STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-262 (S.C. Ct. App. Filed June 28, 2017)

12-CP-32-01783

IN THE MATTER OF THE CARE AND
TREATMENT OF CARL MATTHEW ASQUITH,

PETITIONER

APPELLATE CASE NO. 2017-001907

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 16, 2017.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding Petitioner's argument that his statutory right to counsel pursuant to the Sexually Violent Predator Act was violated when the state transported him to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present was abandoned on appeal?

2.

Did the Court of Appeals err by holding the trial judge did not abuse his discretion when he refused to suppress evidence gathered by Dr. William Mulbry in violation of Petitioner's constitutional due process right to counsel and statutory right to an attorney pursuant to the Sexually Violent Predator Act when the state transported Petitioner from the Lexington County Detention Center to the Medical University of South Carolina (MUSC) in Charleston to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present during the evaluation?

STATEMENT OF THE CASE

On April 25, 2012, James Bogle, an attorney with the South Carolina Office of the Attorney General, filed a petition pursuant to the Sexually Violent Predator (SVP) Act alleging Petitioner was a sexually violent predator. R. 192. The trial commenced in Lexington County on June 2, 2014 before the Honorable James R. Barber, III, and a jury. James Bogle represented the state, and M. Brooks Biediger and Amber C. Fulmer represented Petitioner. R. 1.

Petitioner, who was thirty years old at the time of trial, pled guilty on August 9, 2004 to four counts of second degree criminal sexual conduct with a minor and two counts of first degree criminal sexual conduct with a minor based on events that allegedly occurred when he was sixteen to eighteen years old. R. 162-187 (State's Exhibit Nos. 1-6); R. 97, ll. 24-25. Thus, it was undisputed that Petitioner had been convicted of a sexually violent offense as defined by the Act.[1] After pleading guilty, Petitioner was sentenced to twelve years imprisonment on each count to be served concurrently. He was also ordered to register as a sex offender. R. 162-187 (State's Exhibit Nos. 1-6). The underlying allegations of the convictions were that Petitioner had vaginal, anal, and oral sex with his fourteen year old sister and oral sex with his brothers who were ages five, nine, and eleven at the time of the alleged conduct. R. 162-187 (State's Exhibit Nos. 1-6); See R. 30, l. 2 – 45, l. 8.

Before his release from the Department of Corrections, the state sought to involuntarily commit Petitioner as a sexually violent predator under the Act. He was first evaluated by Dr. Marie Gehle, the chief psychologist at the South Carolina Department of Mental Health. R. 86, ll. 19-24.

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[1] See S.C. Code Ann. § 44-48-30(2) (listing offenses defined as sexually violent offenses under the SVPA).

Dr. Gehle was court appointed to evaluate Petitioner and was qualified as an expert in forensic psychology at trial. R. 92, l. 7 – 93, l. 3. During her evaluation, she and Petitioner discussed his background and upbringing. Petitioner told her he came from a very religious home and that his parents homeschooled him and his siblings and isolated them from the rest of the community. R. 96, ll. 2-20. He attributed his alleged conduct in part on this isolation and seclusion from others. R. 97, ll. 17-18.

Based on Petitioner's prior convictions, Dr. Gehle diagnosed him with "pedophilia, sexually attracted to males, limited to incest, non-exclusive type." R. 105, ll. 17-21. She explained that pedophilia is "reoccurring intense sexually arousing fantasies, behaviors, or urges towards children who have not started sexual maturity." She limited her diagnosis to "sexually attracted to males" because Petitioner "has only offended pre-pubescent males." She explained that while Petitioner was convicted of having sex with his sister, "she was past the point of pubescent" and "had already hit puberty" when the alleged conduct occurred. R. 106, ll. 3-14. Moreover, Gehle testified, "The limited incest again means that he's only been known to have offended family members biologically related [to him] and non-exclusive type means that there's some evidence that he's aroused by more normative groups of people like adult females, adult males, and he's not exclusively attracted to prepubescent children." R. 106, ll. 15-20.

During her evaluation, Dr. Gehle conducted the Static-99R, which is a risk assessment instrument used to evaluate one's likelihood of reoffending. R. 101, l. 18 – 102, l. 7. Petitioner scored a three, which puts him in the low to moderate risk group for sexually reoffending. R. 102, ll. 18-21. Individuals in this risk group have an 11.9 percent rate of reoffending in five years and an 18.3 percent rate of reoffending in ten years. R. 103, ll. 3-16.

