In The

Supreme Court of Virginia

RECORD NO. 092402

LARRY HOOD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

James C. Martin (VSB No. 27968)
MARTIN & MARTIN LAW FIRM
410 Patton Street, Suite A
Post Office Box 514
Danville, Virginia 24543
(434) 792-1861 (Telephone)
(434) 792-1862 (Facsimile)
martinlawva@verizon.net

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

STATEMENT OF THE CASE 2

ASSIGNMENT OF ERROR 3

QUESTION PRESENTED 4

STATEMENT OF FACTS 4

ARGUMENT 14

THE TRIAL COURT ERRED IN RELYING ON VA. CODE §§ 37.2-901 AND 907 TO UPHOLD THE REQUIREMENT THAT APPELLANT HAD TO CHOOSE WHETHER TO COOPERATE WITH THE GOVERNMENT PSYCHOLOGIST BEFORE THE APPOINTMENT OF COUNSEL, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE RIGHT TO COUNSEL PROVISION OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND THE LAW OF THE LAND PROVISION IN ARTICLE I § 8 OF THE CONSTITUTION OF VIRGINIA 14

CONCLUSION 26

CERTIFICATE OF TRANSMISSION & SERVICE 27

ADDENDUM

Form DC-493

TABLE OF CITATIONS

Page(s)

CASES

Jenkins v. Director of the Virginia Center for Behavioral Rehabilitation,
271 Va. 4, 624 S.E.2d 453 (2006)..... 14, 15

Stamper v. Commonwealth,
228 Va. 707, 324 S.E.2d 682 (1985)..... 25

West v. Commonwealth,
249 Va. 241, 455 S.E.2d 1 (1995)..... 25

CONSTITUTIONAL PROVISIONS

U.S. Constitution
Amendment V.....*passim*
Amendment VI.....*passim*

Constitution of Virginia
Article I § 8.....*passim*

STATUTES

Ala. Code (2009)
§§ 15-20-21 *et seq*..... 17

Alaska Stat. (Michie 2009)..... 17

Ariz. Rev. Stat. (2009)
§§ 36-3701 *et seq*..... 17
§ 36-3705 17

Ark. Code Ann. (Michie 2009)..... 17

Cal. Welfare & Institutions Code (West 2009)
§§ 6600 *et seq*. 17
§ 6601(d) 17
§ 6602 17
§ 6603 17

Colo. Rev. Stat. Ann. (West 2009)
§ 16-11.7-103 17
§ 18-3-414.5 17
§ 24-33.5-503 17

Conn. Gen. Stat. Ann. (West 2009)
§ 54-252 17
§ 54-256 17

D. C. Code Ann. (2009)
§§ 22-4001 through 22-4015 17

Del. Code Ann. (2009) 17

Fla. Stat. Ann. (West 2009)
§§ 394.910 *et seq*. 17

Ga. Code Ann. (2009)
§ 42-1-14 17
§§ 42-1-12 through 42-1-15 17

Haw. Rev. Stat. Ann. (Michie 2009)
§ 707-743 17

Idaho Code (Michie 2009)
§§ 18-8301 through 18-8331 17

Ill. Comp. Stat. Ann. (West 2009)
§ 730 ILCS 5/3-3-7 17
§ 730 ILCS 150/1 *et seq*. 17

Ind. Code Ann. (West 2009)
§ 11-8-8-1 17
§ 35-38-1-7.5 17

Iowa Code Ann. (West 2009)
§§ 229A.1 *et seq*. 17
§ 229A.5 17
§ 229A.6 17

Kan. Stat. Ann. (2009)
§§ 59-29a01 *et seq*. 18

Ky. Rev. Stat. Ann. (Michie 2009)
§§ 17.500 through 17.991 18

La. Rev. Stat. Ann. (West 2009)
§§ 15:540 *et seq*. 18
§ 40:2528 18

Mass. Gen. Laws (2009)
123A §§ 1 through 14 18

Md. Code Ann. (2009)
Criminal Procedure § 11-701 *et seq*. 18

Me. Rev. Stat. Ann. (West 2009)
§§ 34A 11201 *et seq*. 18
§§ 34A 11254 *et seq*. 18

Mich. Comp, Laws Ann. (West 2009)
Former § 330.1944 (repealed in 1968) 18
Former § 780.501 (repealed in 1968) 18

Minn. Stat. Ann. (West 2009)
§§ 253B.01 through 253B.185 18
§ 609.1351 18
§ 609.3455 18

Miss. Code Ann. (2009)
§§ 45-33-21 through 45-33-21 18

Mo. Ann. Stat. (West 2009)
§§ 632.480 *et seq*. 18

Mont. Rev. Code Ann. (Smith 2009)
§§ 46-23-501 through 46-23-511 18

N.C. Gen. Stat. (2009)
§§ 14-208.20 *et seq*. 18

N.D. Cent. Code (2009)
§§ 25-03.3-01 through 25-03.3-24 18

Neb. Rev. Stat. Ann. (Michie 2009)
§§ 71-943 through 71-1226 18
§ 71-945 18
§ 71-948 18

Nev. Rev. Stat. Ann. (Michie 2009)
§§ 179.510 *et seq*. 18

N. H. Rev. Stat. Ann. (2009)
§§ 135-E:1 through 135-E:23 18
§ 135-E:12 18
§ 135-E:23 18

N. J. Stat. Ann. (West 2009)
§ 30:4-27.24 *et seq*. 18

N. M. Stat. Ann. (Michie 2009) 18

N.Y. Law (McKinney 2009) 18

Ohio Rev. Code Ann. (West 2009)
§§ 2950.01 through 2950.99 19
§§ 2971.01 through 2971.07 19

