

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lancaster County

R. Knox McMahon, Circuit Court Judge

RECEIVED

IN THE MATTER OF THE CARE AND TREATMENT OF JUL 10 2017

KENNETH CAMPBELL,

S.C. SUPREME COURT

PETITIONER

APPELLATE CASE NO. 2016-001566

BRIEF OF PETITIONER

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ISSUES PRESENTED

I. Did the Court of Appeals err in finding Petitioner's argument that the trial judge erred by allowing the state to impeach the court's expert with irrelevant and unfairly prejudicial information was unpreserved "to the extent [Petitioner] argues Rule 403, SCRE" where the objection was understood by the trial judge and ruled upon as evidenced by the record?

II. Did the Court of Appeals err by affirming the trial judge's ruling that the state could impeach the court's expert with irrelevant and unfairly prejudicial information that a person in an unrelated case she had recommended be released was arrested for rape where there was no evidence the person had been convicted?

STATEMENT OF THE CASE

Petitioner was convicted of criminal sexual conduct with a minor in the first degree on April 7, 2003, and lewd act on a child on April 24, 2003. R. 158 – 159. Petitioner was sentenced to twelve years' imprisonment concerning the lewd act conviction and to twenty years' imprisonment, which was suspended upon the service of twelve years' imprisonment and three years of probation, for the criminal sexual conduct conviction. The sentences were to be served concurrently. R. 158 – 159. On November 1, 2012, shortly before Petitioner's anticipated release date, Lloyd V. Flores Jr., an attorney with the South Carolina Office of Attorney General, filed a petition pursuant to the Sexually Violent Predator Act (SVPA) alleging that Petitioner was a sexually violent predator. R. 160. In accordance with the Act, a trial commenced on September 8, 2014, before the Honorable R. Knox McMahon and a jury. Nichole Wetherton represented the state, and Charles Brooks represented Petitioner. R. 1.

At the conclusion of the trial, the jury found Petitioner was a sexually violent predator under the SVPA. R. 153, ll. 16-25; R. 166. Judge McMahon ordered Petitioner be committed to the Department of Mental Health for long-term control, care, and treatment. R. 157, ll. 2-12; R. 167.

Petitioner filed a timely notice of appeal, which was perfected by undersigned counsel. On May 11, 2016, the Court of Appeals affirmed Petitioner's commitment in an unpublished *per curiam* opinion. App. 1-2; In the Matter of the Care and Treatment of Kenneth Campbell, 2016-UP-198 (S.C. Ct. App. filed May 11, 2016). On May 26, 2016, Petitioner filed a petition for rehearing. App. 3-13. On June 28, 2016, the Court denied the petition. App. 14.

Petitioner filed a petition for writ of certiorari. On May 30, 2017, this Court granted the petition and ordered briefing. This brief follows.

STATEMENT OF FACTS

At the trial, it was undisputed that Petitioner had been convicted of a sexually violent offense as defined by the SVPA.¹ The only issue for the jury to determine was whether Petitioner suffered from a mental abnormality or personality disorder that made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

The state's expert

The state's expert testified regarding the allegations surrounding those convictions as revealed in the incident reports. R. 41, l. 19 – R. 46, l. 11; R. 158; R. 159. Additionally, over objection, the state's expert testified about the details of an allegation made against Petitioner that did *not* result in a conviction. R. 47, l. 8 – R. 48, l. 21. The state's expert even testified about Petitioner's prior non-sexual convictions. R. 48, l. 22 – R. 49, l. 9.

Thereafter, the state's expert opined that Petitioner had a "pedophilic disorder, a non-exclusive type, sexually attracted to both." R. 65, ll. 3-4. The state's expert described pedophilia as a mental abnormality relevant to a determination of whether a person is a sexually violent predator. R. 65, ll. 5-8. Further, the state's expert opined that Petitioner's pedophilia caused "him serious difficulty in controlling his behavior." R. 66, ll. 3-5. She further believed that the diagnosis made "him likely to engage in acts of sexual violence if not confined in a facility." R. 67, ll. 6-8. Finally, the state's expert opined that Petitioner had "been convicted of a sexual[ly] violent offense," and had "a mental abnormality or personality disorder that ma[de] him likely to engage in acts of sexual

¹ See S.C. Code Ann. § 44-48-30(2)(listing offenses defined as sexually violent offenses under the SVPA).

violence if not confined to the facility.” R. 67, ll. 14-17.² Dr. Gomez rendered this opinion despite being forced to admit that Petitioner’s risk factor was a three based on the testing she conducted indicating he was in the low to moderate risk group for re-offending. R. 53, ll. 13-25.

