No. _____

In The
Supreme Court of the United States

THOMAS KIM,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Did trial counsel's failure to advise petitioner of Virginia's Sexually Violent Predator commitment program constitute ineffective assistance of counsel under the Sixth Amendment?

2. Did the Court of Appeals err in denying the claim when it applied an incorrect standard to the request for a Certificate of Appealability?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Thomas Kim, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit *per curiam* opinion denying Kim a certificate of appealability is at 2015 WL 6150863. The district court's opinion denying Kim a new trial on the basis of ineffective assistance of counsel is at 103 F. Supp. 3d 749.

JURISDICTION

The Fourth Circuit entered a *per curiam* opinion denying Kim's request on October 20, 2015, 2015 WL 6150863, and entered its final order denying rehearing on December 1, 2015. App. 30 (order denying rehearing). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. § 2253(c) provides in most relevant part:

> (1)(A) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Virginia Code §§ 37.2-900 through 37.2-921 provides the applicable procedures for the Sexually Violent Predator Commitment Program.

STATEMENT OF THE CASE

1. Thomas Kim, an inmate in the Commonwealth of Virginia, was deprived of his Sixth

Amendment right to the effective assistance of counsel when, prior to his guilty pleas to several serious sex offenses, his attorney failed to advise him of Virginia's Sexually Violent Predator [SVP] commitment program, Va. Code §§ 37.2-900 *et seq*. The Fourth Circuit's denial of a certificate of appealability, affirming the opinion and order of the United States District Court for the Eastern District of Virginia, conflicts directly with controlling Supreme Court precedents *Strickland v. Washington*, 466 U.S. 668 (1984) and *Padilla v. Kentucky*, 599 U.S. 356 (2010) defining the scope of the right to advice concerning the consequences of a plea, as well as *Miller-El v. Cockrell*, 537 U.S. 322 (2003), establishing the standard for granting certificates of appealability. In addition, conflicting rulings by federal courts and state supreme courts both establish error in denying the certificate, and provide compelling reasons to clarify the scope of Sixth Amendment protections in the context of SVP commitments.

2. On March 19, 2012, a Fairfax County (VA) grand jury returned a three-count indictment charging Thomas Kim with abduction with the intent to defile in violation of Virginia Code § 18.2-48 (count 1), forcible sodomy in violation of Virginia Code § 18.2-67.1 (count 2), and use of a firearm during the commission of sodomy in violation of Virginia Code § 18.2-53.1 (count 3). *See Commonwealth v. Thomas Kim*, Fairfax Cnty. Circ. Ct. Crim. Case No. FE-2012-432, Indictment. The charges arose from an October 11, 2011 incident when Kim allegedly posed as a law

enforcement agent and forced the complaining witness to perform oral sex. On the advice of counsel, Kim accepted a plea agreement wherein the Commonwealth "agreed not to seek additional related charges" in exchange for his plea of guilty to the indictment as charged. *See Commonwealth v. Thomas Kim*, FE-2012-432, "Plea of Guilty to a Felony."

3. On May 9, 2012, Kim pled guilty pursuant to this plea agreement. At the conclusion of the September 7, 2012 sentencing hearing, the trial court sentenced Kim to life in prison on count 1; 20 years on count 2 (concurrent with count 1); and 3 years on count 3 (consecutive with other counts). The court suspended all but 24 years, 6 months of its sentence on count 1, for an aggregate sentence of 27 years, 6 months to serve in the penitentiary. *See Commonwealth v. Kim*, FE-2012-432, Sentencing Order of Sept. 12, 2013.

4. Two of Kim's three convictions – those for forcible sodomy and abduction with the intent to defile – render him eligible for civil commitment as a Sexually Violent Predator, which permits continued, indefinite confinement of sex offenders who are nearing release from prison. *See* Va. Code §§ 37.2-900 *et seq*. Although likely for all eligible defendants, the facts of Kim's case and his personal circumstances render it almost certain that he will be subject to consequences under the SVP statutes.

5. Kim's attorney never discussed SVP commitments with Kim prior to his plea and sentencing.[1] *Thomas Kim v. Commonwealth*, FE-2013-14292, Petition for Writ of Habeas Corpus at 1-3, 13-14. Kim first heard of the SVP statutes after sentencing, during a conversation with his attorney's assistant. *Id*.

6. Virginia's SVP commitment program is representative of a recent but widespread phenomenon – states' efforts to prolong the release, potentially forever, of those who have committed certain serious sex crimes. Although nominally a "civil process," commitments bear little difference to criminal sentencing, and their effects are punitive in nature, resulting in confinement in what amounts to a penitentiary, with little chance of release.

7. Kim's attorney had a duty to advise him of the SVP commitment program as either a direct consequence of conviction, or following the rationale of *Padilla v. Kentucky*, 599 U.S. 356 (2010). Although

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[1] The respondent has previously argued that by acknowledging the possibility of "civil commitment" during his plea colloquy, *see* Plea Transcript of May 9, 2012 at 20-21, Kim refuted his claims that counsel failed to inform him of the SVP program. The "admission" in question came in response to one compound question covering eight different consequences of a criminal conviction, all of which are exceedingly minor in comparison to the complete deprivation of one's liberty. *Id*. at 20-21. Moreover, civil commitments are commonly speaking mental health commitments, as Kim has discussed at length in lower courts.

Padilla purported to address circumstances "unique" to immigration, those same circumstances – seriousness of the consequence, close connection to the criminal process, and high likelihood it will result from a conviction – are present to an equal or greater degree in SVP commitments. *Id*. Had Kim known that by pleading guilty he faced a *de facto* life sentence, regardless of the prison term ordered by the court, he would have pled not guilty and proceeded to trial.

8. Kim timely filed a petition for a writ of habeas corpus with the Fairfax County (VA) Circuit Court arguing that his trial counsel had been ineffective for failing to advise him of the SVP program. The petition was denied without an evidentiary hearing, by final order on January 31, 2014. *See Thomas Kim v. Dir., Va. Dep't of Corr.*, Fairfax Cnty. Cir. Ct. Civ. Case No. 2013-14292, Final Order of Jan. 31, 2014 (amended by order of Feb. 3, 2014). Kim then appealed to the Supreme Court of Virginia, which denied his petition by final order on November 7, 2014. *Thomas Kim v. Dir., Va. Dept. of Corr.*, Va. S. Ct. Rec. No. 140730, Order of Nov. 7, 2014.

9. Kim next timely filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Virginia, which was denied by memorandum opinion and order dated April 30, 2015. App. 5, *Kim v. Director*, No. 2:14cv1637 (April 30, 2015) (E.D. Va.). The district court expressly declined to issue Kim a Certificate of Appealability, noting that Kim had "failed to make a 'substantial

showing of a denial of a constitutional right' with respect to his [28 U.S.C.] § 2254 claims." App. 28. Kim appealed the district court's denial of his petition for a writ of habeas corpus to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit denied a certificate of appealability, issuing a per curiam opinion and order on October 20, 2015, App. 1, 4, and a final order denying Kim's requests for rehearing on December 1, 2015. App. 30.

10. Seeing as the significance and scope of the rights at issue here are clearly in dispute, the Fourth Circuit relied on an incorrect standard of review in denying Kim a Certificate of Appealability. When an appellant seeks a certificate, the question before the court is whether the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This does not require him to establish conclusively that the right alleged is cognizable. Rather, he must only demonstrate "reasonable jurists could debate" whether his claims should have been resolved differently "or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (internal quotations omitted). Kim did so, and his request was nonetheless denied.

11. Kim asserts there is a sufficient basis for vacating his convictions based on his right to advice concerning the SVP program, and his attorney's ineffectiveness in that regard, and asks the Court to grant the writ, vacate his convictions and order a new trial, or find that he had a right to proper advice and

remand to the state habeas court for further consideration of the factual claims in light of this opinion. In the alternative, because the lawfulness of SVP commitments themselves is unsettled, and it was error for the Fourth Circuit to deny Kim a certificate of appealability, Kim asks the Court to remand his case to the Fourth Circuit Court of Appeals for consideration of his appeal on the merits.

