IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 000000

GALEN M. BAUGHMAN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND DELEGATE PATRICK A. HOPE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR APPEAL

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INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case because the fundamentally unfair proceedings below raise issues of special relevance to the defense bar and would have wide-ranging, dangerous implications if allowed to stand. These issues concern the protections that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 11 of the Virginia Constitution require

before the Commonwealth or any other State may deprive a person of his liberty under a civil commitment statute.

Delegate Patrick A. Hope is a Member of the Virginia General Assembly who in 2019 was reelected for his sixth term from the Commonwealth's 47th District. Among other things, Delegate Hope currently serves in the House of Delegates as the Chair of the Public Safety Committee, as a Member of the Courts of Justice and Health, Welfare and Institutions Committees, and as the Chair of the latter's Health Subcommittee. More information about his over 20 years of experience working for Virginia is available at https://www.hopeforvirginia.org/about.

Delegate Hope has a particular interest in this case because he opposes Virginia's expansion of mass incarceration through a "civil commitment" process at enormous expense to taxpayers, without any demonstrated benefit for public safety. Delegate Hope wrote about these issues last year. *Patrick Hope column: Virginia's sexually violent predator laws have gone too far*, The Richmond Times-Dispatch, https://richmond.com/opinion/columnists/patrick-hope-column-virginia-s-sexually-violent-predator-laws-have-gone-too-far/article_0ef3ae10-fc80-5eca-b905-ab1c051c553d.html (Sept. 29, 2019). Delegate Hope even more strongly opposes the flagrant violations of Virginia law and due process that he believes occurred in this case.

SUMMARY OF THE ARGUMENT

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the U.S. Supreme Court held that Kansas's Sexually Violent Predator Act (the "Kansas Act") survived a substantive due process challenge by an admitted pedophile with "a chilling history of repeated child sexual molestation and abuse." *Id.* at 354. Over a period of nearly 30 years, this serial offender sexually abused children whenever he was not incarcerated. *Id.* at 353-55. His numerous victims were as young as seven and eight years old – in addition to his own stepchildren, whom he "forced" to "engage in sexual activity with him over a period of approximately four years." *Id.* at 354-55. He admitted that "he 'can't control the urge' to molest children"; that "the only sure way he could keep from sexually abusing children in the future was 'to die'"; that he "suffers from pedophilia" and "is not cured of the condition"; and that he believes "'treatment is bull——.'" *Id.* at 355.

The serial offender in *Hendricks* did *not* claim that the State engaged in expert-shopping, let alone of a kind that violated the Kansas Act. He also did *not* claim that he was prevented (much less improperly) from calling an expert or other witness to dispute the State's allegations about his condition. Instead, his due process challenge was based on mere semantics, arguing that "a finding of 'mental illness' [i]s a prerequisite for civil commitment" and that the Kansas Act required only "a 'mental abnormality.'" *Id.* at 358-59. Rejecting this argument, the Court explained

that it "ha[s] consistently upheld such involuntary commitment statutes *provided the confinement takes place pursuant to proper procedures and evidentiary standards*." *Id.* at 357 (emphasis added). The Kansas Act afforded a number of "procedural safeguards," including (among other things) the right to present witnesses. *Id.* at 353. In this context, the Court concluded that factors including the offender's *admitted* "lack of volitional control" and *conceded* "diagnosis as a pedophile" sufficed "for due process purposes" to subject him to involuntary civil commitment under the Kansas Act. *Id.* at 360.

The present case is a world apart from *Hendricks*, and not only because of Mr. Baughman's sparse record and prior acquittal. Two categories of unmistakable legal errors render his civil commitment order fundamentally unfair.

