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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals
Court Of Appeals Appellate Case No. 2021-000537
Supreme Court Appellate Case No. 2024-001514

Opinion No. 2024-UP-243

IN THE MATTER OF THE CARE AND TREATMENT OF
JAMES GREGORY YOUNGER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTION PRESENTED

Did the court of appeals properly determine Judge McFaddin did not abuse his discretion by allowing the State's expert to testify about uncharged and/or unconvicted sex offense allegations against Petitioner because the expert testified it was best practice in psychosexual evaluations to consider the person's entire sexual behavior functioning, she considered the allegations against Petitioner as one data point for diagnostic and risk assessment purposes, and the prejudice to Petitioner did not substantially outweigh the evidence's significant probative value in this SVPA proceeding?

STATEMENT OF THE CASE

In June 2014, Petitioner James Gregory Younger was convicted at trial of criminal sexual conduct, third degree, arising from the sexual assault of a female acquaintance, and sentenced to ten years incarceration. Prior to Petitioner's release from incarceration, Respondent State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Petitioner's civil commitment for long term control, care and treatment as a sexually violent predator.

The matter was scheduled for a jury trial on April 19, 2021, before the Honorable George M. McFaddin, Jr., Circuit Court Judge. Prior to trial, Petitioner moved to exclude all testimony regarding allegations reported to law enforcement by multiple women alleging Petitioner sexually assaulted them. (R., pp. 490-526).

A. Pre-Trial Hearing

At a hearing before Judge McFaddin on March 30, 2021, Petitioner argued there were pending sex offense charges against him in North Carolina arising from some of the women's allegations, and he could not receive a fair trial if testimony regarding those charges was presented

to the jury because he would not be able to defend himself without waiving his 5th Amendment right not to make any statements. He conceded the information was relevant and could be considered by the experts, but asserted the testimony would be hearsay. (R., pp. 4-9).

The State argued Petitioner discussed the facts of the pending North Carolina charges with the court appointed expert, which waived any 5th Amendment issue, the SVPA allows use of the person's criminal offense history in determining if the person meets the criteria for civil commitment, Petitioner's criminal offense history was directly relevant to the determination of whether he has a mental abnormality or personality disorder that makes him likely to re-offend sexually, and the State was not offering the uncharged or unconvicted allegations for the truth of the matter asserted. (R., pp. 10-16). In addition to argument of counsel, Marie Gehle, Psy.D., and the State's retained expert, Emily Gottfried, Ph.D., testified about how they consider uncharged/unconvicted allegations in SVPA evaluations. (R., pp. 20-64).

By Order filed April 13, 2021, Judge McFaddin denied Petitioner's motion, finding actions under the SVPA are civil in nature, and the 5th Amendment protections do not apply, but even assuming the 5th Amendment did apply, Petitioner waived it when he discussed the facts of the allegations with the two evaluators. Judge McFaddin further found: 1) while Dr. Gottfried's testimony regarding uncharged and unconvicted sex offense allegations against Petitioner was prejudicial, it would not "unfairly" prejudice Petitioner; 2) Dr. Gottfried's testimony about the allegations went to the basis of her ultimate opinions about Petitioner's mental abnormalities/personality disorders and his risk to reoffend sexually; 3) both Dr. Gottfried and Dr. Gehle testified that information regarding the person's criminal history is relied on by experts in the mental health field conducting psychosexual evaluations; and 4) how the experts treated the information regarding Petitioner's history as it related to a pattern of behavior went to the weight

of the experts' testimony and conclusions, not admissibility. Judge McFaddin also expressly found Dr. Gottfried's testimony regarding allegations that did not result in charges, or had criminal charges pending in North Carolina, was not offered for the truth of the matter asserted, or to prove Petitioner actually committed the offenses. Rather, the testimony would only go to her use of it in forming her ultimate opinions. (R., pp. 527-535).

B. Trial[1]

Before the jury, Dr. Gottfried was qualified as an expert in forensic and clinical psychology. She testified her evaluation protocol included reviewing all available information, administering computer based psychological testing, and a clinical interview. (TT, pp. 67-74; R., pp. 122-129). As part of her comprehensive evaluation of Petitioner, Dr. Gottfried reviewed: reports, documents, photographs and videos from various police investigations in North Carolina; documents related to Petitioner's sexually violent offense in South Carolina and his subsequent incarceration on that conviction; records from the Sumter County Detention Center where Petitioner was housed pending the SVPA trial; letters victims wrote to the prison prior to Petitioner's release; hospital records from some reported victims; and prior evaluation reports regarding Petitioner. Dr. Gottfried testified this is the type of information typically and reasonably relied on by experts in her field. In addition to the documents reviewed, Petitioner came to MUSC on three days for testing and a clinical interview. (R., pp. 122-130).

1. Petitioner's General Criminal History

Dr. Gottfried testified the best predictor of future behavior is past behavior, so actions that occurred in the past help predict things that may occur in the future. In evaluating Petitioner, she

[1]Prior to the jury being sworn, Petitioner renewed his pre-trial motion regarding testimony about uncharged/unconvicted sex offense allegations. Judge McFaddin affirmed his prior order regarding that issue. (R., p. 89).

considered his entire criminal history, including convictions, pending charges, and incidents reported to law enforcement with no charges ultimately filed, because Petitioner's entire criminal history may be predictive of reoffending.