The court-appointed expert

The court-appointed expert, Dr. Marie Gale, had conducted more than 160 evaluations pursuant to the SVPA, in stark contrast to the state’s expert, who had become “acquainted with this type of case” only two years before her testimony, had testified as an expert witness only twelve times, and testified as an expert in SVP cases only twice. R. 36, ll. 3-23; R. 81, l. 23 – R. 82, l. 4. In fact, Dr. Gale’s “full-time job” was to conduct evaluations pursuant to the SVPA. Dr. Gale, as an employee of the Department of Mental Health, was very familiar with the SVP program due to the Department’s role as the administrator of the program pursuant to the statute. R. 110, l. 15 – R. 111, l. 7. Dr. Gale diagnosed Petitioner with pedophilic disorder, sexually attracted to females, not exclusive type. R. 85, ll. 19-22. Based on Petitioner’s performance on the Static 99r, Dr. Gale determined Petitioner’s risk assessment was a two, which placed him in the low moderate risk category. R. 86, l. 1 – R. 87, l. 23. Based upon Dr. Gale’s review of Petitioner’s background, the records, her interview with Petitioner, and the relevant testing, Dr. Gale concluded that Petitioner did *not* meet the criteria of a sexually violent predator. Petitioner was *not* likely to reoffend. R. 96, ll. 7-23. According to Dr. Gale, there was insufficient evidence to conclude that Petitioner’s abnormality made him likely to engage in acts of sexual violence in the future. R. 96, l. 24 – R. 97, l. 3.

² Cf. S.C. Code Ann. § 44-48-30(1) defining a sexually violent predator as a person who (1) has been convicted of a sexually violent offense and (2) suffers from a mental abnormality or 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.

On re-cross examination, the following exchange occurred between the state's attorney and

Dr. Gale, the court-appointed expert:

Q. Mr. Brooks said that you do a lot of these pre-commitment evaluations; is that correct?

A. That's correct.

Q. Have you ever gotten any of these ever wrong?

A. I don't know.

Q. Do you remember the case of Michael Thomas?

A. No.

Q. Okay.

[The witness is handed a document]

A. This was conducted, or completed, I guess in August of 2012, so I don't know that I can remember the case specifically.

Q. Well, that's fine. Can you turn to the last page?

A. Yes.

Q. Did you sign that report?

A. Yes.

Q. Okay. And what is the last sentence of the report?

A. "As such it is my opinion that Michael Thomas does not meet criteria to be considered a sexually violent predator as defined by the SVP Act."

[The witness is handed a document]

Q. I'll let you see that, please. And for the record what was the date of the report that you authored?

A. August 9th of 2012.

Q. Okay. And what is the date of that warrant?

A. March 15, 2014.

Q. Okay.

R. 111, l. 25 – R. 113, l. 3. Thereafter, Petitioner objected to the l. of cross-examination: “Unless counsel has a conviction I would object to the relevancy.” R. 113, ll. 7-8. The state responded that the questions went “to the reliability of her reports. He very quickly reoffended after she authored that report.” R. 113, ll. 9-11. Judge McMahon overruled the objection. R. 113, ll. 12-13. Thus, the cross-examination continued:

Q. And who is that warrant for?

A. Michael Darnell Thomas.

Q. Okay. And according to the allegations, isn't it argued that the defendant had raped the individual, that's why they got the warrant for him?

A. Yes.

Q. And doesn't the warrant also indicate that his DNA was a direct hit on CODIS, it was a match?

A. It says the defendant was identified by his DNA through CODIS, so yes.

R. 113, ll. 15-24.

Although Judge McMahon sustained Petitioner's objection to testimony regarding a news article, the state's attorney persisted in her l. of questioning regarding an arrest warrant against an individual whose case was unrelated entirely to the proceedings against Petitioner. R. 113, l. 25 – R. 114, l. 8.

Q. Okay. But what is the offense he has been charged with that's on the warrant?

A. Criminal sexual conduct in the first degree.

Q. And again, the warrant was dated less than two years since you issued that report.

A. Yes.

Q. Okay. And based on your evaluation you felt that he did not meet the criteria as a sexually violent predator.

A. Yes, apparently.

Q. And based on the information you have another woman has been raped; is that correct?

A. Excuse me?

Q. And based on the information you have another woman has now been raped; is that correct?

R. 114, ll. 9-22. Petitioner objected to the last question because it called for a conclusion. The state argued the answer was based “on the information that’s in front of her.” Petitioner noted that all the parties had was an arrest warrant. Thereafter, the judge sustained the objection. R. 114, l. 23 – R. 115, l. 4.

