STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable R. Lawton McIntosh, Circuit Court Judge

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S.C. SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF CALVIN JOE MILLER,

PETITIONER

APPELLATE CASE NO 2017-001362

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming Petitioner's commitment as a sexually violent predator ("SVP") where the trial court failed to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitted testimony regarding Petitioner's prior charges and convictions for non-sexual conduct?

STATEMENT OF THE CASE

On March 15, 2013, the State filed a petition to involuntarily commit Petitioner Calvin Joe Miller pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* ("SVP Act"). The immediate predicate conviction was a guilty plea for lewd act upon a child entered on August 3, 2010. R. 197 – 198. Miller was sentenced to eight years imprisonment, with credit for time served of 470 days. R. 197 – 198; R. 207 (Pet'rs Ex. C to State's Petition).

On July 14-15, 2014, the SVP action was tried before the Honorable R. Lawton McIntosh and a jury. Miller was represented by R. Mills Ariail, Jr., and the State was represented by assistant attorney generals James G. Bogel and Nicole Wetherton. R. 1. The jury concluded that Miller was a sexually violent predator. R. 188, l. 8 – 189, l. 7. On July 15, 2014, Judge McIntosh signed an Order of Commitment placing Miller in the custody of the Department of Mental Health. R. 196.

A timely notice of appeal was filed and perfected in the Court of Appeals. On April 5, 2017, the Court of Appeals filed an unpublished, *per curiam* opinion affirming Miller's SVP commitment. App. 1. Miller filed a petition for rehearing on April 13, 2017. App. 3. By order dated May 19, 2017, the Court of Appeals denied the petition for rehearing. App. 14.

Miller filed a petition for writ of certiorari to the Court of Appeals in this Court on June 29, 2017. The State filed its return to the petition on July 25, 2017. By order filed February 1, 2018, this Court granted certiorari and ordered further briefing.

This brief of petitioner follows.

STATEMENT OF FACTS

This case involved yet another SVP commitment trial for a man who pled guilty to his charge, who had no disciplinary problems in prison, and who the court-appointed evaluator found not to be a sexually violent predator. R. 25, l. 16 – 29, l. 3; R. 128, l. 23 – 130, l. 3; R. 159, l. 19 – 160, l. 10; R. 162, ll. 6-18. There was no dispute at the SVP trial that Miller was previously convicted of a sexually violent offense (lewd act) or that he suffered from a mental abnormality – pedophilia. The element of the "sexually violent predator" definition that was in dispute was whether Miller's pedophilia made him "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." See S.C. Code Ann. § 44-48-30(1); S.C. Code Ann. § 44-48-100(A). The only witnesses at the trial were two experts.

Dr. Kimberly Harrison, formerly a chief psychologist at the Department of Mental Health, was the court-appointed evaluator assigned to Miller's case. She had conducted twenty-four pre-commitment evaluations, out of which she recommended commitment seven times, and had been qualified as an expert thirty-six times with respect to SVP cases alone. R. 142, l. 7 – 148, l. 8. Dr. Harrison conducted her evaluation of Miller in August 2013, which included an interview, psychological testing, and a review of pertinent records. R. 148, l. 11 – 150, l. 23. She testified on behalf of the defense that she did not find Miller to be a part of the small group of "extremely dangerous" sex offenders to whom the SVP Act was intended to apply. R. 162, ll. 6-18. The State had a second evaluation conducted by Dr. Susan Knight, who testified that Miller needed to be committed. Dr. Harrison explained that what Dr. Knight characterized as "additional factors" increasing Miller's risk to reoffend were already considered in the tests conducted, improperly magnifying those factors. R. 160, ll. 11-17. She also disagreed with Dr. Knight's diagnosis of Miller with a personality disorder. R. 153, l. 14 – 156, l. 6.

Miller was charged for offenses committed in 2003 against his twin nieces. Following entry of a guilty plea to one count of lewd act upon a child on August 8, 2010, Miller was sentenced to eight years imprisonment. R. 25, l. 16 – 29, l. 3. There was no objection to the admissibility of Miller's 1996 conviction for incident liberties with a child from North Carolina, which arose from a 1994 incident. R. 29, l. 4 – 31, l. 4. Rather, the basis of Miller's direct appeal was the trial court's admission of testimony, over objection, regarding the following non-sexual charges and convictions: 1992 charges for breaking and entering and larceny, both of which were dismissed; 1995 and 2009 convictions for criminal domestic violence; 2005 conviction for possession of marijuana; and 1999, 2003, and 2005 convictions for failure to register as a sex offender. R. 31, l. 15 – 36, l. 17.

