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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2014-001181

IN THE MATTER OF THE CARE AND TREATMENT OF
JEFFREY ALLEN CHAPMAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

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

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

ATTORNEYS FOR RESPONDENT

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II. If appropriate for consideration on direct appeal, Appellant's allegations of ineffective assistance of counsel are premised on speculation, misstatements of the record, and appellate counsel's opinions regarding what trial counsel should have done, without benefit of trial counsel's input. (Appellant's Issues 3-7)

STATEMENT OF THE CASE

In May 2013, Respondent State of South Carolina filed a Petition pursuant to the Sexually Violent Predator Act, S.C. Code Ann. §§44-48-10-170 (Supp. 2013), seeking Appellant Jeffry Allen Chapman's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on May 20, 2014, before the Honorable Robin B. Stilwell, Circuit Court Judge.

The jury determined Appellant is a sexually violent predator beyond a reasonable doubt, and the circuit court committed him to the custody of the South Carolina Department of Mental Health for long term control, care and treatment. This appeal followed.

STATEMENT OF FACTS

In 2003, Appellant was charged with one count of lewd act on a minor, arising from the inappropriate fondling of a ten year old female. On April 6, 2005, he pled guilty as charged, and was sentenced to fifteen years' incarceration, suspended to time served (277) days and five years' probation. His probation was revoked on May 27, 2011, and he was sent to the South Carolina Department of Corrections to serve five years of his original sentence. (Petition Pursuant to the Sexually Violent Predator Act dated May 6, 2013 [Petition], p. 2, Petition Exhibits C and D; Record on Appeal [R.], pp. _____).

Prior to Appellant's release from incarceration, the State filed a Petition under the Sexually Violent Predator Act (SVPA)seeking Appellant's commitment for long term control, care and treatment as a sexually violent predator. (Petition and Exhibits; R., pp. _____). The circuit court found probable cause to believe Appellant is a sexually violent predator, and appointed Marie E. Gehle, Psy.D., to evaluate Appellant and render an opinion regarding whether he has a mental abnormality or personality disorder that makes him a risk to re-offend sexually if not confined for treatment.

The case was called for a jury trial on May 20, 2014, before the Honorable Robin B. Stilwell, Circuit Court Judge. Prior to trial, the State moved to exclude any testimony regarding the treatment Appellant would receive if committed under the SVPA, and indicated Appellant's trial counsel agreed not to bring the issue up during trial. The State also moved to exclude testimony from Appellant's purported expert on the grounds Appellant had already received an independent evaluation from Thomas Martin, M.D., who was not going to testify, and the State was unaware of the new expert until right before trial, and had not been afforded an opportunity to ascertain the substance of his

testimony. The circuit court denied the State's motion to exclude the testimony, but ordered Appellant to make the witness available prior to calling him to testify so the State could determine the substance of his testimony. (Trial Transcript [TT], pp. 18-26; R., pp. _____).

Prior to opening statements, the circuit court told the jury that jury charges are usually given at the end of a trial because the court has to determine what legal issues apply to the evidence presented, but the legal issues in a case under the SVPA are already determined by the statute, and having them at the beginning allowed the jurors to consider the evidence in the context of the law as it is presented during trial. The court then charged the jury in full regarding the law under the SVPA, including the State's burden to prove its case beyond a reasonable doubt and a definition of reasonable doubt, the jury's duty as finder of fact, direct and circumstantial evidence, and the specific elements the State had to prove under the SVPA. The court further advised the jury it would receive any additional instructions on the law after closing arguments, if necessary, and instructed the jurors not to begin any deliberations until the court advised them to do so. (TT, pp. 27-40; R., pp. _____).

During opening statement, the State acknowledged what it had to prove, and its burden to prove it beyond a reasonable doubt. Appellant also referenced the State's "substantial" burden of proof during his opening statement. (TT, pp. 41-48; R., pp. _____).

The State presented testimony from Marie Gehle, Psy.D, who was appointed by the court to evaluate Appellant under the SVPA, and qualified as an expert in forensic and clinical psychology and the mental health evaluation of sexually violent predators.

Dr. Gehle's protocol for evaluations, which she followed in this case, includes review of any available documents, an interview with the person, some psychological testing and scoring of an actuarial risk assessment. She stated she had performed seventy-six pre-commitment evaluations under the SVPA, and did not recommend commitment in over 50% of those cases. (TT, pp. 50-62; R., pp. _____).

Dr. Gehle testified she reviewed documents regarding Appellant's offenses, his incarceration records, his military records and criminal history, all of which is the type of information typically and reasonably relied on by experts conducting sexually violent predator evaluations. She also interviewed Appellant, did some psychological testing, and completed the Static-99R actuarial risk assessment tool. Appellant's score of the Static-99R was seven, which she described as "a really high score." In addition, she found Appellant had several dynamic risk factors for reoffending not encompassed in the Static-99R, including "sexual preoccupation, offense supportive attitudes, lifestyle impulsiveness, poor problem solving, hostile beliefs about women and resistance to rules and supervisions." (TT, pp. 61-67; R., pp. _____).

Dr. Gehle then testified about Appellant's criminal history and the details of his sexual offenses, which included two sexual assault convictions in 1986 (Florida), an attempted second degree rape conviction in 1991 (North Carolina), a third degree criminal sexual conduct conviction in 1992 (South Carolina), an indecent exposure conviction in 1997 (South Carolina), and a lewd act on a minor conviction in 2005 (South Carolina). Appellant also had non-sexual convictions for breach of peace (2 counts), trespassing, driving under suspension, sex offender registry violation, grand larceny and first degree criminal domestic violence. Dr. Gehle testified Appellant's criminal history

revealed a pattern of "snatch and grab rape," impulsiveness, repeated violations of the rights of others, failure to follow the rules of society, and difficulty learning from his mistakes, all of which related to an increased likelihood of sexual reoffending. She further found Appellant did not take responsibility for his offenses, and frequently blamed the victims, or accused the victims of lying. (TT, pp. 67- 93; R., pp. _____).

Based on Appellant's interview and the documentation she reviewed, Dr. Gehle stated Appellant never participated in sex offender treatment, and he told Dr. Gehle he did not need any treatment because "God is [his] treatment." He also told her about many conduct problems during his childhood, including lying, fighting, bullying, disobedience, and stealing, and said his mother tried to get him admitted somewhere for evaluation and study. His military records revealed he was generally discharged after violating the Uniform Code of Military Justice by fighting, brandishing a knife, using disrespectful language, disobeying orders and stealing. (TT, pp. 93-97; R., pp. _____).