Additional evidence

In addition to the court-appointed expert testifying in favor of Petitioner not being committed under the SVPA, Petitioner testified about his plans upon release, including living with his sister, and performing automotive work in a machine shop. R. 117, ll. 1-5; R. 118, ll. 3-4. The owner of the machine shop, Everett Auten, testified that he had worked with Petitioner previously and had a job waiting for Petitioner upon his release. R. 128, ll. 7-16.

State’s closing argument

In her closing argument, the state argued that if the jury did not find Petitioner was a sexually violent predator and allowed him to be released, then Petitioner was “going to hurt another

kid.” R. 136, ll. 7-8.³ The state urged the jury to disbelieve the court-appointed expert’s opinion because the expert “ha[d] been wrong before.” R. 136, l. 6. The state argued that Dr. Gale conducted only one test and that was the reason why the state sent the case to MUSC, which occurred only in “very, very serious” cases. R. 141, ll. 23-24; R. 142, ll. 11-13. The state capitalized on the jury’s fear by telling the jurors that the ultimate question to decide was whether the jurors, as members of the community, were “really satisfied that a pedophile should be released out into this community.” R. 135, l. 19 – R. 136, l. 3. While telling the jury she was not trying to instill fear, the state left the jury with this:

You have a person who on more than one occasion who [*sic*] has sexually assaulted children. He takes no accountability to what he’s done and he hasn’t had sex offender treatment and he’s refused it when it has been offered. He’s going to go live in a house where people are going to allow him to be around children. You heard the testimony. What do you think is going to happen?

R. 142, ll. 15-22.

³ The state’s closing argument that Petitioner would “hurt another kid” if the jury did not find he was a SVP is reminiscent of the prosecutor’s closing argument in State v. Northcutt, 372 S.C. 207, 222-223, 641 S.E.2d 873, 881-882 (2007) regarding the jury “declaring an ‘open season on babies,’” if the verdict were not death, which this Court held required reversal.

ARGUMENT

I. The Court of Appeals erred in finding Petitioner’s argument that the trial judge erred by allowing the state to impeach the court’s expert with irrelevant and unfairly prejudicial information was unpreserved “to the extent [Petitioner] argues Rule 403, SCRE” where the objection was understood by the trial judge and ruled upon.

This Court has found an objection preserved for review when it was clear from the record that both the state and the trial court immediately understood the basis for the objection. State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014); State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013). This accords with the South Carolina Rules of Evidence, which provide that an objection to the admission of evidence must be timely and state the specific ground of objection “if the specific ground was not apparent from the context.” Rule 103(a)(1), SCRE. “Imposing ... preservation requirement[s] on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Toal, Walker, Baker, Appellate Practice in South Carolina (2016) 184.

In the body of the opinion, the Court of Appeals cited two cases with parenthetical explanations for the admissibility of “relevant” evidence. Additionally, a parenthetical made reference to Rule 401, SCRE, the rule defining relevant evidence. In a footnote, the Court appeared to opine that to the extent Petitioner argued Rule 403, SCRE, required exclusion of the evidence, such an argument was not preserved. By citing State v. Brockmeyer, 406 S.C. 324, 354-355, 751

S.E.2d 645, 661 (2013) for the proposition that an argument based on Rule 403, SCRE, was not preserved for appellate review when Petitioner only objected to the evidence's relevance at trial, it appeared the Court determined that Petitioner's objection at trial was to relevance *only* and any argument on appeal concerning the evidence's unfairly prejudicial impact was unpreserved. This determination is erroneous and places too onerous a burden on trial counsel.

The interplay between Rules 401, 402, and 403 of the South Carolina Rules of Evidence is undeniable based on the language of the rules alone. Generally, all relevant evidence is admissible. Rule 402, SCRE. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. In fact, precedent supports the conclusion that "[t]he dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." Watson ex rel. Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000).

Thus, consideration of whether evidence is relevant and admissible requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two. The opinion by the Court of Appeals indicating in a footnote that consideration of the danger of unfair prejudiced posed by the evidence was unpreserved failed to acknowledge this undisputable link between relevance and the danger of unfair prejudice when a judge determines the admissibility of evidence. Examining the relevance of evidence must not, and cannot, occur in a vacuum.