First, Dr. Ilona Gravers, the expert lawfully designated by the Commissioner of the Department of Behavioral Health and Developmental Services (the "Commissioner") under Virginia's Sexually Violent Predators Act (the "SVPA"), opined that Mr. Baughman is *not* a "sexually violent predator" – meaning he *cannot* be involuntarily committed under the SVPA. The Office of the Attorney General then went expert-shopping: It found, hired, and paid Dr. Michelle Sjolinder to offer its desired opinion – without the Commissioner being involved at all, let alone designating her as the SVPA requires. Yet at Mr. Baughman's trial, the circuit court allowed Dr. Sjolinder to testify for the Commonwealth. This ruling violates the

unambiguous text of the governing SPVA provisions in Va. Code Ann. § 37.2-904 as well as the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by Article I, Section 11 of the Virginia Constitution.

Second, the circuit court also violated the unambiguous text of the SVPA and due process by arbitrarily barring Mr. Baughman from presenting testimony in his defense at trial by Dr. Gravers and by his retained expert, Dr. Richard Krueger. Especially since Dr. Gravers is the Commonwealth's first expert – and its sole lawfully designated expert – it is reasonably probable that the jury would have acquitted Mr. Baughman if it had heard her opinion that he is *not* an SVP. It is also reasonably probable that Dr. Krueger's testimony would have changed the outcome by rebutting both Detective Sloan's testimony on purported "grooming" and Dr. Sjolinder's two mistaken diagnoses of Mr. Baughman.

Standing alone, each of the circuit court's legal errors independently requires reversal. The cumulative unfairly prejudicial effects of these errors reinforce the need for reversal.

ARGUMENT

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). "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) (plurality). Even for a prison inmate, a "determin[ation] that he has a mental illness" and "subject[ing] him involuntarily to institutional care in a mental hospital" are consequences that "are qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Id.* at 493.

In cases involving civil commitment proceedings, a court "must be mindful that the function of legal process is to minimize the risk of erroneous decisions." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Basic procedural protections guaranteed by due process promote "the accurate determination of the matters before the court" by "'prevent[ing] unfair and mistaken deprivations'" of liberty. *Heller v. Doe*, 509 U.S. 312, 332 (1993) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972)).

This Court has specifically and repeatedly emphasized the vital importance of due process in civil commitment proceedings under the SVPA. For example, in a case reversing a civil commitment order on statutory grounds, this Court stated: "'Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Townes v. Commonwealth*, 269 Va. 234, 240,

609 S.E.2d 1, 4 (2005) (quoting *Addington*, 441 U.S. at 425). The next year, in another SVPA case, this Court quoted with approval the U.S. Supreme Court's holding that "'[t]here is a substantial liberty interest in avoiding confinement in a mental hospital.'" *Jenkins v. Dir. of Virginia Ctr. for Behavioral Rehab.*, 271 Va. 4, 15, 624 S.E.2d 453, 459 (2006) (quoting *Zinermon v. Burch*, 494 U.S. 113, 131 (1990)). This Court recognized that "an individual who is the subject of a proceeding under [the SVPA also] has a substantial liberty interest in avoiding confinement." *Id.* "Indeed, the subject of a civil commitment proceeding commenced pursuant to this Act may be confined for his natural life" and "may be compelled to accept medical treatment against his will." *Id.*

Accordingly, this Court decided in *Jenkins* that "involuntary civil commitment [under the SVPA] is a significant deprivation of liberty to which federal and state procedural due process protections apply." *Id.* at 15, 624 S.E.2d at 460. Further, this Court expressly recognized that under *Vitek*, the "minimal standards that federal due process guarantees to a respondent in an involuntary civil commitment proceeding" include, among other things, "a chance to be heard and to present documentary evidence as well as witnesses." *Id.* This Court in *Jenkins* agreed with the plurality in *Vitek*, holding that "the due process protections embodied in the federal and Virginia Constitutions mandate" that the subject of SVPA proceedings

"has the right to counsel at all significant stages" of the judicial process. *Id.* at 16, 624 S.E.2d at 460.