Okla. Stat. Ann. (West 2009)
57 § 581 *et seq*. 19

Ore. Rev. Stat. (2009)
§ 181.585 19

Pa. Cons. Stat. Ann. (2009)
42 § 9791 *et seq*. 19

R.I. Gen. Laws (2009)
§ 11-37.1-1 *et seq*..... 19

S.C. Code Ann. (Law Co-op 2009)
§§ 44-48-10 *et seq*..... 19

S.D. Codified Laws (Michie 2009)
§§ 22-22-30 through 22-22-41 19

Tenn. Code Ann. (2009)
§§ 40-39-201 through 40-39-215 19

Tex. Health & Safety Code Ann. (Vernon 2009)
§§ 841.001 *et seq*. 19
§ 841.023..... 19
§ 841.061(c) 19

United States Code (2009)
18 USC §§ 4247 through 4248 17
18 USC § 4247(b)..... 17
18 USC § 4247(d)..... 17

Utah Code Ann. (2009)
§ 77-27-21.5 19

Code of Virginia, 1950, as amended
§ 19.2-264.3:1..... 21
§ 37.2-800 through 847..... 22
§ 37.2-814..... 23
§ 37.2-814(D)..... 22, 23
§ 37.2-817..... 23
§ 37.2-900..... 5
§ 37.2-900 through 920 22
§ 37.2-901.....*passim*
§ 37.2-901(3) 13
§ 37.2-903..... 20
§ 37.2-904..... 15, 20

§ 37.2-905 20
§ 37.2-906 ..... 15, 21, 23
§ 37.2-907 ..... *passim*
§ 37.2-910 23
§ 37.2-920 22

Vt. Stat. Ann. (2009) 19

Wash. Rev. Code Ann. (West 2009)
§§ 71.09.010 *et seq.* 19
§ 71.09.040 19
§ 71.09.050 19

Wis. Stat. Ann. (West 2009)
§§ 975.09 through 975.12 19
§§ 980.01 through 980.031 19
§ 980.03(2)(a) 19
§ 980.031 19

Wyo. Stat. Ann. (Michie 2009) 19

W.Va. Code Ann. (Michie 2009)
§ 15-12-2a 19

OTHER AUTHORITY

Diagnostic and Statistical Manual (DSM-IV) 11

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 092402

LARRY HOOD,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA

The Appellant, Larry Hood, respectfully petitions for an appeal to the judgment of the Honorable Charles J. Strauss, Judge of the Circuit Court of Pittsylvania County, in a final Order entered on September 1, 2009, by which Appellant, having been found to be a "sexually violent predator" on July 15, 2009, was committed to the custody of the Department of Behavioral Health and Development Services ("DBHDS") [formerly the

Department of Mental Health, Mental Retardation and Substance Abuse Services], to which decision Appellant respectfully represents that he is aggrieved by reversible error. He timely noted his appeal on September 30, 2009 (notice amended October 1, 2009), and a transcript was timely filed on October 29, 2009. The Petition for Appeal was filed on December 1, 2009. The Commonwealth filed a Brief in Opposition on December 22, 2009. In-person oral argument on the Petition for Appeal was had in the City of Richmond on March 31, 2010 before the Honorable Donald W. Lemons and the Honorable S. Bernard Goodwyn, Justices, and the Honorable Charles S. Russell, Senior Justice. On April 22, 2010 this Honorable Court awarded an appeal, limited to the consideration of Assignment of Error No. 1 from the Petition for Appeal. The contents of the Appendix were designated by Appellant on May 7, 2010.

Pages in the appendix will be referred to by the use of (A/__), with the appropriate page number inserted.

STATEMENT OF THE CASE

Appellant was about to complete his penitentiary sentence for a rape conviction when proceedings were brought against him as an alleged "sexually violent predator." Before counsel was appointed for him, he was forced to decide whether or not to cooperate with the government

psychologist, and he initially elected not to do so. After counsel was appointed, he informed the trial judge that he now wished to cooperate, but the government psychologist never took advantage of the opportunity to talk to him again. Nevertheless, the trial court deemed his initial refusal to cooperate to be a waiver of the right to have his private expert testify in the case. Thereafter, he was found to be a "sexually violent predator" and was committed to the custody of the Department of Behavioral Health and Development Services ("DBHDS"), all without an opportunity to present testimony from the psychologist who had been appointed for him, Dr. Evan Nelson.

ASSIGNMENT OF ERROR

The trial court erred in relying on Va. Code §§ 37.2-901 and 907 to uphold the requirement that Appellant had to choose whether to cooperate with the government psychologist before the appointment of counsel, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Right to Counsel provision of the Sixth Amendment to the Constitution of the United States, and the Law of the Land provision in Article I § 8 of the Constitution of Virginia.

QUESTION PRESENTED

Whether the trial court erred in relying on Va. Code §§ 37.2-901 and 907 to uphold the requirement that Appellant had to choose whether to cooperate with the government psychologist before the appointment of counsel, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Right to Counsel provision of the Sixth Amendment to the Constitution of the United States, and the Law of the Land provision in Article I § 8 of the Constitution of Virginia. (See Sole Assignment of Error).