Gehle opined that Petitioner's mental abnormality does *not* make him likely to engage in acts of sexual violence in the future. She also testified that in her opinion, Petitioner does *not* meet the criteria of a sexually violent predator under the Act and does not need to be confined for long term care and treatment.[2] R. 107, ll. 3-25. She explained that there are tens of thousands of sex offenders in South Carolina and that, based on one study, only about 13.4 percent of them will reoffend in the future. Gehle testified that the SVP Act was "written for an extremely dangerous group of people" and that "[w]e can't recommend that every sex offender go into the treatment program." She concluded Petitioner did not fall into the "extremely dangerous group of sex offenders" the statute was designed to treat. R. 104, l. 3 – 105, l. 16.

After Dr. Gehle determined Petitioner did not meet the criteria of a sexually violent predator under the Act, the state sought a second opinion from Dr. William Mulbry, a psychiatrist who does contract work for MUSC.[3] Petitioner was transported to MUSC on three separate occasions. During the first two visits, Petitioner went to the laboratory to undergo various testing and then, on the third visit, Petitioner met with Dr. Mulbry. R. 27, l. 19 – 28, l. 1.

During his testimony, Mulbry discussed Petitioner's prior convictions and the underlying facts surrounding these convictions, including the specific allegations made by Petitioner's siblings. See R. 30, l. 2 – 45, l. 8. He maintained that some of the alleged conduct described by Petitioner's

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

3 Dr. Mulbry admitted the only reason he was hired by the state to evaluate Petitioner was because the state was dissatisfied with Dr. Gehle's opinion that Petitioner did not meet the criteria to be involuntarily committed as a sexually violent predator. He further admitted that he was paid seven hundred dollars a day to testify at Petitioner's trial and ninety dollars an hour to evaluate Petitioner. He was further compensated for his travel expenses to and from Charleston to Lexington County for the trial. Mulbry testified that he was paid this fee by MUSC and that the Attorney General's Office in turn compensated MUSC. R. 79, l. 24 – 81, l. 10.

siblings, including being made to view child pornography, being made to watch Petitioner molest other siblings, being tied up or bound, and Petitioner's use of foreign objects, was deviant sexual behavior. See R. 30, l. 2 – 45, l. 8. Dr. Mulbry testified that Petitioner's deviant sexual interests were concerning to him because deviant sexual thinking is a significant risk factor for recidivism. R. 49, l. 18 – 51, l. 2; R. 62, l. 1 – 64, l. 1.

Like Dr. Gehle, Mulbry conducted the Static-99R and determined Petitioner had a score of three, placing him in the low to moderate risk group for reoffending. R. 59, ll. 15-19. He likewise diagnosed Petitioner with "pedophilia, attracted to males, limited to incest, non-exclusive type." R. 68, ll. 9-16. Mulbry stated the fact that Petitioner's pedophilia was limited to incest was significant because "*the recidivism rate in people who offend only against family members in general is somewhat lower.*" R. 69, ll. 7-17 (emphasis added). However, despite this fact and Petitioner's low score on the Static-99R, Mulbry maintained that Petitioner's mental abnormality makes him predisposed to commit sexually violent offenses in the future. He claimed Petitioner's deviant sexual interests, which he claimed to be an exceptionally high risk factor for recidivism, elevate his risk of reoffending beyond the low rate the Static-99R would suggest. R. 69, l. 25 – 70, l. 13.

Dr. Mulbry concluded Petitioner meets the criteria of a sexually violent predator pursuant to the Act and is likely to engage in future acts of sexual violence unless he is confined in a secure facility for long term control, care, and treatment. R. 72, ll. 3-11.

Petitioner's counsel moved pretrial to suppress the evidence gathered by Dr. Mulbry based on multiple violations of Petitioner's due process right and statutory right to counsel pursuant the SVP Act. Counsel explained that the state transported Petitioner to MUSC in Charleston on three separate occasions to be evaluated by Dr. Mulbry without notifying counsel or allowing counsel to be present during the evaluation. He argued, "At all of these events, he [Petitioner] was asked to

sign waivers, and consent forms, and things of that nature. And he was questioned about the case. This evidence that he was questioned about will be used against him in today's trial. We think that's extremely inappropriate because pursuant to the statutory law, he's entitled to an attorney. Pursuant to the . . . tenants of due process, he is entitled to have his attorney at least know about what the other side's doing to him." Counsel also argued, "[W]hen they take your client and do things to him without even bothering to tell you, that's an extreme violation of due process and it's [a] direct violation of what the statute requires. We think that any evidence that was developed as a result of this basic violation of due process . . . should not be allowed before the jury because frankly, he has a right to an attorney." R. 4, l. 16 – 5, l. 17.

In response, the assistant attorney general first cited to Michau v. Warden, 2011 WL 4943631 (D.S.C. Oct. 17, 2011), which was a *pro se* action filed by Michau in the federal district court of South Carolina pursuant to 42 U.S.C. § 1983. Michau, who had been involuntarily committed pursuant to the SVP Act, alleged he had the right to have an attorney present at his precommitment evaluation. According to the assistant attorney general, the magistrate judge ruled the precommitment evaluation was not an invasion of privacy and was similar to a competency evaluation ordered for an individual charged with a crime. The magistrate judge also ruled that because SVP commitment proceedings are not adversarial, there was no requirement Michau be represented by an attorney during a precommitment evaluation. The district court ultimately affirmed the magistrate's findings.[4] R. 5, l. 23 – 6, l. 12.

The assistant attorney general also cited to United States v. Bondurant, 689 F.2d 1246 (5th Cir. 1982) and State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985), which both hold there is *no Sixth Amendment right* to have counsel present during a *competency evaluation* in a

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[4] Michau predates this Court's opinion in In re Care & Treatment of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017).

criminal proceeding since the examination is not a critical stage of the proceeding and is not adversarial in nature. Both cases also hold that the presence of counsel during a psychiatric examination would be undesirable from a clinical perspective for it would hinder the psychiatrist from effectively examining the defendant. Based on these cases, the state argued Petitioner had no due process right to counsel and requested Petitioner's motion be denied. R. 6, l. 13 – 7, l. 5.

The trial judge denied the motion to suppress and held Petitioner had no constitutional due process right to counsel in a sexually violent predator case because it is a civil proceeding. Judge Barber found the state had the right to have Petitioner evaluated without counsel present. He also indicated that he did not believe counsel would have been permitted in the examination room and thus did not think notifying counsel would have made any difference. However, Judge Barber did state that "the appropriate thing" for the state to do would be to notify the individual's counsel that he or she was being transported for an evaluation and suggested to the assistant attorney general that, in that future, if the state is "going to take somebody [for an evaluation], they at least let the lawyer know they're taking them." R. 7, l. 6 – 8, l. 5.

The jury ultimately found Petitioner satisfied the definition of a sexually violent predator pursuant to the SVP Act. R. 160, ll. 17-23. Consequently, Judge Barber ordered Petitioner be committed to the Department of Mental Health for long term control, care, and treatment. R. 277.

The Court of Appeals affirmed Petitioner's involuntary commitment pursuant to the SVP Act in an unpublished opinion. In re Care & Treatment of Asquith, Op. No. 2017-UP-262 (S.C. Ct. App. filed June 28, 2017). App. 1-5. In its opinion, the court correctly held Petitioner "enjoys both a statutory right to counsel under the SVP Act, as well as a constitutional due process right to counsel." App. 2 (citing S.C. Code Ann. § 44-48-90(B) (Supp. 2016) and In re Care & Treatment of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017)). The court emphasized, however, that the

question remained regarding whether Petitioner's statutory right to counsel under the Act as well as his constitutional due process right to counsel entitle him to the right to counsel at the precommitment evaluation. App. 2.

The court asserted Petitioner did not distinguish between his statutory right to counsel and his constitutional right to counsel in his appellate brief, but merely argued he is entitled to both and maintained both were violated by the state's failure to notify counsel or allow counsel to be present during the precommitment evaluation. App. 2. The court further maintained Petitioner did "not attempt to analyze the statutory scheme or explain why the absence of counsel at the evaluation violated his right to an attorney under the statute as opposed to his constitutional right to an attorney." App. 2. Consequently, the court held "any assertion that Asquith [Petitioner] had a separate statutory right to counsel at his evaluation that was violated under the terms of the statute is abandoned." App. 3. As a result, the Court of Appeals refused to rule on whether Petitioner's statutory right to counsel extended to the precommitment evaluation and, if so, whether this right was violated when the state transported Petitioner to be evaluated on three occasions without notifying his counsel or allowing his counsel to be present during the evaluation.

As to Petitioner's constitutional due process right to counsel argument, the Court of Appeals found no reversible error. App. 3. Notably, the court failed to specifically hold Petitioner had a due process right to counsel at the precommitment evaluation. Instead, the court merely held Petitioner failed to show he was prejudiced by counsel's exclusion from his evaluation. App. 4-5.

Petitioner timely filed a petition for rehearing. App. 6-13. On August 16, 2017, the Court of Appeals denied the petition for rehearing. App. 14. Petitioner now files this petition for writ of certiorari requesting this Court review the Court of Appeals' decision.

ARGUMENT

1.

The Court of Appeals erred by holding Petitioner's argument that his statutory right to counsel pursuant to the Sexually Violent Predator Act was violated when the state transported him to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present was abandoned on appeal.

The Court of Appeals held Petitioner's argument that his statutory right to counsel pursuant to the SVP Act, as distinct from his constitutional due process right to counsel, was violated when the state transported him to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present during the evaluation was abandoned on appeal. Specifically, the court stated:

> As to any statutory right to counsel, Asquith [Petitioner] does not distinguish between this right and his constitutional right to counsel in his appellate brief, but simply argues he is entitled to both and maintains both were violated by the State's failure to notify counsel or allow counsel's presence during the evaluation. He does not attempt to analyze the statutory scheme or explain why the absence of counsel at the evaluation violated his right to an attorney under the statute as opposed to his constitutional right to an attorney. Asquith points to no provision in the SVP Act, nor have we found one, which specifically requires the presence of counsel at an evaluation performed pursuant to the Act. He does not specify how his statutory right to counsel was violated, but generally makes this argument in conjunction with his due process right to counsel argument. Accordingly, aside from his argument made in conjunction with his due process right to counsel, any assertion that Asquith had a separate statutory right to counsel at his evaluation that was violated under the terms of the statute is abandoned.

In re Care & Treatment of Asquith, Op. No. 2017-UP-262 (S.C. Ct. App. filed June 28, 2017) (internal citations omitted); App. 2-3.

Additionally, in a footnote, the court acknowledged that appellate counsel argued at oral argument that the SVP Act includes three stages of proceedings—(1) the probable cause hearing;

(2) the precommitment evaluation; and (3) the trial—and by using the term "all stages of the proceedings" in § 44-48-90(B), implicit in the legislative intent is the right to the presence of counsel at the precommitment evaluation. App. 3. However, the court declined to rule on this argument. First, the court held the argument was not preserved because it was never made to the trial court. Second, the court asserted Petitioner did not argue this in his appellate brief. App. 3.

The Court of Appeals' holding that Petitioner abandoned the argument that his statutory right to counsel was violated when the state failed to notify his counsel of the precommitment evaluation and allow his counsel to be present during the evaluation, and the court's refusal to rule on the argument, was error.

"South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (citing Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). In Brown v. Theos, 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct. App. 1999), *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001), the Court of Appeals held a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal. See Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974) (where only passage in brief relating to issue appealed was single conclusory statement, issue was held abandoned).

In its opinion holding there was insufficient evidence to warrant an involuntary manslaughter instruction in State v. Light, 363 S.C. 325, 333-334, 610 S.E.2d 504, 508 (Ct. App. 2005), the Court of Appeals held a specific portion of Light's argument was abandoned. The court stated:

> In his statement of issues on appeal, Light contends the evidence reveals that he and the victim were struggling over the gun, "and that the gun discharged," making this a classic case of involuntary manslaughter. Indeed, a charge on involuntary manslaughter would be appropriate if there was evidence that a weapon discharged during the struggle between the victim and Light. See Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). However, light fails to argue elsewhere in his brief that the weapon discharged during the course of the struggle, concentrating his argument instead on the contention that he was acting lawfully but with reckless disregard for the safety of the victim. As a consequence, we consider this issue to have been abandoned on appeal. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority).

In reversing the decision of the Court of Appeals and holding Light was entitled to a charge on involuntary manslaughter, this Court disagreed Light abandoned his argument on appeal. The Court asserted:

> The Court of Appeals noted petitioner [Light] argued in his statement of issues that the gun discharged while petitioner and Davis [the decedent] were struggling over the gun and that, as a result, it was "a classic case of involuntary manslaughter." The court held an involuntary manslaughter charge would have been warranted if there was evidence the gun discharged while petitioner and Davis were struggling over it. However, the court noted petitioner failed to argue the gun discharged during the course of the struggle in his brief; therefore, it held petitioner abandoned the issue on appeal. We disagree that petitioner abandoned his argument. Throughout his brief, petitioner discussed the struggle for the gun.

State v. Light, 378 S.C. 641, 647 n. 5, 664 S.E.2d 465, 468 n. 5 (2008).

The Court of Appeals likewise erred by finding Petitioner abandoned the argument that his statutory right to counsel was violated when the state failed to notify his counsel of the precommitment evaluation and allow his counsel to be present during the evaluation. The court's holding is belied by Petitioner's brief.

First, it was unnecessary for Petitioner to specifically distinguish between the statutory right to counsel and the constitutional due process right to counsel because an individual subject to commitment under the SVP Act is entitled to both. Moreover, the statutory right to counsel

provided in the SVP Act stems directly from the constitutional due process right to counsel. In In re Care & Treatment of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017), this Court specifically stated "*section 44-48-90's right to counsel is not merely a statutory right, but also a constitutional one* arising under the Fourteenth Amendment and the South Carolina Constitution." 419 S.C. at 179, 796 S.E.2d at 846 (emphasis added). The statute merely effectuates the constitutional due process right to counsel. This was made clear by this Court in Chapman. Consequently, the statutory right to counsel and the constitutional right to counsel are intertwined.

Additionally, Petitioner clearly set out the argument in his statement of issue on appeal and cited to the pertinent parts of the SVP Act providing for the right to counsel in his argument. See Brief of Appellant at 1, 10. Petitioner also cited to In re Care & Treatment of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004), which held a person committed under the SVP Act has a statutory right to counsel. Brief of Appellant at 9. Petitioner explicitly argued throughout his brief that individuals subject to commitment under the SVP Act have a statutory right to counsel at the precommitment evaluation, and that Petitioner's statutory right to counsel was violated. See Brief of Appellant at 9, 10, 12, 14; see also Light, 378 S.C. at 647 n. 5, 664 S.E.2d at 468 n. 5 (holding argument Light was entitled to involuntary manslaughter instruction because the weapon discharged during the course of a struggle was not abandoned because Light discussed the struggle over the gun throughout his brief).

Significantly, the state has *never* asserted, either in its appellate brief or at oral argument before the Court of Appeals, that Petitioner's argument was not preserved or was abandoned on appeal. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring) ("When the opposing party does not raise a

preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, *the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.*") (emphasis added)

To the extent the Court of Appeals held Petitioner asserted arguments at oral argument not asserted in his brief, Petitioner respectfully disagrees. See App. 3. At oral argument before the Court of Appeals, counsel for Petitioner merely honed in on more detailed aspects of the statute which did not take away from the broader argument asserted by Petitioner in his brief. Counsel was also responding to arguments made by the state in its appellate brief. See Brief of Respondent at 9-10.

Consequently, the Court of Appeals erred by holding Petitioner abandoned the argument that he his statutory right to counsel at the precommitment evaluation was violated, and by failing to rule on the merits of (1) whether individuals subject to commitment pursuant to the SVP Act have a statutory right to counsel at the precommitment evaluation, and (2) whether Petitioner's statutory right to counsel was violated when the state transported him to be evaluated without notifying his attorney or allowing his attorney to be present during the evaluation.

2.

The Court of Appeals erred by holding the trial judge did not abuse his discretion when he refused to suppress evidence gathered by Dr. William Mulbry in violation of Petitioner's constitutional due process right to counsel and statutory right to an attorney pursuant to the Sexually Violent Predator Act when the state transported Petitioner from the Lexington County Detention Center to the Medical University of South Carolina (MUSC) in Charleston to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present during the evaluation.

The Court of Appeals erred by holding the trial judge did not abuse his discretion when he refused to suppress evidence gathered by Dr. Mulbry in violation of Petitioner's due process right to counsel and statutory right to an attorney under the SVP Act when the state transported Petitioner from the Lexington County Detention Center to MUSC to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present during the evaluation.

It is undisputed that individuals facing commitment under the SVP Act have a statutory right to counsel. Section 44-28-90(B) of the South Carolina Code states in pertinent part, "At *all stages of the proceedings under this chapter*, a person subject to this chapter is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 44-28-90(B) (emphasis added); See In re Care & Treatment of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004) (stating a person committed under the SVP Act has a statutory right to counsel).

Recognizing the significant due process implications inherent in civil commitments, this Court in In re Care & Treatment of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) held "section 44-48-90's right to counsel is not merely a statutory right, but also a constitutional

one arising under the Fourteenth Amendment and the South Carolina Constitution."[5] See In re Care & Treatment of Ontiberos, 287 P.3d 855, 864-865 (Kan. 2012) (concluding there is a constitutional right to counsel arising under the Fourteenth Amendment and the state constitution with regards to SVP commitment proceedings); Jenkins v. Dir. Of the Va. Ctr. for Behavioral Rehab., 624 S.E.2d 453, 460 (Va. 2006) (holding that because of the "substantial liberty interest at stake in an involuntary civil commitment based on Virginia's [SVP] Act," persons subject to SVP proceedings have a constitutional right to counsel arising under the Fourteenth Amendment and the state constitution). This Court further held this right to counsel is necessarily a right to effective counsel. Id. at 180, 796 S.E.2d at 847.

Consequently, the Court of Appeals correctly held Petitioner "enjoys both a statutory right to counsel under the SVP Act, as well as a constitutional due process right to counsel." App. 2. However, the court erred by failing to specifically hold Petitioner had a statutory right and constitutional due process right to counsel *at the precommitment evaluation*. As discussed above, the court declined to rule on Petitioner's argument that he had a statutory right to counsel at the precommitment evaluation and that this right was violated when the state transported him on multiple occasions to be evaluated without notifying his counsel or allowing his counsel to be present during the evaluation because the court held the argument was abandoned. See App. 2-3. As to Petitioner's constitutional right to counsel argument, the Court of Appeals merely found no reversible error. It failed to actually rule on whether Petitioner had a constitutional due process right to counsel at the precommitment evaluation. This was error.

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5 This right is distinct from the Sixth Amendment right to counsel in criminal cases. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (finding no Sixth Amendment right to counsel because SVP cases are not criminal proceedings).

In light of this Court's holding in In re Care & Treatment of Chapman, which concluded an individual facing commitment under the SVP Act has a constitutional due process right to counsel under the Fourteenth Amendment and the South Carolina Constitution, and that this right to counsel is necessarily a right to effective counsel, it is evident that all individuals subject to commitment under the SVP Act have a constitutional right to counsel at the precommitment evaluation. In accord with Chapman, Petitioner respectfully requests this Court hold Petitioner had a constitutional right to counsel at the precommitment evaluation.

Because the constitutional due process right to counsel stems directly from the statutory right to counsel as noted by this Court in Chapman, Petitioner also respectfully requests this Court hold Petitioner, and others subject to involuntary commitment pursuant to the Act, had a statutory right to counsel at the precommitment evaluation. The precommitment evaluation is clearly a "stage of the proceeding" pursuant to the SVP Act. See S.C. Code Ann. § 44-28-90(B).

In re Detention of Kistenmacher, 178 P.3d 949, 950 (Wash. 2008), the Supreme Court of Washington held the statutory right to counsel in proceedings for civil commitment as a sexually violent predator includes the statutorily mandated precommitment evaluation. The Washington statute, like S.C. Code Ann. § 44-28-90(B), likewise states that individuals facing commitment as a sexually violent predator are entitled to the assistance of counsel "[a]t all stages of the proceedings." Kistenmacher, 178 P.3d at 950 (citing RCW 71.09.050(1)).

Lastly, the Court of Appeals erred by holding Petitioner failed to show he was prejudiced by counsel's exclusion from his evaluation. First, in light of Chapman, again holding individuals subject to the SVP Act have a statutory and constitutional due process right to counsel, Petitioner need not show prejudice because the denial of counsel is a structural error which is not subject to a harmless error analysis and requires reversal without a particularized prejudice inquiry. See

generally State v. Rivera, 402 S.C. 225, 247-248, 741 S.E.2d 694, 705-706 (2013); see also Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel is structural error); United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, *with consequences that are necessarily unquantifiable and indeterminate*, unquestionably qualifies as structural error.") (internal quotation marks and citation omitted) (emphasis added).

The state at trial and on appeal compared Dr. Mulbry's evaluation to a competency or other psychiatric evaluation of a criminal defendant and relied in part on this Court's opinion in State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985). In Hardy, the Court held that a defendant had no Sixth Amendment right to counsel at a competency evaluation because it was not a critical stage and psychiatric evaluations are not adversarial proceedings. In so holding, the Court noted that during such evaluations "no events take place that are likely to prejudice the defense" and defendants are not asked "to make statements to be used at trial." Id. at 592, 325 S.E.2d at 322.

The state also relied on United States v. Bondurant, 689 F.2d 1246, 1249 (5th Cir. 1982). In Bondurant, the Fifth Circuit held a defendant had no constitutional right to counsel's presence during a competency to stand trial and insanity evaluation. In holding a defendant had no constitutional right to counsel presence's during the evaluation, the court noted that any factual self-incriminating statements made by the defendant would be suppressed. Id. That is not the case with precommitment evaluations. Statements made by the individual the state seeks to commit are used against him at trial. For example, in this case, statements made by Petitioner regarding having sex with a fellow male inmate were used against him along with his denial that he committed some of the offenses to which he pled guilty. Dr. Mulbry also testified, based on his evaluation of Petitioner, that Petitioner's "motivation for treatment was well below average

of people who aren't in therapy and significantly lower than people that are in therapy. In other words, therapy in general . . . he doesn't see any need for it at all." R. 54, ll. 2-11. This testimony was obviously prejudicial to Petitioner.

Again, unlike competency evaluations in criminal proceedings, evidence collected during precommitment evaluations in SVP proceedings is used against the defendant at trial. This includes statements made by the defendant during the evaluation along with results of any laboratory testing conducted. For example, in this case, evidence collected by Dr. Mulbry during his interview of Petitioner and evidence collected by others at MUSC during the laboratory testing was used by Mulbry in reaching his conclusion that Petitioner met the criteria of a sexually violent predator under the SVP Act and bolstered the credibility of his opinion. This evidence was clearly prejudicial to the defense and was used by the state to counter Dr. Gehle's opinion that Petitioner did not meet the criteria to be involuntarily committed under the Act.

Moreover, during or before the evaluation, Petitioner was asked to sign numerous consent forms and other such waivers without the advice of his counsel. This was clearly a violation of Petitioner's constitutional due process right and statutory right to counsel.

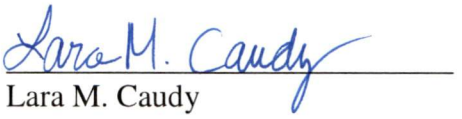
During the evaluation, counsel can be close to invisible, sitting quietly in the corner of the room. The unlikely possibility that counsel's presence during the evaluation would hinder a psychiatrist from effectively examining the defendant may not be used as a reason to deny a defendant in a SVP case his due process right and statutory right to counsel, especially when, as noted, evidence collected during the evaluation will be used against the defendant at trial where his liberty is at stake. The state even asserted during the oral argument before the Court of Appeals that if an attorney requests to be present during the precommitment evaluation, the state honors that request, which proves that counsel can be present without interfering with the evaluation.

Respectfully, this Court should grant certiorari and hold individuals subject to commitment under the SVP Act have both a statutory right to counsel and a constitutional due process right to counsel at the precommitment evaluation, and that Petitioner's right to counsel was violated when the state transported him for evaluation on multiple occasions without notifying his counsel or allowing his counsel to be present during the evaluation.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the questions presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2017.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-262 (S.C. Ct. App. Filed June 28, 2017)
12-CP-32-01783

IN THE MATTER OF THE CARE AND
TREATMENT OF CARL MATTHEW ASQUITH,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari to the Court of Appeals and a copy of the Appendix in the above captioned case have been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari to the Court of Appeals and a copy of the Appendix have been served upon Carl M. Asquith, at Correct Care, 1700 St. Andrews Terrace, Building A, Columbia, SC 29210, this 5th day of October, 2017.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of October, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.