

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown County

Steven H. John, Circuit Court Judge

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IN THE MATTER OF THE CARE AND TREATMENT OF

DARYL T. SNOW,

APPELLANT

APPELLATE CASE NO. 2015-000280

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, in an SVP case, when the State's expert only diagnosed appellant with "Other Specified Personality Disorder," and no mental abnormality, paraphilia, or any specific personality disorder, was appellant entitled to a directed verdict and JNOV because such a diagnosis is legally insufficient for commitment?

## STATEMENT OF THE CASE

On May 1, 2013, the State filed this action seeking the commitment of Appellant under the South Carolina Sexually Violent Predator Act. R. 248. Appellant had two predicate convictions. R. 250. On May 21, 1996, appellant pled guilty to assault with intent to commit criminal sexual conduct and received a sentence of ten years. R. 306. Reuben Goude represented appellant. R. 306. On April 18, 2006, appellant pled guilty to lewd act on a minor child. R. 259. Wesley Locklear represented appellant. R. 195, ll. 2 – 3.

On February 9, 2015, appellant was tried before the Honorable Steven H. John and a jury. R. 1. James G. Bogle, Jr. and Christopher Andrew Morrow represented the State. R. 1. James Kristian Falk represented appellant. R. 1. The jury found appellant was a sexually violent predator. R. 243, ll. 15 – 21. Judge John ordered appellant committed. R. 246, l. 7 – 247, l. 6. This appeal follows.

## ARGUMENT

In an SVP case, when the State's expert only diagnosed appellant with "Other Specified Personality Disorder," and no mental abnormality, paraphilia, or any specific personality disorder, was appellant entitled to a directed verdict and JNOV because such a diagnosis is legally insufficient for commitment.

### **Factual and Procedural Background**

In this SVP case, the State's sole witness, Dr. Marie Gehle ("Gehle"), did not diagnose appellant with a mental abnormality. R. 37, ll. 8 – 11. She did not diagnose appellant with any type of paraphilia. R. 129, ll. 17 – 19. She did not diagnose him with Antisocial Personality Disorder. R. 130, ll. 22 – 25. The only personality disorder Dr. Gehle could find was "something called Other Specified Personality Disorder." R. 122, ll. 2 – 3. Dr. Gehle testified that Other Specified Personality Disorder "is a personality disorder when you can't meet all the criteria for a specific personality disorder." R. 122, ll. 2 – 5.

Dr. Gehle explained that Other Specified Personality Disorder is not a "catch-all" because she believed appellant had Antisocial Personality Disorder, but could not "find the evidence to support that." R. 130, ll. 13 – 21. The evidence that was lacking was whether appellant had conduct problems prior to age eighteen, which is required by Antisocial Personality Disorder's definition. R. 122, l. 2 – 186, l. 4.

Dr. Gehle opined that Other Specified Personality Disorder made appellant predisposed to commit sexually violent offenses in the future because "this disorder is basically that he disregards and violates the rights of others, and in large part that's included women, and while that hasn't always manifested in sexual violence it has numerous times, and therefore I believe that this disorder makes him likely to commit acts of sexual

violence.” R. 123, l. 16 – 124, l. 5. She admitted on cross-examination that there were no specific diagnostic criteria for Other Specified Personality Disorder:

Q. Okay. But Other Specified Personality Disorder, if I looked into the DSM-4, or 5 here, am I going to find any diagnostic criteria for that specific diagnosis?

A. There’s a section that talks about when to use that diagnosis, but they are not listed out like the other diagnoses are.

R. 129, l. 25 – 130, l. 5. Dr. Gehle admitted that someone who had only three of the four qualifiers of Avoidant Personality Disorder could fit into Other Specified Personality Disorder. R. 136, l. 16 – 137, l. 24. Asked whether someone who had only four of the five criteria for Dependent Personality Disorder could fit into Other Specified Personality Disorder, Dr. Gehle responded, “Again, it would depend.” R. 137, l. 25 – 138, l. 5. She agreed that the DSM-5 states that approximately fifteen percent of adults in the United States have at least one personality disorder. R. 144, l. 10 – 145, l. 12.

The State rested its case after Dr. Gehle’s testimony. R. 149, ll. 18 – 19. Appellant moved for a directed verdict. R. 150, ll. 18 – 20. Appellant argued that the State had not proved “a mental disease or defect that is the cause of the risk.” R. 150, ll. 19 – 24. Citing In the Matter of the Treatment and Care of Clair Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) and Kansas v. Crane, 534 U.S. 407 (2002), appellant argued that the purpose of the SVP Act was not to subject a broad class of dangerous people to confinement, but only those dangerous persons who have a mental disorder with a causal link to the risk of future harm. R. 150, l. 18 – 152, l. 5. In response, the State cited Dr. Gehle’s conclusory testimony that Other Specified Personality Disorder made appellant predisposed to commit future acts of sexual violence. R. 152, l. 9 – 153, l. 6. Agreeing with the State, Judge John denied the directed verdict motion. R. 153, l. 7 – 154, l. 21. Appellant renewed his motion

at the close of his case and asked for a JNOV after the verdict, both of which were denied. R. 207, l. 17 – 208, l. 22. R. 244, l. 16 – 246, l. 2. Pursuant to Rule 50(e), Judge John did not allow appellant ten days to make his JNOV motion. R. 244, l. 16 – 245, l. 3. Rule 50(e), SCRCF.

