

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

On Petition for Writ of Certiorari to the Court of Appeals **AUG 12 2014**

Appeal From Richland County

The Honorable Alison Renee Lee, Circuit Court Judge **S.C. Supreme Court**  
Appellate Case No. 2014-000855

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

Petitioner.

Opinion No. 2014-UP-056 (S.C. Ct. App. filed February 5, 2014)

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

ALAN WILSON  
Attorney General

DEBORAH R.J. SHUPE  
Senior Assistant Deputy Attorney General

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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## **STATEMENT OF QUESTION PRESENTED**

Did the Court of Appeals properly affirm the circuit court's denial of Petitioner's directed verdict motion based on the expert testimony to a reasonable degree of psychological certainty Petitioner 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

On January 31, 2002, a Richland County jury convicted Petitioner Patrick Guess of criminal sexual conduct with a minor, and the circuit court sentenced him to twelve years incarceration. The conviction arose from Petitioner's April 2000 sexual assault of a fourteen year old female neighbor he lured into an abandoned house in the neighborhood. (Record on Appeal [R.], pp. 116-118).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to Petitioner's release from incarceration, Respondent State of South Carolina ("the State") commenced a civil commitment proceeding in the Richland County Court of Common Pleas. The circuit court found probable cause to believe Petitioner met the criteria for commitment as a sexually violent predator, and appointed Kimberly S. Harrison, Ph.D., to conduct a mental health evaluation of Petitioner pursuant to the SVP Act. Dr. Harrison diagnosed Petitioner 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 Petitioner for commitment under the SVP Act. (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 Petitioner's criminal history, Department of Juvenile Justice ("DJJ") records, and school records, interviewing Guess, and conducting an actuarial risk assessment. (R., pp. 8-11).

Dr. Harrison stated Petitioner's criminal history was important for purposes of diagnosis and risk assessment. In addition to his 2002 criminal sexual conduct with a

minor conviction, Petitioner 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.<sup>1</sup> (R., pp. 12-14). While confined at DJJ, Petitioner was found guilty of sexual misconduct against a male DJJ resident, and was placed in a special management unit for thirty days. (R., pp. 14-15).

Petitioner also participated in sex offender treatment at DJJ, which included group and individual sessions, and educational classes regarding appropriate sexual behaviors. During that treatment, Petitioner 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. (R., pp. 15-17).

In the interview with Dr. Harrison, however, Petitioner 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.<sup>2</sup> (R., pp. 16-17).

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<sup>1</sup> Petitioner was on probation from this conviction when he committed the April 2000 offense against the fourteen year old victim. (R., p. 33).

<sup>2</sup> Petitioner's 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. (Petition, p. 6). By emphasizing the word "children," Petitioner uses this conflation to imply Dr. Harrison mischaracterized his fantasies, as well as to downplay the significance of those fantasies.

Dr. Harrison testified Petitioner 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 increasing the likelihood of future sexual offenses. (R., pp.17-18).

Dr. Harrison also testified she used an actuarial risk assessment tool as “one piece of information” for purposes of assessing Petitioner’s 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. Petitioner’s 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.” (R., pp. 18-19).

Based on all the information she reviewed, including Petitioner’s offense records and disciplinary records while incarcerated, as well as her forensic interview with him, Dr. Harrison diagnosed Petitioner 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. (R., pp.20-23).

Dr. Harrison opined to a reasonable degree of psychological certainty that Petitioner 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 Petitioner's 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. (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." (R., pp. 29-30). She further testified that a risk assessment under the SVP Act is "a complex, multifaceted decision." (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 Petitioner 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 Petitioner's sexual offenses indicated he had difficulty controlling his behavior. (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." (R., pp. 59-61). She further

testified the Static-99R percentage rates of reoffending are only based on reported subsequent arrests, and sex offenses are frequently not reported. (R., pp.65-66).

After the State rested its case, Petitioner 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. (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 Petitioner. 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. (R., 78-81)

The jury found Petitioner 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. (R., pp. 119-121). This appeal followed.

By unpublished opinion filed February 5, 2014, the South Carolina Court of Appeals affirmed the circuit court's ruling, citing the applicable standard of appellate review of directed verdict rulings, and the relevant portions of the SVP Act. (Appendix, pp. 1-2). By Order filed March 20, 2014, the Court denied Petitioner's Petition for Rehearing. (Appendix, p. 8). Petitioner filed a Petitioner for Writ of Certiorari on July 23, 2014, seeking review of the Court of Appeals opinion.

## ARGUMENT

**The Court of Appeals properly affirmed the circuit court's denial of Petitioner's directed verdict motion because the court appointed expert testified to a reasonable degree of psychological certainty Petitioner 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.**

Relying on virtually the exact same argument he made in the Court of Appeals, Petitioner contends the Court of Appeals erred in affirming the denial of his directed verdict motion because the State's only evidence regarding his risk to re-offend indicated he had a 24.7% chance of re-offending within five years, which did not constitute a "significant likelihood" he would re-offend. The error in Petitioner's contention approaches Brobdingnagian proportions.

The trial court must deny a motion for a directed verdict 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).

In reviewing the denial of a directed verdict, the appellate 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).

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) (emphasis added). 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) (emphasis added). 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.<sup>3</sup>

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 court 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 Petitioner’s risk to reoffend sexually.<sup>4</sup> (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 Petitioner’s entire criminal

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<sup>3</sup> 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).

<sup>4</sup> 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).

history, her interview with him, his general inability to control his conduct as evidenced by his 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 Petitioner 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 Petitioner 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.<sup>5</sup> Other recognized risk factors she considered were the fact Petitioner 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 these factors increased Petitioner's risk to reoffend sexually if not confined for treatment, and she specifically opined to a reasonable degree of psychological certainty that Petitioner's 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. (R., pp. 20-24, 46, 48-51, 57, 59-63).

While focusing on the 24.7% figure, Petitioner glosses over another significant statistic related to his Static-99R score. Dr. Harrison testified his score was "**higher** than about **90 percent** of the sex offenders in terms of his risk level," and he was considered

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<sup>5</sup> It should be noted this offense also occurred **after** Guess participated in sex offender treatment at DJJ.

to be in the “high-risk group,” when compared to **other sex offenders** rated on the Static-99R. (R., pp. 18-19) (emphasis added). In other words, Petitioner 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.

Dr. Harrison further testified the 24.7% re-offending figure was based on “**detected re-offenses,**” and sexually violent offenses are “**frequently not reported.**” (R., pp. 65-66) (emphasis added). Thus, the re-offending risk is actually higher if the low reporting factor is considered, but as with any negative, it is impossible to prove how much higher with any exactitude.

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 child 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. (Petition, p. 14). The blatant fallacy of this assertion is amply demonstrated by the fact Petitioner 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. Petitioner also ignores his numerous disciplinary problems while incarcerated for his second sex offense conviction, which belie his youthful immaturity argument. In short, despite numerous factors that would ordinarily serve to help him mature and develop a sense of responsibility, it is clear Petitioner simply continued to ignore the rights of

others, do whatever he wanted to do, and quickly committed another sexual offense against a minor after his release from DJJ.

Petitioner's reference to State v. Nation, 408 S.C. 474, 759 S.E.2d 428 (2014), is puzzling. In Nation, this Court again upheld the GPS monitoring statute as modified by State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), which held anyone subject to GPS monitoring is entitled to petition for judicial review after ten years, and every five years thereafter. *Id.* at 431-432. The Court's analysis had nothing to do with the proper basis for determining the level of an offender's risk to re-offend. Significantly, the SVP Act statutorily requires periodic judicial review when a person is committed as a sexual violent predator, so it already complies with the Dykes and Nation requirement.

Petitioner asks this Court to find as a matter of law that a low score on an actuarial risk assessment tool based only on reported re-offenses by sex offenders precludes civil commitment as a sexually violent predator, regardless of any other facts or circumstances. Under that theory, a high score on the tool would mandate civil commitment as a matter of law. As the circuit court noted in this case, however, if one "objective" test is the sole basis for determining the outcome in sexual predator cases, "we could have people apply the test with objective standards and be able to come in and testify," and "[t]hat would be basically the end of it." (R., p. 79). Petitioner's position is not, and should not be, the practice, much less the law.

The record contains ample evidence from which the jury could, and ultimately did, determine Petitioner is a sexually violent predator. Therefore, the Court of Appeals properly affirmed the circuit court's denial of Petitioner's directed verdict motion.

**CONCLUSION**

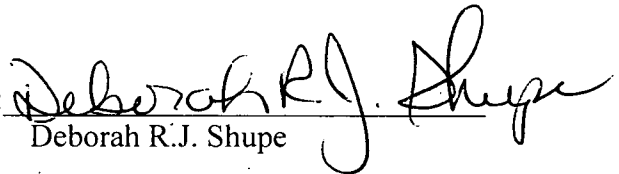
Based on the foregoing reasons, Respondent respectfully submits this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON  
Attorney General

DEBORAH R.J. SHUPE  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 5098

BY:

  
Deborah R.J. Shupe

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 12, 2014

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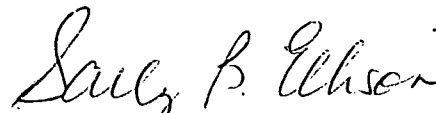
**PROOF OF SERVICE**

I, Sally B. Ellison, certify I served the Return to Petition For Writ of Certiorari to the Court of Appeals 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 that all parties required by Rule to be served have been served.

This 12<sup>th</sup> day of August, 2014.



SALLY B. ELLISON  
Legal Assistant  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727