

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable J Cordell Maddox, Circuit Judge

Case No.: 2014-CP-10-7452

RECEIVED
NOV 20 2015
SC Court of Appeals

Jovan Brown.....PETITIONER

V.

State of South Carolina.....RESPONDENT

MOTION TO FILE OUT OF TIME

The Petitioner Jovan Brown, by counsel moves, that he be permitted to file a belated appeal from the Honorable J. Cordell Maddox’s September 30, 2015, order committing petitioner to the Department of Mental Health after a verdict finding that Respondent is a sexually violent predator as defined in S.C. Code Ann. Section 44-48-30.

As grounds for this Motion Petitioner states:

1. Undersigned counsel was appointed to represent Respondent pursuant to Rule 608 SCACR.

2. On September 30, 2015 a Charleston County Common Pleas jury found Petitioner to be a sexually violent predator as defined by S.C. Code Ann. Section 44-48-30. Presiding Circuit Court Judge, J. Cordell Maddox therefore committed Petitioner to the care and custody of the South Carolina Department of Mental Health, Sexually Violent Predator Treatment Program.

3. At the conclusion of the trial Petitioner expressed his desire to trial counsel that he wanted to appeal the Court's decision, and trial counsel advised that he would file an appeal.

4. On or about October 6, 2015, Petitioner's counsel received notice of the entry of Judge Maddox's Order of Commitment, and counsel failed to timely file this Notice of Appeal.

5. As a direct result of the October 6, 2015 order Respondent is involuntarily confined to a secure facility for long term control, care and treatment. As a result of the court's decision Petitioner is subject to involuntary restraint, and *freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,"* Kansas v. Hendricks, 521 U.S. 346, 356, 117 S.Ct. 2072, 2079, 138 L.Ed.2d 501 (1997), citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d (1992).

6. Petitioner was entitled to be represented by counsel in this proceeding, and if indigent, Petitioner was entitled to have appointed counsel. S.C. Code Ann. § 44-48-90 (B). Implicit in the right to counsel, is the right to effective counsel. Trial counsel's failure to file timely Notice of Appeal is ineffective representation. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (S.C. 1991) (holding that when PCR applicant requested PCR counsel to file an appeal, the counsel's failure to file the appeal would sufficiently state a claim of ineffective assistance).

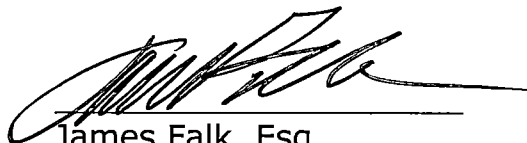
7. Petitioner is without fault for the failure to file a timely Notice of Appeal, and if this motion is denied Petitioner is left without a remedy. Counsel

respectfully asks this Court to consider that although this was a common pleas action, the effect upon Petitioner's liberty interest is analogous to a guilty verdict in a general session's case. However, had this been a general sessions action Petitioner could file an action for Post-Conviction Relief, and avail himself of a remedy pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (S.C. 1974).

8. Petitioner has meritorious grounds upon which to seek appeal. Attached hereto as Exhibit A, is the Motion in limine, counsel filed in Petitioner's commitment proceedings. Counsel maintains that certain instances of "bad acts" evidence described in this Motion in Limine were admitted into evidence over counsel's objection. The admission of testimony regarding Petitioner's prior "bad acts" was highly prejudicial toward Petitioner. In an appeal, Petitioner could seek review of Judge Maddox's evidentiary decisions.

Therefore since Petitioner has no other remedy at law, and since the trial court's decision has a significant impact upon Petitioner's continued liberty interest, Petitioner respectfully requests that this Court grant his motion for permission to file a belated appeal.