### **Discussion**

Justice Anthony Kennedy provided the fifth vote in the 5-4 decision of the United States Supreme Court upholding the constitutionality of Kansas' SVP statute against a challenge that it was punitive and therefore violated the ex post facto and double jeopardy clauses. Kansas v. Hendricks, 521 U.S. 346, 371-72 (1997). Justice Kennedy wrote separately "to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application." Id. He concluded his concurrence by stating that if "it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id. at 372. Justice Kennedy's prescient warning about the imprecision of psychology applies with full force to this case.

The majority in Hendricks wrote extensively about whether the Kansas statute's definition of mental abnormality satisfied substantive due process. Id. at 356-60. Approving the Kansas statute, the Court wrote that it required "evidence of past sexually violent behavior and a present mental condition **that creates** a likelihood of such conduct in the future if the person is not incapacitated." Id. at 357 (emphasis added). Focusing on the lack of control, the Court stated that the "lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other

dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” Id. at 360. From the Court’s opinion, it is clear that due process requires a link between the mental abnormality and the inability to control future sexual behavior.

The Supreme Court refined its holding in Kansas v. Crane, 534 U.S. 407 (2002). The Court rejected the defendant’s argument that due process requires the state to prove complete lack of control. Id. at 411. But the Court also rejected the state’s argument that it did not have to prove any lack of control. Id. at 412. The Court wrote that the lack of control finding distinguishes dangerous sexual offenders from other persons who are dangerous and this “distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment. Id. In its citation for this sentence, the Court noted a study that found that “40% - 60% of the male prison population is diagnosable with antisocial personality disorder.” Id. *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999). The Court further held that there “must be proof of serious difficulty in controlling behavior.” Id. at 413. Elaborating, the Court stated that the proof of lack of control

when viewed in light of such features of the case as the **nature of the psychiatric diagnosis, and the severity of the mental abnormality itself**, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**

Id. (emphasis added).

Our Supreme Court interpreted Crane in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). The Court wrote in Luckabaugh, “[W]e believe Crane holds the substantive due process clause requires a court to determine an individual suffers from a mental illness **which makes it** seriously difficult, though not impossible, for that person to control his dangerous propensities.” Luckabaugh at 143, 568 S.E.2d at 348 (emphasis added). “Inherent within the mental abnormality prong of the Act is a lack of control determination . . . .” Id. at 144, 568 S.E.2d at 349. Like the United States Supreme Court, our Supreme Court requires a link between the mental abnormality or personality disorder and the defendant’s inability to control his sexual impulses. “The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement.” In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted).

Dr. Gehle’s diagnosis of Other Specified Personality Disorder is legally insufficient to meet the constitutional and statutory requirement of a “personality disorder that makes the person likely to engage in acts of sexual violence” unless committed. In re Taft, 413 S.C. 16, 22, 774 S.E.2d 462, 465 (2015). Dr. Gehle’s linkage of Other Specified Personality Disorder to appellant’s lack of control and propensity to commit future crimes was only that “he disregards and violates the rights of others” and sometimes, though not always, had manifested itself in acts of sexual violence in the past. R. 123, l. 16 – 124, l. 5. Almost anyone who is convicted of a criminal offense disregards the rights of others. This general statement says nothing about appellant’s supposed mental disorder or his ability to control his impulses.

In fact, the State presented no evidence of any mental disorder of a sexual nature at all. Dr. Gehle could not diagnose appellant with any paraphilia, such as pedophilia or biastophilia, which are commonly seen in SVP commitments. See, e.g. State v. Gaster, 349 S.C. 545, 554, 564 S.E.2d 87, 92 (2002) (holding directed verdict properly not granted in case where the defendant was diagnosed with “two major mental illnesses: sadism and paraphilia, both of which are sexual disorders.”). Nothing about appellant’s mental health distinguished him from any other recidivist or placed him into the category of sex offenders subject to commitment. Dr. Gehle could not diagnose appellant with any personality disorder. The closest she could come was Antisocial Personality Disorder, but appellant did not meet the definition. “A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy.” Taft at 23, 774 S.E.2d at 466. A person should not be subject to the extraordinary remedy of civil commitment based on a diagnosis of “other.”