REASONS FOR GRANTING THE WRIT

It seems an elementary matter of fairness that a criminal defendant should know whether, as a result of conviction, he might be confined for the rest of his life. If defendants have a right to know this, then those eligible have a right to know about Virginia's Sexually Violent Predator commitment program, Va. Code §§ 37.2-900 *et seq.*, and trial counsel has a duty to tell them. Virginia's SVP program permits lifetime confinement pursuant to a nominally civil process, to which Thomas Kim is highly likely to be subject, as a result of convictions for serious sex offenses. Kim's attorney never advised him of the SVP program or its uniquely dire consequences. As a result, Kim was deprived of the effective assistance of counsel, and is entitled to a new trial.

The Fourth Circuit Court of Appeals further erred in denying Kim a Certificate of Appealability, applying an unconstitutionally burdensome standard of review. As required by statute, Kim made a "substantial showing of the denial of a constitutional

right"; reasonable jurists debate even the constitutionality of SVP statutes themselves, finding them to be direct, punitive consequences of criminal convictions. Overall, the issues are more than adequate "to deserve encouragement to proceed further." The Fourth Circuit should have granted a Certificate of Appealability and considered Kim's claim on its merits.

Pursuant to Supreme Court Rule 10, there are compelling reasons the Court should grant a writ of certiorari. First, The Fourth Circuit's denial of a certificate of appealability, affirming the opinion and order of the United States District Court for the Eastern District of Virginia (and its denial of a rehearing), conflicts directly with controlling Supreme Court precedent including *Strickland v. Washington*, 466 U.S. 668 (1984) and *Padilla v. Kentucky*, 599 U.S. 356 (2010), which defined the scope of the right to advice concerning the consequences of a plea, as well as *Miller-El v. Cockrell*, 537 U.S. 322 (2003), establishing the standard for granting certificates of appealability.

Second, conflicting rulings by federal courts and state supreme courts compel review in that they have not only differed on the Sixth Amendment duty of advice, but on the fundamental and equally dispositive issue of whether SVP commitments are in fact

criminal punishments, and therefore unconstitutional as implemented.[2]

And lastly, Kim's case compels review due to the potentially harsh impact of the erroneous decision below. The published decision of the District Court, affirmed by the Fourth Circuit, adds weight to a line of precedent that unconstitutionally limits essential Sixth Amendment rights of criminal defendants. Without clear guidance to the contrary, defendants will continue to face indefinite confinement without their knowledge.

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[2] As discussed below, courts finding that a defendant must be advised about SVP commitments include the Eleventh Circuit Court of Appeals and the Supreme Courts of New Jersey and Florida. *See Bauder v. United States*, 619 F.3d 1272 (11th Cir. 2010); *State v. Bellamy*, 178 N.J. 127, 835 A.2d 1231 (2003) (duty vested in trial court); Fla. R. Crim. P. 3.172 (2016) (state supreme court requiring defendant to be advised of SVP commitments during plea colloquy). Cases questioning the civil nature of SVP programs and the adequacy of their procedural protections as a result include *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015) and *Van Orden v. Schafer*, No. 4:09CV00971, 2015 WL 5315753 (E.D. Mo. Sept. 11, 2015). Courts finding no duty of advice regarding SVP commitments include the Supreme Courts of Massachusetts and South Carolina, and the Courts of Appeals for the First and Second Circuits. *See Commonwealth v. Roberts*, 34 N.E.3d 716 (Mass. 2015); *Hamm v. State*, 744 S.E.2d 503 (S.C. 2013); *Steele v. Murphy*, 365 F.3d 14 (1st Cir. 2004) (pre-*Padilla* decision); *United States v. Youngs*, 687 F.3d 56 (2d Cir. 2012).

I. Counsel's failure to advise Kim of Virginia's Sexually Violent Predator commitment program constituted ineffective assistance under the Sixth Amendment, and the Court of Appeals erred when it applied an incorrect legal standard, denying Kim's request for a Certificate of Appealability.

A. Kim received ineffective assistance from trial counsel who failed to advise him of Virginia's Sexually Violent Predator commitment program.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). To establish an ineffective assistance claim, the defendant must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Id.* at 687. Prejudice requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Court has further elaborated that the reasonable probability standard is a standard lower than "more likely than not." *See Holland v. Jackson*, 542 U.S. 649, 654 (2004) ("The quoted language does not imply any particular standard of probability."); *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (noting that *Strickland*

"specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"). In the plea context, the prejudice determination rests on whether a reasonable probability exists that with proper representation, the defendant would not have accepted the plea, and "that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372; *Hill v. Lockhard*, 474 U.S. 52, 58-59 (1985) ("the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

1. Trial Counsel had a duty to advise Kim about the SVP Program.

Kim's attorney had an affirmative duty to advise his client that indefinite confinement pursuant to the SVP program was a consequence of a guilty plea, and the failure to fulfill this duty to a standard of objective reasonableness constitutes deficient performance. *See Strickland* at 687; *Padilla* at 362-63. Some courts, including the district court analyzing Kim's case, have determined that duties concerning effects of a conviction only extend to so-called "direct" consequences – those that are mandatory and immediate, such as prison time and probation. Those that are not direct are "collateral," and outside the scope of Sixth Amendment protection. Courts adopting this scheme contend that by determining whether a consequence is "direct" or "collateral," one can determine

"the scope of constitutionally 'reasonable professional assistance' required under Strickland." *Padilla* at 362-63. As a result, habeas review consists mainly of classifying the consequence at issue as "direct" or "collateral," with little further analysis.

The Supreme Court has never sanctioned the direct-collateral dichotomy; to the contrary it has acknowledged its limitations. In *Padilla v. Kentucky*, the Supreme Court held that defense counsel has an affirmative duty to provide competent advice about the immigration consequences of a criminal conviction. *Id*. In doing so, the Court refused to adopt the direct-collateral dichotomy described above, which the government had contended was the touchstone for determining an attorney's duty (had it been, Padilla would have lost). *Id.* Rather, the court noted that a consequence like deportation is a hybrid of both, and that classifying it as either was unnecessary and irrelevant. What mattered more to the Court were the characteristics of the consequence, including 1) its seriousness/severity; 2) how closely connected it is to the criminal process, and; 3) the likelihood it will result from a conviction. *Padilla* at 363-66. Considering the severity, likelihood and close connection with conviction of the immigration consequences, the Court found that "*Strickland* applie[d] to Padilla's claim" and that "counsel must advise his client regarding the risk of deportation." *Id.* at 367.

Although the Supreme Court in *Padilla* remarked that immigration presented a "unique" set of characteristics, it never claimed to limit the underlying

rationale itself. If anything the opposite was true, seeing as the Court ignored the proposed dichotomy, urging a less mechanistic approach. When one examines the characteristics of SVP commitments, those claims to uniqueness seem suspect; if anything commitments fit the *Padilla* criteria *better* than even immigration consequences do. If one has a right to learn that he might be deported to the country of his birth, he *a fortiori* has a right to learn that his term of years may be converted to a life sentence, and that he may never be released from prison. Courts in several jurisdictions have held accordingly. *See, e.g.*, *State v. Bellamy*, 178 N.J. 127, 835 A.2d 1231 (2003); *Bauder v. United States*, 619 F.3d 1272 (11th Cir. 2010). At least one court very recently has found that sexually violent predator commitments are in fact criminal punishments masquerading as civil penalties, and it is not difficult to understand the rationale. *See Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015). Were that to be true, SVP commitments would in fact qualify as direct consequences under the traditional rubric. Regardless of whether actually or nominally civil, the characteristics of SVP commitments fit all of the *Padilla* criteria, conferring the same rights, and compelling the same Sixth Amendment analysis.

2. SVP commitment is a serious and likely consequence of a conviction for a violent sexual offense.

As noted, Virginia's Sexually Violent Predator commitment program, Va. Code §§ 37.2-900 *et seq.*, is a procedure of involuntarily confining convicted sex offenders after they have completed a penitentiary sentence. The SVP commitment process begins with the Virginia Department of Corrections [DOC] identifying prisoners serving sentences for one of the 28 predicate crimes.[3] Within 10 months of an offender's release date, the DOC scores the Static-99 actuarial instrument, which purports to assess the risk of re-offense. Those offenders deemed to be a high risk are referred to the Commitment Review Committee [CRC], which considers the offender's history along with a psychological evaluation in recommending to the Office of the Attorney General [OAG] whether he should be committed. The OAG then determines whether or not to file a petition seeking commitment.