The State's expert, Dr. Knight, was a consultant from the Medical University of South Carolina. She had been qualified as an expert on only three prior occasions in regards to sexually violent predator cases, all of which were as a State's witness. R. 13, l. 24 – 15, l. 20; R. 17, l. 22 – 19, l. 8. Dr. Knight interviewed and conducted testing on Miller for a total of four hours and reviewed his court and prior treatment records. R. 21, l. 19 – 23, l. 23. She did not contact any of Miller's family members or former employers, other than his mother who did not respond. R. 39, ll. 11-21; R. 132, ll. 6-19.

Dr. Knight conducted a Static-99 assessment, which placed Miller in the moderate low risk category for reoffending. Offenders with that score have a sexual recidivism risk of twelve percent (12%) over the next five years and eighteen (18%) percent over the next ten years. R. 44, l. 15 – 46, l. 18. On average, twenty-five percent of sex offenders score higher than Miller and seventy-five percent score the same or below. R. 46, l. 25 – 47, l. 7; R. 126, l. 8 – 128, l. 16; R. 176, l. 8 – 177, l. 16. The risk factors for which Miller was positive on the Static-99 included

that he had an unrelated victim, a prior sexual conviction, four or more other convictions, and a past violent conviction. R. 47, ll. 8-13.

Dr. Harrison agreed that Miller achieved a score of three on the Static-99, rendering him a low moderate degree of risk for sexual reoffending. She then looked at other risk factors that might elevate his risk and found that a significant number of them did not apply to Miller. R. 156, l. 17 – 160, l. 10. Unlike Dr. Knight, who placed additional significance of Miller's non-sexual criminal history, Dr. Harrison noted that those were already a factor in the Static-99's risk score. R. 160, ll. 11-17.

In addition to the Static-99, Dr. Knight conducted other testing to determine if there were other risk-factors that were not accounted for in that assessment, many of which were inconclusive or otherwise inconsequential. R. 48, ll. 1-8. Dr. Harrison did not use some of the other tests utilized by Dr. Knight because of problems with their validity and reliability. R. 160, l. 22 – 161, l. 14; R. 171, l. 17 – 172, l. 18. Using the SASSI-3 evaluation, Dr. Knight determined that Miller did not have a substance abuse disorder. R. 48, ll. 9-18. Miller did not score high enough on the Hare Assessment to meet the threshold criteria for diagnosis as a psychopath either. R. 57, ll. 3-11. Dr. Knight also conducted a Conner's assessment, which measured attention, concentration, and impulsivity. Miller scored in the middle such that "there wasn't much to take away" from the test. R. 51, ll. 4-13.

Miller also underwent a penile plethysmograph (PPG), which measures sexual arousal based on a variety of stimuli. According to Dr. Knight, because Miller did not respond to anything, his test was invalid and she could not draw any conclusions. She insinuated that Miller's lack of reaction may have been an effort to deceive the PPG based on his admission to her that exaggerated his symptoms during psychological testing that he underwent at Patrick

Harris Psychiatric Hospital in 2009. However, she admitted that the invalid test may have also been due to anxiety, medication, erectile dysfunction, or other reasons. She could not say with any certainty that Miller was trying to deceive the PPG. R. 52, l. 13 – 56, l. 2; R. 117, l. 7-18; R. 122, l. 13 – 123, l. 7. Dr. Harrison noted that the Department of Mental Health no longer used the PPG in conducting SVP evaluations. R. 161, ll. 15-16; R. 172, l. 19 – 173, l. 13.

An Able Assessment was also administered, which includes a questionnaire about sexual behavior history and a test of the person's reaction time to looking at different images. Not surprisingly, based on his prior convictions, Miller's assessment "endorsed some sexual abuse" and revealed that he was most interested in adolescents and adults. R. 50, l. 14 – 51, l. 16. However, he scored low on the test's measure for cognitive distortions, which assessed his justifications for sexual misconduct. R. 121, ll. 15 – 122, l. 12. Dr. Knight noted comments made by Miller indicating that he perceived a difference in the offensiveness of anal intercourse versus vaginal intercourse. R. 38, l. 14 – 39, l. 10. Dr. Harrison found that such attempts to minimize or justify behavior is typical in people with pedophilia. R. 169, l. 1 – 170, l. 8.

