STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals

Honorable Steven H. John, Circuit Court Judge

Opinion No. 2017-UP-009 (S.C. Ct. App. Filed January 11, 2017)

2013-CP-22-468

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

PETITIONER

APPELLATE CASE NO. 2017-001033

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in holding that, in an SVP case, the State's expert's diagnosis of "Other Specified Personality Disorder," and no mental abnormality, paraphilia, or any specific personality disorder, was legally sufficient for commitment and this Court should reverse the trial judge's denial of a directed verdict and JNOV?

STATEMENT

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

On February 9, 2015, petitioner 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 petitioner. R. 1. The jury found petitioner was a sexually violent predator. R. 243, ll. 15 – 21. Judge John ordered petitioner committed. R. 246, l. 7 – 247, l. 6. On January 11, 2017, a panel of the Court of Appeals consisting of Judges Williams, Thomas, and Geathers affirmed petitioner's commitment without oral argument. App. 1-2. On March 27, 2017, the Court of Appeals denied the petition for rehearing. App. 10. On January 12, 2018, this Court granted the petition for certiorari and this brief follows.

ARGUMENT

The Court of Appeals erred in holding that, in an SVP case, the State's expert's diagnosis of "Other Specified Personality Disorder," and no mental abnormality, paraphilia, or any specific personality disorder, was legally sufficient for commitment and this Court should reverse the trial judge's denial of a directed verdict and JNOV.

Introduction

Daryl Snow's case presents a stark test of the limit of the power of the State. Despite the availability of laws to punish recidivist criminals, the State used a psychologist's diagnosis of "Other" to confine Daryl Snow as an SVP after he completed his criminal sentence. The State claims nearly unlimited power in this regard—in its Return to the Petition for Certiorari, the State wrote that "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." State's Ret. Pet. Cert. at 14 (emphasis in original). This Court should reject the State's overreach and hold that the diagnosis in this case of "Other" is insufficient. Petitioner is a recidivist criminal and the State's diagnosis of "Other" does nothing to distinguish him from any other recidivist criminal. This Court should not accept the State's invitation to medicalize virtually all criminality. If the SVP statute can confine Daryl Snow, then it can confine anyone as long as they have a qualifying conviction.

Daryl Snow's Criminal History

Daryl Snow has a bad criminal record. R. 363-373. His NCIC report is ten pages long. R. 363-73. He has multiple arrests and convictions for crimes large and small. R. 363-73. His record includes disorderly conduct, hindering an officer, simple assaults, criminal domestic violence, and reckless driving. R. 363-73. It also includes very serious crimes like burglary, kidnapping, and

criminal domestic violence of a high and aggravated nature. R. 363-73. Snow's qualifying convictions for the SVP statute were assault with intent to commit criminal sexual conduct from 1996 and lewd act on a minor child in 2006. R. 94, l. 3 – 95, l. 16.

It seems clear that at the time of Snow's convictions in 2006, the State could have sought a sentence of life without parole under South Carolina's recidivist statute. See S.C. Code Ann. § 17-25-45(A). In 2004, the State charged Snow with first-degree burglary and first-degree assault with intent to commit criminal sexual conduct. R. 250. Had Snow been convicted of either of these crimes, they would have qualified as "most serious offenses," just as Snow's kidnapping and assault with intent to commit CSC convictions from 1996 were "most serious offenses." See S.C. Code Ann. § 17-25-45(A). It is likely that even Snow's guilty plea to second-degree burglary could have triggered the LWOP statute. Id. R. 250. The State chose not to pursue LWOP and accepted guilty pleas for lewd act and second-degree burglary, resulting in a fifteen-year sentence for Snow. R. 250. At the conclusion of his sentence, the Attorney General sought Snow's indefinite confinement in the SVP program. R. 248.

The Attorney General's Evidence

In its opening statement, the Attorney General declined to tell the jury what personality disorder they were going to prove Snow had. R. 76, l. 23 – 80, l. 18. The Attorney General told the jury they would have to prove he had a mental condition that made Snow likely to reoffend. R. 79, ll. 4 – 7. They told the jury they would hear from Dr. Marie Gehle ("Gehle") who evaluated Snow to "see if he had this mental condition, this abnormality or personality disorder that would make him likely to reoffend . . . and I'll tell you up front that she diagnoses him with a personality disorder that, in her opinion, makes him likely to reoffend unless he is confined for treatment." R. 79, l. 19 – 80, l. 7 (emphasis added). At no point in the Attorney General's opening did he specify Snow's

alleged personality disorder was "Other." R. 76, l. 23 – 80, l. 18. The jury only head the "Other" diagnosis after Dr. Gehle described the sordid details of Snow's crimes. R. 122, ll. 2 – 5.

