SC96830

IN THE
SUPREME COURT OF MISSOURI

In the Matter of the Care and Treatment of N.G.,

Appellant,

v.

State of Missouri,

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri - Probate Division
The Honorable Kathleen A. Forsyth
Case No. 14P8-PR00945

# Brief of American Civil Liberties Union of Missouri Foundation as *Amicus Curiae* in Support of Appellant Filed with Consent

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## Jurisdictional Statement

*Amicus* adopt the jurisdictional statement as set forth in Appellant's brief.

## Interest of *Amicus Curiae* and Authority to File

This brief is filed with consent of the parties. The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Missouri is one of the ACLU's statewide affiliates with over 19,000 members. The ACLU and the ACLU of Missouri have long fought to ensure that the all Missourians who have the right to counsel are afforded effective counsel.

## Statement of Facts

*Amicus* adopt the statement of facts as set forth in Appellant's brief.

## Argument

### I. Individuals facing confinement under the Sexually Violent Predator Act have a constitutional right to counsel and such a right guarantees effective counsel.

Due process guarantees the right to counsel to individuals who face civil commitment under §§ 632.480 to 632.513, the Sexually Violent Predator Act (SVPA).[1] It has been recognized that, in this context, a "due process right to the assistance of counsel vested at the time the Attorney General filed a petition with the probate division pursuant to § 632.486." *In re Norton*, 123 S.W.3d 170, 172 (Mo. banc 2003).[2] Moreover, it has also been recognized that, "[f]or the purposes of triggering a defendant's right to counsel under the due process clause, the distinction between a 'criminal' and a 'civil' proceeding is irrelevant[.]" *State ex rel. Family Support Div.-Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App. W.D. 2010) (citing *Walker v. McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985) ("[t]he right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty")). Civil commitment under SVPA is both involuntary and indefinite. *See In re Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007) (noting that, "[t]he basis for allowing indefinite commitment of sexually violent

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[1] All statutory citations are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

[2] The court in *In re Norton* found that Mr. Norton's due process rights had not been violated because his claim involved the absence of legal counsel during an interview for a confinement report, which was not considered part of proceedings pursuant to §§ 632.480 to 632.513. *In re Norton,* 123 S.W.3d at 172. That is not at issue in this case because Appellant is asserting ineffective assistance of counsel during his trial.

predators is to protect society from dangerous persons"). After being deemed a sexually violent predator, the person on trial is "committed to the custody of the director of the department of mental health for control, care, and treatment." §§ 632.492, 632.495.

There is a substantial liberty interest at stake when a person faces confinement under SVPA. *See In re Coffman*, 225 S.W.3d at 446 (finding that the indefinite commitment under SVPA "is a restriction on the fundamental right of liberty"). The Supreme Court of the United States has repeatedly "recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *accord Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (plurality opinion) (noting, in the context of prisoners, that state statutes can "grant … liberty interests that invoke due process protections"). "There is a substantial liberty interest in avoiding confinement in a mental hospital." *Zinermon v. Burch*, 494 U.S. 113, 131 (1990). The Supreme Court further recognized "that for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty,' and in consequence 'requires due process protection.'" *Vitek*, 445 U.S. at 491-92 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) and *Addington*, 441 U.S. at 425).

In *Vitek*, the Supreme Court found that, to satisfy the requirements of due process, persons who suffer from mental disorders and require involuntary confinement but are indigent must be provided counsel for the commitment proceedings. *Vitek*, 445 U.S. at 496-97. In reaching this conclusion, the Court noted that, "[a] prisoner thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to

understand or exercise his rights." *Id.* "In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill." *Id.* at 497. Indeed, in circumstances very similar to the present case, "the threshold question in [*Vitek* was] whether the involuntary transfer of a … state prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause." *Id.* at 487. "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." *Id.* at 492. "It is undisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that '[w]hether 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.* (quoting *Addington*, 441 U.S. at 425). And, "'[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