Dr. Gottfried also testified best practices manuals about conducting psychosexual evaluations indicate the evaluator should look at the person's history of sexual behaviors that were illegal, whether it was charged or not. She stated she may weigh the various reports differently, but it is important to consider the history of illegal sexual behavior because the person may not be forthcoming about it, and the reports may reveal patterns of behavior that might support symptoms of a mental illness. (R., pp. 130-134).

According to the records Dr. Gottfried reviewed, Petitioner's criminal history included: 1) a 1988 charge for assault on a female, which was dismissed in 1989; 2) in 1990, he was convicted of assault on a female, which involved a female (T.B.) who dated Petitioner and reported to police he assaulted her multiple times, including one time he choked her, and he was sentenced to two years' probation;[2] and 3) in 1990, Petitioner was charged and convicted of a probation violation, and Dr. Gottfried testified it suggests an inability to follow rules, which is a risk factor for sexual offending, and is factored into risk assessment tools used in evaluations. In addition, between 1991 and 1996, Petitioner was charged with various non-sexual offenses, including injury to personal property (dismissed), assault and battery (convicted and sentenced to ninety days in jail and three years' probation), first degree arson (convicted of malicious damage and sentenced to one year in jail and five years' probation), assault with a deadly weapon with intent to inflict serious injury

[2]Petitioner objected to the testimony on grounds of hearsay and relevance. The State argued the evidence was not being offered for the truth of the matter asserted, but merely as evidence of what Dr. Gottfried considered in reaching her opinions, and it was directly relevant to the basis for her opinions. Judge McFaddin overruled the objection. (R., pp. 135-137).

(convicted and sentenced to six years in prison and five years' probation), a traffic offense (convicted), and simple assault (dismissed). (R., pp. 138-141).

In 2005, Petitioner was charged with second degree rape, which was dismissed in 2007, but he was indicted in North Carolina in 2019 for second degree forcible rape and second-degree forcible rape of a physically helpless victim based on the 2005 allegations. In 2008, Petitioner was charged and convicted of assault on a female, and sentenced to one year probation. Also in 2008, Petitioner was charged with driving while impaired, convicted and sentenced to a maximum of sixty days in jail, community service and one year of probation.

In 2009, Petitioner was charged with possession of drug paraphernalia, convicted and sentenced to community punishment. He was also charged in 2009 with computer trespass, convicted, and sentenced to twenty days in jail.

In 2012, Petitioner was charged in Sumter County with second degree assault and battery and third degree criminal sexual conduct. He was convicted in 2014 of third degree criminal sexual conduct, and sentenced to ten years' incarceration.

In July 2019, in addition to the two charges arising from the 2005 allegations, Petitioner was indicted in North Carolina for first degree kidnapping, second degree forcible rape, and second degree forcible rape of a physically helpless victim based on allegations related to a 2007 victim. (R., pp. 138-141).

2. <u>Detention Center Records</u>

Dr. Gottfried also reviewed records from the Sumter County Detention Center where Petitioner was housed pending the SVPA trial. She testified it was important to consider infractions or rules violations to determine whether Petitioner had been able to follow the rules of that institution, and whether there were patterns of behavior that might indicate a potential

diagnosis. The detention center records included almost daily incident reports or notes related to Petitioner, and revealed Petitioner sought some type of medical attention nearly every day. Petitioner frequently had extra items in his cell he was not allowed to have, including mattresses, clothing, laundry bags, blankets, towels, and Bibles. In one incident, officers found a plastic rope tied in a knot, which they confiscated, but Petitioner removed it from an officer's desk after it was confiscated.

The records also included multiple reports of Petitioner disrespecting detention center officers, refusing to obey officers' orders or commands, making threats against other inmates, and engaging in verbal altercations with other inmates. Petitioner's cellmates requested to be moved from his cell because he tried to start conflicts. While these incidents were not sexual, Dr. Gottfried testified the records "really demonstrated a pattern of [Petitioner] currently not following the rules," and suggested "[Petitioner] may think that the rules don't apply to him and that he is entitled to special treatment that is not given to other inmates." (R., pp.141-144).

3. Petitioner's Sexual Offenses

Dr. Gottfried then testified she reviewed records regarding the 2012 sexual offense in Sumter County for which Petitioner was convicted in 2014. She stated such records are the type of records typically relied on by experts in her field, and it is necessary to look at the underlying details to see what actually happened. (R., pp. 144-145).

According to police reports and other documents, the Sumter County victim (K.B.) dated Petitioner for approximately five months between May 2012 and September 2012, and they had consensual sex during that time. During a consensual encounter in September 2012, K.B. noticed Petitioner's phone was propped up and recording them having sex. When she confronted him, Petitioner stated he would delete the video. (R., pp. 146-147).