In Mr. Baughman's case, the circuit court's legal errors under the SVPA violate the due process guarantees of the federal and Virginia constitutions. "Because the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). The U.S. Supreme Court "ha[s] repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek*, 445 U.S. at 488 (majority); *see also Bishop v. Wood*, 426 U.S. 341, 344 (1976) (recognizing in context of "property interest" that "the sufficiency of the claim of entitlement must be decided by reference to state law"). Thus, "if the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.'" *Vitek*, 445 U.S. at 490-91 (majority) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Where a State has via statute provided a procedural protection, an individual "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent" the statute allows, and "that

liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). In such a situation, "an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Id.*; *see also Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (recognizing in opinion by Chief Justice Rehnquist that due process is violated "if the defendant does not receive that which state law provides" with respect to peremptory challenges). Both categories of the circuit court's legal errors with respect to experts arbitrarily disregarded Mr. Baughman's right to liberty and thus denied him due process.

I. THE CIRCUIT COURT VIOLATED VIRGINIA LAW AND DUE PROCESS BY ALLOWING THE COMMONWEALTH TO EXPERT-SHOP AND ADMITTING ONLY ITS SECOND, ILLEGALLY OBTAINED EXPERT OPINION.

As this Court has repeatedly recognized, including in cases involving the SVPA:

> "While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed."

Jenkins, 271 Va. at 10, 624 S.E.2d at 457 (quoting *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)); *accord Miles v. Commonwealth*, 272 Va. 302, 307, 634 S.E.2d 330, 333 (2006) ("When the language

of a statute is plain and unambiguous, courts are bound by the plain meaning of that language and may not assign the words a construction that amounts to holding that the General Assembly did not mean what it actually stated."), *on reh'g*, 274 Va. 1, 645 S.E.2d 924 (2007). This "basic principle of statutory construction," *Jenkins*, 271 Va. at 10, 624 S.E.2d at 457, which this Court held controlled the resolution of a threshold issue in *Jenkins*, likewise controls here as to Va. Code Ann. § 37.2-904.

This conclusion is even more inescapable given this Court's rejections of other attempts by the Commonwealth to make an end run around the SVPA's "clear and unambiguous language" that, as here, resulted in a circuit court committing a legal error that requires reversal. *Townes*, 269 Va. at 240-41, 609 S.E.2d at 4. This Court held in *Townes* that, "although civil in nature, a statutory scheme such as the SVPA that permits an involuntary commitment process to be initiated by the Commonwealth is subject to the rule of lenity normally applicable to criminal statutes and must therefore be strictly construed." *Id.* In *Miles*, this Court reaffirmed that "[b]ecause proceedings under the [SVPA] may result in a defendant's involuntary confinement, he has a substantial liberty interest at stake" that requires "apply[ing] the rule of lenity normally applicable to penal statutes to the [SVPA's] provisions." 272 Va. at 307, 634 S.E.2d at 333. This Court again ruled that the SVPA's "plain language" must be "strictly construed" and refused to adopt an argument by the Commonwealth that "would require us to extend by implication the

scope of [the applicable SVPA provision]." *Id.* at 308, 634 S.E.2d at 333; *accord id.* at 307, 634 S.E.2d at 334 (refusing Commonwealth's invitation to "imply" an authority as to which "[t]he statute is wholly silent"); *id.* at 308, 634 S.E.2d at 334 (dismissing argument by Commonwealth that "asks us to draw an implication from the absence of statutory language, which we are not allowed to do in our strict construction of [the SVPA]").

The SVPA's provisions authorizing an "assessment" by a "CRC" of whether an individual is a "sexually violent predator" state in the most relevant parts:

> A. . . . [T]he CRC shall (i) complete *its assessment* of the prisoner or defendant for possible commitment pursuant to subsection B and (ii) forward its written recommendation . . . to the Attorney General pursuant to subsection C.
>
> B. CRC assessments of eligible prisoners or defendants shall include *a mental health examination*, including a personal interview, of the prisoner or defendant *by a licensed psychiatrist or a licensed clinical psychologist* who is *designated by the Commissioner* . . . . The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner or defendant is a sexually violent predator, as defined in § 37.2-900, and forward the results of *this evaluation* and any supporting documents to the CRC for its review. . . .
>
> C. Following *the examination* and review conducted pursuant to subsection B, the CRC shall recommend that the prisoner or defendant (i) be committed as a sexually violent predator pursuant to this chapter; (ii) not be committed, but be placed in a conditional release program as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a sexually violent predator. To assist the Attorney General in his review, the Department of Corrections, the CRC, and the psychiatrist or psychologist who conducts *the mental health examination* pursuant to this section shall provide the Attorney

> General with [various documents] relevant to determining whether a prisoner or defendant is a sexually violent predator.