Following the filing of the petition, the circuit court must conduct a probable cause hearing within 90 days. Va. Code § 37.2-906. Upon finding probable cause it must conduct a commitment hearing within another 120 days. Va. Code § 37.2-908(A). Both the OAG and the offender have a right to demand a jury

[3] Both of Kim's convictions – forcible sodomy and abduction with the intent to defile – are predicate crimes rendering him eligible for SVP commitment.

trial at the commitment hearing, Va. Code § 37.2-908(B), and "a unanimous verdict shall be required" prior to adjudicating the respondent a sexually violent predator. *Id*. Moreover, whether before a judge or a jury, the OAG has the burden of proving its case by "clear and convincing evidence." Va. Code § 37.2-908(C). Once declared an SVP, the court has the option of committing for "involuntary secure inpatient treatment" or conditionally releasing the respondent.[4] Va. Code § 37.908(C), (D). All commitments pursuant to this statute are indefinite, meaning that adjudication of an "incorrigible" offender is essentially a life-sentence without the possibility of parole.

Offenders that are considered amenable to treatment may be released following commitment if they are found to be rehabilitated. The committing court conducts a hearing 12 months after individual has been committed to assess each respondent's "need for secure inpatient treatment." Va. Code § 37.2-910(A). These hearings continue "at yearly intervals for five years and at biennial intervals thereafter." *Id*. In addition to automatic review, the respondent may petition for his own release in years when there is no mandated hearing, and Department of Behavioral Health and Developmental Services may petition for release at any time. Va. Code § 37.2-911.

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[4] "Conditional release" is itself highly-restrictive, including conditions akin to the most intensive parole or probation supervision, including mandatory GPS monitoring. Va. Code § 37.2-912.

Likelihood and Severity of SVP Commitments

Virginia enacted its SVP statute in 1999 but it was not until 2006 that the program experienced dramatic growth, largely as a result of statutory changes, including expansion of the class of offenders eligible for commitment – an increase in the number of SVP predicate crimes from four to 28 – and the adoption of a new, actuarial risk assessment instrument called the Static-99.[5] *See* Commonwealth of Virginia, Joint Leg. Audit and Review Comm., *Report to the Governor and General Assembly of Virginia: Review of the Civil Commitment of Sexually Violent Predators* (January 2012), *available at* http://jlarc.virginia.gov/pdfs/reports/Rpt423.pdf [hereinafter JLARC]. Since enacting these changes, SVP commitments have skyrocketed:

> Between 2003 and 2006, there were 38 civil commitments, or an average of about ten per year. In contrast, from 2007 to 2010, there were 228 civil commitments, or an average of about 57 per year. The rate of growth between 2007 and 2010 was six times more than the rate of growth between 2003 and 2006, and has resulted in the [confinement

[5] Prior to adopting the Static-99 "about seven percent of those released from DOC each year met the actuarial threshold. After this change, between 22 and 26 percent of those released from DOC convicted of an SVP predicate crime met the threshold for review." JLARC at ii.

> facility] census rising to near its intended capacity of 300.

Id. at 11.

In theory, the provisions of Virginia Code §§ 37.2-900 *et seq.*, should provide due process protections to individuals facing the possibility of commitment, mandating multiple levels of review, holding the Commonwealth to a substantial burden of proof, and allowing the respondent to mount a defense with the assistance of counsel. In practice, however, evidence demonstrates that the process is perfunctory and the result virtually inevitable; only a very small number of those identified as potential SVPs mount successful defenses or satisfy the ostensible rehabilitative goals of the program.

In 2011, the Virginia General Assembly directed the Joint Legislative Audit and Review Commission [JLARC] "to undertake a comprehensive review of the civil commitment of sexually violent predators" and its conditional review program, in part because of the dramatic increase in the number of commitments after 2006, and the costs associated with the expansion. JLARC at i. The study released by JLARC noted that "[b]etween 2003 and 2010, the OAG chose to petition the court for 421 individuals, which is about 60 percent of those eligible for civil commitment." JLARC at 61. Once petitioned, the chances of a successful defense were bleak: "The OAG staff attorneys [were] highly successful" with courts finding

"the individual an SVP 89 percent of the time." JLARC at 61.

Additional figures establish that the decision-makers in SVP cases – those whose exercise of discretion is supposed to guard an offender's due process rights – are remarkably uniform in favoring adjudication and commitment. To wit "[t]he CRC recommends civil commitment or conditional release 81.6 percent of the time" when an evaluator finds an offender to be an SVP, "[t]he OAG petitions 82.1 percent of the time when the evaluator finds the offender to be an SVP," and "[t]he court finds an offender to be an SVP 90.3 percent of the time when the evaluator finds him to be an SVP." JLARC at 45.

Similar bias comes into play in the decision about whether to confine or conditionally release an SVP. As of November 2011, only 78 of the approximately 350 persons declared SVPs since 2003 had been placed on conditional release, and only 21 of those were released after having been confined. *See* JLARC at 91. Of those 21 released after confinement, only 16 were released on the recommendation of the Department, which represents *all* instances in which the Department advocated release of a confined individual. JLARC at 92-93. For the vast majority of SVPs, it appears that confinement is inevitable, and it is indeed indefinite.

Further, confinement conditions for SVPs are more or less identical to prison. The Virginia Center for Behavioral Rehabilitation [VCBR], the facility

that houses Virginia's SVPs, may have resembled a treatment facility as originally designed, but it has suffered from underfunding and overcrowding. Without funds to expand the facility, the Department has simply retrofitted it, converting single occupancy rooms to allow for double bunking, while at the same time reducing the 87 square footage to 43.5 feet per person. *See* JLARC at 123-24. As double rooms, they are now "similar to Virginia prison cells" which average 41 feet per person. JLARC at 126. It should come as no surprise that "treatment staff have expressed concern about the negative impact" of the changes, including an increase in "incidents requiring additional security" (including acts of sexual violence) and a disruption in "treatment progress for certain" detainees. JLARC at 123. Much like a public school, if the building itself is underfunded and overcrowded, it can be assumed that the staff is likewise overburdened. With a "success rate" of 21 releases in 8 years, it is fair to question whether SVP confinement advances any therapeutic ends at all, or if its real purpose is simply to incapacitate.[6]

[6] The General Assembly's response to the overburdened SVP program seems to affirm the temptation to be cynical – rather than expanding facilities and services at VCBR, it simply mandated life sentences for many potential SVPs, laying aside any pretense of the SVP program's therapeutic purpose. *See, e.g.*, Va. Code § 18.2-61 (following 2012 amendment, mandating life sentence for persons convicted of rape of a child under 13 years of age).

3. SVP commitments fit the criteria described in *Padilla*, creating a duty of advice.

SVP commitment satisfies the three criteria discussed in *Padilla* – severity, connectedness to the criminal process, and likelihood of occurrence. With regard to severity, indefinite confinement in a penitentiary is the most severe punishment available in non-capital cases. In fact, loss of liberty has been found to be such a serious consequence that the risk of confinement alone compels a right to appointment of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). While deportation is certainly a severe consequence of conviction, it pales in comparison to a complete deprivation of one's liberty. In fact the risk of incarceration has often been cited by courts addressing ineffective assistance in the immigration context to demonstrate that the decision to proceed to trial would have been *irrational* – precisely because the vast majority of persons would elect to live free in the country to which they are deported rather than serve a long prison sentence in the United States.

As for connectedness, SVP commitments may resemble other civil commitments in design, but at their core they are a community safety measure that is inseparable from the criminal justice system. They have become increasingly punitive over time, as well, increasing the number of persons committed and the number and types of offenses that trigger eligibility. Moreover, only persons convicted and sentenced in a criminal court (or those deemed incompetent or

insane through the court process) are eligible for SVP commitment – the government cannot simply identify a civilian suspect and petition for him to be committed. The decision about whether to commit likewise occurs in court, before a jury, with quasi-criminal due process protections that mimic those present in a criminal trial, absent probably the most important one – the presumption of innocence. Rather than presume innocence, the jury knows of and presumes the offender's guilt, and armed with its own prevailing bias against the rehabilitation of sex offenders, the result is almost always indefinite commitment. Viewing the process through this lens, SVP commitment is more like the continuation of a sentencing hearing, only after service of one's sentence rather than immediately after conviction, with the unspoken goal of incapacitating "dangerous" individuals for their entire lives. In the words of the Minnesota federal court:

> If it turns out that the civil commitment is in reality punishment for past crimes or a way to prevent future crimes that might be committed, or, in the words of Justice Anthony M. Kennedy, "[i]f the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." *Kansas v. Hendricks*, 521 U.S. 346, 373, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (Kennedy, J., concurring); *see also id.* ("We should bear in mind that while incapacitation is a goal common to both the

> criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1143 (D. Minn. 2015).