When the sex resumed, Petitioner instructed K.B. to turn over on her stomach and he became more aggressive. He put his hand over her mouth and his other arm around her throat until she passed out. When K.B. regained consciousness, she was disoriented, had trouble walking and her rectal area was severely painful. Petitioner told her his penis had slipped one time into her anus. K.B. was bleeding from her anus, had bruises and skin discoloration on her anus and buttocks, and sought medical treatment. Medical evidence presented at Petitioner's criminal trial indicated the amount of bruising was not constituent with a one-time slip, but showed massive trauma consistent with prolonged force. (R., pp. 147-148).

Dr. Gottfried testified the presence of choking or strangling K.B. was similar to the allegation Petitioner choked T.B. in his assault on a female conviction in 1990. She reiterated that diagnosing a person with a mental disorder, mental abnormality or personality disorder cannot be based on a single incident, so an evaluator looks for patterns of behavior that go toward the person's sexual arousal patterns. (R., pp. 148-149).

Dr. Gottfried then testified about sexual assault charges pending against Petitioner in North Carolina related to the 2005 victim (L.M.R.), who reported she was on a date with Petitioner at his residence, and they were watching a movie and drinking wine. L.M.R. woke up the next morning wearing no clothes, and she did not remember what happened. A family member picked her up and took her to the hospital, where a medical exam revealed a vaginal tear extending into L.M.R.'s rectum, and her urine sample indicated the presence of Ambien. L.M.R. did not have a prescription for Ambien and stated she did not take it. When questioned by law enforcement, Petitioner stated he and L.M.R. had consensual oral, anal, and vaginal sex, and denied putting anything in her drink.

According to the records, the local prosecutor dismissed the second degree rape charge in 2007 after Petitioner's attorney produced naked pictures of L.M.R. taken on the night of the

incident. L.M.R. denied any knowledge of the pictures, but the prosecutor concluded the pictures indicated she had consented. Petitioner was indicted in 2019 on charges arising from the incident. Petitioner told Dr. Gottfried the sex was consensual, and he did not know anything about Ambien. (R., pp. 149-152).

Petitioner was charged in 2008 with assault on a female (S.M.M.) in North Carolina, arising from an incident at a concert in Greensboro, NC. The victim was walking to the restroom when Petitioner walked past her in the opposite direction and commented on her shoes. When the victim looked down at her shoes, Petitioner reached across her body and cupped her breast. Security guards arrested Petitioner, and he was convicted and sentenced to one year probation. (R., pp. 152-154).

In 2019, Petitioner was also indicted in North Carolina on charges arising from a 2007 incident at another concert in the Greensboro Coliseum. According to the records, the victim (K.L.W.) left the concert with an unidentified male, who drove her to his house. She subsequently woke up nude laying in a bed on her stomach with the male on top of her back and hitting her in the head. The male subsequently brought K.L.W. back to the Coliseum. She went to the hospital, where it was determined her labia was red, she had small tears in her vagina, and some tenderness and swelling to her head. The medical records also indicated K.L.W. was very nauseous and threw up in the CT scanner.

K.L.W. was not able to describe the male, his residence or his vehicle, and said she did not want to pursue the matter. She reported the male kept her panties and driver's license, but the license was later mailed back to her. Due to the lack of any information to identify the male, the case was not pursued in 2007.

During an unrelated investigation in 2010, however, the North Carolina State Bureau of Investigation (SBI) executed a search warrant on Petitioner's computer, and found some images of K.L.W. in which she appeared to be unconscious, naked from the waist down and located in the cargo area of a vehicle. There were other pictures of K.L.W. naked and asleep in a location identified as Petitioner's residence. As a result, Petitioner was indicted in 2019 on charges related to the incident. (R., pp.154-159).

Petitioner then objected to testimony regarding information received as a result of a hotline set up by North Carolina law enforcement. Judge McFaddin sustained the objection regarding hotline calls. The State asked to proffer Dr. Gottfried's testimony regarding which incidents she considered were based on actual police reports and victim statements versus only calls to the hotline. (R., pp.159-165).

As a proffer, Dr. Gottfried testified the incidents she considered were either reported to police or to the hotline. She went over every incident in detail, and only three of the allegations were based solely on calls to the hotline, with all the other allegations she considered involved reports and statements given directly to law enforcement. After the proffer, Judge McFaddin excluded information received solely from the hotline was admissible, but allowed reports and statements directly reported to law enforcement were admissible. Petitioner then objected to the evidence as unduly prejudicial, which Judge McFaddin overruled. (R., pp. 166-179).

Dr. Gottfried testified before the jury about allegations from multiple victims alleging Petitioner sexually assaulted them between 1990 and 2013. (R., pp. 135-143, 146-157, 180-190). The criminal history included:

Convictions and Pending Charges

Petitioner's convictions included the 1990 and 2008 convictions for assault on a female and the 2014 conviction for third degree criminal sexual conduct in Sumter County. There are pending 2019 charges arising from the incidents involving L.M.R. and K.L.W.

Uncharged Reports to Law Enforcement

J.B. reported she was engaged to Petitioner in 1998, and during sex, he choked her, slapped her, pulled her hair, tied her up, held her down, and tried to photograph and video her during sex. When Dr. Gottfried asked Petitioner about the allegations, he stated he had "no clue why she would report that he had choked her and that they had a great relationship."

M.J. reported she dated Petitioner for several years, and he choked her during sex until she almost passed out. Petitioner denied that occurred.

