STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Chesterfield County
Michael S. Holt, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF WILEY L. CHAPMAN,

APPELLANT.

Opinion No. 2024-UP-390 (S.C. Ct. App. Filed November 27, 2024)

APPELLATE CASE NO. 2025-000402

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 30, 2025. App. 9.

QUESTION PRESENTED

In this sexually violent predator case, did the Court of Appeals err in holding that cross-examination of an Attorney General's hired expert about outpatient sex offender treatment she provided was not relevant?

STATEMENT OF THE CASE

The Attorney General instituted commitment proceedings against appellant Wiley Chapman under the Sexually Violent Predator ("SVP") Act and on June 6, 2022, appellant was tried in Chesterfield County before the Honorable Michael S. Holt and a jury. R. 1. Suzanne J. Shaw represented the Attorney General. R. 1. James K. Falk represented appellant. R. 1. The jury found appellant was an SVP and Judge Holt ordered him committed. R. 409, l. 12 – 410, l. 10.

Without oral argument, a panel of the Court of Appeals consisting of Judges Konduros, Geathers, and Turner issued an unpublished Opinion affirming appellant's commitment. App. 1. The court denied rehearing and this petition for certiorari follows.

ARGUMENT

The Court of Appeals erred in holding that cross-examination of an Attorney General's hired expert about outpatient sex offender treatment she provided was not relevant.

Introduction

A defendant in a sexually violent predator case has the right to present evidence bearing on his likelihood to reoffend. Part of the definition of a sexually violent predator is someone who is "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(b). See also Matter of Snow, 425 S.C. 544, 549, 823 S.E.2d 467, 470 (2019) ("First, Snow argues the State's evidence was insufficient to prove the third element of the Act—the requirement that Snow's OSPD diagnosis makes him 'likely to engage in acts of sexual violence' unless committed.").

The availability and quality of outpatient sex offender treatment is generally relevant to the third element and specifically important in this case because the competing experts and the Attorney General agreed the third element was the determining factor for the jury. R. 67, l. 7 – 11 (Attorney General, in opening: "that third element, likely to reoffend, is where you really need to focus your attention"). With a motion in limine, the Attorney General prevented Chapman from questioning the hired expert about the outpatient treatment her organization offered. R. 12, l. 21 – 13, l. 7. The Attorney General even opposed petitioner's attempt to proffer his questioning of the hired expert. R. 168, l. 2 – 8. The jury heard the Attorney General's vicious and effective attack on Chapman's plan to reoffend, but never heard about the details of the treatment the hired expert provided. R. 332, l. 17 – 338, l. 9. This Court should grant certiorari to correct this error and make it clear that SVP defendants can present a complete defense to the third element.

The Competing Experts

Chapman's jury heard competing expert witnesses. The Department of Mental Health ("DMH") evaluator opined that appellant did not meet the definition of an SVP. R. 300, l. 22 – 25. Dr. Christopher Gillen ("Gillen") found that appellant had the required convictions and suffered from a personality disorder. R. 284, l. 2 – 286, l. 15. Dr. Gillen found appellant would meet the criteria for antisocial personality disorder except that no evidence of conduct disorder existed before age 15. R. 302, l. 17 – 303, l. 19. Dr. Gillen and the Attorney General's hired expert agreed that appellant had "other specified personality disorder with antisocial traits." R. 125, l. 13 – 22. R. 284, l. 2 – 8.

But Dr. Gillen concluded that this personality disorder did not qualify appellant for commitment because of his low risk to reoffend. R. 300, l. 14 – 21. He explained that while personality disorders are chronic and do not go away, they lessen in severity after a person reaches age forty. R. 295, l. 11 – 298, l. 12.

