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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF OTIS ALFORD,

APPELLANT

APPELLATE CASE NO. 2018-001496

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this SVP trial, whether the trial judge erred in refusing to grant appellant's motion for directed verdict because the only diagnosis given appellant—antisocial personality disorder—is legally insufficient because it fails to distinguish appellant from a common recidivist criminal?

STATEMENT OF THE CASE

The Attorney General sought appellant's commitment to the SVP compound and on August 6, 2018, appellant was tried before the Honorable William H. Seals and a jury. R. 1. Christopher A. Morrow appeared for the Attorney General. R. 1. James K. Falk represented appellant. R. 1. The jury found appellant was a sexually violent predator and appellant was ordered to be confined indefinitely. R. 194. This appeal follows.

STANDARD OF REVIEW

This Court reviews questions of law de novo. Milliken & Co. v. Morin, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012).

ARGUMENT

In this SVP trial, the trial judge erred in refusing to grant appellant's motion for directed verdict because the only diagnosis given appellant—antisocial personality disorder—is legally insufficient because it fails to distinguish appellant from a common recidivist criminal.

The Attorney General's only expert in this sexually violent predator commitment trial was Dr. Gordon Brown, a forensic psychologist. R. 45. He is not a medical doctor. R. 50. He is not board certified. R. 51. He had never testified as an expert in an SVP commitment trial. R. 51. The trial judge qualified him, stating, "Every expert has to start somewhere." R. 52.

Dr. Brown did not diagnose appellant with pedophilia. R. 102. Nor did he diagnose appellant with biastophilia—deviant arousal to non-consensual sex. R. 102-04. Appellant's score on an actuarial table used to predict recidivism risk for sex offenders gave him only an 18-23% chance of reoffending within five years. R. 83-84.

The only basis for commitment was Dr. Brown's diagnosis of appellant with antisocial personality disorder ("ASPD"). R. 74. Dr. Brown agreed that many psychologists believed ASPD was not a mental illness, but just a pattern of criminal behavior. R. 103-04. He also agreed that some professionals believed ASPD should not be the sole basis for SVP commitment. R. 102-04. While he would not put a number on his guess, he acknowledged that "a high percentage of the prison population" would qualify for an ASPD diagnosis. R. 104-06. He attempted to differentiate appellant from a common recidivist criminal by stating appellant failed to have "stability in employment, not having stability in housing, not really planning ahead for those kinds of things." R. 106-07.

After Dr. Brown left the stand, appellant moved for a directed verdict. R. 123-27. Appellant argued that ASPD is not sufficiently specific to form the basis for an SVP

commitment. R. 123-27. Appellant cited the New York high court's opinion in State v. Donald DD., 24 N.Y.3d 174, 190-92 (2014), which held that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment. The trial judge denied the motion, stating it was a question of fact for the jury. R. 127.

The trial judge erred in allowing appellant to be committed solely on the basis of an ASPD diagnosis. In Donald DD., the court relied on the Due Process Clause and the United States Supreme Court's decisions in Kansas v. Hendricks, 521 U.S. 346 (1997) and Kansas v. Crane, 534 U.S. 407 (2002). The Fourth Circuit also has criticized the use of antisocial personality disorder for sex offender commitment. United States v. Antone, 742 F.3d 151, 169-70 (4th Cir. 2014) ("What's more, Antone's civil commitment is based on two mental disorders that are undisputedly prevalent in the nationwide prison population.").

In Hendricks, Justice Anthony Kennedy provided the fifth vote in the 5-4 decision of the Court upholding the constitutionality of Kansas' SVP statute against a challenge that it was punitive and therefore violated the ex post facto and double jeopardy clauses. Hendricks, 521 U.S. at 371-72 (1997). Justice Kennedy wrote separately "to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application." Id. He concluded his concurrence by stating that if "it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id. at 372. Justice Kennedy's prescient warning about the imprecision of psychology applies with full force to this case.

The majority in Hendricks wrote extensively about whether the Kansas statute's definition of mental abnormality satisfied substantive due process. Id. at 356-60. Approving the Kansas

statute, the Court wrote that it required “evidence of past sexually violent behavior and a present mental condition **that creates** a likelihood of such conduct in the future if the person is not incapacitated.” Id. at 357 (emphasis added). Focusing on the lack of control, the Court stated that the “lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” Id. at 360. From the Court’s opinion, it is clear that due process requires a link between the mental abnormality and the inability to control future sexual behavior.