T.G. reported she went on a date with Petitioner in 2005 and had two glasses of wine, but could not remember anything from that night until the next day. She stated Petitioner told her he slipped her Valium at a sushi restaurant and had sex with her. Petitioner told Dr. Gottfried they had consensual sex and T.G. lied about the Valium.

C.P. reported she dated Petitioner from January 2005 to April 2005. She stated Petitioner drugged her wine several times, and had anal sex with her even though she told him she did not want to have anal sex. Petitioner told Dr. Gottfried he did not recall anything about anal sex with C.P.

K.G.M. reported she was a college classmate of Petitioner's in 2005, and he sexually assaulted her while she repeatedly pled with him to stop. He covered her mouth, grabbed her throat, and put her face in a pillow, which made it hard for her to breathe or call for help. Petitioner

told Dr. Gottfried the incident never happened, but he was aware of the allegation because campus security pulled him out of class after K.G.M. reported it.

T.S. reported she went out with Petitioner and some friends in 2008, but the next day she could not remember anything and felt like she could not move her body. She stated Petitioner called her and apologized for sticking his hand down her pants, which she did not remember.

N.G.N. reported she dated Petitioner for approximately two months in 2008. While they were dating, he choked her, then apologized the next day. She stated he also drugged her wine and took videos of her when she was incoherent, including one in which she was throwing up, but she did not remember it happening. Petitioner told Dr. Gottfried the allegations were not true, but he did take a couple of pictures of N.G.N. passed out on the floor naked.

S.F.G. reported she had wine with Petitioner in 2009, but did not remember anything after drinking the wine, and she thought she had been drugged. She stated Petitioner took pictures of her, then threatened to kill her if she told anyone and to put the pictures of her on the internet. S.F.G. ultimately got a court order of protection from a court against Petitioner.[3] When Dr. Gottfried asked Petitioner about the allegations, he denied all of them.

C.P. reported she dated Petitioner in 2009. She stated he choked her at least five times, and told her he knew CPR so if something happened he could resuscitate her. She also stated Petitioner anally and vaginally raped her. Petitioner denied all the allegations.

T.M.C. reported she dated Petitioner for approximately three months in 2009. She stated Petitioner strangled her until she almost passed out, but told her he had gone to nursing school so he knew how much a person could handle. Petitioner told Dr. Gottfried he did not remember any strangling.

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[3]Dr. Gottfried reviewed a transcript of the hearing regarding the order of protection.

L.M.T. reported she dated Petitioner for several months in 2011. Petitioner told her he gave her Ativan to get her to unlock her phone for him and have sex with him, and also told her he put something in her wine. Petitioner told Dr. Gottfried he and L.M.T. had a consensual relationship and he never drugged or raped her.

R.S./R.S.D. reported she met Petitioner in 2011 through a friend, and Petitioner later showed up at her house, held her down, and vaginally and anally raped her. She stated he forced her head into a pillow and she had a hard time breathing. She also stated she had bruising on the back of her neck, her thighs and wrists from when Petitioner held her down. She said she did not report the assault at the time because Petitioner knew where she lived and she was worried for her safety and the safety of her daughter.

In 2013, G.F.S., who was Petitioner's girlfriend's friend, G.F.S., reported that she was sleeping at the girlfriend's house, when she woke up and Petitioner, who was in North Carolina while out on bond from the 2012 Sumter County charge, was performing oral sex on her and penetrating her vagina with his fingers. Petitioner told G.F.S. he was getting back at his girlfriend for cheating on him. Petitioner told Dr. Gottfried the encounter was consensual.

In 2015, C.A.F. reported Petitioner drugged and raped her. Petitioner told Dr. Gottfried he did sleep in the same bed with C.A.F., but they did not have sex.

Based on the records she reviewed, Dr. Gottfried determined there was a "really striking pattern" of Petitioner having consenting sexual relationships with women, but at some point in the relationship, he incapacitated the women (by either drugging, strangling or choking them), and then performed nonconsensual sex acts on them, particularly anal sex. She found Petitioner frequently gave the victims false information about himself, and he engaged in this pattern even though he had sexual partners who did consent to having anal sex with him. (R., pp. 189-190).

As part of her risk assessment, Dr. Gottfried scored Petitioner on two actuarial risk assessment measures based on numerous studies of people who have been convicted of sex offenses and following them for a five- or ten-year period to see if they reoffend. Petitioner's score on one measure was in the above average risk category and higher than 88.7% of the people included in the underlying studies, with an approximate re-offense rate of 2.7 times the rate of sex offenders scoring in the average range on the test. His score on the other measure was also in the above average risk category, and approximately 1.9 times higher than the re-offense rate of sex offenders in the middle range of risk distribution.[4] (R., pp. 193-197).