While it is true that "both the Missouri and United States Supreme Courts have recognized that where there is no constitutional right to counsel, there is no constitutional claim to ineffective assistance of counsel." *In re Grado v. State*, WD 79756, 2017 WL 4622132, at *1, *7 (Mo. App. W.D. Oct. 17, 2017) (citing *State v. Hunter*, 840 S.W.2d 850, 871 (Mo. 1992); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)). Yet, "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 685 (1985); *see also Lane*, 313 S.W.3d at 187 (discussing the due process right to counsel and noting that, "assuming the right to counsel has attached, a complete

denial of that right (as opposed to a denial of the right where the defendant was provided with counsel, but counsel was incompetent) constitutes reversible error irrespective of whether the violation caused prejudice").[3] Thus, where there is a constitutional right to counsel, whether it stems from the due process or the Sixth Amendment, it is a right to *effective* counsel.

## II. Individuals facing confinement under the Sexually Violent Predator Act have a statutory right to counsel and such a right guarantees effective counsel.

Individuals who face civil commitment under SVPA also have a statutory right to counsel. Section 632.492 provides the following: "At all stages of the proceedings pursuant to sections 632.480 to 632.513, any person subject to sections 632.480 to 632.513 shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person."

While it is true that, to date, no Missouri court has found that this statutory right to counsel is a right to effective counsel in the specific SVPA context, courts "have … found that ineffective assistance of counsel claims can be cognizable where the right to counsel is conferred by statute" in other civil contexts. *See, e.g.*, *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. App. W.D. 1989); *In re I.R.S.*, 361 S.W.3d 444, 448 (Mo. App. S.D. 2012). Because Missouri courts have found that the statutory right to counsel

[3] Cases in both state and federal courts note that where there is no constitutional right to counsel—often in the context of discretionary criminal appeals—a person cannot be deprived of effective assistance of counsel. *See, e.g.*, *Wainwright v. Torna*, 455 U.S. 586, 587 (1982) (per curiam); *Winfield v. State*, 93 S.W.3d 732, 738 (Mo. banc 2002). These holdings further support the conclusion that where there is a constitutional right to counsel it is a right to *effective* assistance of counsel.

confers a right to effective counsel in other civil contexts, it should do so here as well. If the statutory right to counsel under SVPA is not a right to effective counsel, then, like Missouri courts have recognized in similar contexts, a right to counsel "become[s] an 'empty formality.'" *In re J.C., Jr.*, 781 S.W.2d at 228 (quoting *In re Bishop*, 375 S.E.2d 676, 678 (1989)).

Missouri courts have consistently held that the statutory right to counsel in cases involving the termination of parental rights implies a right to effective counsel. *See id*.; *see also C.V.E. v. Greene Cnty. Juvenile Office*, 330 S.W.3d 560, 574 (Mo. App. S.D. 2010) ("In Missouri, the test is whether the attorney was effective in providing his client with a meaningful hearing based on the record."). This is not a recent development; it has been in place for almost thirty years and has been noted in numerous cases since it was first recognized. *See In re J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017); *C.V.E.*, 330 S.W.3d at 574; *In re S.T.W.*, 39 S.W.3d 517, 518 (Mo. App. S.D. 2000); *In re F.M.*, 979 S.W.2d 944, 946 (Mo. App. S.D. 1998); *In re K.L.*, 972 S.W.2d 456, 461 (Mo. App. W.D. 1998); *In re F.N.M.*, 951 S.W.2d 702, 707 (Mo. App. E.D. 1997); *In re J.M.B.*, 939 S.W.2d 53, 55-56 (Mo. App. E.D. 1997); *In re C.D.M.*, 888 S.W.2d 725, 726-27 (Mo. App. E.D. 1994); *In re W.S.M.*, 845 S.W.2d 147, 153 (Mo. App. W.D. 1993); *In re J.C., Jr.*, 781 S.W.2d at 227-228.