As the Minnesota court noted, at this stage SVP commitments may be more properly viewed as criminal penalties, and therefore direct consequences. *Id.* at 1144. Indeed, if SVP commitments were reclassified in the Virginia Code, simply based on semantics, as "sentence enhancements" or "resentencing upon completion of sentence," then they undoubtedly would be considered criminal penalties. It is not unreasonable to assume that all of the quasi-criminal procedures built into the SVP commitment process were designed *because* of the close connection to other types of criminal sentencing.

The likelihood of SVP commitment for sex offenses is comparable to the likelihood of deportation as discussed in *Padilla*. Further, unlike deportation, where Immigration and Customs Enforcement has discretion regarding whether to initiate deportation proceedings, there is no such discretion in the SVP evaluation process. If an inmate qualifies, he *must* be evaluated (and it goes without saying that the only people evaluated are persons with criminal convictions, as opposed to deportation, which is frequently not grounded in criminal conduct). In other words, the process itself is mandatory, just like a sentencing

hearing. The outcome may not be a given, at least theoretically, but subjection to the process certainly is. This directly contradicts the assertions of the district court, which relied primarily on the likelihood of deportation as distinguishing it from SVP commitments.

Ultimately, the SVP process in Virginia is inseparable from the criminal process, its consequences dire, and its outcome likely. If it is not a direct consequence, it certainly is covered under the Sixth Amendment following the rationale of *Padilla*. As a matter of basic fairness, Kim had a right to know that his guilty plea might result in a lifetime behind bars as a Sexually Violent Predator. Kim's attorney never advised him of the SVP program or its consequences. Had he known, he would have pled not guilty and proceeded to trial – his plea offer conferred little benefit, justifying the risk of trial in light of the potential SVP commitment. As a result, Kim was deprived of the effective assistance of counsel, and is entitled to a new trial.

He asks this Court to vacate the convictions and order a new trial, or find that he had a right to proper advice and remand to the state habeas court for further consideration of the factual claims in light of this opinion. In the alternative, as discussed further below, it was error for the Fourth Circuit to deny Kim a certificate of appealability, and Kim therefore asks the Court to remand his case to the Fourth Circuit Court of Appeals for consideration of his appeal on the merits.

B. The Fourth Circuit erred in denying Kim's request for a Certificate of Appealability.

In denying his request for a petition of appealability, the district court stated (and the Court of Appeals affirmed) that Kim "failed to make a 'substantial showing of a denial of a constitutional right' with respect to his § 2254 claims." Although it cited the controlling statutory language, it is evident that the court either misread or misapplied precedent interpreting it, and that Kim was in fact entitled to a Certificate of Appealability.

1. "Substantial showing" means that reasonable jurists could debate whether the petition should have been granted.

Under 28 U.S.C. § 2253(c), Kim must be granted a certificate of appealability (COA) in order to appeal an issue on the merits in this action. Fed. R. App. P. 22(b)(1). A COA may issue when an applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The statute does not define what is meant by "substantial showing."

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court rejected the import and meaning the district court and Fourth Circuit appear to have attached to "substantial showing." The Court stated, specifically that, "[w]e do not require petitioner to prove, before

the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338; *Longworth v. Ozmint*, 377 F.3d 437, 441 (4th Cir. 2004), *cert. denied*, 543 U.S. 1156 (2005). The Court further elaborated that a "substantial showing" is made whereupon "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (internal quotations omitted); *see Tennard v. Dretke*, 542 U.S. 274, 282 (2004).

Accordingly, a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. Rather, a COA must issue if the appeal presents a "question of some substance." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). The limits on relief within the AEDPA should not be a consideration when examining the merits of a habeas petition for a COA. *See, e.g.*, *Smith v. Dretke*, 422 F.3d 269, 273 (5th Cir. 2005) (citing *Miller-El*, 537 U.S. at 342).

In *Sprouse v. Stevens*, 748 F.3d 609 (5th Cir. 2014), the defendant sought a COA pursuant to 28 U.S.C. § 2253(c) in order to appeal multiple issues in his case. The Fifth Circuit denied the applications, and in doing so offered a helpful roadmap for determining the types of claims that fall outside the purview of what reasonable jurists could debate, and thus do not warrant a Certificate of Appealability.

Sprouse's claims represented several species of similar constitutional claims: that trial counsel was ineffective for failing to challenge various aspects of Texas's death-penalty scheme. *Id.* at 621. For example, the defendant, Sprouse, argued that counsel provided ineffective assistance by "failing to challenge the statutory definition of 'mitigating' evidence as constitutionally narrow." Specifically, Sprouse maintained that the Texas statute improperly limited the concept of "mitigation" to those factors that might render the defendant "less morally blameworthy for the commission" of the crime (capital murder). *Id.* at 622. The Fifth Circuit rejected this argument, and in doing so denied the Certificate of Appealability, because it had *already held* – in a previous case – that the statute does not preclude the jury "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, citing *Beazley v. Johnson*, 242 F.3d 248, 260 (5th Cir. 2001). The court went on to hold in *Sprouse* that "reasonable jurists could not therefore conclude that the state court's opinion was contrary to or an unreasonable application of Supreme Court precedent."

In other words, Sprouse was not entitled to a COA, because no jurist could reasonably argue that his trial counsel provided ineffective assistance by failing to challenge a statute on constitutional grounds, when the Court of Appeals was *already*

interpreting the statute in the manner requested by the applicant, Sprouse.

Sprouse also argued that his trial counsel was ineffective for failing to challenge Texas's death penalty statute on the grounds that the aggravating factors are unconstitutionally vague. The Fifth Circuit refused to issue a COA on this issue too, because the same issue had already been addressed in at least three previous Fifth Circuit cases. *Sprouse*, 738 F.3d at 622-23, citing *Turner v. Quartermen*, 481 F.3d 292 (5th Cir. 2007); *Hughes v. Johnson*, 191 F.3d 607 (5th Cir. 1999); *James v. Collins*, 987 F.2d 1116 (5th Cir. 1993).

The denials in *Sprouse* make clear what 28 U.S.C. § 2253 was largely enacted to prevent – the relitigation of well-settled matters that have already been decided or others that are so clearly lacking in merit as to be inarguable. It was not intended to prevent the appeal of arguments that the court does not think are "winners." It is telling that the Fifth Circuit *did* grant a COA to Sprouse on one issue – whether Texas's voluntary-intoxication instruction unconstitutionally limits the jury's consideration of mitigating evidence – though it ultimately ruled against him on the merits. *Sprouse*, 748 F.3d 609.

Unlike in *Sprouse*, no court has conclusively decided Kim's claim. Further, given the resemblance of SVP commitments to direct, punitive consequences, as well as their similarities to the immigration consequences according to the rationale of *Padilla*,

reasonable jurors would certainly debate whether Kim was entitled to advice from his attorney.

2. Reasonable jurists could debate the duty of advice concerning SVP commitments, and in fact *are* debating closely related issues.

The lower courts' decisions appear to ignore the current trend of litigation throughout this country on this and related issues.

A recent case, *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015), found a nearly identical sex offender commitment program in Minnesota to be unconstitutional. The court explained that the program and governing statutes at issue were not "narrowly tailored to achieve [the] compelling interests" of providing treatment and protecting the public, rendering the statute unconstitutional. *Id.* at 1168. The court further held that the program was unconstitutional as applied because, in reality, it "results in a punitive effect and application contrary to the purpose of civil commitment." *Id.* at 1173.

Similarly, Missouri's sex offender civil commitment program has also been found unconstitutional. In *Van Orden v. Schafer*, No. 4:09CV00971, 2015 WL 5315753 (E.D. Mo. Sept. 11, 2015), the District Court for the Eastern District of Missouri held that Missouri's Sexually Violent Predator Act does not violate due process on its face. *Id.* at *25, citing *In re Care and Treatment of Coffman*, 225 S.W.3d 439 (Mo.

