STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



---

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

---

IN THE MATTER OF THE CARE AND TREATMENT OF DAQUAN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001959

---

# INITIAL REPLY BRIEF OF APPELLANT

---

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## Cases



## Statutes



## Rules



## Constitutional Provisions

ARGUMENT IN REPLY

**Issues 1, 2, and 7**

The Sexually Violent Predator Program's purpose is to "control a 'limited subclass of dangerous persons' and not to broadly subject any dangerous person to what may be indefinite terms." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002) *quoting* Kansas v. Crane, 534 U.S. 407, 412 (2002). When considering the issues in this case, the Court should keep in mind the incongruity of the SVP Act's purpose and the State's actions in this case. Appellant was initially charged with three counts of first degree criminal sexual conduct with a minor. R. ___. (State's Petition at ¶ 5(a)). For these three charges, appellant faced a mandatory minimum of twenty-five years' imprisonment or a maximum of life imprisonment. S.C. Code Ann. § 16-3-655(D)(1). Even though the State now contends appellant is a member of the limited subclass of dangerous persons who should be committed—perhaps for the rest of his life—the State (through the solicitor) also first made the decision to allow appellant to enter an Alford plea to three counts of lewd act. The trial judge, who must always consider a criminal defendant's future danger to the community during sentencing, gave appellant a suspended sentence with time served and probation. R. ___. (State's Petition at ¶ 5(a)). Over the opinion of the solicitor, the trial judge, and the DMH evaluator, the State sought appellant's indefinite detention in the SVP program after a probation violation. Tr. 178, l. 18.

The State wants this Court to force appellant to file a *pro se* common law habeas petition. The State is careful in its brief not to concede that citizens prosecuted under the SVP Act have the right to effective assistance of counsel. In its issue statement, the State does concede that a statutory right to counsel exists, but then states "**assuming** [the statutory

right] requires effective assistance of counsel," such claims should be litigated in a state common law habeas proceeding. Brief of Resp. at 1 (emphasis added). The State carefully frames the issue as "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." Brief of Resp. at 10. The State explicitly argues that no constitutional right to effective assistance of counsel exists. Brief of Resp. at 9-10. Having never conceded that SVP defendants have the right to the effective assistance of counsel (from any source), the State would not be stopped from claiming in a habeas proceeding that the statutory right to counsel is empty and meaningless.

The State claims in a footnote that "the real reason" appellant does not "want" to use common law habeas is because the legal standard in habeas proceedings is even higher than the difficult standard imposed by Strickland v. Washington, 466 U.S. 668 (1984). Brief of Resp. at 16, n.6. Far from being a revelation, appellant expressly argued this point in his initial brief. Brief of App. at 19-20 ("This remedy is not an adequate safeguard for Johnson's constitutional claims because the legal standard for such claims is too high.") The standard in state habeas proceedings is so high because it presumes that other procedures exist for the protection of defendants' rights—such as PCR in criminal cases. Furthermore, state habeas proceedings do not require the appointment of counsel.

Accepting the State's argument would mean that a person committed indefinitely in the SVP program would face a higher standard than an applicant in a PCR case and be without the benefit of appointed counsel. The State holds up Florida as an example for the Court. Brief of Resp. at 15. In both of the Florida cases cited by the State, the court

acknowledges that ineffective assistance of counsel claims **can be raised on direct appeal** when the deficiency is apparent from the face of the record. Manning v. State, 913 So.2d 37, 38 (Fla. Dist. Ct. App. 2005) ("Other than the rare case where counsel's ineffectiveness can be discerned from the face of the record, claims of ineffective assistance of counsel need to be raised in some type of collateral proceeding where fact finding can take place."); Bohner v. State, 157 So.3d 526, 527 (Fla. Dist. Ct. App. 2015) (declining to decide whether the adoption of rules allowing ineffective assistance of counsel claims in SVP cases precluded raising such claims on direct appeal).

As noted in Bohner, Florida has specific rules of civil procedure that apply to SVP cases. Bohner, 157 So.3d at 528 (citing Rule 4.460, Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators). This rule references a criminal procedure rule, which allows for the appointment of counsel in certain cases. See Rule 4.460, Fla. R. Civ. P. Inv. Comm. Sex. Violent. Predators; Fla. R. Crim. P. 3.850(f)(7) ("The court may appoint counsel to represent the defendant under this rule."). South Carolina has no such mechanism, unless one is created under the common law.

Appellant has a statutory and due process right to the effective assistance of counsel, but presently lacks any constitutionally valid means to assert that right in South Carolina. As shown by the cases cited in appellant's brief, the courts addressing this issue have overwhelmingly concluded that the right to effective assistance of counsel exists in an SVP proceeding. Brief of App. at 11-13. The State has all but denied that such a right exists and has, in the alternative, suggested a procedure that does not

comport with due process. This Court should consider the claims raised in this appeal and remedy the lack of due process inherent in the SVP Act.[1]

**Issue 3**

Far from being an "academic reference" as claimed by the State, appellant cited a law school textbook to illustrate that cross-examining experts for bias based on financial interest is so basic a skill that it is taught to students. Brief of Resp. at 23, n.9. For example, in a medical malpractice or products liability case which usually becomes a "battle of the experts," both sides either take the sting out of such cross-examination by asking their expert witnesses on direct-examination about their compensation, or seize on the opportunity in cross-examination to reveal hourly rates that routinely shock jurors of limited means.

