STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

J. Mark Hayes, II, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF KEITH FITZGERALD BURRIS,

APPELLANT

APPELLATE CASE NO. 2015-002122

INITIAL BRIEF OF APPELLANT

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II. Did trial counsel violate Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clauses of the federal and state constitutions and the statutory right to counsel by failing to introduce evidence of treatment?

III. Did trial counsel violate Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clauses of the federal and state constitutions or the statutory right to counsel by moving to prohibit evidence concerning the state's expert witness's prior evaluation of Appellant under the SVP statute, in which the expert opined Appellant was not an SVP?

IV. Did trial counsel violate Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clauses of the federal and state constitutions and the statutory right to counsel by failing to quash the jury panel and re-strike in light of the state's exercise of gender-based strikes in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On May 4, 2015, the state filed a petition asking for a trial in order to commit Appellant pursuant to the Sexually Violent Predator (SVP) Act. R. *(Petition).[1] On October 7, 2015, the SVP case was tried before the Honorable J. Mark Hayes, II, and a jury. Tr. 1. James G. Bogle represented the state, and Anna R. Good represented Appellant. Tr. 1. After hearing the testimony of the only witness presented by the state, Dr. Marie Gehle, and two defense witnesses – an officer from the detention center and Appellant – the jury found Appellant was a sexually violent predator. Tr. 199, ll. 3-12. During the deliberations, the jury sent a note requesting "to know how long Mr. Burgess [sic] would be put away," and asking for his entire criminal record. Tr. 197, l. 18 – Tr. 198, l. 2; R. * (Court's Exhibit #2). Judge Hayes ordered Appellant be "committed to the Department of Mental Health for his long-term control, care, and treatment." R. *(Order of Commitment).

Appellant filed a timely notice of appeal. This brief follows.

[1] In various places in the transcript, Appellant, whose name is Keith Burris, is referred to as Kenneth Burgess and Kenneth Burris. These appear to be typographical errors or the result of participants misspeaking.

STATEMENT OF FACTS

The state alleged Appellant had a qualifying conviction of criminal solicitation of minor under the SVP Act. Tr. 106, ll. 6-11; R. *(State's Exhibit #4); R. *(petition). On November 13, 2014, Appellant entered a guilty plea to the charge in exchange for a negotiated sentence of ten years' imprisonment suspended upon two years' imprisonment and five years' probation. Tr. 101, l. 17 – Tr. 102, l. 1; R. *(State's Exhibit #4); R. *(petition). Appellant was scheduled to be released on April 28, 2015. R. *(petition). As a result, the Department of Corrections referred him to the Multi-Disciplinary Team for assessment under the Act. R. *(petition). On January 22, 2015, the Team determined Appellant satisfied the definition and sent the case to the Prosecutor's Review Committee. R. *(petition). Thereafter, the Committee found probable cause to believe Appellant was a SVP. R. *(petition). The state then filed a petition to commit Appellant as a SVP pursuant to the Act and requested a trial. R. *(petition).

In addition to the qualifying conviction, Appellant was charged in 1997 with criminal sexual conduct with a minor (CSCM). Tr. 93, ll. 18-19; R. *(petition). He entered a guilty plea to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) in June of 1999. Tr. 93, ll. 20-21; R. *(petition). He was sentenced to five years' imprisonment suspended upon time served and three years' probation. R. *(petition). Subsequently, in 2004, he was charged with three counts of CSCM in the second degree. Tr. 94, l. 25 – Tr. 95, l. 9; R. *(State's Exhibits # 1-3); R. *(petition). He entered guilty pleas to those charges on January 24, 2005. Tr. 95, lines 2-9; Tr. 101, l. 4; R. *(State's Exhibits #1-3); R. *(petition). The judge sentenced him to a negotiated sentence of ten years' imprisonment on each count to be served concurrently. R. *(State's Exhibits #1-3); R. *(petition).

