IN THE

SUPREME COURT OF VIRGINIA

Record No. 092402

LARRY HOOD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR APPEAL

STATEMENT OF THE CASE

Larry Hood seeks to appeal a judgment of the Circuit Court of Pittsylvania County finding him to be a sexually violent predator and committing him to the custody of the Commissioner of the Department of Mental Health, Mental Retardation, and Substance Abuse Services in accordance with Chapter 9, Title 37.2 of the Code of Virginia.

The Commonwealth filed its petition for commitment on December 31, 2008. On July 15, 2009, a bench trial was held before the Honorable Charles Strauss. Ruling from the bench that same day, Judge Strauss found Hood to be a sexually violent predator. The case was continued for disposition to September 1, 2009, where Judge Strauss ordered Hood civilly committed.

QUESTION PRESENTED

> Did the trial court err in relying on Virginia Code §§ 37.2-901 and 907 to uphold the requirement that Hood had to choose whether to cooperate with the government psychologist before the appointment of counsel?

STATEMENT OF FACTS

Hood was convicted in the City of Pittsylvania Circuit Court on May 2, 2001, for the crime of Rape and Abduction. (App. 41.) Hood was visited by Dr. Rex Miller on behalf of the Department of Mental Health, Mental Retardation, and Substance Abuse services. (App. 17.) Hood refused to cooperate with the examination done by Dr. Miller. (App.17.) On December 31, 2009, the Commonwealth filed a Petition seeking to civilly commit Hood as a sexually violent predator pursuant to Virginia Code § 37.2-905.

After the court found probable cause that Hood was an SVP, Hood asked and was granted an expert appointment. (App. 83-85.) Hood argued that since his client had not had an attorney when he refused to cooperate, his expert should be able to testify at trial. (App. 84.)The Court ruled clearly,"

> Well, I mean we are at this point, in other words if he has refused to cooperate, this, is this is a case where the legislature uses SHALL and the, the Appellate courts interpret shall, not to, to mean not shall, but something else, but at any rate, I don't, I'm not unsympathetic to Mr. Martins cause but I'm looking at what the legislature has set out and it appears that if the respondent refused to cooperate in this initial proceeding any expert appointed to assist the respondent SHALL NOT be permitted to testify. Now that's not to say they couldn't take advantage of that expert's assistance in preparing for trial. (App. 84-85.) (emphasis added)

Hood further asked for a ruling if he can present any evidence. (App. 86) The court stated that its ruling applies only to this expert. (App. 86.)

At a trial on July 15, 2009, Judge Strauss found that the Commonwealth had proven its case by clear and convincing evidence and declared Hood an SVP. (App. 266-268.) Further, Judge Strauss continued the trial and ordered a Conditional Release Plan. (App. 273.) 138). On September 1, 2009, Judge Strauss ordered the

inpatient commitment of Hood, over Respondent's Objection and Request for Conditional Release. (App. 336-339).

ARGUMENT

The trial court did not err in relying on VA Code §§ 37.2-901 and 907 to uphold the requirement that Hood had to choose whether to cooperate with the government psychologist before the appointment of counsel.

Hood argues that the trial court must provide him with the assistance of counsel prior to the psychological evaluation, even though no case is pending at that time; even though the potential proceeding is civil in nature; and even though the statute in question does not give him a right to appointment of counsel unless and until a petition for civil commitment is filed in the civil court. There is no provision in the Code of Virginia authorizing the court to grant these demands, and there is no constitutional requirement that it do so.

Section 37.2-903(A) mandates that the Director establish and maintain a treatment program for prisoners convicted of sexual offenses. Section 37.2-903(B) requires the Director to maintain a data base of prisoners who have predicate convictions as set forth in

§ 37.2-900. Hood has a predicate conviction for aggravated sexual battery.