Dr. Knight conducted a personal assessment inventory (PAI), which measures personality traits. The test revealed that Miller "was trying to portray himself in a good light and probably a better light than actually is reflected by other clinical data." Despite that, she testified that the PAI "suggested" a diagnosis of personality disorder with antisocial traits. R. 48, l. 25 – 49, l. 25; R. 116, l. 13 – 117, l. 3. Dr. Harrison testified that there were no indicators that Miller was being dishonest during her evaluation and that she expects people to try to portray themselves in a positive light because they are trying to avoid being committed. She asked questions about details in the record to counteract any such attempts. R. 151, ll. 12-22.

Dr. Knight testified that as a result of her testing and interview, she determined that Miller had additional risk factors not accounted for in the Static-99, which included a history of sexually deviant arousal to prepubescent children based on his admission that he was sexually attracted to his nieces and anti-social traits based on his history of failing to conform his conduct to the requirements of the law. She claimed that those two "additional" factors placed Miller at a higher risk for sexual re-offense. R. 57, ll. 5-20.

Dr. Knight ultimately diagnosed Miller with pedophilia, non-exclusive type, sexually attracted to females. R. 84, l. 16 – 86, l. 24. This was the same diagnosis rendered by Dr. Harrison. R. 86, l. 25 – 87, l. 9. However, unlike Dr. Harrison, Dr. Knight also diagnosed Miller with a personality disorder with antisocial traits. R. 87, l. 10 – 88, l. 12; R. 90, l. 21 – 91, l. 1. Dr. Knight considered his prior diagnosis with the same disorder by Patrick Harris Psychiatric Hospital and the PAI testing that suggested the diagnosis. R. 91, ll. 13-20. She based her diagnosis on her assessment of Miller's "failure to conform [his] behavior to the law," "pattern of irresponsibility," and "pattern of physical aggressiveness." The finding that Miller failed to conform his conduct to the law was based upon his criminal history, which began with a criminal charges at seventeen years old. The finding of a pattern of irresponsibility stemmed from Miller's having held over fifty jobs, defaulted on a bank loan, and failed to register as a sex offender on three occasions. Lastly, the pattern of physical aggressiveness was based upon his two prior criminal domestic violence charges, an altercation with a peer while hospitalized, and his having slammed a door during his sex offender treatment at the Department of Corrections.[1] Dr. Knight further cited Miller's alleged "distorted views of relationships" and "narcissistic

[1] Dr. Harrison revealed that Miller's slamming the door during a treatment session at the Department of Corrections was due to his being upset over being referred for SVP commitment. R. 170, l. 20 – 171, l. 10.

behavior" as relevant to her diagnosis. R. 87, l. 10 – 89, l. 7; R. 90, l. 21 – 93, l. 6; R. 123, l. 19 – 124, l. 14; R. 138, l. 5 – 139, l. 5.

Dr. Knight testified that the diagnosis of a personal disorder can elevate one's risk to re-offend. R. 93, ll. 7-19; R. 125, l. 10 – 126, l. 7. However, she agreed that a high percentage of individuals in the Department of Corrections have some antisocial traits. R. 124, l. 15-22. Dr. Knight opined that her combined diagnoses revealed that Miller has serious difficulty in controlling his behavior. R. 94, ll. 2-20. She also said that Miller has "the propensity to commit future sexually violent offenses" based primarily on "his offense history and difficulty controlling his sexual behavior." R. 94, l. 21 – 95, l. 7. Dr. Knight found that because Miller is likely to engage in acts of sexual violence, he requires long term control, care, and treatment and met the definition to be found a sexually violent predator. R. 95, ll. 8-25.

In explaining why her opinion differed from Dr. Harrison's, Dr. Knight said that she considered factors beyond the Static-99 and that she put emphasis on other things, such as Miller's release plan. R. 96, l. 1 – 97, l. 5. According to Dr. Knight, that included plans to reside with another sex offender who had been released from the SVP program and to work at a zoo. R. 97, l. 14 – 99, l. 18. She also noted the fact that Miller did not have any probation and would not be required to attend any sex offender treatment if released. R. 97, ll. 6-13; R. 139, l. 18 – 140, l. 8. She said that if Miller were released after his trial, prepubescent children would be at risk. R. 100, ll. 4-6.

However, Dr. Knight admitted on cross-examination that Miller attended voluntary sex offender treatment at the Department of Corrections. R. 128, l. 24 – 129, l. 19. She also admitted that he had not any disciplinary infractions since his incarceration in 2010. R. 129, l. 20 – 130, l. 3. Dr. Harrison found the lack of infractions to suggest that Miller had not been

displaying antisocial behaviors to such a degree that he was breaking the rules in prison. She noted that others whom she has evaluated had pages upon pages of infractions, indicating their problems with getting into trouble and breaking the rules even in a controlled environment. R. 159, l. 19 – 160, l. 10.

Dr. Knight also admitted that Miller indicated an intention to try to find a family member to reside with and only mentioned residing with the former inmate as an initial step when he was first released from jail. R. 130, l. 4 – 131, 2. Dr. Harrison explained that it is not uncommon for sex offenders to live together because they know each other and there are restrictions on where they can reside. R. 173, l. 18 – 174, l. 19. Further, Miller's discussion of his past work at a zoo was in response to Dr. Knight's question about his ideal job. She did not actually ask Miller what his work plans were for when he was released. R. 131, l. 3 – 132, l. 5. Miller mentioned previously working at a zoo to Dr. Harrison, but he indicated future interest in employment in either a restaurant or assembly work. R. 154, l. 20 – 155, l. 15; R. 174, l. 20 – 175, l. 15; R. 178, ll. 7-16.

Miller maintained denial of the act that led to his 1996 conviction, indicating that the child was injured on her bicycle. R. 139, ll. 6-17; R. 152, l. 15-20. Dr. Harrison noted that the pediatrician report from the incident found that the injury to the child could have been either a penetration or straddle injury. R. 167, l. 25 – 168, l. 25. However, Miller admitted his conduct toward his nieces and expressed a desire to apologize to them once they are old enough. R. 133, l. 6 – 134, l. 8; R. 152, l. 21 – 153, l. 9.

Dr. Harrison considered other diagnoses but found that there was not sufficient data to render any other diagnosis beyond pedophilia with any degree of certainty. Specifically, she did not find that Miller demonstrated a "pervasive lifelong pattern of antisociality" to diagnose him

with a personality disorder. R. 153, l. 14 – 156, l. 6. She testified that Miller did not meet the criteria for commitment under the SVP Act. R. 162, ll. 15-18. Based on his diagnosis and risk level, she could not say that he is "likely to engage in acts of sexual violence." R. 162, ll. 1-5. She further stated that "the [SVP] statute specifies that this Act in intended for an extremely dangerous group of sex offenders, and I don't believe -- based on all the other evaluations that I have done under this Act, **I don't believe that Mr. Miller falls into that small, but extremely dangerous group**." R. 162, ll. 6-14 (emphasis added). Thus, Dr. Harrison said that Miller did not meet the criteria for commitment under the SVP Act. R. 162, ll. 15-18.

ARGUMENT

The Court of Appeals erred in affirming Petitioner's commitment as a sexually violent predator ("SVP") where the trial court failed to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitted testimony regarding Petitioner's prior charges and convictions for non-sexual conduct.

Introduction

The Court of Appeals erred in affirming Petitioner Miller's SVP commitment where the trial judge improperly allowed the State's expert witness to testify at the commitment trial regarding Miller's prior charges and convictions for non-sexual conduct based upon the expert's averment that she considered them in reaching her opinion on whether Miller was a sexually violent predator. An expert's consideration of information in their evaluation does not make it automatically relevant, nor does it make it substantially more probtaive than prejudical. Rather, the trial judge must consider both the relevance of the information and balance the probative value versus the danger of unfair prejudice. See State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999) ("Even if admissible under Rule 703[, SCRE] or Rule 705, [SCRE,] however, the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE.").