Dr. Gehle first described her work. R. 90, l. 15 – 94, l. 2. She began with a "packet of information" that she reviewed for "patterns" and to "see what the mental abnormality or personality disorder might be. . . ." R. 90, ll. 17 – 25. She described the goal of her evaluation was to see if Snow was "at risk to commit another sexually violent offense." R. 90, l. 24 – 91, l. 2. She reviewed records and tried to "gather anything that's missing," such as mental health records. R. 91, l. 3 – 92, l. 9.

She interviewed Snow for two hours. R. 92, ll. 16 – 18. Dr. Gehle said as part of her interview that she does a detailed sexual history, including asking about masturbation and what the subject finds arousing. R. 91, ll. 16 – 21. Despite this detailed sexual history, Dr. Gehle never connected Snow's sexual arousal patterns to his crimes and could not diagnose him with any paraphilias, such as pedophilia or biastophilia, "a disorder . . . associated with committing rape." R. 146, l. 2 – 147, l. 4. Snow's sexual offenses "were very different" from each other. R. 146, ll. 15 – 17. The patterns of Snow's behavior were not "strong enough" to diagnose any paraphilia. R. 146, l. 2 – 147, l. 4. R. 129, ll. 17 – 19.

Dr. Gehle gave her diagnosis: **"Well, I diagnosed him with something called Other Specified Personality Disorder, and that disorder is a personality disorder when you can't meet all the criteria for a specific personality disorder."** R. 122, ll. 2 – 5 (emphasis added). She explained that closest she could come to a specific personality disorder was Antisocial Personality Disorder ("ASPD"), but she "didn't have enough evidence." R. 122, l. 22 – 123, l. 4. To make the diagnosis of ASPD, she needed evidence of conduct disorder prior to age fifteen,

but she did not have such evidence. R. 122, l. 22 – 123, l. 4. "Other" was the only diagnosis given Snow. Dr. Gehle claimed it was not a "catch-all." R. 130, ll. 13 – 21.

Dr. Gehle said Snow had "a very anti-social personality, and a very anti-social world view, and that's marked by just a consistent pervasive history of violating and disregarding the rights of others." R. 122, ll. 7 – 11. Dr. Gehle opined that Other Specified Personality Disorder made Snow 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 responded with conclusory, affirmative answers to the Attorney General's boilerplate questions taken from the statute and the caselaw. R. 124, l. 6 – 125, l. 16.

Dr. Gehle also based her opinion on Snow's score on the Static-99R, an actuarial risk assessment developed primarily in Canada. R. 115, l. 5 – 120, l. 4. She called the Static-99R "the best predictor of sexual recidivism" and placed Snow in the "high risk category." R. 117, l. 4 – 119, l. 8. The Static-99R predicted that persons with Snow's score reoffended sexually at a 30.6% rate within five years and a 39.7% rate within ten years. R. 119, ll. 3 – 8. The five-year recidivism rate for **all inmates** released by SCDC for 2012, the last year available, was **slightly higher** than the Static 99-R's predicted rate for Snow, at 30.9%.[1]

Dr. Gehle 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?

[1]This data is from the Department of Corrections' website. http://www.doc.sc.gov/research/SpecialReports/RecidivismRatesOfInmatesReleasedDuringFY2010-FY2014.pdf.

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. Avoidant Personality Disorder is "a pattern of social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation." DSM-V, at p. 645. 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. Dependent Personality Disorder is "a pattern of submissive and clinging behavior related to an excessive need to be taken care of." DSM-V, at p. 645. She agreed that the DSM-V 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 DSM-V also specifically lists Obsessive-Compulsive Disorder, Histrionic Personality Disorder, and Narcissistic Personality Disorder, among others. DSM-V at p. 645.

On cross-examination, Dr. Gehle testified that she did not even need evidence of Snow's qualifying sexual offenses to diagnose him with ASPD. R. 138, l. 6 – 143, l. 6. In response to a hypothetical, Dr. Gehle testified that even if petitioner did not have any sexually violent convictions, her diagnosis would not change. R. 138, l. 6 – 143, l. 6. She did, however, agree that she would not be testifying about her diagnosis if Snow lacked any qualifying offenses. R. 144, ll. 4 – 9.

The Directed Verdict Motion

The Attorney General rested after Dr. Gehle's testimony. R. 149, ll. 18 – 19. Snow moved for a directed verdict. R. 150, ll. 18 – 20. Snow argued that the Attorney General 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 Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) and Kansas v. Crane, 534 U.S. 407 (2002), Snow 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 Snow 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. Snow 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 petitioner ten days to make his JNOV motion. R. 244, l. 16 – 245, l. 3. Rule 50(e), SCRCP.

