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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from Georgetown County

Steven H. John, Circuit Court Judge

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IN THE MATTER OF THE CARE AND TREATMENT OF DARYL T. SNOW,

APPELLANT

APPELLATE CASE NO. 2015-000280

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Whether, in an SVP case, when the State's expert only diagnosed appellant with "Other Specified Personality Disorder," and no mental abnormality, paraphilia, or any specific personality disorder, was appellant entitled to a directed verdict and JNOV because such a diagnosis is legally insufficient for commitment?

## STATEMENT OF THE CASE

On May 1, 2013, the State filed this action seeking the commitment of Appellant under the South Carolina Sexually Violent Predator Act. R. __ (State's Petition). Appellant had two predicate convictions. R. __ (State's Petition). On May 21, 1996, appellant pled guilty to assault with intent to commit criminal sexual conduct and received a sentence of ten years. R. __ (State's Petition, Ex. E). Reuben Goude represented appellant. R. __ (State's Petition, Ex. E). On April 18, 2006, appellant pled guilty to lewd act on a minor child. R. __ (State's Petition, Ex. B). Wesley Locklear represented appellant. Tr. 258, ll. 2 – 3.

On February 9, 2015, appellant was tried before the Honorable Steven H. John and a jury. Tr. 1. James G. Bogle, Jr. and Christopher Andrew Morrow represented the State. Tr. 1. James Kristian Falk represented appellant. Tr. 1. The jury found appellant was a sexually violent predator. Tr. 306, ll. 15 – 21. Judge John ordered appellant committed. Tr. 309, l. 7 – 310, l. 6. This appeal follows.

## ARGUMENT

In an SVP case, when the State's expert only diagnosed appellant with "Other Specified Personality Disorder," and no mental abnormality, paraphilia, or any specific personality disorder, was appellant entitled to a directed verdict and JNOV because such a diagnosis is legally insufficient for commitment.

**Factual and Procedural Background**

In this SVP case, the State's sole witness, Dr. Marie Gehle ("Gehle"), did not diagnose appellant with a mental abnormality. Tr. 100, ll. 8 – 11. She did not diagnose appellant with any type of paraphilia. Tr. 192, ll. 17 – 19. She did not diagnose him with Antisocial Personality Disorder. Tr. 193, ll. 22 – 25. The only personality disorder Dr. Gehle could find was "something called Other Specified Personality Disorder." Tr. 185, ll. 2 – 3. Dr. Gehle testified that Other Specified Personality Disorder "is a personality disorder when you can't meet all the criteria for a specific personality disorder." Tr. 185, ll. 2 – 5.

Dr. Gehle explained that Other Specified Personality Disorder is not a "catch-all" because she believed appellant had Antisocial Personality Disorder, but could not "find the evidence to support that." Tr. 193, ll. 13 – 21. The evidence that was lacking was whether appellant had conduct problems prior to age eighteen, which is required by Antisocial Personality Disorder's definition. Tr. 185, l. 2 – 186, l. 4.

Dr. Gehle opined that Other Specified Personality Disorder made appellant predisposed to commit sexually violent offenses in the future because "this disorder is basically that he disregards and violates the rights of others, and in large part that's included women, and while that hasn't always manifested in sexual violence it has numerous times,

and therefore I believe that this disorder makes him likely to commit acts of sexual violence." Tr. 186, l. 16 – 187, l. 5. She admitted on cross-examination that there were no specific diagnostic criteria for Other Specified Personality Disorder:

> Q. Okay. But Other Specified Personality Disorder, if I looked into the DSM-4, or 5 here, am I going to find any diagnostic criteria for that specific diagnosis?
>
> A. There's a section that talks about when to use that diagnosis, but they are not listed out like the other diagnoses are.