The State's own reasoning on this point is contradictory. The State claims that trial counsel likely had a strategic reason to avoid asking Dr. Burke about his financial interest in the manufacturer of the PPG because "Dr. Burke was obviously well versed in the delicacies of testifying" and it was "doubtful" that Dr. Burke's credibility would have suffered. Brief of Resp. at 21-22.

[1] As this Court is aware from the State's motion to hold this case in abeyance, currently pending before the South Carolina Supreme Court is the case of In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181. Appellant agrees with the State's assertion in that motion that the issues raised here regarding whether ineffective assistance of counsel claims can be raised in a direct appeal are identical to those same issues in Chapman. This Court denied the State's motion to hold this appeal in abeyance.

Appellant readily concedes that cross-examining experts is no easy task, even for seasoned trial lawyers. However, the State argues that trial counsel made a strategic decision to cross-examine Dr. Burke on the far more difficult subject matter of his expertise "to undermine Dr. Burke's credibility," instead of picking the low-hanging fruit of how much money he makes from PPG testing. The State notes "the extent of [Dr. Burke's] knowledge in the area of sex offender evaluation," which would make cross-examination on his evaluation difficult. Brief of Resp. at 21-22. It does not make sense that trial counsel would formulate a strategy of only impeaching Dr. Burke's credibility with the most difficult material and avoid easy cross-examination questions on how much money he made from Limestone Technologies. The purported "science" used by Dr. Burke is likely difficult for jurors to understand. Every juror would understand getting paid.

This error is even more egregious in this case because, unlike in most "battle of the experts" cases, Dr. Burke was the only "hired gun" in this case. The DMH evaluator, Dr. Harrison, initially determined that Johnson was not an SVP. Tr. 204, l. 14 – 205, l. 1. Tr. 206, ll. 2 – 7. Appellant's case is the rare instance where evidence of financial bias would be highly unlikely to cut both ways. Dr. Harrison's opinion as a DMH employee and the Court's expert would stand in stark contrast to the State's hired expert, Dr. Burke, who likely receives significant payments from the manufacturer of PPGs. The failure to cross-examine Dr. Burke on this point was a basic error and this Court should reverse.

## Issue 4

The State concedes that the admissibility of PPG evidence is a question of first impression in South Carolina. Brief of Resp. at 23 ("There are no South Carolina appellate court cases directly addressing the admissibility of testimony regarding the PPG."). Despite

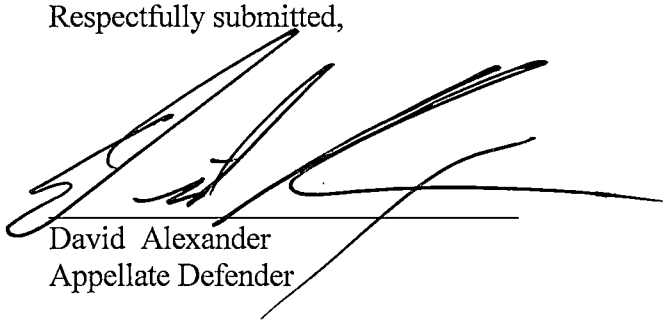
no appellate decision on this point, the State argues that trial counsel may have had a strategic reason for failing to move *in limine* to exclude this testimony. Brief of Resp. at 26. Such a motion would have been heard *in camera.* Had appellant lost the motion, the jury would never have known it was made.

Had appellant won the motion, the jury would never have heard about the test that Dr. Burke claimed differentiated his opinion from Dr. Harrison's and that was "vitally important" to his opinion. Tr. 113, ll. 22 – 24. Arguing that trial counsel may have had a strategic reason not to move to exclude the PPG evidence is no different than an argument that, in a drug case, trial counsel may have a strategic reason for not making a Fourth Amendment suppression motion. Failing to make such a motion was deficient performance. The resolution of this issue rests on whether such evidence, like lie detector tests, is inadmissible. State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). Indeed, the State's argument that admission of the PPG evidence was harmless error demonstrates its lack of confidence in this junk science. Brief of Resp. at 27. DMH does not use PPGs in its evaluations. Tr. 221, ll. 3 – 25. This Court should hold that such tests are inadmissible as a matter of law and reverse.

## CONCLUSION

For the foregoing reasons, appellant's commitment must be reversed and this case remanded for a new trial, or, alternatively, appellant must be released because he is being detained pursuant to an unconstitutional statute.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT.

This 31st day of March, 2016.