STATEMENT OF FACTS

At the probable cause hearing held on April 20, 2009, Hood took the stand and testified that he had been convicted of rape and went to prison (A/74). After he received word that they were trying to keep him longer than his sentence, Dr. Glenn Rex Miller showed up at the prison to talk to him on September 12, 2008 (A/74). Hood talked to Miller but decided that he did not want to cooperate with him at that time (A/74-75). He did not have a lawyer at that time (A/75). James C. Martin was appointed as his attorney on January 29, 2009 (A/222). He had no lawyer before that (A/75). After he talked to Mr. Martin about the case, he decided that he wanted to cooperate with the doctor (A/75). He reiterated this desire to

cooperate in open court at the probable cause hearing, saying, “Yeah, I will, I’ll cooperate. I don’t have anything to hide” (A/75-76). He went on to say that there were no other incidents that he was trying to hide; that he wanted to cooperate now; that he wanted to talk to the doctor and go through that; and that he had been saying this ever since Mr. Martin got into the case (A/76).

The Assistant Attorney General had an opportunity to cross-examine Hood at the probable cause hearing, but he chose to ask no questions (A/76).

The trial court ruled that Hood had refused to cooperate, and appointed him an advisory expert – Dr. Evan Nelson – but ruled that Dr. Nelson could not testify at the trial, over the exception of Hood’s counsel (A/84-86).

At the beginning of the trial on July 15, 2009, it was stipulated (*inter alia*) that that Hood had been convicted of one count each of rape and abduction in Pittsylvania County Circuit Court on May 21, 2001; that rape is a sexually violent offense under Va. Code § 37.2-900; and that Hood had also been found guilty in a separate incident of an assault and battery on a woman named Laura Ann Jackson (A/144-45,149-50).

Hood, through counsel, moved *in limine* to renew the objection he made at the probable cause hearing to the constitutionality of Va. Code § 37.2-901(*et seq*), in that the trial court used these provisions to deny Hood the opportunity to have his expert testify because of his initial refusal to cooperate with the government psychologist – a decision he had to make without benefit of counsel – on the grounds that it violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Right to Counsel provision of the Sixth Amendment to the Constitution of the United States, and the Law of the Land provision in Article I § 8 of the Constitution of Virginia (A/151-52). Hood also preserved his objection to the trial court's ruling that although an advisory expert would be appointed at Hood's request [Dr. Evan Nelson], he would not be allowed to testify because he waited until after he could consult with counsel, when it was supposedly too late for him to cooperate (A/152-54).

The Commonwealth's evidence began with the testimony of Sgt. E. S. Campbell who was the policeman who arrested and interviewed Hood on February 21, 1999 for the rape charge on which he was later convicted (A/165-68). Hood was cooperative, but claimed he did not know the victim, gave his mother's residence as an alibi, and claimed he had not had intercourse in the last couple weeks (A/170-75). But on March 1, 1999,

when he took a PERK kit, he admitted knowing the victim and having intercourse with her (A/175-77). According to the Assistant Attorney General, Hood pled guilty (A/174).

On cross-examination, Sgt. Campbell testified that during his more than 16 years as an officer, he had acquired experience in dealing with mental health situations through TDO's and ECO's, and that when he arrested and interviewed Hood for the rape charge he exhibited nothing that struck him as indicating any mental health agitation or anything of that nature (A/180-81).

Dr. Glenn Rex Miller, Jr., a clinical psychologist who was appointed by the Court for the Commonwealth, testified that Hood met the statutory criteria for a sexually violent predator (hereinafter "SVP")(A/221-22). Dr. Miller met with Hood on September 12, 2008, and Hood refused to cooperate with him at that time (A/183-87, 222). (Counsel was not appointed for Hood until January 29, 2009) (A/222). Miller and Hood spoke for about 45 minutes, and Hood asked numerous questions related to whether it was in his best interest to participate in the evaluation; and at the end of the interview Hood decided he did not believe it was in his best interest and chose not to do so (A/186-87, 233-34).

When asked if he can make a diagnosis if the person accused of being an SVP refuses to cooperate, Dr. Miller first stated, “Yes, if the records are sufficient, yes” (A/187). Then he stated that although about 15% of his SVP patients refused to cooperate, he was *always* able to make a diagnosis despite this (A/188) (emphasis added). But on cross-examination he stated that he was not able to diagnose some of that 15% (A/223-24).

In Dr. Miller’s review of this case, he found negative factors (those which would tend to indicate an increased risk that he would re-offend), “protective factors” (those which would tend to show a reduced risk of re-offending), as well as neutral factors (A/190-91).

Dr. Miller found that Hood had completed a 15-week “Sex Offender Awareness Program”, but claimed that it was “not treatment *per se*” and pointed out that the counselor running it only had a bachelor’s degree (A/189). He also questioned how Hood completed the program because he is “not very literate” (A/189-90). In prison, he was exempted from a GED requirement because of his lack of progress in it (A/190). So Miller inferred that the program must not have had high standards, and that Hood’s completion of it could be viewed either negatively or protectively (A/190).

Dr. Miller also considered Hood's criminal and investigative records, the pre-sentence report from the rape case, and Hood's prison files (A/191-92,195-96). He did not personally interview witnesses such as the victims in the rape or assault cases (A/234).