In addition to the actuarial risk assessments, Dr. Gottfried utilized an assessment tool that is used to guide professional judgment regarding possible risk factors. She testified the tool is "a good predictor of future sexual violence and studies suggest it's, at least, as accurate, if not more accurate" than the actuarial assessment tools.[5]

Based on the records, the psychological tests results, the risk assessment tools and Petitioner's interview, Dr. Gottfried concluded Petitioner has numerous recognized dynamic risk factors for reoffending, including: 1) a stable pattern of sexual arousal to non-consent; 2) a history of substance abuse problems (self-reported); 3) multiple traits of psychopathy or psychopathic personality; 4) chronic sex offending; 5) physical harm in the sexual offending; 6) a serious failure

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[4]Dr. Gottfried stated it was important to note that only thirty percent of sex crime victims actually report the sexual assaults, and the risk assessment tools only include people who were caught re-offending.

[5]In addition to reviewing all available records, Dr. Gottfried administered multiple psychological assessments as part of Petitioner's evaluation, including the Hare Psychopathy Checklist Revised, 2nd Ed., which assesses characteristics associated with psychopathy, and has a cut score for determining whether an individual is a psychopath. Petitioner's score was one point below the cut score, which Dr. Gottfried testified meant that while he would not necessarily be classified as a psychopath, Petitioner has many characteristics associated with a psychopathic personality condition. (R., pp. 191-192).

to accept responsibility for his sexual acts, including those for which he was convicted; 7) attitudes supporting sexual offending such as hostility toward women; 8) psychological coercion or threats and intimidation in his sex offenses; 9) a negative attitude toward supervision as evidenced by his probation violations; 10) narcissistic traits that make him reject supervision; 11) a lack of realistic future plans; and 12) a negative attitude toward treatment and a belief that he does not need treatment. Dr, Gottfried testified Petitioner does not believe he needs treatment because "he says he did not commit any of the alleged or convicted offenses against him." (R., pp. 198-202).

Dr. Gottfried diagnosed Petitioner with narcissistic personality disorder, testifying he met the full diagnostic criteria for that disorder, including having a "grandiose sense of self-importance," believing he is "special and unique," having a "sense of entitlement," exploiting people, being arrogant, and lacking empathy. She also diagnosed Petitioner with other specified personality disorder with antisocial traits because he demonstrates a failure to conform to the rules of society, he is deceitful and impulsive, he exhibits irritability and aggressiveness, and is irresponsible. She testified Petitioner met every potential symptom for a full antisocial personality disorder, except for evidence of conduct disorder before the age of fifteen, which is required for an antisocial personality disorder diagnosis, but he is "strongly antisocial," which "really characterizes him," and he exhibits many features of a psychopathy personality disorder. (R., pp. 202-207).

In addition to the two personality disorder diagnoses, Dr. Gottfried diagnosed Petitioner with paraphilic coercive disorder, which is characterized by persistent urges, fantasies or behaviors involving coercive sexual acts toward nonconsenting people, and reflects an underlying deviant sexual arousal to forced sex and sexualizing power, control, and dominance over nonconsenting people. She testified the diagnosis was based on the pattern of sexual assaults of multiple women

over a twenty plus year period and the striking similarities between the reported assaults. (R., pp. 208-211).

Dr. Gottfried testified it is important to consider the interaction of Petitioner's personality disorders and his paraphilic disorder. Petitioner's personality disorders alone are "risky," because they are related to conning and manipulating people, a lack of remorse or empathy, exploiting others, and feeling entitled to take whatever he wants, and his paraphilic disorder involves sexual arousal to coercion, force, threats, and power of another person. Dr. Gottfried testified that due to his personality disorders, Petitioner felt entitled to satisfy his sexual arousal to coercion with no consideration of the needs, desires, or safety of his victims. (R., pp. 212-213).

Dr. Gottfried testified to a reasonable degree of psychological certainty that Petitioner has relevant personality disorders and a mental abnormality that affect his emotional or volitional capacity, and he has the propensity to commit future acts of sexual violence to such a degree as to pose a menace to public health and safety. She further testified Petitioner is a risk to reoffend sexually unless confined to a secure facility to long-term control, care, and treatment, and outpatient treatment would not be sufficient to get Petitioner the treatment he needs and to protect the public. (R., pp. 214-217).

On cross-examination, Dr. Gottfried stated she believed Petitioner had nonconsensual sex with women when they could not consent because Petitioner had drugged them or otherwise rendered them incapacitated, but did not necessarily assume all the victims were telling the truth, and she had to consider all illegal sexual behavior, charged or not, to determine whether Petitioner has a qualifying mental abnormality or personality disorder that makes him likely to reoffend sexually. She stated she did not necessarily rely on the victims' reports, but she did consider them, and convictions obviously carry more weight.

Dr. Gottfried testified it would be difficult to speculate about her conclusions if she did not have all the information regarding the uncharged assaults or the charges pending in North Carolina, but stated she thought there was still an identifiable pattern of conduct when considering the convictions and pending charges. She further testified it was not her job to determine guilt or innocence, and again stated she did not necessarily assume all of the alleged assaults actually happened, but it was striking how many women reported similar things over a twenty plus year period, and those similarities presented a data point she could not simply ignore for purposes of the evaluation. (R., pp. 244-268).

