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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Georgetown County
The Honorable Steven J. John, Circuit Court Judge
Appellate Case No. 2017-001033

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

Petitioner.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE PRESENTED

The circuit court properly denied Petitioner's directed verdict and post-trial motions because the expert's diagnosis of Other Specified Personality Disorder is recognized in the mental health field, she followed the DSM-5 criteria in reaching the diagnosis, and the credibility of the expert's diagnosis and testimony was a matter for the jury.

STATEMENT OF THE CASE

Petitioner Daryl T. Snow was convicted of a sexually violent offense in April 2006 and sentenced to fifteen years incarceration. Prior to his release from prison, Respondent State of South Carolina commenced a civil action pursuant to the Sexually Violent Predator Act, seeking Petitioner's commitment for long term control, care and treatment. A jury heard the case in February 2015, and found Petitioner was a sexually violent predator beyond a reasonable doubt, and he was committed to the South Carolina Department of Mental Health.

The South Carolina Court of Appeals affirmed the jury verdict by unpublished opinion filed January 11, 2017. Petitioner petitioned for a writ of certiorari to review the Court of Appeals decision, which this Court granted by Order filed January 12, 2018.

STATEMENT OF FACTS

In September 2005, Petitioner was charged with one count of assault with intent to commit criminal sexual conduct, first degree, and one count of lewd act on a minor child, arising from the assault of a thirteen year old female and her younger sister. In April 2004, Petitioner pled guilty to one count of lewd act on a minor. Petitioner also had prior convictions for two counts of assault with intent to commit criminal sexual conduct from May 1996, arising from the kidnapping of an adult female and her seven year old daughter, and multiple attempts to rape the adult female. (R., pp. 250, 261-297).

Prior to Petitioner's release from prison on the 2004 lewd act sentence, Respondent State of South Carolina ("the State") filed a Petition Pursuant to the Sexually Violent Predator Act (the "SVPA"), seeking Petitioner's civil commitment for long term control, care and treatment as a sexually violent predator. (R., pp. 248-379). 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. (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. (R., pp. 90-92).

Dr. Gehle testified she had extensive documentation regarding Petitioner, 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. (R., pp. 92-94).

After identifying the documents related to his qualifying sexually violent offenses, Dr. Gehle testified she also considered Petitioner's nonsexual offenses to determine how much 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 Petitioner'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 Petitioner faced, and how he conducted himself afterwards. She asked Petitioner about those charges during the interview because it was important to hear his version of the events, as well as whether he admitted or denied committing the offenses, and to determine his general attitude toward those offenses. (R., pp. 94-98).

Dr. Gehle described Petitioner'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. 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. (R., pp. 98-112).

She also considered Petitioner's behavior during periods of incarceration 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. Petitioner'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 Petitioner 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. (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 Petitioner'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. (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 Petitioner 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. (R., pp. 120-121).

Dr. Gehle diagnosed Petitioner with Other Specified Personality Disorder, which is used when someone does not meet all the criteria for a specific personality disorder. She testified Petitioner has a very antisocial personality and world view, marked by a consistent and pervasive history of violating and disregarding the rights of others. She explained she could not render a diagnosis of antisocial personality disorder (ASPD) because it requires evidence the person had conduct problems before the age of fifteen, and she had no records or information regarding Petitioner's childhood behavior other than his self-report that he had no behavior problems at all in his life, which was dubious at best given his criminal history, 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. (R., pp. 121-123).

Dr. Gehle testified to a reasonable degree of psychological certainty Petitioner'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 Petitioner 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 Petitioner 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 Petitioner was released. (R., pp. 123-127).

On cross-examination, Dr. Gehle testified Other Specified Personality Disorder is not a catch-all diagnosis. She stated she believed Petitioner has ASPD, but reiterated she could not render the diagnosis without "evidence" he had a conduct disorder before the age of fifteen. (R., pp. 129-130). She stressed that having a mental abnormality or disorder associated with sexual offending does not necessarily make a person a sexually violent predator, and each case has to be based on the individual person. (R., pp. 129-138).

Dr. Gehle again testified her diagnosis and opinion regarding Petitioner and his risk to reoffend were based on Petitioner'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. (R., pp. 139-145).

On re-direct, Dr. Gehle testified she also evaluated Petitioner 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. (R., pp. 145-147).