Tr. 192, l. 25 – 193, l. 5. Dr. Gehle admitted that someone who had only three of the four qualifiers of Avoidant Personality Disorder could fit into Other Specified Personality Disorder. Tr. 199, l. 16 – 200, l. 24. Asked whether someone who had only four of the five criteria for Dependent Personality Disorder could fit into Other Specified Personality Disorder, Dr. Gehle responded, "Again, it would depend." Tr. 200, l. 25 – 201, l. 5. She agreed that the DSM-5 states that approximately fifteen percent of adults in the United States have at least one personality disorder. Tr. 207, l. 10 – 208, l. 12.

The State rested its case after Dr. Gehle's testimony. Tr. 212, ll. 18 – 19. Appellant moved for a directed verdict. Tr. 213, ll. 18 – 20. Appellant argued that the State had not proved "a mental disease or defect that is the cause of the risk." Tr. 213, ll. 19 – 24. Citing In the Matter of the Treatment and Care of Clair Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) and Kansas v. Crane, 534 U.S. 407 (2002), appellant argued that the purpose of the SVP Act was not to subject a broad class of dangerous people to confinement, but only those dangerous persons who have a mental disorder with a causal link to the risk of future harm. Tr. 213, l. 18 – 215, l. 5. In response, the State cited Dr. Gehle's conclusory testimony that Other Specified Personality Disorder made appellant predisposed to commit future acts of sexual violence. Tr. 215, l. 9 – 216, l. 6. Agreeing with the State, Judge John

denied the directed verdict motion. Tr. 216, l. 7 – 217, l. 21. Appellant renewed his motion at the close of his case and asked for a JNOV after the verdict, both of which were denied. Tr. 270, l. 17 – 271, l. 22. Tr. 307, l. 16 – 309, l. 2. Pursuant to Rule 50(e), Judge John did not allow appellant ten days to make his JNOV motion. Tr. 307, l. 16 – 308, l. 3. Rule 50(e), SCRCP.

**Discussion**

Justice Anthony Kennedy provided the fifth vote in the 5-4 decision of the United States Supreme Court upholding the constitutionality of Kansas' SVP statute against a challenge that it was punitive and therefore violated the ex post facto and double jeopardy clauses. Kansas v. Hendricks, 521 U.S. 346, 371-72 (1997). Justice Kennedy wrote separately "to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application." Id. He concluded his concurrence by stating that if "it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id. at 372. Justice Kennedy's prescient warning about the imprecision of psychology applies with full force to this case.

The majority in Hendricks wrote extensively about whether the Kansas statute's definition of mental abnormality satisfied substantive due process. Id. at 356-60. Approving the Kansas statute, the Court wrote that it required "evidence of past sexually violent behavior and a present mental condition **that creates** a likelihood of such conduct in the future if the person is not incapacitated." Id. at 357 (emphasis added). Focusing on the lack of control, the Court stated that the "lack of volitional control, coupled with a

prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Id. at 360. From the Court's opinion, it is clear that due process requires a link between the mental abnormality and the inability to control future sexual behavior.

The Supreme Court refined its holding in Kansas v. Crane, 534 U.S. 407 (2002). The Court rejected the defendant's argument that due process requires the state to prove complete lack of control. Id. at 411. But the Court also rejected the state's argument that it did not have to prove any lack of control. Id. at 412. The Court wrote that the lack of control finding distinguishes dangerous sexual offenders from other persons who are dangerous and this "distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment. Id. In its citation for this sentence, the Court noted a study that found that "40% - 60% of the male prison population is diagnosable with antisocial personality disorder." Id. *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999). The Court further held that there "must be proof of serious difficulty in controlling behavior." Id. at 413. Elaborating, the Court stated that the proof of lack of control

> when viewed in light of such features of the case as the **nature of the psychiatric diagnosis**, and **the severity of the mental abnormality itself**, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**

Id. (emphasis added).

Our Supreme Court interpreted Crane in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). The Court wrote in Luckabaugh, "[W]e believe Crane holds the substantive due process clause requires a court to determine an individual suffers from a mental illness **which makes it** seriously difficult, though not impossible, for that person to control his dangerous propensities." Luckabaugh at 143, 568 S.E.2d at 348 (emphasis added). "Inherent within the mental abnormality prong of the Act is a lack of control determination . . . ." Id. at 144, 568 S.E.2d at 349. Like the United States Supreme Court, our Supreme Court requires a link between the mental abnormality or personality disorder and the defendant's inability to control his sexual impulses. "The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement." In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted).