On behalf of Petitioner, Dr. Gehle testified she reviewed the same records Dr. Gottfried reviewed, interviewed Petitioner on two occasions, and scored the same actuarial risk assessment measures. She stated Petitioner denied all of the allegations related to sexual assaults that were not charged, and testified it was her practice not to consider allegations that were not verified by a conviction or the person's admission. She disagreed with Dr. Gottfried's diagnoses and opinion, and opined Petitioner did not have any mental abnormality or personality disorder that would meet the definition of a sexually violent predator. (R., pp. 289-327).

On cross-examination, Dr. Gehle again stated she gives little to no weight to any allegations when the person denies the allegations and there was no conviction. She acknowledged Petitioner was charged with second degree rape in 2005, which included accusations of drugging the victim, and then assaulting her vaginally and anally. She also acknowledged Petitioner told her his arrest so affected him mentally that it was difficult for him to focus and continue in school, and it was "fair" to say Petitioner was more concerned about how this arrest impacted him rather that what it did to the victim. When pressed, Dr. Gehle conceded that even though Petitioner said his 2005 arrest greatly affected him, he did not change his behavior, and committed another sexual assault

a year after the 2005 charge was dismissed (the 2008 offense against S.M.M. at the Greensboro Coliseum). (R., pp. 341-343).

Dr. Gehle acknowledged her evaluation report stated that the numerous sexual allegations from multiple women were "concerning." She further acknowledged stating in the report there was "compelling" evidence in some of the cases, and if all the alleged assaults occurred, Petitioner had never changed his behavior in spite of being arrested and convicted in at least two cases. (R., pp. 344-353).

The jury found beyond a reasonable doubt Petitioner is a sexually violent predator as defined by the SVPA, and the circuit court committed him to DMH's custody for long term control, care, and treatment. (R., pp. 484-487, 536). This appeal followed. By unpublished opinion filed July 3, 2024, the court of appeals affirmed, and denied Petitioner's Petition for Rehearing by order filed August 13, 2024. Matter of Younger, Op. No. 2024-UP-243 (Ct. App. Filed July 3,, 2024).

ARGUMENT

I. The court of appeals properly determined Judge McFaddin did not abuse his discretion by allowing the State's expert to testify about uncharged and/or unconvicted sex offense allegations against Petitioner because the expert testified it was best practice in psychosexual evaluations to consider the person's entire sexual behavior functioning, she considered the allegations against Petitioner as one data point for diagnostic and risk assessment purposes, and the prejudice to Petitioner did not substantially outweigh the evidence's significant probative value in this SVPA proceeding.

Petitioner contends the court of appeals erred in affirming Judge McFaddin's ruling allowing Dr. Gottfried's testimony regarding the uncharged and/or unconvicted allegations that Petitioner sexually assaulted multiple women over a period of twenty plus years because the testimony was hearsay. Contrary to Petitioner's contention, the challenged evidence was not offered for the truth of the matter asserted, but, as Judge McFaddin expressly ruled, it was offered **only** to provide the jury with part of the basis for Dr. Gottfried's opinions. *See* In re Detention of

Coe, 286 P.3d 29, 43 (Wash. 2012) (evidence on unadjudicated offenses is admissible in a civil commitment case provided it is not being offered for the truth of the matter asserted).

Dr. Gottfried did testify on cross-examination that she personally believed the incidents happened, particularly given the similarities of the reports, but even though she did not know if the allegations were true, they were something she had to consider as part of her evaluation. Dr. Gottfried also stated the underlying facts of Petitioner's sexual convictions did present a pattern, but she truthfully testified it would be difficult for her to say what her conclusions would have been if she had not known about the other allegations. (R., pp. 244-268).

The jury also heard Dr. Gehle's testimony about why she did not consider the uncharged/unconvicted allegations in reaching her opinions, including her view that police reports come "from the perspective of trying to prove that somebody committed conduct and so they're written in a way that makes it seem more true than maybe it would be," and her belief in the "right of innocent until proven guilty." (R., p. 325). In reaching its verdict, the jury was free to discount Dr. Gottfried's testimony regarding the uncharged/unconvicted allegations precisely because she expressly said she did not know if the allegations she considered were true, and equally free to accept Dr. Gehle's opinion that the allegations should not be considered at all.[6]

[6]Petitioner claims Dr. Gehle's testimony indicates "it does not appear at all settled that using even the fact of uncharged conduct is a best practice in the esoteric field of SVP evaluations." While the field of SVP evaluations may have been "esoteric" at one point, twenty states, the District of Columbia and the federal government now have sexual predator commitment laws, and multiple articles and books address the practice, so the field of SVP evaluations has greatly expanded beyond being "esoteric." Dr. Gottfried testified that "best practices manual, so the books written about how to do these kinds of evaluations indicate that you just want to look at their history of sexual behavior functioning that was illegal whether it was discovered or charged or not." (emphasis added). (R. pp.134, 325). It does not appear from the record that Dr. Gehle was even familiar with those published books about the best practices for conducting SVP evaluations.