Va. Code Ann. § 37.2-904(A)-(C) (emphases added).[1] As the italicized text makes clear, the plain language of the statute mandates that the CRC's "assessment" (singular) include "a mental health examination" (singular) "by a licensed psychiatrist or a licensed clinical psychologist" (singular) who is "designated by the Commissioner" and authorizes one "evaluation" or "examination." *Id.* Because the Commissioner "designated" Dr. Gravers, *id.* § 37.2-904(B), only she is legally authorized to opine on whether Mr. Baughman is a "[s]exually violent predator," *id.* § 37.2-900, within the meaning of the SVPA, *see Townes*, 269 Va. at 240-41, 609 S.E.2d at 4 (holding that SVPA "is subject to the rule of lenity" and "must therefore be strictly construed"); *Miles*, 272 Va. at 307-08, 634 S.E.2d at 333 (same).

Nothing in Va. Code Ann. § 37.2-904 authorizes the CRC or the Commissioner – much less the Attorney General's Office – to obtain a second opinion on this issue. Even if section 37.2-904(F) could reasonably be interpreted to provide such authorization – and it cannot be – it would remain irrelevant here. Section 37.2-904(F) states: "If the CRC deems it necessary to have the services of additional experts in order to complete its review of the prisoner or defendant, the Commissioner shall appoint such qualified experts as are needed." Va. Code Ann.

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[1] A "CRC" is a "Commitment Review Committee" described in Va. Code Ann. § 37.2-902.

§ 37.2-904(F). It is undisputed that the CRC did *not* deem Dr. Sjolinder's "services" to be "necessary" *and* that the Commissioner did *not* "appoint" Dr. Sjolinder. *Id.*

Under Va. Code Ann. § 37.2-904, the Attorney General's Office acted unlawfully by obtaining a second opinion from Dr. Sjolinder and the circuit court erred by allowing the Commonwealth to present Dr. Sjolinder's testimony at trial – an error made more egregious by the further error of precluding Mr. Baughman from presenting Dr. Gravers's testimony in his defense (*see* Part II, *infra*). As this Court stated in a materially identical context in *Harvey v. Commonwealth*, 297 Va. 403, 829 S.E.2d 534 (2019):

> Significantly, the Attorney General's Office, the entity responsible for handling SVP cases, does not select the expert. . . . The expert is not the prosecution's expert or the defense's expert. That expert may conclude, over the objections of the Attorney General, that the respondent is, in fact, amenable to conditional release. . . . This non-adversarial model for selecting experts reduces the risk of an erroneous deprivation of a liberty interest.

Id. at 421-22, 829 S.E.2d at 542. Mr. Baughman had "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent" that Va. Code Ann. § 37.2-904 allows. *Hicks*, 447 U.S. at 346. The circuit court's "arbitrary disregard" of the procedural safeguards for Mr. Baughman's protected "liberty interest," *id.*, under the statute violated his federal and Virginia due process rights.

A similar case decided by the Arizona Court of Appeals reinforces the point. In *In re Wilputte S.*, 100 P.3d 929 (Ariz. Ct. App. 2004), the State had two experts

issue reports on whether an inmate was a "sexually violent person." *Id.* at 930. The first expert's report found that he was not, but the second expert's report found that he was. *Id.* Because "[t]he plain language of [the applicable Arizona statute] provides for 'a' report" – singular – the Arizona Court of Appeals held that "the presumptive number of reports is one." *Id.* at 932. The court concluded that "absent necessary and proper justification, the State is precluded from directing subsequent evaluations and obtaining subsequent reports." *Id.* Due process concerns were a basis for the court's decision: It cited "fundamental fairness" and "reason" as dictating that the legislature "could not have intended to subject a person to multiple examinations until the State is able to obtain a favorable opinion to support an SVP petition." *Id.* Because "the record contain[ed] nothing justifying or explaining the need for the second evaluation," the court affirmed the trial court's decision to preclude the second report and dismiss the State's petition to detain the inmate beyond his scheduled release date. *Id.* An analogous result is appropriate here.