Respectfully Submitted,



James Falk, Esq
P.O. Box 1058
Charleston, SC 29402
(843) 606- 6007
jfalklaw@gmail.com

Charleston, SC
November 18, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
In Re Care and Treatment of)
)
)
)
Jovan Brown)
)
Respondent,)
_____)

IN THE COMMON PLEAS COURT
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-7452

RESPONDENT'S MOTION IN LIMINE

FILED
15 SEP 22 PM 12:24
JULIE A. ARYSTORINO
CLERK OF COURT
BY _____

TO: JAMES G. BOGLE, JR., ESQUIRE, OFFICE OF SOUTH CAROLINA ATTORNEY GENERAL:

PLEASE TAKE NOTICE that Respondent Jovan Brown, by and through his undersigned counsel and pursuant to Rules 401, 402 and 403 of the South Carolina Rules of Evidence, will move in *limine* before the Presiding Judge of the Charleston County Court of Common Pleas, for an Order which will exclude at the trial of this action any testimony, oral argument, entry of evidence or publication to the jury of any matter touching on the topics herein enumerated.

RECEIVED

1. Specific Details Regarding Defendant's Sexually Violent Offense NOV 20 2015

Convictions

SC Court of Appeals

Specific details of the Defendant's qualifying convictions under SC Code Ann 44-48-30 (2) should be limited to sex, race and age of victims. It is anticipated that the State will seek to present testimony from its expert or introduce documentary evidence - and also make oral arguments, which provide graphic details of the manner in which the Respondent assaulted his victims. In other words, it is anticipated the State will give specific details of how the crimes transpired in terms of their location, length and duration , and also specific details the purpose of which is to unfairly enflame the passions and prejudices of the jury. With the exception of

details limited to the sex, race and age of Respondent's victims, Respondent asserts that facts surrounding his prior criminal sexual acts are not probative under SCRE Rules 401 and 402. However, if the Court deems that such evidence is probative, Counsel asserts that its probative value, if any, is substantially outweighed by the danger of unfair prejudice and therefore must be excluded under SCRE Rule 403.

2. All reference to any unindicted / dismissed charges of sexually violent crimes.

Page 15 & 16 of Dr. Swan's report describes allegations against Mr. Brown for Second Degree Criminal Sexual Conduct with a Minor. The report also describes a statement made by the alleged victim Mamie J. On information and belief, Dr. Swan was referring to Charleston County warrant H920409, which was Dismissed Not Indicted on July 26, 2005. Respondent's counsel recognizes that pursuant to SCRE Rule 703, an expert may testify regarding the facts or data upon which the expert bases his opinion even when the facts and data would be inadmissible as evidence. However, even if forensic psychiatrists would typically rely upon the mere allegations of a criminal charge to support their opinions, any reference to a dismissed CSC with a minor charge, would be highly prejudicial and clearly outweigh its probative value in these SVP commitment proceedings. Therefore any such reference should be excluded under SCRE Rule 403.

3. All references to charges for which the disposition is listed as unknown.

Dr. Swan's report describes several offenses for which the disposition she described as unknown. These charges as described as follows:

<u>DATE</u>	<u>CHARGE</u>
8/29/2002	Failure to Appear & Probation Violation
4/07/2009	Parole Violation
8/03/2005	Probation Revocation
4/04/2007	Contempt of Family Court
11/05/2007	Parole Violation
11/08/2007	Contempt of Family Court by Adult x 2
06/21/2010	Failure to Appear After Release for Felony x 2
11/25/2011	Contempt of Family Court by Adult x 2

In spite of the latitude given to an expert's testimony under SCRE 703 it is unreasonable for any expert to rely upon any portion of a respondent's criminal record for which the expert has incomplete information. Such testimony would not be probative of any fact at issue in these SVP commitment proceedings. However, in the event the Court finds such testimony to be probative under SCRE Rules 401 & 402, the prejudicial effect of the publication of such information outweighs its probative value and thus should be excluded under SCVRE Rule 403.