Indeed, even the personality disorder which Dr. Gehle wanted to use, but admitted she could not—Antisocial Personality Disorder—has recently been held legally insufficient by the New York Court of Appeals. State v. Donald DD, 24 N.Y.3d 174 (2014). Donald DD involved two appeals, one by Donald DD and another by Kenneth T. Id. at 177. Kenneth T. raped a seventeen-year-old girl in 1982, and attempted to rape a college student a year after he was released from prison in 2000. Id. at 177-78. At his commitment hearing under New York’s SVP law, the state’s psychologist testified Kenneth T. suffered from paraphilia not otherwise specified and antisocial personality disorder. Id. at 178-79. The psychologist also testified that these disorders resulted in Kenneth T. having serious difficulty in controlling his conduct. Id.

In Donald DD.'s case, he had sex with a fourteen-year-old acquaintance when he was eighteen and then forced himself on her twelve-year-old cousin in 2002. Id. at 181. In 2004, after his release from prison, Donald DD. raped his wife's friend in a cemetery. Id. After his release, he violated probation and was then released again on parole when he molested his children and had forcible sex with his wife. Id. at 182. His parole was revoked and the state brought an SVP proceeding against him. Id. at 182-83. Two psychologists testified that Donald DD. had antisocial personality disorder. Id. Like appellant, Donald DD. was not diagnosed with any paraphilias. Id. at 183. Both psychologists testified that Donald DD.'s antisocial personality disorder gave him serious difficulty in controlling his sex-offending conduct. Id. at 183-84.

Concerning Kenneth T., the court described paraphilia not otherwise specified as "controversial" and a "catch-all" diagnosis. Id. at 186. The court held that the evidence was lacking that paraphilia not otherwise specified meant that Kenneth T. had "serious difficulty in controlling his conduct amounting to sex offenses." Id. at 187. The court particularly criticized the psychologist's conclusion that Kenneth T. could not control his behavior because he carried out his offenses in a way that allowed for identification. Id. at 187-88. After considering several examples illustrating why such a conclusion had no probative value, the court held that "such meager material as that a sex offender did not make efforts to avoid arrest and reincarceration" were not legally sufficient. Id. at 188. The court said the evidence of lack of control was "as consistent with a rapist who could control himself but, having strong urges and an impaired conscience, decides to force sex upon someone, as it is with a rapist who cannot control his urges." Id.

The court's holding with respect to Donald DD., who was diagnosed with only antisocial personality disorder, is even more applicable to this case. Citing Crane and other authorities for the point that the vast majority of all incarcerated offenders could be diagnosed with antisocial personality disorder, the court held:

**A diagnosis of [antisocial personality disorder] alone—that is, when the [antisocial personality disorder] diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality—simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.**

Id. at 190 (emphasis added). The court's analysis reveals that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment. Id. at 190-92. Appellant urges this Court to adopt the New York Court of Appeals' reasoning in Donald DD.

The State's case against appellant is even weaker than the evidence in Donald DD. Unlike in Donald DD., Dr. Gehle could not even give appellant a diagnosis of antisocial personality disorder. She was only able to give him the catch-all diagnosis disparaged in Donald DD. If antisocial personality disorder is by itself insufficient, then a diagnosis which—by the State's own expert's admission—is made only because she could not diagnose appellant with antisocial personality disorder, cannot suffice to commit appellant indefinitely.

Furthermore, the reasons used by Dr. Gehle are precisely the general conclusions that do nothing to distinguish appellant from the ordinary recidivist. Most of the factors

cited by Dr. Gehle as supporting her opinion would be true of almost any incarcerated person:

- Used weapons
- Physically violent
- Lack of steady relationships
- Deals with his problems through violence
- Resistance to rules and supervision
- Negative social influences

R. 120, l. 15 – 121, l. 20. Almost any person convicted of a violent crime—sexual or nonsexual—will have these characteristics. Dr. Gehle also did not like appellant’s “attitude” during her two-hour interview with him:

Because he has these attitudes that are very pervasive, and they aren’t just applicable to that situation, it was the way he presented in the interview, his attitudes that he expressed, the way he blamed other people for his problems, the way that he didn’t take any responsibility for his behavior or took very, very limited responsibility for his behavior, the way he didn’t show or express, or I didn’t see any signs of remorse or empathy for others, those things are related to that diagnosis, to the symptoms of Anti-social Personality, you know, Anti-social Personality traits.

R. 139, ll. 11 – 22. Again, nothing in this analysis distinguishes appellant from any other recidivist.

Appellant received a fifteen-year sentence for the offense from which he was due to be released when these commitment proceedings were initiated. R. 250. Appellant has served this sentence. As Justice Kennedy wrote in Hendricks, “If the civil system is used to simply impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function.” Hendricks, 521 U.S. at 372

(Kennedy, J., concurring). The trial court erred in not directing a verdict for appellant when the only evidence consisted of the catch-all diagnosis of “other,” did not demonstrate a lack of control regarding his sexual impulses and did nothing to distinguish appellant from any other recidivist. The State’s evidence that appellant falls into the latter category fails as a matter of law. This Court should reverse and order appellant’s release.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

