

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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IN THE MATTER OF THE CARE AND  
TREATMENT OF CHRISTOPHER BUSCH,

APPELLANT

APPELLATE CASE NO 2017-000987

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ANDERS BRIEF OF APPELLANT

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RECEIVED  
JAN 17 2018  
SC Court of Appeals

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**STATEMENT OF ISSUE ON APPEAL**

In this sexually violent predator case, whether the trial judge erred in refusing to grant appellant's directed verdict motion because the State's expert testified appellant only had an eleven percent chance of reoffending within five years and therefore the State failed to satisfy the likely-to-reoffend element of the statute?

## STATEMENT OF THE CASE

The Attorney General instituted this civil commitment proceeding pursuant to the Sexually Violent Predator Act and on March 27, 2017, appellant was tried in Dorchester County.

R. 1. The Honorable Diane Schafer Goodstein presided over the jury trial. R. 1. Christopher Andrew Morrow and James G. Bogle, Jr. represented the State. R. 1. James K. Falk represented appellant. R. 1. The jury found appellant was a sexually violent predator. R. 238, l. 18 – 239, l.

8. This appeal follows.

## ARGUMENT

In this sexually violent predator case, the trial judge erred in refusing to grant appellant's directed verdict motion because the State's expert testified he only had an eleven percent chance of reoffending within five years and therefore the State failed to satisfy the likely-to-reoffend element of the statute.

The State's sole witness was Dr. Marie E. Gehle. R. 74, ll. 22 – 25. The Department of Mental Health employed Dr. Gehle as a clinical psychologist. R. 75, ll. 7 – 14. The court qualified her as an expert in forensic psychology without objection from the defense. R. 79, ll. 6 – 23. Dr. Gehle was ordered by the court to evaluate appellant for commitment under the sexually violent predator act. R. 80, ll. 2 – 4.

Dr. Gehle reviewed records provided by the Attorney General and interviewed appellant for "about three hours." R. 80, l. 5 – 81, l. 18. She diagnosed appellant with pedophilic disorder and exhibitionistic disorder. R. 101, ll. 18 – 22. She opined appellant met the criteria for commitment. R. 135, ll. 9 – 14. She testified that outpatient treatment would be insufficient and that appellant needed to be confined. R. 136, ll. 11 – 18.

Dr. Gehle used an actuarial risk assessment called the Static-99R. R. 127, ll. 16 – 18. The Static-99R computes a score based on the number of offenses calculated by the psychologist. R. 127, l. 16 – 130, l. 8. The score then gives a percentage chance to reoffend based on data collected by researchers on a population of sex offenders. R. 127, l. 16 – 130, l. 8.

Dr. Gehle determined appellant's score on the Static-99R was "four." R. 129, ll. 14 – 15. She explained what this score meant in terms of appellant's risk to reoffend: "And on average, if you look at the group that has a score of four on this instrument, 11 percent of them go on to reoffend within five years." R. 129, ll. 16 – 22.

On cross-examination, Dr. Gehle agreed that the likelihood of reoffending was part of the statutory definition of a sexually violent predator. R. 157, ll. 4 – 9. She agreed that similarly situated sex offenders only reoffend at an 11% rate. R. 157, ll. 10 – 14. When asked if 11% was “likely,” Dr. Gehle could only respond, “In this case, that’s the opinion that I came to.” R. 157, ll. 15 – 18.

Appellant moved for a directed verdict. R. 194, l. 9 – 195, l. 11. Appellant argued a risk of 11% was insufficient to satisfy the likelihood of reoffending element as a matter of law. R. 194, l. 9 – 195, l. 11. The State argued the Static-99R was only part of a larger evaluation and sufficient evidence existed to send the case to the jury. R. 195, l. 17 – 196, l. 3. Judge Goodstein agreed with the Attorney General and denied the directed verdict motion. R. 196, ll. 6 – 15.