Importantly, when trial counsel objected to the evidence based on “relevancy,” the judge understood the objection to go to the danger of the unfair prejudice the evidence posed as well. This is clear from the judge’s ruling: “I would overrule the objection under State v. Cheeseboro.” R. 113, ll. 7-8; R. 113, ll. 12-13. In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), this Court examined multiple issues on appeal. Of those issues presented, several concerned whether danger of unfair prejudice substantially outweighed the probative value of the proffered evidence. For example, this Court examined the applicability of Rule 403, SCRE, to evidence offered pursuant to Rule 404(b), SCRE. Cheeseboro, 346, S.C. at 547, 552 S.E.2d at 311. As another example, this Court considered whether letters written by Cheeseboro to an individual identified as Virgil Howard were relevant, and if relevant, whether the letters were unfairly prejudicial. Id. at 548, 552 S.E.2d at 311-312. This Court also held the admission of a rap song allegedly written by Cheeseboro while awaiting trial was erroneous because the “minimal probative value of this document [was] far outweighed by its unfair prejudicial impact.” Id. at 550, 552 S.E.2d at 313. Therefore, in light of the judge’s reference to Cheeseboro, supra, the judge likely understood the objection to encompass not merely relevance, but a weighing of the probative value of the evidence against the danger of unfair prejudice posed by the evidence.

This case bears striking similarities to State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) regarding the analysis for determining the relevancy and admissibility of evidence. The state made a motion *in limine* to exclude any comments regarding drug use or the existence of drugs at the alleged victim’s apartment. Id. at 335, 665 S.E.2d at 205. Following a proffer, “[t]he state objected and the trial judge conducted an inquiry to determine the relevance of the testimony.” Id. at 336, 665 S.E.2d at 205. Thereafter, the judge excluded the testimony finding “whatever probative value might result is clearly outweighed by that prejudicial effect, not to mention the fact

that I don't find it to be relevant in any fashion in this case.” Id. In examining this alleged legal error, the Court of Appeals used the heading “Relevancy of Evidence.” Id. In explaining the applicable legal rules for its analysis, the Court of Appeals cited to Rules 401, 402, and 403, SCRE. Id. at 337, 665 S.E.2d at 206. Thereafter, the Court of Appeals analyzed the issue presented by examining the probative value of the proffered evidence. Id. at 340, 665 S.E.2d at 207. According to the Court, “the testimony [did] not serve as a defense to any of the offenses charged in this case nor [did] it excuse or mitigate [the defendants’] actions. It [did] not probative of any issue material to reaching a verdict. This absence of a logical connection to the facts in debate ma[de] the evidence irrelevant and inadmissible.” Id. As clearly demonstrated by the Court of Appeals’ analysis of the issue presented, determining whether evidence is irrelevant and therefore, inadmissible necessarily requires determining whether the danger of unfair prejudice posed by the evidence substantially outweighs its probative value.

II. The Court of Appeals erred by affirming the trial judge's ruling that the state could impeach the court's expert with irrelevant and unfairly prejudicial information that a person in an unrelated case she had recommended be released was arrested for rape where there was no evidence the person had been convicted.

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." *Id.* Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Preslar*, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." *State v. Sweat*, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" *State v. Gray*, 408 S.C. 601, 609, 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. While relevant evidence and probative evidence are not synonymous, the two share many

similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “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 [a] decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, “[t]he term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997). “Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion.” United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C.

524, 534, 763 S.E.2d 22, 27-28 (2014)(citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state, the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the state's irrelevant cross-examination of the court-appointed expert regarding the arrest of an individual who was not the Petitioner and whose case was completely unrelated to Petitioner's proceedings. The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury.

In the present case, the jury was tasked with deciding whether Petitioner was a sexually violent predator as that term is defined by South Carolina's statutory scheme. South Carolina defines a 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 if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1). It was undisputed that Petitioner had been convicted of a sexually violent offense. It was undisputed that Petitioner suffered from pedophilia, a mental abnormality or personality disorder. The only dispute between Petitioner and the state was whether his mental abnormality or personality disorder made him likely to engage in acts of sexual violence if not confined.

