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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
The Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2015-002122

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

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly allowed the State's expert to testify regarding the results of her May 2015 evaluation of Appellant. (Appellant's Issue I)

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

STATEMENT OF THE CASE

In May 2015, Respondent State of South Carolina filed a Petition pursuant to the Sexually Violent Predator Act, S.C. Code Ann. §§44-48-10-170 (Supp. 2013), seeking Appellant Keith Fitzgerald Burris's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on October 7, 2015, before the Honorable J. Mark Hayes, II, Circuit Court Judge.

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

STATEMENT OF FACTS

In 2014, Appellant was charged with one count of criminal solicitation of a minor, arising from the inappropriate fondling of a ten year old female. On November 13, 2014, he pled guilty as charged in exchange for a negotiated sentence of ten years' incarceration, suspended upon two years' incarceration and five years' probation.

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. (Petition and Exhibits; Record on Appeal [R.], pp. 241-284). The circuit court found probable cause to believe Appellant is a sexually violent predator, and appointed Marie E. Gehle, Psy.D., to evaluate Appellant and render an opinion regarding whether he has a mental abnormality or personality disorder that makes him a risk to re-offend sexually if not confined for treatment.

The case was called for a jury trial on October 7, 2015, before the Honorable J. Mark Hayes, II, Circuit Court Judge. Prior to trial, the State moved to exclude any testimony regarding the location of the SVP treatment facility. Appellant's trial counsel responded without objection. The State also moved to exclude any testimony regarding the treatment Appellant would receive if committed under the SVPA, and indicated Appellant's trial counsel agreed not to bring the issue up during trial. (Trial Transcript [TT], pp. 38-39; R., pp. 33-34).

Appellant's trial counsel moved to exclude any testimony from the State's expert, Marie E. Gehle, Psy.D., regarding Appellant's previous two SVP commitment evaluations and her conclusions Appellant was not a sexually violent predator. The circuit court denied the motion. However, the State agreed not to illicit testimony relating to previous evaluations. (TT, pp. 48-49; R., pp. 43-44).

Appellant's trial counsel also moved to exclude testimony regarding any prior charges not resulting in conviction, and the circuit court heard Dr. Gehle's testimony regarding the prior offenses *in camera*. (TT, pp. 40-51; R., pp. 35-46). Dr. Gehle testified she relies on documents regarding a person's entire criminal history to conduct her evaluation. In this case, she diagnosed Appellant with antisocial personality disorder (ASPD), and testified one of the criteria for this disorder is a pattern of disregard and violation of the rights of others. In reaching her diagnosis, Dr. Gehle considered all prior charges, both sexual and non-sexual, including those that were dismissed or *nolle prossed*. She testified this is the type of information typically and reasonably relied upon by experts in the field of forensic psychology. (TT, pp. 54- 57; R., pp. 47-50).

The court excluded any general testimony regarding Appellant's unconvicted non-sexual charges. The court did allow testimony regarding unconvicted charges if the testimony was premised on statements Appellant made during Dr. Gehle's actual interview of him. (TT, pp. 65-67; R., pp. 58-60).

During its opening statement, the State acknowledged what it had to prove under the SVPA, and its burden to prove it beyond a reasonable doubt. Appellant's trial counsel also emphasized the State's burden of proof during her opening statement. (TT, pp. 75-81; R., pp. 68-74).

Without objection, Dr. Gehle was qualified as an expert in psychology and forensic psychology. She testified she was appointed by the court to evaluate Appellant under the SVPA, and outlined the protocol she follows in pre-commitment evaluations, which includes reviewing all available documents, an interview with the person, some psychological testing, and scoring of an actuarial risk assessment. (TT, pp. 81-88; R., pp. 74-81).

Dr. Gehle testified she had extensive documentation regarding Appellant's background, including police reports, witness statements, booking reports, warrants, indictments, narratives, and incident summaries. She also looked for any psychological or psychiatric records. Additionally, she interviewed Appellant for four and a half hours. She testified this was the type of information typically and reasonably relied on by experts in her field. Dr. Gehle 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.87-89; R., pp.80-82).

Dr. Gehle diagnosed Appellant with Antisocial Personality Disorder (ASPD), and stated it was important to look at his criminal offenses other than his sexual crimes when she diagnosed him with that disorder. She also considered the criteria for conduct disorder, which is a prerequisite for a ASPD diagnosis and includes cruelty to animals. During a four and a half hour interview with Appellant, Dr. Gehle asked him if he had ever harmed animals, and he said he used to tie cats up in sacks and throw them in a creek, which did not bother him. Based on his responses during the interview, Dr. Gehle found Appellant met the criteria for conduct disorder. (TT, pp. 89-90; R., pp. 82-83).

Dr. Gehle testified she also considers substance abuse and history of drinking alcohol as part of her evaluations because it relates to the risk factor of impulsivity. She also considered Appellant's attitude toward women as part of her evaluation. Appellant referred to women as "females," and knew it was demeaning. In addition, Appellant told Dr. Gehle he had never been faithful to a woman, and often slept with four or five women a day on a rotation. Dr. Gehle testified Appellant's attitude and behavior indicated a general disrespect for women. (TT, 91-92; R., pp. 84-85).

Dr. Gehle then testified about Appellant's criminal history and the details of his sexual offenses. She testified the documents she relied on in forming her opinion were the type of documents typically and reasonably relied upon by experts in her field, and it was necessary to examine the underlying details of a sexual crime because they are relevant to forming a diagnosis. (TT, pp. 92-93; R., pp. 85-86).

In 1997, Appellant was charged with criminal sexual conduct with a minor, which arose from Appellant's sexual assault of a thirteen year old female, and he ultimately pled guilty to a lesser charge of assault and battery of a high and aggravated nature (ABHAN). In 2005, Appellant was convicted of three second degree criminal sexual conduct with a minor charges, arising from sexual assaults of a minor female between the ages of twelve and fifteen. In 2014, Appellant was convicted of criminal solicitation of a minor in connection with sexually explicit text messages and photographs he exchanged with a fifteen year old female. While out on bond for that charge, Appellant was charged with criminal domestic violence. (TT, pp. 93-107; R., pp. 86-100).

Dr. Gehle also considered Appellant's prison disciplinary history. While incarcerated, Appellant was convicted of possession or attempt to possess a cellphone, possession of contraband, and abuse of privileges. Dr. Gehle testified these offenses were significant to her diagnosis because they occurred while Appellant was under strict supervision. (TT, pp. 107-108; R., pp. 100-101).

Dr. Gehle stated Appellant completed sex offender treatment while incarcerated on the 2005 convictions. The fact Appellant reoffended sexually after receiving sex offender treatment was an indication the treatment did not work. Dr. Gehle testified Appellant showed no remorse for his actions. (TT, pp. 108-111; R., pp, 101-104).

As part of the evaluation, Dr. Gehle considered the results of a personality assessment Appellant completed during a previous evaluation. The assessment indicated Appellant has "very strong antisocial personality attitudes so the way he looks at the world is very much with an antisocial personality disorder." (TT, pp. 111-112; R., pp. 104-105).

Dr. Gehle also completed the Static99-R, which is a well recognized actuarial recidivism assessment tool. Appellant scored a five on the tool, which put him in the moderate-high risk to reoffend sexually. In addition to the risk factors factored into the Static99-R, Dr. Gehle determined Appellant had several "psychologically meaningful risk factors" relating to sexual reoffending, including: a history of sexual preoccupation; a sexual preference for pubescent females; emotional congruence with minors; a history of sexualized violence; offense supported attitudes; lack of emotionally intimate relationships with adults; lifestyle impulsiveness; poor problem solving abilities; resistance to rules and supervision; grievance and hostility; negative social influences; hostile beliefs about women; Machiavellianism; and a lack of concern for others. (TT, pp. 112-119; R., pp. 105-112).

Dr. Gehle considered various paraphilias and personality disorders in reaching her conclusions. She did not find Appellant had a paraphilia, but did conclude he had ASPD, and testified to a reasonable degree of psychological certainty his ASPD made Appellant likely to engage in future sexually violent offenses. She further testified his ASPD caused Appellant to be a menace to the health and safety of others, caused him serious difficulty controlling his behavior, and made him likely to engage in acts of sexual violence if not confined for long term control, care and treatment. She stated outpatient treatment was not sufficient in light of Appellant's difficulty controlling his behavior even if he was subject to probation and required sex offender treatment as part of his probation. (TT, pp. 119-124; R., pp. 112-117).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator, and the court committed him to the custody of the SC Department of Mental Health for long term control, care and treatment. (TT, p. 199, Order of Commitment; R., pp. 199, 292). This appeal followed.

ARGUMENT

I. The circuit court properly allowed the State's expert to testify regarding the results of her May 2015 evaluation of Appellant. (Appellant's Issue I)

Appellant contends the circuit court erred in allowing Dr. Gehle to testify regarding her opinion of Appellant's ASPD because it was premised on testing from her 2012 evaluation of Appellant. While Dr. Gehle did review documentation from the 2012 evaluation, including the personality assessment, the opinion she testified to at trial was premised on the full evaluation she conducted in 2015.

A cursory comparion of Dr. Gehle's 2012 evaluation report and her 2015 trial testimony reveals significant differences between them. (TT, pp. 82-124; Defendant's Exhibit 1 (for ID purposes); R., pp. 75-117, 209-238). As a threshold matter, the 2012 evaluation did not consider any information regarding Appellant's 2014 criminal solicitation of a minor conviction for the obvious reason the information did not exist in 2012. Further, all the documentation from Appellant's offenses prior to 2012 did not change from 2012 to 2015, and Dr. Gehle properly reviewed all that documentation as part of the 2015 evaluation.

Appellant's reliance on In the Matter of the Care and Treatment of Taft, 413 S.C. 16, 774 S.E.2d 462 (2015), is misplaced. The expert in Taft "expressly testified that he '[did not] have the personal contact and the personal interview that [he] would need to do to form a current and active opinion' because 'to be able to say whether [Taft] is a sexually violent predator now, [he] would have to be able to evaluate [him],'" and "admitted on cross-examination that 'as of [that day] he could not give an opinion as to whether or not [Taft] is a sexually violent predator.'"

Id. at 466 (alterations in original).[1]

Unlike the expert in Taft, Dr. Gehle had the personal contact and personal interview necessary to render an opinion as to Appellant's "present" mental status. Also contrary to Taft, Dr. Gehle testified to a reasonable degree of psychological certainty Appellant had ASPD and was a significant risk to reoffend sexually **as of the date of trial** in 2015. Simply stated, the analysis in Taft does not apply to this case.

[1]The State had an expert ready to testify who evaluated Taft two months prior to trial, but his testimony was excluded.

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

Appellant contends trial counsel was ineffective as a matter of law, specifically by failing to introduce evidence of treatment (Issue II), moving to exclude Dr. Gehle's previous evaluation of Appellant (Issue III), and failing to make a Batson[2] motion challenging the State's jury strikes (Issue IV). He further asserts his alleged ineffectiveness should be determined in this direct appeal, asking this Court to ignore long standing issue preservation precedent, and essentially apply a plain error standard of review to decide the issues anyway, all without affording trial counsel an opportunity to be heard. Further, assuming the right to effective assistance of counsel in SVPA cases, there is a well-established and available mechanism for him to raise ineffective assistance of counsel issues arising from a sexually violent predator case.

A. Effective Assistance of Counsel in SVPA Cases

Appellant argues, extensively, that in addition to the statutory right to counsel, there is a due process right to effective assistance of counsel in SVPA cases under the federal and state constitutions. The South Carolina Supreme Court has already determined a person the State seeks to commit under the SVPA has no Sixth or Fourteenth Amendment right to counsel, but does have a statutory right to counsel under S.C. Code Ann. § 44-48-90 (2003). In re McCoy, 360 S.C. 425, 602 S.E.2d 58, 59 (2004)[3]; *see also* In re McCracken, 346 S.C. 87, 551 S.E.2d

[2]476 U.S. 79 (1986)

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

235, 240 (2001) (the only right to counsel under the SVPA is the statutory right to the assistance of appointed counsel).

The primary issue, therefore, is whether the statutory right under the SVPA encompasses the right to "effective" assistance of counsel.[4] The statute does not afford that right, normally arising from the Sixth, Fifth and Fourteenth Amendments, which do not apply to civil cases under the SVPA. In essence, Appellant is attempting to put a square peg in a round hole, and asks this Court to juxtapose post-conviction relief (PCR) rights and procedures on SVPA proceedings, minus the inconvenience of providing a record for meaningful appellate review.

