

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Tanya A. Gee, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF ROY LEE WADE,

APPELLANT

RECEIVED

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SC Court of Appeals

APPELLATE CASE NO 2015-001939

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STATEMENT OF ISSUES ON APPEAL

I.

Whether 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 object to and move to strike the testimony of Dr. Burke, once it became apparent that his testimony was unreliable because it was based upon inaccurate statements of Appellant's history and ignorance of Appellant's release for the thirteen months prior to the SVP hearing?

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IV.

Whether 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 introduce evidence of treatment and failing to request a substantive response to the jury's question regarding the meaning of "long term care"?

STATEMENT OF THE CASE

On September 19, 2014, the State filed a Petition for Commitment Pursuant to the Sexually Violent Predator (“SVP”) Act against Appellant Roy Lee Wade.¹ R. * (SVP Petition). The underlying convictions arose from Wade’s guilty pleas to one count of first degree criminal sexual conduct with a minor and one count of second degree criminal sexual conduct with a minor, both involving the same victim. Wade entered his guilty pleas on July 21, 1988, and was sentenced to consecutive terms of thirty and twenty years, for a total sentence of fifty years. R. * (State’s Exs. 1 and 2, certified prior convictions and sentencing sheets). Wade served twenty-six years in the Department of Corrections and was released on August 1, 2014. Tr. 188, ll. 16-24.

On August 31, 2015 and September 2-3, 2015, Wade appeared before the Honorable Tanya A. Gee and a jury for a trial.² Wade was represented by Aimee J. Zmroczek, and the State was represented by assistant attorney general James G. Bogle, Jr. Tr. 1. The state made a prior motion in limine to preclude “any reference as to the details of any and all future treatment Respondent would receive if committed to the Sexually Violent Predator Program.” R. *(Motion in Limine). Defense counsel consented to the motion. Tr. 32, ll. 12-20.

The jury heard testimony from the state’s retained evaluator, Dr. William Burke; Wade’s sister with whom he had been residing since his release, Barbara Carmony; and the court-

¹ The State originally filed a petition for commitment on July 3, 2013, prior to Wade’s release from prison. However, due to delays in the expert’s preparation of his report, the case against Wade was dismissed without prejudice. The State then re-filed the instant petition. Shortly after the State’s filing, Wade was released from custody. The lower court denied the State’s motion to take Wade back into custody pending the SVP trial. R. 248, l. 20 – 249, l. 12; see also R. * (SVP Petition, p. 38).

² The case against Wade was previously called for trial before the Honorable Doyet Early. A mistrial was declared after the State’s expert, Dr. Burke, mentioned Wade’s commission of a sexual act upon a dog. Judge Early had ruled that evidence inadmissible under Rule 403, SCRE. R. 29, l. 18 – 30, l. 19.

appointed evaluator, Dr. Marie Gehle. Tr. 53 – 241; R. * (SVP Petition, pp. 23-25). During its deliberations, the jury asked “what does long term care means [sic]?” Tr. 285, l. 25 – 286, l. 2; Tr. 287, ll. 15-19; Tr. 288, l. 18 – 289, l. 4; R. * (Court’s Ex. 1, jury note). The judge responded that the jury should not consider the meaning of “long term care” and that their duty was “to determine whether the State has proven beyond a reasonable doubt that the Respondent is a sexually violent predator.” Tr. 299, l. 19 – 300, l. 2; R. * (Court’s Ex. 1, jury note). Both the solicitor and defense counsel acquiesced to that response. Tr. 287, ll. 15-19; Tr. 288, l. 18 – 289, l. 3.

The jury returned a verdict that Wade is a sexually violent predator. Tr. 301, l. 3-9. Judge Gee ordered Wade be “committed to the Department of Mental Health for his long-term control, care, and treatment.” R. *(Order of Commitment).

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

STATEMENT OF FACTS

Introduction

Wade pled guilty to two counts of criminal sexual conduct with a minor, both involving his step-niece. Tr. 132, l. 18 – 133, l. 6; Tr. 212, ll. 8-10; R. * (State's Exs. 1 and 2, certified prior convictions and sentencing sheets). His father, John Wade, Sr. and older brother, John Wade, Jr., were also convicted of incestuous sexual offenses against other children in the family. R. 191, ll. 11-24; R. 224, ll. 6-12. Wade served twenty-six years in the South Carolina Department of Corrections ("SCDC"). In 2002, while incarcerated, Wade pled guilty to a disciplinary infraction for possession of contraband related to the possession of what corrections officers described as pornographic pictures of nude children ranging in age from infants to eleven years old. Tr. 166, l. 5 – 167, l. 15; Tr. 168, ll. 22-23; Tr. 178, l. 9 – 179, l. 6; Tr. 211, ll. 11-23.

Wade's intelligence quotient ("IQ") is seventy-three, placing him in the borderline range of intellectual functioning. Tr. 160, ll. 14-22. In 1997, Wade had a heart attack. Tr. 203, ll. 18-20. From 2005 through 2012, Wade suffered multiple strokes, which left him with weakness on the right side of his body and significant difficulty with verbal communication. Tr. 168, ll. 18-21; Tr. 203, l. 20 – 205, l. 17. Wade was released from SCDC on August 1, 2014, and resided in Aiken County with his mother and fifty-two year old sister, Barbara Carmony, for the thirteen months prior to his SVP trial. Tr. 188, l. 16 – 189, l. 10; Tr. 220, l. 13 – 221, l. 17; see also R. * (Defendant's Ex. 2, pictures of residence).

Wade underwent two evaluations. The first was conducted by the court-appointed evaluator, Dr. Marie Gehle, who has a doctorate in clinical psychology, is a licensed clinical psychologist employed by the Department of Mental Health, and whose sole job has been

conducting pre-commitment evaluations for the past three to four years. Tr. 194, l. 6 – 197, l. 19. When Dr. Gehle's report did not recommend commitment, the State retained Dr. William Burke through the Medical University of South Carolina ("MUSC") to conduct a second evaluation. Tr. 29, ll. 18-24; Tr. 61, ll. 6-24; Tr. 256, ll. 11-16. The Attorney General told the jury: "We don't often do this but the State does – the law does allow us the option and we said, let's get a second opinion." Tr. 256, ll. 11-14. Dr. Burke has a doctorate in counseling with a cognate in psychology. He works as a clinical professor of forensic psychiatry at MUSC and has a private practice where he specializes in the assessment and treatment of people with sexual disorders. Tr. 53, l. 17 – 60, l. 6.

Both doctors diagnosed Wade with (1) pedophilic disorder, non-exclusive type, sexually attracted to females,³ limited to incest, and (2) mild cognitive impairment,⁴ related to his functional impairment due to strokes. Tr. 122, l. 1 – 123, l. 10; Tr. 152, ll. 5-7; Tr. 201, ll. 17-22; Tr. 204, ll. 6-9. Neither doctor found evidence of psychopathy; in other words, Wade is not a psychopath. Tr. 93, l. 23 – 94, l. 18; Tr. 238, l. 17 – 239, l. 6. Dr. Gehle determined that Wade did not meet the criteria to be considered a sexually violent predator ("SVP") to a reasonable degree of psychological certainty and should not be civilly committed because he is not likely to

³ Dr. Burke's diagnosis included "sexually attracted to females and males." Tr. 123, ll. 1-10. However, Dr. Burke based that diagnosis, at least in part, upon Dr. Burke's mistaken belief that Wade was charged with offenses related to both female and male victims. Tr. 123, ll. 6-10. He was later confronted with the fact the nolle prossed charges related to females, not males. Tr. 133, l. 10 – 137, l. 8.

⁴ Dr. Burke diagnosed Wade with "unspecified neural cognitive discord" due to three strokes. Tr. 125, l. 22 – 126, l. 8. He also said that Wade suffered organic brain damage from his strokes, opining that such was significant because it correlated "to unusual, deviant and dangerous behavior" and goes directly to Wade's volition or ability to control his behavior. Tr. 74, ll. 16-22; Tr. 78, l. 25 – 79, l. 4; Tr. 124, l. 17 – 125, l. 15; Tr. 149, ll. 2-21. However, when challenged on the basis of his assertions, Dr. Burke said that he would accept Dr. Gehle's diagnosis of mild cognitive impairment. Tr. 151, l. 1 – 153, l. 4; Tr. 156, l. 20 – 158, l. 9.

reoffend. Tr. 213, ll. 1 – 214, l. 17; Tr. 222, ll. 14-18; Tr. 244, ll. 19-23. Dr. Burke opined that Wade was an SVP. Tr. 128, l. 15 – 130, l. 10. He maintained that opinion despite errors in the facts upon which he relied and Wade’s successful release into the community, which Dr. Burke was unaware of until nearly the end of his direct testimony at the SVP trial. Tr. 119, l. 23 – 120, l. 12; Tr. 150, ll. 14-25; Tr. 152, l. 1 – 153, l. 11; Tr. 177, ll. 3-23; Tr. 180, l. 5 – 181, l. 24.

Court-Appointed Expert Dr. Marie Gehle

Beyond the diagnosis, Dr. Gehle’s evaluation relied upon the Static-99 actuarial test and consideration of other risk factors. Tr. 200, l. 16 – 201, l. 16. She explained that the Static-99 has been shown in research to be the most reliable predictor of sexual recidivism. Tr. 207, ll. 2-11; Tr. 219, ll. 9-24; Tr. 237, ll. 2-10. Contrary to Dr. Burke’s recollection that Dr. Gehle’s report reflected that Wade scored a three on the Static-99, Dr. Gehle’s assessment yielded a score of one. Tr. 110, ll. 12-24; Tr. 137, ll. 10-21; Tr. 206, l. 22 – 214, l. 17.