2007). However, the court went on to hold that the program, which is similar to Virginia's, does violate due process as applied, because the "nature and duration of commitment of [SVP] residents bears no reasonable relation to the non-punitive purpose for which they were committed." *Van Orden* at *27-28.

This Court, in *Kansas v. Hendricks*, 521 U.S. 346 (1997) debated the constitutionality of a sex offender civil commitment program in Kansas. *Hendricks* was rooted in the argument that the state's entire SVP commitment scheme was a violation of double jeopardy. The Court ultimately ruled that it was not, *id.* at 371, but in a non-unanimous decision with several opinions. Justice Kennedy cautioned against the "danger inherent when a civil confinement law is used in conjunction with the criminal process." *Id.* at 371 (Kennedy, J., concurring). Justice Breyer opined that "special features of the [SVP] Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment on him." *Id.* at 373 (Breyer, J., dissenting).

While none of these cases are on all fours with the habeas claims presented here, their application to this case is obvious and straightforward. They fundamentally evince a concern that programs similar to Virginia's are in fact punishment, and therefore criminal in nature. They discuss the inseparability of the commitment programs from the criminal justice system. They touch on the harshness of the penalties entailed by commitment. They suggest that the constitutional questions surrounding such programs

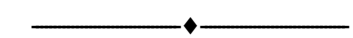
are not unique to any one state, but common to all employing this controversial model of nominally "civil" commitment. Most importantly, they prove that reasonable jurists can *and are* debating the overall effectiveness and constitutionality of these programs. If reasonable jurists can debate and disagree about the programs' validity as a whole, they can certainly disagree and debate about a person's right to be advised that the programs exist.

This contention is further supported by the fact that at least two state supreme courts have found that a defendant must be advised about possible SVP commitment prior to pleading guilty. In *State v. Bellamy*, 178 N.J. 127, 835 A.2d 1231 (2003), the New Jersey Supreme Court held specifically that the trial court has a duty to inform defendants of the possibility that they will face continued confinement as an SVP. The court explained, that "when the consequences of a plea may be so severe that a defendant may be confined for the remainder of his or her life, fundamental fairness demands that the trial court inform [the defendant] of that possible consequence." *Id.* at 139. And further, that "the failure of either court of defense counsel to inform defendant that a possible consequence of a plea to a predicate offense . . . is future confinement for an indefinite period deprives that defendant of information needed to make a knowing and voluntary plea." *Id. But see Fujimoto v. State*, 407 S.W.3d 656 (Mo. Ct. App. 2013). Consistent with *Bellamy*, the Supreme Court of Florida has adopted rules requiring judges, prior to

accepting a plea, to ask eligible defendants whether they are aware that "the plea may subject [them] to involuntary civil commitment as . . . sexually violent predator[s] upon completion of their sentence[s]." Fla. R. Crim. P. 3.172 (2016). As this Court has made clear, an attorney's obligations under the Sixth Amendment to provide advice concerning the consequences of a guilty plea are broader than the judge's obligations under the Fifth and Fourteenth Amendments to ensure that the plea is voluntary, meaning that New Jersey and Florida must both likewise acknowledge a duty of counsel to advise clients of SVP commitments. *See Libretti v. United States*, 516 U.S. 29, 50-51 (1995).

In *Bauder v. Fla. Dept. of Corrections*, 619 F.3d 1272 (11th Cir. 2010), the Eleventh Circuit confronted claims that trial counsel affirmatively misadvised his client, telling him he would not be civilly committed following service of his sentence if he were to plead guilty. *Id.* at 1275. The Court of Appeals found this to be ineffective assistance. While the discussion focused on the affirmative misrepresentation, which is not alleged here, it is telling that the court cited *Padilla* for the contention that "when the law is unclear a criminal defense attorney must advise his client that the 'pending criminal charges may carry a risk of adverse collateral consequences.'" *Bauder*, 319 F.3d at 1275, citing *Padilla*, 559 U.S. at 130.

However the Fourth Circuit may have anticipated deciding Kim's claims, that wasn't the issue before it when Kim requested a certificate of appealability. Its task was more akin to the "laugh test"; were the claims so lacking in merit as to be inarguable or frivolous. It is obvious that they were not; SVP commitments are controversial, and the implications of those commitments to the Fifth, Sixth, Eighth and Fourteenth Amendments are in flux. The Fourth Circuit should have recognized this – that there is an active debate among jurists, or at least that any reasonable jurist could have debated the issues – and it should have granted a certificate of appealability.



CONCLUSION

Thomas Kim deserved to know whether he might be confined for life, and his attorney had a duty to tell him. Because trial counsel failed in his duty, Kim was deprived of the effective assistance of counsel. Kim's plea agreement conferred little benefit, especially considering his likely SVP commitment, and had he been aware of the program, he would have pled not guilty and proceeded to trial. Further, the Fourth Circuit erroneously denied Kim's request for a certificate of appealability, ignoring the merits of the argument and the active debate among jurists. Based on

all of the foregoing, the Court should grant Kim's petition for a writ of certiorari.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-6882

THOMAS KIM,

Petitioner-Appellant,

v.

DIRECTOR, VIRGINIA
DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, Senior District Judge. (1:14-cv-01637-TSE-MSN)

Submitted: October 15, 2015 Decided: October 20, 2015

Before WILKINSON, AGEE, and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Bradley Rittenhouse Haywood, SHELDON, FLOOD & HAYWOOD, PLC, Fairfax, Virginia, for Appellant. Susan Elizabeth Baumgartner, OFFICE OF THE

ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Thomas Kim seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Kim has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: October 20, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-6882
(1:14-cv-01637-TSE-MSN)

THOMAS KIM

Petitioner-Appellant

v.

DIRECTOR, VIRGINIA
DEPARTMENT OF CORRECTIONS

Respondent-Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THOMAS KIM,	)	
Petitioner,	)	
	)	
v.	)	
	)	**Case No. 1:14cv1637**
DIRECTOR, VIRGINIA	)	
DEPARTMENT OF	)	
CORRECTIONS,	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner Thomas Kim, a state inmate who pled guilty to (i) abduction with the intent to defile, in violation of Va. Code § 18.2-48, (ii) forcible sodomy, in violation of Va. Code § 18.2-67.1, and (iii) use of a firearm during the commission of sodomy, in violation of Va. Code § 18.2-53.1, has filed a motion, by counsel, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, based on a claim of ineffective assistance of counsel. Specifically, petitioner contends that his trial counsel was ineffective in failing to inform petitioner prior to his plea that at the end of his sentence, he would be subject to a "re-sentencing" process labeled the Sexually Violent Predator Commitment Program, which carried a strong likelihood of, in petitioner's words, a "de facto life sentence."[1]

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[1] Habeas Corpus Petition at 1.

The petition was filed on December 12, 2014. On March 18, 2015, respondent filed a motion to dismiss and a Rule 5 answer. As the parties have fully briefed the issues presented and neither oral argument nor an evidentiary hearing would aid the decisional process, petitioner's motion is ripe for disposition.[2] For the reasons that follow, petitioner's motion must be denied.

I.[3]

A brief summary of the factual and procedural history of the case places petitioner's motion in context. Thus, the record reflects that on October 11, 2011, petitioner approached a Hispanic female, displayed a badge and handgun, and informed this female that he was an F.B.I. agent looking for "Maria." After querying the female ("R.N.") about her status in the United States and finding that she did not have identification, petitioner fondled her breasts and, after placing R.N. in his car, inserted his hand into her underwear. When R.N. attempted to exit the vehicle, petitioner threatened to handcuff her. He

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[2] Although petitioner requests an evidentiary hearing with respect to his claim, when, as here, "the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1399 (2011) (internal quotation marks and citations omitted).

[3] The facts recited here are derived chiefly from the transcript of petitioner's plea proceedings in Fairfax County Circuit Court.

then drove her to another location, forced her to perform oral sex on him, and ordered her out of the car when he was finished. R.N. reported this incident to the police. Earlier that same day, petitioner had approached another Hispanic female teenager, once again flashing a badge and displaying a gun under the guise of being a police officer who needed to see the teenager's identification. When the teenager ignored petitioner's request and continued walking, petitioner fondled her breasts outside her home and then left.