Dr. Gehle's diagnosis of Other Specified Personality Disorder is legally insufficient to meet the constitutional and statutory requirement of a "personality disorder that makes the person likely to engage in acts of sexual violence" unless committed. In re Taft, 413 S.C. 16, 22, 774 S.E.2d 462, 465 (2015). Dr. Gehle's linkage of Other Specified Personality Disorder to appellant's lack of control and propensity to commit future crimes was only that "he disregards and violates the rights of others" and sometimes, though not always, had manifested itself in acts of sexual violence in the past. Tr. 186, l. 16 – 187, l. 5. Almost anyone who is convicted of a criminal offense disregards the rights of others. This general statement says nothing about appellant's supposed mental disorder or his ability to control his impulses.

In fact, the State presented no evidence of any mental disorder of a sexual nature at all. Dr. Gehle could not diagnose appellant with any paraphilia, such as pedophilia or biastophilia, which are commonly seen in SVP commitments. See, e.g. State v. Gaster, 349 S.C. 545, 554, 564 S.E.2d 87, 92 (2002) (holding directed verdict properly not granted in case where the defendant was diagnosed with "two major mental illnesses: sadism and paraphilia, both of which are sexual disorders."). Nothing about appellant's mental health distinguished him from any other recidivist or placed him into the category of sex offenders subject to commitment. Dr. Gehle could not diagnose appellant with any personality disorder. The closest she could come was Antisocial Personality Disorder, but appellant did not meet the definition. "A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy." Taft at 23, 774 S.E.2d at 466. A person should not be subject to the extraordinary remedy of civil commitment based on a diagnosis of "other."

Indeed, even the personality disorder which Dr. Gehle wanted to use, but admitted she could not—Antisocial Personality Disorder—has recently been held legally insufficient by the New York Court of Appeals. State v. Donald DD, 24 N.Y.3d 174 (2014). Donald DD involved two appeals, one by Donald DD and another by Kenneth T. Id. at 177. Kenneth T. raped a seventeen-year-old girl in 1982, and attempted to rape a college student a year after he was released from prison in 2000. Id. at 177-78. At his commitment hearing under New York's SVP law, the state's psychologist testified Kenneth T. suffered from paraphilia not otherwise specified and antisocial personality disorder. Id. at 178-79. The psychologist also testified that these disorders resulted in Kenneth T. having serious difficult in controlling his conduct. Id.

In Donald DD.'s case, he had sex with a fourteen-year-old acquaintance when he was eighteen and then forced himself on her twelve-year-old cousin in 2002. Id. at 181. In 2004, after his release from prison, Donald DD. raped his wife's friend in a cemetery. Id. After his release, he violated probation and was then released again on parole when he molested his children and had forcible sex with his wife. Id. at 182. His parole was revoked and the state brought an SVP proceeding against him. Id. at 182-83. Two psychologists testified that Donald DD. had antisocial personality disorder. Id. Like appellant, Donald DD. was not diagnosed with any paraphilias. Id. at 183. Both psychologists testified that Donald DD.'s antisocial personality disorder gave him serious difficulty in controlling his sex-offending conduct. Id. at 183-84.

Concerning Kenneth T., the court described paraphilia not otherwise specified as "controversial" and a "catch-all" diagnosis. Id. at 186. The court held that the evidence was lacking that paraphilia not otherwise specified meant that Kenneth T. had "serious difficulty in controlling his conduct amounting to sex offenses." Id. at 187. The court particularly criticized the psychologist's conclusion that Kenneth T. could not control his behavior because he carried out his offenses in a way that allowed for identification. Id. at 187-88. After considering several examples illustrating why such a conclusion had no probative value, the court held that "such meager material as that a sex offender did not make efforts to avoid arrest and reincarceration" were not legally sufficient. Id. at 188. The court said the evidence of lack of control was "as consistent with a rapist who could control himself but, having strong urges and an impaired conscience, decides to force sex upon someone, as it is with a rapist who cannot control his urges." Id.