Appellant was fifty-six years old at the time of his trial. R. 360, l. 8 – 9. Dr. Gillen found that appellant's personality disorder had lessened and that it was no longer "severely impacting his emotional or volitional choices that he's making." R. 297, l. 22 – 298, l. 12. "He's making choices to not commit sexual offenses or sexually problematic behavior and he's been doing that now for over 30 years." R. 297, l. 22 – 298, l. 12. Appellant's impulsive behavior had decreased in the last twelve years. R. 297, l. 22 – 298, l. 12. Dr. Gillen said, "And so, again, this is all evidence that speaks against someone's personality disorder being a qualifying predisposing condition for civil commitment in an SVP case." R. 297, l. 22 – 298, l. 12.

The Attorney General hired Dr. Emily Gottfried ("Gottfried") after DMH determined appellant was not an SVP. R. 84, l. 4 – 17. Dr. Gottfried was the director of the sexual

behaviors clinic and lab at MUSC. R. 76, l. 16 – 18. Her clinic performs "evaluations of individuals who are either convicted of sexual offenses or been charged with sexual offenses. We provide treatment as well. So it's assessment, evaluation, and treatment." R. 76, l. 19 – 77, l. 3. She acknowledged that MUSC is compensated for its evaluations and "routinely" performs them for the Attorney General, but denied that her salary was affected by her recommendation or that she had any incentive to find that people met the SVP definition. R. 81, l. 5 – 23.

Dr. Gottfried found an additional personality disorder than Dr. Gillen—paraphilic coercive disorder. R. 134, l. 9 – 21. She described it as "sexual arousal to coercion." R. 134, l. 9 – 21. "So that's like sexualized power over another person. Not just a means to an end to have sex with somebody who doesn't want to have sex with you, it's the actual arousal to the acts of having that power over someone, that arousal to raping someone." R. 134, l. 17 – 21. Appellant's convictions involved raping the twenty-year-old sister of one of his cousin's girlfriends when he was also twenty years old; raping a fifteen-year-old girl that appellant said he was dating (appellant was 21); and raping a woman in her sixties during an attempted burglary (appellant was 25). R. 97, l. 4 – 98, l. 12. R. 100, l. 6 – 102, l. 5. R. 105, l. 21 – 108, l. 6.

Dr. Gillen disagreed with Dr. Gottfried's diagnosis of paraphilic coercive disorder. R. 286, l. 16 – 17. He explained that paraphilic coercive disorder was "explicitly excluded" from the DSM-5. R. 287, l. 1 – 288, l. 17. The authors of the DSM-5 "were concerned that such a diagnosis would pathologize, or a better way to put that is, **make a mental illness of what is truly criminal behavior**, the rapes. So they deliberately excluded that." R. 287, l. 19 – 25 (emphasis added).

Dr. Gillen had made the coercive diagnosis in the past and did not agree that no such paraphilia existed, but he acknowledged the controversy around the diagnosis. R. 288, l. 9 – 17.

He thought the controversy made it important to be "100 percent certain" about such a diagnosis and that the sexual offense was not "due to something else." R. 288, l. 9 – 17. He opined that appellant's rapes were not paraphilic. R. 288, l. 18 – 20. He said appellant was callous and, "Quite frankly, it sounds like he wanted what he wanted and he didn't care how he got it." R. 289, l. 21 – 290, l. 10. Appellant did not have "a specific deviant interest in rape." R. 290, l. 6 – 10. Appellant had no "rape kit," which Dr. Gillen explained were preparatory materials such as ropes and knives and is an indication of paraphilic motivation. R. 290, l. 11 – 17. Most of appellant's criminal behavior was nonsexual in nature. R. 290, l. 18 – 22. Dr. Gillen also found important that if the victims had consented, appellant would have been "content to go along with the consensual sex" and that he was not "aroused particularly by the fact that they were non-consenting." R. 291, l. 1 – 10. Appellant had a "very high sexual preoccupation." R. 291, l. 1 – 10.