II. THE CIRCUIT COURT VIOLATED VIRGINIA LAW AND DUE PROCESS BY ARBITRARILY PRECLUDING MR. BAUGHMAN FROM PRESENTING TESTIMONY BY DR. GRAVERS AND DR. KRUEGER IN HIS DEFENSE AT TRIAL.

As the U.S. Supreme Court has recognized, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense" in a criminal proceeding "when [a] State has made the defendant's mental condition relevant." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). The same is at least equally true in a civil commitment proceeding where, as here, the respondent's mental condition is not only relevant but dispositive of whether he will be deprived of his liberty. Further, as discussed above, this Court's precedent adopting the plurality opinion in *Vitek* establishes that the "minimal standards that federal due process guarantees to a respondent in an involuntary civil commitment proceeding" include "a chance to . . . present . . . witnesses" in his defense. *Jenkins*, 271 Va. at 15, 624 S.E.2d at 460.

In barring Mr. Baughman from presenting testimony by Dr. Gravers and Dr. Krueger, the circuit court impermissibly allowed the Commonwealth to deprive Mr. Baughman of his liberty without providing the "minimal," *id.*, safeguard of presenting material – indeed, dispositive – witnesses in his defense. The circuit court's rulings in this regard are arbitrary in violation of Virginia law and due process: Far from strictly construing the (irrelevant) SVPA provision on which it mistakenly relied, the circuit court rewrote that provision to impose a requirement the General Assembly did not enact.

The SVPA's plain language authorizes a circuit court to preclude a respondent from presenting testimony by a qualified expert witness in his defense in two limited situations, both of which are unmistakably absent here: The first is set forth in a statute that applies to probable cause hearings, Va. Code Ann. § 37.2-906(D), and the second applies to trial testimony by a respondent's "appointed" expert, *id.* § 37.2-907(A). Despite these provisions' unambiguous text, the circuit court relied on the former to imply an unwritten obstacle to Mr. Baughman presenting *trial* testimony by Dr. Gravers – the *Commonwealth's* only lawfully designated expert – and by Dr. Krueger, an expert whom Mr. Baughman retained. The circuit court failed to address a different provision of the SVPA expressly providing that a respondent's expert witness "may be permitted to testify *at the trial*." Va. Code Ann. § 37.2-908(C) (emphasis added). Section 37.2-908(C) requires only that the expert must "meet[ ] the qualifications set forth in subsection B of § 37.2-904 or 37.2-907." *Id.* Neither Dr. Gravers nor Dr. Krueger even arguably lacks such qualifications.

Nevertheless, the circuit court's relevant orders (both of which were entered on July 31, 2018) rely on Va. Code Ann. § 37.2-906(D) – and no other purported supporting authority – to preclude Mr. Baughman from presenting testimony by Dr. Kreuger and, "upon the same bases and for the same reasons," to quash Mr. Baughman's subpoena for Dr. Gravers's testimony. (Orders of July 31, 2018.) The circuit court's rulings are arbitrary because Va. Code Ann. § 37.2-906(D) plainly

applies only to probable cause hearings and the orders do not attempt to reconcile their conclusions with Va. Code Ann. § 37.2-908(C) – the statute that specifically addresses a respondent's right to present expert testimony *at trial*.[2]