The court's holding with respect to Donald DD., who was diagnosed with only antisocial personality disorder, is even more applicable to this case. Citing Crane and other authorities for the point that the vast majority of all incarcerated offenders could be diagnosed with antisocial personality disorder, the court held:

> **A diagnosis of [antisocial personality disorder] alone**—that is, when the [antisocial personality disorder] diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality—**simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.**

Id. at 190 (emphasis added). The court's analysis reveals that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment. Id. at 190-92. Appellant urges this Court to adopt the New York Court of Appeals' reasoning in Donald DD.

The State's case against appellant is even weaker than the evidence in Donald DD. Unlike in Donald DD, Dr. Gehle could not even give appellant a diagnosis of antisocial personality disorder. She was only able to give him the catch-all diagnosis disparaged in Donald DD. If antisocial personality disorder is by itself insufficient, then a diagnosis which—by the State's own expert's admission—is made only because she could not diagnose appellant with antisocial personality disorder, cannot suffice to commit appellant indefinitely.

Furthermore, the reasons used by Dr. Gehle are precisely the general conclusions that do nothing to distinguish appellant from the ordinary recidivist. Most of the factors

cited by Dr. Gehle as supporting her opinion would be true of almost any incarcerated person:

- Used weapons
- Physically violent
- Lack of steady relationships
- Deals with his problems through violence
- Resistance to rules and supervision
- Negative social influences

Tr. 183, l. 15 – 184, l. 20. Almost any person convicted of a violent crime—sexual or nonsexual—will have these characteristics. Dr. Gehle also did not like appellant's "attitude" during her two-hour interview with him:

> Because he has these attitudes that are very pervasive, and they aren't just applicable to that situation, it was the way he presented in the interview, his attitudes that he expressed, the way he blamed other people for his problems, the way that he didn't take any responsibility for his behavior or took very, very limited responsibility for his behavior, the way he didn't show or express, or I didn't see any signs of remorse or empathy for others, those things are related to that diagnosis, to the symptoms of Anti-social Personality, you know, Anti-social Personality traits.

Tr. 202, ll. 11 – 22. Again, nothing in this analysis distinguishes appellant from any other recidivist.

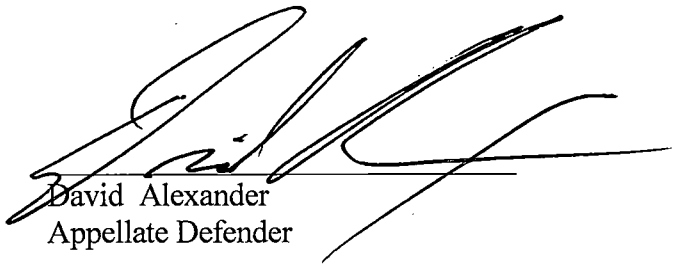
Appellant received a fifteen-year sentence for the offense from which he was due to be released when these commitment proceedings were initiated. R. ___ (State's Petition, paragraph 5(b)). Appellant has served this sentence. As Justice Kennedy wrote in Hendricks, "If the civil system is used to simply impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function."

Hendricks, 521 U.S. at 372 (Kennedy, J., concurring). The trial court erred in not directing a verdict for appellant when the only evidence consisted of the catch-all diagnosis of "other," did not demonstrate a lack of control regarding his sexual impulses and did nothing to distinguish appellant from any other recidivist. The State's evidence that appellant falls into the latter category fails as a matter of law. This Court should reverse and order appellant's release.

## CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown County

Steven H. John, Circuit Court Judge

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IN THE MATTER OF THE CARE AND TREATMENT OF DARYL T. SNOW,

APPELLANT

APPELLATE CASE NO. 2015-000280

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Daryl Snow, at the Sexual Violent Predator Program, 7901 Farrow Road, Columbia, SC 29203, this 12th day of November, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.