Evaluating the evidence offered by the state in this context demonstrates the state's cross-examination of Dr. Gale about an unrelated individual had no tendency to make the existence of any

fact of consequence more probable or less probable. The only facts of consequence concerned whether Petitioner's undisputed personality disorder made him likely to engage in acts of sexual violence if not confined. Dr. Gale's evaluation and report concerning another individual related to no fact of consequence at Petitioner's SVP trial. Additionally, the other individual's arrest warrant related to no fact of consequence at Petitioner's SVP trial. Similarly, the low probative value of the evidence was apparent as was the absolute irrelevance of the evidence to the ultimate issue in the case. Whether another individual had been arrested for a sex crime following a release had no bearing on whether Petitioner was likely to engage in acts of sexual violence. Quite simply, the court-appointed expert's opinion regarding Michael Thomas several years prior to Petitioner's trial and the arrest warrant issued for Thomas had no tendency to prove or disprove the ultimate issue in Petitioner's case – whether *Petitioner* was likely to engage in acts of sexual violence if not confined.

What the court-appointed expert opined regarding Thomas and the subsequent unsubstantiated allegations against Thomas had no tendency to make the existence of any fact of consequence in Petitioner's case more or less probable. The state maintained the evidence shed light on the ability of the court-appointed expert to make a determination of whether a person was likely to re-offend. However, in light of the fact that the state could produce only an arrest warrant, not a conviction, the warrant for Thomas's arrest served no legitimate purpose. Certainly, the mere accusation against Thomas could not be used to show that Thomas had, in fact, re-offended. Further, the mere accusation against Thomas could not be used to show that Petitioner would re-offend. The state never challenged the qualifications of Dr. Gale; thus, the state's use of Dr. Gale's opinion in Thomas's case and the arrest warrant for Thomas was not a challenge to Dr. Gale's methodology or ability to conduct an examination pursuant to SVPA.

The danger of unfair prejudice inherent in the evidence is extreme. A trial under the SVPA is an emotionally charged environment due to the nature of the proceeding – an examination of an individual’s past criminal sexual conduct and concern about whether the individual will re-offend if not confined. Perhaps no other trial could place greater emotional stress on a jury. Examining the danger of unfair prejudice of the state’s 1. of cross-examining the court-appointed expert in the context of an SVPA trial evinces no doubt of the severe danger of unfair prejudice posed by the evidence.

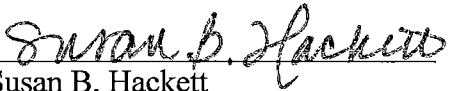
The state impeached the court-appointed expert with evidence that an individual previously determined by the expert not to satisfy the criteria of the SVPA had been accused of re-offending by raping a woman. No doubt this evidence was calculated to play on the emotions of the jury and did in fact play on the emotions of the jury. The jury’s greatest fear would be to release someone who re-offended. The state’s cross-examination capitalized on the inherent fear of the proceedings and heightened the jury’s fear by suggesting the expert had been wrong previously in her evaluation and the expert’s error resulted in the rape of a woman. Further, the state capitalized on this fear in her closing argument when she argued the court-appointed expert had been wrong before resulting in the release of an individual who subsequently raped a woman.

The danger of unfair prejudice of the evidence was not merely the damage it had on Petitioner’s case; rather, the evidence encouraged the jury to render its verdict based upon fear. Without question, fear is an improper basis for a jury verdict. Balancing the very low probative value offered by the evidence against the extremely high danger of unfair prejudice requires the exclusion of the state’s 1. of cross-examination of the court-appointed expert. Accusations of sexual misconduct made against an individual unrelated to Petitioner’s case failed to have any tendency to make the existence of any fact of consequence in Petitioner’s case more or less probable. Simply

put, the evidence was irrelevant to the ultimate issue before the jury. The evidence served only to heighten the jury's fear and encourage the jury to render a verdict based upon emotion – fear.

CONCLUSION

Petitioner respectfully requests this Court reverse the order of the trial court committing him to the SVP program and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Certiorari to the Court of Appeals
Appeal from Lancaster County

JUL 10 2017

R. Knox McMahon, Circuit Court Judge

S.C. SUPREME COURT

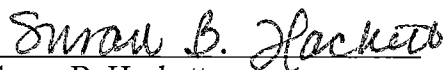
IN THE MATTER OF THE CARE AND TREATMENT OF

KENNETH CAMPBELL,


PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Kenneth Campbell, #, at 7901 Farrow Road, Bldg. #3, 3rd Floor, Columbia, SC 29203, this 10th day of July, 2017.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2017.

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