

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No.: 2014-002414

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**RECEIVED**

JUN 23 2015

SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT OF  
JOHNNY GARRETT, Appellant

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**INITIAL BRIEF OF APPELLANT**

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## TABLE OF AUTHORITIES

### Cases:

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, 1970 U.S.

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State v. Goodwin 384 SC 588, 683 SE2d 500 (2009)

State v. Neva, 305 SC 450, 388 SE2d 791 (1990)

State v. Peterson, 287 SC 244, 335 SE2d 800 (1985)

### Statutes:

South Carolina Code of Law Ann. §44-48-110

South Carolina Code of Law Ann. §44-48-130

**STATEMENT OF ISSUES ON APPEAL**

**Did the trial court err in not granting the Appellant's Motion for Mistrial based upon burden shifting comments of the State?**

## STATEMENT OF THE CASE

That on or about July 28, 2004, the Appellant was arrested and charged with Criminal Sexual Conduct with a Minor less than 11 years old, in the 1<sup>st</sup> Degree. This charge was later nol prossed and The Appellant was Directly Indicted for Committing a Lewd Act on a Child, under the age of 16. On February 7, 2005, the Appellant plead guilty under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, 1970 U.S. and was sentenced to nine (9) years. After maxing out this sentence, he was transferred to the Spartanburg County Detention Center pending a commitment proceeding pursuant to the South Carolina Sexual Violent Predator Act, §44-48-110 et. seq. South Carolina Code of Laws. On January 26, 2010, the Appellant was committed to the Department of Mental Health under the Sexually Violent Predator Act. The Appellant has remained in this program since that time.

The Appellant Petitioned the Court for a review hearing and release in 2012. This Petition for Release was without the approval of the South Carolina Department of Mental Health. An Annual Review hearing was held before The Honorable Roger L. Couch on July 31, 2013. Pursuant to this hearing, the Court found and concluded that based upon the Expert testimony presented, that the Appellant was entitled to a trial on the issue of whether or not his mental abnormality had changed so that he was safe to be released at large and was not likely to commit acts of sexual violence. An Order of the Court was filed on October 2, 2013 granting this relief.

The Respondent requested a Jury Trial in this matter, pursuant to §44-48-110 South Carolina Code of Laws on October 15, 2013. This matter was tried before a Jury on October 6-7, 2014. The Jury returned a verdict finding that the Appellant's

abnormality or personality disorder remained such, that he was not safe to be released from the Sexually Violent Predator Unit.

Motions for Judgement notwithstanding the Verdict and a New Trial were timely filed. On October 28, 2014, the Court issued an Order denying the Appellant's Motions. The Honorable Frank R. Addy, Jr. was the presiding Judge. This Appeal follows:

## STATEMENT OF FACTS

This matter was tried before a Jury on October 6-7, 2014. This Trial was before The Honorable Frank R. Addy, Jr. At trial, Marie E. Gehle, Psy.d., was qualified as an Expert in the fields of psychology and forensic psychology without objection. (Tra. p. 25) Dr. Gehle testified that she was currently employed as a Chief Psychologist at the Department of Mental Health (Tra. p. 22) and that her duties entailed evaluations pursuant to the Sexually Violent Predator Act. That she performed pre-commitment evaluations to, determining whether or not people meet the criteria to be committed and that she also performs annual review evaluations. (Tra. p. 23) Dr. Gehle testified that she had completed three annual review evaluations of the Appellant. (Tra. p. 27) Dr. Gehle testified that she had reviewed all of the documents in this case regarding the Appellant. (Tra. p. 28)

Dr. Gehle testified that Mr. Garrett was serving time for Lewd Act upon a Minor Child (Tra. p. 33) That the Appellant had originally been indicted for Criminal Sexual Conduct with a Minor in the 1<sup>st</sup> Degree and that pursuant to a Direct Indictment, this was changed to a Lewd Act upon a Minor. Dr. Gehle testified to both the facts and circumstances surrounding the 2004 charge as well as prior sexual offenses for which the Appellant was not convicted. (Tra. pp. 37-39) She discussed prior psychological evaluations of the Appellant (Tra. p. 40) and other non-sexual related crimes. (Tra. pp. 46-48) Dr. Gehle diagnosed the Appellant with pedophilia and a personality disorder. (Tra. p. 52)