The Attorney General's Motion in Limine

Before the trial began, the Attorney General moved in limine to prohibit appellant from asking questions about sex offender treatment. R. 7, l. 12 – 13, l. 13. She argued that the type of treatment was "really not a question the jury needs to be considering" and that hearing about treatment would confuse them. R. 7, l. 12 – 13, l. 13. Appellant argued that the question was whether he needed to be confined for treatment in a secure facility or whether he could receive outpatient treatment. R. 7, l. 12 – 13, l. 13. Defense counsel linked the question of outpatient treatment to the likelihood of reoffending and the definition of an SVP in the statute. R. 12, l. 1 – 4. He directly referenced the statute, stating, "Likely to reoffend if not confined for long term treatment—control, custody, and care, whatever the three words are they use. I mean it's in the, it's in the statute." R. 12, l. 1 – 4.

The Attorney General argued that treatment is not a part of the commitment evaluation. R. 7, l. 12 – 13, l. 13. "It's not what kind of treatment does he need, where should it be. It's not that. It's either he's got it or he doesn't." R. 12, l. 16 – 20. The judge agreed it would confuse the jury and granted the Attorney General's motion. R. 12, l. 21 – 13, l. 7. Defense counsel indicated he would like to proffer Dr. Gottfried's testimony at the proper time. R. 13, l. 8 – 14.

Dr. Gottfried Opens the Door and Chapman's Proffer of Gottfried's Extensive Outpatient Treatment Program

During the Attorney General's preliminary questioning seeking to qualify Dr. Gottfried as an expert, she asked her to explain her job duties. R. 76, l. 19 – 21. Dr. Gottfried first listed her administrative duties, then evaluations, and then said, "We provide treatment as well. So it's assessment, evaluation, and treatment." R. 76, l. 22 – 77, l. 3. Dr. Gottfried said she was on the board of directors for the Association for the Treatment of Sexual Abusers. R. 79, l. 7 – 14. When asked by the Attorney General to describe "the scope and nature" of the evaluations she conducts, Dr. Gottfried mentioned a contract with the federal government to perform "their treatment assessments to determine their level of risk and then identify really solid treatment targets that they're—need to work on to be successful in the community." R. 83, l. 3 – 16. Critically for this appeal, Dr. Gottfried then said "MUSC established an intensive outpatient treatment program for individuals who sexually harm. So we do extensive, comprehensive treatments with those individuals as well." R. 83, l. 17 – 22.

After the Attorney General concluded her direct examination, the court sent the jury out for a break. R. 164, l. 1 – 3. Defense counsel asked Judge Holt "to consider whether some of Dr. Gottfried's testimony opened the door to me being able to ask about treatment." R. 165, l. 9

– 11. He cited the expert's testimony about starting an intensive outpatient treatment center that was quoted above. R. 165, l. 9 – 166, l. 3.

The Attorney General vehemently opposed any questions about outpatient treatment and denied she had opened the door. R. 166, l. 4 – 167, l. 14. Defense counsel pointed out that when Dr. Gottfried gave her ultimate opinion shortly before direct-examination ended, she testified, "It is my opinion that he needs treatment to manage this arousal especially in light of his personality disorder." R. 167, l. 2 – 6; R. 162, l. 20 – 163, l. 1. Judge Holt ruled the door had not been opened and that "we're gonna go far afield if we go down that road." R. 167, l. 20 – 168, l. 1.

The Attorney General even opposed a proffer when defense counsel stated he needed to preserve the issue for appeal. R. 168, l. 2 – 8. The Attorney General responded to his request for a proffer saying, "No, Your Honor. I would not, I would not even consent to hear the proffer. Your Honor has ruled that we're not going to be discussing treatment or type, and that that is the Court's ruling and I don't think it is appropriate." R. 168, l. 4 – 8. Judge Holt properly allowed defense counsel to proffer his questions over the Attorney General's objection. R. 186, l. 18 – 23.