The court erred in not granting a directed verdict. The State bears the burden of proving a defendant meets each element of the definition of a sexually violent predator beyond a reasonable doubt. S.C. Code Ann. § 44-48-100(A). “‘Likely to engage in acts of sexual violence’ means the person’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.” S.C. Code Ann. § 44-48-30(9). The statute does not further define “likely.”

The State in this case failed to prove beyond a reasonable doubt that appellant was likely to reoffend sexually unless confined. In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) (reversing denial of directed verdict on appeal). A directed verdict should be granted if the State’s evidence only raises a suspicion that a defendant will reoffend. See id. at 22, 774 S.E.2d at 465.

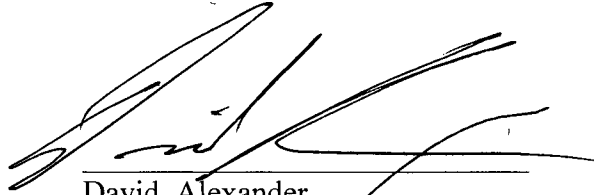
The beyond a reasonable doubt standard is more rigorous than the preponderance of the evidence standard. Judges in this state frequently define the preponderance standard by asking juries to imagine the scales of justice, even at the beginning of the case, tipping ever so slightly

one way or another. This standard implies a numerical value of 51%. Therefore, the beyond a reasonable doubt standard necessarily must be a percentage greater than 51% if assigned a numerical value.

Here, the numerical value given appellant's likelihood to reoffend was only 11%. An 11% value on this important element of the statute could not even satisfy the preponderance standard, much less the beyond a reasonable doubt. Proof beyond a reasonable doubt means jurors must be "firmly convinced" of the proposition and it must eliminate any "real possibility" of the opposite proposition. See State v. McHoney, 344 S.C. 85, 98-99, 544 S.E.2d 30, 36-37 (2001) citing Victor v. Nebraska, 511 U.S. 1 (1994). An 89% chance that appellant would not reoffend is far more than a real possibility. As a matter of law, appellant was entitled to a directed verdict because the State's burden of proof failed on this critical element. This Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should reverse appellant's commitment and order his immediate release from confinement.

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

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2018.

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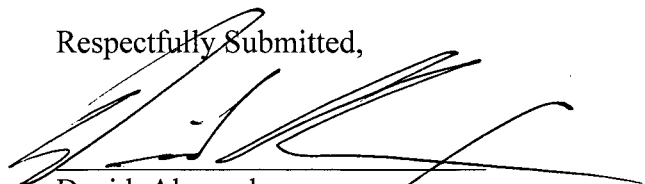
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Busch states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Diane Schafer Goodstein, which was held on March 27, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Christopher Busch.

Respectfully Submitted,



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 17th day of January, 2018.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL** SC Court of Appeals

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Appellant proposes the following be included in the Record on Appeal:

- (1) Entire trial transcript;
- (2) Court's Exhibits No. 1 and 2.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 17, 2018



David Alexander  
Appellate Defender

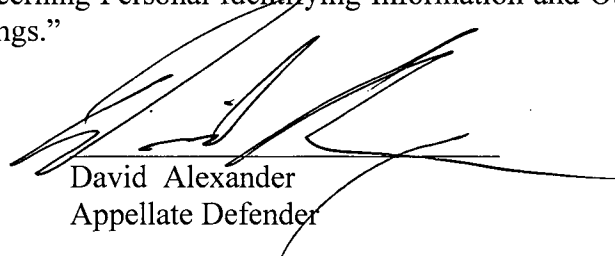
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ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

January 17, 2018.



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Appellate Defender

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CERTIFICATE OF SERVICE

\_\_\_\_\_  
The undersigned hereby certifies that a true copy of the Anders 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 Anders Brief of Appellant and Designation of Matter have been served on Christopher Busch at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 17th day of January, 2018.

  
\_\_\_\_\_  
David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 17th day of January, 2018.

Heather Henderson (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.