Led astray by the arguments of the prosecutor at the commitment trial, the trial judge misinterpreted In re Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008) and In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), as holding that all non-sexual charges and convictions are relevant and admissible in SVP proceedings. The unfettered admission of non-sexual charges and convictions in SVP proceedings presents a substantial danger that the jury will find in favor of commitment based upon a general criminal propensity rather than because it found that the state proved beyond a reasonable doubt that the offender was *likely* to engage in acts of *sexual*

violence if he was not confined. See S.C. Code Ann. § 44-48-20; S.C. Code Ann. § 44-48-30 (1) and (9); In re Harvey, 355 S.C. 53, 61 n.7, 584 S.E.2d 893, 897 n.7 (2003) ("[T]he purpose of the requirements in the SVP Act is to ensure that these involuntary commitment procedures are **only** used to control a limited subclass of dangerous persons and **not to broadly subject any dangerous person to what may be indefinite terms.**" (emphasis in original) (internal quotations omitted)). This Court should clarify for the trial courts the proper method of determining whether such evidence is admissible in SVP proceedings and caution against allowing the State to use such evidence to detract from its burden of proof. The error in this case necessitates reversal of the order of commitment and a new trial where the jury can consider only properly admitted evidence.

Discussion

When it became apparent that the State was eliciting testimony from Dr. Knight regarding Miller's nonsexual criminal charges and offenses, defense counsel objected and the jury was sent out of the courtroom. The charges and convictions at issue included: 1992 charges for breaking and entering and larceny, both of which were dismissed; 1995 and 2009 convictions for criminal domestic violence; a 2005 conviction for possession of marijuana; and 1999, 2003, and 2005 convictions for failing to register as a sex offender. The trial judge asked the State what authority there was for admitting evidence of nonsexual offenses. R. 31, l. 5 – 32, l. 7. The prosecutor cited In re Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), and In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003). He argued that Ettel's prior murder conviction was nonsexual but admissible regarding his likelihood of success in treatment. The judge noted that success in treatment was not an issue in the case, a result of the state's own motion *in limine*. However, the judge agreed that "there was a nonsexual murder case" brought up in In re Ettel. R. 32, l. 8 – 33,

l. 7. The prosecutor also averred that the details of a prior ABHAN conviction were found relevant and admitted in In re Corley, implying that it was nonsexual in nature. R. 33, ll. 8-12. Defense counsel did not agree with the prosecutor's descriptions of the holdings of the cases discussed. Ultimately, the trial judge overruled the defense's objection, but noted it for the record. R. 33, l. 17 – 34, l. 17.

Lack of Relevance

There is no case that stands for the proposition that non-sexual offenses or convictions are automatically relevant to whether an individual is a sexually violent predator. See In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003) (finding no error in admission of prior ABHAN conviction that was *sexual in nature* in SVP trial); White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007) (finding error in failure to consider past unadjudicated sexual offenses at SVP probable cause hearing but specifying: **"In so holding, we are not stating past convictions and prior offenses not resulting in convictions that have no bearing on whether a person is a sexually violent predator should be admissible."**). The concern at an SVP trial is with the likelihood to commit **sexual** violence, not just violence generally. See S.C. Code Ann. § 44-48-30(9)) (defining "[l]ikely to engage in acts of *sexual* violence" as "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." (emphasis added)).

Notably, a review of the cases cited by the prosecutor in support of his position that the non-sexual charges and convictions were admissible reveals that he misrepresented both their facts and holdings. See R. 32, l. 6 – 33, l. 23. These were the same cases cited in the Court of Appeals' opinion. App. 2. In In re the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), this Court found that "past criminal history" is relevant to establishing section 44-

48-30(1)(a) of the SVP Act. That is, whether the offender "had been convicted of a sexually violent offense." S.C. Code Ann. § 44-48-30(1)(a). Corley was convicted in March 1993 of assault and battery of a high and aggravated nature (ABHAN) and sentenced to ten years. In re Corley, 353 S.C. at 204, 577 S.E.2d at 452. Then, in August 1993, Corley pled guilty to criminal sexual conduct (CSC) in the second degree and was sentenced to 14 years, concurrent. Id. Corley argued that the underlying details of the offenses should not have been admitted due to his willingness to stipulate to the convictions. Id. However, the State used the details surrounding the conviction "to prove that appellant's likelihood to re-offend was based in part upon the fact that his previous offenses were similar to one another." Id. at 207, 577 S.E.2d at 454. The State's expert testified that the similarity between the two offenses, including the age, race, and gender of the victims, "evinces a pattern of behavior which in turn indicates the person would be at an increased risk to commit future offenses." Id. Notably then, it appears that the ABHAN offense was sexual in nature, distinguishing Corley from the present case. Here, Miller challenged only the admission of his prior non-sexual charges and convictions.

The prosecutor further relied upon In re Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008). The Ettel Court affirmed the admission of the appellant's prior murder conviction in his SVP trial. 377 S.C. at 563, 660 S.E.2d at 288. Initially, it is notable that contrary to the trial judge's statement in this case, there was evidence that Ettel's prior murder conviction was sexually motivated:

> In 1962, Ettel was convicted in Michigan of murdering his girlfriend's mother with a pair of sewing scissors. Dr. Crawford testified the arresting officers told her the mother's shirt was pulled above the mother's head, and Ettel allegedly told the officers he tried to sexually assault the mother before he killed the mother. No incident report was available for Dr. Crawford to substantiate the officers' testimony.

Id. at 560 n.2, 660 S.E.2d at 287 n.2; see R. 33, ll. 4-7. Relying on Corley, the Ettel Court wrote: "Because a person's dangerous propensities are the focus of the SVP Act, consideration of past criminal history is therefore directly relevant to establishing 44–48–30(1)(a), which in turn bears directly on whether one suffers from a mental abnormality under section 44–48–30(1)(b). Id. at. 562, 660 S.E.2d at 287 (internal quotations omitted). The Ettel Court found that both Ettel's prior sexual offenses and the prior murder conviction "were relevant because Dr. Crawford relied on them in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future." Id. at 563, 660 S.E.2d at 288. Here, the State successfully moved to exclude evidence regarding the likelihood of success in treatment from Miller's SVP trial. See R. 32, ll. 13-24. As will be discussed more fully *infra*, the Ettel Court further found that the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. 377 S.C. at 563, 660 S.E.2d at 288.

Another relevant case is White v. State, 375 S.C. 1, 7, 649 S.E.2d 172, 175 (Ct. App. 2007), where the Court considered whether the circuit court properly excluded White's past unadjudicated sexual offenses at the SVP probable cause hearing. The Court determined that the circuit court erred, and that it could have considered "any prior relevant offenses, which may be contained in the State's petition," which included both convictions and offenses not resulting in convictions. 375 S.C. at 8-9, 649 S.E.2d at 175-76. Instructive to the Court's analysis was the Kansas Supreme Court's decision in Matter of Hay, 953 P.2d 666, 677 (Kan. 1998), in which the court stated: "In assessing whether an individual is a sexually violent predator, *prior sexual history* is highly probative of his or her propensity for future violence." Id. at 9, 649 S.E.2d at 176 (emphasis added). Though finding that White's criminal sexual offenses not resulting in convictions were directly relevant to the circuit court's probable cause determination, the White

Court noted that its holding was "not stating past convictions and prior offenses not resulting in convictions that have no bearing on whether a person is a sexually violent predator should be admissible." Id. at 10 n.3, 649 S.E.2d at 176-77 n.3. Thus, while White is not dispositive on the issue in the present case, it certainly implies that non-sexual prior offenses and convictions are likely irrelevant.

In the present case, there was no testimony that the disputed charges and offenses had any sexual motivation or that they were violent in nature. The State's expert, Dr. Susan Knight, testified that the prior charges and convictions were considered in the evaluation because "[i]t gives me an idea of any other criminal behavior they may have been involved in, the nature of that behavior. It can also go to diagnosis, things like that." R. 35, ll. 2-9. Regarding Miller specifically, she agreed that these offenses were not the sole basis of her opinion, but found them "significant." R. 35, l. 10 – 36, l. 17. She later cited the charges as part of the basis of her antisocial personality disorder diagnosis of Miller. R. 36, ll. 6-17; R. 88, l. 13 – 89, l. 4; R. 138, l. 5 – 139, l. 5. The non-sexual offenses were also taken into account in the Static-99 assessment, the score from which corresponds to a risk level for reoffending, and which was administered by both experts.[2] R. 47, ll. 8-13; R. 160, ll. 11-17. On cross-examination, Dr. Knight admitted that she did not review any records regarding the failure to register offenses. Thus, she was unaware of any underlying facts related to the infractions. R. 134, l. 16 – 135, l. 9.

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[2] The experts agreed that the risk to reoffend sexually based on the Static-99 test was 12% over the next 5 years and 18% over the next ten years. R. 45, l. 6 – 47, l. 13; R. 156, l. 17 – 162, l. 18; R. 176, l. 8 – 177, l. 16. Obviously troubled by the low statistic, Assistant Attorney General Bogel posed a question to the defense expert, Dr. Kimberly Harrison, regarding whether she would get on her plane to fly back home if she found out it had a twelve percent chance of crashing. R. 177, ll. 9-16. The implication was that *any* risk to reoffend is too high. However, the SVP Act requires a finding that the person is "*likely to engage* in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30.

The defense expert, Dr. Harrison, testified that Miller's nonsexual criminal offenses were taken into account in the Static-99 and were thus a factor in the calculation of the risk score under that assessment. R. 160, ll. 11-17. Dr. Knight likewise indicated that the Static-99 risk score factored in Miller's prior sexual conviction, four or more other convictions, and past violent conviction. R. 47, ll. 8-13.

The only of the disputed prior charges and convictions that were potentially relevant to the jury's analysis were the three convictions for failure to register as a sex offender. However, even their admission was likely improper under Rule 403, SCRE, in light of the expert's lack of knowledge regarding anything more than their existence. Both S.C. Code Ann. § 23-3-470 and N.C. Gen. Stat. Ann. § 14-208.11 provide a myriad of possible conduct that can serve as the basis for a failure to register charge. Thus, it cannot be assumed that such a conviction is the result of some nefarious purpose by the accused. However, the jury in this case was left to speculate the worst.

Danger of Unfair Prejudice Outweighed Any Probative Value

Assuming *arguendo* that the prior non-sexual offenses were relevant to the anti-social personality disorder diagnosis, they should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice. The SVP Act allows the experts evaluating the person under the Act to have "reasonable access to the person for the purpose of the examination, as well as access to all *relevant* medical, psychological, *criminal offense,* and disciplinary records and reports." S.C. Code Ann. § 44-48-90(C) (emphasis added). These offenses can include both convictions and offenses not resulting in convictions if they are relevant to the determination of whether a person is a sexually violent predator. See White v. State, 375 S.C. 1, 9, 649 S.E.2d 172, 176 (Ct. App. 2007). However, "[e]ven if admissible

under Rule 703[, SCRE] or Rule 705, [SCRE,] . . . the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE." State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999); see also United States v. Gillis, 773 F.2d 549, 554 (4th Cir. 1985) ("In determining whether to allow an expert to testify to the facts underlying an opinion, the court must inquire whether, under Fed.R.Evid. 403, the testimony should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice."). Rule 403, SCRE, provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...."

"Probative" means "[t]ending to prove or disprove." State v. Gray, 408 S.C. 601, 6090, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. "The more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007)). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Id. The probative value of the evidence must be balanced against "the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998).

The Rule 403, SCRE, analysis in State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002), and In re Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), led the trial court and the Court of Appeals to an improper analysis of probative value versus unfair prejudice in SVP cases. In

Gaster, this Court affirmed the SVP court's admission of a 1998 motion filed by Gaster titled "Motion for Ruling on the Legal Age of Sexual Consent in South Carolina."[3] 349 S.C. at 556, 564 S.E.2d at 93. The Gaster Court ruled that the motion was relevant because Dr. Watts used the motion in evaluating appellant's need for and probability of success in treatment, which were facts relevant to determining appellant's need for commitment. Id. at 557, 564 S.E.2d at 93. With respect to the Rule 403 analysis, the Court ruled:

> [T]he possibility of unfair prejudice did not substantially outweigh the probative value of the motion. As for its probative value, Dr. Watts felt the motion was significant in her evaluation because it indicated appellant's need for and probability of success in treatment. Regarding possible prejudice to appellant, the motion was not the only source Dr. Watts used to evaluate appellant. Dr. Watts used many sources besides the motion to find that appellant suffered from the sexual disorders of sadism and paraphilia. Because the motion was relevant and its probative value outweighed any prejudicial effect on appellant, the trial court properly admitted the motion within its discretion.

Id. at 557, 564 S.E.2d at 94 (internal citations omitted). Respectfully, that analysis was flawed, as the fact that there were other sources to substantiate the doctor's opinion made admission of the contested evidence less necessary to the action.