Even if ambiguity existed with respect to the meaning of section 37.2-906(D) and/or section 37.2-908(C) – and no such ambiguity exists – this Court's precedents would require applying the rule of lenity and strictly construing the statutes in Mr. Baughman's favor. *See Townes*, 269 Va. at 240-41, 609 S.E.2d at 4 (holding that SVPA "is subject to the rule of lenity normally applicable to criminal statutes and must therefore be strictly construed"); *Miles*, 272 Va. at 307-08, 634 S.E.2d at 333 (ruling that the "substantial liberty interest at stake" requires "apply[ing] the rule of lenity normally applicable to penal statutes to the [SVPA's] provisions" and "strictly construe[ing]" those provisions' "plain language"). The doctrine of constitutional avoidance would separately and independently require interpreting any ambiguity in the statutes in Mr. Baughman's favor if any existed (and again, none does). *See Hood v. Commonwealth*, 280 Va. 526, 539, 701 S.E.2d 421, 428 (2010) (concluding that

[2] The circuit court's orders also contain an inconsistency or factual inaccuracy further confirming the errors necessitating reversal: Both assert that Mr. Baughman "refused to be interviewed by the Commonwealth's expert witness." (Orders of July 31, 2018.) But the circuit court viewed *only Dr. Sjolinder* as the Commonwealth's expert witness; she never sought to interview Mr. Baughman; and he never refused to be interviewed by her.

Va. Code Ann. § 37.2-907(A) "must be construed in a manner consistent with due process").

The circuit court's violations of Virginia law and due process in precluding Mr. Baughman from presenting Dr. Gravers's testimony at trial are especially glaring. Standing alone, Dr. Gravers's opinion that Mr. Baughman is *not* a "sexually violent predator" should have ended the civil commitment proceedings against him. Then-Justice Kinser wrote in *Miles* that "the Commonwealth should not be allowed to proceed with its petition to have [an offender] declared a sexually violent predator under the Act when its *own expert witness* admitted the initial scoring that caused [his] name to be forwarded to the [CRC] for further assessment was inaccurate." 274 Va. at 2, 645 S.E.2d at 925 (Kinser, J., concurring) (emphasis in original). Similarly, because Dr. Gravers "admitted," *id.*, that Mr. Baughman is *not* a "sexually violent predator," the Commonwealth should not have been allowed to continue its effort to civilly commit him *at all*, much less by illegal expert-shopping.

Again arbitrarily, and again without citing any purported supporting authority other than the irrelevant statute it rewrote, the circuit court precluded Mr. Baughman from presenting testimony by Dr. Krueger at trial. This is another legal error that violated due process. The SVPA allows a circuit court to preclude *trial* testimony only by a respondent's "appointed" expert. Va. Code Ann. § 37.2-907(A). Because Mr. Baughman *retained* Dr. Krueger, the statute did not authorize the circuit court

to preclude Dr. Krueger from testifying at trial. By nevertheless precluding Dr. Krueger's testimony, the circuit court again violated both the SVPA's unambiguous text and Mr. Baughman's federal and Virginia due process rights. *See Hendricks*, 521 U.S. at 353, 357 (holding that Kansas Act provided "proper procedures and evidentiary standards" where, among other things, a person facing involuntary civil commitment "received the right to present . . . witnesses" in his defense); *Hood*, 280 Va. at 539, 701 S.E.2d at 428 (concluding that Va. Code Ann. § 37.2-907(A) "must be construed in a manner consistent with due process").

CONCLUSION

For the foregoing reasons, as well as those stated in the briefs filed by Mr. Baughman and by other *amici curiae*, this Court should vacate the judgment and direct the circuit court to dismiss the proceeding with prejudice or, in the alternative, grant Mr. Baughman a new trial.

November 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Virginia Supreme Court Rule 5:26(b), I hereby certify that the foregoing brief, excluding items not required to be counted, does not exceed either 50 pages or 8,750 words.

/s/ David B. Smith
David B. Smith

Counsel for Amici Curiae NACDL and Delegate Patrick A. Hope

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2020, pursuant to Virginia Supreme Court Rules 5:17, 5:26, and 5:30 and the Temporary E-Filing Guidelines Pursuant to Supreme Court of Virginia's Order Addressing Operations Under Public Health Emergency Created By COVID-19 Virus, a true and correct copy of the foregoing document was electronically filed with the Clerk of Court using the VACES CM/ECF system and served electronically via email on:

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