The Supreme Court refined its holding in Kansas v. Crane, 534 U.S. 407 (2002). The Court rejected the defendant’s argument that due process requires the state to prove complete lack of control. Id. at 411. But the Court also rejected the state’s argument that it did not have to prove any lack of control. Id. at 412. The Court wrote that the lack of control finding distinguishes dangerous sexual offenders from other persons who are dangerous and this “distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment.” Id. In its citation for this sentence, the Court noted a study that found that “40% - 60% of the male prison population is diagnosable with antisocial personality disorder.” Id. *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999). The Court further held that there “must be proof of serious difficulty in controlling behavior.” Id. at 413. Elaborating, the Court stated that the proof of lack of control

when viewed in light of such features of the case as the **nature of the psychiatric diagnosis**, and **the severity of the mental abnormality itself**, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness,

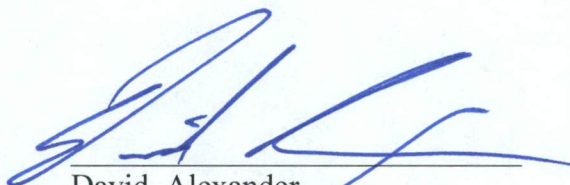
abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**

Id. (emphasis added).

Despite this well-reasoned authority to the contrary, appellant recognizes that our Supreme Court has allowed diagnoses that even fail to rise to the level of ASPD to be used as the sole basis for SVP commitment. In the Matter of Snow, 425 S.C. 544, 823 S.E.2d 467 (2019). However, Snow was wrongly decided and should be overturned. The Snow Court failed to grapple with the Due Process issues and did not even cite or distinguish Donald DD., which is the leading case nationally on this issue. This Court should recognize that ASPD does nothing to distinguish appellant from a common recidivist. According to Dr. Brown, appellant's ASPD is the result of vagrancy, not sexual deviance. This Court should reject the Attorney General's efforts to medicalize criminality and reverse appellant's commitment.

CONCLUSION

For the foregoing reasons, appellant's indefinite commitment and confinement should be reversed.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2019.

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IN THE COURT OF APPEALS

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Honorable William H. Seals, Circuit Court Judge

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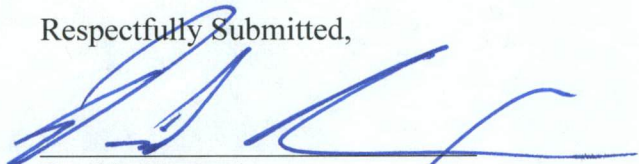
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Otis Alford states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before the Honorable William H. Seals, which was held on August 6-7, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Otis Alford.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 16th day of April, 2019.

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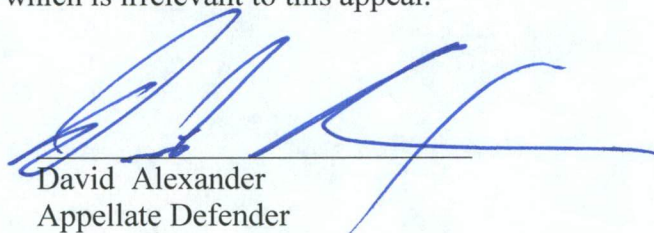
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Trial Transcript dated August 6-7, 2018

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

April 16, 2019



David Alexander
Appellate Defender

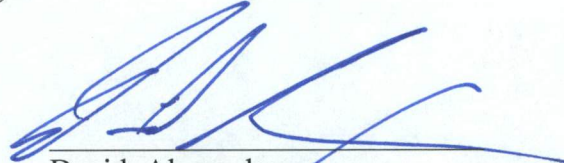
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 16, 2019.



David Alexander
Appellate Defender

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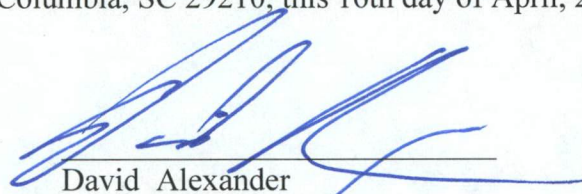
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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Otis Alford, , at 4546 Broad River Road, , Columbia, SC 29210, this 16th day of April, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of April, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.