gonzalez and Way. In Gonzalez, this finding was due in part to the efforts of defense counsel. Gonzalez at 637, 763 S.E.2d at 218 ("defense counsel strenuously rebutted the adverse inference"). Defense counsel in this case made no effort at all. The Gonzalez harmless error conclusion was also based

on the failure to raise the cross-examination of Dr. Martin on appeal, rendering the adverse inference error merely cumulative. Id. at 636-37, 763 S.E.2d at 218.

In Way, the error was found harmless because the victim testified, because of Way's prior criminal history, and the testimony of the State's expert witness. Way at 384-85, 764 S.E.2d at 705-06. The Court also noted that the State "never referred to Dr. Martin as Way's expert or mentioned that Way had retained Dr. Martin for an independent evaluation but then did not call him as a witness, so there was only limited information elicited at trial in this regard." Id. at 385, 764 S.E.2d at 706. The "limited information" was likely due to Way's counsel objecting.

In stark contrast to these two cases, Chapman had a significant chance at a favorable jury verdict. Dr. Price testified he did not meet the definition of an SVP. Chapman had been out of jail for five years without reoffending before a "technical" violation of his parole landed him back in prison and the wheels of the SVP bureaucracy began to turn.

The State's questions regarding Dr. Martin were far more inflammatory than in either Gonzalez or Way. The State told the jury that Dr. Martin used to be the chief psychiatrist of the SVP program. Tr. 251, l. 14 – 252, l. 11. The State told the jury that Chapman had retained Dr. Martin and that he had conducted a "full evaluation." Tr. 251, l. 14 – 252, l. 11.

But by far, the most damaging were the State's questions that not only invited the jury to draw the inference that Dr. Martin's testimony would have been adverse, but that Dr. Martin likely considered Chapman to be one of the worst offenders he had examined. Tr. 211, l. 10 – 212, l. 3. The State told the jury that Dr. Martin "testifies for the defense

in **all of these cases.**" Tr. 211, l. 10 – 212, l. 3 (emphasis added). The State then asked Chapman, "But he's not here to testify for you, is he?" Tr. 211, l. 10 – 212, l. 3. The clear meaning of these questions was that Chapman was so loathsome that not even the expert who **always** testifies for the defense would support his release. Especially when combined with the comparison of Chapman to Ted Bundy, this highly prejudicial line of questioning served only to inflame the jury's passions and strike fear into their hearts of what might happen if they released Chapman. These questions also undermined the credibility of Dr. Price and made him seem like a "hired gun." Trial counsel's failure to object to this inadmissible and devastating questioning undoubtedly deprived Chapman of due process and this Court should reverse.[10]

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 Chapman'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

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

determines the defendant meets the definition, the defendant's case is forwarded for prosecution. S.C. Code Ann. § 44-48-50.

Chapman'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).

Chapman'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 Chapman were 4-0 with no abstentions. R. ___ (State's Petition, Exhibit A). Five signature lines are on the form, but Chapman'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 March 25, 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, page 1, paragraph 3.).

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 Chapman's records and making the initial determination. S.C. Code Ann. § 44-48-50. Chapman'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, Chapman would have been released because the State failed to strictly comply with the SVP Act. Therefore, this court should reverse and order Chapman's release.[11]

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

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's expert 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. After jury selection, the trial judge took up the State's motions in limine. Tr. 18, l. 4. The Attorney General explained the resolution of its first motion to Judge Stilwell:

> MS. WETHERTON: The first motion I was requesting that any discussion as to the treatment, should Mr. Chapman be committed into the Sexually Violent Predator Program, be excluded. I have spoken with Defense Counsel prior to this hearing and he has agreed that he will not be bringing it up. So, that, at this point, I would say that first motion, at this point, is moot.
>
> THE COURT: Okay.
>
> Mr. Ariail, is that your understanding?
>
> MR. ARIAIL: Yes, sir, that's our understanding, Your Honor.

Tr. 18, ll. 5 – 16.

Near the end of the direct-examination of Dr. Gehle, the State opened the door on the treatment issue:

> Q. Do you know of anything other than this program that would guarantee that he has any sex offender treatment?
>
> A. I don't know of anything else that would guarantee it, no.
>
> Q. Would he be required to attend any sex offender treatment if he didn't go into this program?