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

The South Carolina Constitution provides the "privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it." S.C. Const., Art. 1, §18. Habeas corpus **is** available when other remedies, such as PCR, are inadequate or unavailable. Hamm v. State, 403 S.C. 461, 744 S.E.2d 503, 504 (2013); *see also* Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600, 602 (2008) ("a writ of habeas corpus is reserved for the very gravest of constitutional violations which, in the setting, constitute a denial of fundamental fairness shocking to the universal sense of justice"); McWee v. State, 357 S.C. 403, 593 S.E.2d 456, 457 (2004) (habeas relief will only be granted under

[4]Appellant accurately notes this very issue is currently pending before the Supreme Court in another SVPA case, which has been fully briefed and argued.

"unique and compelling circumstances"); Butler v. State, 302 S.C. 466, 397 S.E.2d 87, 88 (1990) ("[N]ot every intervening decision, nor every constitutional error at trial will justify issuance of the writ.") (internal quotations and citations omitted). The PCR statute superseded habeas corpus for post-conviction relief, but the common law privilege still exists, and Appellant cites no cases to the contrary. As noted above, the SVPA does not provide a process for litigating ineffective assistance of appointed counsel, and therefore, if the Court holds the SVPA statutory right to counsel includes effective assistance of counsel, habeas corpus is available to address those issues.

In Hamm, a SVPTP resident filed a habeas petition in the South Carolina Supreme Court seeking release from his civil commitment under the SVPA, alleging counsel in his criminal case was ineffective under Padilla v. Kentucky, 559 U.S. 356 (2010, by failing to advise him of the SVPA implications before he pled guilty to the predicate SVPA offense.[5] The Court denied the petition, finding the resident failed to file a timely PCR petition on the issue, and therefore, failed to exhaust all available remedies before seeking habeas relief. Hamm at 504.

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

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

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

Of particular note is Appellant's request for relief as to each ineffective assistance allegation – remand to the circuit court for a hearing to develop the issues. South Carolina appellate courts unquestionably have discretion to remand any case to the trial court for further proceedings, but there is no established precedent in South Carolina providing for remand **only** to develop issues raised for the first time on direct appeal when the party has another available avenue, such as habeas corpus, to raise those issues. Remanding under the circumstances of this case essentially eviscerates issue preservation and imposes a plain error standard of review.

In Manning v. State, 913 So.2d 37 (1st Dist Fla. Ct. App., 2005), the court determined habeas corpus, rather than direct appeal, was the appropriate avenue to develop and decide a committee's ineffective assistance of counsel claims in cases under Florida's sexually violent predator statute, even though a habeas proceeding might not be the most convenient process. Subsequent to the Manning case, the Florida Supreme Court promulgated Rule 4.460, Florida

Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, which expressly provides habeas corpus is an available mechanism to raise ineffective assistance of counsel claims in sexual predator cases. Bohner v. State, 157 So.3d 526, 527 (1st Dist. Fla. Ct. App., 2015).

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

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

As to Appellant's specific allegations of ineffective assistance, responding to such allegations without counsel's input, which are still protected by the attorney/client privilege,

requires the State to speculate regarding matters outside the record, such as counsel's interaction with her client, and her strategic decisions at trial. With that limitation in mind, the State submits each specific allegation is meritless.

B. Evidence Regarding Treatment (Appellant's Issue II)

Appellant asserts trial counsel was ineffective by essentially acquiescing to the State's motion to exclude inquiry regarding where Appellant would be housed and what type of treatment he would receive if committed, and by failing to ask Dr. Gehle questions about the treatment. Both assertions focus on one word in the statue rather than the statute as a whole, and are meritless.

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

The location of the secure facility and the efficacy of the treatment provided there are absolutely irrelevant during an SVPA commitment trial, and any evidence regarding them is potentially confusing for the jury and inadmissible. The State sought to exclude such evidence in this case because respondents in SVPA cases routinely elicit testimony revealing the SVP treatment program is currently located in the former "death row" at Broad River Correctional Institution, and attacking the treatment provided there, in order to focus the jury on those

irrelevant issues. By agreeing not to offer clearly irrelevant evidence and needlessly complicate the trial, trial counsel acted ethically, which is not ineffective assistance of counsel.

