THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 23 2016
S.C. SUPREME COURT

In the Matter of Care and Treatment of
Larry Edward Hendricks, Petitioner,

Appellate Case No. 2014-000205.

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Appeal from Fairfield County
R. Knox McMahon, Circuit Court Judge

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Unpublished Opinion No. 2016-UP-173

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PETITION FOR A WRIT OF CERTIORARI

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# TABLE OF CONTENTS

# CERTIFICATE OF COUNSEL

Petitioner Pro-se hereby certifies That The Petition for Rehearing was maade and finally ruled on by The Court of Appeals on May 24, 2016.

## Question(s) Presented

THE APPELATE COURT ERRED WHEN IT FAILED TO COMPLY WITH THE SUPREMACY OF PRECEDENT IN AFFIRMING THE LOWER COURT IN VIOLATION OF THE SOUTH CAROLINA CONSTITATION.

## STATEMENT OF THE CASE

In January of 1998, The Fairfield County Grand Jury indicted Larry Edward Hendricks for one count of lewd act upon a child in violation of S.C. Code Ann 16-15-140. Petitioner was again indicted by The Fairfield County Grand Jury for another count of Lewd Act upon a minor in August 1998. Petition Pled guilty To both offenses and received a fifteen year sentence on each with The sentences ordered To run Consecutively. ROA 189-200.

Prior To Petitioner's MAX out date of April 30, 2013, and his release from The Department of Corrections, he was referred to The multi-Disciplinary Team To determine if There was probable cause To believe That he was a sexually Violent predator according To The provisions of The Sexually Violent Predator Act ("SVP"), S.C. Code Ann. §44-48-10 et al. The Team found probable cause existed. Later The Prosecutor's Review Committee who also determined probable cause, was brought into play. Afterwards, Petitioner was evaluated in October 2012 by The Chief Psychologist for The Department of Mental Health. ROA 51, l. 11-55, l. 15.

Petitioner was brought To The Fairfield County jail on April 24, 2013. On January 27, 2014, Petitioner proceeded To Trial in Fairfield County before Circuit Court Judge R. KNOX McMahon and a jury. Petitioner was represented by

Court appointed counsel Ernest M. Spong, III, and The State, by Assistant Attorney General James G. Bogle, Jr. ROA 1. The Court allowed for pro-se motions That were previously filed To be heard. After making a ruling, The jury heard Testimony, and found Petitioner was a sexually Violent predator according To The SVP Act. ROA 180, ll. 11-12. Presiding Judge issued an order committing Petitioner To The Department of Mental Health for long Term control, care, and Treatment. R. 234.

Petitioner filed a timely Notice of Appeal. He was assigned Appellate Counsel Carmen V. Ganjehsani, and Then later assigned Laura R. Baer. Appellate counsel filed an Anders Brief, and Petitioner filed a Pro-se brief in response. On April 19, 2016, Petitioner received an order Dismissing his Appeal. The Petitioner in Turn filed a Timely Petition for Rehearing and enBANC. Petitioner received a response denying his Petition on May 27, 2016.

This Writ follows.

# Issue Presented

Did the Court of Appeals err in affirming the trial Court's abuse of discretion in its failure to grant a motion to dismiss, that relied on Supreme Court precedent?

South Carolina Constitution Article V, §9, declares and recognizes the binding effect of Supreme Court decisions. The Supreme Court has said that the Court of Appeals lacks the authority to rule against prior published precedent, but are bound by such. State v. Cheeks, 408 S.C. 198, 758 SE2d 715 (SC, 2014). Further it is said that it is incumbent upon the Court of Appeals to apply the Supreme Court precedent. State v. Phillips, No. 27607, 2016 WL 1584046 (SC 042016).

The U.S. Supreme Court has also chimed in on this issue. The State's highest court is unquestionably the ultimate expositor of state law. Riley v. Kennedy, 533 U.S. 406 (2008).

The Petitioner filed several motions, pre-trial, with the Circuit Court. In each motion the Petitioner presented precedent of the Supreme Court and illustrated why they should be decided in his favor.

Before the Commitment hearing, after the jury was empaneled, Petitioner was allowed by the Court to present and argue his motions. Assigned Counsel explicitly declined to protect the Petitioner's Due Process rights, and ignored this Court's established precedent, Though Petitioner presented Counsel with copies of the decisions of this court, that would impact Petitioner's liberty. Both parties were heard before the Court

rendered its decision preserving the issue for appellate review. State v. Lyles, 2016 WL 379566 (SC, 012716); Staube v. City of Folly Beach, 529 SE2d 543 (SC 2000). The right of appeal arises from and is controlled by statutory law, Energys Delaware, Inc. v. Hopkins, 738 SE2d 478, 479 (SC 2013).