Dr. Gehle went through each of the ten questions on the Static-99, providing the response and corresponding score. The first question is the age of the person at release, “because as you age you’re less likely to commit a sex offense again.” Wade received **negative one** point based on his age of fifty-six. Tr. 186, ll. 8-19; Tr. 207, ll. 15-21. He received **zero** points on question two, whether he had lived with a lover for at least two years, because Wade was married and lived with his wife for many years. Tr. 207, l. 22 – 208, l. 1. Question three relates to whether the “index offense,” i.e. most recent offenses, was accompanied by a non-sexual violent offense conviction. In this case, Wade’s “index offense” was the 2002 disciplinary infraction for possession of child pornography while incarcerated, which was not accompanied by a non-sexual violent offense, so he received **zero** points. Tr. 208, ll. 2-7; Tr. 208, l. 22 – 209, l. 18. He also

received **zero** points on question four because he had no prior convictions for non-sexual violence. Tr. 208, ll. 8-21; Tr. 210, ll. 2-7.

Dr. Gehle described question five, regarding any prior sex offenses, as “a little bit more complicated.” Tr. 210, ll. 8-9. Because the “index offense” was the disciplinary infraction, Wade’s charges and convictions for which he was incarcerated constituted prior offenses. He had four charges and two convictions, yielding a score of **two**. Tr. 210, ll. 8-14. Wade received **zero** points on questions six and seven because he had only one prior sentencing date and no convictions for any non-contact sex offense. Tr. 210, l. 23 – 212, l. 7. Wade also received scores of **zero** on the final three questions because he did not have an unrelated victim, stranger victim, or male victim. Tr. 212, ll. 1-20. Thus, Dr. Gehle determined that **Wade’s total score on the Static-99 was a one**. Tr. 212, ll. 20-22.

A score of one on the Static-99 placed Wade in the “low risk” category. Tr. 212, ll. 23-25. The actuarial tables, which show the likelihood that a person with a score of one will re-offend, reflect that 7% of people will reoffend in five years and 11.5% of people will reoffend in ten years. Tr. 213, l. 1 – 214, l. 23. Dr. Gehle said that the average re-offense rate is between 10% and 15% at five years, such that **Wade’s risk of reoffending is lower than the average sex offender**. Tr. 213, l. 24 – 214, l. 17. She emphasized that sex offenders are released from prison “all the time” with no treatment or supervision and opined that with Wade’s risk lower than average, he is not part of the “extremely dangerous group” to which the SVP Act was meant to apply. Tr. 214, ll. 9-17.

AAG Bogle attempted to challenge Dr. Gehle’s Static-99 scoring, showing her documents that reflected that two boys were removed from Wade’s home at the time of the 1988 charges. Dr. Gehle explained that all of the children were removed from the home, boys and

girls, and that the documents that the AAG showed her merely listed Wade's natural children. Tr. 224, l. 19 – 226, l. 10. On re-direct examination, she testified that the documents filed by the AAG did not reflect any male victims. Tr. 242, l. 22 – 244, l. 6; R. * (SVP Petition, pp. 3-4; p. 60).

AAG Bogle also questioned Dr. Gehle regarding the classification of Wade's step-niece as an unrelated victim. Dr. Gehle pointed to the page of the Static-99 scoring manual that defines an unrelated victim as "any step-relations where the relationship lasted less than two years." Tr. 228, l. 21 – 229, l. 12. Because Wade became her step-uncle in the 1970s and the offenses did not occur until the 1980s, the relationship was longer than two years and she was properly classified as a related victim. Tr. 229, ll. 12-19.

Dr. Gehle also considered Wade's past excessive masturbation, wearing of women's underwear, feelings that he is a female at times, and thoughts about gender reassignment. Tr. 230, ll. 2-18. Dr. Gehle testified that masturbation is not a threat to the public if done privately. Tr. 242, ll. 5-10. Dr. Gehle was further aware that though married to a woman, Wade had sex with males beginning at age seventeen until the time of his arrest. He continued to have homosexual sex during his incarceration. Tr. 230, l. 19 – 231, l. 9. He also had a business selling female pornography to prisoners while incarcerated, though neither expert ever testified to the extent or timing of that activity. Tr. 231, ll. 10-15.

When the AAG asked if Wade needs sex offender treatment, Dr. Gehle initially stated: "I don't know that he needs sex-offender treatment now. And that's not even the question that's before me. It's whether he has a mental abnormality that makes him likely to commit acts of sexual violence." Tr. 232, ll. 11-18. However, when pressed, Dr. Gehle responded: "I think that anybody can benefit from treatment. **Unfortunately, treatment also has shown to do little to**

reduce recidivism. So, does anybody benefit from treatment? It's questionable." Tr. 232, ll. 19-23 (emphasis added).

Dr. Burke used several tests in addition to the Static-99 in his evaluation, including the Conners' Continuous Performance Test II, Substance Abuse Subtle Screening Inventory, Personality Assessment Inventory, Abel-Blassingame Assessment for Individuals with Intellectual Disabilities, Hare Psychopathy Checklist, Stable 2007, Acute 2007, and the Penile Plethysmograph ("PPG"). Dr. Gehle explained the reasons why she did not employ the variety of tests used by Dr. Burke. Tr. 233, l. 11 – 236, l. 4; Tr. 237, l. 2 – 240, l. 2.

Dr. Gehle said that neither the Conners' test nor the Personality Assessment Inventory have been shown by research to be related to sexual recidivism. The type of impulsivity tested by the Conners' test is related to attention deficient hyperactivity disorder. Tr. 237, l. 11 – 238, l. 4. The Abel-Blassingame assessment also has very limited utility in SVP proceedings and is not recommended by the best practices that she follows. Tr. 238, ll. 11-16. The Hare Psychopathy test is related to sexual recidivism and Dr. Gehle uses it in some of her evaluations. However, it was unnecessary here because she could tell from her interview with Wade that he was not a psychopath. She stated that her assessment was supported by Dr. Burke's finding that Wade was significantly below the threshold for a finding of psychopathy. Tr. 238, l. 17 – 239, l. 6.

Dr. Gehle did not use the Stable 2007 or Acute 2007 because their results are only good for one year and forty-five days, respectively. In her experience, SVP trials usually occur more than a year after her assessment, as they did in this case. Tr. 239, ll. 7-17. Dr. Gehle said that the best practices that she follows do not call for use of the PPG in the pre-commitment evaluation stage and that she has never sent anyone to Dr. Burke for a PPG, though others at the Department of Mental Health may have. Tr. 235, ll. 13-24; Tr. 238, ll. 11-16. She further

testified that in the cases in which she testifies for the State, having recommended commitment to the SVP program, she relies on the Static-99. Tr. 244, ll. 7-13. Dr. Gehle reiterated her opinion that “Roy Lee Wade does not meet the criteria to be a sexually-violent predator because he’s not likely to do it again.” Tr. 244, ll. 21-23.

State’s Expert Dr. William Burke

While Dr. Burke agreed with Dr. Gehle “for the most part,” he disagreed with her determination of Wade’s “level of risk upon release.” Tr. 127, ll. 20-25; Tr. 167, l. 10 – 168, l. 7. He averred that he “utilized a lot more testing than Dr. Gehle did” and had “independent verification of problematic deviant sexual arousal.” Tr. 128, ll. 1-7. Ultimately, Dr. Burke opined that Wade was a sexually violent predator, with a “greater than fifty percent” risk of committing a future sexually violent offense based on his diagnosis and other risk factors. Tr. 128, l. 15 – 130, l. 10. He testified that the clinical component of the SVP program is run by the Department of Mental Health, the facility is located on the campus of one of the prisons, and treatment is provided by both employees of the Department of Mental Health and private practitioners. Tr. 130, l. 11 – 131, l. 6.

As will be discussed more fully *infra*, Dr. Burke’s opinions were based on several misstatements and overstatements of fact, including the erroneous belief that Wade pled guilty to offenses against two female victims rather than one female victim; the erroneous belief that Wade was indicted for molesting two boys rather than two additional females; and unsupported statements regarding Wade’s alleged organic brain damage. Additionally, Dr. Burke was completely unaware that Wade had been released for thirteen months prior to the SVP hearing. Not surprisingly, Dr. Burke testified that his opinion that Wade was a sexually violent predator

would not change in light of the accurate information. Tr. 150, ll. 14-25; Tr. 152, l. 1 – 153, l. 11; Tr. 177, ll. 3-23; Tr. 180, l. 5 – 181, l. 24.

Dr. Burke interviewed Wade on June 17, 2014. He believed that Wade was honest when he told him that his sexual orientation had changed from being heterosexual to homosexual since his strokes. Tr. 68, ll. 3-5; Tr. 119, ll. 18-20. While Dr. Burke admitted “that in itself isn’t deviant,” he said that Wade was “thinking about cutting his penis off so he could be a woman.” Tr. 68, ll. 3-9; Tr. 173, ll. 2-12. Thus, Dr. Burke diagnosed Wade with transvestic gender dysphoria, which he described as “what Bruce Jenner is going through.” Tr. 125, l. 22 – 126, l. 3. Dr. Burke further told the jury:

You know, there’s another thing that I considered to be important and it’s actually in some research I have come across in the last few months by a doctor named Park Deets and that is if you’ve got a history of paraphilia which would be child molestation, whatever, if you had that history and then you branched out into cross dressing there’s a really, a greater increased probability that you’ll act out on coercive behavior, rape behavior.

Tr. 117, l. 19 – 118, l. 2. He further opined that Wade’s homosexuality might be the result of “habituation,” a desensitizing to homosexuality that resulted from his incarceration with all males that may change upon his release. Tr. 118, l. 3 – 119, l. 22. It was after that statement that AAG Bogle informed Dr. Burke that Wade had been released for the past thirteen months. Tr. 119, l. 23 – 120, l. 12.