Thereafter, on October 14, 2011, petitioner approached a different Hispanic teenager and again displayed a badge, asking the teenager if she knew where "Maria Lopez" lived. Although petitioner drove away on account of traffic, this teenager reported petitioner's description and license plate number to the police. On the basis of this information, police identified petitioner as the vehicle owner and then showed petitioner's picture to R.N., who identified petitioner as the individual who had abducted and sexually assaulted her.

On October 24, 2011, police had petitioner under surveillance when he approached yet another Hispanic woman, but this woman walked away from him. Petitioner then proceeded to follow a different Hispanic woman into her apartment building. The police officers surveilling petitioner followed petitioner and the woman up to her apartment and then asked the woman to leave. Petitioner was briefly inside the apartment with the door shut, but exited with a gun

on his hip and a condom in his pocket. He was then arrested. The woman told police that petitioner had shown her a badge, had identified himself as a law enforcement officer, and accompanied her to her apartment to inspect her identification documents. When taken into custody, petitioner admitted to being in the relevant locations and further admitted to looking for a "Lopez family" that owed him money, but he denied ever carrying a badge. Physical evidence undermined petitioner's denial, however, as several weeks later, the final victim found a badge containing petitioner's DNA under a mattress in her apartment.

On March 19, 2012, a Fairfax County grand jury returned a three-count indictment charging petitioner with abduction with the intent to defile in violation of Va. Code § 18.2-48 (Count I), forcible sodomy in violation of Va. Code § 18.2-67.1 (Count II), and use of a firearm during the commission of sodomy in violation of Va. Code § 18.2-53.1 (Count III). After conferring with counsel, petitioner pled guilty to all three counts based on the October 11, 2011 incident with R.N. In exchange, the Commonwealth agreed not to pursue charges for the other October 11, 2011 incident or the October 24, 2011 incidents.

Petitioner entered his plea of guilty on May 9, 2012, in the course of which the Fairfax County Circuit Judge advised petitioner of the possible consequences of his felony conviction as follows:

> THE COURT: As a United States citizen these felony convictions can negatively affect your citizenship. Certainly citizenship can't be taken away from you, but it can have a negative impact because there are certain civil consequences to felony convictions. I'm going to go through a few of those.
>
> Those variety of consequences may include but would not be limited to possible civil commitment, possible civil forfeiture, certainly loss of your right to vote because these are felonies.
>
> Do you understand that these are some additional civil consequences that can result from pleas of guilty to these offenses?
>
> THE DEFENDANT: Yes, your honor.

Thereafter, the Fairfax County Circuit Judge continued the case for sentencing on September 7, 2012. Attorney Robert Whitestone represented petitioner through sentencing.

After hearing evidence and argument from both sides, the Fairfax County Circuit Judge sentenced petitioner to life in prison for Count I, 20 years in prison for Count II, to be served concurrently with the sentence imposed on Count I, and 3 years in prison for Count III, to be served consecutively to the sentences imposed on Counts I and 11.[4] The Fairfax County Circuit Judge then proceeded to suspend all

[4] *See* Sentencing Order at 2.

but 24 years and 6 months of the sentence on Count I, subject to the following conditions: (i) good behavior, (ii) supervised probation, (iii) costs, (iv) restitution, and (v) credit for time served.[5] Thus, petitioner was ultimately sentenced to serve an aggregate sentence of 27 years and 6 months. Furthermore, pursuant to Va. Code § 9.1-903, petitioner was ordered to register with the Department of State Police within 3 days of his release from confinement in a state or local correctional facility, so that this registration could be maintained in the Sex Offender Registry established by Va. Code § 9.1-900.[6]

Both the forcible sodomy and the abduction with intent to defile convictions rendered petitioner eligible to be deemed a "sexually violent predator" under Virginia Code § 37.2-900, which provides in pertinent part that:

> "Sexually violent predator" [hereinafter "SVP"] means any person who (i) has been convicted of a sexually violent offense, or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial . . . and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predator behavior, which makes him likely to engage in sexually violent acts.

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[5] *See id*.

[6] *See id*.

Importantly, Virginia law provides a number of rigorous procedures that must be followed before a court may conclude that an individual is an SVP. First, "[u]pon the filing of a petition alleging that the respondent is a[n] [SVP], the circuit court shall . . . schedule a hearing within 90 days to determine whether probable cause exists to believe that the respondent is a[n] [SVP]." Va. Code § 37.2-906(A). And at "any hearing under this section, the judge shall ascertain if the respondent is represented by counsel and, if he is not represented by counsel, the judge shall appoint an attorney to represent him." Va. Code § 37.2-906(C). If the judge finds probable cause, the judge must then conduct a hearing to determine whether the respondent is an SVP "[w]ithin 120 days after the completion of the probable cause hearing." Va. Code § 37.2-908(A). At this hearing, the "respondent shall have the right to a trial by jury. Seven persons from a panel of 13 shall constitute a jury in such cases. If a jury determines that the respondent is a[n] [SVP], a unanimous verdict shall be required. If no demand is made by either party for a trial by jury, the trial shall be before the court." Va. Code § 37.2-908(B). And the Commonwealth must clear a high bar in order for an individual to be labeled an SVP, inasmuch as "[t]he court or jury shall determine whether, by clear and convincing evidence, the respondent is a[n] [SVP]." Va. Code § 37.2-908(C). Importantly, and particularly pertinent to this case, if a court or jury determines that an individual is an SVP, then that individual "shall be committed" or be placed in "involuntary secure inpatient treatment."

Va. Code § 37.2-908(D). The length of the commitment is "until such time as the respondent's mental abnormality or personality disorder has so changed that the respondent will not present an undue risk to public safety." Va. Code § 37.2-909(A). Petitioner contends that counsel was ineffective for failing to advise him of the possibility of civil commitment as an SVP.

Following sentencing, petitioner retained an attorney, Crystal Meleen, to file a motion for reconsideration, which the Fairfax County Circuit Court denied. Petitioner then filed a timely petition for writ of habeas corpus in the same court, attacking the validity of his conviction based on the same ground he is asserting in the instant petition, namely that "he received ineffective assistance of counsel because his counsel did not advise him that he might face civil commitment as a sex offender after his release from prison." *Kim v. Dir., Va. Dep't of Corrections*, No. 2013-14292 at 2 (Va. Cir. Ct. Jan. 31, 2014). The Fairfax County Circuit Court denied this motion without an evidentiary hearing, finding that [p]etitioner's claim is belied by his plea colloquy, in which the Court highlighted civil commitment as a possible consequence of his guilty plea and Petitioner confirmed that he understood." *Id.* at 4. Moreover, the Fairfax County Circuit Court alternatively found that "even if counsel had not informed [p]etitioner of possible civil commitment, he would not have performed unreasonably because he was not required to do so. A guilty plea is not invalid for failure to advise

a defendant of the possible future consequence of civil commitment." *Id.* at 5.

Petitioner then appealed the Fairfax County Circuit Court's decision to the Supreme Court of Virginia on April 25, 2014. The Supreme Court of Virginia also denied the petition on September 22, 2014. Subsequent to this denial, petitioner filed a motion for rehearing, which the Supreme Court of Virginia also denied on November 7, 2014. Thereafter, petitioner, by counsel, timely filed the instant petition.

II.

When a state court has addressed the merits of a claim raised in a federal habeas petition, a federal court may not grant the petition based on the claim unless the state court's adjudication is contrary to, or is based on an unreasonable application of, clearly established federal law, or is based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Whether a state court decision is (i) "contrary to" or (ii) "an unreasonable application of federal law is based on an independent review of each standard. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

A state court determination runs afoul of the "contrary to" standard if it "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable

facts." *Id.* at 413. Under the "unreasonable application" clause, the writ should be granted only if the federal court finds that the state court "identifies the correct governing legal principle from [the United States Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Importantly, this standard of reasonableness is an objective one. *Id.* at 410. Moreover, in evaluating whether a state court's determination of the facts is unreasonable, a federal court reviewing a habeas petition "presume[s] the [state] court's factual findings to be sound unless [petitioner] rebuts the presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (internal quotation marks and citations omitted). In other words, this standard "'is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Jones v. Clarke*, No. 14-6590, 2015 WL 1812952 at *2 (4th Cir. Apr. 22, 2015) (citing *Cullen*, 131 S.Ct. at 1398). The state court "must be granted a deference and latitude that are not in operation when the case involves review under the [applicable] standard itself." *Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

In sum, under § 2254(d), federal habeas review of a state court decision granting or denying habeas relief focuses, with some deference, on the reasons and rationale of the state court decision. Here, because the Supreme Court of Virginia was silent as to its rationale for affirming the Fairfax County Circuit

Court's (hereinafter "State Court") decision denying petitioner's request for a writ of habeas corpus, the focus of federal review properly shifts to the reasons and rationale of the State Court decision. This is so, as the Supreme Court has instructed, because where, as here, "there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

III.