During the proffer, Dr. Gottfried agreed that MUSC had begun "an intensive outpatient treatment program." R. 187, l. 18 – 21. A patient comes to MUSC for two days and has a full day of treatment. R. 187, l. 22 – 189, l. 7. The program then changed to group and individual treatment over ten weeks. R. 187, l. 22 – 189, l. 7. The treatment included talk therapy, biofeedback, behavioral techniques, and cognitive therapy. R. 187, l. 22 – 189, l. 7. She thought the program was successful and that it seemed "like it's going well." R. 187, l. 22 – 189, l. 7. Patients voluntarily participated in the program and were not necessarily under a court order. R. 187, l. 22 – 189, l. 7.

The Attorney General's Attack on Chapman's Plan to Avoid Reoffending

During the cross-examination of the DMH expert, Dr. Gillen, the Attorney General grilled him about the viability of appellant's plan to not reoffend if he were released. R. 332, l. 17 – 338, l. 9. She asked if appellant's plan to live with his brother was viable because his brother did not believe appellant committed any crimes. R. 332, l. 17 – 338, l. 9. Dr. Gillen acknowledged that "several concerns" existed with Chapman's release plans. R. 333, l. 3 – 11.

The Attorney General asked if a treatment program run by a sheriff that appellant said he would enter existed and Dr. Gillen confirmed it did not. R. 332, l. 17 – 338, l. 9. She asked Dr. Gillen if he had spoken to the probation department and confirmed that other than registering as a sex offender, appellant would "have absolutely no restraints." R. 332, l. 17 – 338, l. 9. She questioned Dr. Gillen about whether appellant could actually live at the address he gave SCDC as his discharge address and Dr. Gillen confirmed that when he tried to contact the person Chapman gave as his sister, the person who answered the phone denied knowing Chapman. R. 335, l. 5 – 336, l. 16. Dr. Gillen was unsure whether the information he had was an error. R. 335, l. 5 – 336, l. 16.

The Attorney General then asked:

> So, let's move on—so we have an outpatient treatment program for release that doesn't exist. We have a brother who does not believe he even committed these offenses and will not hold him accountable. We have another alleged sister who won't even admit she's related to him. Do you think these are supportive and appropriate community supports?

R. 336, l. 18 – 24. After Dr. Gillen's answer acknowledging problems with appellant's release plans, the Attorney General asked, "And those are risk factors for re-offense, correct?" R. 337, l. 16.

The Court of Appeals Found No Error

The Court of Appeals issued an unpublished decision without the benefit of oral argument. The Court wrote, "We hold the trial court did not abuse its discretion in prohibiting Chapman from cross-examining the expert about the outpatient treatment she provided through her clinic because the testimony was not relevant and the State did not open the door." App. 2. For the relevancy ruling, the Court cited a case with a parenthetical about the standard of review. App. 2. On whether the door had been opened, the Court reasoned that Dr. Gottfried "did not place a fact in issue" because she "did not discuss the efficacy of the treatment." App. 2. The Court also ruled that the "details within the proffered testimony were redundant to the testimony already before the jury," which was only that Dr. Gottfried's clinic had an outpatient treatment component. App. 2.

Discussion

Information about the outpatient treatment program Dr. Gottfried ran was relevant to whether Chapman was likely to reoffend and also bore on the expert's credibility on whether Chapman needed to be confined. "Relevant evidence is that evidence having any tendency to make the existence of any fact of consequence to the ultimate determination of the action more or less probable than it would otherwise be without the evidence." Matter of Campbell, 427 S.C. 183, 191-92, 830 S.E.2d 14, 19 (2019). "[A]nything having a legitimate tendency to throw light on the accuracy truthfulness and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." Id. (internal quotations omitted). See also Rule 401, SCRE.

The availability of outpatient treatment for sex offenders makes it less likely that a defendant in an SVP case will reoffend unless confined for treatment. See S.C. Code Ann. § 44-48-30(1)(b). The program was "intensive." R. 187, l. 18 – 21. Initially the program lasted five weeks with the patient coming to MUSC for two days and to another doctor's office for two days. R. 188, l. 2 – 4. The program was changed to twice a week for ten weeks. R. 188, l. 5 – 8. The patients had group and individual sessions. R. 188, l. 5 – 8. Paraphilic arousal was treated with aversion therapy, biofeedback, behavioral techniques and cognitive therapy. R. 188, l. 9 – 20. These details would show the kinds of therapy offered without Chapman being confined. The fact that the Attorney General's hired expert conducted and believed in this kind of outpatient therapy makes it less likely that someone would need to be confined for treatment.