Dr. Burke discounted the efficacy of the Static-99, but nonetheless utilized it in his evaluation of Wade because “you’re supposed to.” Tr. 97, l. 1 – 99, l. 1; Tr. 112, ll. 10-16; Tr. 152, l. 12 – 153, l. 11. Like Dr. Gehle, Dr. Burke used the possession of child pornography as Wade’s “index offense.” Tr. 111, ll. 1-17. Though he did not discuss how he assessed the individual questions on the Static-99, Dr. Burke originally determined that Wade scored a total of three. He later upgraded that score to a four based on his understanding that Wade was

accused of sexually assaulting a male victim. Tr. 99, l. 2 – 100, l. 13. A score of four corresponds to a moderate-high risk, which he opined meant that there is an 18% chance that Wade will reoffend over the next ten years. Tr. 100, ll. 14-17; Tr. 101, l. 1 – 102, l. 17. However, Dr. Burke said that the Static-99 under predicts recidivism because its statistics are only based upon those who are caught and charged with an additional offense. Tr. 111, l. 21 – 112, l. 16.

Though Dr. Burke properly considered Wade's possession of child pornography in 2002 while incarcerated in conducting the Static-99 test and Wade's overall ability to conform his conduct, he further stated that Wade's misconduct "would have certainly resulted in criminal charges . . . if that had occurred in public. And depending on if the federal government or state government was involved, there would be mandatory prison time." Tr. 67, l. 22 – 68, l. 2; Tr. 76, l. 15 – 77, l. 13; Tr. 111, ll. 1-20; Tr. 116, ll. 17-21. He later said:

He [Wade] would have additional prison time had he been prosecuted for possessing and probably from -- reading, he had a business where he was selling pornography in prison to other inmates. If that were outside the prison walls that would be distribution of child pornography which has minimal federal standards, five years per picture.

Tr. 149, l. 1 – 150, l. 7. Dr. Burke later clarified that the pornography Wade sold was not child pornography. Tr. 153, ll. 21-25. Though unresponsive to the question posed, Dr. Burke again repeated to the jury that "outside that wall in the prison he [Wade] would be federally prosecuted, probably, for that [possession of child pornography]." Tr. 168, ll. 9-14.

While he conducted other assessments, Dr. Burke relied heavily on the PPG, with which he has been intimately involved since 1995. Tr. 59, ll. 1-14; Tr. 92, ll. 3-6; Tr. 128, ll. 1-14; Tr. 145, ll. 5-9; Tr. 147, l. 7 – 148, l. 14; Tr. 149, ll. 22-24. Dr. Burke described the PPG as a circular rubber band placed around the penis by the subject, which measures enlargement of the

penis while the subject is exposed to various sexual scenarios. The increased blood flow causing the enlargement corresponds to sexual arousal. Tr. 88, l. 19 – 89, l. 25; Tr. 145, l. 2 – 146, l. 25. Dr. Burke characterized the PPG as providing objective evidence of the subject's sexual interests. Tr. 90, ll. 12-23. The subject is shown a picture, followed by a ninety second audio story with real child voices and additional photographs. Tr. 95, l. 123 – 96, l. 15. Though Dr. Burke acknowledged that there is some criticism regarding the use of the PPG at the pre-commitment stage, he was largely dismissive, saying that it made no sense to approve the use of the PPG for treatment but not evaluation. Tr. 92, l. 7 – 93, l. 10.

According to Dr. Burke, Wade responded to several normal stimuli but was also aroused by prepubescent boys and girls, infant boys and girls, and to a child female coercive stimulus, explaining that the coercive scenario is a brutal rape. Tr. 70, l. 18 – 71, l. 13; Tr. 94, l. 19 – 95, l. 22; Tr. 96, ll. 16-25. Though his original diagnosis of Wade's pedophilic disorder was "limited to incest," he added on re-direct that the pictures and stories that he was aroused to in the PPG were not incestuous in nature, indicating "a broader spectrum of possible victims." Tr. 181, l. 24 – 182, l. 7. When asked who would be at risk if Wade continues to be released, Dr. Burke responded: "Well, **I can't think of a category that would not be at risk except for big strong men or women.**" Tr. 182, ll. 9-12 (emphasis added).

Dr. Burke opined that Wade was in denial about his offenses, claiming that Wade pled guilty to offenses involving two female victims but only admitted to molesting one of his daughters. Tr. 70, ll. 18-22; Tr. 71, l. 14 – 72, l. 19; Tr. 73, ll. 2-15; Tr. 77, ll. 14-19. Dr. Burke said that denial is a significant factor, especially when it comes to incest. Tr. 77, l. 20 – 78, l. 5; Tr. 115, l. 22 – 116, l. 16. However, he was later confronted with the indictments for the

offenses to which Wade pled guilty, which reflected only one female victim, a step-niece. Tr. 132, l. 13 – 133, l. 6.

Dr. Burke also testified repeatedly about the import of Wade's abuse of boys and girls, stating that the "level of risk" was higher for someone who has been accused of abusing both sexes. He specifically testified that Wade was indicted for offenses against boys but that the charges were later nolle prossed. Tr. 66, ll. 9-18; Tr. 67, ll. 17-21; Tr. 70, ll. 22-24; Tr. 74, l. 23 – 76, l. 14. Dr. Burke's said he could not limit his diagnosis of Wade to "sexually attracted to females," as Dr. Gehle had determined, because of Wade's PPG results and his past charges for offenses against boys. Tr. 122, l. 1 – 123, l. 17; Tr. 126, ll. 9-23. Again, Dr. Burke's testimony was impeached with documents reflecting that the indicted charges that were nolle prossed related to alleged additional female victims, not male victims. Further, a Department of Social Services report included a finding that there was no sexual abuse to the boys who were removed from the home. Tr. 133, l. 10 – 137, l. 7. Additionally, it is notable that Wade's Able-Blassingame assessment revealed sexual interests in adult males, adult females, and adolescent females, and six to thirteen year old females. Tr. 84, l. 20 – 86, l. 10. It did not show the sexual interest in young males purportedly revealed by the PPG.

Despite the lack of evidence to support his claim, Dr. Burke remained convinced that he read somewhere that Wade was charged with molesting two boys and that the charges were nolle prossed, recalling that it was noted on the top of a piece of paper in a female DSS worker's handwriting. Dr. Burke never produced that piece of paper, but stated that even if there was no accusation of molesting young boys, his diagnosis of Wade is "going to hold." He said that it would not matter if Wade was ever indicted or convicted of a crime against a boy, just the accusation is enough. Dr. Burke then referenced "the Citadel guy . . . who molested 38 boys."

Apparently referring to Louis "Skip" Reville, Dr. Burke said that "[p]eople knew for years . . . he [was] doing something with those young boys. But nothing ever happened, he never got indicted or anything. But that's part of his history." Tr. 180, l. 5 – 181, l. 24.

Dr. Burke said that Wade's multiple strokes had resulted in "some pretty extensive brain damage" and impaired his memory concerning sexual offender treatment that he underwent while incarcerated. Tr. 74, ll. 13-15. He found that Wade's atypical responses on the Conners' test were "most likely due to his organic brain damage." Tr. 79, l. 23 – 81, l. 4. Dr. Burke further stated that Wade's brain damage is a risk factor because:

[B]rain damage to specific parts of the brain increases one's level of risk because it's been indicated multiple times through research depending on what part of your brain is affected by a stroke or a tumor or a blow to the head, whatever it may be, deviant sexual behavior will -- can occur because, simply because of that.

Tr. 74, ll. 16-22; see also Tr. 78, l. 25 – 79, l. 4; Tr. 124, l. 17 – 125, l. 15. On cross-examination, Dr. Burke went even further to say that "**his [Wade's] brain damage in certain specific areas of the brain correlates to unusual, deviant and dangerous behavior**" and goes directly to Wade's volition or ability to control his behavior. Tr. 149, ll. 2-21 (emphasis added). When asked about what areas of Wade's brain had "severe organic brain damage," Dr. Burke could not readily locate anything to answer that question. Instead, he cited to Dr. Gehle's findings regarding neuro cognitive disorders and the Conners' assessment, which was "consistent with brain damage." Tr. 151, ll. 1-22. Thus, Dr. Burke agreed to concede for the sake of argument that Wade suffers from mild cognitive impairment rather than organic brain damage, saying that he would classify Wade as an SVP even absent the brain damage. Tr. 151, l. 19 – 152, l. 11; Tr. 153, ll. 3-11.

After the lunch break, Dr. Burke testified that though he was not medical doctor and had not seen any scans of Wade's brain, Wade's brain damage "would have to be the parietal lobe"

based on his difficulty communicating. Tr. 156, l. 20 – 157, l. 9. He then described how damage to the temporal lobe, frontal lobe, and prefrontal lobe could affect sexual arousal and impulse control. Tr. 157, ll. 22-25. The obvious consequence of Dr. Burke's testimony was that, for all of his testimony regarding how organic brain damage to certain areas of the brain can increase the risk of re-offense, the damage to Wade's brain was not to one of the relevant areas. Yet, he later asserted that damage to the parietal lobe "indirectly affects your volition." Tr. 171, l. 18 – 172, l. 3.

Most interestingly, Dr. Burke was completely unaware that Wade had been released from prison and living in the community for thirteen months. Tr. 120, ll. 4-8; Tr. 121, ll. 18-25; Tr. 159, ll. 18-23. He initially stated that such information "certainly will factor into it [his ultimate opinion about whether or not Wade should be civilly committed], but it may factor into it significantly in different ways." Tr. 120, ll. 10-11. Dr. Burke said that he "need[ed] more information." Tr. 120, ll. 8-12. He said that he would want to know if Wade was being supervised by anyone with weekly check-in requirements, underwent GPS monitoring for the first months of his release, and complied with sex offender registry requirements. Tr. 120, l. 13 – 121, l. 6. If those things were occurring and he had not re-offended, that would be "a positive data point for him." Tr. 121, ll. 7-9. However, he opined that he would need "at least that protocol in place plus polygraphs exams," such as is available in the program that Dr. Burke runs. Dr. Burke asserted that Wade's lacks of arrests and his compliance with the requirements of the sex offender registry during his thirteen months of release was unremarkable because "most sex offenses go unreported" and he was not subject to polygraphs. Tr. 121, ll. 9-16; Tr. 174, l. – 175, l. 7; Tr. 177, ll. 3-23. Dr. Burke said: "If he were my responsibility it would be indefensible to supervise somebody in that manner." Tr. 177, ll. 22-23.