Miller's review of the rape conviction revealed that Hood had known the woman previously; that she had agreed to go with him in a vehicle, not knowing where they were going; that they ended up in the "middle of nowhere"; that he parked and tried to initiate sexual contact with her which she refused and attempted to walk away; that he followed her and at some point indicated he was going back to the vehicle to get a gun; that she then went back to the vehicle and removed her own clothing; and that he then engaged in sexual intercourse during which she told him to stop on multiple occasions (A/197-98). Clinically, Dr. Miller opined (*inter alia*) that the remote location showed planning; that the fact that he had an opportunity to let her go when she got out of the car – but instead threatened to get a gun – showed successful intimidation; that the fact that he originally denied knowing her or having a sexual encounter with her showed deception and an attempt to prevent capture (A/198-201, 224-25). However, on cross-examination he stated that changing one's story may or may not be clinically significant depending on why he changed it – and

without an interview he did not have enough information to find this out (A/226).

Miller testified that he was not aware that Hood had ever admitted to the rape or the abduction, but that Hood had pled guilty (A/202,227). He said it was “hard to say” what the clinical significance of refusing to admit guilt would be, since he never spoke to Hood about it (A/202).

Miller found Hood’s history of other assaultive behavior to be “clinically significant” as showing a pattern of behavior that violates the rights of other people and of “behavioral discontrol” (A/192-93). One was allegedly against a “family or household member,” although Miller failed to speak to the family to confirm this (A/193, 223). The alleged victim was a female with whom Hood was having a relationship, which Miller found to be clinically significant as showing: 1) a pattern of aggression toward females, not just sexually but physically; 2) a pattern of violence generally; and 3) specifically as violating the rights of someone he supposedly cares about (A/193-95, 202-03). He also opined that Hood was a “failure on conditional release” because he kept getting charged, let go, and re-offending, thus showing that he tends to do whatever he wants to meet his own needs (A/203-04).

Dr. Miller first testified that he was able to diagnose Hood with two mental abnormalities or personality disorders from the Diagnostic and Statistical Manual (hereinafter "DSM-IV"): 1) Paraphilia NOS [Not Otherwise Specified], Non-Consent; and 2) Personality Disorder NOS with antisocial traits and a rule-out diagnosis of Antisocial Personality Disorder (A/204-05, 208-09, 221-22). The DSM-IV is the "Bible" of the psychological profession (A/235). "NOS" diagnoses are residual categories used when nothing else fits (A/234-35).

As to Paraphilia NOS, when Miller was asked how often it was diagnosed, he responded, "Any time a person has sexual assaults toward adult females" (A/205-06). Thus "if somebody has repeated rapes" it would go under Paraphilia NOS (A/206). When asked on direct examination, "[D]o you stand by that diagnosis today?", he stated, "I do", and further stated that he did so "to a reasonable degree of psychological certainty" (A/207). However, on cross-examination he admitted that without considering the *nolle prosequied* charges, he could not arrive at the diagnosis of Paraphilia NOS (A/229-30, 233; *see also* A/71). This was because Paraphilia NOS requires a repeated pattern over at least six months, which would not be present without reference to *nolle prosequied* charges (A/233). Furthermore, Dr. Miller admitted that none of the

example categories for Paraphilia NOS in the DSM-IV (p. 576) are applicable to Hood's case (e.g., necrophilia, zoophilia, and urophilia); however, he explained that the examples are not exclusive (A/241-42).

The Personality Disorder diagnosis was also arrived at, according to Dr. Miller, "to a reasonable degree of psychological certainty" (A/208-11). He stood by this diagnosis (A/230). However, on cross-examination he acknowledged that the general diagnostic criteria in the DSM-IV for personality disorders described them (*inter alia*) as "inflexible and pervasive", and that the DSM also stated that "[t]he pattern is stable and of long duration, and its onset can be traced back at least to adolescence or early adulthood" (A/242). However, he claimed these were only "general" diagnostic criteria (A/242). He further claimed that the "long duration" requirement was satisfied here Hood was "charged or arrested for offenses and violent offenses since about twenty, age twenty" (A/243).

The rule-out diagnosis of Antisocial Personality Disorder could not become an actual diagnosis because it requires evidence of adolescent problematic behaviors, specifically, a conduct disorder before age 15 – and Miller did not have enough information about Hood's early life because he "did not have the opportunity to interview him" (A/209-10; *see also* A/227-29, 236, 245).

Regarding Hood's risk assessment, Miller opined that "it depends", but that "overall he would be considered a high risk" (A/212). Miller did two "actuarial tests": 1) the Static-99, on which Hood scored as a "five" on the Static-99 test, supposedly indicating an approximately 38% risk of being re-convicted within 10 years, 40% within 15 years (A/214); and 2) the RRASOR test ("Rapid Risk Assessment of Sex Offense Recidivism"), which used to be required in Virginia but no longer is, and on which Hood scored a "two" on a zero to five scale which indicates a slightly above average recidivism rate (A/215, 246-48).

Dr. Miller at first claimed he "didn't really necessarily find any protective factors" for Hood (A/216). But he admitted Hood received no institutional infractions; that he has some community support through family; and that "He hasn't really refused anything" (A/216).

Hood elected not to testify, pursuant to his right under Va. Code § 37.2-901(3) (A/257).

Hood's appointed expert, Dr. Evan Nelson, was not allowed to testify pursuant to an Order of the trial court, since Hood had previously refused to cooperate with Dr. Miller before the appointment of counsel (A/114-16,132-33).

After arguments of counsel, the trial judge found that it had been proven by clear and convincing evidence that Hood had Personality Disorder NOS and had been shown to be a sexually violent predator (A/266-68).

The case was continued to September 1, 2009 for the consideration of a conditional release plan report (A/282-84).