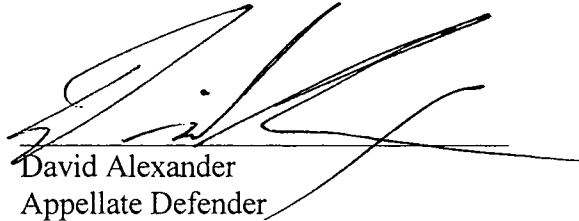
ATTORNEY FOR APPELLANT

This 5th day of July, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 5, 2016



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STATE OF SOUTH CAROLINA

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Appeal from Georgetown County

Steven H. John, Circuit Court Judge

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IN THE MATTER OF THE CARE AND  
TREATMENT OF DARYL T. SNOW,

APPELLANT

APPELLATE CASE NO. 2015-000280

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CERTIFICATE OF SERVICE

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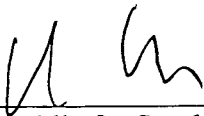
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of July, 2016.



David Alexander  
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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 5th day of July, 2016,



(L.S.)

Notary Public for South Carolina

My Commission Expires: May 12, 2015.

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown County  
Honorable Steven H. John, Circuit Court Judge  
Appellate Case Tracking No. 2015-000280  
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JUN 17 2016

SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT  
OF DARYL T. SNOW,

APPELLANT.

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## **STATEMENT OF ISSUE ON APPEAL**

The circuit court properly denied Appellant's directed verdict motion because the expert's diagnosis of Other Specified Personality Disorder is recognized in the mental health field, and the credibility of the expert's diagnosis and testimony was a matter for the jury.

**STATEMENT OF THE CASE**

Respondent concurs with Appellant's procedural Statement of the Case.

## STATEMENT OF FACTS

Prior to Appellant's release from prison, Respondent State of South Carolina ("the State") filed a Petition Pursuant to the Sexually Violent Predator Act (the "SVPA"), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on February 9, 2015, before the Honorable Steven H. John, Circuit Court Judge.

After a pre-trial hearing regarding her qualifications and testimony, Marie Gehle, PsyD, testified before the jury, and was qualified as an expert in forensic psychology without objection. She stated she had conducted approximately ninety SVPA pre-commitment evaluations, and approximately ninety annual review evaluations, but she currently conducts only pre-commitment evaluations. (Trial Testimony [TT], pp. 148-153; Record on Appeal [R.], pp. 85-90).

Dr. Gehle outlined the protocol she follows in pre-commitment evaluations, which includes a very detailed review of all documentation she receives in the case, to determine if there are any discernible behavior patterns and identify risk factors for reoffending. After reviewing the documents, she interviews the person extensively about things revealed in the documents, as well as his family, school history, employment history, medical and mental health history, and a detailed sexual history to determine if the person has any sexual deviance. She may then request additional records if necessary. Once she has all the information she can get, she writes a report and reaches her conclusions. (TT, pp. 153-155; R., pp. 90-92).

Dr. Gehle testified she had extensive documentation regarding Appellant, and she interviewed him for two hours. The documentation included police reports, prison records, witness statements, sentencing sheets, warrants, and indictments, and Dr. Gehle testified this was

the type of information typically and reasonably relied on by experts in her field. She stated a person's past behavior, sexual or nonsexual, is the best predictor for future behavior because if the person has already engaged in the behavior, it is more likely he will do it again. (TT, pp. 155-157; R., pp. 92-94).

After identifying the documents related to his qualifying sexually violent offenses, Dr. Gehle testified she also considered Appellant's nonsexual offenses to determine the time he was out in the community to actually commit sexual offenses, and how the sex crimes and nonsexual offenses fit together, *i.e.*, common victims, similar elements, etc. For purposes of assessing Appellant's risk to reoffend sexually, Dr. Gehle also considered criminal charges against him that did not result in convictions to determine how those charges fit into the timeline of his convictions, what consequences Appellant faced, and how he conducted himself afterwards. She asked Appellant about those charges during the interview because it was important to hear his version of the events, as well as whether he admits or denies committing the offenses, and see his general attitude toward those offenses. (TT, pp. 157-161; R., pp. 94-98).

Dr. Gehle described Appellant's sexual offenses and other charges associated with those offenses. One thing she looked for in the evaluation process was patterns of behavior, which are essential in assessing future risk, and she testified she found a pattern of extreme hostility toward women, resorting to sexual violence if the victims did not comply with his demands, as well as continuing to offend even in the face of legal sanctions. (TT, pp. 161-175; R., pp. 98-112).

She also considered Appellant's behavior during incarcerations because it was necessary to see how he behaved in a very controlled environment, and any sexually related disciplinary infractions were particularly important to the risk assessment. Appellant's prison records revealed he was disciplined twice for sexually related offenses, which included masturbating in

the recreation yard and grabbing the buttocks of a female staff member. The records also revealed Appellant was offered sex offender specific treatment in prison, but he refused it because it was not mandatory, and he did not believe he needed any treatment. (TT, pp. 175-177; R., pp. 112-114).