Dr. Marie Gehle evaluated Appellant in 2012. At that time, she diagnosed Appellant with "antisocial personality disorder but concluded he was not of such a risk to reoffend in a sexually violent manner as to warrant commitment." R. *(Defendant's Exhibit #1); R. *(petition). Dr. Gehle evaluated Appellant again in May of 2014. R. *(petition). At that time, she did not conduct any psychological testing to determine whether Appellant satisfied the criteria for antisocial personality disorder, or any other mental abnormality or personality disorder. Tr. 112, lines 16-17. Instead, she relied upon her evaluation in 2012 to maintain Appellant had a personality disorder, specifically, antisocial personality disorder. Tr. 119, l. 16 – Tr. 120, l. 2; R. *(Defendant's Exhibit #1). She stated that in her opinion, Appellant's "personality predisposes him to commit a wide variety of criminal offenses that also includes sexual offenses." Tr. 122, ll. 4-12. She opined that Appellant's "propensity" was "of such an effect that it's caused a menace to the health and safety of others." Tr. 122, ll. 13-17. Further, she stated Appellant had "the propensity to be dangerous and commit future sexually violent offenses." Tr. 122, ll. 13-17. Appellant's "antisocial personality disorder" and other risk factors cause serious difficulty for him in controlling his behavior. Tr. 122, l. 22 – Tr. 123, l. 2. Finally, she concluded Appellant's personality disorder made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. Tr. 123, ll. 3-7; R. *(Defendant's Exhibit #1).

Specifically, during the 2012 evaluation, Dr. Gehle tested Appellant using the MMPI. Tr. 111, ll. 6-12; Tr. 112, ll. 13-15. This 500+ question test was designed "to determine whether somebody has problems in certain areas related to mental health problems or personality problems." Tr. 111, ll. 17-22. From the test, Dr. Gehle "learned that [Appellant] has very strong antisocial personality attitudes." Tr. 112, ll. 7-10. She also performed a Static 99R test, which is an actuarial risk assessment tool. Tr. 112, ll. 21-25. According to this ten-question test, Dr. Gehle determined

Appellant scored a five out of twelve. Tr. 115, ll. 4-11. This score placed Appellant in the "moderate high risk" category. Tr. 115, ll. 17-19. According to the recidivism table accompanying the test, she opined that Appellant had a 21.2% chance of re-offending sexually within five years. Tr. 115, ll. 22-24. In other words, he had a 79% chance of not re-offending within five years. Tr. 126, ll. 4-8. Further, she opined that Appellant had a 32% chance of re-offending sexually within ten years. Tr. 116, ll. 3-5. This meant Appellant had a 68% chance of not re-offending. Tr. 126, ll. 9-12.

In scoring the Static 99R, Dr. Gehle gave Appellant one point for a CDV conviction from the 1980s because the test assigns one point when a person has a prior conviction for nonsexual violence. Tr. 139, ll. 5-22; Tr. 141, ll. 9-13. In other words, one of his five points was from a CDV conviction in the 1980s, over thirty years before the SVP trial. Tr. 139, ll. 23-24. Appellant received negative one point because of his age at the time of release. Tr. 140, ll. 5-15. He got zero points because he lived with a romantic partner for two consecutive years. Tr. 140, ll. 16-19. He also got zero points because his last conviction was unaccompanied by other offenses. Tr. 140, l. 20 – Tr. 141, l. 8. He then got a score of three because in 1998 he was charged with and convicted of a sex offense – the ABHAN – and in 2003, he was convicted of three sexually related offenses. Tr. 141, l. 14 – Tr. 142, l. 9. Appellant received another point because he had four or more prior sentencing dates for any offenses. Tr. 142, ll. 13 – 24. Appellant received zero points because he had no convictions for non-contact sexual offenses, such as peeping tom. He also got one point because his alleged victims were not related to him. Tr. 144, ll. 3-10. He got zero points because his alleged victims were not strangers and his alleged victims were not males. Tr. 144, ll. 11-17. Thus, he had a score of five.

Dr. Gehle's testimony, coupled with certified copies of Appellant's prior convictions, was the sum total of the state's case. Appellant did not dispute that he had been convicted of a sexually violent offense. Tr. 79, ll. 16-20; Tr. 176, ll. 15-20. The only dispute was the second element - whether Appellant suffered from a mental abnormality or personality disorder that made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. Tr. 79, ll. 20-23; Tr. 176, ll. 20-22. More precisely, Appellant's focus at trial was whether he had a present personality disorder and whether out-patient treatment would address any problems sufficiently. Tr. 178, l. 7 – Tr. 179, l. 12; Tr. 180, ll. 11-18.

ARGUMENT

I. The trial judge erred in permitting the expert to testify regarding her opinion that Respondent suffered from a personality disorder that made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment because her opinion regarding his personality disorder was based upon her 2012 evaluation of Respondent, which made it unreliable in assessing his present psychology.