Dr. Gehle testified to a reasonable degree of psychological certainty Appellant has other specified paraphilic disorder (biastophilia - coercive sexual acts with non-consenting persons), and anti-social personality disorder (pattern of disregard for and violation of the rights of others), both being chronic conditions that can be managed to some extent. She stated Appellant's self-report of behavior problems during childhood indicated he had conduct disorder, which is a requirement for anti-social personality disorder. Dr. Gehle further testified Appellant's anti-social personality disorder coupled with his paraphilic disorder was "an especially dangerous combination" making him likely to reoffend. (TT, pp. 97-105; R., pp. _____).

When the State asked Dr. Gehle to explain the meaning of the word "psychopath," she responded:

> Psychopath is somebody who appears rather charming, normal, yet they can often be self-centered, dishonest, undependable. They-re largely devoid of guilt, remorse, empathy or love. They tend to exploit other people. They use people. If they get in any trouble or get caught they usually blame other people. They often do things for the sheer fun of it. Even when they destroy other peoples (sic) lives in the process. They often talk their way out of a lot of things.

By way of **example**, Dr. Gehle referred to Bernie Madoff, "who can to your face lie to you and keep up a façade of being this well respected financier for so many years, and Ted Bundy, who was the "prototype for a psychopath," was very charming and did not show emotions, and got away with murder for a long time. Dr. Gehle testified she did not attempt to diagnose Appellant with a psychopathic disorder, which is not recognized as a diagnosis in the DSM-5, but he did exhibit some of the characteristics associated with psychopathy, "including the pathological lying, being manipulative, lacking remorse, being irresponsible, having some behavior control problems, being in denial, being sexually promiscuous." (TT, pp. 105-106; R., pp. _____).

Dr. Gehle opined to a reasonable degree of psychological certainty Appellant's disorders caused him difficulty controlling his behavior, made him likely to engage in acts of sexual violence, and he met the statutory criteria of a sexually violent predator, and needed to be confined for treatment. She testified he planned to live with his girlfriend (the victim in Appellant's criminal domestic violence conviction), and he did not have to serve a probationary period or attend sex offender treatment if released. The State asked her if she knew "of anything other than [the SVP treatment program] that

would guarantee that [Appellant] has any sex offender treatment," and she indicated she did not "know of anything else that would guarantee it." She also testified Appellant's history indicated any woman or child with whom he had contact could be a target and at risk if he was released. (TT, pp. 106-112; R., pp., _____).

During an extensive cross-examination, Dr. Gehle testified she had testified against the State in twenty-two cases under the SVPA, and the State did not tell her what to say in this case. She reiterated Appellant did not take responsibility for his offenses, which was contrary to his expressions of remorse during the interview. She also reiterated she did **not** evaluate Appellant for psychopathy directly, but it is "kind of considered on a spectrum with the anti-social personality disorder." (TT, pp. 113-150; R., pp. _____).

Appellant presented two lay witnesses (former employer and current girlfriend), and testified on his own behalf. (TT, pp. 154-218; R., pp. _____). He then presented David Price, PsyD., as an expert in clinical and forensic psychology. The State objected to Dr. Price's qualification as an expert on the ground he did not have experience evaluating sex offenders pursuant to the SVPA. The court overruled the State's objection, finding Dr. Price's qualifications were sufficient "within the scope that was proffered by the Defense." Appellant agreed the scope proffered was clinical and forensic psychology.[1] (TT, pp. 220-231; R., pp. _____).

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[1]Appellant's contention the State "continued to argue with the trial judge" after the objection was overruled patently misrepresents the record. (Brief of Appellant, p. 16). The State merely requested clarification of "the scope" of Dr. Price's expert qualification, which was appropriate to ensure his "expert" testimony was limited to that scope.

Dr. Price testified Appellant's family retained him to evaluate Appellant and determine if he was a sexually violent predator. As part of his evaluation, he administered a personality assessment (MMPI-2), which suggested Appellant "had a history of anti-social behavior, substance abuse, some suicidal ideation," but he did not use the Static-99R because there were "problems" with it, which he discussed in excruciating detail. Ultimately, Dr. Price disagreed with Dr. Gehle's paraphilia and anti-social personality disorder diagnoses, primarily because he did not accept biastophilia as a valid diagnosis, and he saw no evidence of a conduct disorder to support an anti-social personality disorder diagnosis. He opined Appellant did not have a mental abnormality or personality disorder, and was not a risk to reoffend sexually if released. (TT, pp. 231-248; R., pp. _____).

On cross-examination, Dr. Price testified he was hired one month before trial, and admitted he never saw the petition filed by the State seeking Appellant's commitment. He also admitted he did not prepare a written report, or attempt to consult with Dr. Gehle regarding the basis for her opinion, and he was not present during her trial testimony. He did, however, review her written report, including the part about Appellant's account of his childhood behavior problems. (TT, pp. 248-259; R., pp. _____).

Prior to closing arguments, the court indicated it had "already provided to the jury the charge on the law," and asked if either party had requests for additional charges. Neither the State nor Appellant requested additional jury charges. (TT, pp. 260-261; R., pp. _____).

In its closing argument, the State reminded the jury about the court's instructions on the elements the State had to prove, and stated: "I believe that I have met my burden

of proof and that you are really firmly convinced." During his closing argument, Appellant stated: "how can you come in here and argue beyond a reasonable doubt, which is as you heard Judge Stilwell say, firmly convinced. It's not more likely than not where the scale is a tipped, it's a substantial burden." He subsequently argued "to say that beyond a reasonable doubt you can say it's going to happen again, I don't think holds mustard." (TT, pp. 267-272; R., pp. _____).

Prior to deliberations, the court asked if either party had any matter to take up before the jury was allowed to deliberate, and both the State and Appellant responded there were no issues. After deliberating approximately one and a half hours, the jury found Appellant is a sexually violent predator beyond a reasonable doubt, and the circuit court committed him to the South Carolina Department of Mental Health for long term control, care and treatment in the Sexually Violent Predator Treatment Program (SVPTP). (TT, pp. 273-275, Order of Commitment filed May 21, 2014; R., pp. ____). This appeal followed.

ARGUMENT

I. The right to counsel in sexual predator cases is a statutory right, and the statute does not provide a right to effective assistance of counsel, but if the Court finds such a right, ineffective assistance allegations should not be considered on direct appeal because committees under the SVPA can raise ineffective assistance of counsel through common law habeas corpus proceedings, which afford all parties, including trial counsel, an opportunity for the full evidentiary hearing necessary for appellate review, and the Strickland two part test should be used to assess the ineffective assistance claims. (Appellant's Issues 1, 2 and 8).