Dr. Gehle testified she completed a Static-99R risk assessment, which is an actuarial tool based on research involving thousands of sex offenders, and consists of ten questions related to known risk factors for reoffending sexually. The scores range from negative three to twelve, and Appellant's score was seven, which Dr. Gehle stated is in the high risk category and is higher than 94.9% of the sex offenders included in the research. The assessment only considers risk factors that are static and generally not changeable through treatment, such as the number of convictions. (TT, pp. 178-183; R., pp. 115-120).

Dr. Gehle then testified about dynamic risk factors, which are not factored in the Static-99R and can be changed through treatment, but research shows they are strongly associated with sexual offending. She stated Appellant had many of the known dynamic risk factors, including: 1) hostile beliefs about women; 2) blaming women for all his problems; 3) a long history of violence toward women; 4) sexualized violence; 5) a lack of steady, emotionally intimate relationships with adults not involving hostility and violence; 6) a history of poor problem solving and dealing with problems through violence; 7) resistance to rules and supervision as evidenced by resisting arrest, escape from jail, violating probation and behavioral infractions in prison; 8) attempts to control others through violence; and 9) negative social influences arising from him surrounding himself with people who either help him violate the law or violate it with him. (TT, pp. 183-184; R., pp. 120-121).

Dr. Gehle diagnosed Appellant with Other Specified Personality Disorder, which is used when someone does not meet all the criteria for a specific personality disorder. She testified Appellant has a very antisocial personality and world view, marked by consistent and pervasive history of violating and disregarding the rights of others. She explained a diagnosis of antisocial personality disorder (ASPD) requires evidence the person had conduct problems before the age of fifteen, and she had no records or information regarding Appellant's childhood behavior other than his self-report that he had no behavior problems at all in his life, which lead her to doubt his report, but she still had no evidence. She stated Other Specified Personality Disorder is a diagnosis found in the Diagnostic and Statistical Manual, Fifth Edition (DSM-5), which is the book used by psychiatrists and psychologists for diagnosing mental abnormalities and personality disorders. (TT, pp. 184-186; R., pp. 121-123).

Dr. Gehle testified to a reasonable degree of psychological certainty Appellant's personality disorder affected his emotional or volitional control such that he is disposed to commit future acts of sexual violence, he has serious difficulty controlling his dangerous propensities, and he poses a menace to the health and safety of others. She stated Appellant disregards and violates the rights of others, primarily women, his disorder has manifested itself in sexual violence numerous times, and his score on the Static-99R put him in the high risk to reoffend category. She further testified Appellant was not a candidate for outpatient treatment, he had no probation hanging over his head, and women or girls of any age would be at risk if Appellant was released. (TT, pp. 186-190; R., pp. 123-127).

On cross-examination, Dr. Gehle testified Other Specified Personality Disorder was not a catch-all diagnosis. She stated she believed Appellant has an ASPD, but she could not render that diagnosis without evidence he had a conduct disorder before the age of fifteen. (TT, pp.

192-193; R., pp. 129-130). She stressed that having a mental abnormality or disorder associated with sexual offending does not make a person a sexually violent predator, and each case has to be based on the individual person. (TT, pp. 192-201; R., pp. 129-138).

Dr. Gehle reiterated her diagnosis and opinion regarding Appellant and his risk to reoffend were based on Appellant's pattern of pervasive attitudes, his tendency to blame other people for his problems and refusal to take responsibility for his behavior. She stated he did not show or express any signs of remorse or empathy for others, and he was unable to maintain lawful behaviors or fit in with social norms. (TT, pp. 202-208; R., pp. 139-145).

On re-direct, Dr. Gehle testified she also evaluated Appellant for possible paraphilic diagnoses, and while he met some criteria for a paraphilia, she found no clear pattern in his behavior. As a result, she did not render any paraphilic mental abnormality diagnosis. (TT, pp. 208-210; R., pp. 145-147).

The circuit court denied Appellant's motion for a directed verdict, finding "there is more than sufficient evidence in the record, under the standard of beyond a reasonable doubt," to submit the case to the jury. (TT, pp. 212-217; R., pp. 149-154). The court also denied Appellant's directed verdict motion at the close of the evidence, again finding there was "more than sufficient evidence to carry the State's burden of proof." (TT, pp. 270-271; R., pp. 207-208). The jury found Appellant is a sexually violent predator beyond a reasonable doubt, the court denied his motion for judgment notwithstanding the verdict, and committed Appellant to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 306-310; R., pp. 243-247). This appeal followed.

## ARGUMENT

**The circuit court properly denied Appellant's directed verdict motion because the expert's diagnosis of Other Specified Personality Disorder is recognized in the mental health field, and the credibility of the diagnosis was a matter for the jury.**

Appellant contends the circuit court erred in denying his motion for a directed verdict because the Other Specified Personality Disorder diagnosis is legally insufficient as a basis for commitment under the SVPA because it is not a personality disorder that makes the person likely to engage in acts of sexual violence unless committed. (Brief of Appellant, p. 9). He further contends the State's evidence was insufficient because Dr. Gehle did not diagnose any mental disorder of a sexual nature. To the contrary, Other Specified Personality Disorder is expressly recognized in the DSM-5, Dr. Gehle's testimony sufficiently linked Appellant's personality disorder to his risk to commit future acts of sexual violence, and the SVPA does not require a mental abnormality or personality disorder "of a sexual nature" as a basis for commitment.