Relevant facts

During pre-trial hearings, trial counsel moved to prohibit the state's expert, Dr. Marie Gehle, from testifying regarding her diagnosis of Appellant with antisocial personality disorder because the testing to arrive at that diagnosis was conducted in 2012 and the statute requires a finding by the jury that the person has a present personality disorder. Tr. 45, ll. 2-18; Tr. 45, l. 21 – Tr. 46, l. 21. Trial counsel explained the 2012 testing occurred three years prior to the current proceeding, and as a result, the test could not indicate that Appellant had a present personality disorder. Tr. 46, ll. 12-21. The state admitted that Dr. Gehle evaluated Appellant in 2012 pursuant to a petition filed by the state. Tr. 47, ll. 7-8. At that time, Dr. Gehle determined Appellant did not meet the criteria for SVP although he had a personality disorder. Tr. 47, ll. 8-9. Following Appellant's subsequent conviction, Dr. Gehle evaluated Appellant again. Tr. 47, ll. 9-11. Dr. Gehle changed her opinion – just three years later, she opined Appellant was a SVP. Tr. 47, ll. 11-13. The state argued "[a]nything going about the prior evaluation really goes to the weight of her testimony as opposed to it's [*sic*] admissibility." Tr. 47, ll. 14-16. The judge concluded the expert could "testify as to her prior evaluation" and that trial counsel's objection went "to the weight of her testimony not to the admissibility of it." Tr. 49, ll. 6-8; Tr. 50, ll. 8-12.

Appellant submitted Dr. Gehle's report as an exhibit for identification purposes only. R. *(Defendant's Exhibit #1). The report made clear that it was primarily based upon the 2012 evaluation. R. *(Defendant's Exhibit #1). She also told the jurors she had evaluated Appellant "on a previous occasion." Tr. 87, ll. 6-8. Dr. Gehle testified that in her opinion, Appellant suffered from antisocial personality disorder. Tr. 120, ll. 1-2. She told the jurors that antisocial personality disorder is a pervasive pattern of disregard for and violations of the rights of others. Tr. 121, ll. 19-20. According to Dr. Gehle, "the primary personality disorder related to sexually violent offender and sexually violent civil commitment is antisocial personality disorder." Tr. 89, ll. 20-23.

During the 2012 evaluation, Dr. Gehle tested Appellant using the MMPI. Tr. 111, ll. 6-12; Tr. 112, ll. 13-15; Tr. 133, ll. 22-25; R. *(Defendant's Exhibit #1). This test was designed "to determine whether somebody has problems in certain areas related to mental health problems or personality problems." Tr. 111, ll. 17-22; Tr. 134, ll. 3-12. From the test, Dr. Gehle "learned that [Appellant] has very strong antisocial personality attitudes." Tr. 112, ll. 7-10. She did not "feel it was necessary to redo the MMPI" because it is "something that's stable over time." Tr. 112, lines 16-17. However, she was forced to admit that a person's personality problems, including disorders, could change over time. Tr. 134, ll. 13-18. She also explained that the test "can take somebody a couple of hours" to complete because it is "very long" and she "didn't want to give him that long test again." Tr. 112, ll. 18-19; Tr. 134, ll. 19-22. Based upon this diagnosis, Dr. Gehle concluded Appellant had a predisposition to commit a "wide variety of criminal offenses," including sexual offenses, had a "propensity to be dangerous and commit future sexually violent offenses," had difficulty controlling his behavior, and was likely to engage in acts of sexual violence unless confined for long term control, care, and treatment. Tr. 122, l. 4 – Tr. 123, l. 7.

Discussion

According to the statute, a sexually violent predator is a person who "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(b). Obviously, the statute was written in the present tense because the legislature sought to commit only individuals with a present mental abnormality or personality disorder. Additionally, a person is considered likely to engage in acts of sexual violence if "the person's propensity to commit acts of sexual violence is such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9). Again, the present tense in the statute indicates the legislature's desire to commit only those who presently pose a danger. The South Carolina Supreme Court made this clear in In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015). The Court explained the state "must prove, beyond a reasonable doubt that the individual is *presently* a sex offender." Id. at 23, 774 S.E.2d at 466 (emphasis in original); see also State v. Gaster, 349 S.C. 545, 551, 564 S.E.2d 87, 90 (2002)(holding that the SVP Act allows "involuntary confinement based upon the determination the person currently suffers from both a mental abnormality or personality disorder and is likely to engage in acts of sexual violence").

In Taft, the state's expert examined the respondent "nearly two years earlier in June 2009" and that based on that previous evaluation, the expert opined Taft suffered from pedophilia and met the statutory definition of a SVP. Taft, 413 S.C. at 20, 774 S.E.2d at 464-465. The state's expert's opinion was based upon his administration of several risk assessment tests to measure Taft's likelihood of reoffending. Id. at 20, 774 S.E.2d at 465. The Supreme Court explained the state's expert's opinion was that Taft met the statutory definition of SVP in 2009 and was not a current opinion. Id. at 23, 774 S.E.2d at 466.