Petitioner's repeated reference to Dr. Gottfried's testimony as recounting "lurid" or "graphic" details of the victims' reports is misleading. As the court of appeals found, Dr. Gottfried only testified to the limited details of each allegation that she found were similar (primarily incapacitation by drugging, strangling or choking followed by sexual assaults, including anal sex), and it was the striking similarities of reports by women from different geographic areas across a twenty plus year period that made the reports significant for purposes of Dr. Gottfried's opinions.[7]

Dr. Gottfried's testimony in the State's case-in-chief encompassed ninety-seven pages of the trial transcript, only sixteen pages of which dealt with Petitioner's criminal offense history, including his convictions, pending charges and uncharged allegations. (R., pp. 122-219). Thus, approximately 87% of Dr. Gottfried's direct testimony dealt with other information, including the records she reviewed and the tests and risk assessment tools she utilized in formulating her opinions. Further, the State did not dwell on the details of the multiple reports in closing, but only pointed out the similarities between the allegations and Petitioner's conduct in the offenses for which he was convicted. (R., pp. 449-450).

Assuming for purposes of argument that the evidence at issue was hearsay, Petitioner's reliance on State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620 (2022) is misplaced. In Jenkins, the Supreme Court held that when evidence relied on by an expert serves dual purposes, the trial court must "'determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper

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[7]Petitioner's contention the allegations were based only on police reports and statements is inaccurate. Dr. Gottfried testified she also reviewed medical records associated with some of the victims, a protection order hearing transcript associated with one victim, and the *in camera* sworn testimony of two victims (unconvicted) in Petitioner's criminal trial in Sumter County. By implication, Dr. Gottfried also had K.B.'s sworn testimony in the criminal trial. Thus, there was substantially more corroboration of Petitioner's sex offense history than mere police records.

purpose.'" *Id.* at 631(*quoting* State v. Perry, 430 S.C. 24, 842 S.E.2d 654, 657-58 [2020]). The evidence at issue in this case did not serve dual purposes. Rather, as Judge McFaddin found, its only purpose was to inform the jury of the basis for Dr. Gottfried's opinions, not to establish the allegations were true, or even believable. Again, the jury was free to discount the evidence and Dr. Gottfried's opinions entirely.

It is well established that propensity evidence is not admissible in criminal cases. Rule 404(b), of the South Carolina Rules of Evidence; State v. Dinkins, 435 S.C. 541, 868 S.E.2d 181, 187 (Ct. App. 2021) ("Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial.") However, this is not a criminal case. It is also well established that SVPA cases are civil proceedings, and the person's **propensity** to commit future acts of sexual violence is the focus of SVPA proceedings. *See, e.g.,* In re Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (A "'person's **dangerous propensities** are the focus of the SVP Act.'") (*quoting* In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]) (emphasis added).

The SVPA affords evaluators "reasonable access to the person for the purpose of the examination, as well as access to **all** relevant medical, psychological, criminal **offense**, and disciplinary records and reports." S.C. Code Ann. § 44–48–90 (2018) (emphasis added). Criminal "offenses" can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator. *See* White v. State, 375 S.C. 1, 649 S.E.2d 172, 176 (Ct. App. 2007) (past convictions and prior offenses not resulting in convictions that bear on whether a person is a sexually violent predator are admissible in SVPA cases). "Because a 'person's dangerous propensities are the focus of the SVP Act,'" consideration of "'[p]ast criminal history is therefore directly relevant to establishing 44–48–

30(1)(a),' which in turn bears directly on whether one suffers from a mental abnormality under section 44–48–30(1)(b)." Ettel, 660 S.E.2d at 287. Prior unconvicted sexual offenses may establish a "pattern of behavior of sexual assaults," which aids in the diagnosis of a mental abnormality and goes to the person's propensity to commit future sexual offenses. *Id.* at 288.

Petitioner's contention that evidence of uncharged/unconvicted conduct is inadmissible at a SVPA trial, even if it is directly relevant and necessary to explain the expert's methodology, evaluation, and opinion, is counter-intuitive to the language of the statute regarding access to the person's criminal offense history, as well as case law finding propensity to commit future acts of sexual violence is the focus of SVPA proceedings. Essentially, the experts would be statutorily entitled to access and consider the person's entire criminal offense history, including uncharged/unconvicted offenses, for purposes of diagnosis and risk assessment, but then could not testify at trial about the basis for their conclusions if it includes the uncharged/unconvicted offenses.

Recognizing the purposes of expert testimony in sexual predator cases, other jurisdictions have allowed evidence of uncharged/unconvicted conduct.[8] In sexual predator civil commitment cases, expert testimony regarding the details of underlying facts or data related to uncharged sexual offenses is "'highly probative and helpful to the jury in explaining the basis of [the expert's] opinion that [a person] has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.'" In re Commitment of Renshaw, 598 S.W.3d 303, 314 (Tex. App. 2020) (*quoting* In re Commitment of Stuteville, 463 S.W.3d 543, 556 [Tex. App. 2015]). The need to

[8]While Petitioner claims that "other jurisdictions" refuse to allow evidence of uncharged conduct in sexual predator cases, Virginia is the only jurisdiction the State can find, and Petitioner cites, that prohibits introduction of any evidence regarding unadjudicated offenses in sexual predator civil commitment cases. *See* Commonwealth v. Wynn, 671 S.E.2d 137 (2009).

present evidence of uncharged/unconvicted offenses to explain the basis of the expert's opinion is great because, without that evidence, the jury would not hear about the person's pattern of sexual conduct, and the jury would not be basing its verdict on the full picture of the person's sexual deviance. *Id.* at 315.