Section 37.2-903(C) mandates that the Director identify all prisoners who are within 10 months of release from prison and who have predicate convictions and score them on an actuarial risk assessment test, in this case the STATIC-99. Persons who score high enough must be referred to the Commitment Review Committee ("CRC"). § 37.2-903(E). The Director has no discretion under §§ 37.2-903(A), 37.2-903(B) and 37.2-903(C).

Section 37.2-904 mandates that the CRC review a prisoner referred by the Director; subsection (A) mandates this review to be done within 90 days of referral from the Director. The CRC then sends the file with its non-binding recommendation to the Attorney General. §§ 37.2-904(A), 37.2-905(B). As part of the CRC assessment, the prisoner is evaluated by a mental health professional, including a face to face interview. § 37.2-904(B).

If the Attorney General decides to prosecute a case for civil commitment, the petition for civil commitment is filed in the circuit court in which the prisoner was last convicted of one of the predicate

offenses, § 37.2-905(A). At the point of the initial interview, no such petition has yet been filed in the Circuit Court.

Section 37.2-901 does give a prisoner the right to appointment of counsel, but **only** in "hearings and trials conducted pursuant to this chapter…" The face to face mental health evaluation called for in § 37.2-904(B) is neither a hearing nor a trial conducted pursuant to this chapter. The hearing contemplated by § 37.2-901 is the probable cause hearing provided for in § 37.2-906, and the trial contemplated by § 37.2-901 is the trial provided for in § 37.2-908. Indeed, § 37.2-906(B) specifically states that appointment of counsel will not occur until the filing of the civil petition.

The Supreme Court of Virginia has examined the SVP Act and declared it to be constitutional, *Shivaee v. Commonwealth*, 270 Va. 112 (2005). The United States Supreme Court has also declared such civil commitment acts to be constitutional. *Kansas v. Crane*, 534 U.S. 407 (2002); *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997). Further, these cases hold that SVP civil commitment acts do not violate the Double Jeopardy Clause or the Ex Post Facto Clause because they are civil and not

criminal in nature, and because they are aimed at rehabilitation and treatment rather than punishment.

The indisputable facts are that the SVP Act is constitutional in nature. The SVP Act does not give the inmate a right to counsel until the petition is actually filed in court; and there is no adversarial proceeding until a petition is actually filed in court.

SIXTH AMENDMENT

Unquestionably, Hood has the right to due process of law in this proceeding. *Jenkins v. Director*, 271 Va. 4, 14-15, 624 S.E.2d 453, 460 (2006), citing *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980), and *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Townes v. Commonwealth*, 269 Va. 234, 240, 609 S.E.2d 1, 4 (2005). "Once it is determined that due process applies [however], the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Commitment proceedings under the Act have repeatedly, expressly, and authoritatively been held to be civil proceedings. *Jenkins*, 271 Va. at 15, 624 S.E.2d at 460; *Shivaee v. Commonwealth*, 270 Va. 112, 125, 613 S.E.2d 570, 577-78 (2005). Persons who are the subjects of civil commitment proceedings do not

have all the same procedural rights as criminal defendants. *Jenkins*, 271 Va. at 15, 624 S.E.2d at 460, citing *Jones v. United States*, 463 U.S. 354, 367-68 (1983). The Sixth Amendment to the United States Constitution applies in "criminal prosecutions" and not civil proceedings. Thus, Respondent does not have a Sixth Amendment right to the assistance of counsel during the CRC mental health examination.

However, the General Assembly afforded respondents a statutory right to counsel. Virginia Code § 37.2-901. This statutorily-created "right to counsel" under the Act has specific and limited applicability. The statutory right to be represented by counsel only applies "in hearings and trials" <u>after</u> a petition has been filed by the Commonwealth. Virginia Code §§ 37.2-901 and 37.2-907. The CRC mental health examination is not a hearing or a trial. At the time of the CRC mental health examination, there is no litigation pending and there may never be any litigation if the Commonwealth declines to file a petition. Virginia Code §§ 37.2-904 and 37.2-905. Thus, Respondent does not have a statutory right to counsel when no litigation is pending and no petition may ever be filed.