A. To my knowledge he would not be required.

Tr. 111, ll. 19 – 25. Trial counsel did not object to these questions. Nor did trial counsel take advantage of the door opened by this testimony to ask any questions of Dr. Gehle concerning the lack of treatment provided in the SVP program.

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 and claims through the chief psychologist at DMH that the SVP program is the only guarantee of treatment for a defendant. Trial counsel was ineffective in not addressing this issue either with an objection, or, better yet, through effective impeachment regarding the SVP program.

Since trial counsel did not object or 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 Chapman's trial. See Ontiberos, 87 P.3d at 866. Chapman should be allowed the opportunity to explore in an evidentiary hearing the extent to which trial counsel's failure to cross-examine Dr. Gehle on this issue prejudiced his case. As the record now stands, appellant cannot prove prejudice under either the K.G.F. or Strickland standards.

However, appellant can show the importance placed on this evidence by the State. The attorney general discussed treatment twice in her closing argument. Tr. 266, ll. 4 – 5. Tr. 267, ll. 1 – 5. The State told the jury, "I'd like to point out that Mr. Chapman has never participated in sex offender treatment." Tr. 266, ll. 4 – 5. At the end of her initial closing, the attorney general stated, "And I believe that Mr. Chapman is a sexually violent predator that needs treatment. So, he can finally gain that understanding as to why he committed and get that treatment for sexually violent offenses so he does not hurt another woman." Tr. 267, ll. 1 – 5. Therefore, this Court should remand this case to the circuit court for a full exploration of this issue so that Chapman can have meaningful appellate review and his due process rights are protected.

8.

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 Chapman to vindicate his ineffective assistance of counsel claims would render the SVP Act unconstitutional. Chapman cannot be constitutionally detained for the rest of his life after the egregious deprivations of his right to counsel during the farce of his trial. Any decision by this Court which prevents Chapman from raising these claims will transform his continued detention into a constitutional violation.

Further compounding the problem of the SVP Act's constitutionality is this Court'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 Chapman's case, he could not prevail on the claim raised in Issue 5, 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 Chapman's case.

Continuing to detain Chapman 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 Chapman'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. Chapman 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 Chapman 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

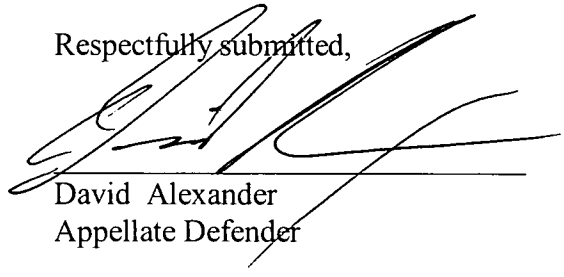
the SVP Act requiring higher standards for appointed counsel and providing remedies when the right to counsel is deprived.

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 Chapman'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 Chapman's fundamental right to counsel would require his immediate release from confinement.

CONCLUSION

For the foregoing reasons, Chapman's commitment must be reversed and this case remanded for a new trial, or, alternatively, Chapman must be released because he is being detained pursuant to an unconstitutional statute.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of September, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

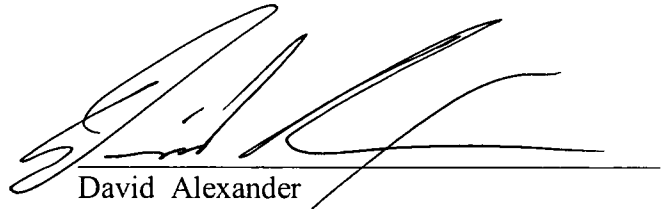
IN THE MATTER OF THE CARE AND
TREATMENT OF JEFFREY ALLEN CHAPMAN,

APPELLANT

APPELLATE CASE NO. 2014-001181

CERTIFICATE OF SERVICE

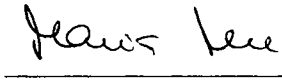
The undersigned attorney hereby certifies that a true copy of the Amended Initial Brief of Appellant and Amended Designation of Matter in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Jeffrey Allen Chapman, Sexual Violent Predator Program, 7901 Farrow Road, Columbia, SC 29203, this 23rd day of September, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.