Petitioner has a protected interest through the Article 1, §3, and the Fourteenth Amendment of the State and Federal Constitution. This stems from two sources, The Due Process Clause itself or state-created statutes. In order to create a protected interest, the law must contain "explicitly mandatory language, i.e. specific directives to the decisionmaker that if the [laws] substantive predicates are present, a particular outcome must follow." Kentucky Dept. of Corr. v. Thompson, 490 U.S. 454, 463 (1989).

The Appellate court erred when it did not reverse the decision of the lower court. A motion of dismissal must be based solely on allegation set forth, and the court must presume all-well-pled facts to be true. Gressette v. S.C. Elec. and Gas Co., 635 SE2d 538 (SC 2006).

## FAILURE TO PROSECUTE

As described earlier, the Petitioner relied on this Court's precedent to understand and argue his point. This Court decided in Care and Treatment of Miller, 715 SE2d 253 (SC 2011), that if the statute involving the Sexual Violent Predator Act ("SVPA"), S.C. Code of Law §44-48-90(B), States a procedure, in mandatory language, Then it must be followed.

Specifically Petitioner filed a pre-trial motion To Dismiss for failure to prosecute and based it upon Miller and In re care + treatment of matthews, 550 SE2d 311 (2001). Miller stood on all fours with what was occurring at the time in Petitioner's situation. No motion for a continuance was offered and filled by The state, and a period of over 90 days had passed. The state had failed To prosecute the case, and by precedent established in Miller counsel was To file a motion to dismiss. Supp. ROA P. 19-22.

Assigned counsel would not file said motion after being asked numerous times To do so by Petitioner. Petitioner filed a Motion To relieve counsel with The court, and later filed a pro-se motion To dismiss, regarding This issue, which was heard by The lower court.

Regardless To The decision of Trial counsel, The appellate Court had an obligation to adhere To The precedent of This Court. Because at the time of filing of the motion the Petitioner had his liberty subdued by The state, which had failed To Timely prosecute the matter, The lower court erred in its decision which abused its discretion. The appellate court Violated The State's Constitution, when it failed to reverse the lower court.

The matter was even more complicated because the clerk's office had orders granted by the court in its files that did not have corresponding motions or Requests

filed with the court. Petitioner found out about these orders by contacting the Clerk of Court, who forwarded copies of all material in Petitioner's clerk file.

This ex parte communication amounted to a conspiracy to rob Petitioner of his liberty. McMillian v. Oconee Memorial Hospital, Inc., 367 SC 559, 564 (2006). A civil conspiracy consist of a combination of two (2) or more persons joining for the purpose of trying and causing special damage to the Petitioner.

Petitioner filed a motion to show cause to have it explained how the Orders were provided without filed motions, or Requests, to correspond with their existence. Supp. ROA P. 11-13.

In the Motion filed on November 1, 2013, the Petitioner brought forth that his procedural protections via the Due Process Clause had been abrograted by the granting and issuing of orders that the Petitioner had no notice of. Bundy v. Shirley, 772 SE 2d 163, 169 (SC 2015)(The fundamental requirement of Due Process include notice, an opportunity to be heard in a meaningful way, and judicial review.)

The Petitioner was denied an opportunity to be heard in these matters which affected him. The judicial

practice of merely signing an order prepared by Counsel of one party is condemned. Herring v. Retail Credit Co., 224 SE2d 663 (1976). South Carolina Case law and rule-making authorities are well synchronized on the prohibition against ex-parte contacts. Burgess v. Stern, 311 SC 326, 330 (SC 1993).

This issue was argued before the trial court. ROA P. 22, L. 20 TO P. 29, L. 9. The Court admitted it did not have corresponding paperwork regarding the Continuances but assumed, rather than question whether this violated the Petitioner's procedural due process.

This was an abuse of discretion and should have been corrected by the Court of Appeals. The Petitioner understands that the State may have authority to create, or not a standard in a statute, but once that state created right is instituted then Article I, § 3, of the S.C. Constation, and the Fourteenth Amendment requires, through the Due Process Clause, insurances that the state-created right is not arbitrarily abrogated. Wolff-v. McDonnell, 418 U.S. 539 (1974); Sander v. Conner, 515 U.S. 472, 483-484 (1995) (the States may, under certain circumstances, create liberty interests which are protected by the Due Process Clause.)