Although the expert in Taft refused to render a current opinion as to whether Taft met the statutory definition of SVP at the time of his trial, the Court's holdings in the case are instructive to the instant matter. Dr. Gehle's opinion concerning Appellant's personality disorder was based upon her evaluation of Appellant in 2012, three years prior to his SVP trial. Although she claimed the MMPI test, which she used to diagnose Appellant with a personality disorder, was stable over time, she admitted that a person's psychology changes over time. Her testimony revealed her reluctance to administer the MMPI again was due to the length of the examination, and not due to confidence of the results. As explained by the Supreme Court, "[a] civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy," therefore, the state must prove the respondent's present mental status, not a past mental status, and should not be permitted to use test results for the sake of expediency over accuracy. See Taft, 413 S.C. at 23, 774 S.E.2d at 466. Permitting the state to use an expert's evaluation from a prior criminal proceeding "would obviate any possibility of rehabilitee during incarceration" and "would violate the legislature's statutory scheme, which clearly envisions a new civil commit proceeding based upon current evidence that the individual suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." Id.

II. Trial counsel violate Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clauses of the federal and state constitutions and the statutory right to counsel by failing to introduce evidence of treatment.

Relevant facts

Prior to trial, the state moved to prohibit the introduction of evidence and argument regarding whether Appellant would receive treatment or the nature of that treatment if he were committed pursuant to the SVP Act. R. *(Petitioner's Second Motion in Limine). In the motion, Respondent admitted the statute defined a SVP as a person with a mental abnormality or personality disorder, which made the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. R. *(Petitioner's Second Motion in Limine). However, incongruously, the state argued proof of this element was not required. R. *(Petitioner's Second Motion in Limine). According to the state, allowing Appellant "to pose arguments and questions as to his future treatment [would] place[] an additional burden on the state to prove the potential for treatment success." R. *(Petitioner's Second Motion in Limine). Thereafter, the state appeared to argue it was unable to provide effective treatment for Appellant, and therefore, any evidence regarding treatment should not be presented to the jury. R. *(Petitioner's Second Motion in Limine). According to the state, allowing evidence regarding treatment would create an additional element for the state to prove for confinement. R. *(Petitioner's Second Motion in Limine).

During the hearing on the motion, Respondent argued treatment was "outside the realm" of what the state was required to prove. Tr. 39, ll. 5-8. Further, the state argued evidence regarding treatment "was speculative at best" because the type of treatment needed was unknown and the state's expert was not responsible for determining the treatment regimen, particularly in light of the

fact that she had "not been involved in treatment for some time." Tr. 39, ll. 8-13. The state continued by suggesting that "any allegations or testimony about the type of treatment that he might get would confuse the jury and ... place an additional burden on the state." Tr. 39, ll. 13-16.

Trial counsel argued only that she should be permitted to present evidence concerning outpatient and in-patient treatment. Tr. 39, ll. 19-21. Trial counsel explained that the statute concerned confining a person for "long term control, care, and treatment," which implicated in-patient treatment. Tr. 39, ll. 21-24. Trial counsel requested the opportunity to present evidence of the utility of out-patient treatment. Tr. 39, ll. 24-25. Respondent agreed to permit trial counsel to question the witnesses concerning out-patient treatment. Tr. 40, l. 2. In light of the parties' agreement, the judge limited the evidence concerning treatment to the existence of out-patient treatment. Tr. 40, l. 3.

Over the course of the trial, the jury heard the word "treatment" repeatedly, but never learned of the type of treatment, if any, Appellant would receive if found to be a SVP. In his opening statement, Respondent told the jurors the state had to prove that Appellant required "involuntary civil commitment in a secure facility for long-term control, care, and treatment." Tr. 76, ll. 14-18; Tr. 77, ll. 7-11. He emphasized the state was "trying to commit [Appellant] to a facility for long-term control, care, and treatment for these sexual problems that he has." Tr. 77, ll. 12-14. Additionally, the state told the jurors that his expert witness would tell them she found Appellant had a mental abnormality or personality disorder that made him so likely to commit these types of crimes that he needed to be confined for treatment. Tr. 78, ll. 2-6. He boiled it down very succinctly: "Has [Appellant] been convicted of the right kind of crimes and does he have that mental condition that makes him likely to reoffend so badly that he needs to be committed for care and treatment?" Tr. 78, ll. 20-23.