Dr. Burke further referenced a government funded study conducted by Dr. Abel regarding sex offenders released into the community. The study found that a child molester with pedophilic disorder “will re-offend within 18 to 24 months of release if there [are] not safety precautions put into place, not the least of which is mandated treatment and supervision because your urges when you get caught or get in trouble go away but over time those urges come back.” Tr. 172, ll. 4-19. Dr. Burke then said: **“I seriously doubt from what he’s saying and from the evidence that we have that he [Wade] could benefit from sex-offender treatment right now because of the issues with his cognition in processing.”** Tr. 172, ll. 21-25. Despite having stated that treatment of Wade would be ineffective, Dr. Burke said that there was nothing in place that could require Wade “to get the kind of sex-offender treatment which is offered by the Sexually-Violent Predator Treatment Unit.” Tr. 182, ll. 11-18.

ARGUMENT

I.

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 object to and move to strike the testimony of Dr. Burke, once it became apparent that his testimony was unreliable because it was based upon inaccurate statements of Appellant's history and ignorance of Appellant's release for the thirteen months prior to the SVP hearing.

Introduction

A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy. *In re Taft*, 413 S.C. 16, 23, 774 S.E.2d 462, 466 (2015). In the decision declaring Minnesota's SVP Act unconstitutional, United States District Court Judge Donovan W. Frank quoted Grant Duwe, Director of Research at the Minnesota Department of Corrections, who said: "Many high-risk sex offenders can be managed successfully in the community. The cost of civil commitment in a high-security facility also implies that **this type of commitment should be reserved only for those offenders who have an inordinately high risk to sexually reoffend.**" *Karsjens v. Jesson*, 109 F.Supp.3d 1139, 1174 (D. Minn. 2015) (emphasis added). Judge Frank further expressed "serious concern" over the "confinement of the elderly, individuals with substantive physical or intellectual disabilities, and juveniles, who might never succeed in the MSOP's [Minnesota Sex Offender Program's] treatment program or who are otherwise unlikely to reoffend." *Id.*

While our Supreme Court has thus far held the SVP Act constitutional, it has "decline[d] to construe it in a manner which would lessen the State's burden of proof." *Id.* In this case, the evidence presented by the State was the testimony of a hired-gun, Dr. William Burke, whose opinion was based on erroneous information and determined prior to Wade's thirteen month release from custody. While defense counsel impeached Dr. Burke's testimony, she failed to

move to strike his entire testimony as unreliable, which if granted would have surely resulted in a directed verdict in favor of Wade. See discussion *infra*, Issue I. At the very least, defense counsel should have objected to and moved to strike the various portions of Dr. Burke's testimony that were irrelevant, speculative, and unduly prejudicial. See discussion *infra*, Issue II. Defense counsel also failed to move to exclude testimony regarding the penile plethysmograph ("PPG"), which is essentially a penile polygraph that is both unreliable and unscientific. See discussion *infra*, Issue III. Trial counsel was further ineffective by improperly consenting to the State's motion in limine to preclude evidence regarding treatment. See discussion *infra*, Issue IV. In light of each of these errors, Wade's commitment should be reversed, or his case should be alternatively remanded for additional proceedings.

Right to Effective Assistance of Counsel

While our state courts have not yet held that a respondent in an SVP case has the right to the *effective* assistance of counsel, there is a case presently pending before the South Carolina Supreme Court which raises that issue. See In re Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016). The Appellant in In re Champan additionally argues that to the extent the Court denies relief and fails to provide a means for SVP respondents to raise their claims of ineffective assistance of counsel, the SVP Act is unconstitutional and deprives the SVP respondents of due process. Appellant's pursuit of the right to effective assistance of counsel in the present brief is an effort to preserve the issue for him as well.⁵ Appellant further

⁵ 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). The opinion in In the Matter of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 58 (2004), 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*

acknowledges that 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, the claims raised in this brief are framed as ineffective assistance of counsel.

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. 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)).

South Carolina grants persons accused under the SVP Act a liberty interest in the right to counsel. Our SVP Act specifically provides: “At all stages of the proceedings under this chapter, a person subject to this chapter is entitled to the assistance of counsel, 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 would have little meaning unless

before the Court. Id. To the extent McCoy established a precedent that no due process right to counsel exists in SVP cases, Chapman argued it should be overruled, and Appellant argues likewise. See In re Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016).

counsel's assistance was required to be effective. SVP respondents face the possibility of being involuntarily committed for the rest of their lives.

Notably, it appears that 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 should likewise construe an SVP respondent's right to counsel to mean the right to effective assistance of counsel.⁶

⁶ Appellant incorporates his argument that he is entitled to the effective assistance of counsel at the SVP trial to all of the Issues raised in this appeal.

Discussion

Defense counsel in the present case was ineffective in failing to object to and move to strike the testimony of the State's expert witness, Dr. Burke, once it became apparent that his testimony was unreliable. Because defense counsel's voir dire focused solely upon Dr. Burke's expert qualifications, the problems with the reliability of Dr. Burke's testimony were not realized until Dr. Burke provided testimony based on errors and ignorance of significant facts, including Wade's criminal convictions and past allegations of abuse, the impact of Wade's alleged organic brain damage, and Wade's lengthy pre-trial release.⁷ Tr. 53, l. 17 – 60, l. 4. While the State attempted to rehabilitate Dr. Burke, asking him if his opinion that Wade was an SVP would persist in light of the accurate and complete information, those efforts fell short. Tr. 180, l. 5 – 182, l. 19.

Dr. Burke mistakenly thought that Wade pled guilty to offenses against two minor girls rather than just one and was under the impression that Wade offended against his daughter. In fact, Wade pled guilty to two offenses related to the same minor girl, who was his step-niece. Tr.

⁷ In State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012), our Supreme Court clarified that “the expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony.” (emphasis in original). Here, trial counsel made no effort to vet Dr. Burke's testimony for its reliability prior to its admission into evidence. However, unlike the PPG evidence discussed *infra* in Issue III, it was unlikely that trial counsel could have anticipated Dr. Burke's gross misstatements of what should have been undisputed facts, overreaching testimony regarding organic brain damage, or ignorance of Wade's release. While a determination of reliability following an *in camera* hearing would have prevented the jury from hearing Dr. Burke's inadmissible testimony, the result of striking his testimony would have been the granting of a motion for directed verdict, at which point the fact that the testimony was heard by the jury would be irrelevant. Additionally, Appellant is cognizant of the judicial resources that would be expended if every expert was required to essentially testify twice, once *in camera* and once before the jury. As such, with respect to Issue I, Appellant is alleging that defense counsel was ineffective in failing to move to strike Dr. Burke's testimony rather than alternatively alleging that defense counsel should have requested an *in camera* hearing to vet the reliability of Dr. Burke's testimony pursuant to Tapp.

70, ll. 18-22; Tr. 71, l. 14 – 72, l. 19; Tr. 73, ll. 2-15; Tr. 77, l. 14 – 78, l. 5; Tr. 115, l. 22 – 116, l. 16; Tr. 132, l. 13 – 133, l. 6. Dr. Burke even had to ask defense counsel if “[minor victim] is the one he’s convicted of?” Tr. 164, ll. 4-11. Nonetheless, he testified that his diagnosis was “going to hold” even in light of the accurate information regarding the convictions. Notably, he never discussed how his error affected his determination that Wade was in denial about the offenses to which he pled guilty. Tr. 181, ll. 16-24. The assertion that Wade was denying the conduct for which he was convicted was important because Dr. Burke said that Wade’s denial was “significant” and increases the risk to reoffend, especially in cases of incest. Tr. 77, l. 14 – 78, l. 5; Tr. 115, l. 22 – 116, l. 16.

Dr. Burke also said that Wade was indicted for offenses against two minor boys even though no boys were listed as victims in the State’s SVP Petition and he was shown documentation that the nolle prossed offenses were for other minor girls. Dr. Burke would not admit his mistake in thinking that Wade was indicted for offenses against minor boys, improperly increasing his score on the Static-99. Tr. 67, ll. 17-21; Tr. 70, ll. 22-24; Tr. 74, l. 23 – 76, l. 14; Tr. 99, l. 2 – 100, l. 13; Tr. 122, l. 1 – 123, l. 17; Tr. 126, ll. 9-23; Tr. 133, l. 10 – 137, l. 7; Tr. 180, l. 5 – 181, l. 24. He had even opined that though research suggests that incest is normally a lower level of risk, having a male victim increases that level of risk. Tr. 66, ll. 9-18. Dr. Gehle testified regarding the importance of the gender of the victims and how one inaccurate response to a question on the Static-99 can skew the actuarial test. Tr. 205, l. 21 – 206, l. 24. Despite Dr. Burke’s protests that his recollection was correct, he did ultimately testify that his diagnosis would not change even if the nolle prossed indictments were for girls instead of boys. Tr. 181, ll. 16-24. Even so, Dr. Burke made clear to the jury that he believed Wade was accused

of molesting at least two boys and never clarified what the recidivism risk would have been if Wade's Static-99 score were reduced. Tr. 180, l. 5 – 181, l. 15.

Dr. Burke's testimony regarding organic brain damage began generally, stating that damage to certain areas of the brain can cause "deviant sexual behavior" and affect one's inhibitions and impulse control. Tr. 74, ll. 2-22; Tr. 78, l. 25 – 79, l. 4; Tr. 124, l. 17 – 125, l. 15. However, he later connected those statements to the damage suffered by Wade, saying: "His [Wade's] brain damage in certain specific areas of the brain correlates to unusual, deviant and dangerous behavior." Tr. 149, ll. 2-21. When challenged on the basis of his opinion, Dr. Burke momentarily indicated that he would concede that Wade did not suffer organic brain damage. Tr. 151, l. 1 – 152, l. 11; Tr. 153, ll. 3-11. He soon returned to his assertion that Wade suffered organic brain damage that "would have to be" to the parietal lobe in light of Wade's communication problems. Tr. 156, l. 20 – 157, l. 25. In his vain attempt to repair his overreaching testimony, Dr. Burke claimed that even parietal lobe damage "indirectly affects your volition," increasing the risk to reoffend. Tr. 171, l. 18 – 172, l. 3.