The circuit court denied Petitioner'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. (R., pp. 149-154). The court also denied Petitioner'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." (R., pp. 207-208). The jury found Petitioner is a sexually violent predator beyond a reasonable doubt, the court denied his motion for judgment notwithstanding the verdict, and committed Petitioner to the South Carolina Department of Mental Health for long term control, care and treatment. (R., pp. 243-247). This appeal followed.

The Court of Appeals affirmed the circuit court's findings and Petitioner's commitment in an unpublished opinion filed January 11, 2017. (Appendix, pp. 1-2). The Court denied Petitioner's Petition for Rehearing by Order filed March 27, 2017. (Appendix pp. 3-10). Petitioner sought review of the Court of Appeals' decision, which was granted by Order filed January 12, 2018.

ARGUMENT

The circuit court properly denied Petitioner's directed verdict motion because the expert's diagnosis of Other Specified Personality Disorder is recognized in the mental health field, she followed the DSM-5 criteria in reaching the diagnosis and the credibility of the diagnosis was a matter for the jury.

Petitioner contends the circuit court erred in denying his motion for a directed verdict because the Other Specified Personality Disorder diagnosis is constitutionally and statutorily insufficient as a basis for commitment under the SVPA. He further contends the State's evidence was insufficient because Dr. Gehle did not diagnose any mental disorder of a sexual nature. As a threshold matter, the constitutionality or legality of an Other Specified Personality Disorder diagnosis in SVPA proceedings is not preserved for appeal. Further, Other Specified Personality Disorder is expressly recognized in the DSM-5, Dr. Gehle's testimony sufficiently linked Petitioner'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.

A. Standard of Review

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).

B. Issue Preservation

South Carolina law requires a party to raise an issue and obtain a ruling from the trial judge to preserve an issue for appellate review, which also applies to constitutional issues. State v. Cain, 419 S.C. 24, 795 S.E.2d 846, 851 (2017); State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16, 19 (2011) (same). Further, the issue must have been raised to and ruled upon by the trial court with **sufficient specificity** to bring into focus the **precise** nature of the alleged error so it can be reasonably understood by the court. State v. Daise, 421 S.C. 442, 807 S.E.2d 710, 714 (Ct. App. 2017); State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005) (the general rule of issue preservation requires an issue to be raised and ruled upon below to be considered on appeal).

At trial, Petitioner never challenged the constitutionality or legality of the Other Specified Personality Disorder diagnosis itself. Rather, in moving for a directed verdict, he argued "there's a problem with the State's proof that he suffers from a mental disease or defect that is the cause of the risk," and there was insufficient "proof here to show a causal link between what the -- the disorder that she believed my client has and the risk of future harm." (R., pp. 150, 152). In support of his argument, he cited to Kansas v. Crane, 543 U.S. 407 (2002), and In re: Matter of the Care and Treatment of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002), regarding the purpose of sexual predator laws, which is to control a limited sub-class of dangerous persons. (R., p. 151).

In ruling on the motion, the circuit court stated:

> [T]here is more than sufficient evidence in the record, under the standard of beyond a reasonable doubt standard, even though that's not my standard, I do find that there is more than sufficient evidence, if it's believed by the jury, that would show, beyond a reasonable doubt, that the - - first – and it's been admitted – obviously [Petitioner] has been convicted of sexually violent offenses – it's in the record and that's - - that has been shown, but the evidence also exists that he does have a personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment. Dr. Gehle stated that he did suffer from the personality disorder she spoke of, she took into consideration the - - all of the matters before her, she did find, in her opinion, that he was pre-disposed to commit future criminal sexual activities, he's likely to commit sexual violence in the future, he has a propensity to be dangerous, is a menace to the public, he has serious difficulty in controlling his behavior, again, unless he is confined for long-tern control, care and treatment, and that outpatient treatment would not be sufficient, that he meets the test to be a - - declared to be a sexually violent predator, and in the dangerous - - that basically any women he focuses on are at risk. I do find, therefore, that the State has produced more than sufficient evidence to survive a direct (sic) verdict motion, and therefore, respectfully decline to grant your motion for directed verdict.

(R., pp. 153-154). Thus, it is clear the circuit court viewed the directed verdict motion as a challenge to the sufficiency of the evidence, and the Court of Appeals applied the appropriate standard of review for a sufficiency of the evidence issue. Petitioner **never** alleged the Other Specified Personality Disorder itself was unconstitutional or lacked a legal basis, or even sought a ruling on **any** constitutional or legal issue regarding the diagnosis. Therefore, the issue of whether the diagnosis rendered in this case is constitutionally or legally deficient is not preserved for appellate review.