4. All reference to any dismissed or nolle prossed non sexual crimes.

Dr. Swan's report lists several nolle prossed charges for non-violent and or non-sexual offenses. The offenses described as follows

<u>ARREST DATE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
2/27/1998	ABHAN	Nolle Prossed
4/02/2002	PWID	Nolle Prossed
11/21/2002	Disturbing Schools	Nolle Prossed

8/23/2005	Grand Larceny	Nolle Prossed
12/04/2009	Property Offense	Nolle Prossed

5. Prior Convictions for Non-Sexual Crimes.

Dr. Swan's report describes these convictions as follows:

<u>ARREST DATE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
4/08/2002	Obtaining Prop False Pretense	Conviction YOA
4/04/2002	Fed. Fin Inst Crime	Conviction YOA
08/29/2002	Fraudulent Check <\$500 x4	Convicted 30 days
12/26/2002	Lynching	Conviction 2yrs active
4/04/2003	ABHAN	Conviction 2yrs active

At issue in these proceedings is whether or not Respondent suffers from a mental disease or defect which makes it likely that he would commit a crime of sexual violence if not committed to a secure facility for long term care. Therefore any information regarding prior convictions for non-sexually violent crimes is not probative to the contested issues in this case and therefore inadmissible under SCRE Rules 401 & 402. However, in the event the Court finds such testimony to be probative under SCRE Rules 401 & 402, the prejudicial effect of the publication of such information outweighs its probative value and thus should be excluded under SCVRE Rule 403.

6. Non Violent/ Non Sexual Custodial infractions

Under the heading PRISON DISCIPLINARY HISTORY, Dr. Swan lists the following infractions.

<u>OFFENSE</u>	<u>DATE</u>
Refusing/ Failing to Obey Orders	7/22/14, 4/1/14

Possession of Contraband	7/3/14, 7/3/12, 8/23/11
Possession of Cell Phone	4/1/14, 1/31/13, 3/5/12, 8/28/13
Disrespect	7/24/13
Inmate under the Influence	11/09/13
Damage to Property <\$500	10/24/11
Any act defined as a felony	4/27/11
Use of profanity	10/24/05, 6/27/03
Out of Place	10/22/03
Refusing a Command	7/22/03

Similar to the non-violent convictions described above, prison disciplinary infractions are not probative of whether Respondent suffers from a mental disease or defect and whether he is likely to commit a future act of sexual violence. Therefore they should be excluded under SCRE Rules 401, 402 and or 403.

7. Any Reference to Respondent's failure to call expert witness.

Respondent seeks to prevent the State from making any reference to or discussion of William Mulbry, M.D.'s evaluation of Respondent or Respondent's failure to call Dr. Mulbry, or any other psychologist/psychiatrist as a witness in his defense. There have been two recent South Carolina Supreme Court decisions which have addressed the application of various aspects of the "missing witness rule" in Sexually Violent Predator Cases. See, *In re the Care & Treatment of Gilbert Gonzalez*, 409 S.C. 621, 763 S.E.2d 210 (2014), and *In re the Care & Treatment of Vincent Way*, 410 S.C. 377, 764 S.E.2d 701 (2014). In both cases the South Carolina Court held that the probative value of testimony

regarding the Respondent's retention of a non-testifying expert was substantially outweighed by the danger of unfair prejudice. See *Gonzalez* 763 S.E.2d at 217; *Way*, 764 S.E. 2d at 704.

CONCLUSION

For the reasons given herein, Respondent respectfully requests that the Court exclude from evidence, testimony or argument any of the matters raised herein.

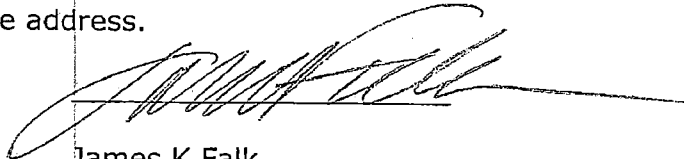
Respectfully Submitted,



James Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29401
(843) 606 6007
(843) 972 9005 (fax)
jfalklaw@gmail.com

CERTIFICATE OF SERVICE

Undersigned certifies that on September 22, 2015 a copy of the forgoing was emailed to the party listed above at jbogle@SCAG.gov and that a copy was mailed to the recipient at the above address.



James K Falk

THE STATE OF SOUTH CAROLINA
In Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Honorable J. Cordell Maddox, Circuit Judge

Case No.: 2014-CP-10-7452

RECEIVED
NOV 20 2015
SC Court of Appeals

Jovan Brown.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within Motion to File Out of Time upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, James Bogle, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 18 day of November, 2015.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402