Additionally, Dr. Burke had no idea that Wade was released for thirteen months prior to the SVP hearing. Tr. 119, l. 23 – 120, l. 12. As our Supreme Court emphasized in In re Taft, 413 S.C. 16, 23, 774 S.E.2d 462, 466 (2015), "the State must prove, beyond a reasonable doubt that the individual is *presently* a sexually violent predator." (emphasis in original). Any glimmer of reasonableness when Dr. Burke initially said that he needed more information to determine how Wade's release would impact his opinion quickly faded when Dr. Burke implied that Wade may well have resumed offending during his release and needed regular polygraph testing. Tr. 119, l. 23 – 121, l. 25; Tr. 159, ll. 18-23; Tr. 174, l. – 175, l. 7; Tr. 177, ll. 3-23. Dr. Burke never testified how Wade's release would impact the "habituation" theory that Dr. Burke

previously discussed. Burke had essentially claimed that Wade's homosexuality was merely a product of his environment in the all-male prison. He said that if Wade was released there would be "a lot more options, a lot more targets possibly." Tr. 118, l. 3 – 120, l. 22.

Notably, Dr. Gehle had spoken to Wade and his family since his release. She said that the "risk has already been taken" and Wade has not had any problems. Tr. 220, l. 13 – 221, l. 17. Wade's sister, Barbara Carmony, also testified that Wade has not been in any trouble since his release. Wade had complied the reporting requirements and at-home checks with the Sheriff's office and had not been around any children. Tr. 186, l. 8 – 190, l. 10.

Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), our Supreme Court held that "[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." "Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In State v. White, our Supreme Court made clear that "[t]he familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." 382 S.C. at 273, 676 S.E.2d at 688. Thus, the Court ruled that both scientific and nonscientific expert testimony must satisfy Rule 702, SCRE, both in terms of expert qualifications and reliability of

the subject matter. Id. However, the Court recognized that “the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach” and did not provide a “formulaic approach” to be followed in determining the reliability of non-scientific expert testimony. Id. at 274, 676 S.E.2d at 688-89.

In Jamison v. Morris, 385 S.C. 215, 219, 684 S.E.2d 168, 170-71 (2009), our Supreme Court reversed a civil verdict of negligence against one of the co-defendants, MiniMart, finding that the trial court erroneously admitted expert testimony predicated on unreliable evidence. Minimart was alleged to have sold alcohol to the underage driver of a vehicle that was in a single-car accident that rendered the passenger, Louis Jamison, a quadriplegic. 385 S.C. at 219, 684 S.E.2d at 170. The trial judge allowed the State’s expert to give testimony of the driver’s blood alcohol level at the time of the crash based upon a SLED test that was unreliable due to the absence of a chain of custody. Id. at 226-29, 684 S.E.2d at 173-75. The Jamison Court ruled that “an expert cannot testify to an opinion predicated on an unreliable test.” Id. at 228, 684 S.E.2d at 175. While this case will also support Appellant’s argument that trial counsel should have objected to Dr. Burke’s reliance on the unreliable PPG test, see Issue III *infra*, Jamison is also instructive on the matter of Dr. Burke’s reliance upon inaccurate and incomplete information.

Rule 703, SCRE, provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” It certainly cannot be reasonable for an expert to rely upon erroneous and incomplete information in forming his opinions or inferences. Thus, once it was evident that Dr. Burke’s

testimony was unreliable, counsel had an obligation to object to and move to strike Dr. Burke's testimony. Impeachment of the witness was not sufficient here because the severe misstatements in Dr. Burke's entire testimony went to the reliability of his opinion, not just the weight of his testimony. See White, 382 S.C. at 273-74, 676 S.E.2d at 688-89. Further, the errors in Dr. Burke's testimony could not have been successfully stricken piecemeal from the minds of the jurors, especially in light of how they permeated his testimony. They were related to the testing conducted by Dr. Burke and his determination that Wade had other risk factors. As such, it was necessary that Dr. Burke's entire testimony be stricken.

Wade was prejudiced by Dr. Burke's testimony because Dr. Burke refused to admit several of his errors. This left the jury with the option to believe Dr. Burke's testimony that Wade was alleged or even indicted for additional offenses against young boys and that Wade suffered organic brain damage to an area of his brain that increased his risk to reoffend. The jurors may have further indulged in Dr. Burke's speculative suggestion that Wade offended against more victims while released since "most sex offenses go unreported." See Tr. 174, l. 17 - 175, l. 1. Moreover, had defense counsel properly objected to and moved to strike Dr. Burke's entire testimony because of its unreliability, the State would have been left with no evidence in order to withstand the motion for directed verdict. See, e.g., In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015).

Therefore, defense counsel was deficient in failing to object to and move to strike Dr. Burke's testimony as unreliable. Wade was prejudiced because without Dr. Burke's testimony the State could not survive a motion for directed verdict. Instead, the jury was left to consider the erroneous testimony of Dr. Burke because he would not admit his errors. The ineffective

assistance of defense counsel with respect to this issue is apparent from the record before this Court such that no remand is necessary to decide this issue.

II.

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 move to strike portions of the testimony of the State's expert witness, Dr. Burke, that were irrelevant, speculative, and unfairly prejudicial.

In addition to the overt misstatements of fact made by Dr. Burke, discussed *supra* in Issue I, trial counsel failed to object to his irrelevant, speculative, and unfairly prejudicial statements throughout his testimony. Specifically, Dr. Burke commented regarding the additional criminal penalties that Wade could, and impliedly should, have faced related to his possession of child pornography in prison. Tr. 67, l. 22 – 68, l. 2; Tr. 149, l. 1 – 150, l. 7; Tr. 168, ll. 9-14. Dr. Burke also insinuated that Wade may have been committing abuse during his thirteen month release because “most sex offenses go unreported.” Tr. 174, l. 17 – 175, l. 1. Dr. Burke further testified that if Wade were released he could not think of a category of people who would not be at risk “expect for big strong men or women.” Tr. 182, ll. 9-12. In discussing his unrelenting belief that Wade was at least *accused* of crimes against young boys, Dr. Burke analogized that case of Louis "Skip" ReVille, who Dr. Burke dubbed “the Citadel guy . . . who molested 38 boys.” Tr. 180, l. 5 – 181, l. 24. Trial counsel never objected to any of this improper testimony.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of

time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” Rule 703, SCRE.

An expert’s opinion must be reliable. Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); see also Rule 702, SCRE. Expert testimony is “also subject to attack for relevancy and prejudice.” State v. Council, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517-18 (1999). Trial judges must determine whether Rule 403, SCRE, bars admission of the expert’s testimony. Id. at 20, 515 S.E.2d at 518; State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999) (“Even if admissible under Rule 703, [SCRE] or Rule 705, [SCRE,] however, the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE.”).

Here, the testimony regarding Wade’s disciplinary infraction for child pornography at the Department of Corrections was relevant, as it was utilized by both experts as the “index offense” in the Static-99. Appellant is not arguing that no testimony should have been admitted regarding it. Rather, trial counsel should have objected to Dr. Burke’s averments that Wade should have been prosecuted rather than just receiving a disciplinary infraction and Dr. Burke’s speculation regarding the amount of additional time that Wade could have been incarcerated. While Dr. Burke claimed that he “feel[s]” for Wade because he has “been in prison all this time” and “served his time,” Tr. 150, ll. 14-23, his other statements suggested to the jury that Wade’s commitment would not be unjust in light of Wade’s apparent lack of punishment for the child

pornography.⁸ Tr. 67, l. 22 – 68, l. 2; Tr. 149, l. 1 – 150, l. 7; Tr. 168, ll. 9-14. Dr. Burke also speculated that Wade may have been committing abuse during his thirteen month release because “most sex offenses go unreported.” Tr. 174, l. 17 – 175, l. 1. There was no evidence that Wade had committed any contact sexual offense since his convictions in 1988. Thus, Dr. Burke’s testimony was rank speculation and encouraged the jury to speculate. Yet, defense counsel made no objection or request for a curative instruction.

Dr. Burke further speculated that Wade had offended against minor boys. Dr. Burke originally said that Wade was indicted for offenses against two minor boys but that the charges were nolle prossed. Tr. 67, ll. 17-21. Dr. Burke explained how charges can be dismissed for a variety of reasons as part of plea negotiations but that those accusations should still be considered in the SVP assessment. Tr. 75, l. 5 – 76, l. 14. On cross-examination, Dr. Burke was confronted with the fact that the nolle prossed indictments were for offenses against minor girls. Tr. 135, l. 16 – 136, l. 16.

While his impeachment should have ended the matter, Dr. Burke changed the averred nature and source of his information on re-direct, claiming that he specifically recalled handwritten notes of a female DSS worker at the top of a typed piece of paper “describing the offenses against the two boys” and indicating “nolle prossed.” Tr. 136, ll. 17-23; Tr. 180, l. 5-21. He insisted that even if the offenses were not indicted, it did not matter, claiming that even an allegation against a male victim was relevant. However, Dr. Burke provided no documentation to show that even an allegation was made of abuse against a male victim. Tr. 180, l. 22 – 181, l. 15. Dr. Gehle testified that all of Wade’s victims were female. While there

⁸ Though not brought to the attention of the jury, the SCDC records attached to the SVP Petition reflected that Wade’s infraction for possession of child pornography was sanctioned by the loss of three hundred and sixty days of good time credit, loss of state pay, and pre-hearing detention (“PHD”) for eighteen days. R. * (SVP Petition, p. 4, n. 1; pp. 81-82).

were boys in the home, the boys “all denied sexual abuse and it was never suspected.” Tr. 205, l. 21 – 206, l. 21. Surely, the mere removal of Wade’s male sons from the home when the incestuous acts his daughters and nieces were discovered was not enough to constitute an allegation of sexual misconduct. See Tr. 225, l. 4 – 227, l. 9. With no objection and Dr. Burke’s refusal to admit his error, the jury was left with the option of believing that Dr. Burke’s recollection was accurate.