In State v. Floyd Y., 2 N.E.3d 204 (N.Y. 2013), a case Petitioner cites as support, but then ignores a significant part of the court's analysis in it, the court found that a significant number of jurisdictions take a flexible approach allowing the admission of "basis hearsay" in sexual predator commitment cases.

> [B]asis hearsay does not come into evidence for its truth, but **rather to assist the factfinder with its essential article 10 task of evaluating the experts' opinions. In order to assess an expert's testimony, the factfinder must understand the expert's methodology and the practice in the expert's field.** In this case, for example, [the expert] testified that experts in her field "rely heavily upon witness statements, affidavits, [and] victim statements ... because in treatment there are issues of confronting a sexual offender with exactly what happened." Understanding her diagnosis and her treatment of Floyd Y. **requires understanding the information she considered when making her diagnostic and treatment decisions.** As our concurring colleagues concede, **out-of-court statements are routinely admitted at trial for purposes other than to demonstrate their truth. Factfinders in article 10 trials cannot comprehend or evaluate the testimony of an expert without knowing how and on what basis the expert formed an opinion.**
>
> **To the extent that a factfinder's assessment might turn on its acceptance of basis evidence as true, article 10 provides the respondent with an opportunity to challenge the State's expert by presenting a competing view of the basis evidence through the testimony of the respondent's expert.**

Id. at 212-13 (internal citations omitted) (emphasis added);[9] *see also* State v. John S., 15 N.E.3d 287, 300–01 (N.Y. 2014) (hearsay at issue was derived from documentary sources, including

[9]Petitioner did present a competing view of the basis evidence via Dr. Gehle's testimony. Petitioner then emphasized in closing argument the extent of Dr. Gehle's experience conducting SVPA evaluations and that she was appointed by the court to conduct Petitioner's evaluation, and implied Dr. Gottfried formulated her opinions because the State hired her. (R., pp. 459-463).

complaints from five different victims attacked within a 32–day time period involving a strikingly similar pattern, which supported trial court's finding the information was sufficiently reliable). As in John S., the evidence of Petitioner's extensive sex offense history involved a "strikingly similar pattern" of sexually deviant conduct, which established its reliability for purposes of admitting the evidence at trial. Indeed, Petitioner himself acknowledged the significance and inherent reliability of the evidence when he testified that the odds of multiple women from different geographic locations and over a period of twenty plus years reporting such similar allegations against him were "slim to none." (R., p. 441-442).

In John S., the court found:

> The State's experts based their mental abnormality diagnoses, in part, on patterns of behavior that they perceived had emerged from respondent's criminal history, such as his propensity to commit sex offenses in public places, to reoffend after having been previously sanctioned for a sex offense, and to use violence to control his victims. **It was reasonable for the trial court to conclude that basis testimony about the 1968 charges (which involved three violent rapes) was necessary for the jury to adequately evaluate whether these opinions were credible or convincing, and that excluding the testimony may have stymied the jury's fact-finding.**

15 N.E.3d at 300–01 (emphasis added). Similarly, the challenged evidence in this case was necessary for the jury to adequately evaluate the two expert's opinions.

Petitioner's reliance on Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), is misplaced. Bilton involved an expert's testimony about the results of a scientific test administered by someone else, but the testifying expert did not have training or experience in administering the specific test, and did not know who had actually performed the test or how it was performed. *Id.* at 165-166. The instant case does not involve a scientific test performed by an unknown individual, and Dr. Gottfried was able to testify first-hand about each part of Petitioner's evaluation, what

documents she personally reviewed, what she considered and how she used all the information in reaching her opinions. Thus, the Bilton analysis simply does not apply.

Petitioner's contention that the fact the law enforcement reports did not result in charges "craves the inference that those statements were of dubious reliability" is grossly speculative and ignores the reality of sex offenses. Initially, as both Dr. Gottfried and Dr. Gehle testified, the vast majority of sex offenses are not reported. (R., pp. 195, 372-373). Further, there are a myriad of reasons charges are not filed in sex offenses that are reported, notably protecting the victims' mental well-being from having to relive their sexual assaults. In this case, some of the victims reported why they did not initially report Petitioner's assaults, including fear of the Petitioner, and L.M.R.'s experience after she did report the assault in 2005 starkly demonstrates another reason sex offenses are not reported.

As discussed in depth above, the challenged evidence was not admitted to prove the allegations were true, but only to explain part of the basis for Dr. Gottfried's methodology, analysis and opinions regarding Petitioner's mental status and risk to reoffend sexually. To the extent the challenged evidence constituted hearsay, it was basis hearsay necessary to explain to the jury what Dr. Gottfried considered and how she reached her opinions. Without that evidence, the jury would not have the "full picture" of Petitioner's sexual deviance, and its fact finding responsibility would have been stymied. Therefore, Judge McFaddin did not abuse his discretion in admitting the evidence, and the court of appeals properly affirmed his ruling.

CONCLUSION

Based on the foregoing, the State respectfully submits the court of appeals correctly found Judge McFaddin did not abuse his discretion in allowing the evidence of Petitioner's criminal offenses, and the Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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