Appellant contends counsel should have pursued this issue because the word "treatment" was used repeatedly during the trial, including opening statements, Dr. Gehle's testimony, closing arguments and the jury charges. This contention fails to consider the context of the references to treatment.

As noted above, one of the elements the jury had to find beyond a reasonable doubt was whether Appellant was likely to reoffend **if not confined** for treatment. When the treatment references are considered in context, it is clear they went directly to that element, and had nothing to do with either the location of the facility or the efficacy of the treatment provided there.[6]

<u>C. Evidence of Appellant's Prior Evaluation (Issue III)</u>

Appellant argues counsel was ineffective by moving to exclude evidence regarding Dr. Gehle's 2012 evaluation of Appellant. Counsel argued allowing the jury to know Appellant had previously been evaluated under the SVPA would be prejudicial. (TT, pp. 44-49; R., pp. 39-44).

This allegation starkly reveals the danger of attempting to decide an ineffective assistance of counsel claim on direct appeal. Trial counsel clearly made a strategic decision regarding how to handle the fact Appellant was previously evaluated under the SVPA, and the Court cannot analyze that decision on the current record. The fact appellate counsel may have handled the issue differently does not lead to the conclusion trial counsel was ineffective. *See* <u>State v. Van Cleave</u>, 239 Kan. 117, 516 P.2d 580 (1986) (when making ineffective assistance of counsel

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

claims, it is incumbent on appellate counsel to do more than read the record and decide how he would have handled the case differently; contacting defense counsel and the prosecutor would seem to be the minimum investigation required to lodge a charge of ineffective assistance of counsel; asserting a claim of ineffective assistance of counsel without any independent inquiry and investigation other than reading the record is questionable to say the least). In the event the Court decides to address the issue in this appeal, however, Appellant cannot show counsel was ineffective, or that the requested limitation regarding the 2012 evaluation was so prejudicial it likely affected the jury's verdict, particularly in light of other evidence in the record.

D. Failure to Make Batson Motion (Issue IV)

Appellant asserts trial counsel was ineffective by failing to make a Batson motion after the State exercised all its preemptory jury strikes on female jurors, claiming the strikes were "obviously gender-based," and counsel should have moved to quash the jury panel. This assertion blatantly ignores evidence in the record regarding the jury selection process.

While pointing to the State's strikes as gender-based and discriminatory, Appellant fails to acknowledge that all of his jury strikes were also against females, and further, were all black females. (Voir Dire/Batson Sheet dated October 7, 2015, York Circuit Court Random Strike Sheet in 2015-CP-46-0758; R., pp. 195-196). Therefore, if discrimination was truly an issue in this case, and trial counsel had moved to quash the jury based on the State's strikes, it is highly likely Appellant would have faced a cross-Batson motion based on gender **and race** discrimination.

In addition, there may be completely gender and race neutral reasons for the strikes by both the State and trial counsel, but finding what those reasons might be requires rank

speculation. In short, there simply is no evidence a Batson motion was warranted in this case, much less that the strikes so impacted the ultimate verdict as to render it invalid.

Trial counsel is an experienced trial attorney, who handles many SVPA cases and is obviously familiar with the Rules of Evidence, and her performance at trial establishes she knew how to present Appellant's case. An adverse jury verdict does not indicate counsel was ineffective, and the record simply does not support any of Appellant's ineffective assistance claims.

CONCLUSION

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

Respectfully submitted,

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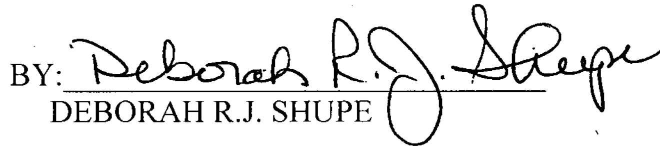
BY: 
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IN THE MATTER OF THE CARE AND TREATMENT OF
KEITH FITZGERALD BURRIS,

Appellant.

CERTIFICATE OF COUNSEL

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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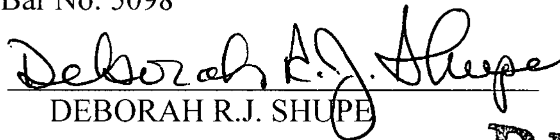
By: 
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