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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Greenville County
The Honorable R. Lawton McIntosh, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2017-001362

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

Petitioner.

BRIEF OF RESPONDENT

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S.C. SUPREME COURT

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ISSUE PRESENTED

The circuit court properly allowed the State's expert to testify about Petitioner's non-sexual criminal charges and convictions, because the expert considered those charges and convictions in reaching her opinion regarding Petitioner's diagnoses and risk to reoffend sexually if not confined for long term control, care and treatment.

STATEMENT OF THE CASE

Respondent concurs with Petitioner's procedural Statement of the Case.

STATEMENT OF FACTS

Petitioner Calvin Miller pled guilty on August 3, 2010, to one count of committing a lewd act on a child under the age of sixteen, arising from the molestation of his twin nieces when they were under the age of ten, and was sentenced to eight years incarceration, with no probationary term. Prior to his release from prison, Respondent State of South Carolina commenced an action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Petitioner's civil commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment. The matter was called for a jury trial on July 14, 2014, before the Honorable R. Lawton McIntosh, Circuit Court Judge.

The State presented testimony from Susan Knight, Ph.D., who was qualified as an expert in psychology and forensic psychology. Dr. Knight testified she worked for the Medical University of South Carolina (MUSC) Sexual Behaviors Clinic, and MUSC assigned her to conduct Petitioner's forensic evaluation after the State retained MUSC on the case. (Record on Appeal [R.], pp. 10-19).

In evaluating Petitioner, Dr. Knight used the standard protocol for MUSC evaluations, including review of all available records, a clinical interview of Petitioner, which lasted approximately four hours, collateral interviews, and a battery of psychological and physiological tests. She testified this is the type of information experts rely on in the field of forensic psychology. (R., pp. 20-25).

According to records associated with Petitioner's 2010 lewd act conviction, Dr. Knight testified he was originally charged with two counts of criminal sexual conduct with a minor under the age of eleven, and one count of lewd act on a minor under the age of sixteen. The offenses were reported in 2009 when the victims (Petitioner's twin nieces) were ten years old,

but the actual abuse occurred years earlier. One victim stated Petitioner fondled her genitals and breasts when she was five or six years old, and again when she was eight years old. The other victim reported Petitioner anally raped her when she was five or six years old, and again when she was eight years old. (R., pp. 25-28).

In addition to his 2010 conviction, Petitioner had a previous conviction in North Carolina for a sexual offense involving the digital penetration of a three year old female he was babysitting. The victim immediately reported the incident to her mother, and her five year old brother reported witnessing Petitioner "punching [victim] in her private area." (R., pp. 29-31).

Petitioner objected to Dr. Knight testifying about his non-sexual offenses, which included breaking and entering, larceny, two criminal domestic violence convictions, possession of marijuana, and three failure to register as a sex offender convictions. The circuit court overruled the objection based on applicable case law. Dr. Knight then testified it is necessary to consider the non-sexual offense history of the person being evaluated because it goes to diagnosis and a pattern of behavior, but she did not base any diagnosis or opinion solely on Petitioner's criminal history. (R., pp. 31-36).

During the four hour interview with Dr. Knight, Petitioner denied any sexual conduct with his nieces when they were five or six years old, but admitted fondling one and sodomizing the other when they were eight years old. He stated the fondling lasted a minute, and he put her hand on his penis, but it ended when the victim said it was weird because he was her uncle, so he got embarrassed and quit. (R., p. 37).

As to the other victim, Petitioner stated he was laying in the bed with her, and asked her if he could put his penis in her "butt," and she said okay. He said the sexual activity lasted a couple of minutes on that occasion. A week later he asked the victim if she wanted to do it

again, and she agreed, but his conscience started bothering him when she got undressed and laid on the bed, so nothing happened. (R., pp. 37-38).

Petitioner told Dr. Knight he believes anal intercourse "does not count as somebody's first time of having sex." Dr. Knight testified Petitioner's distinction between the severity of anal intercourse and vaginal intercourse showed a lack of insight into the gravity of the sex act with his eight year niece, and was "quite concerning." (R., pp. 38-39).

Petitioner also told Dr. Knight he had sexual thoughts and fantasies about his nieces, and started masturbating to those fantasies, which "took over his mind." He stated he was attracted to the physical characteristics of his prepubescent nieces, particularly the smoothness of their vaginal areas, which was significant to her diagnosis of pedophilia. (R., pp. 39-41).