At the September 1 hearing, Hood again preserved the issue of the due process violation that occurred when he was forced to decide whether to cooperate with the state's doctor before such time as he had counsel (A/284).

ARGUMENT

THE TRIAL COURT ERRED IN RELYING ON VA. CODE §§ 37.2-901 AND 907 TO UPHOLD THE REQUIREMENT THAT APPELLANT HAD TO CHOOSE WHETHER TO COOPERATE WITH THE GOVERNMENT PSYCHOLOGIST BEFORE THE APPOINTMENT OF COUNSEL, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE RIGHT TO COUNSEL PROVISION OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND THE LAW OF THE LAND PROVISION IN ARTICLE I § 8 OF THE CONSTITUTION OF VIRGINIA.

This Honorable Court ruled eloquently in *Jenkins v. Director of the Virginia Center for Behavioral Rehabilitation*, 271 Va. 4, 624 S.E.2d 453 (2006) that counsel must be provided under this act:

> We hold that in view of the substantial liberty interest at stake in an involuntary civil commitment based upon Virginia's Sexually Violent Predators Act, the due process protections embodied in the federal and Virginia Constitutions mandate that the subject of the involuntary commitment process has *the right to counsel at all significant stages of the judicial proceedings…*

Id. at 16, 624 S.E.2d at 460 (emphasis added).

The significance of the decision as to whether to cooperate with the government psychiatrist or psychologist is crucial under Virginia's SVP Act, since it affects the entire trial as well as the dispositional proceeding on whether outpatient treatment is feasible. Code § 37.2-901 specifies that the respondent has the right to be represented by counsel, but does not say when this right attaches. Code § 37.2-906, which deals with the probable cause hearing, states that "[p]rior to any hearing under this section, the judge shall ascertain if the respondent is represented by counsel" and shall appoint counsel for him or give him time to retain counsel. But further on in § 37.2-901, the Code specifies that:

> In the event the respondent refuses to cooperate with the mental health examination required under § 37.2-904, the court may admit evidence of such refusal and *may* bar the respondent from introducing his own expert psychiatric or psychological evidence.

(emphasis added). But even the possibility that the judge *may* nevertheless allow the defense expert is apparently precluded later in the

Code at § 37.2-907, the section allowing an expert for the respondent to be appointed:

> [H]owever, if the respondent refused to cooperate pursuant to § 37.2-901 any expert appointed to assist the respondent shall not be permitted to testify at trial nor shall any report of any such expert be admissible.

Thus an extremely important right – the right to present testimony favorable to one's side of the case – is being made dependent upon whether the respondent cooperates with a government psychiatrist or psychologist, and under Virginia's statutory scheme he *must* make the decision to cooperate or not before having counsel appointed.

No similar state or federal law has been found which uses an uncounseled "carrot-and-stick" approach for psychiatrists and psychologists in the manner of the Virginia statute – i.e., forbidding the defense expert from testifying unless the patient previously agreed to cooperate with the government expert *before* receiving the assistance of counsel. The statutes of the states who have sexual-predator-type laws vary widely, with several, for example, providing for counsel only to be appointed after the probable cause hearing, whilst others apparently deal with the problem through criminal sentencing proceedings, registration and monitoring. But whenever or however counsel is appointed in an SVP-type civil commitment proceeding, there is apparently no other state with an

"exclusionary rule" that can silence a defense expert before the appointment of counsel.[1]

---

[1] *Cf.* 18 USC §§ 4247 through 4248 (2009) ("sexually dangerous person" civil commitment process with mental examination by more than one examiner under 18 USC 4247(b) and counsel for hearing under 18 USC 4247(d), but without any apparent "carrot-and-stick" approach involving denial of opportunity to present defense expert because of lack of cooperation with state expert); *Cf.* Ala. Code §§ 15-20-21 *et seq*. (2009) (SVP law, but mental evaluation apparently not mentioned); *cf*. Alaska Stat. (Michie 2009) (no SVP law found); *cf*. Ariz. Rev. Stat. §§ 36-3701 *et seq*. (2009) ("sexually violent persons" statutory scheme in which evaluation only ordered after finding of probable cause under 36-3705); *cf*. Ark. Code Ann. (Michie 2009) (no mention of SVP law found); *cf*. Cal. Welfare & Institutions Code §§ 6600 *et seq*. (West 2009) (complex SVP statutory scheme in which two evaluators must agree under § 6601(d) for petition to be brought, but respondent has apparently unfettered right to counsel under § 6602 for preliminary hearing and for trial under § 6603, and also right to retain defense expert under § 6603); *cf*. Colo. Rev. Stat. Ann. §§ 16-11.7-103, 18-3-414.5 & 24-33.5-503 (West 2009) (apparently deals solely with assessment screening for SVP risk); *cf*. Conn. Gen. Stat. Ann. §§ 54-252 & 256 (West 2009) (apparently registration requirement only); *cf*. Del. Code Ann. (2009) (no apparent mention of SVP law); *cf*. D. C. Code Ann. §§ 22-4001 through 22-4015 (2009) (apparently only a registration requirement); *cf*. Fla. Stat. Ann. §§ 394.910 *et seq*. (West 2009) ("violent predator civil commitment" process in which judge can sometimes determine probable cause without adversarial hearing, but right to counsel apparently attaches at trial); *cf*. Ga. Code Ann. § 42-1-14 (2009) ("sexually dangerous predators" mentioned within scheme of registration in §§ 42-1-12 through 42-1-15); *cf*. Haw. Rev. Stat. Ann. § 707-743 (Michie 2009) (apparently registration only); *cf*. Idaho Code §§ 18-8301 through 18-8331 (Michie 2009) (apparently registration only); *cf*. Ill. Comp. Stat. Ann. §§ 730 ILCS 5/3-3-7 & 730 ILCS 150/1 *et seq*. (West 2009) (apparently only registration & monitoring); *cf*. Ind. Code Ann. §§ 11-8-8-1 & 35-38-1-7.5 (West 2009) (a registration requirement is apparently combined with a determination of SVP status at criminal sentencing); *cf*. Iowa Code Ann. §§ 229A.1 *et seq*. (West 2009) (scheme in which an examination by a defense expert is required under 229A.5 and counsel is required under 229A.6, but