As the State Court correctly recognized, the merits of petitioner's claim of ineffective assistance of counsel are governed by the settled and familiar two-pronged legal analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). Specifically, to prevail on a claim of ineffective assistance of counsel, petitioner must show first, that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Importantly, judicial review of counsel's performance in this context is "highly deferential." *Id.* at 689. Indeed, to establish that counsel's performance was objectively unreasonable, petitioner must overcome a strong presumption that counsel rendered "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. If petitioner demonstrates that counsel's performance was objectively unreasonable, *Strickland* next requires petitioner to establish that "the deficient performance prejudiced

the defense." *Id.* at 687. Thus, in step two of the *Strickland* analysis, petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The prejudice analysis also requires consideration of whether "the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). In other words, counsel may be deemed constitutionally ineffective only if his or her "conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Therefore, the focus of review here is whether the State Court's "application of the *Strickland* standard was unreasonable." *Jones*, 2015 WL 1812952 at *3.

IV.

Petitioner contends that the State Court's application of the *Strickland* performance prong was unreasonable in light of the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). Because the crux of petitioner's claim is based on *Padilla*, a close examination of that case is necessary.

In *Padilla*, the Supreme Court upheld the petitioner's claim that his counsel's performance was ineffective for failing to advise petitioner of the consequence of "automatic deportation" upon petitioner's guilty plea. *Id.* at 360. In reaching this result, the

Supreme Court majority (7-2) relied chiefly on the fact that "[u]nder contemporary law, if a noncitizen has committed a removable offense . . . his removal is *practically inevitable* but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General. . . ." *Id.* at 363-64 (emphasis added). The Supreme Court majority further noted that the Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*" but significantly, did not resolve the question of whether that distinction was appropriate in a context other than "the unique nature of deportation." *Id.* at 365. Because deportation was "nearly an automatic result" for a large class of offenses, including the offense at issue, the Supreme Court concluded that the failure to disclose this consequence constituted ineffective performance under *Strickland*. *Id.* at 366-67.

Petitioner argues that the Supreme Court's holding in *Padilla* renders the State Court's decision in his case unreasonable and contrary to clearly established federal law. This argument fails; *Padilla* is significantly and substantially distinguishable from this case, as the possibility of civil commitment upon being deemed an SVP under Virginia law is far from practically inevitable or largely automatic. To the contrary, as petitioner concedes, unlike removal or deportation, multiple prerequisites exist for petitioner to be labeled an SVP under Virginia law, including a probable cause hearing in which petitioner

would be entitled to counsel[7] and a commitment hearing in which petitioner would be entitled to a trial by jury.[8] In sum, *Padilla* is inapposite chiefly because unlike deportation in that case, which was "nearly an automatic result," being labeled an SVP under Virginia law is far from automatic. *Padilla*, 559 U.S. at 366.

Moreover, there is a sound basis to conclude that *Padilla* did not disturb the well-settled principle that "counsel has a constitutional duty to inform his client of direct consequences of his guilty plea; but if a consequence is merely collateral to a plea of guilty – in other words, if it is an incidental or loosely related result of the plea – counsel has no duty to mention it." *United States v. Reaves*, 695 F.3d 637, 640 (7th Cir. 2012). This is so because "[a]lthough the Supreme Court declined to apply this [collateral versus direct consequences] distinction to deportation in *Padilla*, it was also careful to note that it *would not answer* whether the distinction was an appropriate one for other ineffective assistance of counsel claims." *Id.* (emphasis added). And "[i]ndeed, *Padilla* is rife with

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[7] *See* Va. Code § 37.2-906(C) ("Prior to any hearing under this section, the judge shall ascertain if the respondent is represented by counsel, and, if he is not represented by counsel, the judge shall appoint an attorney to represent him.").

[8] *See* Va. Code § 37.2-908(B) ("[T]he respondent shall have the right to a trial by jury . . . If a jury determines that the respondent is a[n] [SVP], a unanimous verdict shall be required. If no demand is made by either party for a trial by jury, the trial shall be before the Court.")

indications that the Supreme Court meant to limit its scope to the context of deportation only." *Id.* Thus, there is no Supreme Court precedent rejecting the application of the direct/collateral consequences dichotomy in the context of ineffective assistance of counsel claims arising outside of the context of deportation.

Indeed, the reasonableness of the State Court's interpretation of federal law on this subject finds firm support in a number of cases in the Fifth Amendment context, including the Second Circuit's decision in *United States v. Youngs*, 687 F.3d 56 (2d Cir. 2012).[9]

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[9] *See also Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) ("We believe that the possibility of commitment for life as a sexually dangerous person is a collateral consequence of pleading guilty."); *George v. Black*, 732 F.2d 108, 111 (8th Cir. 1984) (finding that possibility of civil commitment was a collateral consequence because "civil commitment does not flow automatically from the plea"); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1365, 1366 (4th Cir. 1973) ("[T]he fact that the acceptance of the petitioner's plea of guilty . . . placed him in a class, where he *might*, as a result of the judgment in an entirely separate *civil* proceeding, in which he would be afforded counsel and all due process rights . . . be committed . . . was . . . a collateral consequence of his plea. . . ."). At least one Virginia state court decision has also concluded that counsel has no duty to disclose the possibility of commitment as an SVP under Virginia law. *See Ames v. Johnson*, No. CL04-413, 2005 WL 820305 at *3 (Va. Cir. Ct. 2005):

> Although eligibility for civil commitment under the SVPA [Sexually Violent Predators Act] is triggered by conviction of a "sexually violent crime," civil commitment can be imposed only after testing, evaluation, a probable cause hearing, and a jury trial. No one can

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There, the defendant argued that "his plea was defective because the district court did not advise him of the possibility of civil commitment as a sexually dangerous person at the end of his prison term." *Id.* at 58. The defendant's contention rested, like the petition at issue here, in large measure on *Padilla.* Like the case at bar, the Second Circuit placed principal emphasis on the fact that the Supreme Court's analysis focused on the reality that deportation or removal was "virtually inevitable" upon conviction. *Id.* at 61 (citing *Padilla*, 559 U.S. at 360). The Second Circuit thus concluded that the "concerns expressed by the Supreme Court in *Padilla* as to deportation . . . do not apply to such a remote and uncertain consequence as civil commitment" especially because the Supreme Court in *Padilla* pointed out that the *only* way for convicted defendants to avoid deportation was the "possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." *Id.* at 62 (citing *Padilla*, 559 U.S. at 364). Thus, "deportation under these circumstances is nearly automatic." *Id.* at 63. By contrast, "future civil commitment . . . is not nearly as certain." *Id.* In underscoring the relative unpredictability of future civil commitment, the Second Circuit attached

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> be civilly committed as a "sexually violent predator," unless the Commonwealth meets its burden of proof on a multitude of factors . . . [c]ivil commitment under the SVPA would be, at best, a remote collateral consequence of the . . . plea.

particular importance to the fact that "for civil commitment . . . the Government will still have to establish by clear and convincing evidence that the inmate suffers from a condition that will make him sexually dangerous to others." *Id.*[10]

Youngs and *Reaves* undermine petitioner's claim that the State Court's decision was an unreasonable application of federal law, as the outcome in *Padilla* was based largely on the fact that deportation was almost inevitable, absent an exercise of discretion by the Attorney General. *See Padilla*, 559 U.S. at 364.