> The Sixth Amendment right of the "accused" to assistance of counsel in "all criminal prosecutions" is limited by its terms: "it does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). We have, for purposes of the right to counsel, pegged commencement to "'the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,'" *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra*, at 689.

Rothgery v. Gillespie County, 554 U.S. ___ 07440 (2008) (Some citations omitted.)

<u>Fifth Amendment</u>

Hood has no Fifth Amendment privilege against self-incrimination because this is a civil proceeding. Guarantees against double jeopardy as provided for in Fifth Amendment of the United States Constitution and Article 1, Section 8 of the Constitution of Virginia are applicable only in criminal proceedings.

There is no Fifth Amendment privilege against self-incrimination in such examinations. *Allen v. Illinois*, 478 U.S. 364 (1986); *accord,*

Estelle v. Smith, 451 U.S. 454, 465(1981)(explaining that if psychiatric examination results used only for non-incriminatory function, no Fifth Amendment issue arises).

As Respondent correctly cites, the due process right to counsel in commitment proceedings under the Act applies at "all significant stages of the judicial proceedings." *Jenkins*, 271 Va. at 16, 624 S.E.2d at 460 (emphasis added). As noted above, the statutory right to counsel found in the Act pertains to "hearings and trials." Virginia Code § 37.2-901. The CRC mental health examination is simply not a hearing, trial or judicial proceeding, nor have such proceedings commenced at the point at which the examination is conducted.

Any right to general due process under the Fifth Amendment is also inapplicable to civil proceedings.

Law of the Land Provision

Hood's argument that he is entitled to counsel under "Law of the Land" under Article I, § 8, of the Virginia State Constitution has no foundation and is a contradiction to established case law. That provision is within a section captioned "Section 8 Criminal Prosecutions" that does not apply to preliminary hearings in civil matters. This court has discussed the Sixth Amendment and the law

of the land provisions in response to claims such as the ones claimed by Hood.

> The denial of the right to have counsel present at preparatory steps, such as the taking or analyzing of a blood sample does not violate the Sixth Amendment; such preparatory steps are not critical steps since there is minimal risk that . . . absence [of counsel for the accused] at such stages might derogate from his right to a fair trial". *United States v. Wade*, 388 U.S. 218, 227-28 (1967); *see Schmerber v. California*, 384 U.S. 757 (1966) (compelling an accused to submit to a blood test over his objection on advice of counsel does not violate Sixth Amendment right to assistance of counsel. For the same reason, denial of the right to consult with counsel before an accused decides whether to take a blood test does not violate the Sixth Amendment. Nor does such a denial impair an accused's right to a trial "by the law of the land" guaranteed by Article I, § 8, of the State Constitution. We therefore reject the defendant's contention that his constitutional rights were violated.

Law v. City of Danville, 212 Va. 702, 703, 187 S.E.2d 197, ___ (1972).[1] (Some citations omitted.)

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[1] The phrase, "the law of the land," as used above has been construed to mean that no person in a criminal case shall be denied the right to the assistance of counsel of his own selection, and that no person indicted for an infamous offense who is financially unable to engage counsel shall be denied the aid of counsel if this fact is brought to the attention of the trial judge. It has never been construed to mean that the court, in the absence of request, *must* appoint counsel to assist the accused in the trial of every criminal case.

Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948)[1]

In effect, Respondent argues for a broader right to counsel than is recognized even in criminal cases. As previously stated, in such cases the Sixth Amendment right to counsel attaches at the commencement of adversary judicial proceedings. Therefore, it does not apply to preliminary matters in civil proceedings.

CONCLUSION

For these reasons the petition for appeal should be refused and the judgment appealed from the Circuit Court of The City of Pittsylvania should be affirmed.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On June 25, 2010, the required number of copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and one copy was mailed to James C. Martin, Martin & Martin Law Firm, 105 S. Union Street, Suite 206, Danville, Virginia 24541, counsel for appellant.

_____
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