In Ettel, the Court of Appeals panel conducted a similarly misguided Rule 403 analysis regarding the prior murder conviction. 377 S.C. at 563, 660 S.E.3d at 288. Regarding probative value, the Court found that "Dr. Crawford used the information to develop her 'opinion in terms of [Ettel] not being able to control his behavior' and to diagnose Ettel with paraphilia." Id. In discussing prejudiced, the Court again focused on the impact to the doctor's analysis rather than

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[3] Gaster testified he filed the motion in an attempt to have the proper age of consent in South Carolina clarified, and not because he was intending to pursue minors. State v. Gaster, 349 S.C. 545, 556, 564 S.E.2d 87, 93. In the motion, Gaster stated he did "not want to be arrested or harassed by the police if a woman 14 years of age or older chooses him as a sexual partner." Id. at 557, 564 S.E.2d at 93. Gaster testified he made that statement in an effort to show he had standing to bring the suit. Id.

the impact upon the jury. The Court noted that the prior charges and conviction were "not the only sources of Dr. Crawford's diagnosis" and that Dr. Crawford testified that her diagnosis would have stayed the same even without consideration of the disputed evidence. Id.

In both cases the analysis is contradictory, as it finds that the objected to evidence was "significant" to the evaluation for the purposes of determining probative value but notes the use of many other sources of information underlying the diagnoses for the purpose of determining prejudice. In so far as other factors were considered in addition to the objectionable information, such would appear to weigh against admission because its reference was less necessary to explain the related diagnosis. Here, Dr. Knight cited numerous other factors the weighed in her diagnosis of antisocial personality disorder, such that it was not necessary that she discuss Miller's specific non-sexual offenses to support her diagnosis. See R. 35, l. 2 – 36, l. 17; R. 87, l. 10 – 95, l. 7; R. 123, l. 19 – 126, l. 7; R. 138, l. 5 – 139, l. 5.

Moreover, the wrong perspective was used to evaluate prejudice in Gaster and Ettel. Both Courts failed to look at whether the admission of the evidence tended to suggest to the jury that it render its decision on an improper basis. See State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2008) ("Unfair prejudice [within the meaning of Rule 403, SCRE,] means an undue tendency to suggest a decision on an improper basis.'") (quoting State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000)). In this case, reference to Miller's non-sexual offenses presented a substantial danger that the jury would find in favor of commitment based upon a general criminal propensity rather than because it found that the state proved beyond a reasonable doubt that Miller was *likely* to engage in acts of *sexual violence* if he was not confined.

To be clear, Appellant is not suggesting that the non-sexual charges and convictions could not be considered by the evaluators. Rather, the evaluators should not have discussed them during their testimony in front of the jury. Automatic admission of such testimony promotes a serious danger that the State will seek to bolster feeble evidence of a person's risk to reoffend sexually by introducing evidence of the person's prior, non-sexual conduct, as it did in the present case. This Court has emphasized:

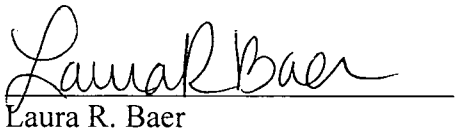
> A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy. Although this Court has repeatedly held the Act constitutional, we decline to construe it in a manner which would lessen the State's burden of proof. The General Assembly has carefully written our SVP Act to lay out exactly what is required to establish that someone is a sexually violent predator; the State must prove, beyond a reasonable doubt that the individual is *presently* a sexually violent predator.

In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) (additional emphasis added)).

The Court of Appeals erred in failing to reverse the trial court's flawed application of our case law as automatically permitting admission of a person's entire criminal record, including charges and convictions of both a sexual and non-sexual nature, merely if considered by an expert witness. The trial court was required instead to make a twofold inquiry. First, were the charges and convictions relevant to the determination of whether Miller was a sexually violent predator? Second, was the probative value of the offenses outweighed by the danger of unfair prejudice? See Ettel, 377 S.C. at 563, 660 S.E.2d at 288; Rule 401, SCRE; Rule 403, SCRE. In this case, the SVP trial judge misconstrued the consideration of the information by the expert as the only relevant question and improperly admitted the evidence of the non-sexual charges and convictions. Miller is accordingly entitled to a new commitment trial.

CONCLUSION

Based on the foregoing, Petitioner Calvin Joe Miller respectfully requests that this Court reverse his commitment and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN JOE MILLER,

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 have been served on Calvin Joe Miller, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 14th day of March, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .