

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

RECEIVED

Alison Renee Lee, Circuit Court Judge

JUL 23 2014

S.C. Supreme Court

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

PETITIONER

APPELLATE CASE NO. 2014-000855

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

In the Matter of the Care and Treatment of Patrick Guess,
Appellant.

Appellate Case No. 2011-203688

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Unpublished Opinion No. 2014-UP-056
Submitted December 1, 2013 – Filed February 5, 2014

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
both of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Brannon*, 379 S.C. 487, 494, 666 S.E.2d 272, 275 (Ct. App. 2008) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* ("When reviewing a denial of a directed verdict, an appellate court views evidence and all reasonable inferences in the light most favorable to the State."); S.C. Code Ann.

§ 44-48-30(1) (Supp. 2013) (defining a sexually violent predator as "a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person 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(9) (Supp. 2013) (providing the phrase "likely to engage in acts of sexual violence" means a "propensity to commit acts of sexual violence . . . of such a degree as to pose a menace to the health and safety of others").

AFFIRMED.¹

FEW, C.J., and PIEPER and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT.

Appellate Case No. 2011-203688

Unpublished Opinion No. 2014-UP-056

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court respectfully misapprehended the fact appellant was entitled to a directed verdict because the state's only witness testified that Guess had only *a twenty-five percent chance* of reoffending within five years. R. 44. A fair reading of the Sexually Violent Predator Act mandates that a person who objectively has only a twenty-five percent chance of reoffending should not remain confined indefinitely in the custody of the state.

S.C. Code §44-48-30 provides the following pertinent definitions:

(1) "Sexually violent predator" means a person who:

(a) has been convicted of a sexually violent offense; and

(b) suffers from a mental abnormality or personality disorder **that makes the person likely to engage in acts of sexual violence** if not confined in a secure facility for long-term control, care, and treatment.

The act defines “likely to engage in acts of sexual violence” to mean the person’s propensity “to commit acts of sexual violence *is of such degree* as to pose a menace to the health and safety of others.” S.C. Code Ann. § 44-48-30(9) (2002). The act also requires a determination that “an individual can only be committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility....” In re Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002). The purpose of the requirements in the sexually violent predator act is to ensure that involuntary commitment procedures under the act are *only used to control a limited sub-class of dangerous persons* and not to broadly subject any dangerous person to what may be indefinite terms. In Re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 894 (2003).

A case should be submitted to the jury when the evidence is circumstantial “if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which has guilt may be fairly and logically deduced.” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict....” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774 776 (2011) (quoting State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984)).

During the trial, defense counsel moved for directed verdict on grounds that the statistical evidence was the only objective evidence of recidivism risk and that Dr. Harrison’s testimony that Guess had a one in three or **one in four chance of re-offending** was not “likely.” R. 74-75. The judge nonetheless denied the directed verdict motion. R. 78-81.

The issue on appeal is whether the state presented any evidence that there was a **significant likelihood** Guess would reoffend. The state’s only witness was Dr. Kimberly

Harrison. Dr. Harrison opined that Mr. Guess was considered “to be in the high-risk group of the Static 99-R test because he “scored higher than about ninety percent of sex offenders in terms of his risk level” and Mr. Guess had several risk factors including that he is male, has never married or been in a long-term relationship, and had victims unrelated to him. R. 19. However, on cross examination, Dr. Harrison admitted that Guess had a relatively low statistical risk of reoffending. R. 44-46. Specifically, Dr. Harrison testified **that her Static 99-R risk assessment indicated that Mr. Guess had only a 24.7 percent chance of reoffending within five years.** R. 44.

Dr. Harrison’s statistical evidence is the only objective evidence on the record. Dr. Harrison acknowledged that her conclusion was based on other sex offenders with the same score as Guess. R. 44. She explained “if you had a group of 100 guys who all had the same score, about 25 of them went on to reoffend in five years.” R. 45. She admitted this meant that *three out of four people in the pool would not reoffend* within five years. R. 46. She admitted that **two-thirds** of sex offenders with Guess’ score do not reoffend within ten years. R. 46.

The central issue of this case is the meaning of a “significant likelihood.” Appellant Guess was entitled to directed verdict if the evidence in the case because as a matter of law a 25% chance of reoffending is not **likely**. See In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118 (2007).

Again, the only evidence directly bearing on Guess’s recidivism risk was the Static-99 test. The test showed Guess is a low risk to reoffend. Therefore, the state presented no evidence showing a “significant likelihood” that Guess would reoffend. Appellant’s submission remains that the mere opinion of an expert that appellant was a sexually violent predator that flies in the face of the only objective statistical evidence is insufficient to survive a directed verdict motion.

Again, a twenty-five percent recidivism likelihood cannot be what "significant likelihood to re-offend" means. "Significant likelihood" is normally understood to indicate an occurrence is probable or more likely than not. Twenty-five percent is not probable. Also, this interpretation would disregard the statutory language requiring propensity "of such degree" to threaten public safety.

This Court should grant rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

February 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

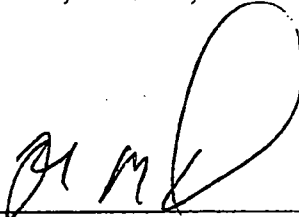
Alison Renee Lee, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT

CERTIFICATE OF SERVICE

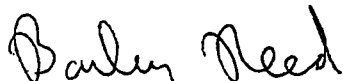
The undersigned attorney hereby certifies that a true copy of Petition for Rehearing in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of February, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021

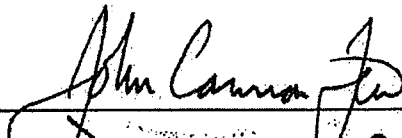
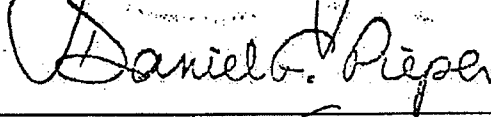
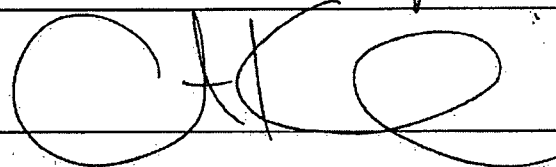
The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Patrick Guess,
Appellant.

Appellate Case No. 2011-203688

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.

J.

J.

Columbia, South Carolina

cc: Robert Michael Dudek
Deborah R.J. Shupe
The Honorable Alison Renee Lee

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MAR 21 2014

SC OFFICE OF
APPELLATE DEFENSE

FILED

March 20, 2014

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Alison Renee Lee, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT

Appellate Case No. 2011-203688

RECORD ON APPEAL

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State of South Carolina) In the Court of General Sessions
) Fifth Judicial Circuit
 County of Richland) 2011-CP-40-2334

In the Matter of the Care)
 and Treatment of Patrick)
 Guess,)
)
 Respondent.) Transcript of Record
)
 _____)

November 14, 15, 2011
 Columbia, South Carolina

B E F O R E:

The Honorable Alison Renee Lee, Judge, and a jury

A P P E A R A N C E S:

Lloyd V. Flores, Jr., Esquire, Assistant Attorney General
 Attorney for the State

David E. Belding, Esquire
 Attorney for the Defendant

Elizabeth B. Harris, CVR-M
 Circuit Court Reporter

1 sure that the bailiffs collected those from you.

2 I ask that you not take notes throughout the course of
3 the trial. I find that when people are taking notes,
4 they're busy writing down information, and they're missing
5 something that's being presented. But having said that, I
6 know that people need to take notes to help them remember
7 sometimes. And if you need to take notes to help you
8 remember information, please let me know so that I can
9 accommodate you.

10 I believe at this time, we may be ready to hear the
11 opening statements. Mr. Flores.

12 MR. FLORES: Thank you, Your Honor. May it please the
13 court?

14 THE COURT: Yes, sir.

15 MR. FLORES: Mr. Belding, Mr. Guess.

16 Good afternoon, ladies and gentlemen. My name Lloyd
17 Flores. I was shortly -- I was introduced to you a short
18 time ago. I am employed by the Office of the Attorney
19 General, and I am here today on behalf of the state.

20 Today's case is about the protection of the citizens
21 of Richland County. This is a case brought under the
22 Sexually Violent Predator Act. Now, before I talk about
23 this case in detail, I do want to give this disclaimer.
24 These cases by their very nature contain very disturbing
25 facts. If it were possible to have you not hear these

1 facts, I would do so. Unfortunately, we must have this
2 question answered, and that is a question of fact for you
3 to answer for us.

4 What is the Sexually Violent Act? About thirteen
5 years ago, our legislature, legislature, our legislators
6 met here in Columbia and said there exists within our
7 population in South Carolina a group of extremely dangerous
8 individuals who suffer from mental abnormalities or
9 personality disorders that make them more likely to conduct
10 acts of sexual violence. These people, the legislature
11 stated, should be confined for long-term control, care, and
12 treatment so that they can attempt to correct those
13 abnormalities or personality disorders and return to
14 society.

15 The state would contend that Mr. Guess is a sexually
16 violent predator. The legislature defined that term as
17 meaning a combination of two things. First, an individual
18 must have been convicted of committing a sexually violent
19 offense, and these offenses are specifically delineated
20 within that statute.

21 The second requirement to be found a sexually violent
22 predator is that that person must suffer from some mental
23 abnormality or personality disorder that makes them more
24 likely to commit acts of sexual violence if not confined to
25 a facility for long-term control, care, and treatment.

1 Now, I've spoken to you about the law just now, and I
2 wish to disclaim this. I am but a lawyer. Lawyers
3 sometimes misspeak about what the law is, what those
4 definitions are. And so if I have said anything today
5 during this opening statement or later during my closing
6 argument in which the law is different from what I say, the
7 judge will tell you what that law is. You should give
8 every -- 100 percent of what she says credence over what I
9 said. That's my belief and my knowledge of what that act
10 says.

11 So, how do we get here today? Two requirements. Has
12 Mr. Guess been convicted of a sexually violent offense? We
13 submit that he has. In the year 2002, he was convicted of
14 criminal sexual conduct with a minor in the second degree.
15 You will learn the details about that offense involving a
16 teenager in which Mr. Guess sexually assaulted her behind
17 an abandoned house. You will also hear details of other
18 sexual offenses that Mr. Guess has committed.

19 The second requirement, as I stated, is that he must
20 have a mental abnormality or personality disorder. That's
21 the first part. The court has appointed an evaluator in
22 this case, Dr. Kimberly Harrison, who will testify today
23 that Mr. Guess, in fact, has two, or one of each. He
24 suffers from a mental abnormality which is called
25 paraphilia not otherwise specified, and he suffers from a

1 personality disorder called antisocial personality
2 disorder.

3 You will hear testimony today. You will hear what she
4 did in her evaluation and the information she relied upon
5 in rendering her opinion in this matter. And you will get
6 to decide whether or not Mr. Guess does suffer from that
7 mental abnormality and personality disorder, and that those
8 make him more likely to commit acts of sexual violence.

9 The state would like to thank you on behalf of my
10 employer, the attorney general, for taking your
11 responsibility as citizens of this state and this country
12 and being here for jury service. As I said before, this
13 case is not your typical contract dispute that you might
14 see a common pleas court. The details are not very
15 pleasant. But we thank you for taking that responsibility
16 and sitting in that box to answer these difficult questions
17 of law -- or of fact.

18 We would ask this as well. Throughout the course of
19 this trial, don't listen to just what we put up, but any
20 evidence, any evidence from wherever it comes from. We
21 believe in the end that you will find Mr. Guess is a
22 sexually violent predator. Thank you.

23 THE COURT: Mr. Belding.

24 MR. BELDING: Thank you, Your Honor. May it please
25 the court?

1 THE COURT: Yes, sir.

2 MR. BELDING: Good afternoon. My name is David
3 Belding. I'm a lawyer from here in Columbia, and I've been
4 appointed to represent Mr. Patrick Guess, who sits before
5 you in this trial. I think Mr. Flores did a good job of
6 laying out what happens in a sexually violent predator
7 trial. The statute is something you'll be instructed on by
8 the judge. And you will hear the history of Mr. Guess, and
9 also you will hear the opinion of whether or not a
10 psychologist thinks that he fits under this statute.

11 My position is very simple. When we get to the end,
12 I'm going to remind you about this again. The statute has
13 specific requirements. Okay, and one thing that Mr. Flores
14 didn't bring up -- usually he does -- is that this is an
15 unusual type of civil trial. Normally in civil trials, the
16 jury weighs what we call a preponderance of the evidence so
17 that if someone's 51/49, that's who wins, plaintiff or
18 defendant. But in criminal trials, the jury has to find
19 beyond a reasonable doubt. I know you've heard that
20 before, and that's a much higher standard.

21 You must find beyond a reasonable doubt, and Judge Lee
22 will instruct you on what that means. You must find beyond
23 a reasonable doubt that Mr. Guess is a sexually violent
24 predator.

25 Now, the thing that Mr. Flores did talk about is the

1 statute. The statute has been in place since the late
2 '90s. It has been upheld by the U.S. Supreme Court. It is
3 a very unusual piece of legislation. We don't have
4 anything like this in any other area of criminal law.

5 When murders finish their sentence, they go home;
6 they've paid their debt to society. Kidnappers, bank
7 robbers, drug dealers, when you serve your time, you go
8 home. This is the only type of case where this occurs
9 where they want to know: do we need to treat this person
10 before we can send him home?

11 And the thing that's critical here are the two issues
12 that we're going to focus on, and I'm going to remind you
13 about that at the end. One is, again, you have to find
14 beyond a reasonable doubt that he is a sexually violent
15 predator. And also the statute requires that you find not
16 only that he suffers from a mental abnormality or
17 personality disorder, but that those make it likely that he
18 will commit future acts of sexual violence.

19 Now, we're going to be talking about what likely
20 means. This word is in the statute for a reason. Our
21 General Assembly put that word in the statute, and it is
22 going to be for you to today, today determine. Not Mr.
23 Flores, not Ms. Harrison, not me. It's going to be up to
24 you to determine what likely means in the case of Patrick
25 Guess.

1 And when we get done, I'm going to be asking you that
2 when his sentence is up shortly, right after the first of
3 the year, that he be sent back home. He's paid his debt to
4 society.

5 Thank you for you attention. I do thank you for doing
6 your civil duty. We should be done by some time tomorrow
7 morning. Hope you enjoy it.

8 THE COURT: You may call your first witness.

9 MR. FLORES: Thank you, Your Honor. The state would
10 call Dr. Kimberly Harrison.

11 KIMBERLY HARRISON, BEING DULY
12 SWORN, TESTIFIES AS FOLLOWS:

13 CLERK OF COURT: Have a seat in the witness stand,
14 please; state your name for the record.

15 WITNESS: Kimberly Harrison, H-a-r-r-i-s-o-n.

16 VOIR DIRE EXAMINATION BY MR. FLORES:

17 Q. Good afternoon, Dr. Harrison.

18 A. Good afternoon.

19 Q. Dr. Harrison, how are you currently employed?

20 A. I'm employed as a chief psychologist with Department
21 of Mental Health's Forensic Evaluation Service.

22 Q. And what professional degrees do you possess?

23 A. I have it bachelor's and a master's degree in
24 psychology and a Ph.D. in clinical psychology.

25 Q. Doctor, could you briefly describe for the jury what

K. HARRISON - *VOIR DIRE* EXAMINATION BY MR. FLORES

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1 the study of psychology is?

2 A. Psychology in general is the study of behavior,
3 thoughts, emotions, mental disorders. Within the realm of
4 clinical psychology, we focus on clinical: mental
5 disorders, how to assess them, how to treat them, how to
6 diagnose them. And then forensic psychology is the
7 application of those psychological principles to questions
8 of law. And so that's the area that I'm involved in is
9 clinical forensic psychology.

10 Q. And, Doctor, have you previously been recognized and
11 testified as an expert witness in forensic psychology in
12 the courts of law in the state?

13 A. Yes, I have.

14 Q. And approximately how many times have you been so
15 recognized?

16 A. I think close to twenty times.

17 MR. FLORES: Your Honor, at this time I would move
18 that Dr. Harrison be recognized as an expert in the field
19 of forensic psychology.

20 THE COURT: Any objection or any *voir dire*?

21 MR. BELDING: No. No *voir dire* at this time. Subject
22 to cross-examination, we have no objection.

23 THE COURT: Then I will find her qualified as a
24 forensic psychologist.

25 MR. FLORES: Thank you, Your Honor.

K. HARRISON - DIRECT EXAMINATION BY MR. FLORES

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1 DIRECT EXAMINATION BY MR. FLORES:

2 Q. Dr. Harrison, how did you become involved in this
3 case?

4 A. I was appointed by the court to conduct an evaluation
5 of Mr. Guess regarding if he meets criteria for civil
6 commitment as a sexually violent predator.

7 Q. And what type of evaluation did you conduct?

8 A. I conducted a psychological evaluation which involved
9 reviewing records pertaining to Mr. Guess and his history,
10 as well as interviewing Mr. Guess himself.

11 Q. Were you paid to conduct this evaluation?

12 A. It's part of my job duty, part of my salary.

13 Q. As part of that evaluation, did you meet -- sorry.
14 Strike that. Is the man that you met with during that
15 evaluation here in the courtroom today?

16 A. Yes. He's sitting next to his attorney.

17 MR. FLORES: And, Your Honor, we would ask that the
18 record reflect that Dr. Harrison did identify Mr. Guess.

19 THE COURT: So noted.

20 BY MR. FLORES:

21 Q. Doctor, can you describe for the jury what your
22 protocol is when conducting one of these evaluations when
23 you've been asked to do so by the court?

24 A. Sure. Once I get the court order that's directing me
25 to do the evaluation, we receive information from the

K. HARRISON - DIRECT EXAMINATION BY MR. FLORES

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1 Attorney General's Office. This usually includes the legal
2 records such as the arrest warrants, the police
3 investigative reports for the offenses that were committed,
4 prison records, any other legal type of records. And then
5 through our paralegal, I request additional records.

6 So, in Mr. Guess's case, he had been committed to the
7 Department of Juvenile Justice as a teenager. So, I
8 received records from that agency. I received school
9 records, anything that might be pertinent to his history
10 and his functioning. And then I also interviewed him and
11 conducted what's called an Actuarial Risk Assessment
12 Instrument.

13 Q. Now, the information that you just listed for the
14 jury, is that the type of information that is typically and
15 reasonably relied upon by other experts in your area?

16 A. Yes, it is.

17 Q. At the time you conducted your interview and
18 evaluation of Mr. Guess, was there any information that you
19 could not obtain?

20 A. I don't recall right now. I know there wasn't
21 anything important or critical that I felt like I was
22 missing.

23 Q. And did you consider and rely on that information you
24 just listed for the jury a moment ago, and upon your
25 interview with Mr. Guess in rendering an opinion in this

1 matter?

2 A. Yes, I did.

3 Q. Now, Doctor, why would you rely on information
4 regarding Mr. Guess's criminal history in reaching your
5 opinion?

6 A. The criminal history is important because, first of
7 all, that's one of the areas of the statute is that the
8 person has to have been convicted of a sexually violent
9 offense. It also goes towards his diagnosis, his pattern
10 of behavior, how he has behaved in the past, what kind of
11 urges he's had. So, all of that goes towards both his
12 diagnosis and his risk of committing future acts.

13 Q. Dr. Harrison, based on your interview with Mr. Guess
14 and your review of the file of information, at the time of
15 your interview, had Mr. Guess been convicted of a sexually
16 violent offense?

17 A. Yes, he had.

18 Q. And of what had he been convicted at that time?

19 A. I'm just going to refer to my report to make sure I
20 don't make an error. He was convicted of criminal sexual
21 conduct with a minor in the second degree, and that was in
22 2002.

23 MR. FLORES: If I may approach the witness, Your
24 Honor?

25 THE COURT: Yes, sir.

K. HARRISON - DIRECT EXAMINATION BY MR. FLORES

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1 BY MR. FLORES:

2 Q. Dr. Harrison, I'm going to hand you what's been marked
3 as State's Exhibit 1. Would you please review that?

4 A. Yes.

5 (A PAUSE.)

6 Q. Dr. Harrison, are you familiar with these documents?

7 A. Yes. This is the arrest warrant, the indictment, and
8 the sentencing sheet for that conviction.

9 Q. And how do you know that those are, in fact, that
10 information?

11 A. They have the certified stamp on each page by the
12 court.

13 Q. Doctor, can you tell the jury about that conviction?

14 A. Sure. The conviction happened in 2002. He went to a
15 jury trial and was convicted. What he was convicted of
16 doing was -- it took place in 2000, the year 2000 in April.
17 And basically he assaulted a fourteen year-old female
18 acquaintance. This was a girl that lived in his
19 neighborhood.

20 He, according to her statement and the investigative
21 reports, he lured her to an abandoned house in their
22 neighborhood. He kissed her, pulled down her pants and
23 underwear, and performed sexual intercourse on her.

24 MR. FLORES: Your Honor, at this time, we would move
25 State's Exhibit Number 1 into evidence.

K. HARRISON - DIRECT EXAMINATION BY MR. FLORES

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1 MR. BELDING: Without objection, Your Honor.

2 THE COURT: It will be admitted.

3 BY MR. FLORES:

4 Q. Doctor, you've testified that you relied on Mr.
5 Guess's prior criminal history in rendering your opinion in
6 this matter. Outside of that conviction that you just
7 described, did Mr. Guess have any previous sexually-related
8 offenses?

9 A. Yes. Prior to that offense, in 1996 when he was
10 fourteen years old, he sexually assaulted his four year-old
11 female cousin. After her mother found her bleeding from
12 her vagina area, she asked what happened, and he was found
13 to have penetrated her vagina with his penis.

14 At that time, he was -- he entered a plea of assault
15 and battery of a high and aggravated nature. He was
16 originally charged with criminal sexual conduct with a
17 minor in the first degree. Took a plea of high and --
18 assault and battery of a high and aggravated nature, and
19 was sent to Department of Juvenile Justice, DJJ, on an
20 indeterminate sentence.

21 Q. Now, you said that Mr. Guess was committed to the
22 Department of Juvenile Justice on indeterminate sentence.
23 What happened while he was at DJJ?

24 A. While he was at DJJ, he was, he was found to have
25 committed sexual misconduct against another boy who was

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1 also in DJJ. That was in November of 1996.

2 He was -- the records were a bit unclear, but he was
3 found to be feeling on a boy in a sexually inappropriate
4 way, and he was found guilty of the -- this is a
5 disciplinary or institution conviction of sexual
6 misconduct, and was placed in a special management unit for
7 thirty days at DJJ.

8 Q. Now, Doctor, while he was at DJJ, did Mr. Guess
9 receive any sex offender specific treatment?

10 A. Yes. He did participate in sex offender treatment at
11 DJJ.

12 Q. Do you know what that involved?

13 A. It typically involves group sessions. These would all
14 be juveniles who have been adjudicated delinquent on sex
15 offenses, and so it involves usually group therapy. There
16 may be some individual therapy as well, some educational
17 classes about appropriate sexuality. And then groups to
18 deal with their sexual urges or their other inappropriate
19 behaviors.

20 Q. Now, these, all of these offenses that you've just
21 described, did you discuss these offenses and his
22 conviction during your evaluation?

23 A. Yes, I did.

24 Q. Your interview?

25 A. I did.

1 Q. And what did he tell you about those offense?

2 A. Regarding the first offense that I talked about, the
3 one against the fourteen year-old girl in his neighborhood,
4 during my evaluation of him, he said that it was consensual
5 sex, and that she just couldn't tell her mother that she
6 had had sex with him. He also said that she believed -- or
7 he believed that she was seventeen years old at the time
8 rather than fourteen years old. Regarding the first
9 offense, he denied committing that offense to me.

10 Q. Based on your review of his records from the DJJ, did
11 he ever admit to committing that act?

12 A. Yes, he did. During his sex offender treatment at
13 DJJ, he not only admitted to offending against his four
14 year-old cousin, he admitted to having other victims as
15 well. He admitted, admitted to fantasizing about other
16 children. He admitted to having sexual fantasies of his
17 victim for several months prior to actually committing the
18 offense against her.

19 Q. All the information that you've just discussed with
20 the jury, was that, was that part of the basis of your
21 opinion in this matter?

22 A. Yes, it was. The fact that he had admitted to having
23 these fantasies, including having fantasies about his
24 cousin fighting back against him. He said, and this was in
25 DJJ treatment. He said that that was what was especially

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1 sexually arousing to him was her fighting back. And the
2 more she fought back in his fantasy, the more aroused he
3 became. And that when he actually committed the offense,
4 he did not ejaculate because she did not fight back as much
5 as he thought that she would or hoped that she would.

6 Q. Doctor, what are risk factors?

7 A. Risk factors are characteristics or situations,
8 thoughts, or feelings, or historical events that make a
9 person more likely to do something in the future. So,
10 specific to this case when we talk about risk factors,
11 we're talking about those things that are characteristic of
12 the person or their history that make them likely to commit
13 a sex offense in the future. And the more risk factors you
14 have, the more likely you're considered to commit another
15 sex offense in the future.

16 Q. Doctor, what types of risk factors does Mr. Guess
17 have?

18 A. In Mr. Guess's case, he, he has a male victim. That's
19 typically considered to be a risk factor. He has the male
20 victim in DJJ. He's also -- excuse me -- he's never been
21 married or had a long-term romantic relationship. So,
22 that's considered a risk factor.

23 He's had victims who were unrelated to him, the girl
24 in the neighborhood as well as the boy at DJJ. That's also
25 considered a risk factor, and these are all based on

1 statistics.

2 And they've looked at groups of offenders and said
3 okay, those that have, for example, male victims are more
4 likely to keep offending in the future. Those that have
5 victims who are not related to them are more likely to keep
6 offending in the future. So, that's where these risk
7 factors come from. They're all from statistical research
8 studies. So, those are some of his historical, what we
9 would consider static risk factors. Those can't be
10 changed.

11 Q. Tell us. As part of your protocol, you mentioned to
12 the jury that you performed an actuarial assessment.

13 A. Yes.

14 Q. Could you describe what that assessment was?

15 A. Sure. It's an instrument called the Static 99-R, and
16 basically what it is is it looks at some of these risk
17 factors that I just described. These are factors that have
18 been found to significantly predict who will recidivate or
19 who will commit another sex offense in the future.

20 And they -- it's kind of like when you get your car
21 insurance, and there are different rates depending on what
22 your history is basically. And you know that, for example,
23 teenage boys have some of the highest insurance rates
24 because just based on teenage boys in general as a group,
25 they tend to get in more wrecks, get more tickets, those

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1 types of things. So, being young, being male, those things
2 would be considered risk factors in the car insurance
3 world. Just like here, we have certain risk factors that
4 we know that, as a group, certain people are more likely to
5 reoffend.

6 So, that's what the Static 99-R is. It's ten factors
7 and you just, you score the people like Mr. Guess. You
8 score the individual on those factors. And then it gives
9 you a score that says this person is in this group as far
10 as risk level goes.

11 Q. And how did Mr. Guess score on this actuarial
12 instrument?

13 A. Mr. Guess was considered to be in the high-risk group.
14 It compares the individual to other people who are rated on
15 this measure. And in terms of other sex offenders, if you
16 just went and grabbed a collection of sex offenders out of,
17 out of a prison, where he would rate in relation to that.
18 And he scored higher than about 90 percent of sex offenders
19 in terms of his risk level.

20 Q. And, Doctor, was this assessment part of the basis of
21 your opinion?

22 A. Yes. This is one piece of information that I used,
23 especially when looking at the -- is the person at risk to
24 commit a future sex offense.

25 Q. Doctor, was there any other information upon which you

1 relied in rendering your opinion regarding Mr. Guess?

2 A. I believe we talked about all the -- well, the
3 Department of Corrections records. I reviewed his -- he's
4 been in prison, I guess, for the last twelve years. In
5 reviewing his behavior in prison over the time, that time,
6 he's had numerous disciplinary infractions, including
7 assaults, possession of weapons, possession of drugs while
8 in prison. And so even being in a controlled environment,
9 he continues to demonstrate these antisocial, criminal
10 behaviors.

11 Q. Doctor, based on your examination of Mr. Guess, the
12 review of these records that you've indicated, all these
13 factors we've been discussing -- the actuarial instruments,
14 instrument -- did you render an opinion to a reasonable
15 degree of psychological certainty as to whether Mr. Guess
16 has a mental abnormality or personnel disorder?

17 A. Yes, I did. I diagnosed Mr. Guess with two disorders.

18 Q. And what were those disorders?

19 A. The first disorder is called paraphilia not otherwise
20 specified. A paraphilia is a pattern of sexual arousal to
21 deviant stimuli. So, paraphilia is sort of an umbrella
22 term.

23 You may have heard of pedophilia, pedophiles. Those
24 are people who are sexually attracted to children. That's
25 one type of paraphilia. So, there are several specific

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1 paraphilias.

2 In Mr. Guess's case, it's called paraphilia not
3 otherwise specified because based on his history, his
4 convictions, he appears to be aroused to sex with
5 nonconsensual partners. So, his two convictions, as well
6 as his disclosures in treatment at DJJ that he was aroused
7 to his victim fighting back and protesting against the
8 assault, suggests that he's aroused to the nonconsensual
9 aspect of sexual assaults.

10 Q. Now this paraphilia, this condition, is it a lifelong
11 condition?

12 A. Yes. It's considered to be chronic.

13 Q. Can it be treated?

14 A. It's believed that it can be managed if an individual
15 wants to manage it, wants to change their behavior and
16 control it. That there are various techniques, therapy,
17 medication that can be used to manage the behavior.

18 Q. And, Doctor, you also diagnosed him with a personality
19 disorder. What was that?

20 A. Yes. I also diagnosed him with antisocial personality
21 disorder. Personality disorders in general are persistent
22 and inflexible patterns of behaving, thinking, interacting
23 with other people. Antisocial personality disorder --
24 excuse me -- is manifested in sort of chronically breaking
25 the law, doing things that get you in trouble, not caring

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1 about the effect of your behavior on other people. Sort of
2 a reckless disregard for the safety of other people,
3 irresponsibility, dishonesty. These are all
4 characteristics of antisocial personality disorder.

5 And based on Mr. Guess's behavior starting really in
6 childhood prior to him going to DJJ, all through DJJ, after
7 DJJ, and throughout prison, he chronically breaks the
8 rules, gets in fights, does things that puts other people's
9 safety in danger.

10 MR. FLORES: Beg the court's indulgence.

11 (A PAUSE.)

12 BY MR. FLORES:

13 Q. Doctor, at this time, do you have an opinion to a
14 reasonable degree of psychological certainty as to whether
15 Mr. Guess's paraphilia and his antisocial personality
16 disorder affect his emotional or volitional capacity so
17 that he is predisposed to commit future sexually violent
18 offenses?

19 A. Yes, that is my opinion: that both of those disorders,
20 particularly in combination, do lead to a propensity to
21 commit acts of sexual violence.

22 Q. Now, you said both in combination. Could you explain
23 that for the jury?

24 A. Sure. Oftentimes with sexual offenders, you really
25 look at two components. First of all, is there a sexually

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1 deviant component, and is there an antisocial sort of
2 willingness to break laws component?

3 You can have someone who has deviant sexual interests
4 but is able to manage: who doesn't go out and break the
5 law, who is able to find other channels for those
6 interests, or channel those interests into ways that are
7 appropriate and law abiding.

8 You also have people who are criminals who have no
9 problem breaking the law but don't have any kind of sexual
10 deviance. So, your average burglar or drug dealer or
11 whoever that chronically breaks the law might have
12 antisocial personality disorder, but they don't have any
13 interest in the sexually deviant component.

14 But when you have the two together, that's sort of a
15 dangerous combination if a person both has these sexually
16 deviant interests and is willing to break the law to have
17 their needs met.

18 Q. Doctor, do you have an opinion to a reasonable degree
19 of psychological certainty as to whether Mr. Guess has the
20 propensity to be dangerous and to commit future sexually
21 violent offenses?

22 A. Yes. That is my opinion.

23 Q. Doctor, do you have an opinion to a reasonable degree
24 of psychological certainty as to whether Mr. Guess's
25 propensity to commit sexually violent offenses is of such a

1 degree that it poses a menace to the health and safety of
2 others?

3 A. Yes. I believe it does.

4 Q. Doctor, do you have an opinion to a reasonable degree
5 of psychological certainty as to whether Mr. Guess has
6 serious difficulty controlling his behavior and his
7 propensities to be dangerous?

8 A. Yes. Based on his pattern and behaviors since before
9 being admitted to DJJ, he clearly has difficulty
10 controlling his behavior.

11 Q. Doctor, do you have an opinion to a reasonable degree
12 of psychological certainty as to whether Mr. Guess's
13 paraphilia and antisocial personality disorder make him
14 likely to engage in acts of sexual violence if he is not
15 confined in a secure facility of long-term control, care,
16 and treatment?

17 A. Yes. That is my opinion.

18 Q. Doctor, do you have an opinion to a reasonable degree
19 of psychological certainty as to whether Mr. Guess meets
20 the legal criteria to be found to be a sexually violent
21 predator at this time?

22 A. In my opinion, he does meet the criteria.

23 Q. Dr. Harrison, if the jury were to find that Mr. Guess
24 is a sexually violent predator, would he be offered
25 treatment for his paraphilia and antisocial behavior?

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1 A. Yes. They do offer treatment in the Department of
2 Mental Health.

3 Q. And could you describe? Where would he go for that
4 treatment?

5 A. He would be, he would be in DMH facility. We actually
6 have sort of two facilities right now. One of the
7 Department of -- in a Department of Corrections prison that
8 the Department of Mental Health sort of rents out space
9 for. He would most likely go there, be confined in a
10 secure facility, and be offered sex offender specific
11 therapy, as well as whatever medical treatment he needs,
12 other types of treatment.

13 MR. FLORES: Beg the court's indulgence.

14 (A PAUSE.)

15 MR. FLORES: Dr. Harrison, that's all the questions I
16 have for you at this time. Would you please answer any
17 questions that Mr. Belding may have?

18 WITNESS: Yes.

19 THE COURT: Any cross?

20 MR. BELDING: May it please the court, Your Honor?

21 THE COURT: Yes, sir.

22 CROSS-EXAMINATION BY MR. BELDING:

23 Q. Good afternoon, Dr. Harrison.

24 A. Good afternoon.

25 Q. Let me just ask. How long have you been licensed to

1 practice psychology in South Carolina?

2 A. Since July of 2009.

3 Q. Okay, a little over two years?

4 A. Correct.

5 Q. Okay. You testified that you were the chief
6 psychologist at DMH in the forensic unit. Is that right?

7 A. Right. My title is chief psychologist. There are a
8 number of chief psychologists.

9 Q. Okay. So, okay, how long, how long have you been a
10 chief psychologist?

11 A. Since I was hired. So, a little over three years ago.

12 Q. Okay. So, you've been practicing psychology since, I
13 guess, July of 2009. Is that correct?

14 A. Well, actually when I first moved here because we're
15 not technically required to be licensed to work for the
16 Department of Mental Health. So, I began working in 2008
17 and then got licensed the next year.

18 Q. Okay, and I noticed that you studied at the University
19 of North Texas in Denton. Is that correct?

20 A. That's correct.

21 Q. All right. What year did you receive your, your
22 doctoral degree?

23 A. 2007.

24 Q. 2007. Was your, was your dissertation paper about
25 Miranda, competency under Miranda? Is that right?

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1 A. Right, competency to waive Miranda rights was my
2 dissertation topic.

3 Q. Okay. Did you study under someone out there named Dr.
4 Richard Rogers?

5 A. Yes.

6 Q. Okay. Was he, in fact, your adviser?

7 A. Yes.

8 Q. Did you take classes from him?

9 A. Yes, I did.

10 Q. All right. Was he -- I mean, was he like a mentor or,
11 or how would you describe your, your faculty-student
12 relationship with Dr. Rogers?

13 A. Yes, I worked very closely with him. I was his main
14 research fellow, what we called them. I ran research
15 projects for him with other members of the research team.
16 I published several papers with him, did presentations with
17 him.

18 Q. As a matter of fact, he's a pretty well known
19 professor of psychology, isn't he, in this area?

20 A. He is, yes.

21 Q. And while you were out there, did you have occasion to
22 ever meet a Dr. Rebecca L. Jackson?

23 A. Yes.

24 Q. All right.

25 A. She was a couple of years ahead of me in the program,

1 and yes, a good friend.

2 Q. And she is now, I understand, in Florida working in a
3 sex offender treatment clinic or heading it up. But until
4 recently she was here, and I think she was a chief
5 psychologist, too, is that correct, at the DMH?

6 A. Yes. She worked here for a little over a year and
7 moved to Florida over the summer to work at the Florida sex
8 -- sexually violent predator program.

9 Q. Okay. Now, when you were assisting Dr. Rogers, how
10 many research articles did you participate in writing?

11 A. I would have to look at my CV. I'm going to say maybe
12 around eight.

13 Q. Did you participate -- and also I understand Dr.
14 Jackson, who I just mentioned, was a coauthor of this
15 article. Did you help research and write an article called
16 "Sexually Violent Predators: The Risky Enterprise of Risk
17 Assessment" that was published in 2005?

18 A. No. I was not on that one.

19 Q. Okay. Are you familiar with that article?

20 A. I'm sure I read it at some point during graduate
21 school.

22 Q. Okay. Is that -- do you read research articles on a
23 regular basis as part of your continuing ed, continuing
24 education?

25 A. Yes, I do.

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1 Q. All right. So, you don't recall ever reading that
2 article at all about the risky business of risk assessment?

3 A. I have a vague memory of it, about it points out some
4 of the weaknesses. The fact that this is a new area of
5 sort of psychological enterprise. These sexually violent
6 predator laws are new throughout the country. And yes, it
7 sort of, I think, points out some of the areas that
8 improvement is needed in.

9 Q. Okay. Now, I want to talk about your actual
10 evaluation of Mr. Guess. As I understood it when I read
11 your evaluation report -- you did read the South Carolina
12 Sexually Violent Predator Act. Is that correct?

13 A. Yes.

14 Q. Okay, and isn't it true in making your determinations,
15 you have to deal with, you have to deal with some ambiguity
16 in the statute? Isn't that true?

17 A. Absolutely.

18 Q. Okay. What are some of the ambiguous terms in the
19 statute that you, you found?

20 A. Some of the ambiguity I found? Words like likely.
21 Some states clearly define that as more likely than not,
22 for example. South Carolina defined likely as being a
23 menace to the community. So, that's, in my mind, sort of a
24 different way of thinking about what likely means. So,
25 these are -- the ambiguity is something that we struggle

1 with in doing these evaluations.

2 Q. And it isn't easy to make an accurate risk assessment,
3 is it, even with the help of risk assessment tools?

4 A. It's a complex, multifaceted decision, yes.

5 Q. Okay. Now, as you, as you recounted early, under the
6 act there are several determinations that you need to make
7 that you outlined to the jury. One is that Mr. Guess was
8 convicted in the past of a sexually violent offense,
9 correct?

10 A. Right.

11 Q. And the one you pointed to was a criminal sexual
12 conduct with a minor second degree in 2002, correct?

13 A. Correct.

14 Q. And the actual event took place eleven years ago in
15 2000?

16 A. In 2000, yes.

17 Q. Okay. Do you know why it was second degree?

18 A. That I don't know.

19 Q. Okay. Do you understand that -- I understand your
20 background is medical, not legal, but you understand that
21 first degree is considered worse than second?

22 A. Right.

23 Q. And that's worse than third and so forth?

24 A. Right.

25 Q. Okay. Did you do any investigation and find out at

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1 all why he might have been convicted of second degree?

2 A. No, I did not.

3 Q. Okay, and you understood that was after a jury trial
4 here in Richland County?

5 A. Yes.

6 Q. That was not a plea?

7 A. Right.

8 Q. Now, you also talked about the fact that when he was
9 fourteen years old -- how old is he now, Mr. Guess?

10 A. His birth date was in '81. I think he just turned
11 thirty.

12 Q. Date of birth [REDACTED] [REDACTED]. Okay, thirty years
13 old. All right, so one of the things that you, you spoke
14 to the jury about was that when he fourteen years old, more
15 than half his life ago, that he was convicted of assault
16 and battery of a high and aggravated nature, correct?

17 A. That's right.

18 Q. All right. Now, in the Sexually Violent Predator Act,
19 there are a list enumerated of offenses, crimes that are
20 considered to be sexually violent. Is that correct?

21 A. Yes, there are.

22 Q. Is assault and battery of a high and aggravated nature
23 one of those crimes?

24 A. I would have to look at my list, but I know there is
25 also a category where the -- other crimes that the judge

1 deems fall under the stature.

2 Q. Okay, and you may have been familiar with criminal
3 cases from the past where people get convicted of what we
4 call ABHAN?

5 A. Right.

6 Q. Assault and battery of a high and aggravated nature.
7 Many times, ABHAN doesn't have anything to do with sexual
8 offenses. Isn't that true?

9 A. Right.

10 Q. And you understand again the difference between
11 medical and legal. That in the court system, people can be
12 accused of just about anything. But what's important is
13 what they were actually convicted of. Isn't that true?

14 A. That's right.

15 Q. And do you, as you sit here in front of this jury
16 today, have any knowledge or explanation for why he was
17 convicted of ABHAN and not a sexually violence offense?

18 A. I don't. All I know is that he took an *Alford* plea
19 for ABHAN and was sent to DJJ and ordered into sex offender
20 treatment.

21 Q. Okay, and that is something the state consented to was
22 allowing him to plead to that, correct?

23 A. That's my understanding, yes.

24 Q. Okay, and if I understand your testimony, when you
25 talked to Mr. Guess, he actually denied committing a sex

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1 offense in that case. Isn't that correct?

2 A. With me he denied it. He had previously admitted to
3 it.

4 Q. Okay. Now, you also mentioned that after he got to
5 DJJ, he participated in the sex offender treatment program.
6 Is that correct?

7 A. Yes. He did.

8 Q. From your record review, did he successfully complete
9 that program?

10 A. It's my understanding that he did not complete it
11 because of other behavioral problems. He had -- he was
12 often suspended from treatment because he had to be placed
13 in a special housing unit for various disciplinary
14 infractions. So, it's my understanding he did not complete
15 the program.

16 Q. Okay, and when did he get out of DJJ?

17 A. I'll have to refer to my report, if you don't mind.

18 (A PAUSE.)

19 A. I'm not sure when he got out. He was out by 2000.

20 Q. Correct.

21 A. But I would have to go through my other records to
22 find out exactly when he was released from DJJ, but he was
23 still on probation when he was arrested for the next
24 offense.

25 Q. Now, so you have essentially satisfied one prong of

1 the analysis you've got to make under the state's Sexually
2 Violent Predator Act: that he was convicted of a sexually
3 violent offense. And that is on the list. Even second
4 degree criminal sexual conduct with a minor is on the list,
5 correct?

6 A. Right.

7 Q. Now, the second part is a little more problematic.
8 That's the easy part, isn't it? You have to say yes or no.

9 A. Yes.

10 Q. Okay. Next you have to make a determination that he
11 suffers from a mental abnormality or personality disorder
12 that makes the person likely to engage in acts of sexual
13 violence if not confined in a secure facility for long-term
14 control, care, and treatment?

15 A. Right.

16 Q. Correct? Now, it was your conclusion that Mr. Guess
17 had antisocial personality disorder, correct?

18 A. Yes, that was ---

19 Q. And ---

20 A. --- one of them.

21 Q. Was that based on his -- on the records that you
22 reviewed?

23 A. Right. That was primarily based on his behavior up
24 until the time that I saw him.

25 Q. Okay. When you met him, how long did you actually

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1 talk with him?

2 A. I talked to him for about two and a half hours.

3 Q. Okay, and was part of that time him taking that test
4 you talked about, the Static 99-R test?

5 A. No, it's not a test, and it's not something that he
6 fills out or anything. I just fill it out based on
7 historical information. So, the two and a half hours was
8 me interviewing him.

9 Q. All right. Okay. The records that you reviewed to
10 form these conclusions, did you talk to any of the people
11 that wrote the reports?

12 A. I do not believe so, no.

13 Q. Okay, and some of them are like the court records.
14 You would -- those speak for themselves, but you mentioned
15 that he had records from the Department of Corrections,
16 records from DJJ, records from Richland District One. Mr.
17 Guess didn't have any input into the creation of those
18 reports, did he?

19 A. Well, the reports from DJJ were based on his behavior
20 and based on his -- what he said in group. But no, he
21 didn't write any of those reports.

22 Q. I guess what my question is, if he had gotten to write
23 the reports, do you think they would have said the same
24 thing?

25 A. I'm sure they wouldn't have, no.

1 Q. Okay, and you didn't follow up to talk to anybody to
2 ascertain whether or not you got a real accurate, accurate
3 picture of what happened?

4 A. I'm not -- who would I -- I'm not sure I understand.

5 Q. Well, you read some reports, and you don't know who
6 the authors of those reports were, correct?

7 A. Well, most of them are signed or have a name on them.

8 Q. But you didn't call any of them to say, hey, is this
9 really who Mr. Guess is?

10 A. No, I did not call any of them.

11 Q. Okay. Now, you also stated that Mr. Guess had
12 repeatedly engaged in acts that are grounds for arrest both
13 inside and outside of correctional facilities?

14 A. Yes.

15 Q. Recall that, and included in that were what you said
16 were numerous disciplinary infractions while at DJJ and at
17 the Department of Corrections?

18 A. Yes.

19 Q. All right. Have you personally ever been in custody?

20 A. Have I been arrested or?

21 Q. Yeah. Even thrown in a jail cell?

22 A. I have not.

23 Q. Okay. You ever had to live around other people in a
24 jail or prison environment for any reason?

25 A. Just a college dorm.

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1 Q. Pretty bad.

2 A. But not a jail, no.

3 Q. Okay. So, you don't have any firsthand experience of
4 what the pressures and conditions of confinement might be
5 like, do you?

6 A. Not firsthand, no.

7 Q. Okay. Do you understand that there may be things that
8 go on in a prison that people like us in the outside world
9 would have no way of knowing?

10 A. Oh, sure. There -- I know there are things that go on
11 that are stressful. And it's a different environment in
12 there.

13 Q. Okay, and you made the comment earlier about -- you
14 related to teenaged drivers and insurance rates.

15 A. Right.

16 Q. Are you familiar with football?

17 A. I am not a big football follower, sorry.

18 Q. Okay. Well, I was going to ask you do you -- if you
19 had ever noticed that sometimes two guys get in a, get in a
20 fight on the football field, and the second guy is the guy
21 that gets flagged for the penalty because that's the one
22 the referee saw when he might not have started the fight.
23 Do you understand that concept?

24 A. I do.

25 Q. Okay, and my point is you don't know what it's like

1 being in prison, and what kinds of things might have been
2 done to Mr. Guess to get him to react in the way it was
3 written up in the reports.

4 A. No. I didn't go into each infraction and figure out
5 who did what to whom.

6 Q. Okay.

7 A. But I do evaluate a lot of guys who get through prison
8 without any infractions.

9 Q. Well, isn't it true that everybody in DJJ and the
10 Department of Corrections has engaged in some acts that are
11 grounds for arrest?

12 A. Well, to get them there in the first place, sure.

13 Q. Okay. Now, let me, let me go back here to this term
14 mental abnormality. Your diagnosis, if that's the correct
15 term, is a paraphilia NOS, correct?

16 A. Yes, paraphilia not otherwise specified.

17 Q. Okay. Are you familiar with something called the DSM?

18 A. Yes. That is published by the American Psychiatric
19 Association, and that's the *Diagnostic and Statistical*
20 *Manual*, 4th Edition. It lists all of the diagnoses as far
21 as mental health diagnoses and the criteria for diagnosing
22 them. It's basically our guidebook so that when we talk
23 with other mental health professionals or talk to whoever,
24 we're all using the same language, that we're all meaning
25 the same thing. So, when I say paraphilia, it means the

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1 same thing as when another psychologist or psychiatrist
2 says paraphilia.

3 Q. Okay, and I'm following up on something you said on
4 direct examination with Mr. Flores. We were talking, you
5 were talking about some fact that says these were kind of
6 new areas of psychology. Now, the DSM, and it's fourth
7 edition? Is that the new one, the one that you're --
8 DSM-IV, is that what you said?

9 A. The DSM-IV-TR, yes.

10 Q. Okay. All right. That manual is pretty much the
11 bible of the American Psychiatric Association, correct?

12 A. Correct.

13 Q. And -- but that's been -- they've been contributing to
14 that book for a long time, haven't they?

15 A. Right. I meant the sexually violent predator
16 evaluations are relatively new because the laws are
17 relatively new.

18 Q. All right. So, the diagnosis of the mental
19 abnormality was paraphilia NOS, and you said that stood for
20 not otherwise specified, correct?

21 A. That's right.

22 Q. Okay. What, in layman's terms, what does that mean,
23 not otherwise specified?

24 A. Well, within the paraphilias, as I explained, there
25 are some specific ones that are laid out like pedophilia,

1 like zoophilia, which is sexual attraction to animals.
2 Exhibitionism, which is people who enjoy exposing their
3 genitals to others. Those are specific paraphilias that
4 are laid out as specific diagnoses.

5 But then if you have -- there's a whole wealth of
6 other paraphilias that don't have specific, specific
7 diagnoses, and they are captured under the umbrella term of
8 paraphilia not otherwise specified.

9 And so the fact that he is aroused to sexual activity
10 with nonconsenting people is a specific type of paraphilia,
11 but it doesn't have its own diagnosis essentially. It
12 falls under that umbrella.

13 Q. Okay. So, things like pedophilia and exhibitionism,
14 been around long enough and studied long enough that we
15 have a specific name for it, and they put it in the DSM,
16 correct?

17 A. Right, and those are also more common ones.

18 Q. Okay, but this NOS, this paraphilia NOS, this is an
19 evolving area of psychology, isn't it?

20 A. Well, I'm not sure about that. All of the categories
21 in the DSM have a not otherwise specified category. So,
22 you can have a mood disorder not otherwise specified. You
23 can have a psychotic disorder not otherwise specified,
24 cognitive disorder not otherwise specified. So, it's not
25 just the paraphilias that have this NOS category. It's for

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1 sort of other disorders that don't meet one of the specific
2 diagnoses.

3 Q. And is that because they haven't been researched
4 enough to know how to actually codify them in that book?

5 A. I'm not sure why it's not its own diagnosis at this
6 point.

7 Q. Would you agree that the term mental abnormality is,
8 is ambiguous?

9 A. Yes.

10 Q. Would you agree that that term, mental abnormality,
11 lacks any diagnostic precision?

12 A. Right. Mental, mental abnormality is a much more
13 general term than, for example, a mental disorder. A
14 mental disorder is something that we diagnose from the
15 DSM usually, but mental abnormality could mean a lot of
16 things.

17 Q. Isn't it true that there's a lot of information now
18 from psychologists to the effect that they don't think
19 there's enough science to make sexually violent predator
20 determinations?

21 A. There is controversy among psychologists about doing
22 these types of evaluations, yes.

23 Q. Okay. Appreciate it. Now, now I want to talk about
24 the next thing in the statute. After you get your mental
25 abnormality or personality disorder, the statute says

1 that: The mental abnormality or personality disorder that
2 makes the person likely to engage in acts of sexual
3 violence. So, you already have said that likely is -- that
4 was your first example of an ambiguous word in the statute,
5 correct?

6 A. Right.

7 Q. All right. Well, I -- have you looked up the word
8 likely in the dictionary to get some idea of what it means?

9 A. I don't know if I've specifically looked it up in the
10 dictionary.

11 Q. Well, I did, and let me ask you if you think this
12 sounds reasonable.

13 A. Okay.

14 Q. *Webster's Dictionary*, I looked it up. It says the
15 word likely meant: Probable, reasonably to be expected. Is
16 that likely?

17 A. If that's what Webster says. I'm not going argue with
18 Webster.

19 Q. It's hard to argue with Webster. So, and then you
20 actually said earlier, you were talking about the Static
21 99-R, that risk assessment tool you said based on
22 statistics.

23 A. Yes.

24 Q. Correct?

25 A. Right.

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1 Q. Okay. So, likely, the word likely suggests
2 statistical probability, doesn't it?

3 A. I'm not sure that that's how all it's meant or that's
4 how it's defined in our statute.

5 Q. Well, let me go back. You said it wasn't defined at
6 all, correct?

7 A. Well, it's defined as being a menace.

8 Q. Well, now, wait a minute. Is the term likely defined
9 in the Sexually Violent Predator Act?

10 A. Can I consult my report?

11 Q. Please. Take a second.

12 (A PAUSE.)

13 A. I can read from the statute.

14 Q. Okay.

15 A. If you'd like:

16 Likely to engage in acts of sexual violence means
17 the person's propensity to commit acts of sexual
18 violence is of such a degree as to pose a menace
19 to the health and safety of others.

20 Q. Okay. Now, doesn't that suggest to you that -- and
21 again this goes back to your statistical probability you
22 testified about. Doesn't that mean, likely mean that there
23 is more than 50 percent chance that somebody will do
24 something?

25 A. That's not what our statute says.

1 Q. Well, actually -- but this is your determination.

2 A. Right.

3 Q. You said it was based on statistics. Our statute is
4 silent about the statistical part it.

5 Let me ask you. If I said if there's 100 percent
6 chance that anything could happen and you say, well, we've
7 -- I've done my research. I've done my calculation;
8 there's a 25 percent chance of this happening. Is that
9 considered more likely or less likely?

10 A. That's considered a 25 percent likelihood.

11 Q. Okay. The term likely or more likely, you don't use
12 those terms?

13 A. I guess -- what, what's the...

14 Q. Let me rephrase that. I want to make sure you
15 understand where I'm going with this.

16 A. Yes.

17 Q. If something is 51 percent likely to happen.

18 A. Right.

19 Q. Don't you say that's more likely to happen than
20 something that's 49 percent?

21 A. Sure.

22 Q. And, in fact, in this case when you performed the
23 Static 99, you concluded that Mr. Guess on average, that
24 24.7 percent of sex offenders with his score sexually
25 recidivate within five years. Isn't that correct?

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1 A. I'm just getting to that part in my report. I'm
2 sorry.

3 Q. Page 8 of your report.

4 A. Yes.

5 Q. Okay.

6 A. Yes, of people, the group of people ---

7 Q. First of all, I don't mean to interrupt. I want to
8 make sure I understand what is meant by the term
9 recidivate. What does that mean?

10 A. When I'm using the term recidivate, I'm meaning commit
11 another sexually violent offense.

12 Q. Okay. All right. So, in your report on the bottom
13 of page 8 after you had administered this Static 99-R
14 risk assessment, you scored him on ten factors you
15 testified to.

16 A. Right.

17 Q. Determined that he was in the high range.

18 A. Right.

19 Q. And then noted that: On average, 24.7 percent of
20 nonroutine sex offenders with this score sexually
21 recidivate with five years. Correct?

22 A. Right. On average of -- so, if you had a group of 100
23 guys who all had the same score, about 25 of them went on
24 to reoffend in five years.

25 Q. In five years, and what was the -- what about within

1 ten years?

2 A. Within ten years, the average is about 33 percent.

3 Q. Okay. Now, I took statistics in college. It was not
4 my favorite course. That's why I went into law. Isn't it
5 true that if you say one-fourth of people might commit a
6 future act of sexual violence, that another way of saying
7 that is three out of four don't?

8 A. Right.

9 Q. And the same way within ten years, you've got a third
10 reoffending. Two out of three don't.

11 A. Right.

12 Q. Correct, and this is from the test that you used to
13 make the risk assessment, correct?

14 A. Well, this isn't the only piece of information I use.
15 This is, this just considers the static, historical factors
16 that Mr. Guess possesses. This is one element of risk
17 assessment. We're also looking at other things that the
18 Static 99 doesn't account for. So, this is just, this is
19 one piece of information.

20 Q. I understand, but it's the only piece of information
21 you had or that you've testified to that has any kind of
22 objective result to it. Everything else is just some
23 people might interview him and come up with a different
24 conclusion. But this test you scored, and you have a
25 statistical number that goes with it, correct?

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1 A. Right.

2 Q. And this is the only one that you scored in any way
3 where you've got a statistical number attached to it,
4 correct?

5 A. Right.

6 Q. And we have the numbers that you just testified to.

7 A. Correct.

8 Q. Correct?

9 MR. BELDING: One moment, Your Honor.

10 (A PAUSE.)

11 Q. You know, I read this article, Dr. Harrison, that Dr.
12 Rogers and Dr. Rebecca Jackson wrote.

13 A. Yes.

14 Q. Risk assessment, and that was done some years ago.
15 And at that time, as I understood it, it sounded like the
16 basis, their thesis in the paper was that risk assessment
17 is in and of itself a risky enterprise. Matter of fact,
18 that was the name of the article. But you're not familiar
19 with that article, correct?

20 A. Like I said, I read it. I read a lot of articles.

21 I'm not sure exactly what that one said.

22 Q. Did -- in that paper, and I'm just going to represent
23 to you what I got out of it. Dr. Rogers said there were
24 five steps that you had to do to make an SVP, that's what
25 we call it, a sexually violent predator determination. Did

1 you go through those same five steps? Is that your same
2 *modus operandi* in these kind of cases?

3 A. I don't ---

4 Q. You want, you want me to list them so you know what
5 they are?

6 A. Yeah. I don't know what ---

7 Q. Okay.

8 A. --- what steps he lays out.

9 Q. In his article, he wrote there were:

10 Five specific factors forensic practitioners must
11 take into account in SVP consultations. One,
12 does the defendant have the requisite clinical
13 condition: e.g. mental abnormality or mental
14 disorder or personality disorder.

15 And you -- we've established that that's satisfied,
16 correct?

17 A. Right.

18 Q. He was convicted of a crime that has that. So, in two
19 now he said: Does the person have volitional impairment?

20 Did you go through an analysis like that?

21 A. I did. I looked at his ability to control his
22 behavior, and I believe I discuss that in my report.

23 Q. And specifically you talked about records from DJJ and
24 records from SCDC. Of course, some of those DJJ records
25 are now sixteen years old, correct?

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1 A. Right. Well, the elements of the defense -- offenses
2 were sort of the main information that I used for his
3 ability or lack of ability to control himself.

4 Q. Well, and I'm curious about that because -- maybe
5 you'd like to clarify this for me. I've always heard that
6 a lot of times rape, which is what criminal sexual conduct
7 is, that rape is often a crime of power and control, not
8 necessarily sex. Do you agree with that?

9 A. It depends on the situation.

10 Q. Okay. Were you able to determine accurately in this
11 situation what the motivation was for Mr. Guess?

12 A. Because he said that it was consensual, and I just had
13 the victim's statement to go on.

14 Q. Okay.

15 A. But the fact that he, he committed the rape outdoors
16 in a neighborhood to me suggested that he had difficulty
17 controlling his behavior. Same thing with the first
18 offense. He committed it in a house while other people
19 were there, which could easily have led to his detection.
20 Those are the types of things that I look at when assessing
21 whether or not a person has the ability to control his
22 behavior.

23 Q. Isn't it possible, though, Dr. Harrison, when people
24 have sexual relations in a house with other people around,
25 they're not worried about getting caught?

1 A. Well, it was with a four year old. So ---

2 Q. I understand.

3 A. She could have cried. She could have...

4 Q. Okay, and out in the park, that was the one with the
5 fourteen year old?

6 A. Yes. It was in the yard of a house, I believe.

7 Q. Right, and did Mr. Guess, did you testify that he told
8 you he thought the girl was seventeen?

9 A. Yes. That is what he told me.

10 Q. All right. Did -- have you seen the victim?

11 A. No, I have not.

12 Q. All right. Do you have any information for this court
13 about what she looked like when she was that age?

14 A. No, I don't.

15 Q. Okay. Is it possible she might have looked like she
16 was in her, in -- later on into her teen years?

17 A. I don't have any idea.

18 Q. Okay. Next factor, the third factor that Dr. Rogers
19 wrote about said: Does the volitional impairment directly
20 arise from clinical condition? Did you make that
21 connection in this case?

22 A. Did I make that connection? Well, his paraphilia,
23 just by the nature of it, he has the propensity to commit
24 future acts of nonconsenting sexual activity.

25 Q. So, volitional impairment, and if I understand those

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1 terms, that means I can't control my behavior. Isn't that
2 what that means?

3 A. Well, it doesn't mean total lack of control, but it
4 means serious difficulty controlling one's behavior.

5 Q. Because volition is free will, correct?

6 A. Right.

7 Q. And impairment means I can't control it. Volition,
8 doesn't volitional impairment mean for some reason,
9 sometimes I can't control my behavior?

10 A. It means having difficulty controlling one's behavior.

11 Q. Okay, and is it your testimony that that comes
12 directly from the two conditions that you talk about?

13 A. Right. By, by the nature of those conditions, he has
14 difficulty controlling his behavior.

15 Q. I have something I want to read to you out of the DSM
16 since you brought it up. I'm just going to quote.

17 MR. FLORES: Your Honor.

18 Q. And this comes out of Dr. Roger's article.

19 MR. FLORES: If I might just see where Mr. Belding is
20 at in the DSM?

21 (COUNSELORS CONFER.)

22 THE COURT: I'll tell you what, Mr. Belding. Let's
23 take a brief break.

24 MR. BELDING: Okay.

25 THE COURT: Ladies and gentlemen, let's take a brief

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1 break. I'm going to remind you of the instructions I've
2 given to you. That is not to begin to discuss this matter
3 among yourselves as you still have not heard all the
4 evidence that is to be presented. Let's take a brief
5 afternoon break, and we'll come back and continue on. You
6 may follow them; go to the jury room.

7 (THE JURY EXITS AT 4:13 P.M.)

8 THE COURT: Dr. Harrison, I just ask you during this
9 break that you should not discuss your testimony with
10 anyone. Since you've not concluded it, it would not be
11 appropriate to discuss it, but you may step down and take a
12 break.

13 WITNESS: Thank you.

14 THE COURT: And let's take a break, and then we will
15 come back and continue.

16 MR. FLORES: Thank you.

17 MR. BELDING: Thank you, Your Honor.

18 (OFF THE RECORD.)

19 THE COURT: Is there anything we need to take up
20 before we bring the jury back in?

21 MR. BELDING: Nothing for the respondent, Your Honor.

22 MR. FLORES: Nothing from the state, Your Honor.

23 THE COURT: Mr. Hollis, you can let the jury in,
24 please.

25 BAILIFF: Be glad to, Your Honor.

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1 (THE JURY ENTERS AT 4:34 P.M.)

2 THE COURT: We just had some technical difficulties.

3 I think she went to get some towels.

4 MR. BELDING: Please the court? Continue?

5 THE COURT: Yes, sir. You may continue.

6 MR. BELDING: Appreciate it.

7 BY MR. BELDING:

8 Q. All right, Dr. Harrison, I see we're nearing the end.

9 Let me ask you. In your report, you also discussed some of
10 Mr. Guess's substance abuse history, correct?

11 A. Right. That was part of ---

12 Q. Okay.

13 A. --- the historical background.

14 Q. Now, as I understand from reading some of the
15 materials in the DSM and other places about some of these
16 mental abnormalities and personality defects, aren't some
17 of these caused by substance abuse? I mean, aren't a lot
18 of what you might call deviant sexual behaviors caused by
19 drug abuse?

20 A. No. I'm not, I'm not sure I understand the question.

21 Q. Well, can't some things happen when you are under
22 either alcohol or drugs, the influence of alcohol or drugs?

23 A. Well, sure. Those substances lower people's
24 inhibitions. They do things they might not do when they
25 were sober. But to get a diagnosis of paraphilia, the

1 pattern of behavior and there's no reference to substance
2 use or...

3 Q. Were you able to find out if he had always been under
4 the influences of substances when these events occurred?

5 A. If I could just refer to my report.

6 (A PAUSE.)

7 A. The only, the only substance that he has said or
8 records have indicated that he used was marijuana.

9 Q. Okay.

10 A. Which is not normally associated with paraphilic
11 behavior.

12 Q. All right. Now, if -- you're an employee at DMH and
13 testified under questioning from Mr. Flores that there was
14 a program that DMH runs for people in the sexually violent
15 predator program, correct? There were two locations?

16 A. Yes. One, the main location is out at the Broad River
17 Correctional Facility, and then we have other units at the
18 G.O. Care building on the Crafts-Farrow campus.

19 Q. Okay. Are you familiar with those treatment programs?

20 A. I am not involved in the treatment program at all.

21 Q. You don't know anything about it?

22 A. I know enough about it because I work at DMH, but --
23 and I do evaluations for the SVPs' annual reviews. But as
24 far as actually the details of the specific treatment
25 programs that they have, no.

K. HARRISON - CROSS-EXAMINATION BY MR. BELDING

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1 Q. Well, let me just ask you if you've heard. Do you
2 understand that the program that they have in place out
3 there is considered a thirty-six month program?

4 A. It's based on a program that was devised as a
5 short-term treatment program, yes.

6 Q. Okay. So, and isn't it true that the statute allows
7 anyone who is sent to that program to petition annually for
8 reviews? Isn't that correct?

9 A. Right. Everybody gets reviewed on an annual basis,
10 and then they can have a hearing if they, if they want.

11 Q. But no one's ever been released from that program
12 before they completed the program. Isn't that true?

13 A. That, I don't know.

14 Q. Okay. Would you find it hard to believe that one of
15 the reasons people get turned down for being released is
16 that they hadn't completed the program?

17 A. Right. In the past, that's, that's been commonly
18 stated.

19 Q. Okay, and you're, so you're here and the Sexually
20 Violent Predator Act talks about, you know, intensive
21 treatment. How often do people get treated, say, on a
22 weekly basis out there?

23 A. My understanding is that their sex offender specific
24 groups meet, I don't know if it's once or twice a week.

25 Q. What I've been told is once a week. Do you have any

1 reason to dispute that?

2 A. It might be twice a week. They're attempting to hire
3 more treatment providers, but again I'm not on that side
4 of things. So, I really don't know, but once or twice a
5 week.

6 Q. So, the state is asking Mr. Guess be sent to this
7 secure facility for intensive treatment for his problem,
8 and it's so intensive that they get to him one day a
9 week?

10 A. Well, it's care, control, and treatment. Treatment is
11 one part of it.

12 Q. Care and control?

13 A. Right.

14 Q. He's already had care and control; he's been in prison
15 ever since he was convicted of this offense. Isn't that
16 true?

17 A. That's my understanding, yes.

18 Q. Okay. Did he receive any sex offender treatment while
19 he was in the Department of Corrections?

20 A. The records do not indicate that he did, no.

21 Q. So, really this is just care and control. This is
22 just a way of keeping him off the streets, isn't it?

23 A. I don't -- I didn't write the law.

24 Q. Okay.

25 A. And they do offer treatment at DMH.

K. HARRISON - CROSS-EXAMINATION BY MR. BELDING

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1 Q. One day a week?

2 A. That's my understanding of how it is now.

3 Q. Okay. Bottom line is -- and this is certainly not
4 your fault, and I hope you don't feel I've picked at you
5 too much, but we all have our role to play here. As you
6 sit here under, under oath, and you've testified that the
7 one objective test you administered, the Static 99-R, that
8 he scored in the high range. And that he had much less
9 than a 50 percent rate within five years or ten years of
10 committing a future act of sexual violence. Isn't that
11 correct?

12 A. Well, that's the risk group that he falls in. I did
13 not assign a percentage of risk to Mr. Guess. That's
14 impossible to do.

15 Q. It's impossible. As a matter of fact, no test can say
16 what anybody specifically is going to do in the future, can
17 it?

18 A. Right. Absolutely not.

19 Q. Okay, and for all of your training and all of your
20 research and everything, you -- isn't it difficult to
21 figure out what's going on in someone else's mind?

22 A. Sure, which is why we look at the pattern of behavior
23 and what they've demonstrated in the past.

24 Q. Okay, and the best test -- there were, there were
25 other tests you could have used. Isn't that true? I mean,

K. HARRISON - CROSS-EXAMINATION BY MR. BELDING

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1 there's a number of risk assessment tests out there. As a
2 matter of fact, there's a Static 2000-R or 2002-R, isn't
3 there?

4 A. There are. There are a number of risk assessment
5 instruments. And the, the most recent research shows that
6 the Static 99 is the one that has the best predictive
7 validity.

8 Q. Right, and the test with the best predictive validity
9 concludes that Mr. Guess has a 1 out of 4 chance of
10 reoffending in five years, and a 1 out of 3 chance of
11 offending in ten years, correct?

12 A. No. Those numbers can't specifically be applied to an
13 individual. He ---

14 Q. Okay, but his group ---

15 A. His group.

16 Q. I'm sorry. I appreciate the correction. His group
17 that you put him in reoffends 1 out of 5 times within five
18 years?

19 A. 25 percent of the people in that group offend after
20 five years, yes.

21 MR. BELDING: Okay. Thank you very much, Dr.
22 Harrison.

23 WITNESS: You're welcome.

24 MR. BELDING: No further questions, Your Honor.

25 THE COURT: Any redirect?

K. HARRISON - REDIRECT EXAMINATION BY MR. FLORES

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1 MR. FLORES: Yes. Just a couple of questions if you
2 don't mind. May it please the court?

3 THE COURT: Yes, sir.

4 REDIRECT EXAMINATION BY MR. FLORES:

5 Q. Let me get this right, Dr. Harrison. You also
6 researched for Dr. Rogers. Is that correct?

7 A. Yes, I did.

8 Q. And this article that Mr. Belding was quoting to you
9 from was written prior to your being at the program?

10 A. No. I think I was there, but it wasn't a research
11 project that I was a part of.

12 Q. And is that article part of the -- is it an industry
13 standard? Is it held to be more important than other
14 articles?

15 A. In this area of psychology, there are a lot of
16 opinions; there are a lot of people who are writing about
17 it. Dr. Rogers is a big name in the field, although not
18 necessarily in the SVP arena; he's bigger in other areas.
19 So, there are a number of experts who have different
20 opinions. So, I would -- I wouldn't say it's better or
21 worse than any, any other opinions that are out there.

22 Q. It's just one other researcher amongst many?

23 A. Right.

24 Q. Now, Mr. Belding talked to you a lot about definitions
25 within the stature when he talked about what -- was likely

1 to commit acts of sexual violence or future acts of sexual
2 violence. Is that correct?

3 A. Yes, we did.

4 Q. Now, in your direct testimony, did you offer an
5 opinion as to whether or not you believed Mr. Guess was
6 likely to commit acts of future sexual violence?

7 A. Yes. I do believe he, I believe he meets criteria for
8 commitment as a sexually violent predator.

9 Q. And it's your opinion that he is a menace, would be
10 considered a menace?

11 A. Yes, based on all the information that I have.

12 Q. Why did you not just rely on -- do one objective test
13 that you, you use? Why not rely on that one objective
14 actuarial test?

15 A. Well, that measure includes ten items. You can't
16 reduce a person down to ten historical items. So, there
17 were other things that I looked at in addition to that.
18 That's, that's one piece of information to consider.

19 But I certainly didn't base my entire opinion on the
20 results of the Static 99. I based it on all of the records
21 that I had on his past behavior, on my interview with him,
22 as well as other, what we call dynamic risk factors. These
23 are the types of risk factors that would be targeted in, in
24 treatment. Things having to do with his general inability
25 to self regulate himself as evidenced by his behavior in

K. HARRISON - REDIRECT EXAMINATION BY MR. FLORES

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1 prison, his impulsivity, poor problem-solving skills, those
2 types of things that the Static 99 doesn't consider at all.

3 Again, it's like your car insurance. Your car
4 insurance rates are set by your age, your gender, your
5 history of driving infractions. It doesn't take into
6 account, you know, if you're a very careful person, or if
7 you're a very smart person, or any other factors that may
8 be relevant.

9 Q. Would it, would it be professionally acceptable for
10 you, within your field, to base your opinion in this case
11 on just that one objective test?

12 A. No. That would, that would not be ethical, I would
13 say.

14 Q. Would you be subject to discipline by your licensure
15 board?

16 A. If somebody reported me, yes.

17 Q. You would, you would agree with Mr. Belding's
18 statement that nobody can predict with 100 percent accuracy
19 whether anyone subject to this act would definitely
20 recommit a -- recidivate. Is that ---

21 A. Right, right. In this or any area, we can't predict
22 human behavior with 100 percent accuracy.

23 Q. Doctor, I'm going to ask you a couple of questions
24 concerning the sequence of events that occurred for -- Mr.
25 Guess's life, how it's gone.

1 A. Okay.

2 Q. I'm going to ask you. Why was it relevant for you to
3 look at the facts underlying his ABHAN conviction?

4 A. That was the first conviction that sent him to DJJ.
5 Is that correct? That's the one you're referring to?

6 Q. That would be involving the four year-old.

7 A. The four year-old. Well, it was important to look at
8 that as from the perspective of the type of harm that he
9 caused the victim, the way he responded when that event was
10 reported. The, just the whole circumstances of the case.
11 The fact that there were other people in the house. That
12 this was a relative who could easily identify him. Those
13 types of thing show an inability to control his behavior.
14 The fact that he committed those in a house where other
15 people were sleeping against a relative who could easily
16 identify him. And it also shows -- goes to the diagnosis
17 of the paraphilia, that he was aroused by having sex with a
18 four year-old.

19 Q. Doctor, would you, as part of your protocol in
20 conducting these evaluations, would you have looked at the
21 facts underlying an ABHAN conviction had it not been a
22 sexual offense?

23 A. Well, I would look at it to see what it was, and that
24 different kinds of offenses might also contribute to a
25 diagnosis of antisocial personality disorder. So, I

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1 typically look at the underlying events of all --
2 especially violent -- convictions for these cases.

3 Q. Now, you testified that Mr. Guess, based on the
4 records and everything that you've seen, was still on
5 probation in 2000 when he committed the criminal sexual
6 conduct with a minor in the second degree.

7 A. Yes.

8 Q. How did that affect your opinion, the fact that he was
9 on probation?

10 A. Right. Again, that sort of shows another instance of
11 his inability to control his behavior. He knows that he's
12 under closer scrutiny, that he has rules he's supposed to
13 follow, and that his probation can get revoked and he can
14 be incarcerated again. And the fact that he committed
15 another crime while on a probation violation -- or while on
16 probation is a pretty significant risk factor.

17 Q. I just want to talk to you very briefly about the
18 DSM-IV. Mr. Belding discussed this a little bit. I have a
19 copy right here we keep at the office. How would you
20 describe the DSM-IV?

21 A. How would I describe it? Well, it's a book that lists
22 all the diagnoses that we use of all the mental disorders.
23 Groups them by categories. They have all your mood
24 disorders, things like major depressive disorder, bipolar
25 disorder, and other types of mood disorders. It has groups

1 of your psychotic disorders, which should be like
2 schizophrenia, delusion disorder.

3 So, it has categories of disorders, as well as all the
4 criteria for diagnosing them. Some research about the
5 prevalence rates, how to differentiate diagnoses from each
6 other. There are some that are pretty similar, so how to
7 differential them. Some of the more researched disorders
8 have information about typical course and prognosis and
9 treatment. So, it's basically just a catalog of all the
10 mental disorders and the information that's known about
11 them.

12 Q. And what does the IV stand for?

13 A. That is the fourth edition, which I believe came out
14 in 2000.

15 Q. Are you aware of whether or not there are changes that
16 are being made to this book?

17 A. They are currently working on DSM-V.

18 Q. Currently working. Is that a -- can that be -- can
19 these -- are any changes codified within a year when they
20 start working on it?

21 A. No. I, I don't understand.

22 Q. Do you know the process by which they change this,
23 this manual?

24 A. It's a, it's a long process. A lot of research, a lot
25 of committees, experts in different disorders. They do lot

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1 of field trials. They collect a lot of data. So, the
2 changes are made pretty systematically and with a lot of
3 research and expertise behind it.

4 Q. So, to use Mr. Belding's term, it's difficult to
5 codify any new diagnoses within a short period of time?

6 A. Right.

7 MR. FLORES: Beg that the court's indulgence.

8 (A PAUSE.)

9 BY MR. FLORES:

10 Q. Now, Doctor, when you talk about the Static 99-R and
11 the rates to -- these are predictions of whether someone
12 will sexually recidivate is what you said. Is that
13 correct?

14 A. Yes, commit a sexual or violent act.

15 Q. Based on your information about the field of forensic
16 psychology and sexually violent offenses, are these types
17 always reported?

18 A. No. It's my understanding that they are frequently
19 not reported, especially when it's a family member or
20 someone -- when the perpetrator is someone the victim
21 knows.

22 Q. So, these values in the Static 99-R are only based on
23 those that we know about. Is that correct?

24 A. Right. Those are only detected reoffenses. So,
25 obviously they don't include the ones that someone was

1 never arrested for.

2 Q. I just want to make, make sure I have this correct
3 from your testimony. You testified that Mr. Guess had told
4 you that the victim from his criminal sexual conduct with a
5 minor in the second degree looked like she was seventeen.

6 I just want to make sure. You said that she was an
7 acquaintance? Is that correct?

8 A. From what I understand, they lived in the same
9 neighborhood; they had mutual friends. They, they knew
10 each other, yes.

11 Q. Mr. Belding asked you about substance abuse and
12 whether substance abuse can contribute to these types of
13 sexually violent offenses. In your interview and
14 evaluation with Mr. Guess, did he offer an opinion on his
15 own drug issues?

16 A. He said he, he started smoking marijuana when he was
17 five. He smoked marijuana pretty much on a daily basis.
18 Started selling marijuana and crack cocaine when he was
19 twelve but said he never used cocaine. Continued using
20 marijuana while he was incarcerated, both DJJ and SCDC.
21 And he said he didn't start drinking until he got
22 incarcerated at SCDC. So, he started drinking alcohol once
23 he was in prison.

24 Q. I just wanted to make sure that this is correct as
25 well. The -- you were asked to offer an opinion as to

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1 whether or not Mr. Guess meets the definition of a sexually
2 violent predator. Is that correct?

3 A. Yes.

4 Q. And you sought to see if he was convicted of a
5 sexually violent offense?

6 A. Right.

7 Q. And whether or not he needed long-term control, care,
8 or treatment. Is that correct?

9 A. Yes.

10 Q. There's nothing about intensive treatment. Is that...

11 A. Not to my knowledge, no.

12 MR. FLORES: Those are all the questions I have for
13 Dr. Harrison, Your Honor.

14 THE COURT: Anything further, Mr. Belding?

15 MR. BELDING: Briefly recross.

16 RECROSS-EXAMINATION BY MR. BELDING:

17 Q. All right, Dr. Harrison, I just want to make sure I
18 understand now. When Mr. Flores asked you about Dr.
19 Rogers, and I think, what I wrote down you said he's a big
20 name in the arena, correct?

21 A. Yes, in forensic psychology.

22 Q. Okay.

23 A. He's well known and well respected.

24 Q. Okay, and my point is you've got a big name in the
25 field who doesn't necessarily think these risk assessment

1 tools are all that reliable, correct?

2 A. Again, I would have to reread the article to know
3 exactly what he said.

4 Q. Do you recall him saying anything about that at the
5 time that you were his research assistant?

6 A. I don't, I didn't -- that wasn't an area that he was
7 researching that I was researching with him. So, I, I
8 can't recall.

9 Q. Okay. I think that's fair. The point is this is
10 still a, as you said, a fairly new area. Sexually Violent
11 Predator Act has only been here for thirteen years. The
12 first one was in Kansas twenty years ago.

13 A. Right.

14 Q. It's kind of still a new area, isn't it?

15 A. Yes, it is.

16 Q. And you've got even respected psychologists and
17 psychiatrists don't all agree about a lot of things about
18 this area. Isn't that true?

19 A. That's true.

20 Q. And wouldn't it be very possible that some other
21 psychologist could come interview Mr. Guess, and maybe
22 focus on different things and come up with a different
23 opinion?

24 A. It's possible.

25 Q. Particularly if they focus on that likely question.

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1 If they focused on the Static 99, they might be concerned
2 about the fact that statistically, much less than half the
3 people reoffend in the group, correct?

4 A. I don't know what another psychologist would be
5 concerned with.

6 Q. Fair enough. This Static 99 test, as I understand, it
7 was originally done on a 3,000 person sampling of Canadian
8 sex offenders. That when it was revised the 99-R, now it's
9 up to something like 30,000. Does that, does that square
10 with your understanding?

11 A. I believe so. They increased the number and the
12 representativeness of the sample. So, it also includes
13 American samples and a wider variety of races and things
14 like that.

15 Q. Right, and like any statistical model, the more the
16 database is increased, the more information that goes in,
17 the better your predictive results are, correct?

18 A. Right.

19 Q. Correct? All right, and now you said you didn't
20 actually give him a test. That you talked to Mr. Guess for
21 two and a half hours, and went over in the course of your
22 conversation the ten different areas that are included in
23 your analysis under the Static 99-R, correct?

24 A. I don't think I had to ask him about many of the items
25 on there just because they were already in his records

1 about his -- the number of convictions and that type of
2 information.

3 Q. Well, and let me ask you about some of those records.
4 Again, I'm a little out of my league when I'm talking about
5 psychology, but the legal part I've got. Do you understand
6 that when someone is charged with anything, that that
7 doesn't necessarily mean that those are facts?

8 A. Right.

9 Q. Okay. I mean, people get charged with things all the
10 time. Until they're convicted, they're not facts. They're
11 just allegations, correct?

12 A. Sure.

13 Q. Okay, and you didn't go back and try to find out and
14 dig in and figure out what happened with the, the ABHAN
15 when he was, you know, fourteen years old?

16 A. Well, I had all the police records and investigation
17 that was done at that time.

18 Q. But you used the word facts, and you understand now
19 they were just allegations. Isn't that true?

20 A. Well, he was convicted.

21 Q. But he wasn't convicted of a sexual offense, was he?

22 A. Right. He was convicted of ABHAN.

23 Q. Okay, and what -- and you earlier admitted that not
24 all ABHANS have anything to do with sex. Sometimes it's a
25 big fight.

K. HARRISON - RECROSS-EXAMINATION BY MR. BELDING

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1 A. Right.

2 Q. Okay. My point is that people get accused of things
3 all the time, but they don't always get convicted of what
4 they're accused of because people have a tendency to
5 exaggerate on both sides, don't they?

6 A. Yes.

7 Q. Okay. So, when you say you looked into the facts of
8 the sex offense that ended up becoming ABHAN, you weren't
9 looking at facts. You were looking at allegations. Isn't
10 that right?

11 A. Right, and the only allegations were that he sexually
12 assaulted his four year-old cousin. There were no
13 allegations of a fight or that he hit somebody or -- that
14 was all there was.

15 Q. Understand, but for some reason, the government
16 determined that assault and battery of a high and
17 aggravated nature was the proper result for that case,
18 correct?

19 A. That's what he ended up being convicted of, sir.

20 Q. Right, and you don't know how that happened?

21 A. I don't.

22 Q. Okay, and this, the DSM-IV which you admitted earlier
23 was the bible of psychology and the diagnostic area,
24 that ---

25 A. I think that was your word. I didn't ---

1 Q. Well, I mean ---

2 A. --- use the bible.

3 Q. You agreed with it, so, but that's eleven years old
4 right now, isn't it? I mean, the most recent edition is
5 2000?

6 A. The most recent edition, yes, came out in 2000.

7 Q. So, psychology, the field of knowledge is constantly
8 expanding by way of research, isn't it?

9 A. Yes, it is.

10 Q. And we're learning more all the time about what goes
11 on in the minds of people, aren't we?

12 A. Yes.

13 Q. And bottom line is as we sit here, you cannot predict
14 what's going to happen with Mr. Guess in the future?

15 A. No, I can't.

16 MR. BELDING: Okay. Thank you very much. Appreciate
17 it.

18 Nothing further, Your Honor.

19 MR. FLORES: Nothing further, Your Honor.

20 THE COURT: You may step down. Thank you.

21 (THE WITNESS EXITS THE STAND.)

22 MR. FLORES: Your Honor, Dr. Harrison is here under
23 subpoena. We would ask that she be released from that
24 subpoena.

25 THE COURT: Any objection?

1 it's appropriate for him to do so, that we should be able
2 to wrap up any of those legal issues within a short period
3 of time.

4 I assume that you've received a copy of the state's
5 proposed jury charge?

6 MR. BELDING: Your Honor, I read through those. It's
7 similar to ones I've seen before. I find those imminently
8 fair, and I think that's -- any way you want obviously
9 modify it. I wouldn't have anything else to recommend.

10 THE COURT: Okay, and I may tweak it just a little
11 bit, but I'll be happy to discuss that with you all
12 tomorrow when we get to that particular point. And I'll
13 leave it for 9:30 in the morning then.

14 MR. BELDING: Great. Thank you, Your Honor.

15 THE COURT: We'll see you at 9:30 in the morning.
16 Thank you.

17 MR. FLORES: Thank you, Your Honor.

18 (WHEREUPON, THE CASE IS AT EASE.)

19 TUESDAY, NOVEMBER 15, 2011

20 (COURT RESUMES AT 9:45 A.M.)

21 THE COURT: Good morning, anyone.

22 MR. FLORES: Good morning.

23 MR. BELDING: Good morning, Your Honor.

24 THE COURT: I believe where we left off yesterday, the
25 state, I believe you were going to rest.

1 MR. FLORES: Yes, ma'am.

2 THE COURT: And then we were going to talk to Mr.
3 Belding to find out whether Mr. Guess wishes to testify.

4 MR. BELDING: Yes, Your Honor. If it please the
5 court? We were still talking about that, but first I'd
6 like to make a motion, if it pleases the court.

7 THE COURT: Sure.

8 MR. BELDING: Your Honor, at this time I'd move for a
9 directed verdict on behalf of the respondent for the
10 following reasons.

11 First of all, the testimony by the state's witness
12 established some things very clearly. One, that there's a
13 lot of ambiguity in this, in the statute. She admitted
14 that clearly, and that that's something she said that we
15 all have to struggle with.

16 Secondly, I think one of the key terms that the
17 Sexually Violent Predator statute talks about, that there
18 must be a finding that the respondent is likely to commit
19 future acts of sexual violence. And, you know, I didn't
20 bring this up. She did it on direct examination from Mr.
21 Flores.

22 She talked about the only objective thing that she did
23 in her two and a half hour evaluation was administer the
24 Static 99 test, and she explained how she did that. She
25 did it by talking with him and eliciting information about

1 his background and what he does and fits them into
2 categories, and then went back later and scored it. And
3 when she was done -- and this is the only objective thing
4 we have in this whole case. She came up with a score that
5 indicated that in his group range, that he was 24.7 percent
6 likelihood of him reoffending, of committing a future act
7 of sexual violence within five years, and just at 33
8 percent over ten years. So, we're talking about a 1 out of
9 4 or 1 out of 3 chance. That's the likelihood that she
10 testified to, Dr. Harrison, on the stand.

11 That's not likely. By any normal definition of
12 likely, that's, that's unlikely. It is unlikely that he
13 will commit a future act of sexual violence within ten
14 years because only 1 out of 3 in ten years of people who
15 she put in -- him into a group with will reoffend. So, he
16 is unlikely, by her own testimony.

17 I think, Your Honor, that it is absolutely unfair to
18 put this before a jury of people. They're lay people. I
19 respect the jury system like anybody else, but here's the
20 problem with that, okay? I know, and this is certainly not
21 disparaging in any way to Mr. Flores, who I consider to be
22 a friend and a very good attorney, but I mean, he's doing
23 -- in doing his job, you know, we started out the trial
24 with him saying now, ladies and gentlemen of the jury, now,
25 you know, you're going to hear some pretty, you know, tough

1 facts here. You're going to hear some rough things, you
2 know, and it's going to be kind of hard for you to listen
3 to.

4 The point is is that the way these cases get to the
5 jury is by appealing to their passion and prejudice.
6 There's no other way. They talk about history, they talk
7 about what happened and, you know, who the victims were and
8 things like that. They would love for me to put him on the
9 stand so they could run him through that again.

10 But as we sit here right now, the only objective thing
11 that anybody can really hang their hat on the in this case
12 is likelihood. And the state's testimony is, quite
13 frankly, that it's unlikely. It is statistically unlikely
14 that he will commit future acts of future sexual violence.

15 I think that's not appropriate to send to the jury. I
16 think that even though this is a hard case for any judge or
17 jury, the fact is we're talking about science that is
18 unproven, a new area of science. It's twenty years old.
19 We're dealing with a psychologist with three years'
20 experience who says well, you know, I think he's a menace,
21 okay? It's an absolutely subjective judgment at this
22 point. And the only objective thing that we can hang our
23 hat on is that statistically, by her own testimony, he's
24 unlikely to reoffend.

25 That doesn't meet the statute, and I think it's only

1 appropriate for the court to direct a verdict for the
2 respondent so that the jury doesn't have to struggle with
3 these things that they're not capable of making a decision
4 on. So, we would move for a directed verdict on that
5 basis, Your Honor. I appreciate it.

6 THE COURT: Thank you.

7 Any response, Mr. Flores?

8 MR. FLORES: Yes, Your Honor. May it please the
9 court? Mr. Belding's first point as to the ambiguity
10 within the statute, I believe that the doctor, and I think
11 we're all familiar with the definitions that are laid out
12 by our legislature -- likely to engage in acts of sexual
13 violence -- is defined by statute. In fact direct, during
14 her direct testimony, she opined to a reasonable degree a
15 psychological certainty that it was her opinion that Mr.
16 Guess was likely to engage in acts of sexual violence as
17 defined by our statute. Furthermore, she did opine that
18 she believed him to pose a menace to the health and safety
19 of others.

20 While Mr. Belding points to this one, one test, I
21 would submit one actuarial assessment, the doctor stated in
22 her testimony it would be unethical of her with regard to
23 her profession obligations to rely solely upon that one
24 instrument. In fact, as I asked her in direct testimony
25 what was her protocol, what would -- what is it that she

1 does when a court asks her to perform such examinations,
2 she went through a list of I would say a litany of things,
3 all the records she reviews, everything she tries to
4 discover about Mr. Guess and his past. And I would submit
5 that asking it solely upon this one instrument would be
6 inappropriate for her and unethical.

7 I think she's laid out exactly how she arrived at her
8 opinion, why experts in the field of forensic psychology
9 arrive at the opinion in these cases.

10 And as to Mr. Belding's discussion about the statute,
11 the new area of science, without expressing an opinion on
12 these issues, the statute itself, as well as other sexually
13 violent predator statutes across this country, have been
14 upheld as constitutional by both our United States and our
15 state Supreme Courts.

16 And so taking all that -- and the standard at this
17 stage, whether or not there's any evidence -- in the light
18 most favorable to the state at this point, we believe that
19 there's ample testimony from which a jury could find Mr.
20 Guess is a sexually violent predator.

21 THE COURT: Any response to that, Mr. Belding?

22 MR. BELDING: No thank you, Your Honor. I think you
23 understand what's going on.

24 THE COURT: Yes, sir. Let me start off by saying I
25 understand that there's only, there's been a witness who

1 has testified, and the witness happens to be an expert in
2 the field of psychology and forensic psychology. I think
3 I'm going to have to end up denying the motion for the
4 following reasons.

5 I understand very clearly that you're pointing to the
6 objective test that was performed to help Dr. Harrison come
7 up with her opinions in the case. But her opinions are not
8 based solely on objective standards. Part of her duties
9 and responsibility as a psychologist and a forensic
10 psychologist is to consider a multitude of factors and not
11 solely base a decision on objective tests because if that
12 were the case, we could have people apply the test with the
13 objective standards and be able to come in and testify.
14 That would be basically the end of it.

15 But because of the nature of the science, being
16 psychology, that because we are dealing with the mind and
17 that there are no, there's not a predictor, and I think she
18 readily testified that there is no one predictor that can
19 determine whether or not Mr. Guess would reoffend or would
20 be likely to engage in acts of sexual violence in the
21 future. And that her testimony was that that decision was
22 based upon a myriad of things that she discovered, both
23 through the records and through the interview with him.
24 Based upon all of those factors, she came to an opinion, an
25 opinion and conclusion that in her opinion, he was likely

1 to engage in acts of sexual violence.

2 Now, in my view, in determining directed verdict, my
3 role is to look to see if there is evidence in the light
4 most favorable to the non-moving party. And I would have
5 to say that that opinion, along with the things that she
6 testified about, there is evidence to suggest that Mr.
7 Guess would be likely to reoffend or likely to engage in
8 acts of sexual violence in the future.

9 Now, the question for the jury is whether or not to
10 believe her testimony, whether or not to believe that there
11 is sufficient education and training. You mentioned her
12 three years of experience. Whether or not there was
13 sufficient information that she possessed for her to come
14 to that conclusion, whether or not -- what weight to give
15 either the Static 99 or the other factors that she
16 testified to. Those are all questions for the jury to make
17 a decision about.

18 And in addition, I understand that the question about
19 the statute and whether there's ambiguity. Likely to
20 engage in acts of sexual violence has been defined by the
21 statute to mean that the person's propensity to commit acts
22 of sexual violence is of such a degree as to pose a menace
23 to the health and safety of others. And I think that those
24 are all words that can be given their common, ordinary,
25 everyday meaning for a jury to be able to determine, based

1 on everything that they have before them, does Mr. Guess,
2 is his condition such that he would pose a menace to the
3 health and safety of others. And I think they can make
4 that determination.

5 Additionally, I think because the state has recognized
6 that psychology is not an exact science, that there is not
7 an objective way to come up with a final conclusion, that
8 they placed a higher burden on the state in that the burden
9 is beyond a reasonable doubt. So, we're not just talking
10 about more likely than not or preponderance standard.
11 We're talking about a higher burden and a higher standard.
12 That I think the jury will also have to come to that
13 conclusion as well before they are able to return a verdict
14 that does, in fact, say that Mr. Guess is a sexually
15 violent predator. I think they are going to have to, they
16 have to get through a number of hoops before they get to
17 that final conclusion.

18 And at directed verdict stage, as you well know, my
19 only effort is to make sure that there is evidence in the
20 record that would support such a conclusion. And based on
21 the testimony that's been provided, I'd have to say that
22 there is evidence. And in terms of what weight to give
23 that evidence and whether or not it meets beyond a
24 reasonable would be a jury function, and so I respectfully
25 deny your motion, Mr. Belding.

1 the evidence that you've heard in an effort to try to sway
2 you to find the facts in accordance with their view of what
3 happened. So, I ask that you listen very carefully to
4 those closing arguments.

5 Sometimes they may cause you to think about the
6 evidence in a different light, or they may raise questions
7 that you'll want to discuss among yourselves when it's time
8 for you all to begin your deliberations.

9 Once they've made those closing arguments, then I will
10 instruct you on the law that's to be applied, and then you
11 may begin your deliberations at that particular.

12 Mr. Flores.

13 MR. FLORES: Thank you, Your Honor. May it please the
14 court? Mr. Belding, Mr. Guess.

15 Good morning, ladies and gentlemen. Came before you
16 yesterday afternoon when we started this trial and said
17 this case is not a very simple case. It's a very difficult
18 case: to determine whether or not Mr. Guess is a sexually
19 violent predator.

20 You've heard the testimony of the court-appointed
21 expert in this case, and we'll talk, I want to talk to you
22 a little bit about what she did, what she relied upon, what
23 she heard, she didn't hear in rendering her opinion in this
24 matter because ultimately the state must prove to you
25 beyond a reasonable doubt that Mr. Guess is a sexually

1 violent predator.

2 And while Mr. Belding brought it up in his opening --
3 I typically don't. As he said in his opening argument,
4 beyond a reasonable doubt, I must prove, as the state, that
5 Mr. Guess is a sexually violent predator. And that
6 definition is whether or not Mr. Guess has been convicted
7 of a sexually violence offense as defined by statute, and
8 whether or not he suffers from a mental abnormality or
9 personality disorder that makes him more likely to engage
10 in acts of sexual violence if he's not committed for
11 long-term control, care, and treatment. A lot of words,
12 but that is information that is in your common sense
13 capacity to understand. And that that's why we bring that
14 question to you.

15 So, the first element, has Mr. Guess been convicted of
16 sexually violent offense. And I don't think Mr. Belding
17 will argue that he hasn't. I think we all understand that
18 Mr. Guess has been convicted of a sexually violent offense.
19 That offense was in 2002 following a jury trial in which
20 the victim testified and evidence was presented to a jury.
21 And they said beyond a reasonable doubt Mr. Guess committed
22 criminal sexual conduct with a minor in the second degree
23 when he took a fourteen year-old acquaintance behind an
24 abandoned house and raped her. That is a sexually violent
25 offense; that is a conviction for a sexually violent

1 offense. And so that question is answered.

2 But how did we get there? And this leads me into my
3 discussion about the second prong, the more different
4 question that we present to you, and it's almost two
5 questions wrapped into one. Does Mr. Guess have a mental
6 abnormality or personality disorder, and does that disorder
7 make him more likely to commit these types of sexually
8 violent offenses?

9 Dr. Kim Harrison, Kimberly Harrison, came here and
10 testified as a court-appointed evaluator in this case. She
11 was asked by the court to look at all the information she
12 could and determine whether or not Mr. Guess has either
13 that mental abnormality or personality disorder, and
14 whether in her opinion he was more likely to commit these
15 types of acts.

16 Now, she is -- in fact, she described her professional
17 career to you. She has gone to school for psychology. She
18 got a master's in psychology; she got a Ph.D. in
19 psychology. And while we wish she could have done that
20 here in South Carolina, because we have the best schools,
21 she went to Texas, North Texas. Studied under Dr. Richard
22 Rodgers, a well known psychologist in the area of forensic
23 psychology, and obtained her Ph.D. He is well known. I
24 wouldn't say he's the sole expert in forensic psychology.
25 In fact, I'd argue to you some of the best experts in

1 forensic psychology are here in our state, but that's for
2 another day.

3 She went. She learned how to conduct evaluations,
4 what to look for, what it means to be a psychologist. She
5 was licensed here in our state, and she has done
6 evaluations for the Forensic Evaluation Service of the
7 Department of Mental Health for the past three years.

8 Now, what did she tell you is part of her protocol?
9 She said I look at everything I can possibly get: police
10 reports, victim's statements, treatment records, medical
11 conditions. I look at educational background. I look at
12 social background. I get criminal convictions, anything I
13 can get my hands on. I also rely upon an instrument, an
14 actuarial instrument called the Static 99-R because, in her
15 words, it's considered the best instrument in her field of
16 forensic psychology in predicting sexual recidivism.

17 I asked her during my recross-examine -- my redirect
18 testimony or questioning whether or not it would be okay
19 for her as a professional to rely only on that one
20 objective test because Mr. Belding has talked a lot about
21 that objective test. And wouldn't it be easy if a test,
22 that one test could tell us whether or not Mr. Guess was
23 going to reoffend or sexually recidivate? It would be. We
24 wouldn't have to ask you that question. Simply punch in
25 the numbers. Says yes, then yes. It says no, no. But

1 it's not that easy, and Dr. Harrison said psychology is not
2 that easy. It's that all that experience, all that
3 information I can get about Mr. Guess is what I'm trying to
4 find. Is he the type of person that's going to sexually
5 recidivate, who's going to commit future acts of sexual
6 violence? And I would submit to you that he is, and is a
7 beyond a reasonable doubt.

8 Why? Psychology is often about learning about the
9 whole person. About what they've done, how they think.
10 What do we know about Patrick asked? Dr. Harrison told us
11 about a prior sexual offense. Now, it's true it is an
12 assault and battery of a high and aggravated nature. By
13 statute, it's not defined as a sexually violent offense.
14 But I would submit to you that that crime was sexual in
15 nature.

16 Mr. Guess sexually assaulted his four year-old cousin,
17 penetrated her vagina and sexually assaulting her. While
18 considered assault and battery of a high and aggravated
19 nature, still a sexual offense. He was originally charged
20 with criminal sexual conduct in the first degree with a
21 minor. And the degrees in this sense as delineated,
22 delineated by our legislature, it's first degree if it's
23 under age eleven, second degree if it's between ages eleven
24 and fourteen, the victim is within those ages.

25 So, what happened when he pled guilty because he did

1 plead guilty to ABHAN. He pled guilty to pursuant to
2 *Alford vs. North Carolina, Alford vs. North Carolina*, an
3 *Alford* plea, if you will. And the state, represented by
4 your solicitor's office, said that for that crime, it's
5 adequate. When Mr. Guess was fourteen years old, he said I
6 plead guilty to this act because the state could prove
7 beyond a reasonable doubt at trial that I committed it.

8 And we learned later also after that plea that he was
9 ordered to undergo sex offender treatment while at DJJ, and
10 that's a good thing, right? People who commit sexual
11 offenses that go through treatment successfully have a
12 lower chance of recidivating or committing these acts
13 again.

14 But what did we learn about Mr. Guess? What did we
15 learn about what happened during his treatment? He did
16 some assignments. He didn't do assignments. He admitted
17 guilt to assaulting his cousin. In fact, a good step in
18 that treatment was admitting he assaulted even other
19 children, children ages five and six and twelve. And that
20 admission, I would submit to you, is a good thing in
21 treatment. A person who admits they have a problem can fix
22 that problem.

23 However, as we know from the facts that were derived
24 in this case, Mr. Guess's sexual offending didn't stop
25 after he went through treatment. He didn't successfully

1 complete that treatment, I think, largely due to the fact
2 that he left DJJ custody pursuant to his parole. However,
3 we know that he committed another sexual offense.

4 Now, I would also like to point out to you that Dr.
5 Harrison has discussed with us what Mr. Guess suffers from.
6 That's one of the major points of what she had -- she was
7 asked to do. Based on everything you look at, and
8 everything you read, and everything you talked Mr. Guess
9 about, find out if he does have a mental abnormality or a
10 personality disorder. And she, in fact, said he has both:
11 paraphilia not otherwise specified, and antisocial
12 personality disorder.

13 His paraphilia derives, is -- as she defined it, it's
14 his sexual orientation, if you will. His sexual pleasure
15 is derived from nonconsenting individuals. When he was
16 conducting himself in the sexual assaults, the pleasure was
17 not derived from the sexual activity in and of itself. It
18 was from that power, that fighting back from his victims.
19 So, that is paraphilia not otherwise specified.

20 And Mr. Belding and I, I think we both agree that
21 psychology is an ever growing science like any science.
22 You learn new things every week. And while the DSM-IV is a
23 valiant effort, although Mr. Belding says it's a viable --
24 although a valiant effort to codify, using Mr. Belding's
25 words, all the types of conditions that may exist, it's

1 only an effort. And a difficult effort at that because our
2 psychologists learn new things every day.

3 But also Mr. Guess suffers from antisocial personality
4 disorder. He breaks the rules, any rules. You are heard
5 from Dr. Harrison that Mr. Guess while in DJJ custody had a
6 sexual offense there. We've heard that he's had several
7 disciplinary actions at the Department of Corrections.
8 These places where you're already in for a conviction of
9 some law, for breaking some law, you can't even follow the
10 rules when you're locked up.

11 Dr. Harrison also testified and opined that based on
12 all this information, everything she looked at and
13 everything she considered, that his paraphilia and his
14 antisocial personality, that deadly combination, she said,
15 that those make him likely to engage in acts of sexual
16 violence. She said it's my opinion as a psychologist that
17 he does. And the judge will instruct you as to whether or
18 not you have to believe that. It's your job -- that's why
19 we asked you to come here -- to gauge her credibility, her
20 background. Do you believe her opinion, based on
21 everything you've heard? Do you agree with her opinion?

22 And the judge will also instruct you, as Mr. Belding
23 pointed out, there are some ambiguities in our statute, but
24 those ambiguities are defined. Likely to engage in acts of
25 sexual violence is a defined term. Our legislature tells

1 us what that means, and Dr. Harrison opined that he fit
2 that statutory definition.

3 While it might not be likely that, you know, 20
4 percent chance of showers likely to rain, this term is,
5 that term is defined by law, and it's that term that would
6 be submitted to you to decide whether or not Mr. Guess is
7 likely to commit acts of sexual violence.

8 This isn't easy question, and as I said in my opening
9 statement, if there were a way that you could have avoided
10 all of this, I would have done so. But I thank you so much
11 for being here to answer this difficult question for us,
12 and thank you for your time.

13 Your Honor.

14 THE COURT: Mr. Belding.

15 MR. BELDING: Thank you, Your Honor. May it please
16 the court?

17 THE COURT: Yes, sir.

18 MR. BELDING: I have to bring all my stuff up here.
19 There was a lot of points that were made in this trial.

20 I, too, appreciate you time. I know I served on a
21 jury in this exact courtroom before, and I know what it was
22 like having to make a decision, and mine wasn't even as
23 hard as yours. Just a civil case, traffic accident. So,
24 thank you for coming.

25 What is this case about? Well, you already know what

1 the case is about. Mr. Flores said, and we stipulated
2 right up front. I mean, he said they proved the first
3 thing they needed to prove, which was that Mr. Guess was
4 convicted of a sexually violent offense. Well, of course.
5 We stipulated to that. We wouldn't be here if it wasn't
6 for that. It would have never gotten to first base. But
7 the rest of the statute is the part that we have a problem
8 with.

9 Dr. Harrison was our only witness in this trial. I
10 discussed with Mr. Guess whether or not he should take the
11 stand, but you know what? I believe that we don't need Mr.
12 Guess to testify because the state has not proved its case
13 beyond a reasonable doubt. The judge will instruct you
14 what that means, but let's review what we have.

15 Dr. Harrison is a licensed forensic psychologist. I
16 did not attack her, but let's face it. I did ask her a
17 couple of questions that were just empirical. For one
18 thing, she's only been a psychologist for three years, all
19 right? As Mr. Flores pointed out, psychology is an
20 evolving field. It is not an exact science. Who do you
21 think would know more about it? Someone who's been
22 practicing three years, or someone who's been practicing
23 twenty years or twenty-five and would have a base of
24 knowledge, an expanding amount of knowledge about the human
25 mind?

1 I asked her. Can you predict someone's behavior? Of
2 course not. Do psychologists understand what goes on in
3 someone's brain? No. No. It's all guess work. Educated
4 guess work, certainly, but it's her opinion as to what
5 might happen.

6 Now, why is that the problem in this case? Well,
7 because the statute, and I wanted to bring it to make sure
8 that I would say it exactly right. One of the things that
9 you, that we're sticking on you, the jury, in this case, is
10 that you have to find beyond a reasonable doubt that Mr.
11 Guess is likely to engage in acts of sexual violence after
12 he gets out.

13 Well, we heard Dr. Harrison's testimony. First of
14 all, as Mr. Flores said, she got all the information she
15 could possibly get to try to make this determination, and I
16 had a list of them, fifteen things: school records, records
17 from the Department of Juvenile Justice from the late '90s,
18 records from the Department of Corrections. Some things
19 that -- the victim's statement.

20 And I asked her, did you talk to those people? All
21 right, now, I mean, if you're going to base -- I'm not a
22 psychologist, but if I'm going to base my opinion on pieces
23 of paper, I want to make sure those pieces of paper are
24 accurate, and I asked her. Did you talk to the authors of
25 any of those documents? Did you talk to anybody at DJJ or

1 SCDC who wrote up these reports to get the facts, find out
2 what happened? No, I didn't do that. She just based it on
3 the records that the Attorney General's Office gave her.

4 Ms. -- Dr. Harrison has been a psychologist for three
5 years. During that time, she's been employed by the state.
6 She's performed twenty of these evaluations for the state.
7 She testified today. I think she sounds like a very fine
8 doctor. She's still new, and I suggest that her
9 orientation, working at the Department of Mental Health,
10 would certainly be defined that people have problems.
11 Otherwise, she wouldn't be an expert witness for the state.
12 They'd find somebody else.

13 The question is when I asked her, okay, what did you
14 use to come up with this opinion besides these documents.
15 Oh, well, I spent two and a half hours talking to Patrick
16 Guess, two and a half hours. So, here we are in this
17 inexact science in this field that's constantly evolving
18 with someone who's only been a psychologist three years,
19 and she spent two and a half hours talking to him.

20 Tell you the truth, I don't know how long you'd need
21 to talk to him. I don't know how long I'd want to talk to
22 somebody. But I will tell you that I don't think two and a
23 half hours is enough time to figure out what's going on in
24 someone's mind, all right, and you are being asked to make
25 that determination beyond a reasonable doubt. And the

1 linchpin to the entire question for you is likelihood. Is
2 he likely to engage in future acts?

3 Now, everything else is subjective. Everything else
4 is her opinion. I read something from the Department of
5 Juvenile Justice. I came to this opinion. I read
6 something from the Department of Corrections. Then I came
7 to this opinion.

8 And I even asked her. Said have you ever been in
9 prison? I was pretty sure the answer would be no.
10 Fortunately for her, she'd never been incarcerated. My
11 point is I've been in there. As an employee, my first job
12 out of law school, I worked at the South Carolina
13 Department of Corrections. I didn't even know what a
14 prison was until I went to work out there, and it was a
15 very eye-opening. And I remember walking through one of my
16 visits at one of the prisons, and I said, you know, this
17 doesn't look so bad. There was an inmate near me. He said
18 yeah, but you haven't been here all night.

19 And I asked Dr. Harrison. Have you been in a
20 custodial setting? Do you understand? Have you had any
21 experience with what goes on in a custodial situation?
22 Because she walked to talk about, well, he's broken some
23 prison rules. Well, what kinds of pressures of confinement
24 might have led to that? Well, I don't know. I didn't ask
25 that. I just read the report.

1 And the problem we have is here is the only objective
2 thing she did, the only things we can wrap our hand around
3 was the Static 99-R test that she gave he. She went back
4 and she graded those answers, the ten factors into the
5 scale, and what does she come up with? That in the next
6 five years, he's got a 24.7 percent chance of committing an
7 act of future sexual violence, a 1 out of 4 chance that he
8 might reoffend in five years. It goes up to almost a third
9 in ten years.

10 But when I asked her and the state said oh, no, we've
11 defined all these terms. We've told you what likely to
12 engage means. It's defined. It says likely to engage in
13 acts of sexual violence means the person's propensity to
14 commit acts of sexual violence is of such a degree as to
15 pose a menace to the health and safety of others so that he
16 is dangerous to such a degree. To such a degree means
17 statistics.

18 When I asked her -- matter of fact -- I'm sorry. It
19 came out on her direct testimony. I didn't even ask her.
20 I said what is the Static 99? She says it's a statistical
21 predictive risk assessment tool. This tool tries to
22 predict future behavior. She testified. I asked her.
23 There was a bunch of other ones. She said this was the
24 best one. So, I -- so, you used the best test to try to
25 predict future behavior in this case? And the answer came

1 out 24.7 percent he'll reoffend in the next five years.

2 Folks, to me that's not likely. That's unlikely.

3 All right, if there's a 24 percent of rain, is that
4 likely, or it's a change that it won't like -- won't rain
5 more likely? Well, clearly, getting back to what Mr.
6 Flores talked about in using your common sense, that's
7 likely. You know, when there's a 24 percent chance of
8 rain, I go play golf; I don't sit at home worried that I'll
9 get wet.

10 Mr. Guess has been objectively determined to be a 24.7
11 percent risk by Dr. Harrison's own testimony, and the state
12 says ah. There you go. And you back all that up with all
13 that, everything else that she talked to him about in the
14 two and a half hours, and she's of the opinion that he's
15 likely to commit future acts.

16 Well, I say he's unlikely. I say that's the only way
17 you can interpret her testimony is that he is unlikely.
18 And if he's unlikely, then he's going home because that's
19 what the law says.

20 The judge is going to charge you that you have to find
21 these two things beyond a reasonable doubt. And it's --
22 even though this is not a criminal trial, it's a civil
23 commitment trial. It's very unusual in our system because
24 in this case, as I mentioned in the opening statement, this
25 is not a preponderance of the evidence question for the

1 jury. It is a beyond a reasonable doubt standard. And the
2 reason is because you've got someone's liberty in your
3 hands. So, this inexact science is held to a higher
4 standard. You have to find beyond a reasonable doubt. The
5 judge will tell you what that means; she will charge you in
6 this case what you have to follow in reaching your
7 decision.

8 One of the things she's going to tell you is that your
9 verdict cannot be based on sympathy, passion, prejudice, or
10 emotion, or any other consideration not in evidence in this
11 case. Let me tell you what I think that means.

12 Mr. Flores, who I get along with very well and I
13 consider him to be a friend -- we've done several of these
14 cases. Good guy. He's got a job to do, and so do I. Mr.
15 Flores said in his opening statement, he warned y'all
16 there's going to be some things that come out that are not
17 pleasant. Pretty nasty stuff. Just want to let y'all
18 know, give you the heads up. That's the start of trying
19 to get y'all conditioned to think uh-oh. What have we got
20 coming here? All right, that is passion, prejudice,
21 emotion, all right?

22 What we heard from the stand, though, the evidence
23 that is before you is I did this test. I spent two and a
24 half hours. Here's what I came up with. And the bottom
25 line is those things all point to one thing: that he is

1 unlikely to commit a future act of sexual violence. That's
2 all there is to it.

3 Beyond a reasonable doubt you're supposed to find he's
4 likely would go against Dr. Harrison's testimony because
5 the Static 99, the only objective thing she gave, it says
6 not even near 50 percent chance, not even near.

7 So, you have a tough job, jury. You know, I didn't
8 like it when I was on the jury, but we came to a decision,
9 and I know you will, too. I know that you'll do your job.
10 The judge is going to instruct you on how to make your
11 determination after deliberation back in the jury room, and
12 I ask you to remember a couple of things.

13 Beyond a reasonable doubt is a pretty high standard.
14 She's going to define to you what that means. If you've
15 got any doubt in this case, it is to be resolved in favor
16 of Patrick Guess, who has served his time. He's coming up
17 to be released from the Department of Corrections after
18 paying his debt to society for the crime y'all heard about.
19 And you must find that he is likely beyond a reasonable
20 doubt to reoffend. And the only thing we've heard from
21 this stand, the state's only witness, is quite frankly,
22 empirically, objectively he's unlikely.

23 I would ask you to return a verdict that says he is
24 not a sexually violent predator so that when he is done
25 with his time at the Department of Corrections at the end

1 of this year, he goes homes. Thank you. I appreciate your
2 attention.

3 THE COURT: Any rebuttal, Mr. Flores?

4 MR. FLORES: No, Your Honor.

5 *JURY CHARGE*

6 THE COURT: During this trial, ladies and gentlemen,
7 you and I have certain duties to perform. As the trial
8 judge, it's my responsibility to preside over the trial of
9 this case, and to rule upon or pass upon the admissibility
10 of evidence that's been presented throughout the course of
11 this trial.

12 And you are to consider only the competent evidence
13 which is before you. You must not insinuate to be true any
14 suggestion that's made by a question that's asked of a
15 witness. The question is not evidence, but you can
16 consider it only to the extent that it supplies meaning to
17 the answer that's been provided. You should consider the
18 testimony, along with any exhibits that have been made a
19 part of the record in this case.

20 Now, I have the additional duty and responsibility to
21 instruct you on the law that applies in this case. And as
22 the trial judge, I am the sole judge of the law that
23 applies. If you have any preconceived ideas as to what the
24 law is or what the law should be, your interpretation of
25 the law, you must set all that aside. For under your oath

1 as jurors, you were to accept the law as I charge it to
2 you.

3 Now, if by change I make some error today in my
4 charge, then there is another court at another time that
5 can correct those errors of law. But for purposes of this
6 trial, right now, this moment, you must accept the law as I
7 charge it to you as being the correct statement of the law.

8 Now, in every case tried before a jury, you, the
9 jurors, become the sole, exclusive judges of the facts of
10 this case. No one can tell you what the facts of this case
11 are. And if I've done anything throughout the course of
12 this trial that's given you any impression that I am
13 commenting on the facts, that I'm telling you what facts to
14 find, that I'm expressing an opinion about the facts, I ask
15 that you set that aside as well. I assure you I don't have
16 any opinion about the facts of this case. That's not my
17 job here; that's not my role. That's your duty, your
18 responsibility as jurors to determine the facts of this
19 case.

20 Now, in order to do that, you have to analyze and
21 evaluate the evidence and determine what evidence convinces
22 you of its truth. In order to do that, you have to judge
23 the credibility or believability of the witnesses who've
24 testified in this case. And in judging the credibility or
25 believability -- that's simply a legalistic term meaning

1 believability -- you may consider certain factors in
2 determining that credibility.

3 Those would include what was the manner and appearance
4 of the witness who testified? Was he or she hesitant or
5 straightforward in answering the questions? Was the
6 testimony of a witness consistent or inconsistent? How did
7 the witness come to know the facts that he or she testified
8 to? What was his or her ability to know these facts? Is
9 there some reason that a witness would want to give
10 testimony that would help or hurt one side or the other?
11 In other words, was the witness's testimony biased or
12 prejudiced in any manner? And was the witness's testimony
13 strengthened or weakened by other testimony or other
14 evidence?

15 Now, ladies and gentlemen, in determining the
16 credibility of the witnesses, you may believe one witness
17 against several witnesses, or you may believe several
18 witnesses against one witness. You may believe a portion
19 of the witness's testimony and disregard other portions of
20 that same witness's testimony. And if you have a good,
21 sufficient reason for doing so, you may accept a witness's
22 testimony in its entirety, or you may reject it in its
23 entirety.

24 These factors you should not exercise arbitrarily.
25 But if in your good judgment there is reason for you to

1 consider these things, then you should do so.

2 Your objective, ladies and gentlemen, is to seek the
3 truth. You do not determine the truth by counting the
4 number of witnesses who have testified for one side or the
5 other. The truth isn't determined counting witnesses.

6 What the law simply requires is that when you exercise
7 your mental processes in coming up with what you consider
8 to be truthful evidence, you use your good common sense,
9 your sense of logic and reasoning. Use your experiences in
10 life. You then apply these attributes to the evidence and
11 determine what you, the jury, consider to be truthful
12 evidence. And then to those true statements of fact as
13 determined by you, you apply the law as I will charge it to
14 you. And then you will be able to arrive at your verdict.

15 Your verdict should not be based upon sympathy,
16 passion, or prejudice. By your verdict, you have no
17 friends to reward, and you have no enemies to punish. Your
18 verdict should simply speak the truth.

19 Now, under our rules of evidence, ordinarily a witness
20 cannot testify as to opinions or conclusions. An exception
21 exists for those that we call expert witnesses. Those are
22 witnesses who, because of their education and training,
23 they profess to be an expert in some art or science, and
24 they can give an opinion in the area in which they profess
25 to be an expert.

1 You should consider any expert opinion that's been
2 offered in this case and give it the weight you think that
3 it deserves. If you should find that the expert's opinion
4 is not based upon sufficient education or training, or if
5 the expert's opinion is outweighed by other testimony or
6 other evidence, then you are not required to accept the
7 witness's opinion.

8 A witness's opinion should be given no greater weight
9 than that of any other witness simply because that person
10 professes to be an expert. And you are not required to
11 accept an expert's opinion even though it may be
12 uncontradicted.

13 Now, when an expert provides an opinion, the opinion
14 must be stated to a reasonable degree of professional
15 certainty that the event in question most probably is, in
16 fact, correct. Now, that does not mean that the expert has
17 to use the words most probably. It's enough that the
18 expert states in his or her professional opinion that the
19 basis of the opinion and the conclusion of the opinion is
20 such that it's one of many causes or most probable cause
21 among many other causes.

22 Now, ladies and gentlemen, in this case the state has
23 brought this lawsuit under the Sexually Violent Predator
24 Act here in South Carolina. The state seeks the civil
25 commitment of Patrick Guess for long-term control, care,

1 and treatment in a secure facility. This is not a criminal
2 prosecution, but this is a civil case. So, we are not
3 seeking incarceration of Mr. Guess. We're talking about
4 civil commitment in a secure facility.

5 The state alleges or claims that Mr. Guess is a
6 sexually violent predator under the law. Now, Mr. Guess
7 denies that he is a sexually violent predator, and the
8 burden of proof is therefore on the state to prove by
9 evidence sufficient to satisfy each of you beyond a
10 reasonable doubt that Patrick Guess is a sexually violent
11 predator.

12 If the state is able to meet that burden, then you
13 must return a verdict finding that Patrick Guess is a
14 sexually violent predator. If the state is unable to meet
15 that burden of proof on one or more elements of its claim,
16 then you must return a verdict that finds that Patrick
17 Guess is not a sexually violent predator.

18 Now, of course in most civil cases, the plaintiff or
19 the person who is bringing the action only has the burden
20 of proving that the facts are more likely true than not
21 true, and that's what we call but the greater weight or
22 preponderance of the evidence. However, in this particular
23 type of case, the state's burden is more powerful than
24 that. It must be beyond a reasonable doubt.

25 What is reasonable doubt? Reasonable doubt is the

1 kind of doubt that would cause a reasonable person to
2 hesitate to act. Now, proof beyond a reasonable doubt is
3 proof that leaves you firmly convinced. Now, there are
4 very few things that we know with absolute certainty, and
5 the law does not require proof that overcomes every
6 possible doubt.

7 But if based upon your consideration of all of the
8 evidence that has been presented in this case you are
9 firmly convinced that the respondent, Patrick Guess, is a
10 sexually violent predator, then you must return a verdict
11 finding that he is a sexually violent predator.

12 If, on the other hand, you think that there is a real
13 possibility that he is not a sexually violent predator,
14 then you must give him the benefit of that doubt and return
15 a verdict showing that he is not a sexually violent
16 predator.

17 Reasonable doubt may arise from evidence that's in
18 this case, and the evidence that's been presented in this
19 case. Or it may come from the lack of evidence that's been
20 presented in this case. It's up to you, ladies and
21 gentlemen, to determine whether or not reasonable doubt
22 exists in this case.

23 So, what are the elements that the state must prove
24 beyond a reasonable doubt? First, the state must prove
25 that the respondent, Mr. Guess, has been convicted of a

1 sexually violent offense. And I charge you, ladies and
2 gentlemen, that criminal sexual conduct in the second
3 degree with a minor is a sexually violent offense.
4 Secondly, the state must prove that Mr. Guess suffers from
5 a mental abnormality or personality disorder. And third,
6 the state must prove that that mental abnormality or
7 personality disorder makes him likely to engage in acts of
8 sexual violence if he is not confined in a secure facility
9 for long-term control, care, and treatment.

10 Inherent in all of these elements is that the state
11 must prove the requirement that the respondent, Mr. Guess's
12 mental abnormality or personality disorder causes him
13 serious difficulty in controlling his behavior. In other
14 words, the state must prove beyond a reasonable doubt that
15 the individual it seeks to commit suffers from a mental
16 illness which he cannot sufficiently control without the
17 structure and care provided by a mental health facility,
18 rendering him otherwise likely to commit a dangerous act.

19 Now, in order for you to understand the elements of
20 the state's claim, you must -- I'll define certain terms
21 for you and the terms that I've used.

22 Mental abnormality. Mental abnormality means a mental
23 condition affecting a person's emotional or volitional
24 capacity that predisposes the person to commit sexual --
25 sexually violent offenses. This mental abnormality or

1 personality disorder must cause the respondent, Mr. Guess,
2 serious difficulty in controlling his behavior.

3 Likely to engage in acts of sexual violence means that
4 the person's propensity to commit acts of sexual violence
5 is of such a degree as to pose a menace to the health and
6 safety of others so that he is dangerous to others.

7 Again, ladies and gentlemen, I remind you that the
8 burden of proof is on the state to prove to your
9 satisfaction beyond a reasonable doubt that the respondent,
10 Patrick Guess, has been convicted of a sexually violent
11 offense, as I've instructed you. And also suffers from a
12 mental abnormality of personality disorder, and that
13 disorder or abnormality makes him likely to engage in acts
14 of sexual violence if he is not confined in a secure
15 facility for long-term control, care, and treatment.

16 Now, if the state carries that burden of proof and
17 convinces you beyond a reasonable doubt as to each of these
18 elements, then you must return a verdict that Patrick Guess
19 is a sexually violent predator. However, if the state does
20 not meet that burden of proof as to one or more of the
21 elements as I've described, then you must return a verdict
22 finding that Patrick Guess is not a sexually violent
23 predator.

24 Now, ladies and gentlemen, as I've indicated, there
25 are two possible verdicts in this case. When you arrive at

1 your verdict, then it will be time for your foreperson to
2 complete the form. The form says: We, the jury,
3 unanimously find beyond a reasonable doubt. There's a
4 space that says: Patrick Guess is a sexually violent
5 predator. The next line says: Patrick Guess is not a
6 sexually violent predator.

7 Based upon the law that I've described to you, when
8 you arrive at your verdict, Mr. Foreman, then you check
9 whichever blank is appropriate. Again, if you find that
10 the state has met its burden beyond a reasonable doubt that
11 Patrick Guess is a sexually violent predator, then you must
12 check that block. If you find that the state has failed in
13 that burden and that you find that the state has not proven
14 beyond a reasonable doubt that Patrick Guess is a sexually
15 violent predator, then you must check that he is not a
16 sexually violent predator. No matter what your verdict,
17 when you have signed the form and placed today's date, we
18 will be ready to receive you back into court with your
19 verdict.

20 Now, ladies and gentlemen, as you've heard, your
21 verdict must be unanimous; it must be the verdict of all
22 twelve of you. You have been sworn as a fair and impartial
23 jury to determine the facts of this case based upon the
24 evidence that has been presented, and based upon the law as
25 I have charged it to you. And when you have done that, you

1 will arrive at your verdict, and no one will be able to
2 complain about the verdict that you have reached, and you
3 would have fully discharged your duty and your
4 responsibility in this case.

5 Again, ladies and gentlemen, your verdict should not
6 be based upon sympathy, passion, or prejudice. Your
7 verdict should simply speak the truth.

8 Now, at this time, ladies and gentlemen, I'm going to
9 ask that you retire to the jury room. I ask that you not
10 begin your deliberations just yet. The law requires that I
11 consult with the attorneys to see if I have omitted
12 anything from my instructions. If I have not omitted
13 anything, then this verdict form, along with the exhibits,
14 will be sent to you, and you may begin your deliberations.

15 Mr. Foreman, if at any time throughout the course of
16 your deliberations there are any questions that come up
17 that you would like for us to try to answer, if you will
18 write the question on a sheet of paper, sign your name,
19 knock on the door and give it to the bailiff, and we'll try
20 to answer it. If, however, you have no questions, when you
21 have finished the verdict form and signed it, then if you
22 will, knock on the door at that time and tell us that you
23 have reached a verdict. And we will receive you back in to
24 court to receive your verdict.

25 Ms. Taylor, as the alternate, your role has also been

1 extremely important. I ask that when the jury retires,
2 retires to the jury room that you wait outside of the jury
3 room. Do not go in with them, and I'll come and excuse you
4 shortly from further service. I appreciate that.

5 And, ladies and gentlemen, I will tell you that given
6 the hour, if you decide that your deliberations are such
7 that you would like to have lunch ordered for you, we can
8 do that. I will tell you that it takes at least an hour
9 from the time that the lunch is ordered until it is
10 received here at the courthouse, and that really depends on
11 what time the order is placed. But if you decide that you
12 wish to do that, if you will let me know so that I can get
13 you menus so that you can make that order.

14 I ask that you retire at this time, ladies and
15 gentlemen, and await further instructions.

16 (THE JURY EXITS AT 11:07 A.M.)

17 THE COURT: Are there any exceptions to the charge for
18 the state?

19 MR. FLORES: None from the state, Your Honor.

20 THE COURT: By the respondent?

21 MR. BELDING: None, Your Honor. Thank you.

22 THE COURT: If you will come and look at the verdict
23 form and make sure it's in proper form, and also the
24 exhibit and make sure it's appropriate as well.

25 (COUNSELORS REVIEW EXHIBIT WITH COURT REPORTERS.)

1 THE COURT: If you will, tell the jury that they may
2 begin their deliberations.

3 We'll stand in recess in this matter until we hear
4 from them further. If you all need to leave for whatever
5 reason, just let me know, and let Joseph know so he can get
6 your numbers.

7 And, Mr. Guess, they will return you downstairs to the
8 holding cell until we hear back from the jury.

9 (OFF THE RECORD AS JURY DELIBERATIONS BEGIN AT 11:07
10 A.M.)

11 THE COURT: Counsel, it's my understanding that the
12 jury has reached a verdict in the matter of the *State vs.*
13 *Patrick Guess* as respondent. Is there anything we need to
14 take up before we bring the jury in?

15 MR. FLORES: Nothing from the state, Your Honor.

16 MR. BELDING: Nothing from respondent. Thank you.

17 THE COURT: Mr. Desasseure, if you would ask the jury
18 to come in, please.

19 (THE JURY ENTERS AT 12:04 P.M.)

20 BAILIFF: All the jurors are present, Your Honor.

21 THE COURT: Thank you.

22 Mr. Foreman, I understand that you all have reached a
23 verdict. Is that correct?

24 FOREPERSON: Yes, ma'am.

25 THE COURT: If you would please pass it to the

1 bailiff.

2 (A PAUSE.)

3 THE COURT: Madame Clerk, if you would please publish
4 the verdict.

5 CLERK OF COURT: Yes, Your Honor.

6 VERDICT

7 In the Court of Common Pleas for the Fifth Judicial
8 Circuit, civil action number 2011-CP-40-2334, the matter of
9 the *State of South Carolina vs. Patrick Guess*, in the
10 matter of the care and treatment of Patrick Guess, we, the
11 jury, unanimously find beyond a reasonable doubt Patrick
12 Guess is a sexually violent predator. Signed by the
13 foreperson, and the date is 11/15/2011.

14 Mr. Foreman, this is your verdict and the verdict of
15 the entire jury?

16 FOREPERSON: Yes, ma'am.

17 CLERK OF COURT: Thank you.

18 THE COURT: Do the parties wish to poll the jurors?

19 MR. FLORES: No, Your Honor.

20 MR. BELDING: No, Your Honor. Thank you.

21 THE COURT: Ladies and gentlemen, the court is not
22 concerned with the verdict that you reached so much as I am
23 concerned with the process by which you reached your
24 verdict. You listened to the evidence as it was presented
25 throughout the course of this trial. You also listened to

1 my instructions to you as to the law. You determined the
2 facts in accordance with your view of what that evidence
3 showed, and you applied the law as I charged it to you, and
4 you were able to arrive at your verdict.

5 And having done so, then no one can complain about the
6 verdict that you've reached. And you have fully discharged
7 your duty and your responsibility as jurors in this case.
8 On behalf of the county and the state, I'd like to thank
9 you very much for your service in this particular case.

10 I will excuse you for the remainder of the day, but I
11 will ask that you call back this afternoon after 6 p.m.
12 We've got a couple of other things going on this week. We
13 may need your services further, but there's also a
14 possibility we may not need you further. So, I just ask
15 that you call in just out of an abundance of caution.

16 Thank you all very much, and you all are excused for
17 today; the rest of the day, you're free. Just call back
18 tomorrow -- tonight after 6.

19 (THE JURY EXITS AT 12:07 P.M.)

20 THE COURT: Are there any post-trial motions at this
21 time?

22 MR. FLORES: Not for the state, Your Honor.

23 MR. BELDING: Your Honor, on behalf of the respondent,
24 I'd move for a judgement notwithstanding the jury's verdict
25 based essentially on the same grounds that I brought up in

1 the motion for directed verdict. If you would like to hear
2 those for the record, I'd be glad to go through them.

3 But I think that this was an interesting -- it's
4 always an interesting question of law, particularly
5 considering it's the issue of likelihood. And of course
6 the respondent's position is that was not proved beyond a
7 reasonable doubt, despite jurors' verdict, and we would ask
8 the court for a judgement JNOV.

9 THE COURT: And I think, based upon the same grounds
10 -- and I understand the reasons for that. I will say that
11 judgment notwithstanding the verdict basically imposes upon
12 me the duty to consider basis and the reasons for the
13 verdict and whether there is evidence to support that. Or
14 whether or not the jury's verdict would have been based
15 upon some undue, inappropriate reason such as prejudice or
16 passion.

17 And while these cases always have that element that
18 appealed to the passions of the jurors, I think in this
19 particular case there was evidence from which they
20 appropriately made a decision based upon all the testimony
21 that was presented. They had the duty and the
22 responsibility to weigh that evidence, and I believe that
23 their finding was appropriate under the circumstances.
24 That there is evidence to support their verdict in this
25 particular case. And being aware that the burden was

1 beyond a reasonable doubt, based upon the evidence that was
2 presented to them, I think that there was evidence to
3 support that verdict beyond a reasonable doubt, and so I
4 will deny your motion.

5 MR. BELDING: Thank you, Your Honor. There's nothing
6 else for the respondent.

7 *SENTENCE OF THE COURT*

8 THE COURT: And based upon that, then, Mr. Guess, the
9 jury returned a verdict finding that you meet the
10 qualifications or definitions of a sexually violent
11 predator under the act. And that upon your completion of
12 your sentence within the Department of Corrections, that
13 you would be transferred to the Department of Mental Health
14 in a secure facility for long-term care, control, and
15 treatment.

16 Mr. Belding will have the opportunity to talk with you
17 about whether or not you wish to appeal the verdict in this
18 particular case. And I suggest that if you decide --
19 whatever your decision is with regard to that, that you
20 make your wishes clearly known to Mr. Belding so that he
21 can take appropriate action on your behalf.

22 RESPONDENT: Yes, ma'am.

23 THE COURT: Thank you, and with that, I believe the
24 state will prepare an order to that effect.

25 MR. FLORES: Yes, Your Honor. I do have an order

WITNESSES

③ Inv. L. Weeks, RCSD

Inv. W. J. O'Neill

00
00
00

ARREST WARRANT NO.

DP02048

ACTION OF GRAND JURY

TRIP BILL

Willie M. Young-Sims
Foreman of Grand Jury

01/23/02

VERDICT

Guilty

Leva S. Williams

3150 2002
Foreman of Petit Jury Date:

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#00 JANUARY TERM 2002

THE STATE

vs.

PATRICK GUESS

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

S. C. Code Section 16-3-655(3) Class C-Felony
0397

FORM 32 (12/87)

337

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH
A MINOR SECOND DEGREE

At a Court of General Sessions, convened on January 23, 2002,
the Grand Jurors of RICHLAND County present upon their oath:

That PATRICK GUESS did in Richland County on or about the 24th day of April, 2000 engage in sexual battery; to wit: sexual intercourse or any intrusion, however slight, into and with the body of the victim Minor, a victim who was at least fourteen years of age, but who was less than sixteen years of age and the said Patrick Guess is older than the victim, all in violation of §§16-3-655(3) of the Code of Laws of South Carolina 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warner B. Giese
SOLICITOR

OF SOUTH CAROLINA

TY OF

Richland

VS
Patrick Guess

DOB

Sex: Male

Age: 20

SS#:

SS:

Columbia SC 29209

SID#: SC39000176

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

2002 -GS- 40 - 843

A/W#: DP03048

Date of Offense: 4-24-00

S.C. Code §: 16-3-655(3)

CDR Code #: 0 / 3 / 9 / 7

☐ CASE RESTORED

SENTENCE

☒ PLEA

☒ TRIAL

☒ CONVICTED OF or ☒ PLEADS

osition of the said indictment comes now the Defendant who was

Criminal Sexual Conduct with a Minor

tion of § 16-3-655(3) of the S.C. Code of Laws, bearing CDR Code # 0 / 3 / 9 / 7

N-VIOLENT

☒ VIOLENT

☐ SERIOUS

☒ MOST SERIOUS

☐ 17-25-45

arge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

ea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ST:

M. M. [Signature]

Solicitor

[Signature]

Defendant

Cosley M. Coggin

Attorney for Defendant

REFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
eterminate term of 12 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
is/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
tion, which are incorporated by reference.

The Defendant is to be given credit for 536 days/months jail time.

CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

STITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

l: \$ _____ plus 20% fee: \$ _____

ment Terms: _____

l set by SCDPPPS _____

ipient: _____

e:\$

1-206 (Assessments 100%)\$

1-211(A)(1) (Surcharge)\$

1-211(A)(2) (Surcharge)\$

5-2995 (DUI Assessment)\$

to County (if paid in installments) ...\$

TAL\$

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: no contact with the victim
whatsoever

PRESIDING JUDGE

Judge Code: _____

Sentence Date: _____

Barbara A. Scott

Clerk of Court/ Deputy Clerk

Reporter: Tracy

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

State of South Carolina,

Petitioner,

v.

Patrick Guess,

Respondent.

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-2334

VERDICT

JEANETTE W. McBRIDE
C.C.P. & G.S.

2011 NOV 15 PM 4:17

RICHLAND COUNTY
FILED

WE, THE JURY, UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT:

☒

Patrick Guess **IS** a Sexually Violent Predator.

☐

Patrick Guess **IS NOT** a Sexually Violent Predator.


Foreperson

Date: 11/15/2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
IN THE MATTER OF THE CARE	)	CASE NO. 2011-CP-40-2334
AND TREATMENT OF	)	
PATRICK GUESS,	)	ORDER OF COMMITMENT
RESPONDENT.	)	

The trial of this case was held in the County of Richland in the Court of Common Pleas the week of November 14, 2011. A jury of citizens from Richland County heard this case pursuant to request for a jury trial filed by the State. Assistant Attorney General Lloyd V. Flores, Jr. represented the State. David E. Belding, Esquire, represented the Respondent. The jury having heard the presentation of the evidence made the following findings of fact pursuant to South Carolina Code Sections 44-48-90 and 44-48-100:

The State has proven beyond a reasonable doubt that Respondent, Patrick Guess, is a sexually violent predator as that term is defined in South Carolina Code Section 44-48-30.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT

(a) Respondent is committed to the Department of Mental Health for his long-term control, care and treatment;

(b) Respondent is to continue to be detained in the South Carolina Department of Corrections until his projected release date, and then transported by the Department of Corrections to the secure facility of the South Carolina Department of Mental Health, at 4460 Broad River Road, Columbia, SC 29210. The Department of Corrections is to transport Respondent on such scheduled date as the Department of Corrections coordinates with the Department of Mental Health.

AND IT IS SO ORDERED.


 The Honorable Alison Renee Lee,
 Chief Administrative Judge for the Fifth
 Judicial Circuit Court of Common Pleas

November 15, 2011
 Columbia, South Carolina

RECEIVED

NOV 18 2011

S.C. Supreme Court

RICHLAND COUNTY
 FILED
 2011 NOV 15 PM 3:30
 JEANETTE
 C.C.P.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 261 CP-40-233d

State of S.C.

Patrick Guess

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

This order ☒ ends ☐ does not end the case.
Additional information for the Clerk :

ORDER INFORMATION

Verdict pending Respondent is a sexually violent predator. Post Trial motions denied.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Mr. Beebe
Circuit Court Judge

2118
Judge Code

11/15/2011
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 15th day of Nov., 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Lloyd V. Flores, Jr.

David E. Belding

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Shanette W. Andrade
CLERK OF COURT

Court Reporter:

WITNESSES

Inv. L. Weeks, RCSD

Inv. W. J. O'Neill

38
3

ARREST WARRANT NO.

DP02048

ACTION OF GRAND JURY

TRUE BILL

Willie M. Usery-Bowers
Foreman of Grand Jury

01/23/02

VERDICT

Guilty

Leva S. Winters

Foreman of Petit Jury

Date:

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#00 JANUARY TERM 2002

THE STATE

vs.

PATRICK GUESS

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

S. C. Code Section 16-3-655(3) Class C-Felony
0397

FORM 32 (12/87)

337

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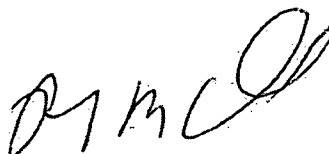
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warren B. Giesi
SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 17th, 2013



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT

Appellate Case No. 2011-203688

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)	11
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STATEMENT OF ISSUES ON APPEAL

Whether the court erred by refusing to direct a verdict where the state presented no evidence there was a significant likelihood appellant would engage in repeated acts of sexual violence where the state's own statistical evidence showed appellant had a less than one in four likelihood that he would re-offend within five years?

STATEMENT OF THE CASE

In 2002, appellant was convicted of criminal sexual conduct with a minor in the second degree. R. 4, ll. 11-18. The state subsequently moved to have appellant classified and retained in custody as a sexually violent predator.

His case was called to trial on November 14, 2011 before the Honorable Alison Renee Lee. David Belding represented appellant. Lloyd Flores, Jr. was the assistant attorney general. R. 1.

At the conclusion of the trial on November 15, 2011 the jury found appellant was a sexually violent predator. R. 112, ll. 7-13. This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict where the state presented no evidence there was a significant likelihood appellant would engage in repeated acts of sexual violence where the state's own statistical evidence showed appellant had a less than one in four likelihood that he would re-offend within five years.

Relevant Facts

Dr. Kimberly Harrison had a PhD in Clinical Psychology. R. 8, ll. 17-24. She testified that: "Psychology in general is the study of behavior, thoughts, emotions, mental disorders . . . and then Forensic Psychology is the application of those psychological principles to questions of law." R. 8, l. 22 – 9, l. 9. She was qualified as an expert in Forensic Psychology without objection. R. 9, ll. 17-22.

Harrison testified she reviewed appellant's criminal history, and she knew he had been convicted of criminal sexual conduct with a minor in the second degree in 2002. She said the report showed appellant assaulted a fourteen-year-old female acquaintance from his neighborhood. R. 13, ll. 9-23. Harrison stated she also reviewed appellant's school records and "interviewed him and conducted what's called the Actuarial Risk Assessment Instrument." R. 11, ll. 6-12.

Harrison was aware when appellant was fourteen years old in 1996 he sexually assaulted his four-year-old female cousin. R. 14, ll. 4-20. Appellant pled guilty to ABHAN for this offense, and he was sent to the Department of Juvenile Justice (DJJ). R. 14, ll. 4-20.

Harrison revealed that appellant said his sexual intercourse with the fourteen-old-girl was consensual. However, she testified that appellant admitted to fantasizing about other

“children.” “He admitted to having sexual fantasies of his victim for several months prior to actually committing the offense against her.” R. 16, ll. 1-18.

Harrison said appellant had risk factors including the fact that he was a male. He also had never been married or been in any long-term relationship, and he had victims unrelated to him. Harrison said appellant was considered “to be in the high-risk group” on the Static 99-R test because he “scored higher than about ninety percent of sex offenders in terms of his risk level.” R. 19, ll. 6-19.

Harrison said appellant had an anti-social personality disorder and she opined he had a propensity to commit sexually violent offenses and he was a menace to the health and safety of others. R. 21, l. 10 – 23, l. 22. Harrison said to a reasonable degree of psychological certainty that appellant’s paraphilia and anti-social personality disorder made him likely to engage in acts of sexual violence if he was not confined to a secure facility. R. 24, ll. 11-22.

On cross-examination Dr. Harrison said she received her degree from the University of North Texas, and she studied under a well known professor of psychology, Dr. Richard Rogers. R. 26, l. 5 – 28, l. 21. Defense counsel questioned Harrison about the meaning of “likely” to re-offend in the statute. Harrison acknowledged this was an ambiguous term “that we struggle with in doing these evaluations.” R. 29, l. 18 – 30, l. 4. Harrison said her risk assessments were “complex, multi-faceted decisions.” R. 30, ll. 2-10.

Harrison admitted she only talked to appellant for two and half hours. She acknowledged there was a controversy among psychologists about sexually violent predator evaluations. R. 35, l. 9 – 42, l. 6. She admitted that Webster’s dictionary defined likely as “probable, reasonably to be expected.” R. 42, ll. 11-18. She said the statute did not define

likely to re-offend as there being more than a fifty percent chance. At one point she defensively stated that she did not write the statute at issue here. Harrison testified the statute read “likely to engage in acts of sexual violence means the person’s propensity to commit acts of sexual violence *is of such a degree* as to pose a menace to the health and safety of others.” R. 43, l. 1 – 44, l. 2. (emphasis added). Defense counsel asked Harrison if a twenty-five percent chance of something happening meant it was “likely.” Harrison acknowledged, while dodging the question, that a fifty percent chance something was probable to happen was more of a chance something would occur than forty-nine percent. R. 44, ll. 3-21. Harrison admitted that she concluded appellant **had a 24.7 percent chance of re-offending within five years** based on other sex offenders “with his score.” R. 44, l. 22 – 45, l. 18.

Harrison explained “if you had a group of 100 guys who all had the same score, about 25 of them went on reoffend in five years.” R. 45, l. 19 – 46, l. 2. Harrison admitted this meant that three out of the four in that pool would not re-offend. R. 46, ll. 3-19. Harrison repeated that appellant said that his sex with the fourteen-year-old girl was consensual, and appellant told her he thought she was seventeen. R. 49, l. 4 – 50, l. 14. The following occurred on cross-examination of Harrison:

Mr. Belding: Okay. Did he receive any sex offender treatment while he was in the Department of Corrections?

Dr. Harrison: The records do not indicate that he did, no.

Mr. Belding: So, really this is just care and control. This is just a way of keeping him off the streets, isn’t it?

Dr. Harrison: I don’t - - I didn’t write the law.

Mr. Belding: Okay.

Dr. Harrison: And they do offer treatment at DMH.

Mr. Belding: One day a week?

Dr. Harrison: That's my understanding of how it is now.

R. 56, l. 18 – 57, l. 2.

On re-direct testimony Harrison claimed it would not “be ethical” to base her opinion on “one objective test” [24.7 chance of reoffending] given to appellant. R. 61, ll. 9-13. Harrison defended her opinion of appellant saying it “goes to the diagnosis of the paraphilia, that he was aroused by having sex with a four-year-old.” R. 62, ll. 2-18.

Defense counsel moved for a directed verdict noting the state's one witness acknowledged there was a lot of ambiguity in the statute and the one objective factor was the Static-99 test. Appellant only had a 24.7 likelihood of re-offending in five years and just thirty percent over ten years “so, we're talking about a 1 out of 4 or 1 out of 3 chance. That's the likelihood that she testified to, Dr. Harrison, on the stand. That's not likely. By any normal definition of likely, that's unlikely.” R. 74, l. 8 – 77, l. 5.

Defense counsel argued that appellant was entitled to a directed verdict based on this statistical unlikelihood appellant would reoffend, and that giving this case to the jury just invited a verdict based on passion and prejudice. The assistant attorney general argued that the jury could find appellant was a sexually violent predator when the evidence was viewed in the light most favorable to the state. R. 78, ll. 16-20. The judge stated Dr. Harrison's opinions were not based “solely on objective standards.” “I think because the state has recognized that psychology is not an exact science, that there is not an objective way to

come to a final conclusion. . . .” The judge ruled here was evidence presented by the state and it was therefore a jury question. R. 78, l. 24 – 81, l. 25.

Discussion

The sexually violent predator act is designed to: (1) meet the special needs of sexually violent predators; (2) address the *significant likelihood that they will engage in repeated acts of sexual violence* if not treated for their mental conditions; and (3) *assess the risks* requiring their involuntary civil commitment in a secure facility for a long-term control, care, and treatment. In Re Care and Treatment of Brown v. State, 372 S.C. 611, 616-616, 643 S.E.2d 118, 121 (Ct. App. 2007); In Re Care and Treatment of Canupp, 380 S.C. 611, 618, 671 S.E.2d 614, 617 (Ct. App. 2008).

The issue in this case is the meaning of “significant likelihood.” Defense counsel Belding argued when moving for a directed verdict that a 24.7 chance of committing another offense was not likely or probable by any definition. Appellant Guess was entitled to a directed verdict because the objective evidence in this case showed there was not a “significant likelihood” he would engage in repeated acts of sexual violence if not treated. See In Re Care and Treatment of Brown v. State, 372 S.C. 611, 643 S.E.2d 118 (2007).

The purpose of the requirements in the sexually violent predator act is to ensure that involuntary commitment procedures under the act are *only used to control a limited subclass of dangerous persons* and not to broadly subject any dangerous person to what may be indefinite terms. In Re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 894 (2003). The state has the burden of proving beyond a reasonable doubt that the person is a sexually violent offender; See S.C. Code Ann. § 44-48-100 (2002), and the act defines “likely” to engage in acts of sexual violence, to mean the person’s propensity “to commit

acts of sexual violence *is of such degree* as to pose a menace to the health and safety of others.” S.C. Code § 44-48-30(9); In Re Care and Treatment of Harvey, 355 S.C. 53, 60 S.E.2d 893, 896 (2003). (emphasis added).

Here, the state failed to prove that appellant should be committed because he “suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act.” In Re Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002).

Appellant submits that any person who commits a particular crime (burglary, rape, drug dealing, etc.) is more likely than a “normal person” to commit that same offense in the future. However, that is not, and cannot, what “significant likelihood to re-offend” means. Appellant understands that court looks at the totality of the evidence when ruling on a directed verdict motion. However, a 24.7 % likelihood to re-offend is not a significant likelihood, and the fact appellant at one time had sexual intercourse with a four year old cannot be deemed a significant likelihood that he would re-offend. In other words, the sexual offense itself cannot prove a likelihood to reoffend or else any person who ever had sex with a child would never be released. Further, appellant was only fourteen years old at the time of the offense, and it is now known that teenagers are still developing their minds, and can be expected to exercise better judgment as they grow older. See Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012). The Court in Miller noted that “children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2463 (2012) *citing Roper v. Simmons*, 543 U.S. 551 (2005).

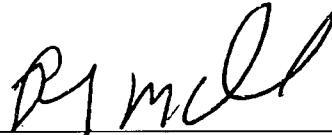
Children also are “are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings . . . [and] a child's character is not as “well formed” as an adult's; his traits are “less fixed” [and] “[o]nly a relatively small proportion of adolescents’ ” who engage in illegal activity “ ‘develop entrenched patterns of problem behavior.’” *quoting* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003). Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2464 (2012).

Dr. Harrison undoubtedly found appellant’s sexual desires abnormal but her stand-alone opinion that appellant was sexual predator renders the language of the statute meaningless if a **24.7 chance** of re-offending is considered a “significant likelihood” within the meaning of the statute. Respectfully, if that is the meaning of the statute then its purpose is to detain persons who have served their sentences based on a small statistical chance they may reoffend. That cannot be the meaning of a constitutional statute, and defense counsel correctly argued appellant was entitled to a directed verdict in this case.

CONCLUSION

By reason of the foregoing argument, this Court should order a directed verdict in appellant's favor.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

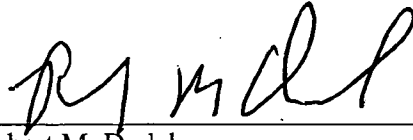
ATTORNEY FOR APPELLANT

This 21st day of June, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

June 21st, 2013

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

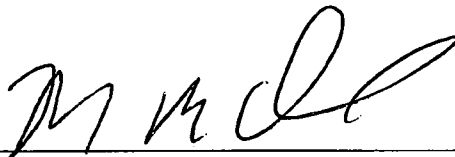
IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT

Appellate Case No. 2011-203688

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of June, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of June, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2011-203688

IN THE MATTER OF THE CARE AND TREATMENT OF
PATRICK GUESS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Guess' directed verdict motion because the court appointed expert testified to a reasonable degree of psychological certainty Guess has both a mental abnormality and a personality disorder that cause him serious difficulty controlling his conduct, and he is a high risk to engage in future acts of sexual violence if not confined for long term control, care and treatment.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On January 31, 2002, a Richland County jury convicted Appellant Patrick Guess ("Guess") of criminal sexual conduct with a minor, and the circuit court sentenced him to twelve years incarceration. The conviction arose from Guess' April 2000 sexual assault of a fourteen year old female neighbor he lured into an abandoned house in the neighborhood. (State's Exhibit 1; Record on Appeal [R.], pp. 116-118).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to Guess' release from incarceration, Respondent State of South Carolina (the "State") commenced a civil commitment proceeding in the Richland County Court of Common Pleas in April 2011. The circuit court found probable cause to believe Guess met the criteria for commitment as a sexually violent predator, and appointed Kimberly S. Harrison, Ph.D., to conduct a mental health evaluation of Guess. Dr. Harrison diagnosed Guess with paraphilia, not otherwise specified, and anti-social personality disorder, and found he was a high risk to re-offend sexually. Based on her findings and conclusions, Dr. Harrison recommended Guess for commitment under the SVP Act. (Trial Transcript [TT], pp. 46-50; R., pp. 20-24).

The case was called for a jury trial on November 14, 2011, before the Honorable Alison Renee Lee, Circuit Court Judge. Dr. Harrison was qualified as an expert in forensic psychology, and testified her evaluation protocol included reviewing Guess' criminal history, Department of Juvenile Justice ("DJJ") records, and school records, interviewing Guess, and conducting an actuarial risk assessment. (TT, pp. 34-37; R., pp. 8-11).

Dr. Harrison stated Guess' criminal history was important for purposes of diagnosis and risk assessment. In addition to his 2002 criminal sexual conduct with a minor conviction, Guess was charged in 1996 with first degree criminal sexual conduct with a minor in connection with the sexual molestation of his four year old female cousin, including penetration of her vagina with his penis, and was sentenced to an indeterminate term at DJJ after he pled guilty to assault and battery of a high and aggravated nature.¹ (TT, pp. 38-40; R., pp. 12-14). While confined at DJJ, Guess was found guilty of sexual misconduct against a male DJJ resident, and was placed in a special management unit for thirty days. (TT, pp. 40-41; R., pp. 14-15).

Guess also participated in sex offender treatment at DJJ, which included group and individual sessions, and educational classes regarding appropriate sexual behaviors. During that treatment, Guess admitted molesting his four year old cousin, as well as other victims. He admitted he had sexual fantasies about his cousin for several months prior to the actual molestation, including fantasies about her fighting back, which he found especially arousing. (TT, pp. 41-43; R., pp. 15-17).

In the interview with Dr. Harrison, however, Guess completely denied committing the offense against his cousin, even though he pled guilty and admitted it in treatment at DJJ. He did admit committing the April 2000 offense against the fourteen year old victim, but claimed it was consensual and he thought the victim was seventeen years old.² (TT, pp. 42-43; R., pp. 16-17).

¹ Guess was on probation from this conviction when he committed the April 2000 offense against the fourteen year old victim. (TT, p. 59; R., p. 33).

² Guess' recitation of Dr. Harrison's testimony on this issue is incredibly misleading because he conflates it to appear her testimony regarding his fantasies related to his fourteen year old victim, rather than his four year old victim. (Brief of Appellant,

Dr. Harrison testified Guess had multiple risk factors for sexual reoffending, including having a male victim, never being married or in a long term romantic relationship, and having victims who were not related to him. She stated those are recognized factors that increase the likelihood of future sexual offenses. (TT, pp. 43-44; R., pp.17-18).

Dr. Harrison also testified she used an actuarial risk assessment tool as "one piece of information" for purposes of assessing Guess' risk to commit future acts of sexual violence. She stated the Static-99R considers ten known risk factors that relate to the likelihood of recidivism in sex offenders, which are scored based on the offender's history compared with other sex offenders. Guess' Static-99R score was "higher than about 90 percent of sex offenders in terms of his risk level," and was considered to be "in the high-risk group." (TT, pp. 44-45; R., pp. 18-19).

Based on all the information she reviewed, including Guess' offense records and disciplinary records while incarcerated, as well as her forensic interview with him, Dr. Harrison diagnosed Guess with two disorders; paraphilia, not otherwise specified, and anti-social personality disorder. She testified the paraphilia diagnosis was based on his offense history and disclosures in treatment at DJJ, which indicated a sexual arousal to non-consenting victims. The anti-social personality disorder was based on his history of chronically breaking the law and rules, and doing things that put others at risk. Dr. Harrison stated both disorders, particularly in combination, lead to a propensity to commit acts of sexual violence. (TT, pp. 46-49; R., pp.20-23).

pp. 5-6). By emphasizing the word "children," Guess uses this conflation to imply Dr. Harrison mischaracterized his fantasies, as well as to downplay the significance of those fantasies.

Dr. Harrison opined to a reasonable degree of psychological certainty that Guess had the propensity to be dangerous and commit future acts of sexual violence, and his propensity was of such a degree as to pose a menace to the health and safety of others. She further opined Guess' disorders caused him serious difficulty controlling his behavior, and he was likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (TT, pp. 49-50; R., pp. 23-24).

On cross-examination, Dr. Harrison testified certain terms in the SVP Act are ambiguous, such as the word "likely," but "likely to engage in acts of sexual violence" is defined in the statute as "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." (TT, pp. 55-56; R., pp. 29-30). She further testified that a risk assessment under the SVP Act is "a complex, multifaceted decision." (TT, p. 56; R., p. 30).

As to the Static-99R scores, Dr. Harrison stated that approximately twenty-five percent of the sex offenders in the same high risk category of Static-99R scores as Guess were actually arrested on new sexual offense charges within five years, and approximately thirty-three percent were arrested on new charges within ten years. She stated the Static-99R score was not the only information she used, and she also considered factors not included in the Static-99R. She again testified the circumstances of Guess' sexual offenses indicated he had difficulty controlling his behavior. (TT, pp. 68-75; R., pp. 42-49).

On re-direct examination, Dr. Harrison further clarified her use of the Static-99R, stating she did not just rely on that score because "[y]ou can't reduce a person down to ten historical items." She testified she based her conclusions "on all of the records that

[she] had on his past behavior, on [her] interview with him, as well as other what we call dynamic risk factors,” including his “impulsivity, poor problem-solving skills, those types of things that the Static 99 doesn’t consider at all.” (TT, pp. 85-87; R., pp. 59-61). She further testified that the Static-99R percentage rates of reoffending are only based on reported subsequent arrests, and sex offenses are frequently not reported. (TT, pp. 91-92; R., pp.65-66).

After the State rested its case, Guess moved for a directed verdict, arguing the only objective evidence in the record indicated there was a 24.7 % likelihood he would reoffend, which made it statistically unlikely to reoffend, and therefore, the State failed to meet the statutory requirement for civil commitment. (TT, pp.104-107; R., pp 74-77). The circuit court denied the motion, finding Dr. Harrison’s opinion was not based solely on one objective standard; rather, she considered a multitude of factors, and her conclusion was based on a myriad of things she found in records and through the interview with Guess. The court further found the SVP Act adequately defined “likely to engage in acts of sexual violence” in terms that would be given their common, ordinary everyday meaning. The court concluded there was sufficient evidence to submit the case to the jury. (TT. pp. 108-111; R., 78-81)

The jury found Guess is a sexual violent predator beyond a reasonable doubt. The circuit court denied his post-trial motions, and committed him to the custody of the South Carolina Department of Mental Health for long term control, care and treatment. (Form 4 Order, Verdict Form and Order of Commitment filed November 15, 2011; R., pp. 119-121). This appeal followed.

ARGUMENT

The circuit court properly denied Guess' directed verdict motion because the court appointed expert testified to a reasonable degree of psychological certainty. he has both a mental abnormality and a personality disorder that cause him serious difficulty controlling his conduct, and he is a high risk to engage in future acts of sexual violence if not confined for long term control, care and treatment.

Guess asserts the circuit court erred in denying his directed verdict motion because Dr. Harrison's testimony revealed there was only a 24.7% chance he would reoffend, which he contends did not meet the statutory requirement of a "significant likelihood" of reoffending. The error in the defendant's position approaches Brobdingnagian proportions.

In reviewing the denial of a directed verdict, the court should consider the question of whether any evidence existed in favor of the non-moving party. S.C. Fed. Credit Union v. Higgins, 394 S.C. 189, 714 S.E.2d 550, 552 (2011). The court should be concerned only with the existence or nonexistence of evidence. *Id.*; *see also* Hamilton v. Charleston County Sheriff's Dept., 399 S.C. 252, 731 S.E.2d 727, 728 (Ct. App. 2012) (same).

The trial court must deny a motion for a directed verdict or judgment notwithstanding the verdict ("JNOV") if the evidence yields more than one reasonable inference, or its inference is in doubt. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166, 171 (2012). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues, or to resolve conflicts in the testimony or the evidence. Welch v. Epstein, 342 S.E. 279, 536 S.E.2d 408, 419 (Ct. App. 2000).

As a threshold matter, “significant likelihood” is not the statutory requirement for determining a person’s sexually violent predator status. Section 44-48-30 defines a “sexually violent predator” as a person who: 1) has been convicted of a sexually violent offense; and 2) “suffers from a mental abnormality or personality disorder that makes the person 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 §44-48-30(1)(a) & (b) (Supp. 2012). The SVP Act then defines “likely to engage in acts of sexual violence” as “the person’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.” S.C. Code §44-48-30(9) (Supp. 2012). Therefore, the degree of “likelihood” required under the SVP Act, and what the evidence must show, is specifically defined, and the word “significant” is not included in that requirement.³

Even if evidence of a “significant likelihood” to reoffend is required, however, the evidence presented in this case was more than sufficient to meet that requirement. As the circuit noted in denying the directed verdict motion, Dr. Harrison expressly testified the Static-99R was only one factor she considered in reaching her conclusions regarding Guess’ risk to reoffend sexually.⁴ (TT, pp. 85-87, 108-111; R., pp. 59-61, 78-81).

In addition to the Static-99R score, Dr. Harrison considered factors not encompassed by the ten question Static-99R, including Guess’ entire criminal history, her interview with him, his general inability to control his conduct as evidenced by his

³ The only time the SVP Act uses the word “significant” is in the “Legislative findings,” which states the General Assembly found “the likelihood a sexually violent predator will engage in repeated acts of sexual violence if not treated for their mental conditions is significant.” S.C. Code §44-48-20 (Supp. 2012).

⁴ Dr. Harrison stated it would be unethical for her to base her opinion on one objective test, and she would be subject to professional discipline if she did so. (TT, p. 87; R., p. 61).

behavior in prison, his impulsivity, and his poor problem solving skills. She also considered the underlying circumstances of his first sex related offense involving his four year old cousin, including the type of harm caused to the victim, the way Guess responded when the crime was reported, the presence of other people in the home when the crimes was committed, and the fact the victim was a relative who could easily identify him. She stated these factors supported the paraphilia diagnosis, as well as indicated an inability to control behavior.

Dr. Harrison further testified the fact Guess committed his second sexual offense with the fourteen year old victim while he was on probation, and under increased scrutiny, from the first conviction, also indicated an inability to control his behavior.⁵ Other recognized risk factors she considered were the fact Guess had a male victim (while in DJJ), he has never been married or in a long term relationship, and he had victims who were not related to him. She testified all of these factors increased Guess' risk to reoffend sexually if not confined for treatment, and she specifically opined to a reasonable degree of psychological certainty that Guess' mental abnormality and personality disorder, especially in combination, made him a risk to reoffend sexually, and his risk was of such a degree as to make him a menace to the health and safety of others. (TT, pp.46-50, 72, 74-77, 83, 85-89; R., pp. 20-24,46, 48-51, 57, 59-63).

While focusing on the 24.7% figure, Guess conveniently ignores another significant statistic related to his Static-99R score.⁶ Dr. Harrison testified his score was

⁵ It should be noted that this offense also occurred **after** Guess participated in sex offender treatment at DJJ.

⁶ Dr. Harrison testified the 24.7% reoffending figure was based on "detected reoffenses," and sexually violent offenses are "frequently not reported." (TT, pp. 91-92; R., pp. 65-66).

“higher than about 90 percent of the sex offenders in terms of his risk level,” and he was considered to be in the “high-risk group,” when compared to other sex offenders rated on the Static-99R. (TT, pp. 44-45; R., pp. 18-19) (emphasis added). In other words, Guess’ risk to reoffend was in the **top ten percent** of all sex offenders included in the database. Even as the sole “objective” factor of the evaluation, that is a “significant” risk to reoffend.

Guess also attempts to divert attention from his entire record by alluding to the fact he was fourteen years old at the time of his first sex offense against his four year old cousin, essentially chalking the sexual violation of a four year old up to a mere “lack of maturity and an underdeveloped sense of responsibility,” and a vulnerability to negative influences and outside pressures over which he had limited control. (Brief of Appellant, pp. 10-11). The blatant fallacy of this assertion is amply demonstrated by the fact Guess continued to offend sexually **after** he was committed to DJJ for that offense, including an offense while in DJJ, **after** he participated in sex offender treatment at DJJ, **after** he was released from DJJ and **while** he was on probation, and **after** he turned eighteen. Guess also ignores his numerous disciplinary problems while incarcerated for his second sex offense conviction also belie his youthful immaturity argument. In short, despite numerous factors what would ordinarily serve to help him mature and develop a sense of responsibility, it is clear Guess simply continued to ignore the rights of others, and do whatever he wanted to do.

The record contains ample evidence from which the jury could, and ultimately did, determine Guess is a sexually violent predator. Therefore, the circuit court properly submitted the case to the jury for determination.

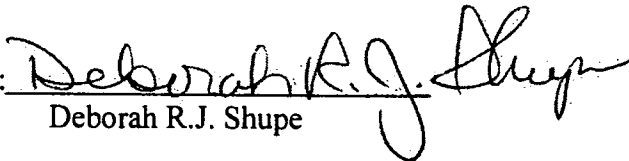
CONCLUSION

Based on the foregoing, the State respectfully submits the circuit court properly denied the directed verdict motion, and Guess' commitment should be affirmed.

Respectfully submitted,

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June 24, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2011-203688

IN THE MATTER OF THE CARE AND TREATMENT OF
PATRICK GUESS,

Appellant.

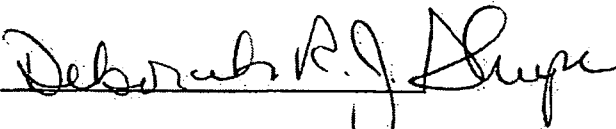
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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ATTORNEYS FOR RESPONDENT

June 24, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2011-203688

IN THE MATTER OF THE CARE AND TREATMENT OF
PATRICK GUESS,

Appellant.

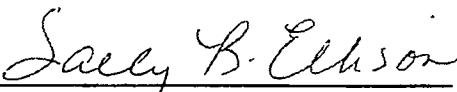
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 24th day of June, 2013.



Sally B. Ellison
Legal Assistant

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