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[10] *Youngs* arose in the context of a district court's Fifth Amendment disclosure obligations to a defendant in the course of a plea colloquy, instead of an attorney's Sixth Amendment disclosure obligations to his or her client. It is true that the "Sixth Amendment responsibilities of counsel to advise of the advantages and disadvantages of a guilty plea are greater than the responsibilities of a court under the Fifth Amendment." *Youngs*, 687 F.3d at 62. Nonetheless, the analysis in *Youngs* as to whether the possibility of civil commitment needs to be disclosed by an attorney in light of *Padilla* is still applicable, because the standard for disclosure of plea-related consequences articulated in *Youngs* is consistent both with the Supreme Court's decision in *Padilla* and the standard for whether counsel has a Sixth Amendment disclosure obligation of collateral consequences. *Compare Youngs*, 687 F.3d at 60 ("Civil commitment under the Act is not definite, immediate, and largely automatic.") (internal quotation marks and citations omitted) *with Munday v. Lampert*, 215 F. App'x 593, 595 (9th Cir. 2006) ("Counsel's failure to advise a defendant of the collateral consequences of his plea . . . does not amount to ineffective assistance . . . [t]he distinction between a direct and collateral consequence of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.") (internal quotation marks and citations omitted).

By contrast, civil commitment as an SVP under Virginia law is far from certain, as classification as an SVP requires (i) a probable cause hearing, in which it must be determined that probable cause exists to label the individual an SVP; *and* (ii) a commitment hearing, in which the Commonwealth must prove by clear and convincing evidence that the respondent is an SVP.[11] The Eleventh Circuit's decision in *Bauder v. Dep't of Corr. State of Fla.*, 619 F.3d 1272 (11th Cir. 2010) does not compel a contrary result. There, the petition at issue alleged that "counsel provided ineffective assistance of counsel by affirmatively telling him that pleading no contest to aggravated stalking would *not* subject him to civil commitment." *Id.* at 1273 (emphasis added). The Eleventh Circuit found that because "counsel told Bauder that pleading to the criminal charge would *not* subject Bauder to civil commitment," this "constituted affirmative misadvice." *Id.* at 1275. Critically, however, the Eleventh Circuit held that the district court did not clearly err in finding that "counsel misadvised Bauder on the *collateral consequence* of civil commitment stemming from his plea" and thus, the holding in *Bauder* stemmed from the fact that counsel tendered affirmative misadvice. *Id.* at 1274 (emphasis added).[12] More

[11] *See* Va. Code § 37.2-908(C) ("The court or jury shall determine whether, by clear and convincing evidence, the respondent is a[n] [SVP].").

[12] The Supreme Court in *Padilla* expressed some disapproval towards delineating an attorney's obligations by distinguishing affirmative misadvice from nondisclosure, although this too was apparently driven, in large measure, by the unique

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importantly, *Bauder* is not Supreme Court precedent, and "it is Supreme Court precedent . . . to which we look in applying the AEDPA standard of review." *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008). And to the extent *Bauder* creates disagreement on the correctness of the State Court's decision, such disagreement still fails to meet the requirements imposed by § 2254, as a "state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (internal quotation marks and citations omitted). In summary, where, as here, no Supreme Court precedent establishes that the possibility of civil commitment is a plea-related consequence an attorney must disclose and where, as here, some circuits have concluded, in the Fifth Amendment context, that disclosure of the possibility of civil commitment is not required, it is proper to conclude that the State Court's decision was a reasonable application and construction of *Padilla* and *Strickland.*[13] And because petitioner has failed to show that

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characteristics of deportation. *See Padilla*, 559 U.S. at 370-71 ("[Such a holding] would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.").

[13] Petitioner cites empirical data in support of his claim that the possibility of civil commitment as an SVP is as certain as deportation. An examination of this data belies petitioner's claim; indeed, the data petitioner cites demonstrates that commitment as an SVP is far from guaranteed, as between 2003 and 2010, SVP petitions were filed for 60 percent of those individuals eligible for civil commitment, and those petitions

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the State Court's application of the *Strickland* performance prong was unreasonable, this, by itself, compels dismissal of petitioner's § 2254 motion.

V.

In denying petitioner's motion for habeas relief, the State Court alternatively relied on its conclusion that because petitioner was advised by the Court that civil commitment was a possible consequence of pleading guilty, petitioner could not show prejudice under *Strickland*. Given the result reached in Part IV, *supra*, it is unnecessary to resolve the reasonableness of the State Court's analysis on this point, but certain aspects of this analysis nonetheless merit mention. Prejudice under *Strickland* requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," namely that petitioner would not have pled guilty upon learning of the possibility of civil commitment. *Strickland*, 466 U.S. at 694. It is worth noting that some courts have found that defendants cannot prevail on the prejudice prong "if the information given by the court . . . corrects or clarifies the earlier erroneous information given by the defendant's attorney and the defendant admits to understanding the court's advice. . . ."

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were successful 89 percent of the time. Habeas Corpus Petition at 15-16. In other words, the empirical data shows that just over half of the individuals eligible for SVP status were civilly committed, a figure that hardly shows that commitment as an SVP is a foregone conclusion.

United States v. Foster, 68 F.3d 86, 88 (4th Cir. 1995) (internal quotation marks and citations omitted). In these circumstances, the Fourth Circuit noted that the defendant "was clearly not prejudiced by any misstatements made by his attorney." *Id*.[14]

More recently, however, the Fourth Circuit reached a somewhat different result in *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012). There, a defendant was given "*affirmative* misadvice" that deportation was not a possible consequence of pleading guilty. *Id.* at 253 (emphasis added). The district court, during the plea colloquy, then proceeded to mention deportation as one of many possible consequences of pleading guilty, which the defendant confirmed he understood. *Id.* at 250. The Fourth Circuit found that, in these circumstances, counsel's affirmative misadvice prejudiced the defendant under *Strickland.* In reaching this conclusion, the Fourth Circuit distinguished *Foster* by holding that the "general and equivocal admonishment" by the district court was "insufficient to correct counsel's affirmative misadvice that Akinsade's crime was not categorically a deportable offense." *Id.* at 254.

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[14] *See also United States v. Hernandez-Monreal*, 404 F. App'x 714, 715 (4th Cir. 2010) (finding that defendant's ineffective assistance of counsel claim predicated on counsel's failure to advise defendant of the consequence of deportation failed to show prejudice because the defendant "affirmatively acknowledged his understanding that his plea could definitely make it difficult, if not impossible, for [him] to successfully stay legally in the United States") (internal quotation marks and citations omitted).

Here, the State Court found that petitioner's claim of prejudice was "belied by his plea colloquy, in which the Court highlighted potential civil commitment as a possible consequence of his guilty plea and [p]etitioner confirmed that he understood." *Kim*, No. 2013-14292 at 4. Yet, given that *Akinsade* and *Foster* are arguably in some tension on this issue and because the result reached with respect to the State Court's analysis of the *Strickland* performance prong is dispositive, it is unnecessary to reach or decide the reasonableness of the State Court's analysis of the *Strickland* prejudice prong.

VI.

In sum, because the State Court's conclusion that counsel's failure to disclose the possibility of civil commitment did not constitute ineffective assistance of counsel was neither contrary to nor an unreasonable application of clearly established Federal law with respect to the *Strickland* performance prong, respondent's motion to dismiss must be granted and this petition must be dismissed.

An appropriate Judgment and Order will issue.

Alexandria, VA
April 30, 2015

/s/ [Illegible]
T. S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THOMAS KIM,	)	
Petitioner,	)	
	)	
v.	)	
	)	**Case No. 1:14cv1637**
DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on respondent's motion to dismiss petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

For the reasons stated in the accompanying Memorandum Opinion of even date, and for good cause shown, it is hereby **ORDERED** that respondent's motion is **GRANTED**.

The Clerk is directed to send a copy of this Order to all counsel of record and to place this matter among the ended causes.

Alexandria, VA
April 30, 2015

/s/ [Illegible]
T. S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THOMAS KIM, **Petitioner,** **v.** **DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,** **Respondent.**	))))))))	**Case No. 1:14cv1637**

ORDER

This matter is before the Court on petitioner's motion for this Court to issue or deny a certificate of appealability pursuant to Rule 11.

For the reasons stated in the Memorandum Opinion (Doc. 11) of April 30, 3015 [sic], it is hereby **ORDERED** that the Court expressly declines to issue a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(2), because petitioner has failed to make "a substantial showing of the denial of a constitutional right" with respect to his § 2254 claim. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, VA
May 22, 2015

/s/ [Illegible]
T. S. Ellis, III
United States District Judge

FILED: December 1, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-6882
(1:14-cv-01637-TSE-MSN)

THOMAS KIM

Petitioner-Appellant

v.

DIRECTOR, VIRGINIA
DEPARTMENT OF CORRECTIONS

Respondent-Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk