

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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**ORIGINAL**

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

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IN THE MATTER OF THE CARE AND  
TREATMENT OF KENNETH WRIGHT,

APPELLANT.

APPELLATE CASE NO. 2019-000204

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ANDERS BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW .....3

ARGUMENT

Appellant could not be re-committed to the Sexually Violent  
Predator Program without a new sexually violent conviction. ....4

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL .....8

**TABLE OF AUTHORITIES**

**Cases**

Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 642 S.E.2d 751 (2007)..... 3

Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017)..... 6

Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) 3

Kansas v. Hendricks, 521 U.S. 346 (1997)..... 6

Univ. of S. California v. Moran, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005)..... 3

**Statutes**

S.C. Code Ann. § 16-15-310..... 5

S.C. Code Ann. § 16-15-130(B) ..... 5

S.C. Code Ann. § 44-48-30 (2)..... 5

S.C. Code Ann. § 44-48-30(1)..... 5

S.C. Code Ann. § 44-48-40(A)..... 6

**STATEMENT OF ISSUE ON APPEAL**

Whether appellant could be re-committed to the Sexually Violent Predator Program without a new sexually violent conviction?

## **STATEMENT OF THE CASE**

The State petitioned for appellant to be committed to the Sexually Violent Predator Program and on April 23, 2018, the Honorable R. Lawton McIntosh held a jury trial. R. 1. Christopher Morrow represented the State and Scarlett Moore represented appellant. R. 1. The jury found appellant was an SVP. R. 200-01. Appellant moved for JNOV, which was heard on June 11, 2018. R. 208. The motion was denied on January 3, 2019. R. 439. This appeal follows.

## **STANDARD OF REVIEW**

The issue of interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

## ARGUMENT

Appellant could not be re-committed to the Sexually Violent Predator Program without a new sexually violent conviction.

In 2002, appellant was convicted of two counts of committing a lewd act on a minor. R. 60-61. Before his release from prison, he was committed into the SVP program. R. 74. Appellant was confined in the SVP program from 2006-10. R. 118. He was released. R. 104.

It was undisputed that appellant did not commit another sexually violent offense as defined by the SVP Act after his release. R. 118-19. Appellant was convicted of two counts of indecent exposure after his release from the SVP unit, which again landed him in prison. R. 119. The State's expert agreed that appellant's indecent exposure convictions were not sexually violent qualifying offenses under the SVP Act. R. 119. The State relied on the previously-used lewd act convictions to meet the offense element. R. 119.

The State's expert, who was hired by the Attorney General for a second opinion, recommended commitment, diagnosing appellant with pedophilia, exhibitionism, antisocial personality disorder (ASPD), telephone scatologia, and substance abuse, which was in remission. R. 75-76. The first doctor to evaluate appellant, Dr. Marie Gehle from DMH, did not opine that appellant should be committed. R. 141. Dr. Gehle disagreed with the diagnosis of ASPD and pedophilia. R. 145, 147. She believed that appellant could be managed safely in the community as long as he was prescribed Depo-Provera, a hormone that diminishes arousal. R. 150-51. Dr. Gehle noted the difficulty in getting psychiatrists to prescribe Depo-Provera and that appellant had not committed any offenses after release from the SVP unit as long as he had been on his medication. R. 150-51. Dr. Gehle also testified that it appeared that appellant was only a risk to expose himself, which is not a sexually violent offense under the SVP Act. R. 141.

Judge McIntosh allowed appellant ten days to file post-trial motions after the jury's verdict finding appellant was an SVP. R. 205. The court held a hearing on appellant's JNOV and appellant argued extensively that he did not meet the definition of an SVP because he did not commit a new qualifying offense after successfully completing treatment in the SVP program. R. 209-212. Appellant argued that indecent exposure should not trigger a new commitment proceeding under the Act. R. 216-218. Appellant analogized the situation to a released SVP getting a traffic ticket and then facing re-commitment to point out the absurd result in appellant's case. R. 216-218.

The trial court erred in denying appellant's JNOV motion. The SVP Act specifically defines which offenses qualify as sexually violent. S.C. Code Ann. § 44-48-30 (2). Only those offenses will satisfy the conviction element of the statutory definition of an SVP. S.C. Code Ann. § 44-48-30(1). After release, appellant was convicted only of indecent exposure under § 16-15-310. R. 257.

Appellant's specific conviction for indecent exposure is not a qualifying offense under the Act. Section 44-48-30(1) states that "violations of Article 3, Chapter 15, Title 16" that involve minors "when the violations are felonies" qualify as a sexually violent offense. S.C. Code Ann. § 44-48-30(1). Indecent exposure is listed in this article and appellant's offenses did involve minors. However, the section under which appellant was convicted states that such a conviction is a misdemeanor. S.C. Code Ann. § 16-15-130(B). Because appellant's convictions were misdemeanors, they do not meet the felony requirement under the SVP Act. The State's expert correctly admitted this point. R. 119.

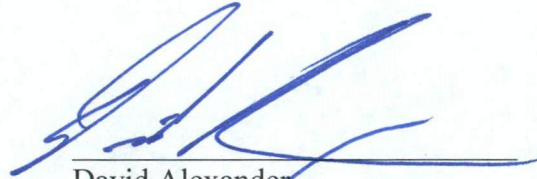
Appellant could not be re-committed to the SVP program without committing a new qualifying offense. The statute that begins the commitment process states, "If a person has been

convicted of a sexually violent offense.....” S.C. Code Ann. § 44-48-40(A). While appellant was incarcerated and had a prior qualifying offense, the process could not begin anew without a new qualifying offense. Appellant had been treated in the SVP unit and released, which wipes away the lewd act convictions from consideration. Using the lewd act convictions again is analogous to a double jeopardy violation and cannot be allowed under substantive due process. See Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017) (applying substantive due process in an SVP case). In the 5-4 decision barely upholding the constitutionality of SVP statutes, Justice Kennedy wrote in a concurrence that if “civil confinement were to become a mechanism for retribution or general deterrence. . . our precedents would not suffice to validate it.” Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring).

Here, the double jeopardy concerns and the use of this statute for retribution for prior offenses after which appellant was deemed not to be dangerous by the State invalidate his commitment under the Act. This Court should strictly construe the SVP Act as only allowing re-commitment after the commission of a new qualifying offense. Otherwise, the entire statute could be construed as punitive and held unconstitutional. Appellant’s commitment must be reversed.

**CONCLUSION**

For the foregoing reasons, appellant's commitment must be reversed and he should be released from confinement.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2019.

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Counsel for Kenneth Leallen Wright states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Lawton McIntosh, which was held on April 23-26, 2018, and has also reviewed the record of appellant's hearing held before Judge R. Lawton McIntosh on June 11, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Kenneth Leallen Wright.

Respectfully Submitted,



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 4th day of November, 2019.

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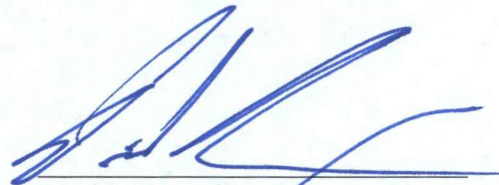
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript dated April 23-24, 2018;
- (2) Hearing Transcript dated June 22, 2018;
- (3) Petition with Exhibits;
- (4) Order of Commitment dated April 24, 2018;
- (5) Motion for Judgment Notwithstanding the Verdict
- (6) Return to Motion for Judgment Notwithstanding the Verdict
- (7) Form 4

I certify that this designation contains no matter which is irrelevant to this appeal.

November 4, 2019



David Alexander  
Appellate Defender

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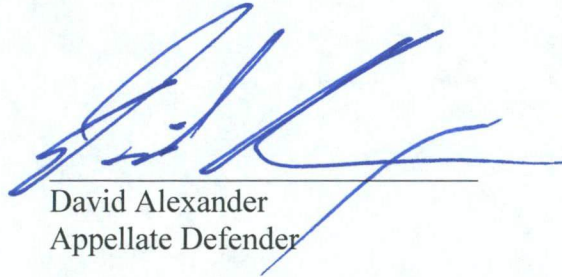
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**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 4, 2019.



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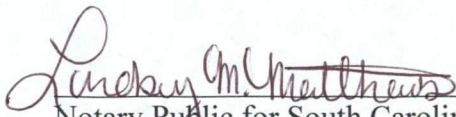
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has 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 Anders Brief of Appellant and Designation of Matter have been served on Kenneth Leallen Wright, at Correct Care, 4546 Broad River Road, Columbia, SC 29210, this 4th day of November, 2019.



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4th day of November, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: October 22, 2024.