Appellant contends trial counsel was ineffective as a matter of law, and the alleged ineffectiveness should be determined in this direct appeal because the SVPA does not provide a mechanism to raise ineffective assistance of counsel issues, and he has no other available mechanism to raise the issues. Appellant concedes the specific issues he asserts as ineffective assistance of counsel are not preserved for appellate review, and such issues would not be decided on direct appeal, even in a death penalty case. In the face of those concessions, however, he asks this Court to ignore long standing issue preservation precedent, and essentially apply a plain error standard of review to decide the issues anyway, all without affording trial counsel an opportunity to be heard. Further, contrary to Appellant's contention, there **is** a well-established and available mechanism for him to raise ineffective assistance of counsel issues arising from a sexually violent predator case.

A. Effective Assistance of Counsel in SVPA Cases

Appellant argues, extensively, that in addition to the statutory right to counsel, there is a due process right to effective assistance of counsel in SVPA cases under the federal and state constitutions. This Court has already determined a person the State

seeks to commit under the SVPA has no Sixth or Fourteenth Amendment right to counsel, but does have a statutory right to counsel under S.C. Code Ann. § 44-48-90 (2003). In re McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004)[2]; *see also* In re McCracken, 346 S.C. 87, 551 S.E.2d 235, 240 (2001) (the only right to counsel under the SVPA is the statutory right to the assistance of appointed counsel).

The primary issue, therefore, is whether the statutory right under the SVPA encompasses the right to "effective" assistance of counsel. The statute does not afford that right, normally arising from the Sixth, Fifth and Fourteenth Amendments, which do not apply to civil cases under the SVPA. In essence, Appellant is attempting to put a square peg in a round hole, and asks this Court to juxtapose post-conviction relief (PCR) rights and procedures on SVPA proceedings, minus the inconvenience of providing a record for meaningful appellate review.

If this Court holds the statutory right to counsel under the SVPA includes the right to effective assistance of counsel, however, the remaining issues are how such claims should be litigated, and what standard should be used to determine whether counsel was ineffective. Rather than force the square peg into a round hole, there is already a round hole available to Appellant, even though it may be inconvenient for him to use it.

B. Availability of Relief

Appellant contends he has no avenue other than direct appeal to raise ineffective assistance of counsel allegations. On the contrary, if such a right exists, the common law

[2]Even though the Court specifically cites the Fourteenth Amendment in the McCoy opinion, by way of footnote, Appellant asserts the Fourteenth Amendment reference was dicta, and the constitutional issue was not before the Court. To the contrary, rather than mere dicta, the constitutional references in McCoy were central to the Court's adoption of a meritless appeal procedure in SVPA cases.

habeas corpus petition provides an adequate, and more appropriate, forum for litigating such allegations.

The South Carolina Constitution provides the "privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it." S.C. Const., Art. 1, §18. Habeas corpus **is** available when other remedies, such as PCR, are inadequate or unavailable. Hamm v. State, 403 S.C. 461, 744 S.E.2d 503, 504 (2013); *see also* Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600, 602 (2008) ("a writ of habeas corpus is reserved for the very gravest of constitutional violations which, in the setting, constitute a denial of fundamental fairness shocking to the universal sense of justice"); McWee v. State, 357 S.C. 403, 593 S.E.2d 456, 457 (2004) (habeas relief will only be granted under "unique and compelling circumstances"); Butler v. State, 302 S.C. 466, 397 S.E.2d 87, 88 (1990) ("[N]ot every intervening decision, nor every constitutional error at trial will justify issuance of the writ.") (internal quotations and citations omitted). The PCR statute superseded habeas corpus for post-conviction relief, but the common law privilege still exists, and Appellant cites no cases to the contrary. As noted above, the SVPA does not provide a process for litigating ineffective assistance of appointed counsel, and therefore, if the Court holds the SVPA statutory right to counsel includes effective assistance of counsel, habeas corpus is available to address those issues.

In Hamm, a SVPTP resident filed a habeas petition in the South Carolina Supreme Court seeking release from his civil commitment under the SVPA, alleging counsel in his criminal case was ineffective under Padilla v. Kentucky, 559 U.S. 356 (2010, by failing to advise him of the SVPA implications before he pled guilty to the

predicate SVPA offense.[3] The Court denied the petition, finding the resident failed to file a timely PCR petition on the issue, and therefore, failed to exhaust all available remedies before seeking habeas relief. Hamm at 504.

Significantly, the Court did **not** hold habeas relief was never available to a SVPTP resident, and as discussed above, precluding habeas relief would be contrary to the state constitution. To the contrary, the Court explicitly recognizes a SVPTP resident's right to file a habeas petition when appropriate. In re: McCracken, 346 S.C. 7, 551 S.E.2d 235, 238 (2001) (SVPTP resident's remedy for unconstitutional confinement under the SVPA would be by writ of habeas corpus).[4] *See also* Douglas v. Hall, 229 S.C. 550, 93 S.E.2d 891, 894 (1956) (writ of habeas corpus always available to test the legality of proceedings in which person was civilly committed on grounds of insanity).

Appellant correctly asserts the PCR statute and S.C. Code Ann. §17-17-10 (_____) (the habeas statute) are only available to people either convicted of a crime (PCR statute), or committed or detained for a crime (habeas statute), and he could not seek relief under those statutes because his current commitment/detention is not punishment for a criminal conviction, or other pending criminal charges. Nothing in either statute relates to civil cases, however, or trumps the constitutionally recognized common law right to petition for habeas relief if other remedies are unavailable. Rather, the PCR statute provides the functional equivalent of a habeas proceeding, and the habeas

[3]In fact, multiple SVPTP residents have filed habeas petitions in the circuit court.

[4]Appellant's assertion the habeas right referenced in McCracken is "limited to challenging the conditions of their confinement" is simply incorrect. Nothing in the Court's opinion imposes such a limitation.

statute merely recognizes the right to seek habeas relief prior to conviction if detained on criminal charges.

Requiring a petition for habeas relief to assert ineffective assistance of counsel allegations avoids the problem of trying to decide such claims on the record in a direct appeal, a problem readily apparent in this case. A habeas proceeding would include an evidentiary hearing similar to PCR hearings, which affords trial counsel the opportunity to address the ineffective assistance of counsel allegations, and provides the appellate courts a full record, including the circuit court's findings and conclusions, for review purposes. Absent a full record, the appellate courts: 1) will not have the benefit of trial counsel's input, and have to assume counsel had no legitimate, strategic reasons for proceeding in a particular way; 2) engage in rank speculation based on appellate counsel's assertions regarding what trial counsel should, or should not, have done; 3) ignore issue preservation rules; and 4) apply the plain error standard of review consistently rejected in South Carolina.

Appellant relies heavily on In re Ontiberos, 295 Kan. 10, 287 P.2d 855 (2012), arguing this Court should follow the Kansas Supreme Court's analysis of ineffective assistance of counsel claims in sexual predator cases because the SVPA was modeled on the Kansas sexual predator statute.[5] There are significant aspects of the Ontiberos analysis impacting its applicability to South Carolina sexual predator cases.

A central basis for the Kansas court's right to counsel analysis in Ontiberos was the Kansas statute's provision that failure to comply with the statute's requirements,

[5]Appellant apparently equates "modeled on" with "indistinguishable." As discussed below, however, there is at least one clear distinction between the SVPA and the Kansas statute that goes to the heart of the Ontiberos analysis.

arguably including the statutory right to counsel, did not prevent the state from pursuing a sexual predator determination, which the court found diluted the statutory right to counsel and required a constitutional analysis. 287 P.2d at 863. South Carolina's SVPA has no such provision, and the statutory right to counsel is not diluted in any way.

Further, Kansas had a specific precedent regarding appellate court remand to the trial court for an evidentiary hearing on ineffective assistance of counsel claims raised on direct appeal, and the Kansas Court of Appeals had already remanded the case for an evidentiary hearing pursuant to that precedent. *Id.* at 865-866 (*citing* State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 [1986]). The committee argued he could not file a habeas petition to raise his ineffective assistance of counsel claims, and the Court of Appeals did not have authority to remand the case on direct appeal for an evidentiary hearing on the allegations. The Kansas Supreme Court disagreed, finding the committee could file a habeas petition, but the remand was an appropriate exercise of discretion. *Id.* As a result, the appellate court had a full record in the committee's direct appeal on which to assess the ineffective assistance of counsel claims.

South Carolina appellate courts unquestionably have discretion to remand any case to the trial court for further proceedings, but unlike Kansas, there is no established precedent in South Carolina providing for remand **only** to develop issues raised for the first time on direct appeal when the party has another available avenue, such as habeas corpus, to raise those issues. Remanding under the circumstances of this case essentially eviscerates issue preservation and imposes a plain error standard of review, which appears to be Appellant's ultimate goal. *See* Brief of Appellant, p. 45 (asserting SVPA constitutionality problem compounded by "this Court's consistent refusal to adopt a plain

error standard," and constitutional infirmity would be remedied "[i]f South Carolina used plain error review").

In Manning v. State, 913 So.2d 37 (1st Dist Fla. Ct. App., 2005), the court determined habeas corpus, rather than direct appeal, was the appropriate avenue to develop and decide a committee's ineffective assistance of counsel claims in cases under Florida's sexually violent predator statute, even though a habeas proceeding might not be the most convenient process. Subsequent to the Manning case, the Florida Supreme Court promulgated Rule 4.460, Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, which expressly provides habeas corpus is an available mechanism to raise ineffective assistance of counsel claims in sexual predator cases. Bohner v. State, 157 So.3d 526, 527 (1st Dist. Fla. Ct. App., 2015).

Admittedly, as Appellant notes, some courts have decided ineffective assistance claims on direct appeal in sexual predator cases when the claims did not require development of facts, which is not the case currently before this Court. As discussed below, notwithstanding Appellant's conclusory proclamations regarding trial counsel's deficiencies, all Appellant's allegations, with one notable exception, require development of facts before a court can render a truly informed decision on whether trial counsel was so ineffective it shocked the conscious, and Appellant was prejudiced to the point he could not receive a fair trial.

C. Appropriate Standard for Ineffective Assistance Analysis in SVPA Cases

Appellant concedes the vast majority of jurisdictions addressing the issue of ineffective assistance of counsel in civil commitment cases use the two part analysis established in Strickland v. Washington, 466 U.S. 668 (1984) (to warrant reversal based

on ineffective assistance of counsel, defendant must show both deficient performance and resulting prejudice). He argues Strickland imposes an "unreasonably" low standard for counsel's performance and an onerous burden to show ineffective assistance. He further argues the "denial of fundamental fairness shocking to the universal sense of justice" habeas standard imposes a "nearly insurmountable legal standard" even more onerous than Strickland.[6] He asks this Court to adopt the ineffective assistance of counsel analysis espoused by the Montana Supreme Court in the civil (**not** sexual predator) commitment case of In Re: Mental Health of K.G.F., 306 Mont. 1, 29 P.3d 485 (2001).

In K.G.F., the court considered the right to counsel afforded by a state statute governing civil commitment of mentally ill individuals whose illness made them a danger to themselves or others.[7] No criminal act was required to trigger applicability of the statute, and the process was completed in two days. Looking to guidelines developed by a national advocacy group, the court espoused five "critical areas" to define the scope of effective representation in commitment cases, and held an involuntary commitment must be vacated "upon a **substantial showing of evidence** . . . that counsel did not effectively represent the patient-respondent's interest" in those areas. 29 P.3d at 498-501 (emphasis added).

Significantly, in Ontiberos, the case Appellant asserts should control in this case, the Kansas Supreme Court expressly **rejected** the K.G.F. analysis, and adopted the

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6This contention reveals the real reason Appellant does not want to use the available habeas procedure.

[7]It appears the Montana statute at issue is similar to probate court proceedings in South Carolina.

Strickland test for ineffective assistance of counsel claims in civil commitment proceedings under the Kansas sexual predator statute.

> Numerous other jurisdictions use Strickland for claims of ineffective assistance of counsel raised by persons committed under that state's sexually violent predator law. *See, e.g.,* Jenkins, 271 Va. at 16, 624 S.E.2d 453 (recognizing a constitutional right to effective counsel and evaluating the claim under Strickland); State of Texas for the Best Interest *29 and Protection of H.W., 85 S.W.3d 348, 356 (Tex.App.2002) (same); People v. Rainey, 325 Ill.App.3d 573, 585–86, 259 Ill.Dec. 369, 758 N.E.2d 492 (2001) (recognizing statutory right to effective counsel and evaluating that claim under Strickland); In re Crane, 704 N.W.2d 437, 439 (Iowa 2005) (same); In re Alleged Mental Illness of Cordie, 372 N.W.2d 24, 29 (Minn.App.1985) (same). These courts applied Strickland regardless of whether that court held that the person's right to effective counsel arose from statute or the constitution.

Ontiberos, 287 P.3d at 868. In rejecting the K.F.G. analysis, the court noted no other jurisdiction had adopted it, and stated:

> The Montana court's criticism of Strickland appears partially based on the abbreviated, 2–day time frame in which persons found to be a danger to themselves are civilly committed under Montana's commitment statutes. 306 Mont. at 8, 29 P.3d 485 ("[T]he conduct of counsel during those few available hours prior to an involuntary commitment hearing or trial should be a key focal point of the inquiry as to whether the counsel's representation was effective."). But that process is distinguishable from KSVPA proceedings because counsel has substantially more time to prepare under the KSVPA since the statute requires a trial within 60 days of the probable cause hearing..