The circuit court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference, or its inference is in doubt. Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 781 S.E.2d 737, 741 (Ct. App. 2015) (citing Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439, 440 [1994]). When reviewing the circuit court's ruling on a directed verdict motion, appellate courts must apply the same standard as the circuit court, and view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Id.*; see also State v. Larmand, 415 S.C. 23, 780 S.E.2d 892, 895 (2015) (same).

### A. Other Specified Personality Disorder

Appellant's argument regarding the validity of Dr. Gehle's diagnosis blatantly ignores the fact the DSM-5 not only expressly includes Other Specified Personality Disorder as a valid diagnosis, it explains the circumstances under which a clinician could use the diagnosis.<sup>1</sup> Recognizing the complexity of mental health disorders cannot be reduced to simple summaries of symptoms covering every situation practitioners face, the DSM-5 authors provided two categories designed to "enhance diagnostic specificity."

To enhance diagnostic specificity, DSM-5 replaces the previous NOS [not otherwise specified] designation with two options for clinical use: *other specified disorder* and *unspecified disorder*. The other specified disorder category is provided to allow the clinician to communicate the specific reason that the presentation does not meet the criteria for any specific category within a diagnostic class. This is done by recording the name of the category, followed by the specific reason. For example, for an individual with clinically significant depressive symptoms lasting 4 weeks but whose symptomatology falls short of the diagnostic threshold for a major depressive episode, the clinician would record "other specified depressive disorder, depressive episode with insufficient symptoms."

\* \* \* \*

The symptoms contained in the respective diagnostic criteria sets do not constitute comprehensive definitions of underlying disorders, which encompass cognitive, emotional, behavioral and physiological processes that are far more complex than can be described in these brief summaries. Rather, they are intended to summarize characteristics syndromes of signs and symptoms that point to an underlying disorder with a characteristic developmental history, biological and environmental risk factors, neuropsychological and physiological correlates, and typical clinical course.

\* \* \* \*

Although decades of scientific effort have gone into developing the diagnostic criteria sets for the disorders included in Section II, it is well recognized that this

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<sup>1</sup>Appellant acknowledged at trial the DSM-5 is "an authoritative source." (TT, p. 208; R., p. 145).

set of categorical diagnoses does not fully describe the full range of mental disorders that individuals experience and present to clinicians on a daily basis throughout the world. As noted previously in the introduction, the range of genetic/environmental interactions over the course of human development affecting cognitive, emotional and behavioral function is virtually limitless. As a result, it is impossible to capture the full range of psychopathy in the categorical diagnostic categories that we are now using. Hence, it is also necessary to include “other specified/unspecified” disorder options for presentations that do not file exactly into the diagnostic boundaries of disorders in each chapter.

\* \* \* \*

Following the assessment of diagnostic criteria, clinicians should consider the application of disorder subtypes and/or specifiers as appropriate. Severity and course specifiers should be applied to denote the individual’s current presentation, but only when the full criteria are met. When full criteria are not met, clinicians should consider whether the symptom presentation meets criteria for an “other specified” or “unspecified” designation.

DSM-5, pp. 15-16, 19, 21 (emphasis in original).

In the DSM-5’s personality disorder section, Other Specified Personality Disorder (301.89) is described as “presentations in which symptoms characteristic of a personality disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the personality disorders diagnostic class.” DSM-5, p. 684. “The other specified personality disorder is used in situations when the clinician chooses to communicate the specific reason that the presentation does not meet the criteria for any specific personality disorder.” *Id.* Therefore, contrary to Appellant’s contention, Other Specified Personality Disorder is merely a “catch-all” diagnosis, it is a legitimate diagnosis contained in what Appellant acknowledged is the leading authority used for diagnosing mental health issues, and it is recognized by the vast majority of mental health practitioners.

## **B. Sufficiency of the Evidence**

Appellant encourages this Court to adopt the reasoning of the New York Court of Appeals in State v. Donald DD, 24 N.Y.3d 174 (2014), rejecting the premise that ASPD alone is insufficient to support civil commitment as a sexually predator, and the State's evidence failed to distinguish him from any other person convicted of a violent crime, or establish any link between Dr. Gehle's diagnosis and his risk to reoffend sexually. His argument ignores relevant differences between the New York statute at issue in Donald DD and the SVPA, and is premised on an extremely truncated version of Dr. Gehle's testimony.

### **1. Donald DD**

In Donald DD, the New York Court of Appeals, in a 4-3 decision, held ASPD was legally insufficient to support civil commitment as a sexually dangerous person because it "establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior." As a threshold matter, the New York statute at issue in Donald DD is different from the SVPA. Further, three of the judges joined in a compelling dissent revealing fundamental flaws in the majority opinion's rationale, and recognizing cases from other jurisdictions holding ASPD is a legally sufficient predicate diagnosis for sexual predator proceedings.

One major difference between the New York and South Carolina statutes is the New York law does **not** expressly reference "personality disorder," while South Carolina's statute expressly includes "personality disorder." *Compare* N.Y Mental Hygiene Law §10.03(e) and (i) (2016) (defining "dangerous sex offender requiring confinement" as a person "suffering from a mental abnormality," and "mental abnormality" as "a congenital or acquired condition, disease or disorder" predisposing the person to commit a sex offense) *with* S.C. Code §44-48-30(1)

(Supp. 2015) (defining sexually violent predator as a person who has been convicted of a sexually violent offense and “suffers from a mental abnormality **or personality disorder** that makes the person likely to engage in acts of sexual violence”) (emphasis added). South Carolina’s statute does not limit “personality disorder” in any way, and therefore, any diagnosable personality disorder may serve as a predicate to civil commitment under the SVPA if the other statutory elements are established.

As discussed extensively in the Donald DD dissenting opinion, the majority opinion essentially foreclosed the use of ASPD as a predicate disorder for civil commitment, which improperly narrowed the statutory language, and “implicitly injects a requirement that the underlying disorder be “sexually-related” into [the sexually dangerous person statute] on the mistaken premise that such a requirement is necessary to distinguish an offender subject to civil management from a ‘typical recidivist convicted in an ordinary criminal case.’” 24 N.Y.3d at 196-197 (Graffeo, J., dissenting). Finding the prevalence of ASPD in the general prison population irrelevant, the dissent indicated the State was only required to prove the specific offender’s ASPD affected his emotional, cognitive, or volitional capacity such that it predisposed him to commit sexual offenses and have serious difficulty controlling his sexual impulses. *Id.* at 198. “Although a certain percentage of the incarcerated may meet the diagnostic criteria for ASPD, the disorder concededly manifests in such a manner as to predispose the individual to the commission of sex offenses in a limited subset of ASPD sufferers,” and evidence through expert testimony linking the offender’s ASPD to a predisposition for the commission of sex offenses and an inability to control his conduct sufficiently establishes the statutory mental abnormality requirement. *Id.* at 198-199.

The dissent further noted “courts of other states have upheld civil confinement on an ASPD diagnosis standing alone.” *Id.* at 199 (citations of cases).<sup>2</sup> Additional jurisdictions have also found an ASPD diagnosis is a sufficient mental abnormality to support sexually violent predator determinations when combined with evidence of a nexus between the ASPD and the person’s risk to reoffend sexually. *See Mays v. State*, 982 N.S.2d 387, 392 (Ind. 2014) (expert testimony person suffered from ASPD and was likely to reoffend sexually was sufficient support for sexually violent predator determination); *Commonwealth v. Fuentes*, 991 A.2d 935, 943-944 (Pa. 2010) (ASPD diagnosis sufficient mental abnormality or personality disorder for sexual predator classification); *In re: Care and Treatment of Miller*, 210 P.3d 625, 633-634 (Kan. 2009) (sexually violent predator statute did not require diagnosis of a sex-related mental abnormality or personality disorder, and ASPD with narcissistic personality traits was a sufficient mental abnormality or personality disorder to satisfy element of sexually violent predator definition); *In re: Care and Treatment of Murrell*, 215 S.W.3d 96, 103-108 (Mo. 2007) (ASPD diagnosis qualifies as mental abnormality under sexual predator statute, and is sufficient to support civil commitment when combined with other evidence of sexually violent behavior and predisposition to commit future acts of sexual violence); *In re: Anderson*, 730 N.W.2d 570, 577-582 (N.D. 2007) (sexually violent predator statute does not require sex-related diagnosis, and ASPD diagnosis is sufficient mental abnormality to support SVP determination when combined with evidence of a nexus between the diagnosis and risk to reoffend sexually); *In re: Barnes*, 689 N.W.2d 455, 457-461 (Iowa 2004) (same). In short, the majority of jurisdictions with sexually

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<sup>2</sup>The dissent indicated the majority opinion was really premised on “the majority’s dissatisfaction with the implications of [the sexually dangerous person statute].” *Id.*

violent predator laws have held an ASPD diagnosis is a sufficient mental abnormality or personality disorder for SVP purposes, and no other court has adopted the Donald DD analysis.

The DSM-5 criteria for ASPD requires “evidence of conduct disorder with onset prior to age 15 years.” DSM-5, p. 659. Dr. Gehle testified she believed Appellant probably exhibited signs of a conduct disorder during his childhood in light of his adult criminal history, but she did not have **evidence** he displayed such conduct. Appellant denied having any conduct problems as a child, but he also denied having **any** conduct problems at all in his life, even in the face of his extensive criminal history. Appellant’s parents are deceased, any records of a possible juvenile offense were destroyed, and Dr. Gehle had no one to contact regarding Appellant’s childhood. As a result, Dr. Gehle diagnosed Other Specified Personality Disorder, with the specifier “current evidence of conduct disorder is insufficient.”