Branching from this line of cases, the Southern District held that parents with a statutory right to counsel in juvenile court also have a right to effective counsel. *I.R.S. v. Greene Cnty. Juvenile Office*, 361 S.W.3d 444, 448 (Mo. App. S.D. 2012). In reaching this conclusion, the court cited directly to *C.V.E. v. Greene County Juvenile Office*,

despite the fact that the two cases dealt with different legal contexts: one with termination of parental rights and the other with whether the children were in the need of care and treatment.

Just as Missouri courts have found that the statutory right counsel in proceedings where a parent faces termination of their parental rights or a child is alleged to be in need of care and treatment is a right to effective counsel, this Court should find that the statutory right to counsel in the SVPA context is also a right to effective counsel. If it is not, then the statutory right to counsel provided to these individuals who face involuntary and indefinite commitment is an empty formality.

## III. Decisions from other jurisdictions support a finding that there is both a statutory and constitutional right to effective assistance of counsel in the SVPA context.

Without a right to effective counsel in the SVPA context, the statute's grant of counsel to those facing involuntary and indefinite commitment is specious. Any passive attorney occupying a seat in a court room could meet the statutory requirements if there is no requirement that he or she also be effective.

This concern has been reflected in a number of jurisdictions outside Missouri where courts have found both that the statutory right to counsel in the SVPA context is a right to effective counsel and that these individuals have a constitutional right to effective counsel. These cases are instructive, just as decisions from other jurisdictions were instructive in 1989 when the Western District found that the statutory right to counsel in cases involving the termination of parental rights implies a right to effective counsel. *See In re J.C., Jr.* 781 S.W.2d at 228 (noting that, "[s]everal states have recognized the

viability of a claim of ineffective assistance of counsel in termination of parental rights proceedings" and citing cases from Arizona, California, Colorado, Illinois, Iowa, Kansas, Massachusetts, Michigan, New York, North Carolina, and Washington).

In the SVPA context, the Idaho Supreme Court held that the "'statutory right to counsel would be a hollow right if it did not guarantee the defendant the right to effective assistance of counsel.'" *Smith v. State*, 203 P.3d 1221, 1232 (Idaho 2009) (quoting *Hernandez v. State*, 905 P.2d 86, 88 (Idaho 1995)). In *Smith*, the court also held that there is no "legitimate basis for determining whether there has been a violation of the right to effective assistance of counsel guaranteed by I.C. § 19-852 differently from determining whether there has been a violation of a similar constitutional right." *Id*. at 1232-33. Thus, the statutory right to effective counsel in the SVPA context is identical to the constitutional right to effective assistance of counsel. *Id*. at 1233. In deciding what analysis is required, the court held that the "appropriate analysis is by reference to the well-established standards governing such claims under the Sixth Amendment." *Id*.

Likewise, in Illinois, the statutory right to counsel in the SVPA context is a right to effective counsel. *People v. Rainey*, 758 N.E.2d 492, 501-03 (Ill. Ct. App. 2001). In *Rainey*, the court reasoned that "the legislature could not have intended to provide individuals subject to involuntary commitment with the right to counsel and permit that counsel to be prejudicially ineffective." *Id*. at 502 (citing *In re Carmody*, 653 N.E.2d 977 (Ill. App. Ct. 1995)); *see also In re Jones*, 743 N.E.2d 1090, 1094 (Ill. App. Ct. 2001) ("Involuntary mental health services entail a 'massive curtailment of liberty,' and the right to counsel is a central feature of the procedures enacted to ensure that citizens are

not subjected to such services improperly." (citation omitted)). In *Rainey*, the court also acknowledged the Supreme Court's holding that, "'the right to counsel is the right to the effective assistance of counsel.'" 758 N.E.2d at 501-03 (discussing the right to counsel and quoting *Strickland*, 466 U.S. at 686).