As to the North Carolina offense, even though he pled guilty to the charge, Petitioner denied any sexual contact with the victim, stating she got injured in a bike accident. When he pled guilty, Petitioner had the option of incarceration or probation, and he chose incarceration because "he didn't have a place to live, so he was afraid he would violate his probation." Dr. Knight found his version of the incident significant because it "could have been a denial of the offense." (R., pp. 41-43).

Dr. Knight testified about the battery of tests administered pursuant to the evaluation protocol, which includes measures of attention and impulsivity, substance abuse, personality, psychopathy, sex offender risk, and sexual interests. She stated the protocol is designed to give the most clear picture of the person they can get from a psychological, physiological and sexual arousal standpoint, and the results form the basis for an ultimate opinion. (R., pp. 43-44).

The Static-99R is an actuarial risk assessment tool comprised of ten risk factors correlating with the person's risk to commit another sexual offense. At the time of Dr. Knight's

evaluation, Petitioner's score on the Static-99R was four, which put him in the moderate high risk category. Between the evaluation date and trial, Petitioner turned forty years old, lowering his score to three, which is the moderate low risk category. Dr. Knight testified the lower score did not change her ultimate opinion in the case because the Static-99R is just one tool, and it does not account for all risk factors applicable to the individual being evaluated. (R., pp. 44-48).

Other tests indicated Petitioner did not have any attention, substance abuse or psychopathy problems. A test measuring personality traits indicated Petitioner tried to present himself in a better light than other clinical data, and suggested a diagnosis of personality disorder with antisocial traits. Another tool indicated a history of sex abuse, and sexual interests in adolescent and adult females. (R., pp. 48-52).

MUSC administered a penile plethysmorgraph (PPG) as part of Petitioner's evaluation. Dr. Knight explained the PPG is designed to measure a man's sexual arousal by their physiological response to visual and audio stimuli, and Petitioner's PPG was invalid because he did not respond to any stimuli. She testified the lack of response could be the result of several things, including Petitioner trying to manipulate the test by moving around, holding his breath and contracting his muscles, all of which was indicated during his PPG.

Dr. Knight further testified records she reviewed from Petitioner's voluntary two month stay in a psychiatric hospital around the time he was arrested indicated he was uncooperative, aggressive and grossly exaggerated his symptoms on psychological tests. In addition, Petitioner told her he lied to get into the hospital because he "'wanted to beat his charges and play insane,'"

and she found Petitioner's history of trying to fool tests significant in connection with the PPG results.[1] (R., pp. 52-56).

Dr. Knight testified Petitioner's Static-99R results revealed several risk factors to reoffend, including a prior sex offense, an unrelated victim, multiple sentencing dates, and a violent conviction. She further testified he had additional risk factors not included in the Static-99R, including a history of sexually deviant arousal to prepubescent children, antisocial traits, cognitive distortions regarding his conduct and victims, which makes him a higher risk to reoffend sexually than reflected on the Static-99R. (R., pp. 57, 81-82).

Dr. Knight also expressed concern about Petitioner's plans if he was released from confinement, which included living with another convicted sex offender, who had been committed as a sexually violent predator. The sex offender he planned to live with was also a pedophile, who violated his probation by being around prepubescent children, and after his release from DMH's sexually violent treatment program, he was caught mailing his pubic hair and bodily fluids to residents in the program. She testified this plan indicated Petitioner had no insight into his risk to reoffend, particularly because his plan to avoid reoffending was to "'always keep an adult around.'" (R., pp. 97-100).

Based on his admitted sexual attraction to prepubescent females and history of acting on those urges, Dr. Knight diagnosed Petitioner with the mental abnormality of pedophilia, attracted to females, non-exclusive type. Based on his lengthy criminal history, his pattern of

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[1]Testimony proffered by the State but excluded from evidence also indicated Petitioner was disruptive, narcissistic and manipulative during his participation in a Department of Corrections sex offender treatment program, and even though he "passed" the program by answering enough questions on a test correctly, he did not internalize the concepts and could not apply them to himself. (R., pp. 69-73).

irresponsibility evidenced by his job history and failure to comply with the sex offender registry requirements, and his pattern of physical aggressiveness, Dr. Knight also diagnosed Petitioner with a personality disorder with antisocial traits. (R., pp. 84-93).[2]

Dr. Knight testified to a reasonable degree of psychological certainty Petitioner's pedophilia and personality disorder cause him serious difficulty controlling his behavior, and he has the propensity to commit future acts of sexual violence. She stated he requires long term control, care and treatment due to his disorders. (R., pp. 94-97).

Kimberly Harrison, Ph.D., who was originally appointed by the court to evaluate Petitioner, testified as an expert on Petitioner's behalf. She diagnosed him with pedophilia, attracted to females, non-exclusive type, but concluded he did not meet the criteria for commitment under the SVPA because he was a low risk to reoffend. She did not conduct any psychological tests during the evaluation, but did score the Static-99R. (R., pp. 142-162).

On cross-examination, Dr. Harrison testified she saw the records from Petitioner's psychiatric hospitalization, including the personality disorder with antisocial traits diagnosis, but she did not contact anyone at the hospital to follow-up after she concluded there was not enough "data" to render a similar diagnosis. She also confirmed the only assessment tool she used to reach her ultimate conclusion was the Static-99R, even though other tests and tools were available. Finally, she testified Petitioner said similar things regarding anal intercourse versus vaginal intercourse during her interview with him, blamed the North Carolina incident on a bike injury, and told her about his plan to live with the convicted sex offender, but she did not find any of that information particularly concerning. (R., pp. 163-178).

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[2] Petitioner was also diagnosed with personality disorder with antisocial traits during his 2009 psychiatric hospitalization. (R., p. 91).

The jury found Petitioner is a sexually violent predator beyond a reasonable doubt, and the circuit court ordered him into DMH's custody for long term control, care and treatment. (R, pp. 188-191, 196). This appeal followed.

By unpublished opinion filed April 5, 2017, the Court of Appeals affirmed Petitioner's commitment, finding the circuit court did not abuse its discretion in admitting Dr. Swan's testimony regarding Petitioner's non-sexual offenses. (Appendix, pp. 1-2). Petitioner sought rehearing, which the Court of Appeals denied by Order filed May 19, 2017. (Appendix, pp. 3-14). Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals seeking review of the Court of Appeals decision, which this Court granted by Order dated February 1, 2018.

ARGUMENT

The circuit court properly allowed the State's expert to testify about Petitioner's non-sexual criminal charges and convictions, because the expert considered those charges and convictions in reaching her opinion regarding Petitioner's diagnoses and risk to reoffend sexually if not confined for long term control, care and treatment.

Petitioner contends the circuit court failed to conduct a Rule 403, SCRE, analysis regarding evidence of Petitioner's non-sexual criminal charges and convictions, and erred as a matter of law in allowing the State's expert to testify about those offenses. He further asserts the circuit court and Court of Appeals misapprehended existing case law regarding admission of prior offenses and convictions in SVPA cases by interpreting it as "allowing automatic admission of an offender's entire criminal history of charges and convictions," and asks this Court to clarify the existing law.

When the record is considered in context rather than the truncated version offered by Petitioner, the evidence was directly relevant, its significant probative value outweighed the prejudicial effect, the circuit court properly interpreted existing law and exercised its discretion in allowing the evidence, and the Court of Appeals properly affirmed the circuit court's ruling. Further, the existing case law regarding the admissibility of such evidence is sufficiently clear, and does not need clarification.

A. Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013). Appellate courts will not disturb the trial court's ruling absent a manifest abuse of discretion accompanied by probable prejudice, which occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Id.*

B. Applicable Statutory and Case Law

The SVPA expressly gives experts "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 (Supp. 2014) (emphasis added). "Criminal offense" includes both convictions and offenses not resulting in convictions "as long as they are relevant to the determination of whether a person is a sexually violent predator." In re the Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008); *see also* White v. State, 375 S.C. 1, 649 S.E.2d 172, 176 (Ct. App. 2007) (legislature did not limit "criminal offense" in the SVPA to only convictions; therefore, the court must assume the legislature intended to include both convictions and prior offenses not resulting in convictions that bear on whether a person is a sexually violent predator as admissible evidence in a SVPA case).

A person's dangerous propensities are the focus of the SVPA, and past criminal history bears directly on the presence of a mental abnormality and/or personality disorder, as well as the person's risk to reoffend. In re the Care and Treatment of Chandler, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (*citing* In re the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453-54 (2003). Similar to the conviction versus offense issue decided in White, the legislature did not limit the expert's consideration of "criminal offenses" to sexual offenses, but intended to include any criminal offenses, sexual or non-sexual, relevant to the person's mental status and risk to reoffend. *See* In re the Detention of Altman, 723 N.W.2d 181, 184-185 (Iowa 2012) (the statutory definitions of "mental abnormality" or "sexually violent predator" do not require the person's risk be primarily sexual in nature; and the fact he might be "even more likely to commit

other types of offenses does not detract from his risk as a sexual predator");[3] *see also* In re Commitment of Hooker, 360 Ill. Dec. 334, 968 N.E.2d 1087, 1100-1103 (2012) (person's criminal history, sexual and non-sexual, is relevant and admissible in a sexual predator case as the bases for an expert's diagnosis and opinion) (*citing* In re Commitment of Doherty, 343 Ill.App.3d 615, 934 N.E.2d 590 [2010]).

In Ettel, the Court of Appeals found Ettel's prior sexual offenses and murder conviction were relevant because the expert relied on them in evaluating his need for, and likelihood of success in, treatment and his ability to control his behavior in the future. The expert testified Ettel's murder conviction was relevant to his propensity to commit further violent crimes, even if there was no sexual component, and she used it to develop a diagnosis and render an opinion regarding his ability to control his behavior. *Id. See also* State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 [2002] [admission of motion filed by defendant did not violate his due process rights because it was relevant in evaluating defendant's need for and probability of success in treatment]).

In this case, in addition to his sexual offenses, Petitioner's criminal history included possession of marijuana, breaking and entering, criminal domestic violence, and sex offender registry violations. It spanned decades, from his teenage years to his arrest in 2009, and across

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3South Carolina's definitions of "mental abnormality" and "sexually violent predator" are similar. *Compare* Iowa Code §229A.2(5) (mental abnormality is one predisposing person to commit sexually violent offenses) and Iowa Code §229A.2(11) (sexually violent predator is person likely to engage in predatory acts constituting sexually violent offenses) *with* S.C. Code §44-48-30(2)(3) (Supp. 2014) (mental abnormality is a mental condition predisposing the person to commit sexually violent offenses) and S.C. Code §44-48-30(1)(b) (Supp. 2014) (sexual predator is person who suffers from mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence).

two states. Dr. Knight testified Petitioner's non-sexual offense history was relevant to assessing his risk to reoffend sexually because it showed patterns of irresponsibility, physical aggressiveness, and failure to conform his conduct to the law, which increased his risk to commit a future act of sexual violence against a child.[4] (R., pp. 35-36, 57, 87-89).

The evidence was also highly probative on the issue of Dr. Knight's personality disorder with antisocial traits diagnosis. Dr. Knight testified extensively regarding her basis for this diagnosis, and noted the psychiatric professionals who evaluated Petitioner during his 2009 two months stay in a psychiatric hospital also diagnosed the personality disorder. Dr. Harrison failed to give any credence to the prior diagnosis, or even reach out to the hospital before deciding to ignore it.

As for the evidence's possible prejudice, Petitioner's non-sexual offenses were not the only basis for Dr. Knight's diagnoses and opinion. In assessing Petitioner's mental status and risk to reoffend sexually, Dr. Knight also considered and relied on the specifics of Petitioner's sexual offenses, his work history, her clinical interview with him, and information regarding his participation in a sex offender treatment program during his incarceration. Based on all the information she relied on, including Petitioner's non-sexual offenses, she concluded he had a mental abnormality (pedophilia) and a personality disorder (with antisocial traits), and he was a

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[4]Petitioner's contentions regarding Dr. Knight's use of the Static-99R amply demonstrate why a professional should not rely solely on the Static-99R in rendering an opinion on a person's risk to reoffend because of differing views on what it does or does not include. While Petitioner correctly states the Static-99R score accounts for prior convictions, it does **not** consider the length of the person's offense history, or the significance in a sexual predator case of prior non-sexual offenses such as repeatedly violating the sex offender registry laws. Dr. Knight found both of those factors significant in this case.

high risk to reoffend sexually if not confined for long term control, care and treatment. *See* Ettel, 660 S.E.2d 285 at 288 (expert also relied on prior sexual conviction, statements made during clinical interviews, and Ettel's record while in a sex offender treatment program in reaching her ultimate diagnosis and opinion); *see also* Gaster, 564 S.E.2d at 94 (disputed evidence was relevant and its probative value outweighed any prejudicial effect such that circuit court properly admitted the evidence within its discretion). Petitioner's pedophilia diagnosis was undisputed, and the probative value of his extensive criminal history, sexual and non-sexual, cannot be seriously disputed, particularly on the issue of his risk to reoffend sexually against children.

The State concurs with Petitioner's assertion the existing case law (primarily Ettel, Corley, and Gaster) does not provide for "automatic" admission of the person's entire criminal history, but that is **not** how the circuit court and Court of Appeals interpreted the case law in this case. The cited cases provide for admission of prior criminal offenses and convictions to the extent they were relied on by the evaluator **and** significant to the evaluator's ultimate opinion. By way of example, if the person being evaluated has a relatively minimal non-sexual criminal history, and the evaluator did not rely on that history for diagnosis or risk assessment, evidence of the non-sexual offenses would not be allowed into evidence under existing law.

The circuit court allowed the evidence at issue in this case after carefully considering the analysis in those prior cases, particularly as it related to non-sexual offenses, and found they allowed admission of Petitioner's prior non-sexual offenses based on the fact Dr. Swan relied on it for purposes of rendering her opinions on Petitioner's mental status and risk to reoffend sexually. (R., pp. 31-34). At no point did the court indicate the prior cases made admission "automatic."

Petitioner contends the evidence at issue was more prejudicial than probative because it created a substantial risk the jury would render its decision on an improper basis, i.e., a general criminal propensity rather than a risk to reoffend sexually. To the contrary, it is far more likely the jury rendered its decision based on the thoroughness and validity of Dr. Knight's evaluation and opinions regarding Petitioner's mental status and risk to reoffend sexually when compared to Dr. Harrison's perfunctory evaluation.

Dr. Knight's testimony presented the evidence regarding Petitioner's non-sexual offenses very concisely, with the primary focus on how and why they were significant to her diagnoses and opinion regarding Petitioner's risk to reoffend sexually, which limited the potential prejudice to Petitioner as much as possible. (R., pp. 35-36, 88-89). The offenses were a significant part of the basis for her diagnosis of personality disorder with antisocial traits, and they showed Petitioner's inability to control his conduct, which went directly to her risk assessment. She specifically testified the combination of Petitioner's pedophilia and personality disorder significantly increased his risk to reoffend sexually. (R., pp. 86-89, 93-94).

Taken to its logical conclusion, Petitioner's argument regarding the admission of non-sexual criminal offenses in a sexual predator case will put every evaluator in the position of either ignoring non-sexual offenses regardless of their relevance to diagnosis and risk assessment, or rendering an opinion they cannot support at trial because they cannot testify about the basis for it. In this case, if the limited evidence regarding Petitioner's non-sexual offenses was not admitted, Dr. Knight could testify about her diagnoses of pedophilia and personality disorder with antisocial traits, as well as her conclusion Petitioner was a high risk to reoffend, but she could not testify about evidence going directly to the heart of the basis for her opinions, thus giving only a partial explanation to the jury. Such a result deprives the jury of vital information

regarding the validity of an expert's opinions about the person's mental status and risk to reoffend, which is contrary to the legislative intent of the SVPA.

Given the direct relevance of Petitioner's non-sexual criminal offenses to Dr. Knight's conclusions, and specifically the highly probative nature of the evidence to Petitioner's personality disorder diagnosis and his overall risk to reoffend sexually, the circuit court did not abuse its discretion in allowing Dr. Knight's limited testimony regarding those offenses, and the Court of Appeals properly affirmed the court's ruling. Therefore, the Court of Appeals opinion should be affirmed

CONCLUSION

Based on the foregoing and the Final Brief of Respondent, Respondent submits the Court of Appeals properly affirmed the circuit court's ruling, and its ruling should be affirmed.

Respectfully submitted,

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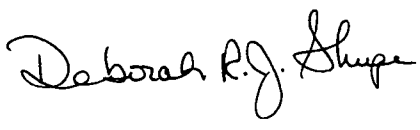

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals by depositing a copy in the United States mail, postage prepaid, addressed to:

Laura R. Baer
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
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I further certify all parties required by Rule to be served have been served.

This 10th day of April, 2018.

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