As part of her experience and training, which qualified her as an expert in the fields of psychology and forensic psychology, the state's expert, Dr. Marie Gehle, "did treatment with sexually violent predators and detained individuals" at the Western State Hospital in Tacoma, Washington. Tr. 82, ll. 16-24. She also "did treatment with people who were sent to the hospital by the courts" at East Central Regional Hospital in Augusta, Georgia. Tr. 83, ll. 2-7. She was a member of the Sex Offenders Civil Commitment Program Network, a division of the American Psychology on Law Society, which consisted of a group of individuals involved in civil commitment sexually violent predator programs. Tr. 83, ll. 12-20; Tr. 127, ll. 9-12.

Dr. Gehle explained that in a pre-commitment evaluation, she looks to determine whether a person should be committed for treatment. Tr. 84, ll. 21-25. On direct examination, Dr. Gehle informed the jurors that Appellant completed sex offender treatment while he was in prison. Tr. 85, ll. 9-11; Tr. 108, l. 25 – Tr. 109, l. 2. She noted that Appellant had re-offended after the treatment, which meant "that treatment didn't really work." Tr. 109, l. 3 – Tr. 110, l. 2. Additionally, Appellant discussed sex offender treatment with Dr. Gehle during their interview session. Tr. 110, l. 5 – Tr. 111, l. 2. Appellant told Dr. Gehle he would go to treatment voluntarily if he were released. Tr. 110, l. 22 – Tr. 111, l. 2.

After expressing her opinion that Appellant met the criteria for a SVP under the Act, including that he was likely to engage in acts of sexual violence unless he was confined for long term control, care, and treatment, Dr. Gehle emphasized that Appellant needed to be "confined for treatment." Tr. 123, ll. 3-9. She further emphasized that outpatient treatment was not the "right route" for Appellant because he had "a lot of difficulty controlling his behavior." Tr. 123, ll. 10-18.

On cross-examination, Dr. Gehle acknowledged that while Appellant was waiting for the SVP trial, he was released from jail incorrectly, and during that week, he voluntarily attended sex

offender treatment at Three Trees. Tr. 130, ll. 7-23. She further admitted that Appellant was required to serve five years' probation, and as a part of that probationary sentence, he would be required to attend out-patient sex offender treatment. Tr. 124, ll. 1-9. However, Dr. Gehle believed Appellant needed "inpatient, or you know, civil commitment." Tr. 124, ll. 10-12.

Appellant told the jurors that he wanted to change his life and had signed up for sex offender treatment when he was released from jail prior to his SVP trial. Tr. 159, ll. 4-13.

During his closing argument, the state reminded the jurors that the SVP Act was designed for individuals who required "long term control, care, and treatment." Tr. 168, l. 21 – Tr. 169, l. 5. Respondent acknowledged that Appellant had a plan if he were released, and that the plan involved sex offender treatment, but he discounted this plan because Appellant attended only one class during the week he was released from the jail. Tr. 175, ll. 6-10. During her closing argument, trial counsel also talked to the jurors about treatment. Specifically, trial counsel reminded the jury that Appellant had attended sex offender treatment – voluntarily – when he was released from jail prior to the commitment proceedings. Tr. 180, ll. 11-22. She also reminded the jurors that Appellant testified that sex offender treatment would be a part of his life plan if he were released. Tr. 181, ll. 16-25.

As expected, the judge charged the jury that the state was seeking "the civil commitment" of Appellant "for long-term control, care, and treatment in a secure facility." Tr. 183, ll. 18-22. He informed the jurors that if they found that the state had met its burden that Appellant was a SVP, then he would not be released, but would be "committed to a secure facility, a secure treatment facility in Columbia operated by the South Carolina Department of Mental Health." Tr. 184, ll. 20-25. When defining the elements, the judge told the jurors that they must find the state proved beyond a reasonable doubt that Appellant suffered from "a mental abnormality or personality disorder that made him likely to engage in acts of sexual violence if not committed in a secure

facility for long-term control, care, and treatment" in order to find Appellant was a SVP. Tr. 191, ll. 11-14; see also, Tr. 192, ll. 14-22.