Additionally, Wade’s past offenses were incest such that his pedophilic disorder diagnosis was qualified as limited to incest by both experts. Tr. 122, l. 17 – 123, l. 3; Tr. 201, ll. 20-22. However, Dr. Burke testified that the PPG, the efficacy of which will be discussed *infra* in Issue III, reflected arousal to pictures and stories of other children. Tr. 181, l. 24 – 182, l. 7. Even if that were true, there was no evidence that Wade had ever committed an offense against an unrelated victim. Yet, Dr. Burke testified that if Wade were released he could not think of a category of people who would not be at risk “expect for big strong men or women.” Tr. 182, ll. 9-12. This statement was aimed at appealing to the fear of the jurors and was again drenched in speculation, now that Wade would begin offending against entirely new classes of victims.

If that was not enough, Dr. Burke analogized Wade to Louis “Skip” ReVille, who molested approximately thirty-eight boys. Tr. 180, l. 5 – 181, l. 24. In averring that every accusation is a part of someone’s history and relevant to their level of risk, Dr. Burke said:

[G]etting back to the Static-99 again. You know, you can’t have it both ways. If you want to depend on the Static-99, you know, very heavily, the scoring criteria is, you know, you increase their level of risk if they’ve been accused of molesting a boy. They don’t have to be indicted. They don’t have to plead guilty. It’s just an accusation because they found over research, yeah, this guy, like, you may have heard of the guy from Charleston who, the Citadel guy, I’m sorry to say, who molested 38 boys, you know. People knew for years it was, you know, oh, he’s, he’s doing something with those young boys. But nothing ever happened, he never got indicted or anything. But that’s part of his history.

And so when you go back and get that kind of information it helps you to establish whether there's an increase or decrease in his level of risk.

Tr. 181, ll. 6-15. Dr. Gehle concurred that if the information is reliable, one's history for the Static-99 can include convictions, accusations, and self-reported information. However, she said that "if you have an accusation that you don't believe is correct, you shouldn't give him a point for that." Tr. 227, l. 24 – 228, l. 8; see also Tr. 205, l. 21 – 206, l. 21; Tr. 224, l. 3 – 226, l. 9.

ReVille's case received local and national press in 2011 when it was discovered that he began molesting young boys while a counselor at a Citadel summer camp and later while he worked as a teacher, coach, tutor, and church volunteer. In June 2012, he pled guilty to indictments regarding twenty-three boys who he had molested over the course of ten years. Philip Caulfield, The Citadel 'profoundly sorry' for not investigating sex abuse charges after alumnus arrest, N.Y. DAILY NEWS, Nov. 15, 2011, <http://www.nydailynews.com/news/national/1.977859>; NBC News, et al., *Ex-youth coach indicted in Citadel military college sex case*, NBC NEWS, Mar. 7, 2012, http://usnews.nbcnews.com/_news/2012/03/07/10598547-ex-youth-coach-indicted-in-citadel-military-college-sex-case; Paul Bowers, *Skip ReVille was unstoppable until a mother found him out: A decade of sins ends with a hellish day in court*, CHARLESTON CITY PAPER, June 14, 2012, <http://www.charlestoncitypaper.com/charleston/skip-reville-was-unstoppable-until-a-mother-found-him-out/Content?oid=4094572>. In the Charleston City Paper article, Ninth Circuit Solicitor Scarlett Wilson was quoted as saying: "If he [ReVille] makes it to age 74 and his 85 percent is up, if he goes through the Sexually Violent Predator proceeding, the chances are he's going to be deemed a predator, and they're not going to let him out until he's cured. And there is no cure." Bowers, *supra*. Reville's crimes have continued to receive media attention related to civil actions filed by various victims against the Citadel for failing to report allegations of abuse. See, e.g., Natalie Caula Hauff, *Convicted child molester Skip ReVille talks*

about his inner demons in a deposition, CHARLESTON POST AND COURIER, May 17, 2014, <http://www.postandcourier.com/article/20140517/PC16/140519384>.

“Comparing an accused or his acts to those of a notorious criminal is . . . an improper and erroneous interjection of facts not in the record.” Brown v. State, 978 S.W.2d 708, 714 (Tex. App. 1998). In Brown, the Texas Court of Appeals found that the prosecutor’s references in closing argument to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy were improper because “the State not only invoked the memory of the horrific crimes they committed but also effectively asked the jurors to punish appellant like they were punished, that is, by the assessment of imprisonment.” 978 S.W.2d at 714. In Gonzalez v. State, 115 S.W.3d 278, 283-86 (Tex. App. 2003), the court reversed and remanded for resentencing because of prosecutor’s comparison of defendant to Osama Bin Laden in his closing argument.

In State v. Hardy, 492 N.W.2d 230, 233-34 (Iowa Ct. App. 1992), the Iowa Court of Appeals remanded for a new murder trial where the state admitted evidence that “on the night before the murder, a local cable television station had carried a movie about the life and crimes of the notorious serial killer of women, Ted Bundy.” Id. at 233-34. The Iowa Court of Appeals ruled that “the evidence concerning the content and timing of the movie about Ted Bundy served only to unfairly prejudice the defendant by drawing a not-so-subtle analogy between the defendant and a notorious serial killer.” Id. at 234. The Hardy court reversed, stating that if Rule 403 was “to be given any effect whatsoever, surely it should be to keep this type of information from jurors.” Id.

More recently, our Supreme Court ruled in Vasquez v. State, 388 S.C. 447, 456-61, 698 S.E.2d 561, 565-68 (2010), that trial counsel was ineffective for failing to object to the solicitor’s reference to the Muslim defendant as a “domestic terrorist” during a trial held on the second

anniversary of the September 11, 2001, attacks. The Court remanded Vasquez's case for resentencing because it found that "the solicitor's improper remarks occurred primarily during the penalty phase of Petitioner's trial." 388 S.C. at 464-65, 698 S.E.2d at 570. The Vasquez Court found State v. Jones, 558 S.E.2d 97 (N.C. 2002), to be analogous. Id. at 462-63, 698 S.E.2d at 569. In Jones, the prosecutor referenced the Columbine shootings and Oklahoma City bombings in his closing argument. 558 S.E.2d at 107. The Jones Court wrote:

In our view, **such remarks cannot be construed as anything but a thinly veiled attempt to appeal to the jury's emotions by comparing defendant's crime with two of the most heinous violent criminal acts of the recent past.** Thus, the argument was improper for at least three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice.

Id. (emphasis added). The Vasquez Court ruled that the "domestic terrorist comment" similarly invoked circumstances outside of the record, appealed to the jurors' sense of passion and prejudice involving anti-Muslim sentiment, and because there was no objection, there was no opportunity for the trial judge to even attempt to cure the error. 388 S.C. at 463, 698 S.E.2d at 569.

Here, it was the State's expert witness rather than the solicitor who made the unnecessary and prejudicial comparison of Wade to ReVille. This arguably increased the prejudice, as "qualification as an expert clothes the witness with an air of authority that does not attach to 'ordinary' witnesses." State v. Douglas, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting). For those jurors familiar with the ReVille case, they would have recalled the long and sordid history of the molestation against his victims whose families ReVille befriended, often times posing as mentor and spiritual leader for their sons. For any who were unfamiliar, Dr. Burke gave them the most important details – ReVille had nearly forty victims

and his crimes went unreported for years. Dr. Burke's analogy to ReVille was similar to his statement that "most sex offenses go unreported" in that it insinuated to the jury that Wade may also have been "doing something" to the minor boys in the family, or even other unknown male victims, and those crimes were never reported. Trial counsel should have immediately objected to the analogy regarding ReVille and asked for a curative instruction that the jury was to render its decision based on the facts of *this* case and disregard Dr. Burke's comments.

To be clear, Appellant recognizes that our Courts have approved the "introduction of prior offenses that are relevant to determining whether a person is a sexually violent predator." See In re White, 375 S.C. 1, 12, 649 S.E.2d 172, 178 (Ct. App. 2007); see also In re Chandler, 382 S.C. 250, 259, 676 S.E.2d 676, 680-81 (2009). However, this is not tantamount to an endorsement of the type of irrelevant and speculative evidence presented in this case.

Therefore, defense counsel was deficient in failing to object to the various portions of Dr. Burke's discussed *supra*. Wade was prejudiced because various portions of the testimony had a tendency to confuse the issues, inflame the passions of the jury, and encourage the jury to speculate. The ineffective assistance of defense counsel with respect to this issue is apparent from the record before this Court such that no remand is necessary to decide this issue.

Further, to the extent that this Court finds that the prejudice to Wade from the individual errors is not sufficient on their own to warrant reversal, it should consider their cumulative effect. The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors

adversely affected his right to a fair trial to qualify for reversal on this ground. Id. Here, Dr. Burke's comments built upon one another to imply to the jury that the known allegations of incest against Wade did not show the full picture of his sexual misconduct. His continued use of insinuations and speculation encouraged the jury to do the same regarding both Wade's past and future behavior. These errors were compounded by Dr. Burke's assertion that Wade went unpunished for the possession of child pornography in 2002, confusing the issues and suggesting that confinement in the SVP program might be proper in retribution for that misconduct. Because trial counsel failed to object to any of the improper testimony, none of it was stricken and there was no curative instruction given.

III.

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 move to exclude any evidence related to a penile plethysmograph ("PPG") because, like a polygraph test, it is unreliable and unscientific.