The Decision of the Court of Appeals

The Court of Appeals affirmed in an unpublished opinion without oral argument. App. 1-2. The court treated Snow's case as a run-of-the-mill sufficiency of the evidence case and failed to address petitioner's legal and constitutional arguments. App. 1-2. The court failed to cite, distinguish, or address petitioner's principal case. App. 1-2. The petition for rehearing again brought Snow's legal and constitutional arguments to the court's attention. App. 3-8.

Discussion

The State's diagnosis of "Other" did nothing to differentiate petitioner from any other dangerous recidivist. The State's diagnosis was too general to demonstrate Snow's alleged personality disorder was the cause of his risk to commit another sex crime as opposed to any other crime. Dr. Gehle admitted she lacked the evidence necessary to diagnose petitioner with a named personality disorder in the DSM-V, ASPD—which itself is controversial because it describes almost everyone in prison. Because the State's diagnosis fails to even meet the low threshold of an ASPD

diagnosis which has been held legally insufficient, the lower court erred in not granting Snow a directed verdict.

The diagnosis the State wanted to prove, but could not—ASPD—is heavily criticized because of its failure to sufficiently differentiate potential SVPs from other recidivists. See State v. Donald DD., 24 N.Y.3d 174 (2014). In Donald DD., the New York Court of Appeals recognized 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. Donald DD., 24 N.Y.3d at 190-92. The New York high court relied on the Due Process Clause and the United States Supreme Court's decisions in Kansas v. Hendricks, 521 U.S. 346 (1997) and Kansas v. Crane, 534 U.S. 407 (2002). The Fourth Circuit also has criticized the use of antisocial personality disorder for sex offender commitment. United States v. Antone, 742 F.3d 151, 169-70 (4th Cir. 2014) ("What's more, Antone's civil commitment is based on two mental disorders that are undisputedly prevalent in the nationwide prison population.").

In Hendricks, Justice Anthony Kennedy provided the fifth vote in the 5-4 decision of the 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. Hendricks, 521 U.S. at 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).

This Court interpreted Crane in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). This 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, this 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) (emphasis added).

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 petitioner'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.

By definition, everyone who is convicted of a criminal offense disregards the rights of others. Dr. Gehle's opinions linking "Other" to Snow's lack of self-control were given only in a conclusory manner. Despite her intense questioning during her interview with Snow about his arousal patterns, Dr. Gehle never linked his sexual urges to his crimes. Her general statement about disregarding the rights of others is true about every single crime and says nothing about petitioner's supposed mental disorder or his ability to control his impulses with respect to sex. See State v. Frank P., 2 N.Y.S.3d 483, 493 (App. Div. 2015) (finding government failed to prove defendant had serious difficulty controlling his behavior because of the "conclusory fashion" of the expert opinions).

In fact, the State presented no evidence of any mental disorder of a sexual nature at all. Dr. Gehle could not diagnose petitioner 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 petitioner'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 petitioner with any personality disorder. The closest she could come was Antisocial Personality Disorder, but petitioner 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."

The Donald DD. Decision and its Applicability

The personality disorder which Dr. Gehle wanted to use, but admitted she could not—Antisocial Personality Disorder—was been held legally insufficient in Donald DD. 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 difficult 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 petitioner, 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. Petitioner urges this Court to adopt the New York Court of Appeals' reasoning in Donald DD. See also State v. Dennis K., 27 N.Y.3d 718 (2016) (reaffirming specific holding of Donald DD. and holding that defendants' diagnoses of ASPD coupled with other personality disorders were sufficient for commitment). But see Commonwealth v. George, 76 N.E.3d 217, 336 n.5 (Mass. 2016) (rejecting Donald DD. analysis).

The State's case against petitioner is even weaker than the evidence in Donald DD. Unlike in Donald DD, Dr. Gehle could not even give petitioner 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 petitioner with antisocial personality disorder, cannot suffice to commit petitioner indefinitely. While Dr. Gehle was at pains to contest the description of "Other" as a "catch-all," her conclusion ignores the reality that this catch-all exists primarily because of the **rejection** of diagnoses for inclusion in the DSM-V. Cia Bearden, Comment and Note, The Reality of the DSM in the Legal Arena, 13 Hous. J. Health L. & Pol'y 79, 94-95 (Fall 2012). Dr. Allen Frances was the editor of the DSM-IV. Id. at 88. Dr. Frances "has pointed out that certain catch-all diagnoses that have created the most controversy in legal proceedings are actually included as a result of their not being generally accepted by the scientific and psychiatric community." Id. at 94-95. This Court should reject the State's use of this catch-all diagnosis in this case.