Discussion

The SVP Act defines a "sexually violent predator" as someone who (1) has been convicted of a sexually violent offense and (2) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence "if not confined in a secure facility for long-term control, care, **and** treatment." S.C. Code Ann. § 44-48-30(1)(b)(emphasis added). Thus, under a plain reading of the statute, treatment is an element that the state must prove in order commit someone under the SVP Act. To read the statute in any other way would be to deny the General Assembly's use of the term "and." See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (providing that "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature"); In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (explaining that under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995) (holding that where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning); State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993) (explaining the rules of statutory construction, courts must strictly construe the criminal statutes against the state); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (noting the cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature). Thus, the

issue of treatment is relevant in an SVP case. The trial judge erred in granting the state's motion to exclude evidence of treatment.[2]

To the extent trial counsel acquiesced in the state's request, seeking only to cross-examine the witness on out-patient versus inpatient treatment, trial counsel was ineffective. Appellant acknowledges that neither this Court nor the South Carolina Supreme Court has held a respondent in a SVP case have the right to the effective assistance of counsel.[3] However, a case presently before the South Carolina Supreme Court raises that issue, and Appellant's pursuit of the right in the present brief is an effort to preserve the issue for him as well. See In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016). The right to the effective assistance of counsel in SVP cases flows from the Due Process Clauses of both the United States and South Carolina Constitutions. U.S. Const. amend. V, XIV; S.C. Const. Art. I, § 3. Appellant further acknowledges that in In the Matter of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 58 (2004), the South Carolina Supreme Court in holding that the Anders v. California, 386 U.S. 738 (1967) procedure applied to SVP cases, mentioned, in *dicta*, that individuals committed under the SVP Act have no Sixth or Fourteenth Amendment rights to counsel, but do have a statutory right to counsel. It is clear from the opinion, however, the Fourteenth Amendment issue was *not* before the Court. Id. To the extent McCoy established a precedent that no due process right to counsel exists in SVP cases,

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[2] Appellant acknowledges South Carolina appellate courts do not review trials for "plain error." See e.g., State v. Torrence, 305 S.C. 45, 60-61, 406 S.E.2d 315, 324 (1991) (abolishing *in favorem vitae* review in capital cases). Thus, this claim is framed as one of ineffective assistance of counsel.

[3] The South Carolina Supreme Court held that respondents in SVP cases are not entitled to counsel under the Sixth Amendment because SVP cases are not criminal proceedings. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001).

Chapman argued it should be overruled, and Appellant argues likewise. See In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016).

According to the United States Supreme Court, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 (1979). In fact, "[t]he loss of liberty produced by an involuntary commitment is *more* than a loss of freedom from confinement." Vitek v. Jones, 445 U.S. 480, 492 (1980)(emphasis added). The Vitek Court concluded that involuntary commitment implicates a liberty interest protected by the due process clause. Id. at 489-491. "Once a state has granted prisoners a liberty interest . . . due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" Vitek, 445 U.S. at 488-89 (quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1974)).

Based upon Appellant's research, it appears every state to address this issue has determined that SVP respondents have the right to the effective assistance of counsel. See e.g., Manning v. State, 913 So.2d 37, 37-38 (Fla. Dist. Ct. App. 2005) (holding individuals in SVP cases have the right to effective assistance of counsel in SVP); Smith v. State, 203 P.3d 1221, 1232 (Idaho 2009) (finding a statutory right to the effective assistance of counsel in SVP cases); People v. Rainey, 758 N.E.2d 492, 502 (Ill. App. Ct. 2001) (providing for the effective assistance of counsel in SVP cases); In re Detention of Crane, 704 N.W.2d 437, 438 (Iowa 2013) (agreeing with and explaining the state conceded that respondents SVP proceedings had the right to effective assistance of counsel); In re Ontiberos, 287 P.3d 855, 865 (Kan. 2012) (holding the constitutional right to assistance of counsel in state SVP proceedings, included the right to "competent, effective counsel."); Jenkins v. Director of the Virginia Ctr. Behav. Rehab., 624

S.E.2d 453, 460 (Va. 2006) (holding the SVP respondent had a constitutional right to the effective assistance of counsel); In re Detention of Stout, 150 P.3d 86, 97 (Wash. 2007) (discussing an ineffective assistance of counsel claim in SVP case); State ex rel. Seibert v. Macht, 627 N.W.2d 881, 886 (Wis. 2001) (finding that right to counsel in an SVP appeal "encompasses the right to effective assistance of counsel.").

South Carolina grants persons accused under the SVP Act a liberty interest in the right to counsel. According to the South Carolina's SVP Act, respondents have the right to counsel "[a]t all stages of the proceedings" "and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 44-48-90(B). The liberty interest and its corresponding right to counsel have little meaning unless respondents also have the right to effective assistance of counsel. SVP respondents face the possibility of being involuntarily committed for the rest of their lives. Appellant had a statutory right and a constitutional due process right to the effective assistance of counsel at his trial.

In light of trial counsel's failure to proffer questions on cross-examination regarding treatment and her apparent acquiescence in the state's motion to prohibit such evidence, Appellant respectfully requests a remand to address the failure and what impact the evidence would have had on his trial. As discussed previously, "treatment" permeated the trial: the state mentioned it in opening and closing and elicited some evidence regarding treatment during the examination of witnesses; trial counsel discussed "treatment" during cross-examination of Dr. Gehle and with Appellant; the trial judge correctly instructed the jury that consideration of the statute included consideration of treatment. Therefore, this Court should remand this case to the for a hearing of this issue so that Appellant can have meaningful appellate review and his due process rights are protected.

III. Trial counsel violated Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clause of the federal and state constitutions or the statutory right to counsel by moving to prohibit evidence concerning the state's expert witness's prior evaluation of Appellant under the SVP statute, in which the expert opined Appellant was not an SVP.

Relevant facts

During a hearing concerning pre-trial hearings, trial counsel asked "that the jury not be privy to the fact that there was a prior SVP action filed and it was dismissed against him." Tr. 48, ll. 4-6. According to trial counsel, the prior SVP action and its concomitant evaluation were unfairly prejudicial and confusing to the jury. Tr. 48, ll. 1-14. The state expressed surprise by the motion, noting his expectation that Respondent would "cross examine her extensively about the prior eval and how she's being inconsistent by saying yes now and no back then." Tr. 48, ll. 17-20. The state noted he was "perfectly happy not to mention the prior evaluation." Tr. 48, ll. 20-21. He explained, harkening back to the previous discussion, that the expert had conducted testing during the previous evaluation that was relevant to the current evaluation and diagnosis and requested the expert be permitted to discuss those matters. Tr. 48, ll. 20-24. Noting the state had agreed not to mention the prior evaluation was conducted as part of a prior SVP action, the judge ruled the expert could testify concerning her prior evaluation. Tr. 49, ll. 13-23.

In response to questioning on direct examination, Dr. Gehle told the jurors she had evaluated Appellant "on a previous occasion." Tr. 87, ll. 6-8. Concerning that previous evaluation, Dr. Gehle testified that in her opinion, Appellant suffered from antisocial personality disorder. Tr. 120, ll. 1-2. The jury also learned that during the 2012 evaluation, Dr. Gehle tested Appellant using the MMPI. Tr. 111, ll. 6-12; Tr. 112, ll. 13-15; Tr. 133, ll. 22-25. The MMPI test was designed "to determine whether somebody has problems in certain areas related to mental health problems or personality

problems." Tr. 111, ll. 17-22; Tr. 134, ll. 3-12. According to Dr. Gehle, the test revealed "that [Appellant] has very strong antisocial personality attitudes." Tr. 112, ll. 7-10. She also told the jurors she did not "feel it was necessary to redo the MMPI" because it is "something that's stable over time." Tr. 112, lines 16-17. Later, on cross-examination, she admitted that a person's personality problems, including disorders, could change over time. Tr. 134, ll. 13-18. Based upon the diagnosis revealed in the 2012 testing, Dr. Gehle concluded Appellant had a predisposition to commit a "wide variety of criminal offenses," including sexual offenses, had a "propensity to be dangerous and commit future sexually violent offenses," had difficulty controlling his behavior, and was likely to engage in acts of sexual violence unless confined for long term control, care, and treatment. Tr. 122, l. 4 – Tr. 123, l. 7.

Trial counsel asked no questions of Dr. Gehle concerning her opinion at the conclusion of the 2012 evaluation that Appellant was not a SVP. She posed no questions to ferret out bias or prejudice or unreliability of Dr. Gehle's opinion.

Discussion

As an initial matter, Appellant incorporates by reference his argument presented in Issue II, supra, that he is entitled to the effective assistance of counsel at the SVP trial. Further, Appellant acknowledges that a remand is necessary to determine whether trial counsel violated Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clauses of the state and federal constitutions and statutory law for her failure to question the state's expert concerning her prior evaluation in which she opined Appellant was not a SVP.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's

demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." To establish a violation of the Confrontation Clause, Appellant must show that he was prohibited from asking questions designed to show bias on the part of Dr. Gehle. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002). Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

Without question, trial counsel would have been permitted to cross-examine Dr. Gehle concerning her prior evaluation and conclusion that Appellant was not a SVP. This prior evaluation and conclusion was a mere three years prior to the instant trial. Such cross-examination would have provided important information for the jury to use in making its ultimate decision. The cross-

examination would have revealed any bias or prejudice by Dr. Gehle in arriving at her opinion in 2015. Further, the cross-examination would have revealed the unreliability of the "science" underlying the evaluation process in SVP cases.