without any "carrot-and-stick" approach or exclusionary rule); *cf*. Kan. Stat. Ann. §§ 59-29a01 *et seq*. (2009) (scheme in which judge decides probable cause at initial hearing, and notice to contest finding given, along with right to counsel at second hearing and right to expert for indigents); *cf*. Ky. Rev. Stat. Ann. §§ 17.500 through 17.991 (Michie 2009) (registration plus risk assessment); *cf*. La. Rev. Stat. Ann. §§ 15:540 *et seq*. & 40:2528 (West 2009) (registration & alert system); *cf*. Me. Rev. Stat. Ann. §§ 34A 11201 *et seq*. & 34A 11254 *et seq*. (West 2009) (registration & notice upon release, apparently no civil commitment); Md. Code Ann., Criminal Procedure § 11-701 *et seq*. (2009) (apparently registration only); *cf*. Mass. Gen. Laws 123A §§ 1 through 14 (2009) ("sexually dangerous persons" apparently entitled to examination & counsel without "carrot-and-stick" approach); *cf*. Mich. Comp, Laws Ann., Former §§ 330.1944 & 780.501 (West 2009) ("sexual psychopaths" laws apparently repealed in 1968); *cf*. Minn. Stat. Ann. §§ 253B.01 through 253B.185 & 609.1351 & 609.3455 (West 2009) (complex and unclear "sexually dangerous persons" laws, apparently including civil commitment); *cf*. Miss. Code Ann. §§ 45-33-21 through 45-33-21 (2009) (apparently registration & notification only); *cf*. Mo. Ann. Stat. §§ 632.480 *et seq*. (West 2009) (counsel provided at probable cause determination stage, and evaluation done only later); *cf*. Mont. Rev. Code Ann. §§ 46-23-501 through 46-23-511 (Smith 2009) (apparently registration only); *cf*. Neb. Rev. Stat. Ann. §§ 71-943 through 71-1226 (Michie 2009) (clear right to counsel in all "sex offender commitment" proceedings including initial review of petition by board is guaranteed by 71-945, and right to employ private mental health expert and have this expert testify is guaranteed by 71-948); *cf*. Nev. Rev. Stat. Ann. §§ 179.510 *et seq*. (Michie 2009) (potential SVP's are examined by two mental health experts who are part of panel); *cf*. N. H. Rev. Stat. Ann. §§ 135-E:1 through 135-E:23 (2009) (right to counsel prior to and during all judicial hearings under 135-E:23, and state has right to have respondent examined under 135-E:12, but no apparent provision of exclusion of testimony for non-cooperation); *cf*. N. J. Stat. Ann. § 30:4-27.24 *et seq*. (West 2009) (SVP system with right to counsel but where expert is on "treatment team," and apparently with no clear right to independent or defense expert); *cf*. N. M. Stat. Ann. (Michie 2009) (no SVP law found); *cf*. N.Y. Law (McKinney 2009) (apparently no SVP law); *cf*. N.C. Gen. Stat. §§ 14-208.20 *et seq*. (2009) (apparently only registration & monitoring); *cf*. N.D. Cent. Code §§ 25-03.3-01 through 25-03.3-24 (2009) (SVP process with counsel and expert for respondent, apparently without any uncounseled "carrot-and-stick"

The steps required in Virginia's statutory process make it inevitable that the injustice of having to decide whether to cooperate with a mental health professional without having access to a lawyer must be perpetrated in each and every such case. Even if the trial judge wanted

---

approach); *cf*. Ohio Rev. Code Ann. §§ 2950.01 through 2950.99 & 2971.01 through 2971.07 (West 2009) (apparently only registration & notification, and criminal sentencing); *cf*. Okla. Stat. Ann. 57 § 581 *et seq*. (West 2009) (apparently only registration); *cf*. Ore. Rev. Stat. § 181.585 (2009) (apparently just public notification); *cf*. 42 Pa. Cons. Stat. Ann. § 9791 *et seq*. (2009) (SVP provision apparently relates to criminal sentencing); *cf*. R.I. Gen. Laws § 11-37.1-1 *et seq*. (2009) (apparently registration & notification); *cf*. S.C. Code Ann. §§ 44-48-10 *et seq*. (Law Co-op 2009) (SVP process with counsel & right to request private expert, apparently without any uncounseled "carrot-and-stick" approach); *cf*. S.D. Codified Laws §§ 22-22-30 to 22-22-41 (Michie 2009) (apparently registration only); *cf*. Tenn. Code Ann. §§ 40-39-201 through 40-39-215 (2009) (apparently just registration); *cf*. Tex. Health & Safety Code Ann. §§ 841.001 *et seq*. (Vernon 2009) (examination done under 841.023 with state & respondent both entitled to experts under 841.061(c), without any apparent uncounseled "carrot-and-stick" approach); *cf*. Utah Code Ann. § 77-27-21.5 (2009) (apparently just registration): *cf*. Vt. Stat. Ann. (2009) (only registration provision found); *cf*. Wash. Rev. Code Ann. §§ 71.09.010 *et seq*. (West 2009) (SVP cases are transferred for evaluation after probable cause hearing under 71.09.040, with each side having an expert at trial under 71.09.050 & no apparent uncounseled "carrot-and-stick" approach); *cf*. W.Va. Code Ann. § 15-12-2a (Michie 2009) (right to own expert during SVP determination); *cf*. Wis. Stat. Ann. §§ 975.09 through 975.12 & 980.01 through 980.031 (West 2009) (civil commitment of sex offenders with right to counsel under 980.03(2)(a) & right to examiners including expert for indigent under 980.031, without any apparent uncounseled "carrot-and-stick" approach); *cf*. Wyo. Stat. Ann. (Michie 2009) (only registration provision found).

to appoint counsel sooner, he would not know about the case in time to do so. This is because Virginia's SVP process has the following steps:

1) The database established by the DBHDS is checked each month for prisoners incarcerated for sexually violent offenses who are scheduled to be released within 10 months and who receive a score of five or more on the Static-99 actuarial test, and their names and files are forwarded to the Commitment Review Committee ("CRC"), pursuant to Code § 37.2-903.

2) Within 120 days of receiving notice under 37.2-903, the CRC does an assessment, *which must include an in-person mental examination by a psychiatrist or psychologist designated by the Commissioner* of the DBHDS, after which the CRC shall recommend that the prisoner; a) be committed as an SVP or b) placed on conditional release or c) not be committed because they feel he is not an SVP, under § 37.2-904 (emphasis added).

3) Upon receipt of the CRC recommendation, the Attorney General has 90 days to review the case and file a "civil" SVP petition in the appropriate circuit court under § 37.2-905.

4) Upon the filing of the petition, the circuit court judge must hold a probable cause hearing within 90 days, *prior to which he must appoint*

counsel or provide an opportunity for retained counsel upon request, pursuant to § 37.2-906 (emphasis added).

Thus, the circuit court judge would not even know about the case – or have the authority to deal with it – until the filing of the petition, which can only be done after the CRC assessment and mental evaluation, the CRC recommendation, and the Attorney General review period. Counsel cannot be appointed until after the petition is filed, and if the prisoner (now respondent) refused to cooperate with the Commissioner-appointed psychiatrist or psychologist it is now "too late". The Court may – and apparently must – bar his expert evidence under § 37.2-901 and § 37.2-907. Unlike the expert defense mental expert statute for capital murder cases, 19.2-264.3:1, which allows exclusion of defense expert testimony when the defendant refuses to cooperate with the state's expert, the SVP respondent's decision to cooperate or not to cooperate must be made *without the assistance of counsel*. In Virginia's SVP law, the process is backwards, putting the expert's cart before the horse of counsel. Thus assuming *arguendo* that the capital murder statutory scheme is constitutional, without conceding such, the SVP scheme is quite different because a capital murder defense attorney has the opportunity to discuss

with his client the legal pro's and con's of his impending decision on whether to cooperate.

Virginia's SVP statutory scheme contrasts sharply with her statutory provisions on the role of counsel in ordinary hearings for involuntary mental commitments. The procedures for assistance of counsel in Chapter 9 of Title 37.2 of the Code of Virginia (§§ 37.2-900 through 37.2-920), dealing with SVP's, are woefully inadequate when compared to Chapter 8 of the same title (§§ 37.2-800 through 37.2-847), which deals with both voluntary and involuntary commitments. Code Section 37.2-814(D) mandates that "*an attorney*" give the patient a detailed "*written explanation*" of his or her rights prior to the commitment hearing:

> A *written explanation* of the involuntary admission process and the statutory protections associated with the process shall be given to the person, and its contents shall be *explained by an attorney* prior to the commitment hearing. The written explanation shall describe, at a minimum, the person's rights to: (i) retain private counsel or be represented by a court-appointed attorney, (ii) present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, (iii) be present during the hearing and testify, (iv) appeal any order for involuntary admission to the circuit court, and (v) have a jury trial on appeal. The judge or special justice shall ascertain whether the person whose involuntary admission is sought has been given the written explanation required herein.

(emphasis added).

Personnel of this Court have implemented 37.2-814 by designing Form DC-493, which is included as an Attachment to this brief. Lines are provided on the Form for signatures by the patient, the attorney, and the judge or special justice. The attorney signs under the line which states, "I have explained the involuntary admissions process, the statutory protections associated with such process, and the contents of this form to the respondent prior to the commitment hearing."

The written explanation which SVP respondents are sent by the Attorney General prior to the probable cause hearing pursuant to 37.2-906 (*see* A/8) is wholly inadequate to serve as a substitute for consultation with an attorney whose job it is to represent the respondent's best interests.

Thus for a mere commitment of up to 30 days under 37.2-817, with the doctor or facility having the right to release the patient early at any time without further court action, there is greater provision for the assistance of counsel – in explaining the process whilst all options are still open – than for an SVP commitment which is only reviewed after a year under 37.2-910.

Since none of the attorney-consultation procedures required by 37.2-814(D) are included in Chapter 9 for SVP cases, it becomes all the more imperative that counsel, when appointed, inform the respondent of all the

legal implications of any decision he or she may make in the case. This obviously cannot be done if a major right – the presentation of evidence at trial by an expert – is irrevocably waived before counsel even gets into the case.

Thus, the entire SVP statutory scheme in Virginia is a violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Right to Counsel provision of the Sixth Amendment to the Constitution of the United States, and the Law of the Land provision in Article I § 8 of the Constitution of Virginia. To be precluded from presenting such evidence deprives the respondent of the ability to contest an extremely serious erosion of his liberty.

The present case is even worse because there was a window of opportunity at the probable cause hearing for the trial judge to rule that the refusal to cooperate was not final since Hood had changed his mind and was now willing to cooperate. The Assistant Attorney General even had an opportunity to cross-examine Hood but failed to do so. The Commonwealth had ample opportunity during that time period to interview Hood, perform tests, and make a report of them. The judge could have ordered Dr. Miller to talk to Hood again, or Dr. Miller could have done so without an order. Or was the problem that Miller's fee could not exceed

$5,000.00 under § 37.2-907, and he feared he would be putting in time without compensation? In any case, it is Hood's rights that were violated in that he was forced to make an apparently irrevocable choice to cooperate or not to cooperate before he had the opportunity to consult with counsel and to become informed of the legal implications of whatever decision he made as to cooperation. Rights, once given, whether by constitution or statute, must be implemented fairly and with due process. This principle applies even to rights which are actually or arguably not required constitutionally. For example, this Court has held both that there is no constitutional right to appeal a criminal conviction, *see*, *e.g*., *West v. Commonwealth*, 249 Va. 241, 243, 455 S.E.2d 1, 2 (1995), and that applying for an appeal in the manner provided by statute *is* a constitutional right, *Stamper v. Commonwealth*, 228 Va. 707, 719, 324 S.E.2d 682, 690 (1985). Here, the statute provides for a defense mental expert, but takes this right away in an unfair manner by forcing a person who is alleged to be severely mentally ill to make a crucial choice in trial strategy without the assistance of counsel. This statutory scheme is unconstitutional and cannot stand.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that: 1) the judgment appealed from should be reversed, and the case dismissed; or, in the alternative, if this Court refuses to reverse and dismiss the case, 2) that the case be remanded for a new trial, if the Commonwealth be so disposed, prior to which Appellant would have the opportunity to decide, with the assistance of counsel, whether or not to cooperate with the state's mental health expert, with the full opportunity for Appellant to have his own expert consult with him and testify at trial, if Appellant chooses to cooperate with the state's expert.

LARRY HOOD

By James C. Martin

James C. Martin (VSB No. 27968)
Attorney for the Appellant
Martin & Martin Law Firm
410 Patton Street, Suite A
P.O. Box 514
Danville, Virginia 24543
Telephone: (434) 792-1861
Facsimile: (434) 792-1862
martinlawva@verizon.net

CERTIFICATE OF TRANSMISSION & SERVICE

I, James C. Martin, Counsel for Appellant, hereby certify that, pursuant to Rule 5:26(d), on this 1st day of June, 2010, fifteen paper copies and one electronic copy on CD of this brief if appellant and appendix were hand-filed with the Clerk of this Court, and that the required number of copies were also mailed, via U.S. Mail, postage prepaid, on that day to Sean J. Murphy, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219.

Appellant does not waive oral argument.

Respectfully submitted,

James C. Martin

James C. Martin
Attorney for the Appellant

ADDENDUM

Print form Highlight Fields Clear All Data

EXPLANATION OF INVOLUNTARY COMMITMENT PROCESS – ACKNOWLEDGEMENT OF RIGHTS Court Case No. _____

Commonwealth of Virginia VA. CODE § 37.2-814

_____ [ ] Juvenile and Domestic Relations District Court
[ ] General District Court

In re: _____

To the respondent:

You are a person whose involuntary admission for inpatient treatment is being sought.

You have the right to retain private counsel or be represented by a court-appointed attorney in this proceeding.

You may present any defenses you have to your involuntary commitment including independent evaluations, expert testimony, and the testimony of other witnesses.

You have the right to be present and to testify during the hearing.

You have the right to appeal to the circuit court any commitment for involuntary admission or to mandatory outpatient treatment, and to have a jury trial on appeal.

You are entitled to request a copy of the tape or other audio recording made at any commitment hearing for involuntary admission of which you were the subject that was presided over by a judge or a special justice. The court retains such a recording for three years from the date of the hearing.

Copies of the audio recording of the hearing, relevant medical records, reports, and court documents pertaining to this proceeding are kept confidential by the court, with access to the dispositional order provided to others only by court order. However, you may waive confidentiality in writing, in order to allow others to have access to the dispositional order only, or to all of the records pertaining to the hearing.

The judge or special justice may rely upon the evaluation report and certification of the appointed examiner and the preadmission screening report from the community services board to order your involuntary commitment. You have the right to object to the acceptance of the examiner's written certification and these written reports at the hearing.

I have received a copy of this written explanation and its contents have been explained to me.

_____ _____
DATE SIGNATURE OF RESPONDENT

I have determined that the respondent has received this form and its contents have been explained to him by an attorney.

_____ _____
DATE [ ] JUDGE [ ] SPECIAL JUSTICE

I have explained the involuntary admission process, the statutory protections associated with such process, and the contents of this form to the respondent prior to the commitment hearing.

_____ _____
DATE SIGNATURE OF ATTORNEY

_____ _____ _____
PRINT NAME ADDRESS TELEPHONE NUMBER

Print form