C. Other Specified Personality Disorder

Petitioner'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. 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."
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> * * * *
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> 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 characteristic 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.
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> * * * *
>
> 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 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 fit 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 (emphasis added). "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 Petitioner's contention Other Specified Personality Disorder is merely a "catch-all" diagnosis, it is a legitimate diagnosis contained in what Petitioner acknowledged at trial is an "authoritative source" used for diagnosing mental health issues, and it is recognized by the vast majority of mental health practitioners.[1]

In support of his argument regarding the validity of the diagnosis at issue, Petitioner cites a quote from United States v. Antone, 742 F.3d 151 (4th Cir. 2014), as evidence the Fourth

[1]During his cross-examination of Dr. Gehle, Petitioner had her read a sentence from the DSM-5 regarding personality disorders in the general population, and then had her acknowledge the DSM-5 is a recognized "authoritative source" in the field of mental health. (R., pp. 144-145). On appeal, however, he dismisses the impact of the DSM-5, and argues the fact a diagnosis is in the DSM-5 does not make it a "constitutional" diagnosis. Again, the constitutional issue is not preserved, but having used the validity of the DSM-5 as a sword when it served his purposes at trial, Petitioner cannot diminish its validity because it undermines his position on appeal.

Circuit Court of Appeals criticized the use of ASPD for sexual predator civil commitment, but he takes the cited quote completely out of context, and attempts to elevate dicta to the level of binding authority. In Antone, using the clear error doctrine, the court reversed Antone's civil commitment under the federal sexual predator statute, finding the district court (as factfinder) focused almost exclusively on Antone's pre-incarceration conduct, and failed to properly consider the substantial evidence indicating he had rehabilitated himself while incarcerated. *Id.* at 167-169. Noting the commitment was premised on two mental disorders (paraphilia not otherwise specified and ASPD) prevalent in the prison population, the court concluded the government failed to distinguish Antone from a typical recidivist **in light of the rehabilitation evidence**. *Id.* at 169-170. Contrary to Petitioner's implication, the court did **not** criticize the use of ASPD as a predicate to civil commitment, but merely emphasized the government's burden to prove how a potential committee differs from the typical recidivist.

Petitioner also cites a 2015 law review article to claim the American Psychiatric Association (APA) has "'vociferously opposed SVP laws since their enactment.'" (Brief of Petitioner, p. 16). While it is true the APA opposed the Kansas sexual predator law at issue in Kansas v. Hendricks, 521 U.S. 346 (1997), the cited article is a more about the author's obvious distaste for sexual predator laws, rather than a consensus of the mental health community as it exists today.[2]

[2]Significantly, Petitioner cites the APA's original opposition to sexual predator laws to attack the validity of the diagnosis at issue in this case, but completely ignores the thorough discussion in the DSM-V explaining how and when the Other Specified Personality Disorder diagnosis is appropriate.

Indeed, the very title of the article, Dangerous Diagnoses, Risk Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment, starkly reveals the author's inherent bias. Given the number of states with sexual predator laws, calling it a "failed experiment" in general, without any real exploration of the experience in each state, is very telling. As with any state program, the sexual predator civil commitment success/failure rates are affected by numerous factors, including when the review process begins, how the process progresses, and the resources devoted to the program.[3]

In any event, the validity of sexual predator laws in general is not the issue in this case. Given the DSM-5 inclusion of Other Specified Personality Disorder as a valid diagnosis, and the discussion regarding how and when it can be used, it cannot be seriously disputed the diagnosis is a valid one recognized by the mental health community. Thus, the true issue before the circuit court, the Court of Appeals, and this Court, was, and remains, the sufficiency of the State's evidence to support the diagnosis and Petitioner's risk to reoffend sexually.

D. Sufficiency of the Evidence

Petitioner 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 sufficient to support civil commitment as a sexually predator, and asserts 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

[3]For instance, according to statistics maintained by the Multi-Disciplinary Team and the Attorney General's Office, South Carolina's experience with the SVPA belies the author's multiple assumptions to support his pre-formed conclusions. Under the SVPA, as of December 31, 2018, less than 4% of all inmates reviewed have been committed, and over 36% of those committed have been released based on mental health professionals' opinions. To date, only five of the released committees have reoffended sexually.