This case provides a perfect example of why the authors included Other Specified Personality Disorder in the DSM-5, and when a practitioner should use it. But for the passage of time making records unavailable, and having to rely solely on Appellant’s self-report, which was questionable at best, it is clear Dr. Gehle would have diagnosed Appellant with ASPD. Notwithstanding Appellant’s version of the evidence (discussed below), Dr. Gehle’s testimony detailed the evidence supporting the other ASPD criteria, and Respondent’s documented history fully supports her diagnosis.

## **2. Dr. Gehle’s Testimony**

Appellant summarizes Dr. Gehle’s testimony into six bullet points, citing thirty lines out of approximately sixty-three pages of testimony, asserts those six characteristics apply to almost any person convicted of a violent crime, and then denigrates the basis of her opinion as simply a

dislike of his “attitude.” Appellant takes Dr. Gehle’s testimony completely out of context, and ignores the full substance of her testimony.

After describing Appellant’s sexual offenses, other charges associated with those offenses, and Appellant’s nonsexual offenses, Dr. Gehle testified she found a **pattern of extreme hostility toward women, resorting to sexual violence if the victims did not comply with his demands**, and continuing to reoffend even in the face of legal sanctions. (TT, pp. 161-175; R., pp. 98-112).

She also testified Appellant’s behavior during incarcerations was necessary to evaluate how he behaved in a very controlled environment, and any sexually related disciplinary infractions were particularly important to the risk assessment. Appellant was disciplined twice for **sexually related offenses** in prison, which included masturbating in the recreation yard and grabbing the buttocks of a female staff member. Further, Appellant was offered sex offender specific treatment in prison, but refused it because it was not mandatory, and he did not believe he needed any treatment. (TT, pp. 175-177; R., pp. 112-114).

Appellant’s score on the Static-99R risk assessment was seven, which Dr. Gehle stated is in the high risk to reoffend category, and is higher than 94.9% of the sex offenders included in the research. (TT, pp. 178-183; R., pp. 115-120). She then testified about dynamic risk factors, which are strongly associated with sexual offending. She stated Appellant had many of the known dynamic risk factors, including: 1) **hostile beliefs about women**; 2) blaming women for all his problems; 3) a **long history of violence toward women**; 4) **sexualized violence**; 5) a lack of steady, emotionally intimate relationships with adults not involving hostility and violence; 6) a **history of poor problem solving and dealing with problems through violence**; 7) resistance to rules and supervision as evidenced by resisting arrest, escape from jail, violating probation

(sometimes by committing another sexual offense) and behavioral infractions in prison; 8) attempts to control others through violence (frequently sexual violence); and 9) negative social influences arising from surrounding himself with people who either help him violate the law, or violate it with him. (TT, pp. 183-184; R., pp. 120-121). The “attitude” Dr. Gehle referenced was related to the attitudes Appellant expressed about women and his criminal offenses.

Contrary to Appellant’s assertions, for which he cites no authority, the vast majority of people incarcerated for violent crimes do **not** exhibit all these characteristics, even if they have a full-blown ASPD diagnosis. Someone with ASPD may well have a lengthy criminal history, and may be likely to commit an armed robbery, but may never commit a sexual offense, which removes him from the sexually violent predator arena. On the other hand, some with ASPD, or Other Specified Personality Disorder, like Appellant, may have a pattern of sexual offenses as well as non-sexual offenses. As discussed in the Donald DD dissent, the confluence of ASPD (or as in this case, Other Specified Personality Disorder), and sexual offending is the critical distinction between the routine offender and the sexually violent predator.

As the circuit court found, there was evidence in the record to meet the State’s beyond a reasonable doubt burden of proof. The record amply supports the court’s findings, and its ruling should be affirmed.

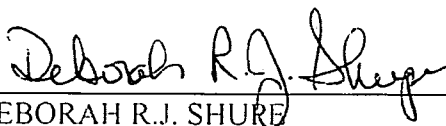
**CONCLUSION**

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 17, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown county  
Honorable Steven H. John, Circuit Court Judge  
Appellate Case Tracking No. 2015-000280

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IN THE MATTER OF THE CARE AND TREATMENT  
OF DARYL T. SNOW,

APPELLANT.

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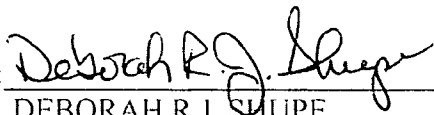
**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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**PROOF OF SERVICE**

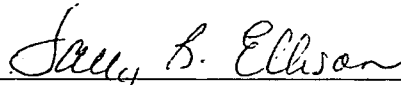
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I, Sally B. Ellison, certify I served the Final Brief of Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

David Alexander  
South Carolina Commission on Indigent Defense  
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I further certify all parties required by Rule to be served have been served.

This 17th day of June, 2016.



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