In Jamison v. Morris, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009), our Supreme Court held: "An expert cannot testify to an opinion predicated on an unreliable test." Here, defense counsel made no challenge to the admissibility of the penile plethysmograph ("PPG") though, like a polygraph, the PPG fails to meet our Courts' standards of reliability and scientific validity. Wade was prejudiced by the admission of evidence regarding the PPG that he was administered because Dr. Burke claimed that "the number one predictor of re-offending is chronic sexual arousal [to] children in the laboratory, the PPG laboratory." Tr. 128, ll. 8-14. Dr. Burke made no qualms about his primary reliance upon the PPG, citing it in support of his assertion that Wade may offend against virtually anyone and his otherwise baseless assertion that Wade had a greater than fifty percent chance of reoffending. Tr. 128, l. 15 – 129, l. 5; Tr. 149, ll. 13-25.

Dr. Burke described the origins of the PPG in 1950s Czechoslovakia, where it was used to verify claims of military exemption based on homosexuality. Tr. 90, ll. 1-10. According to Burke, use of the PPG for sex-offender assessments began in the 1970s.⁹ Tr. 90, ll. 11-12. He said that the PPG is “the only test available to directly measure sexual arousal. Tr. 63, ll. 10-22. He further characterized the PPG as providing “objective” evidence. Tr. 89, ll. 14-25; Tr. 90, ll. 12-23.

Essentially, the subject places a rubber band around their penis. They are then exposed to pictures and audio stories using real children’s voices, each related to various sexual scenarios. The PPG purportedly measures the increase in the circumference of the penis caused by increased blood flow from arousal.¹⁰ Tr. 88, l. 19 – 89, l. 25; Tr. 95, l. 23 – 96, l. 15. According to Dr. Burke, the PPG shows “how the person’s body is responding to what they’re exposed to.” Tr. 90, ll. 12-16. He said that “in forensic settings oftentimes people just, they deny that they have problems. They deny, you know, like an alcoholic says, I don’t have a problem drinking. Or I’m not aroused to kids. I’m not sexually interested in kids.” Tr. 90, ll. 16-20. He claimed that the PPG “is a way to find out if their body is actually responding to if children are raped in a sexually-arousing manner.” Tr. 90, ll. 21-23. In other words, Dr. Burke asserted that the PPG reveals the truth about the subject’s sexual interests.

In State v. Tapp, 398 S.C. 376, 384, 728 S.E.2d 468, 472 (2012), the Court clarified that “the reliability of a witness’s testimony is not a pre-requisite to determining whether or not the witness is an expert.” Id. at 388, 728 S.E.2d at 474. Rather, “the expertise, reliability, and the

⁹ For a full history of the PPG and its many problems, see Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (Fall 2004) (hereinafter “Odeshoo”). The author notes that evidence from PPG tests have “generally not been found admissible at trial.” Id. at 3.

¹⁰ An analogous procedure exists for women, called the vaginal plethysmography. Odeshoo, *supra*, at 2 n.9.

ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony." Id. at 388, 728 S.E.2d at 474-75 (emphasis in original). Thus, though the majority in Tapp ultimately found the error harmless, the Court found that the trial court erred by not properly vetting the testimony for its reliability before its admission into evidence. Id. at 389-91, 728 S.E.2d at 475-76. Here, despite Dr. Burke's reputation for heavy reliance upon the PPG, trial counsel made no effort to vet Dr. Burke's testimony for its reliability prior to its admission into evidence. While an *in camera* hearing may have been time consuming, it would have avoided reference to the unreliable PPG evidence, upon which Dr. Burke heavily relied, before the jury.

Just as evidence regarding lie-detectors is routinely excluded, evidence regarding the PPG should also be ruled inadmissible. State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). "Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." Id. at 252, 349 S.E.2d at 404. Trial counsel should have objected that the PPG does not satisfy South Carolina's requirements for the admission of scientific evidence and is inadmissible just like polygraph results. In re Robert R., 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000). See also Rule 702, SCRE; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

Under Rule 702, SCRE, and State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), the trial court must determine whether the "underlying science is reliable." In making this determination, the court should examine "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control

procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” Council, 335 S.C. at 20, 515 S.E.2d at 518.

“Courts generally have held [the PPG] inadmissible to show the presence or absence of pedophilia.” David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n.21. The Fourth Circuit held the PPG did not meet the scientific standards for admissibility in United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995). The court noted the “extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test.” Id. at 1471.

Multiple state and federal courts have cited the PPG’s lack of reliability regarding diagnosis and treatment in a variety of contexts. See also United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (discussing the problems with the reliability of PPG testing where such testing was imposed as a condition of supervised release); United States v. McLaurin, 731 F.3d 258 (2nd Cir. 2013) (“The Government made no showing to the district court that plethysmography is reliable or therapeutically beneficial.”); Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) (“In fact, courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence because there are no accepted standards for this test in the scientific community.”); United States v. White Horse, 177 F.Supp.2d 973, 975-76 (D.S.D. 2001) (citing the DSM-IV for the proposition that the PPG “is not accepted as a reliable or valid diagnostic tool”); State v. Spencer, 459 S.E.2d 812, 815 (N.C. Ct. App. 1995) (“We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph’s reliability to measure sexual deviancy.”); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) (“Given the rejection of penile plethysmograph evidence by

other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.”); Billips v. Commonwealth, 652 S.E.2d 99, 101-02 (Va. 2007) (holding expert’s report that relied on PPG testing was inadmissible, even at a sentencing hearing).

The Virginia Supreme Court approached PPG testing with a critical eye in Billips, saying:

Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be “scientific,” **and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism.** That tendency has given rise to frequent complaints of “junk science” in the courts. To guard against that risk, we continue to require a “threshold finding of fact with respect to reliability of the scientific method offered. . . .”

652 S.E.2d at 101-02 (emphasis added). It is hard to imagine any field more “esoteric” than PPG testing.

In addition to the unreliability of the PPG, there are also ethical implications of its use. “Although the concern might be articulated in a number of ways, the problem, simply put, is that sexualizing children is bad; using images calculated to excite sexual desire for children is exploitative.” Jason R. Odesloo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 35 (Fall 2004). “When the government engages in such tactics, it runs the risk of participating in the very evil it purports to eradicate.” Id. Additionally, “[a] person, even if convicted of a crime, retains his humanity.” United States v. McLaurin, 731 F.3d 258 (2nd Cir. 2013) (holding PPGs as a condition of sex offender’s supervised release violated due process). The concurring

opinion of Senior Circuit Judge John R. Noonan in United States v. Weber, 451 F.3d 552, 570-71 (9th Cir. 2006), succinctly describes the moral implications of the PPG:

Judge Berzon's excellent opinion is deserving of support. I would, however, go beyond it to hold the Orwellian procedure at issue to be always a violation of the personal dignity of which prisoners are not deprived. The procedure violates a prisoner's bodily integrity by affecting his genitals. The procedure violates a prisoner's mental integrity by intruding images into his brain. The procedure violates a prisoner's moral integrity by requiring him to masturbate.

By committing a crime and being convicted of it, a person does not cease to be a person. A prisoner is not a mere tool of the state to be manipulated by it to achieve the purposes the law has determined appropriate in punishment. The prisoner retains his humanity and therefore has purposes transcending those of the state. A prisoner, for example, cannot be forced into prostitution to aid the state in securing evidence. A prisoner, for example, cannot be made to perjure himself in order to assist a prosecution. Similarly, a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. **There is a line at which the government must stop. Penile plethysmography testing crosses it.**

Id. at 570-71 (Noonan, J. concurring) (emphasis added).

Given the overwhelming rejection of PPG testing by courts in other jurisdictions and the ethical implications of its use, trial counsel was deficient in failing to contest its admission in this case. It was no doubt prejudicial because Dr. Burke stated it was the most important factor he relied upon, and it was what differentiated his opinion from Dr. Gehle. Dr. Gehle testified that DMH—the government agency in this state charged with the identification, housing, and treatment of SVPs—does not use PPGs in its evaluations. R. 221, ll. 3 – 25; R. 235, ll. 11-24; R. 238, ll. 11-16. This court should rule that, like polygraph examinations, PPGs are not admissible evidence in this state. In the event that the court cannot make this conclusion on this record or as a matter of law, then it should remand the case to the trial court to develop a record under Rule 702 and Council as to whether PPG evidence is admissible.

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 introduce evidence of treatment and failing to request a substantive response to the jury's question regarding the meaning of "long term care."

Relevant Facts

Prior to trial, the state moved to "prohibit any reference as to the details of any and all future treatment Respondent would receive if committed to the Sexually Violent Predator Program. R. *(Motion in Limine). In the motion, Respondent admitted that the statute defines an SVP as a person with a mental abnormality or personality disorder, which 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. R. *(Motion in Limine). However, incongruously, the state argued proof of this element was not required. R. *(Motion in Limine). According to the state, allowing Appellant "to pose arguments and questions as to his future treatment places an additional burden on the state to prove the potential for treatment success." R. *(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. *(Motion in Limine). According to the state, allowing evidence regarding treatment would create an additional element for the state to prove for confinement. R. *(Motion in Limine). Additionally, and ironically in light of Dr. Burke's testimony discussed supra in Issue II, the state further argued that "any testimony as to treatment from the State's witness, Dr. William Burke would be speculative." R. *(Motion in Limine).

The trial judge asked if there was anything that needed to be put on the record regarding the state's motion in limine. Defense counsel responded: "I won't be talking about treatment." Tr. 32, ll. 12-17. Judge Gee said: "No details of the treatment. It's similar to yesterday's trial. Tr. 32, ll.

18-19. Defense counsel responded: "Absolutely." Tr. 32, ll. 20. In addition to abandoning any evidence of inadequacy of the treatment provided in the SVP program, defense counsel made no argument that she should, at the very least, be able to present evidence of the availability and effectiveness of the alternatives of out-patient or voluntary in-patient treatment. According to Wade's sister, "no one," ostensibly including defense counsel, had recommended that Wade attend out-patient sex offender treatment following his release. Tr. 192, ll. 5-18.

Over the course of the trial, the jury heard the word "treatment" over ninety times, but never learned of the type of treatment, if any, Appellant would receive if found to be an SVP. See Tr. 38, 44, 46, 52-55, 58, 62, 70, 74, 92-93, 113, 116-117, 121, 124-25, 130, 139, 150, 153, 159, 160, 172-74, 177, 182, 192, 195-96, 199, 214, 217, 231-32, 244, 252-53, 256, 265, 267, 270-71, 275, 281, 283. In his opening statement, AAG Bogle said that one of elements that the State must prove is: "Does he [Wade] suffer from some kind of mental abnormality or a personality disorder that makes him likely to commit the same type of crimes again unless he's confined for long-term control, care and treatment." Tr. 46, ll. 17-22. The State's expert, Dr. Burke, testified that he had "extensive training in the assessment and the treatment of individuals with sexual disorders and sex offenders" Tr. 54, ll. 12-14; Tr. 48, ll. 2-6. Dr. Burke had also authored various chapters for books articles regarding the treatment of sex offenders. Tr. 55, ll. 13-19.

Dr. Burke testified that it was his understanding that once Wade was released from prison "there's no probation, there's no parole, there's no mandatory reporting or mandatory treatment." Tr. 73, l. 22 – 74, l. 1; see also Tr. 124, ll. 8-14; Tr. 125, ll. 14-15; Tr. 153, ll. 6-11. While Dr. Burke said that pedophilic disorder is not curable, he said that it is treatable and controllable, similar to diabetes. Tr. 123, l. 18 – 124, l. 7. He opined: "[I]f you're not required to address it in treatment, if you're not mandated by the Court, I think that it's, you know, the likelihood -- that

that increases the likelihood that you're going to re-offend." Tr. 124, ll. 4-7. Dr. Burke agreed with AAG Bogle that the SVP treatment program, "where the State's trying to commit Mr. Wade, is run by the Department of Mental Health." Tr. 92, ll. 21-24; see also Tr. 130, l. 11 – 131, l. 6. AAG Bogle asked Dr. Burke whether he "[knew] of anything that could require him [Wade] to get the kind of sex-offender treatment which is offered by the Sexually-Violent Predator Treatment Unit?" Tr. 182, ll. 13-18. Dr. Burke responded: "Not at this time." Tr. 182, l. 19.

Though Wade had completed sex offender treatment in prison with "excellent participation," both experts testified that Wade did remember it, likely due to his strokes. Tr. 74, ll. 2-15; Tr. 116, l. 22 – 117, l. 12; Tr. 129, l. 24 – 130, l. 6; Tr. 217, ll. 17-22; Tr. 231, l. 20 – 232, l. 6. Dr. Burke said "essentially he's not had any treatment because he can't recall it." Tr. 74, ll. 14-15. While he said that his lack of memory was not Wade's fault, Dr. Burke averred that Wade had "not been afforded the skills or the tools to try to, to try to not re-offend." Tr. 130, ll. 3-6. He later testified: "I seriously doubt from what he's saying and from the evidence that we have that he could benefit from sex-offender treatment right now because of the issues with his cognition in processing." Tr. 172, ll. 20-25.

When asked if Wade had "any realistic plan for preventing himself from [re-]offending," Dr. Burke responded: "Well, I don't -- I think -- I don't believe so. I mean, his plan is to live, I believe, on a 12-acre piece of land with his mother and just pretty much stay away from all children." Tr. 117, ll. 13-18. Dr. Burke further said: "I think [Wade is] being honest when he tells me that he's now homosexual and that he wants to be a woman. I understand all of that. I also know from experience that that can change rather rapidly upon release." Tr. 119, ll. 18-22. However, when Dr. Burke learned that Wade had been released for thirteen months prior to trial

he said Wade would need supervision, including weekly checks, GPS tracking for the first six months, and sex-offender registry compliance. Additionally, he said that Wade would need to be polygraphed, which Dr. Burke claimed was “a valuable tool for treatment.” Tr. 120, l. 4 – 121, l. 16. His testimony certainly suggested that there were less restrictive alternatives than SVP commitment to ensure the safety of the community.

Dr. Gehle, the court-appointed evaluator, had experience in the treatment of sex offenders, including working as supervisor to the treatment providers in the South Carolina SVP program. Tr. 195, l.4 – 196, l. 3. Dr. Gehle testified that Wade’s risk of reoffending was below that of an average sex offender, who are released every day with no supervision or treatment. Tr. 214, ll. 5-17. AAG Bogle asked Dr. Gehle if Wade “need sex-offender treatment now?” Tr. 232, ll. 7-10. Dr. Gehle responded: “I don't know that he needs sex-offender treatment now. And that's not even the question that's before me. It's whether he has a mental abnormality that makes him likely to commit acts of sexual violence.” Tr. 232, ll. 11-14. However, when pressed to respond, Dr. Gehle said: “I think that anybody can benefit from treatment. Unfortunately treatment also has shown to do little to reduce recidivism. So, does anybody benefit from treatment? It's questionable.” Tr. 232, ll. 15-23. On re-direct, defense counsel said: “You [Dr. Gehle] were asked about whether treatment is necessary. Does treatment have anything to do with this jury’s consideration of whether he’s a sexually-violent predator?” Tr. 244, ll. 14-17. Dr. Gehle responded: “No.” Tr. 244, l. 18.

In his closing argument, AAG Bogle gave the jury his version of the elements that the state had to prove at trial beyond a reasonable doubt – “does the Respondent have a mental abnormality” and “has he been convicted of the right kind of crimes?” Tr. 252, l. 21 – 253, l. 6. He then told the jury:

So -- and the next thing, kind of a third, kind of a spin-off of one of these elements is: Does this mental abnormality present such a risk that he cannot control his urges and is at risk to sexually re-offend? And if that's the case, then he would be committed to the Department of Mental Health for what they call long-term control, care and treatment.

We've all talked about that. You've heard some talk about that, where it is and what it is. It's a facility run by the Department of Mental Health. There's testimony about that. It's located on the campus of one of the prisons in Columbia. So it's behind the wires. That's because it is confinement. It's got to be a secure place. That's what the law says. It's run by the Department of Mental Health. The treatment, the doctors are all run by them.

Tr. 253, ll. 7-24. In defense counsel's closing argument, she said that jury should not be concerned whether or not Wade requires treatment. Rather, their concern was whether Wade was "likely to engage in acts of sexual violence if not confined." Tr. 266, l. 21 – 267, l. 8.

The trial 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. 274, l. 21 – 275, l. 1; Tr. 289, ll. 16-21. 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 confined in a secure facility for long-term control, care, and treatment" in order to find Appellant was an SVP. Tr. 281, ll. 10-15; Tr. 296, ll. 1-5.

The jury asked what long term care means, revealing their concern about this issue. Tr. 285, l. 25 – 286, l. 2; Tr. 287, ll. 15-19; Tr. 288, l. 18 – 289, l. 4; R. * (Court's Ex. 1, jury note). The judge responded that the jury should not consider the meaning of "long term care" and that their duty was "to determine whether the State has proven beyond a reasonable doubt that the Respondent is a sexually violent predator." Tr. 299, l. 19 – 300, l. 2; R. * (Court's Ex. 1, jury note). Trial counsel made no objection to this resolution, which was not surprising in light of her apparent misunderstanding of the import of treatment. Tr. 288, l. 18 – 289, l. 3.

Discussion

The SVP Act defines a “sexually violent predator” as “[a] person who: (a) has been convicted of a sexually violent offense; and (b) 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) (emphasis added). Treatment is essentially an element that the State must prove in order commit someone under the SVP Act. Otherwise, the statute would read “long-term control, care, or treatment” or omit the term. 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”); 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); 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). Therefore, the issue of treatment is relevant in SVP case, particularly when the State opens the door on this issue during its opening statement and the testimony of its expert.

Defense counsel was ineffective in averring that treatment had nothing to do with the SVP trial and failing to present evidence regarding both alternative forms of treatment and the effectiveness of the treatment provided in the SVP unit. 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. While the trial judge correctly

instructed the jury that consideration of the statute included consideration of treatment, the jury was not provided sufficient evidence to properly include treatment in its deliberations.

Defense counsel was further deficient in failing to request an accurate and substantive response to the jury's question about what was meant by "long term care." The South Carolina SVP Act provides that a person determined by the jury to court to an SVP after trial "must be committed to the custody of the Department of Mental Health for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and has been released pursuant to this chapter." S.C. CODE ANN. § 44-48-100(A). Though the Act provides that "[t]he control, care, and treatment must be provided at a facility operated by the Department of Mental Health," but also allows DMH to enter into an interagency agreement with the Department of Corrections. Pursuant to the Act, persons committed to the SVP program are supposed to be examined annually, an annual report filed, and an annual hearing held to "review the status of the committed person." S.C. CODE ANN. § 44-48-110.

In death penalty cases, the jury is required to know that "life" means "life without parole" if the State presents evidence of future dangerousness. State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). In Simmons v. South Carolina, 512 U.S. 154, 168 (1994), the United States Supreme Court explained: "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." Here, the jury had a right to know the truth – that long term care means indefinite commitment such that Wade may never be released. Given Wade's age, physical and mental deficiencies, compliance with reporting requirements while released, and the

decades that had passed since his incestuous offenses, the jury may well have determined that “long-term care” was not proper in this case.

In light of the trial judge’s error of law in instructing the jury that it should not consider the meaning of long-term care, Appellant requests that he be granted a new trial. However, if this court instead finds this record is insufficient to determine this issue, Appellant respectfully requests a remand to address the failure and what impact the evidence would have had on his trial.

CONCLUSION

Based on the foregoing, this Court should reverse Appellant Roy Lee Wade's commitment or alternatively remand his case for an evidentiary hearing.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above the printed name and title.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Aiken County

SEP 16 2016

Honorable Tanya A. Gee, Circuit Court Judge

SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF ROY LEE WADE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Roy Lee Wade, at Sexual Violent Predator Program, 7901 Farrow Road, Bldg. 3, Columbia, SC 29203, this 16th day of September, 2016.



Laura R. Baer

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2016.



(L.S)

Notary Public for South Carolina

My Commission Expires: April 27, 2026.