In discussing the Appellant's major assignments in the sex offender treatment program, Dr. Gehle testified that the Appellant was lacking detail. That he lacked honesty and lacked insight of how he was thinking or feeling. (Tra. p. 62)

Dr. Gehle was further questioned by the State and asked "if he was released by this Jury, what is your information that you have gotten from him or from other sources about his plans and where he was going to live?" (Tra. p. 62) Dr. Gehle replied "That she believed he was planning to live with family members and that he had indicated that he planned to spend more time with his kids and grandchildren." (Tra. p. 62) Very shortly after this statement, Dr. Gehle was again asked "Who would be at risk if the Jury releases Mr. Garrett?" (Tra. p. 68) Dr. Gehle replied "pre-pubescent girls and his family." (Tra. p. 68)

Objection was made by counsel for the Appellant. (Tra. p. 69) A Motion was made for a mistrial. This Motion was based on counsel's belief that the comment made by the State "if the Jury lets this man go" is a burden shifting comment. (Tra. p. 79) Argument was made that these comments shift the burden to the Appellant to prove that he should be released, when in fact the burden is on the State to show that the Appellant's mental abnormality or personality defect remains such that he cannot safely be released at large and if released is likely to commit acts of sexual violence. (Tra. p. 70) The Court denied the Motion for Mistrial. (Tra. p. 71)

The Appellant's Expert Witness, Dr. Selman Watson, testified that he had an opportunity to evaluate the Appellant. (Tra. p. 189) That he performed a battery of psychological testing. (Tra. pg. 189) He reviewed the Appellant's past. (Tra. p. 190) That he also reviewed police records, affidavit's victim statements and any source that

could shed light on the case. (Tra. p. 190) He further reviewed the report of Dr. Gehle, the Static-99 and spoke with Dr. Bill Burke regarding the PPG. (Tra. p. 190) Dr. Watson testified that the Appellant has a diagnosis of a personality disorder and pedophilia. (Tra. p. 198) However, based upon his evaluation, Dr. Watson stated that he believed that the Appellant's mental abnormality or personality disorder had so changed that he is now safe to be at large. And that if released he is not likely to engage in acts of sexual violence. (Tra. p. 202)

## ARGUMENT

### **Did the trial court err in not granting the Appellant's Motion for Mistrial based upon burden shifting comments of the State?**

Question: "Who would be at risk if this Jury releases Mr. Garrett?"

Answer: "Prepubescent girls in his vicinity." (Tra. p. 68)

Question: "If he is released by this Jury...where is he going to live?"

Answer: "He plans to live with family members" (Tra. p. 62)

Question: "Does he plan to spend more time with kids and grandchildren?"

Answer: Yes (Tra. p. 62)

Generally, the decision to grant or deny a Mistrial is within the sound discretion of the trial court. State v. Stanley 365 S.C. 24, 615 SE2d 455 (2005). The Court's discretion will not be overturned on Appeal, absence of abuse of discretion amounting to an error of law. It is in the power of the Court to declare a mistrial. It should be used with the greatest of caution under urgent circumstances and for very plain and obvious causes stated in the record by the trial court. State v. Goodwin 384 S.C. 588, 638 SE2d 500 (2009). The Defendant must show both error and resulting prejudice. The question is whether the State's comment so infected the trial with unfairness as to make the Jury's decision a denial of due process. Goodwin

The Appellant would submit that a commitment pursuant to the Sexual Violent Predator Act is a Quasi criminal proceeding. In this case, due process both procedural and substantive should be afforded to the Petitioner. In the case at hand, the State, on two occasions, asked if the Jury "was to release the Petitioner". The Response by Dr. Gehle was that he was likely to commit another sexually violent crime and that he planned to spend more time with children.

The Appellant has the burden to show that the Court erred and that this error prejudiced the Appellant. The consequence of an individual being continually committed to the Sexually Violent Predator program is very great. The individual is maintained in a secure environment 24 hours a day, 7 days a week. His personal freedom and liberties are severely restricted. This is very prejudicial if that individual can be safely maintained outside an inpatient program.

A civil commitment is a difficult topic for the Jury to understand. It has the elements of both a civil and criminal trial. The comments made by the State only served to heighten the confusion regarding the burden of proof in determining the necessity for an individual to be retained in the program.

In civil issues, it is the Plaintiff who must prove his case by a preponderance of the evidence. In this case, the burden is on the State to prove that the Appellant's condition had not changed and that a mental abnormality or personality defect has not changed such that he is not safe to be released at large and is likely to commit acts of sexual violence. The Appellant is akin to the Plaintiff in a civil trial, yet it is the State, or the Defendant who carries the burden of proof beyond a reasonable doubt.

The Appellant would submit that the comments made by the State and the witnesses answers, complicates the Jury's decision process to the point that the Appellant was prejudiced. Our courts have long held that burden shifting presumptions are unconstitutional. State v. Peterson, 287 SC 244, 335 SE2d 800 (1985); State v. Neva, 305 SC 450, 388 SE2d 791 (1990). Generally this happens in the context of the Courts instruction to the Jury. A burden shifting presumption or conclusive presumption

deprives a Defendant of the due process of law. State v. Belcher 385 SC 597, 685 SE2d 802 (2009)

In this case, the burden shifting is in the body of the State's case, the questioning and answers given by the State and its Expert witness.

An analogy can be made to case law regarding burden shifting comments made in the State's closing argument. The Court in State v. Goodwin 384 SC 588, 683 SE2d 500 (2009) did not find that the State's argument arose to burden shifting, but it does give us the criteria for such a burden shifting comment. The Court says that the comment must present urgent circumstances for a mistrial. The comment must be so grievous that the prejudicial effect could not be removed in any other way and that the comment so infected the trial with unfairness as to result in a denial of due process.

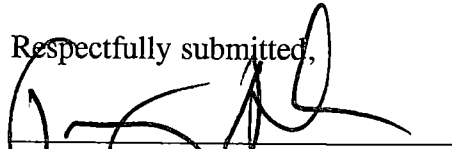
In this case, the Appellant would submit that the question presented by the State and the response of the expert witness meets this criteria, as set out in Goodwin.

The Trial Court in closing argument, charged that it was the State's burden, beyond a reasonable doubt to prove that the Appellant's condition had not changed and that a mental abnormality or personality defect has not changed that he is not safe to be released at large and is likely to commit acts of sexual violence. However, the Appellant would contend that at this point prejudice had already occurred. This charge by the trial Judge did not render the error harmless or prevent the shift of the burden of proof in the eyes of the Jury.

**CONCLUSION**

For the reasons stated above, Appellant respectfully requests that this Court reverse the Lower Court's decision.

Respectfully submitted,



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June 22, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Frank R. Addy, Jr., Circuit Court Judge

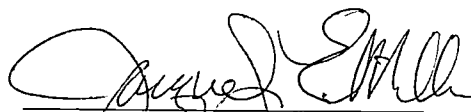
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IN THE MATTER OF THE CARE AND TREATMENT OF  
JOHNNY GARRETT, Appellant

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant, hereby certify that I placed in the United States Mail, a copy of an Initial Brief of Appellant and Designation of Matter with postage prepaid and the return address clearly shown on said envelope, to Deborah R.J. Shupe, Esq., at:

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**SC Court of Appeals**

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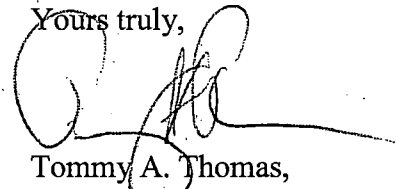
RE: In the Matter of the Care and Treatment of Johnny Garrett  
Appellate Case No.: 2014-002414

Dear Ms. Allen:

Enclosed please find an original and a copy of an Initial Brief of Appellant, Designation of Matter and a Certificate of Service for filing.

Kindly return the clocked copies to me in the enclosed envelope. Thank you.

Yours truly,



Tommy A. Thomas,  
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SC Bar No.: 5536

TAT/jem  
cc: Deborah R.J. Shupe, Esq.  
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