Id. See also In re Detention of Moore, 167 Wash.2d 113, 216 P.3d 1015, 1020-1021 (2009) (applying Strickland in a sexual predator proceeding); In re Det. of T.A.H.-L., 123 Wash. App. 172, 97 P.3d 767, 771-72 (2004) (rejecting K.F.G. analysis and finding Strickland analysis sufficient to protect the right to effective assistance of counsel in civil commitment cases). As these courts found, the Strickland standard is well known and

supported by a well-developed body of case law, and there is no reason to create a separate standard for civil commitment cases. Ontiberos, 287 P.3d at 867.

The SVPA affords counsel substantially more than two days to prepare the case for trial. The earliest trial date under the statute is sixty days from the circuit court's finding of probable cause, assuming the court appointed evaluator does not get an extension of time to prepare the evaluation report, and neither party seeks an independent evaluation. If a party does seek an independent evaluation, the statutory trial deadline is ninety days from the date of the court appointed evaluator's report, and either party can seek a continuance for good cause. Therefore, as the court found in Ontiberos, the K.G.F. analysis is unnecessary.

If the Court finds the SVPA statutory right to counsel includes the right to effective assistance of counsel, the State submits the standard for habeas corpus relief is appropriate for ineffective assistance of counsel claims in SVPA cases. The Strickland standard can then provide a framework for determining whether counsel's performance was so deficient it was shocking to the conscious and undermined the fundamental fairness of the SVPA proceeding.

Appellant has an available procedure to raise ineffective assistance of counsel claims, if such a right exists, which will result in development of a full record for appellate review, and he should not be able to circumvent well established issue preservation rules by raising his claims in this direct appeal. While remand may be possible, remanding this case will set a precedent for similar claims in virtually all SVPA proceedings, and any other proceeding in which habeas relief is available but inconvenient. Therefore, even if the Court finds a right to effective assistance of counsel

exists in SVPA cases, the Court should find Appellant's claims are not preserved for direct review, and affirm Appellant's commitment as a sexually violent predator.

II. If the Court considers Appellant's ineffective assistance of counsel allegations on direct appeal, they are premised on speculation, misstatements of the record, and appellate counsel's opinions regarding what trial counsel should have done, without benefit of trial counsel's input. (Appellant's Issues 3-7).

Assuming there is a right to effective assistance of counsel under the SVPA statutory right to counsel, Appellant contends trial counsel's purported performance deficiencies are sufficiently demonstrated by the record, and this Court can readily rule on his ineffective assistance allegations without further information. To the contrary, in the event the Court considers Appellant's ineffective assistance claims in this direct appeal, except for one allegation legally inaccurate on its face, each purported deficiency is premised on speculation, misstatements of the record, and appellate counsel's opinions, all without benefit of trial counsel's input. In Strickland, the U.S. Supreme Court acknowledged the importance of considering trial counsel's strategy during trial:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 690-91.

This case involves an experienced trial counsel, who vigorously cross-examined the State's expert and presented four witnesses on Appellant's behalf. It is inherently unfair to judge counsel's trial performance without affording him a reasonable opportunity to respond to allegations regarding the effectiveness of his representation.

Further, in order to respond to such allegations without counsel's input, which are still protected by the attorney/client privilege, the State must speculate regarding matters outside the record, such as counsel's interaction with his client, and his strategic decisions at trial. With that limitation in mind, the State submits each allegation is meritless.

A. Ted Bundy Reference (Appellant's Issue 3)

Appellant asserts trial counsel was ineffective by failing to object to Dr. Gehle's testimony regarding psychopathy and Ted Bundy, claiming it was speculative and improperly compared Appellant to a serial killer. When the testimony is read in context, however, it is clear Dr. Gehle gave a general definition of psychopathy, and merely used Bernie Madoff and Ted Bundy as known examples of psychopaths to assist the jury in understanding it. Further, she did **not** testify Appellant is a psychopath, or compare him to Ted Bundy.

As a threshold matter, Appellant's claim the State "ambushed" him with the testimony regarding psychopathy presents a prime example of the dangers inherent in attempting to decide ineffective assistance of counsel assertions on direct appeal. It is clear from the record the State and trial counsel communicated prior to trial, and trial counsel may well have known the State was going to ask Dr. Gehle about psychopathic characteristics. Psychopathy was directly relevant to, and highly probative of, Appellant's risk to reoffend, especially in light of Dr. Gehle's anti-social personality disorder diagnosis.

As for the limited reference to Ted Bundy, rather than draw the jury's attention to it, trial counsel may have strategically decided not to object given the context of the

reference, and wait until cross-examination to make it clear Dr. Gehle did not reference psychopathy in her written evaluation report, which he did. Arguably, this strategy enabled counsel to challenge the credibility of Dr. Gehle's direct testimony, and minimize any impact on the jury.

Further, Dr. Gehle expressly stated she did **not** attempt to diagnose Appellant with psychopathy, and she never "speculated" that such a diagnosis would be appropriate.[8] After testifying about Appellant's paraphilia (biastophilia) and anti-social personality disorder diagnoses, she testified he had **some** of the **characteristics** associated with psychopathy, "including the pathological lying, being manipulative, lacking remorse, being irresponsible, having some behavior control problems, being in denial, being sexually promiscuous." (TT, p. 106; R., p. _____).

Significantly, in connection with Appellant's anti-social personality disorder, Dr. Gehle testified Appellant exhibited deceitfulness, impulsivity, irresponsibility, reckless disregard for the safety of others, rationalization of violating the rights of others and hurting others, lack of remorse, and oppositional attitude and behaviors, and she subsequently stated psychopathy is "on a spectrum with the anti-social personality disorder." (TT, pp. 104, 139; R., pp. _____). Dr. Gehle never referenced "murder" in connection with Appellant, or even implied he was likely to commit murder.

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[8]Appellant's contention psychopathy is not a recognized diagnosis in the field of psychology simply because it is not specifically included in the DSM-5 is inaccurate. The DSM-5 editors expressly recognized "the set of categorical diagnoses [in the DSM-5] does not fully describe the full range of mental disorders that individuals experience and present to clinicians on a daily basis throughout the world," and "it is impossible to capture the full range of psychopathology in the [DSM-5's] categorical diagnostic categories." Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed., p. 19. There are psychological tests used by professionals to measure psychopathy, and "psychopath" is a word readily recognized, if not understood, by most of the population.

Appellant contends the Ted Bundy reference "implanted in the jury's mind that perhaps [Appellant] was a murderer who had gotten away with crimes yet undiscovered by the State or that he would murder women in the future." (Brief of Appellant, p. 29) (emphasis added). At best, this contention is rank speculation.

Given Appellant's extensive documented criminal history, the State did not need to imply he may have committed undiscovered crimes, and may be a murderer. The State did have to prove beyond a reasonable doubt Appellant is likely to commit future acts of sexual violence, not murder, if not confined for treatment, and the psychopathy characteristics went directly to that issue. Nothing in Appellant's history indicated he would commit murder, and the State never implied he would do so in the future. After Dr. Gehle's limited testimony regarding psychopathy, the State did not even mention psychopathy during cross-examination of Appellant's expert, or in closing argument.

This allegation starkly reveals the danger of attempting to decide an ineffective assistance of counsel claim on direct appeal. As noted above, there may have been strategic reasons trial counsel did not object to the limited reference, but the Court cannot analyze those reasons on the current record. The fact appellate counsel may have handled the issue differently does not lead to the conclusion trial counsel was ineffective. *See* State v. Van Cleave, 239 Kan. 117, 516 P.2d 580 (1986) (when making ineffective assistance of counsel claims, it is incumbent on appellate counsel to do more than read the record and decide how he would have handled the case differently; contacting defense counsel and the prosecutor would seem to be the minimum investigation required to lodge a charge of ineffective assistance of counsel; asserting a claim of ineffective assistance of counsel without any independent inquiry and investigation other than

reading the record is questionable to say the least). In the event the Court decides to address the issue in this appeal, however, Appellant cannot show counsel was ineffective, or that the limited Ted Bundy reference was so prejudicial it likely affected the jury's verdict, particularly in light of other evidence in the record.

B. Jury Charges (Appellant's Issue 4)

Appellant asserts trial counsel was ineffective by failing to object "to the trial court's failure to give the jury any charge on the law at all after closing arguments," contending the failure to do so "was grave and prejudiced [Appellant]." His argument on this issue glosses over the indisputable fact the circuit court **did** fully, and accurately, charge the jury on the applicable law at the beginning of the trial, including the statutory definition of sexual predator, the State's burden to prove its case beyond a reasonable doubt, the definition of proof beyond a reasonable doubt, the specific elements the State had to prove under the statute, and that the attorneys' arguments were not evidence. (TT, pp. 27-40; R., pp. _____).

Further, after the jury instructions, during opening statements and closing arguments, both the State and Appellant reiterated the instructions regarding the State's burden of proof, and what the State had to prove,. As a result, one of the last things the jury heard before beginning deliberations was Appellant's trial counsel argue on the issue of the State's burden to prove its case beyond a reasonable doubt, and why the evidence failed to meet that burden of proof. (TT, pp. 41-49, 263-272; R., pp. _____). Arguably,

rather than prejudicing him, this worked to Appellant's advantage.[9]

Other than speculation and conclusory claims of prejudice, Appellant cites nothing in the record indicating the jury struggled with the applicable law as charged at the beginning of the trial. The jury deliberated for approximately one and a half hours, and did not ask any questions, indicating the jury knew the law as charged, and took time to review all the evidence before rendering a verdict.

C. Questions Regarding Prior Evaluation (Appellant's Issue 5)

Appellant also contends trial counsel was ineffective in failing to object to the State's questions during cross-examination of Appellant and Dr. Price regarding a prior evaluation by Thomas Martin, M.D., citing In re the Care and Treatment of Way, 410 S.C. 377, 764 S.E.2d 701 (2014), and In re the Care and Treatment of Gonzalez, 409 S.C. 621, 763 S.E.2d 210 (2014). Both Way and Gonzalez involved SVPA proceedings, but were decided well **after** the trial in this case, however, and significantly changed the long standing "missing witness" rule, on which the circuit court relied in allowing the State to ask similar questions at trial, and the Court of Appeals relied in affirming the circuit court ruling.

1. Missing Witness Rule

> [I]t has long been the general rule in South Carolina that if a party fails, without satisfactory explanation, to produce the testimony of an available witness on a material issue in the case and the evidence is within his knowledge, is within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to

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9Appellant correctly asserts Rule 51, SCRCP, states the trial court shall instruct the jury after arguments. Even if Rule 51 applies to SVPA proceedings, the legal issues in a SVPA trial are primarily dictated by the statute, will not change over the course of the trial, and Appellant cannot show prejudice from the jury having the full charge on the law at the beginning of trial rather than after closing arguments.

> him, it may be inferred that such testimony, if presented, would be adverse to the part who fails to call the witness.

Gonzalez, 763 S.E.2d at 214 (discussing the history of the missing witness rule). The rule is applicable in both civil and criminal cases, and has been applied to non-testifying experts. *Id.* Finding application of the rule to non-testifying experts allowed the jury to speculate regarding what the expert might have said and created a risk of unfairness, the Court stated:

> [W]e hold today that a party's invocation of the missing witness rule should be limited to *fact* witnesses, and it should not be applied to *opinion witnesses*, particularly psychiatric experts.

Id. at 217.

The sole issue before the Court in Gonzalez was the State's invocation of the rule's adverse inference during closing argument when Gonzalez was independently evaluated by Dr. Martin, who did not testify at trial.[10] *Id.* at 218. In Way, the Court expanded the scope of its Gonzalez holding to preclude cross-examination regarding an opinion witness who was not going to testify at trial. 764 S.E.2d at 705.

The instant case was tried in May 2014. At that time, in addition to general case law regarding the missing witness rule, trial counsel had the Court of Appeals' opinions in Gonzalez and Way, both holding cross-examination regarding the prior evaluation by Dr. Martin was appropriate under the rule. *See* In re the Care and Treatment of Gonzalez, Op. No. 2012-UP-003, 2012 WL 10826180 (S.C. Ct. App. filed January 4, 2012); In re the Care and Treatment of Way, Op. No. 2011-UP-268, 2011 WL 11734641 (S.C. Ct.

[10]In this case, the State's closing argument did not mention an adverse inference from Dr. Martin's absence at trial, or even mention Dr. Martin in any way, so that part of the Court's analysis in Gonzalez and Way does not apply..

App. filed August 24, 2011). While the Court of Appeals opinions were unpublished, they both adhered to the long standing missing witness rule in allowing the questions on cross-examination.

An attorney is not required "to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); *see also* Harden v. State, 360 S.C. 405, 602 S.E.2d 48, 49 (2004) (same); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764, 765 (1993) (same). Trial counsel's failure to object in this case cannot be deemed ineffective in light of the established law directly on point, which was changed well after trial.

2. Harmless Error

While the cross-examination questions at issue would be improper **after** Gonzalez and Way, as the Court found in those cases, the error in this case was harmless beyond a reasonable doubt. Indeed, the responses to the questions arguably prejudiced the State as much, if not more, than Appellant.

During his direct testimony, Appellant testified he was evaluated by "Dr. Bardoff" as a condition of his probation from the 1997 indecent exposure conviction. He stated Dr. Bardoff administered the same psychological test Dr. Gehle administered, and he "never heard nothing else about it."[11] (TT, pp. 205-206; R., pp. _____).