Appellant respectfully requests a remand on this issue to determine if trial counsel had a reasonable trial strategy for moving to exclude mention of the prior evaluation, and if such a strategy existed, whether the strategy was reasonable and made after a reasonable investigation.

IV. Trial counsel violated Appellant's right to the effective assistance of counsel as guaranteed by the Due Process Clauses of the federal and state constitutions and the statutory right to counsel by failing to quash the jury panel and re-strike in light of the state's exercise of gender-based strikes in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Relevant facts

During the jury selection process, the state exercised all five of its peremptory strikes against females. Tr. 33, ll. 2-25; Tr. 204-205. However, despite this exercise of obviously gender-biased strikes, trial counsel failed to move to quash the jury panel based upon a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In fact, trial counsel specifically told the judge she had no motions concerning the manner or method of selection of the jury. Tr. 35, ll. 15-19.

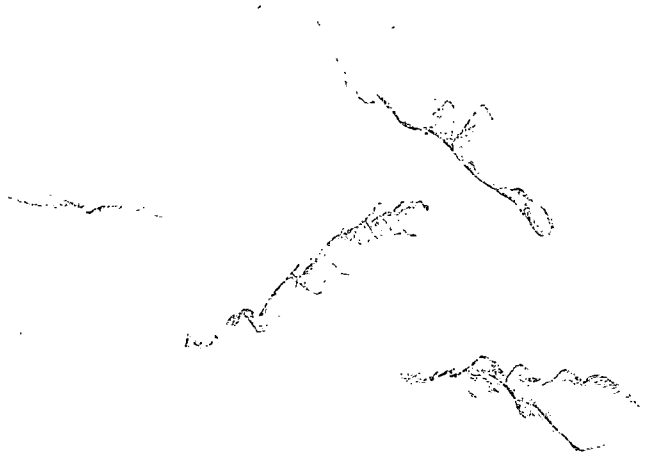
Discussion

The United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). In a subsequent opinion, the United States Supreme Court held that a criminal defendant may not engage in racial discrimination in exercising peremptory strikes. Georgia v. McCollum, 505 U.S. 42, 59 (1992). Two years later, the United States Supreme Court recognized that the Fourteenth Amendment also prohibits the striking of a juror on the basis of gender. J.E.B. v. Alabama, 511 U.S. 127, 146 (1994). In Purkett v. Elem, 514 U.S. 765, 767 (1995), the United States Supreme Court set out the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court adopted that procedure in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). The first step requires the moving

party to make out a prima facie case of racial or gender discrimination.[4] At the second step, the burden of production shifts to the proponent of the strike to present a race or gender neutral explanation for the challenged strike. If a race or gender neutral explanation is provided, then the third step requires the trial judge to decide whether the moving party has proven purposeful racial or gender discrimination. Purkett, 514 U.S. at 767; see also State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

According to the United States Supreme Court, the "second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 767-68. The South Carolina Supreme Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations" for the strikes. Adams, 322 S.C. at 123, 470 S.E.2d at 371. Unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two. Purkett, 514 U.S. at 768. During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006) (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." Id. If the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. Id. "The burden of persuading the court that

[4] Our Supreme Court has determined that "requesting a Batson hearing in effect sets out a prima facie case of discrimination." State v. Chapman, 317 S.C. 302, 305-306, 454 S.E.2d 317, 319-320 (1995) overruled on other grounds by State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998).



a Batson violation has occurred remains at all times on the opponent of the strike." Evins, 373 S.C. at 415, 645 S.E.2d at 909. The trial judge must examine the totality of the facts and circumstances in the record to determine whether a Batson violation occurred. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009).

Appellant respectfully requests a remand to the trial court to pursue the presentation of factual evidence to support this claim. A remand is necessary to determine if trial counsel had a reasonable strategic reason for not moving to quash the jury based on a constitutional violation. Further, a remand is necessary to determine the reasons for the strikes and whether a motion to quash the jury panel would have been successful.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court reverse the decision by the lower court in light of the state's expert's use of an outdated test to determine Appellant had a personality disorder. As to Issues II, III, and IV, Appellant respectfully requests this Court hold that individuals in SVP trials have the right, statutorily and constitutionally, to the effective assistance of counsel. Furthermore, as to Issues II, III, and IV, Appellant respectfully requests this Court remand for a hearing to determine whether trial counsel provided ineffective assistance.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of June, 2016.