S.C. Code §44-48-90 (2010) has embedded in it mandatory procedural language that this Court recognized in Miller, as not being optional. In a sister state, Florida, in State v. Goode, 830 So. 2nd 817, 828 (Fla, 2002), the trial court dismissed an action for involuntary commitment because Goode had not been to a SVP Trial within the statutory 30 days time period. Id, at 818. The Florida Supreme Court affirmed the dismissal holding, "based on the importance of the obvious liberty rights at stake, and consistent with the Kansas Act upon which Florida's law (and South Carolina) is modled, we agree that the legislature intended that there should be 'scrupulous compliance' with the statutory 30 day time limit." Id, at 826.

Similarly, in Matthews the Supreme Court of South Carolina held: "When the 60 day period [of time to hold a trial] has passed, and no Continuance has been granted, the proper procedure for a respondent to follow is to file a motion to dismiss." Matthews, 550 SE2d at 314, 345 S.C. at 645.

Clearly substantial prejudice has occurred because the Petitioner liberty was deprived him, after he finished his term of incarceration, while awaiting a hearing. Any delays further that loss of liberty.

Because of the mandatory pre-trial detention scheme of S.C. Code §§ 44-48-80 to 90, The Petitioner's constitutional rights were seriously put in jeopardy due to the State's non-adherence to its legislature's expressed intention to have these types of cases before the Court in a timely manner.

The State's petition to involuntary commit should have been dismissed in accordance with established court precedent. This Court had noted that, "It is not a significant burden on the state or the trial court to require the issuance of a continuance, or even notation in the records, indicating: (1) the trial cannot be held within [ninety] days; (2) good cause for the delay; and the respondent will not suffer prejudice." Matthews, 550 SE2d at 314, Miller, 713 SE2d at 257.

Based on the established precedent incorporated herein, the fact that the Court appointed expert issued her report on July 9, 2013, and the Petitioner was not tried until January 27, 2014, the mandatory statutory provision had been abrogated. Petitioner was released from SCDC on April 24, 2013.

The Trial Court erred in not granting the motion to Dismiss, pursuant to Rule 41(b), SCRCP.

## JURISDICTION OVER SUBJECT MATTER

The Petitioner also filed a MOTION TO Dismiss based upon mandatory statutory procedural error denying The Committing Court jurisdiction TO hear The subject matter before it. The Petition TO involuntary commit was filed in The wrong county.

The qualifying offense used by The state that was committed in said county had been repealed by Legislature Act 255, effective June 12, 2012. The state did not start The statutory procedure to involuntary commit until after The effective date of The repeal.

The concept of jurisdiction refers TO the authority of a court TO entertain a particular action, but The concept does not refer TO the validity of The claim on which an action or person is based, Cribb v. Spatholt, 676 SE2d 714 (CA 2009).

The subject matter here, a hearing to determine whether the Respondent (Petitioner) fits the requirements TO be involuntary civilly confined, requires a particular predicate offense. That offense must be one adjudicated by The Court in which a conviction was upheld. The fact that the legislature choose TO repeal the statute S.C. Code §16-15-140, without putting in a saving clause referencing The SVPA, or a conforming amendment, clearly meant

That once the effective date occurred, That statute was repealed and any claim referencing it, Thereafter, done away with it.

As such, This matter can no ~~longer~~ longer be persued in Fairfield County because There is no relative offense To bring The SVPA into play in That judicial circuit.

The rules of statutory construction and legislative intent clearly come into play here. Gay v. Arial, 673 SE2d 418 (SC 2009). The legislature repealed the offending statute, making it not valid as a qualifying offense after The effective date of the repeal. There was no saving Clause or conforming amendment To Act 255. Chem-Nuclear Systems, LLC v. S.C. Bd. of Health and Env'l Control, 648 SE2d 601 (SC 2007).

As Such the appellate court erred when it affirmed The decision of The lower court over The question of Jurisdiction over The specific subject matter of the Petition To Involuntary Commit. Petitioner's Motion To Dismiss pursuant To Rule 12(b)(1) and Rule 40(b) SCRCP, Should have been granted to protect his Due Process rights and for fidelity To precedent.

# Violation of the Seperation of Powers Act

Finally, The Petitioner filed a Motion To dismiss To attack a novel issue in South Carolina. On October 20, 2013, a motion was filed with the Clerk of Court questioning whether a violation of the Seperation of Powers doctrine occurred in determining That Petitioner was a candidate for sexual Violent Predator classification.

The Petitioner has never been convicted of a crime of violence. The determination of an offense's classification is declared at the time of its occurrence. Hill v. U.S. ex rel Wampler, 298 U.S. 460, 56 S.Ct. 760 (1936); Jones v. Cunningham, 370 U.S. 236 (1963); Early v. Murray, 451 F.3d 75 (CA2, 2006)(only The judgment of a court, as expressed Through the sentence imposed by a judge has The power To constrain a person's liberty and That judgment includes only Those terms expressly imposed.) Once a determination has been made by a member of the judicial branch of government any deviation would violate the seperation of Powers doctrine.

S.C. Code of Law §44-48-30(2)(1)+(6)(a), are offensive To The state's Constitutional provisions of seperation of powers, by allowing The Executive Branch to re-open final judgments of the judicial branch To consider what The judicial

Branch has declared as non-violent offenses to now be violent, for purposes of the Sexual Violent predator act.

The judgment of a court must stand as final. It can be reversed, modified or superseded only by a judicial process. It is wholly under the control of the judicial department of government. The legislature cannot supersede a judgment of a court by its direct declaration to that effect. Because the effect of the statute would be to annul the court's judgment, reclassifying the case. The new statute, which was not a statute at the time Petitioner's offense occurred, is an attempt by the legislature to exercise a power that is exclusive to the judiciary, and thus the statute violates the Seperation of powers provisions of the S.C. Constitution Article 1, §8.

Therefore, when the General Assembly directed the attorney general to reclassify the Petitioner, it impermissibly invaded the province of the judiciary by mandating the reopening of a final judgment, and by directing that a judicial function be performed by a member of the Executive Branch of government. Ultimately the Constitution was violated.

As such, S.C. Code §44-48-30, as applied in this matter, is unconstitutional in that it requires the attorney general, a member of the Executive Branch, to reclassify

Sex offenders, by a new definition, who had been previously been adjudicated and classified pursuant to a final order of a court.

The General Assembly may not overturn a final judgment at law by legislative mandate. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-219 (1995).

This matter deserved, at the least, a declatory judgment from the trial court. Now it is this courts duty to use its inherent power to do all things reasonably necessary to insure that results are reached to the fullest extent possible. State v. Langford, 735 SE2d 471 (SC 2012); Robinson v. Estate of Harris, 698 SE2d 801 (SC 2010).

Through Petitioner's research he has found the issue of "seperation of powers" and "judgment of a court," to be litigated in dozens of states where similar factors, as illustrated here occurred, but one is the most on point. It is State v. Bodyke, 126 Ohio St. 3d 266, 278-280 (2010) (Courts must be wary that the legislature in discharging its own duties, does not accrete power and encroach on the province of the judiciary.) The majority of sister states hold statutory infringement to be unconstitutional. This Court should too,

# CONCLUSION

Based on the aforementioned this Court should revisit the decision of the lower courts and vacate the lower court's commitment order based on a violation of Court precedent and the State's constitution, allowing Petitioner his liberty and an opportunity to start anew.

June 21, 2016

Respectfully Submitted

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Petitioner Pro-se

# CERTIFICATE OF SERVICE

Petition, pro-se, has supplied the following a Copy of this Writ of Certiorari via U.S. Postal Service this 21st day of June 2016.

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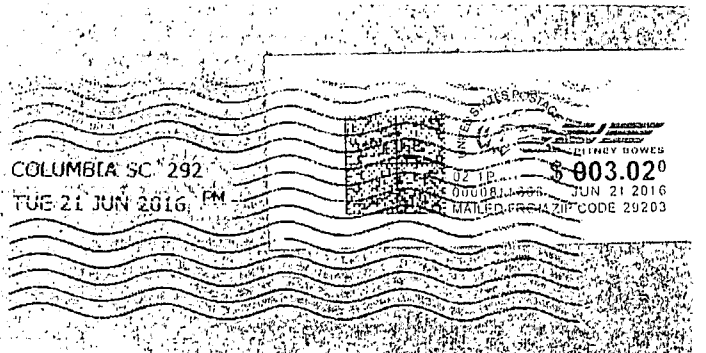


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