During cross-examination, the State asked about Dr. Bardoff, and then asked Appellant about other evaluations prior to trial.

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[11]Arguably, this opened the door to cross-examination regarding other evaluations of Appellant, including Dr. Martin's evaluation.

Q. Okay. Isn't it true that you had other evaluations as well by defense experts?

A. Not that I recall, ma'am.

Q. Isn't it true that Dr. Martin was retained by the defense for this trial to evaluate you as your expert?

A. Yeah, **there should have been a red flag immediately with Dr. Martin. Because he knew you and says that he's been dealing with you two for quite some time, he knew y'all** (sic) **right away**.

Q. Absolutely. He's an independent expert that testifies for the defense in all of these cases, doesn't he?

A. Right.

Q. But he's not here to testify for you, is he?

A. No, he's not here to testify for me.

Q. Okay.

A. **Why is that, ma'am?**

Q. You tell me.

A. **I don't know**.

(TT, pp. 210-211; R., pp. _____) (emphasis added). In short, Appellant implied the State interfered with Dr. Martin's evaluation, and Dr. Martin was not there to testify for him because of his relationship with the State.

During Dr. Price's cross-examination, the State asked if he was aware of any opinions of other mental health professionals regarding Appellant. He stated he thought Appellant "had seen a Dr. Martin," but he could not recall. Dr. Price further testified he did not know Dr. Martin, or know he had an outpatient sex offender treatment program and previously worked at the SVP treatment program. (TT, pp. 251-252; R., pp. _____).

The testimony regarding Dr. Martin's prior association with the SVP treatment program arguably furthered Appellant's implication regarding Dr. Martin's allegiance to the State.

Appellant speculates the State's questions implied "Dr. Martin likely considered [Appellant] to be one of the worst offenders he had examined." Considered in context of the entire record, however, it is equally reasonable to speculate the jury could conclude the State controlled Dr. Martin and he was not present to testify because of that control, essentially prejudicing the State and nullifying any potential prejudice to Appellant.

In any event, it is far more likely the jury's verdict was based on the substantial evidence presented by the State, rather than the limited references to Dr. Martin. As the Court found in Gonzalez:

> The State set forth an abundance of evidence as to Gonzalez's mental abnormality based on Dr. Crawford's diagnosis of Gonzalez as having pedophilia and an anti-social disorder, as well (sic) Gonzalez's risk of reoffending and inability to control his actions based on the fact that he continued to commit offenses while out on bond and based on his steadfast refusal, or inability, to accept responsibility for his conduct. . . .
>
> In the end, the determination whether the evidence indicated Gonzalez was an SVP was one to be made by the jury as the fact-finder, and the very brief reference to a second evaluation could not reasonably have affected the outcome here. If anything, Gonzalez's failure to fully acknowledge his prior sexual misconduct despite his guilty pleas to the offenses, . . . probably did more than any passing reference to a second evaluation to convince the jury that he was at a risk to reoffend if he did not receive long-term control, care and treatment in a secure facility.

763 S.E.2d at 218.

In addition to evidence of Appellant's significant history of sexual offenses, the State presented Dr. Gehle's extensive testimony regarding the basis for her diagnoses of paraphilic disorder (biastophilia) and anti-social personality disorder, which she stated is "an especially dangerous combination" making Appellant likely to reoffend sexually.

She testified he did not take responsibility for his sexual offenses even though he pled guilty to all of them, he reoffended while on probation from previous offenses, he offended against women who could readily identify him, some of his offenses were very impulsive indicating an inability to control his behavior, and he did not believe he needed any sex offender treatment, which made it unlikely he would engage in treatment if not confined for it. (TT, pp. 50-150; R., pp. _____).

Unlike Gonzalez and Way, where the State's expert was the only expert presented at trial, Appellant presented Dr. Price as an expert, and he testified Appellant had no mental abnormality or personality disorder, was not likely to reoffend sexually, and did not meet the criteria for commitment as a sexual predator. The primary focus of his testimony, however, was undermining Dr. Gehle's use of the Static-99R tool to access Appellant's risk to reoffend, claiming other courts, specifically New Hampshire, had not allowed evidence regarding the tool.[12] On cross-examination, however, he was forced to admit the New Hampshire decision excluding testimony about the Static-99R was a non-

[12]Contrary to Dr. Price's testimony, the majority of courts allow expert testimony concerning actuarial tests in a sexual predator civil commitment trial to show the person's propensity to reoffend sexually, and arguments concerning the reliability of the actuarial instruments go to weight, not admissibility. *See generally*, Admissibility of Actuarial Risk Assessment Testimony in Proceeding to Commit Sex Offender, 20 A.L.R.6th 607 (Originally published in 2006); *see also* Heather Ellis Cucolo, Michael L. Perline, "Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators, 18 U. Pa. J. L. & Soc. Change 125, 139-145 (2015).

binding circuit court ruling, and the person eventually voluntarily committed to the sexual predator treatment program.[13] (TT, 220-259; R., pp. _____).

In light of all the evidence presented by both parties, the limited references to Dr. Martin were harmless, and Appellant's rights were not violated. The simple facts are 1) the State's case was strong; 2) Appellant did not present himself very well when forced to undergo cross-examination by a female; 3) his other witnesses, particularly his girlfriend, did not hold up well under cross-examination; and 4) Dr. Price was not effective as an expert.

Trial counsel performed admirably all things considered, including a difficult, manipulative client, who could not hide his disdain for females when he was subjected to hard-hitting cross-examination by a female attorney. (TT, pp. 266-267; R. pp. _____). Then, probably at his client's insistence, he had to put Appellant's girlfriend on the stand, where she proceeded to lie, and then get impeached on cross-examination by her own written statements when she had Appellant charged with criminal domestic violence. Finally, knowing the strength of the State's case, and the fact Dr. Martin would not testify, counsel had to present an expert chosen by Appellant's family, who had no experience evaluating sexual violent predators, and his "expertise" was fairly easily impeached on cross-examination.

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[13]Appellant asserts Dr. Price's testimony gave him "a significant chance at a favorable jury verdict." This assertion ignores how Dr. Price's credibility was undermined on cross-examination by the revelation he grossly overstated support for his opinion the Static-99R was unreliable, and he was not even present during Dr. Gehle's testimony to hear her testify she did not rely solely on the Static-99R.

D. Motion to Dismiss (Appellant's Issue 6)

Appellant asserts trial counsel was ineffective by failing to seek dismissal on the ground the SVPA requires five members on the Multidisciplinary Team (MDT), and only four members were present when the MDT considered his case and found probable cause to believe he is a sexually violent predator. Under existing precedent from this Court, Appellant's assertion is legally inaccurate on its face.