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 alone 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 judges joined in a thoughtful and 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. 2016) (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.[4]

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

[4]Petitioner contends this statement shows the State "claims nearly unlimited power" in SVPA cases, and seeks to "medicalize virtually all criminality." (Brief of Petitioner, p. 3). This extreme rhetoric is neither helpful nor true. As acknowledged in the statement itself, the "other statutory elements" in the SVPA must be met before any diagnosed personality disorder can constitute a basis for civil commitment under the SVPA. The term "mental abnormality" is not statutorily limited to specific abnormalities, and just like "personality disorder," any "mental abnormality" (such as schizophrenia) may serve as a predicate for civil commitment, but **only if** the State establishes "the other statutory elements," such as a qualifying conviction, and the link between the diagnosed mental abnormality and the person's risk to commit future acts of sexual violence.

and an inability to control his conduct sufficiently establishes the statutory 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).[5] In addition to the cases the dissent cited, other jurisdictions have held 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

[5]The dissent indicated the majority opinion was really premised on "the majority's dissatisfaction with the implications of [the sexually dangerous person statute]." *Id.* Thus, much like the law review article Petitioner cites, the majority opinion in Donald DD was more about a bias against sexual predator laws in general, and was written to reach a preferred result.

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, virtually all jurisdictions with sexually violent predator laws have held an ASPD diagnosis is a sufficient mental abnormality or personality disorder for civil commitment purposes, if a nexus between the ASPD and the risk to reoffend sexually is established, and the Donald DD analysis stands alone.[6]

2. Dr. Gehle's Testimony

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 Petitioner probably exhibited signs of a conduct disorder during his childhood in light of his adult criminal history, but she did not have **evidence**, such as school records or family sources, establishing he displayed such conduct. Petitioner's parents are deceased, and any records of a possible juvenile offense were destroyed, so Dr. Gehle had no independent source for information regarding Petitioner's childhood. (R., pp. 122-123).

During the interview with Dr. Gehle, Petitioner denied having any conduct problems as a child, but he also denied ever having **any** conduct problems in his life, even in the face of his extensive criminal history. As a result, Dr. Gehle testified she believed Petitioner has ASPD, but she had to diagnose Other Specified Personality Disorder, with the specifier "current evidence of conduct disorder is insufficient." Petitioner now seeks to use Dr. Gehle's meticulous adherence to the ASPD diagnostic criteria in the DSM-5, and her use of another diagnosis expressly endorsed by the DSM-5, to discredit her conclusions.

[6]Petitioner essentially acknowledges the limited value of Donald DD via a "but see" citation to a Massachusetts case expressly **rejecting** the Donald DD analysis, while citing **no** cases outside of New York **adopting** the analysis. (Brief of Petitioner, p. 14). To date, **no** jurisdictions have adopted the Donald DD analysis.

Petitioner also attempts to denigrate Dr. Gehle's diagnosis by repeatedly labeling it simply "Other," and asserts the diagnosis "exists primarily because of the **rejection** of diagnoses for inclusion in the DSM-V." (Brief of Petitioner, p. 15) (emphasis in original).[7] This case, however, 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 Petitioner's self-report, which was highly suspect at best, it is clear Dr. Gehle would have diagnosed Petitioner with ASPD. Notwithstanding Petitioner's version of the evidence (discussed below), Dr. Gehle's testimony detailed the evidence supporting the remaining ASPD criteria, Petitioner's documented history fully supports her diagnosis, and she explained why his diagnosis made him a significant risk to reoffend sexually.

Petitioner 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 any person convicted of a crime, and then claims her opinion was the result of her simply disliking Petitioner's "attitude" during the interview.[8] Petitioner takes Dr. Gehle's testimony completely out of context, and ignores the full substance of her testimony, which belies his entire argument.

After describing Petitioner's sexual offenses, other charges associated with those offenses, and Petitioner's nonsexual offenses, Dr. Gehle testified she found **a pattern of**

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[7]The article Petitioner cites for this proposition was written before publication of the DSM-5, which changed the "not otherwise specified" category included in earlier versions to "other specified" and "other unspecified," with express instructions regarding when to use those diagnoses.