The reasons used by Dr. Gehle are precisely the general conclusions that do nothing to distinguish petitioner 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 petitioner'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. She also agreed that Snow's sexual convictions **were not even necessary to her diagnosis.** R. 138, l. 6 – 143, l. 6. Nothing in this analysis distinguishes petitioner from any other recidivist and the State failed to link Snow's risk of reoffending sexually to its general diagnosis having nothing to do with sex.

Simply because the State's expert used terms from the DSM to label petitioner does not mean they pass constitutional muster. The American Psychiatric Association has "vociferously opposed SVP laws since their enactment." Diedre M. Smith, Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment, 67 Okla. L.Rev. 619, 623 (2015). "SVP commitment, by contrast, is generally based upon diagnoses, such as pedophilia and ASPD [antisocial personality disorder], that are among the most controversial, and that have the most questionable validity, of all the mental disorders in the DSM." Id. at 688-96 (internal quotations omitted). Professor Smith particularly criticizes the practice of using the "other" / "not otherwise specified" category, writing that it "has offered legislators and mental health professionals carte blanche to invent criteria by which to deprive sex offenders of their freedom after they have completed their sentences." Id. at 689.

The Due Process Clause imposes limits on the nebulous reach of psychology to confine persons against their will. This case provides this Court with the ability to draw a line against vague diagnoses that describe nearly every prisoner—whether or not he is a sex offender. 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 Question Presented is Legal, Not One of Weight

The Court must restrict the general diagnosis used in this case both as a matter of law and as-applied to Snow. Implicit in the Attorney General's argument that any personality disorder diagnosed by an expert is sufficient to create a jury question implies that the issue presented is one of weight, not law. As this Court's recent directed verdict jurisprudence in criminal cases makes clear, we are reluctant to take cases from juries. See, e.g., State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). However, the Court's directed verdict standard—that of sufficient evidence for a reasonable juror—presents problems in an SVP trial because of their potential for unfairness.

The directed verdict standard is premised on the hypothetical, objective reasonable juror. However, we know as a matter of law that juries tend to not be objective or reasonable when evidence of a defendant's prior bad acts are admitted—especially when crimes against children are admitted. See State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). In Nelson, this Court reversed because character evidence portraying the defendant as pedophile with a propensity to molest children was improperly admitted. Id. at 6-15, 501 S.E.2d at 718-23. Among the evidence was the defendant's membership in the "Punky Brewster" fan club. Id. The admitted

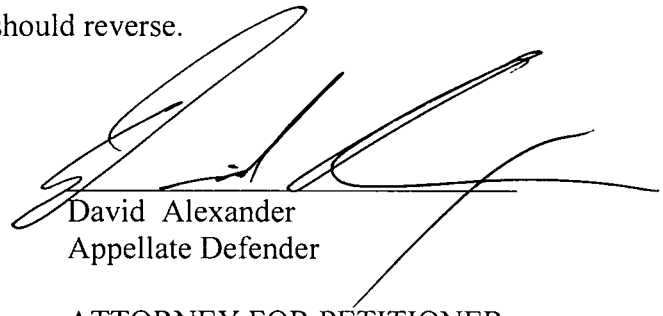
evidence was so prejudicial that the Court concluded that the defendant did not receive a fair trial from the jury. Id.

An SVP trial is only about propensity evidence. The jury hears the details of prior sex crimes and any other crime. It hears the State's expert opine that the defendant has a propensity to commit future sex crimes. A jury in an SVP case is not magically created from people immune to the same fears as the Nelson jury. A jury in an SVP case hears evidence deemed too prejudicial for juries in a criminal cases to render a fair verdict.

Therefore, it seems unlikely that the "hypothetical" reasonable juror is ever encountered in a real SVP trial. The State requests jury trials in SVP cases precisely because it begins with this advantage. S.C. Code Ann. § 44-48-90(B) (allowing the State to request a jury trial). Our judges must be especially vigilant in preventing the State from submitting cases to juries based on imprecise, general diagnoses and junk science. The directed verdict motion exists in SVP cases for precisely this reason—to allow judges to protect the rights of persons accused under this statute on flimsy evidence. Judges, not juries, are the primary protection against overreach by the State in this area of the law. The question of the sufficiency of "Other" in Snow's SVP trial is legal and is not simply a question of the weight of the evidence. This Court should find the State's evidence lacking as a matter of law and reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from the Court of Appeals

Honorable Steven H. John, Circuit Court Judge

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

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner 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 Brief of Petitioner has been served on Daryl Snow at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 12th day of February, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of February, 2018.

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