Absent a statutory or other controlling provision, under the common-law rule, a majority of a board is necessary to constitute a quorum, and the board may not act in the absence of a quorum. In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 314-15 (2001). The SVPA does not require all members of the MDT to be present at each meeting, or that the MDT decisions be unanimous, or made by any majority other than a simple majority. *Id.* at 315 (four members of the MDT constitute a quorum sufficient to issue a decision regarding whether person qualified as a sexually violent predator under the SVPA).

The MDT requirements under the SVPA have not changed since Matthews was decided in 2001. Appellant concedes four members of the MDT were present when his case was considered, and as in Matthews, all four members present voted to refer his case for further action.[14] Thus, a quorum was present, and any motion to dismiss by trial counsel on this ground would have been **patently** frivolous, and arguably violate counsel's ethical duty not to raise frivolous issues.

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[14]Appellant's contention the retired judge is "the most important member" of the MDT "for protecting his rights," conveniently ignores the **practicing criminal defense attorney** member of the MDT, who is most likely to instinctively protect the person's rights.

E. Evidence Regarding SVPTP (Appellant's Issue 7)

Appellant asserts trial counsel was ineffective "when he acquiesced in the State's attempt to keep the lack of treatment in the SVP program from the jury." He further asserts counsel was ineffective by failing to ask Dr. Gehle questions about the treatment program after the State "opened the door" during her direct testimony. Both assertions are meritless.

In a SVPA trial, the jury must find beyond a reasonable doubt the person has been convicted of a sexually violent offense, and has a mental abnormality or personality disorder that makes him likely to reoffend sexually **"if not confined in a secure facility** for long-term control, care, and treatment." S.C. Code Ann. §44-48-30 (Supp. 2014) (emphasis added). Thus, under the plain language of the statute, the relevant elements for the jury are 1) a sexually violent offense conviction, 2) a mental abnormality or personality disorder, 3) which makes the person likely to reoffend sexually, 4) unless the person is confined for long-term treatment.

The location of the secure facility and the efficacy of the treatment provided there are absolutely irrelevant during an SVPA commitment trial, and any evidence regarding them is potentially confusing for the jury and inadmissible. The State sought to exclude such evidence in this case because respondents in SVPA cases routinely elicit testimony revealing the SVP treatment program is currently located in the former "death row" at Broad River Correctional Institution, and attacking the treatment provided there, in order to focus the jury on those irrelevant issues.[15] By agreeing not to offer clearly irrelevant

[15]Indeed, Appellant makes the "death row" reference in his Brief. (Brief of Appellant, p. 14) ("A person facing a lifetime of being warehoused at South Carolina's

evidence and needlessly complicate the trial, trial counsel acted ethically, which is not ineffective assistance of counsel.

Appellant's argument the State opened the door to those issues takes the cited testimony completely out of context. As noted above, one of the elements the jury had to find beyond a reasonable doubt was whether Appellant was likely to reoffend **if not confined** for treatment. When the testimony at issue is considered in context, it is clear the State's questions and Dr. Gehle's responses went directly to that element, and had nothing to do with either the location of the facility or the efficacy of the treatment provided there.

Dr. Gehle testified she diagnosed Appellant with a paraphilia (biastophilia) and anti-social personality disorder, which made him likely to reoffend "if not confined in a secure facility for long-term control, care and treatment." (TT, pp. 110-111; R., pp. _____). At the end of her direct testimony, the following exchange occurred:

> Q. Now , if [Appellant] was released at this time, would he be released to the community?
>
> A. Yes.
>
> Q. Where will he live?
>
> A. I believe he told me that he would live with his girlfriend.
>
> Q. Is this the same woman that the CDV first convictions stem from?
>
> A. Yes, that's my understanding that is the same person.

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former Death Row deserves no less."). This statement, and many other statements in Appellant's Brief, i.e., "the wheels of the SVP bureaucracy began to turn," clearly reveal the strategy used in most SVPA cases - denigrate the law and the program in order to invoke the jury's (or court's) sympathy and draw attention away from the person's history and mental status.

Q. Will he be on probation?

A. I believe that he completed the remainder of his probationary sentence when he was sent to prison in 2010. That was a probation violation. So, I don't know of any other probation that (sic) has to serve other than that so I don't believe so.

Q. Do you know of **anything other than this program that would guarantee that he has any sex offender treatment**?

A. I don't know of **anything else that would guarantee it**, no.

Q. **Would he be required to attend any sex offender treatment if he didn't go into this program?**

A. To my knowledge he would not be required.

(TT, pp. 111-112; R., pp. _____) (emphasis added).

The State's questions went directly to the issue of whether Appellant should be confined for treatment. Dr. Gehle's responses established if Appellant was released, he would be in the community and living with a woman he previously abused, with no supervision or restrictions, and nothing requiring him to seek or participate in treatment. In short, he needed treatment, and the **only** way to **guarantee** he received it was to confine him in a secure treatment facility. Again, this exchange had **nothing** to do with the location of his confinement, or the quality of treatment provided there, and therefore, it did not open the door to raise those irrelevant issues.[16]

The very first sentence in the argument portion of Appellant's Brief provides a lens through which his claims regarding trial counsel's effectiveness should be viewed. He states: "Trial counsel did not make a single objection during [Appellant's] trial."

[16]The SVPA provides the mental status of any person committed thereunder must be reviewed annually. S.C. Code Ann. §44-48-110 (Supp. 2014). Issues regarding the treatment provided, or lack thereof, can be raised during the annual review process.

(Brief of Appellant, p. 4). The fallacy of this statement is readily revealed by the trial transcript. The fact is counsel **did** object during the State's *voir dire* of Dr. Price's expert qualification, and then raised an issue regarding the scope of Dr. Gehle's qualification. (TT, pp. 229-231; R., pp. _____). He also vigorously attacked Dr. Gehle's evaluation and direct testimony, and then presented four witnesses on Appellant's behalf. Apparently, Appellant believes the only way counsel can object or control aspects of the trial is to use the word "objection," which is patently incorrect.

As noted above, trial counsel is an experienced trial attorney, who is obviously familiar with the Rules of Evidence, and his performance at trial establishes he knew how to present Appellant's case. An adverse jury verdict does not indicate counsel was ineffective, and the record simply does not support any of Appellant's ineffective assistance claims.

CONCLUSION

Based on the foregoing, Respondent submits the jury verdict finding Appellant is a sexually violent predator beyond a reasonable doubt should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

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

BY: _____
for DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0087

ATTORNEYS FOR RESPONDENT

February 5, 2016

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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2015-001424

IN THE MATTER OF THE CARE AND TREATMENT OF
JEFFREY ALLEN CHAPMAN,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter by depositing a copy in the United States mail, postage prepaid, addressed to:

David Alexander
Assistant Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.

This 5th day of February, 2016.

SALLY B. ELLISON
Legal Assistant

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