[8]Petitioner's attempt to dismiss Dr. Gehle's opinion as simply the result of her dislike of his attitude is unavailing. The "attitude" Dr. Gehle referenced and relied on in reaching her conclusions related to the attitudes Petitioner expressed about women and his criminal offenses, not her personal opinion of his attitude during the interview. (R., 139).

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. (R., pp. 98-112).

She also testified Petitioner's behavior during incarceration 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. Petitioner was disciplined twice in prison for **sexually related offenses**, which included masturbating in the recreation yard and grabbing the buttocks of a female staff member (demonstrating his sexual attitude toward women). Further, Petitioner 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. (R., pp. 112-114).

Dr. Gehle stated Petitioner's score on the Static-99R risk assessment was seven, which is in the high risk to reoffend category, and is higher than 94.9% of the sex offenders included in the research. (R., pp. 115-120). She then testified about dynamic risk factors, which are not factored into the Static-99R, but are strongly associated with sexual offending. She found Petitioner 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. (R., pp. 120-121).

Contrary to Petitioner's assertions, for which he cites no authority, the vast majority of people incarcerated for 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 a murder or an armed robbery, but **never** commit a sexual offense, which removes him from the sexually violent predator arena. On the other hand, someone with ASPD, or Other Specified Personality Disorder, like Petitioner, may have a pattern of sexual offenses as well as non-sexual offenses, and the person's history of sexual violence may indicate a significant nexus between the personality disorder and the risk to reoffend sexually.

Petitioner makes the extraordinarily misleading assertion Dr. Gehle "agreed that [Petitioner's] sexual convictions were not even necessary to her diagnosis." (Brief of Petitioner, p. 16). A cursory review of the testimony cited, which occurred during cross-examination, reveals Dr. Gehle was asked whether her diagnosis would change if she assumed one of the victims of Petitioner's sexual offenses was not truthful, and the other victim misidentified Petitioner as her assailant. She replied the diagnosis would not change in light of all the factors she considered. (R., pp. 136-144). The questions went to whether the diagnosis of Other Specified Personality Disorder would change, **not** whether the risk assessment might change. A person can have an ASPD even if he has never been convicted of a sexual offense, which makes it less likely the person will commit sexual offenses in the future because of the ASPD.

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. In this case, the confluence of Petitioner's personality disorder with his significant history of sexually violent crimes distinguishes him from the routine offender. As Dr. Gehle testified, unlike the routine offender, the risk Petitioner will commit future acts of sexual violence is significant unless he is confined for long term control, care and treatment.

Finally, Petitioner makes sweeping and speculative statements about whether a person can ever get a fair trial before a jury in a sexual predator trial. There is absolutely no basis, and Petitioner cites none, for his claim jurors cannot render a fair and impartial verdict in sexual predator cases simply because the evidence may be disturbing. Taking Petitioner's assertion to its logical conclusion, jurors in the criminal cases on which a sexual predator case is based can never be truly impartial because actually seeing the victims at trial, hearing their testimony describing what the accused did to them, and possibly seeing or hearing evidence of injuries inflicted, is so inherently disturbing and prejudicial.[9] Such a result is contrary to well established law.

This case presents no constitutional issue that is properly before this Court, but even if Petitioner's belated constitutional claim is preserved, premising a sexual predator civil commitment on an Other Specified Personality Disorder diagnosis, combined with sufficient evidence to meet the other statutory requirements for civil commitment, does not violate due process. The case as presented to the circuit court was a directed verdict/sufficiency of the evidence case. The circuit court found, and the Court of Appeals agreed, there was sufficient

[9]The same analysis would lead to the conclusion a defendant can never get a fair and impartial jury in personal injury or medical malpractice cases because the relevant evidence may include disturbing victim testimony or graphic photographic evidence.

evidence in the record to meet the State's beyond a reasonable doubt burden of proof. The record amply supports those findings, and Petitioner's civil commitment as a sexually violent predator should be affirmed.

CONCLUSION

Based on the foregoing, Respondent respectfully submits this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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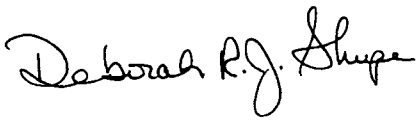

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March 13, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Georgetown County
Honorable Steven J. John, Circuit Court Judge
Appellate Case No. 2017-001033

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

Petitioner.

PROOF OF SERVICE

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

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Assistant Appellate Defender
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I further certify all parties required by Rule to be served have been served.

This 13th day of March, 2018.

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