The details about the therapy also bore on the jury's duty to evaluate these battling experts. The outpatient treatment that Dr. Gottfried conducted made Dr. Gillen's opinion that Chapman did not need to be confined more credible. Dr. Gottfried expressed her belief during the proffer that outpatient treatment works. R. 188, l. 21 – 189, l. 7. She said it was voluntary. R. 188, l. 21 – 189, l. 7. Successful, voluntary outpatient treatment would presumably not be provided free of charge. The jury hearing these details would show that Dr. Gottfried was more likely to recommend commitment or outpatient treatment depending on who was paying her.

The sex offender statute in Washington recognizes that outpatient treatment is relevant to the jury's determination. See Wash. Rev. Code Ann. § 71.09.060. The Washington statute says, "In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." Id. "This means a fact finder

may consider evidence that voluntary treatment on unconditional release is appropriate. Because this goes to whether the definition of SVP is met, the individual may bring this evidence in defense of commitment." In re Det. of Thorell, 72 P.3d 708, 723 (Wash. 2003). See also People v. Ghilotti, 44 P.3d 949, 975-76 (Cal. 2002) (holding that evidence of a defendant's amenability to voluntary treatment is relevant to a person's risk of reoffending).

Another case from Washington shows both that Chapman's evidence was relevant and that the Attorney General's expert opened the door. See In re Det. of Post, 187 P.3d 803 (Wash. Ct. App. 2008). The defendant in Post introduced evidence of "his proposed voluntary community treatment program." Id., 187 P.3d at 744-45. By putting his voluntary treatment proposal before the jury, the State "should have been allowed to attempt to discredit the efficacy of the proposed program and the true level of Post's commitment to successful completion thereof." Id. The State in Post introduced evidence related to his performance in treatment programs while in custody. Id. While not normally relevant, Post opened the door for the State to introduce this evidence to attack the viability of his release plan. Id. Dr. Gottfried mentioned her outpatient treatment program on direct-examination and this opened the door for Chapman's proper cross-examination.

While this Court has not addressed this issue directly, a review of its Opinions in SVP cases shows that evidence about a defendant's plan to avoid reoffending—including outpatient treatment—has been admitted. See In re Care and Treatment of Harvey, 355 S.C. 53, 59, 584 S.E.2d 893, 895 (2003) ("Dr. Bodtorf opined that outpatient treatment, which he could provide, would be an appropriate option for Harvey."); In re Manigo, 398 S.C. 149, n.2, 728 S.E.2d 32, n.2 (2012) (quoting evaluator's opinion that she thought defendant could have outpatient treatment); In re Luckabaugh, 351 S.C. 122, 130, 568 S.E.2d 338, 341 (2002) ("Dr. Waid

differed with Dr. Schwartz-Watts' opinion by concluding Luckabaugh could obtain outpatient treatment.").

The errors by the Court of Appeals regarding relevancy and whether the door was opened merit a grant of certiorari. SVP cases are already incredibly difficult to defend with juries hearing propensity evidence excluded in criminal trials because of its immensely prejudicial value. See State v. Cross, 427 S.C. 465, 478, 832 S.E.2d 281, 288 (2019) (holding bifurcated trial was proper remedy because of "the inherently prejudicial stigma a prior sex-related offense undoubtedly carries."). The Attorney General's hyper-aggressive posture in Chapman's case made a difficult defense even harder and further weighs in favor of a certiorari grant. With competing expert opinions, the error in this case cannot be harmless and this Court should grant Chapman's petition.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of granting Chapman a new commitment trial.

Respectfully Submitted,

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This 10th day of March, 2025.