While recognizing that the right to counsel in the SVPA context is different than the Sixth Amendment right in the criminal context, the South Carolina Supreme Court found both a statutory and constitutional right to effective counsel and noted that, "given the significant due process implications inherent in civil commitments," the right to counsel found in the applicable South Carolina statutes "is not merely a statutory right, but also a constitutional one arising under the Fourteenth Amendment and the South Carolina Constitution." *In re Chapman*, 796 S.E.2d 843, 846 (S.C. 2017). In reaching this conclusion, the court relied on the United States Supreme Court's repeated recognition "'that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Id.* (quoting *Addington*, 441 U.S. at 425). The court also cited to *Vitek* and its holding "that to satisfy due process, prisoners suffering from a mental disease or defect requiring involuntary commitment must be provided with independent assistance during the commitment proceeding." *Id.* (citing *Vitek*, 445 U.S. at 496-97). The court then noted that the statutory requirement of counsel in South Carolina was "[i]n accordance with these directives." *Id.*

The Supreme Court of Kansas acknowledged that the KSVPA provides a statutory right to counsel and held 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." *In re Ontiberos*, 287 P.3d 855, 862-63 (Kan. 2012). However, because the language in the KSVPA statute diminishes the right by noting that failure to comply with the statutory provisions does not prevent the attorney general from proceeding in the action, the court was compelled "to address whether a person is entitled to counsel in a SVPA proceeding under the constitution." *Id.* at 863. In reaching a conclusion that a person facing commitment under KSVPA does have a constitutional right to effective counsel, the Kansas Supreme Court looked to the due process analysis of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and ultimately held that "examination of the three *Mathews* factors supports finding that the federal and Kansas due process clauses establish a right to counsel in KSVPA proceedings." *In re Ontiberos*, 287 P.3d at 865.

In Virginia, after discussing the statutory requirements and review process for SVPA proceedings, the state Supreme Court held "that in view of the substantial liberty interest at stake in an involuntary civil commitment based upon Virginia's Sexually Violent Predators Act, the due process protections embodied in the federal and Virginia Constitutions mandate that the subject of the involuntary civil commitment process has the right to counsel at all significant stages of the judicial proceedings, including the appellate process." *Jenkins v. Dir. of Virginia Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006). There, the court found that the standard for ineffective assistance of counsel should be the same as the one set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

In Florida, after "previously recogniz[ing] 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," an appellate court extended that right to individuals facing commitment under the state's SVPA. *Manning v. State*, 913 So.2d 37, 37 (Fla. Dist. Ct. App. 2005); *see also Pullen v. State*, 802 So. 2d 1113, 1116 (Fla. 2001). A formal procedural rule later officially set forth the mechanism for raising such a claim. *See Bohner v. State*, 157 So. 3d 526, 527 (Fla. Dist. Ct. App. 2015) (noting that previous decisions held that only a very limited number of these claims could be raised on direct appeal when ineffectiveness is apparent "from the face of the record" and finding that "the rule provides that ineffectiveness of trial counsel may be asserted by filing a habeas corpus petition").

In California, an appellate court held that individuals facing commitment under the SVPA have both a statutory and constitutional right to effective counsel. *People v. Hill*, 162 Cal. Rptr. 3d 3, 7 (Cal. Ct. App. 2013). In reaching this conclusion, the court relied on a previous decision finding a right to effective counsel in a non-SVPA involuntary commitment context and noted that "in light of the fact that a commitment under the SVPA is most likely to result in loss of physical liberty for a prolonged period, potentially for the remainder of the defendant's life, these considerations apply with even greater force in SVPA proceedings than in [non-SVPA commitment] proceedings." *Id.*

As these cases demonstrate, there is a wide consensus that not only does the statutory right to counsel in this context convey a right to effective counsel, but that

individuals facing involuntary civil commitment have a constitutional right to effective counsel as well.

## Conclusion

This Court should hold that individuals facing civil commitment under the SVPA have both a statutory and constitutional right to *effective* assistance of counsel.

Respectfully submitted,

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**Certificate of Service and Compliance**

The undersigned hereby certifies that on March 22, 2018, the foregoing *amicus brief*, redacted for the purposes of posting online, was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 3,130 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert